LANDMARK CASES ON EUROPEAN TORT LAW 2001–2025

Barbara C Steininger (ed)

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with contributions by

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This book is dedicated to
Helmut Koziol on the occasion
of the 25th Annual Conference
on European Tort Law

Preface

In 2000, Helmut Koziol had the idea of organising a Conference where tort law specialists from various European legal systems meet and present the latest tort law developments in their jurisdiction. Their reports could then be published annually for readers in order to keep them abreast of the tort law developments in Europe. This idea was brought to life when the first Annual Conference on European Tort law was held in Vienna in 2001, and was later followed by the publication of the first European Tort Law Yearbook. By starting this project, Helmut initiated much more than just a Conference series and a collection of Conference Proceedings: he initiated a network of tort law enthusiasts from all over Europe – and some beyond – who meet regularly, exchange their views, discuss new and open questions and enrich each other's perspectives. Over time, many of the former and current country reporters have grown into what we tend to call our tort law family. We are very happy to celebrate our 25th anniversary this year and decided to mark this occasion by publishing the current book, which collects five landmark tort decisions issued over the course of these 25 years in each of the many jurisdictions involved. The authors would like to dedicate this book to Helmut Koziol.

I am extremely grateful to all reporters for their contributions. Special thanks go to Vera Bolmgren, who agreed to fill in for our Swedish reporter Sandra Friberg at short notice, when Sandra could not submit her contribution due to an injury. I would also like to thank the entire ECTIL and ETL team. Without their tremendous support (as ever), this book would not have been possible. All the team members in some way or another contributed to the project. In particular, I would like to express my gratitude to Rafael Cimatti Elias and Adyasha Samal for their support in coordinating the project and preparing it for publication. Moreover, I am grateful to Kathrin Karner-Strobach for taking care of the copy-editing in her meticulous way. Finally, special thanks go to Donna Stockenhuber, who took charge of language-checking all the contributions and helped to make them easily accessible for the readers. Heartfelt thanks also go to my team at the University of Graz, particularly Alexander Aichmayr, Simon Gartner, Lilian Kern and Valerie Schwarz. Last but not least, I would like to express my sincere gratitude to the University of Graz for supporting the open access publication of the current book.

Barbara C Steininger
Graz, February 2026

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Landmarks for a Bird's Eye View of European Tort Law

Barbara C Steininger

This book is published to celebrate the 25th anniversary of the Annual Conference on European Tort Law and, on this occasion, it aims to offer a slight change of our usual perspective on tort law in Europe. At the Annual Conferences, we combine an analysis of a specific tort-related topic with yearly reports on the developments of legislation, court practice and doctrine in the field of tort law in over 30 jurisdictions. These reports are then published in full in the European Tort Law Yearbooks,[1] but for the Conference, contributors limit their presentations to only one of the developments covered in their reports. Narrowing the focus for individual jurisdictions in this way not only ensures that coverage of so many tort law systems in a short period of time remains interesting for the audience, but also allows a broader view on the developments in the jurisdictions covered, thereby reaching beyond the narrow perspective of national law.

A similar method has been chosen for this book. In order to provide an impression of the evolution of tort law in Europe in the last 25 years, the national reporters for the Annual Conference on European Tort Law were asked to select and present the five – in their view – most important tort-related court decisions from their jurisdiction for the period between 2001 and 2025. Notwithstanding a rather strict character limit, authors were asked to place the decisions in the context of their respective tort law system, amongst others by including information on the starting point for the decision in their jurisdiction, by outlining the decision's consequences and by explaining why the individual decision qualifies as a landmark decision in their system. On the basis of these reports from 30 European jurisdictions, an analysis of CJEU cases and an additional report from Israel, the five landmark decisions selected in the reports are combined to create a bird's eye view of the evolution of tort law in Europe in the first quarter of the 21st century. We therefore hope that 5^2 equals 25 – even though, or maybe exactly because, we include more than five jurisdictions.

[1] See eg *E Karner/BC Steininger* (eds), European Tort Law (ETL) 2024 (2025).

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Before trying to sketch some lines of this broader picture of tort law developments, a few general comments are required: first of all, no additional criteria for selecting the five cases were provided to the authors apart from a reference to the five *most important* ones. The selection by the contributors to this book therefore necessarily contains subjective elements. While sometimes there will have been clear candidates for inclusion, selecting one decision over another will have been more difficult in other cases. Quite a few of the authors addressed the way they came to their choice in the first introductory paragraphs of their contributions. As will also be seen, contributors have chosen decisions from different levels of court practice. Often – but not exclusively – decisions issued by highest courts, like Supreme Courts or Constitutional Courts, were selected, but occasionally, district court decisions are also included. While authors were expressly asked to select a maximum of five cases and to contribute fewer decisions if, in their view, less than five cases qualify as landmark decisions, contributors for all but one jurisdiction opted for presenting five cases – Denmark being the odd one out with a coverage of only four decisions.

Finally, it should be noted that, even over the period of 25 years, a significant element of chance is involved when it comes to which cases are decided by national courts and which are of importance for the system in question. Apart from technical-legal questions, public interest and the importance for society at large in the respective legal system also play a role. It will therefore come as no surprise that the *URGENDA* climate change case is covered in the Dutch selection,[2] that the *Erika* and *Prestige* oil spill disasters are discussed in the French and Spanish contributions,[3] that the *PFAS* case[4] is one of the five landmark cases selected for Sweden and that the German report covers the *Diesel emissions scandal*.[5] Also, it has to be kept in mind that, in some jurisdictions, certain topics will already have been addressed by the legislator or by earlier court decisions. The fact that we are not covering tort law as such but its evolution in national court practice over the last 25 years will therefore make the result even more diverse. Naturally, the cases selected cover a broad range of topics, ranging from assessing fundamental questions like unlawfulness, duty or strict liability as bases for awarding compensation, via questions of what is often referred to as legal causation and aims at limiting attribution, to

[2] Netherlands, Case 1.

[3] France, Case 4 (leading to the recognition, in French law, of pure ecological harm) and Spain, Case 3.

[4] Sweden, Case 5.

[5] Germany Case 3.

more specific areas such as State liability,[6] medical liability,[7] liability for auxiliaries[8] or prescription[9]. Notwithstanding this broad range, a comparison of the national reports shows considerable overlap as to the case scenarios and legal questions covered and it is primarily this convergence of topics that allows some general lines to be drawn. While the broader picture which the reports paint can therefore clearly not be an all comprising one, our collage of snapshots in the form of landmark cases can help to sharpen our perception of tort law's evolution in the last 25 years.

As the aim of the current book is to give readers such a broader impression based on a collection of individual cases, reading these is indispensable. As indicated before, I will nevertheless, though without going into great detail, sketch some rough lines of this broader picture in the following paragraphs. To stay in tune, I have chosen to limit myself to five such sketched lines of development.

The first line of the broader picture emerging from the reports is the high importance of non-pecuniary loss cases.[10] This is hardly surprising and the same holds true for the most important group of cases covered in this respect, namely decisions on **claims of secondary victims**. What is unexpected is the impressive number of 18 cases specifically dealing with this subject matter. Cases often focus on scenarios in which the primary victim died and there seems to be a clear tendency to broaden the conditions under which compensation will be available, eg by awarding compensation without psychiatric injury,[11] by broadening the circle of persons eligible for such compensation[12] or the conditions under which compensation is available.[13] In other decisions, the focus is shifted to cases of severe injury of the primary victim and the question of wheth-

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[6] Cases stating that State liability also covers legislative and judicial wrongs deserve special mention here: see Belgium, Case 1; Bulgaria, Case 2; Croatia, Case 1; Lithuania, Case 5; see also EU, Case 2.

[7] See eg Cyprus, Case 3; Greece, Case 1; Malta, Case 3; Poland, Case 4; Portugal, Cases 2 and 4; Romania, Case 4; Scotland, Cases 3 and 5; Slovakia, Cases 2, 3 and 4.

[8] See eg Czech Republic, Case 3; Norway, Case 2. Cf also Austria, Case 3.

[9] See in particular Latvia, Case 2; The Netherlands, Cases 2 and 3; Poland, Case 2; Romania, Case 2; Spain, Case 2 and Switzerland, Case 4.

[10] See eg Belgium, Case 5; Czech Republic, Case 5; Croatia, Cases 2 and 5; Denmark, Case 1; Greece, Case 3; Hungary, Case 2; Italy, Case 1; Latvia, Case 5; Lithuania, Cases 4 and 5; Malta, Case 2; Romania, Case 5; Sweden, Cases 3 and 4; EU, Case 5.

[11] See eg Austria, Case 2; The Netherlands, Case 5; cf also Germany, Case 5 and Czech Republic, Case 1.

[12] See eg Bulgaria, Case 1; Greece, Case 4; but cf also Finland, Case 2.

[13] See eg Estonia, Case 4; Malta, Case 2; Slovakia, Case 1. Cf also Czech Republic, Case 1.

er the secondary victim is nevertheless entitled to compensation,[14] a question that, yet again, often leads to a broadening of the category of cases meriting compensation.[15] The large number of landmark cases on the issue of non-pecuniary loss for secondary victims can be explained by the important role courts have had in the development of the law in this area, though the interplay with the legislator also plays a prominent role here as is exemplified eg in the Polish, German and Dutch reports.[16] The intervention of the legislator in this respect also contributed to the shift from cases of death to serious injury as there are now often specific provisions allowing surviving relatives to claim compensation of their non-pecuniary loss.[17]

Another notable area of overlap of the topics covered – though not concerning the results reached – are **wrongful birth** cases. While there seems to be wide agreement that there should be no compensation of wrongful life claims,[18] the decisions concerning wrongful birth cases vary considerably. First of all, these cases are not necessarily directed at the same type of harm. While some focus on the pecuniary harm suffered,[19] in particular the parents' maintenance costs, others are directed at non-pecuniary loss[20] and, in other cases, both elements are combined.[21] But more importantly, the answers to the question of whether and to what extent compensation should be awarded are also diverse.[22] What is noteworthy though is that the argument of discrimination of persons with a disability is used to reach opposing results.

While the first two lines of the broader picture I have sketched address topics where changing societal values and medical possibilities play an important role, the third area that came up frequently in the reports is the question of how the law should deal with scenarios of **causal uncertainty**, a central question courts are facing. The topic can be found

[14] In this sense eg Lithuania, Case 3; Poland, Case 5; Portugal, Case 3; Romania, Case 1.

[15] A development exemplified also by Bulgaria, Case 4, where compensation for non-pecuniary loss is awarded to pet-owners and might be available more generally in the case of destruction of property.

[16] Poland, Case 5; The Netherlands, Case 5; Germany, Case 5. But cf also Sweden, Case 2.

[17] See eg Poland, Case 5.

[18] See eg Belgium, Case 4; Italy, Case 3; Spain, Case 4; Israel, Case 4; cf also Austria, Case 5; Hungary, Case 5; Poland, Case 3.

[19] Eg Austria, Case 5.

[20] Eg Czech Republic, Case 2.

[21] Eg Hungary, Case 5; Poland, Case 3; cf also Italy, Case 3

[22] Compensation awarded: Austria, Case 5; Czech Republic, Case 2; Poland, Case 3; cf also Italy, Case 3; Spain, Case 4; compensation denied: Hungary, Case 5; Norway, Case 1 (depression suffered by the mother).

in various subject areas, for instance in relation to asbestos,[23] PFAS[24] or medical conditions in general.[25] Also, the issue of causal uncertainty is addressed from various perspectives, be it via the question of proof, prescription, the theory of loss of a chance or the assumption of proportionate liability and one can differentiate between scenarios in which different defendants may have been causal[26] and scenarios in which one of the causes is attributable to the claimant, eg their health condition.[27] Legal systems struggle with how they should deal with such causal uncertainties. Traditionally, the uncertainty risk would be placed on the claimant. Some decisions show a tendency to be victim-friendly and shift the risk of scientific uncertainty to defendants, at least if certain conditions, like culpable conduct on the part of the defendant, are met. Often, a lowering of the standard of proof, presumptions or reversals of the burden of proof are used.[28] But some systems seem to consider such black or white solutions to be problematic and go a step further by accepting loss of a chance[29] or proportionate liability solutions[30] in this context.

Tendency number four could be called the continued struggle as to where to draw the line and it relates to one of the core questions of tort law, namely the difficult area of **limiting liability**. The topic is discussed under different headings; foreseeability, adequacy, legal causation and proximity are only a few of the terms referred to in the cases selected for this book.[31] Should, for instance, the tortfeasor be held liable for a psychosis developed in the aftermath of an injury even though other external factors were involved?[32] Similar problems of limiting imputation to the defendant can be found in another area, namely in the field of liability for auxiliaries, where courts had to decide which conduct of an auxiliary can

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[23] See England and Wales, Case 2; France, Case1; Malta, Case 5.

[24] Sweden, Case 5.

[25] Cf eg Cyprus, Case 4.

[26] See eg England and Wales, Case 2.

[27] See eg Estonia, Case 5; cf also Malta, Case 5; The Netherlands, Case 4.

[28] See France Case 3; Hungary, Case 1; Italy, Case 2; Slovakia, Case 2; but see also France, Case 1 (*obligation the sécurité de résultat* for employers). Cf also Greece, Case 1.

[29] Belgium, Case 3; Slovakia, Case 3; see also Hungary, Case 1 (where the concept was referred to, though the case, according to the Hungarian reporter, is in fact a case of a reversal of the burden of proof).

[30] The Netherlands, Case 4; Israel, Case 3.

[31] See eg Norway, Case 4; Scotland, Case 1; cf also Ireland, Case 3; Lithuania, Case 1.

[32] While liability was denied by the Norwegian court (Case 4) in this scenario, a Scottish decision (Case 1) came to an opposite conclusion in a case of consequential loss suffered following the initial injury.

still be attributed to the principal in question, particularly if the auxiliary acted intentionally or committed a crime.[33] The limits to imputation are also at the heart of another issue raised in several cases, namely that of the contributory conduct of the victim. Rather to this author's surprise, cases primarily concerned situations in which liability for motor vehicles, which is typically (though not necessarily) strict, coincides with negligent conduct on the part of the victim, in particular because of the victim agreeing to be the passenger of a drunk driver.[34] While this is hardly a topic related to new societal or technical developments, there seems to be a tendency to at least consider apportioning liability.[35]

Finally, the fifth and last line I would like to draw from the reports is a tendency towards what could be called a **constitutionalisation** or fundamental rights focus of tort law. While, as indicated already, quite some of the decisions selected were taken by constitutional courts, this formal aspect is not the decisive element here. Instead, it seems that constitutionally guaranteed rights seem to play an increasing role in justifying liability. This cannot only be observed within classical tort law (in particular as far as defamation, invasion of privacy or violations of other personality rights are concerned),[36] where fundamental rights (often both on the part of the tortfeasor and the defendant) are used to measure liability, but fundamental rights also seem to open up new and sometimes parallel routes towards modifying or justifying liability.[37]

These five indications of lines of development must obviously fall short of conveying the wealth of the case material available, but I hope they have been able to whet readers' appetite for the much richer and more nuanced picture painted by the case analyses provided in the reports. Therefore, allow the landmark cases presented below to provide you with a bird's eye perspective of tort law's evolution in the last 25 years and enjoy reading.

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[33] See England and Wales, Case 1 and Ireland, Case 2; both dealing with liability of an employer for sexual abuse committed by their employee.

[34] See Bulgaria, Case 5; Slovenia, Case 3.

[35] See Bulgaria, Case 5; Estonia, Case 3 (several keepers liable); Germany, Case 2; Portugal, Case 1; Scotland, case 2; Slovenia, Case 3. But see also Switzerland, Case 5. Cf also Austria, Case 3.

[36] See eg Croatia, Case 4; Hungary, Cases 2 and 3; Romania, Case 3; Israel, Case 5.

[37] See eg Croatia Case 3; Cyprus, Cases 1 and 2; England and Wales, Case 3; Finland, Case 4; Germany, Case 1 (but cf also Case 4); Ireland, Case 4; Sweden, Cases 1 and 4 (cf also Case 3).

I. Austria

Barbara C Steininger and
David Messner-Kreuzbauer

The Austrian Civil Code, the ABGB (*Allgemeines Bürgerliches Gesetzbuch*), dates back to the year 1812 and while there were substantial amendments concerning tort law in the early 20th century as well as some less significant more recent amendments, court practice has been of great importance in the area of tort law. In the first quarter of the 21st century, there were two prominent subject areas in which notable decisions of the Austrian Supreme Court, the OGH (*Oberster Gerichtshof*), reshaped the Austrian tort law landscape. The first being the expansion of compensation for non-pecuniary loss of secondary victims and the second, the much-debated issue of wrongful birth. When choosing landmark decisions, there were three obvious candidates from these two subject areas, two dealing with non-pecuniary loss and one with wrongful birth. Selecting the other two decisions was more difficult, as several cases would equally have merited being chosen. Ultimately, we decided to include a decision on the criteria for compensation of frustrated expenses and another one heralding a restrictive stance on attributing the behaviour of an auxiliary to a person harmed.

1. OGH 22 February 2001, 2 Ob 79/00g[1]

This decision of the OGH was the first to award a close relative compensation for the mental shock suffered as a consequence of the primary victim's death even though the close relative had not been present at the scene of the fatal accident. In this case, the father of the direct victim,

[1] ECLI:AT:OGH0002:2001:0020OB00079.00G.0222.000; Zeitschrift für Verkehrsrecht (ZVR) 2001/52 (comment *E Karner*). The case is also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 58, nos 51–54. On the topic of compensation for non-pecuniary loss in mental shock cases, see, in particular, *E Karner*, Zur Ersatzfähigkeit von Schock- und Trauerschäden, in: FS Danzl (2017) 87; *idem*, Der Ersatz ideeller Schäden bei Körperverletzung (1999) 94 ff; *H Koziol*, Österreichisches Haftpflichtrecht II (3rd edn 2018) A/5/182 ff; *K-H Danzl*, Handbuch Schmerzengeld (2019) nos 3.51 ff, 3.67 ff.

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who had been killed in a car accident, suffered mental shock reaching the level of an injury to health when informed about his son's fatal accident.

While earlier court practice had rejected compensation claims of close relatives of fatally injured primary victims outright with the argument that these relatives were only indirect victims,[2] the OGH accepted compensation for mental shock in two cases from the 1990s,[3] in which the secondary victims had been involved in the accident causing the primary victim's death. With the present decision, the OGH made it clear that compensation for mental shock of close relatives does not depend on the close relative having witnessed the accident: if the close relative suffered mental shock reaching the level of an injury to health, this constitutes bodily injury in the sense of § 1325 ABGB, a provision that expressly foresees monetary compensation of non-pecuniary loss (*Schmerzengeld*). This is important as, ever since a decision from the early 20th century,[4] the OGH, in principle, limited compensation of non-pecuniary loss to cases where such compensation is expressly provided for by the law.[5] As mental shock cases fall under bodily injury in the sense of § 1325 ABGB, compensation for the non-pecuniary loss suffered is therefore possible. Based on legal literature,[6] the OGH came to the conclusion that such injury is unlawful due to the violation of the secondary victim's absolutely protected right to bodily integrity, provided that the tortfeasor's conduct was also particularly dangerous in relation to the secondary victim due to it being highly likely to cause their mental shock. Thus, the secondary victim is protected not as an 'indirect' victim of the tort against the primary victim, but in their own capacity, effectively becoming a 'primary victim' themself. The OGH therefore awarded the claimant compensation for what it calls shock damage (*Schockschaden*).

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[2] OGH 2 Ob 501/57, ZVR 1958/144; 2 Ob 34/63, ZVR 1963/147; 2 Ob 6/71, Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (SZ) 44/39.

[3] 2 Ob 45/93, ZVR 1997/75; 2 Ob 99/95, ZVR 1997/75.

[4] GlUNF (Sammlung von zivilrechtlichen Entscheidungen des kk Obersten Gerichtshofes, Neue Folge) 4185 from 1908.

[5] On the alternative position taken by parts of legal doctrine according to which monetary compensation of non-pecuniary loss is generally possible in cases of gross negligence or intent according to §§ 1323 and 1324 ABGB, see *F Bydlinski*, Der Ersatz ideellen Schadens als sachliches und methodisches Problem, Juristische Blätter (JBl) 1965, 181; *H Koziol*, Österreichisches Haftpflichtrecht I (4th edn 2020) D/3/2 ff; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 5/26.

[6] *E Karner*, Rechtsprechungswende bei Schock- und Fernwirkungsschäden Dritter? ZVR 1998, 182, 186 ff.

This case was followed by a whole range of decisions which defined more closely under which conditions compensation is possible in mental shock cases and carved out different groups of cases. Accordingly, the benchmark always has to be the ground for attributing liability identified by the OGH in the first case, namely whether the conduct of the tortfeasor was highly likely to cause the secondary victim mental shock reaching the level of an injury to health. In this sense, compensation is possible either if close relatives of a primary victim suffered mental shock or if the secondary victim suffering the shock, though not being a close relative, was involved in the accident in a qualified manner,[7] eg by having been endangered in the accident. As far as the family relationship is decisive, it was discussed which family members are entitled to compensation. The OGH convincingly uses the close emotional relationship between the primary and secondary victim as its starting point[8] and has, for instance, considered parents (as in the case at hand)[9] and children,[10] spouses,[11] non-marital partners,[12] siblings[13] but also a stepparent[14] as close relatives, not, however, best friends. The latter may be entitled to

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[7] See OGH 2 Ob 208/23m, ZVR 2024/167 (comment *E Karner*); also discussed by *D Messner-Kreuzbauer/BC Steininger* in: E Karner/BC Steininger (eds), ETL 2023 (2024) 1, nos 68–74. See also *C Huber*, Schockschaden bei qualifizierter Beteiligung am Unfallgeschehen – Anmerkung zu OGH 14.12.2023, 2 Ob 208/23m, Österreichische Jurist:innenzeitung (ÖJZ) 2024, 550.

[8] See on this *Karner*, FS Danzl (fn 1) 99.

[9] But also the parents of an unborn child: OGH 1 Ob 114/16w, Evidenzblatt der Rechtsmittelentscheidungen (EvBl) in ÖJZ 2017/53 (comment *C Brenn*) = Juristische Ausbildung und Praxisvorbereitung (JAP) 2016/2017, 168 (comment *S Konrad/S Nitsch*) = Recht der Medizin (RdM) 2017, 68 (comment *E Karner*). See also *K-H Danzl*, Aktuelle (Fort-)Entwicklung beim Schmerzengeld, ZVR 2016, 456; *C Huber*, Zuspruch von Trauerschmerzengeld an beide Elternteile im Fall der Totgeburt – Bestandsaufnahme und weitergehende Überlegungen – Anmerkung zu OGH 30.8.2026, 1 Ob 114/16w, ÖJZ 2017, 383; *G Gerstner/R Rienmüller*, Trauer-Schmerzengeld nach vermeidbarer Totgeburt (intrauterinem Fruchttod) in der 37. Schwangerschaftswoche, Österreichische Zeitschrift für das ärztliche Gutachten (DAG) 2017, 105.

[10] Eg OGH 2 Ob 135/07b, ZVR 2008/59 (comment *C Huber*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2007 (2008) 134, nos 40–46.

[11] OGH 2 Ob 136/11f, SZ 2012/64 = EvBl 2013/3 (comment *R Rohrer/M Spitzer*) = ZVR 2012/204 (comment *E Karner*).

[12] OGH 8 Ob 127/02p, ZVR 2002/96 (comment *E Karner*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 66, nos 52–60.

[13] Eg OGH 2 Ob 39/09p, ZVR 2010/119 (comment *C Huber*).

[14] OGH 2 Ob 126/23b, ZVR 2024/6 (comment *BC Steininger*); also discussed in ETL 2023 by *Messner-Kreuzbauer/BC Steininger* (fn 7) nos 39–44. See also *T Schoditsch*, Die schadenersatzrechtliche "Kernfamilie" im Licht des Art 8 EMRK, ÖJZ 2024, 283.

compensation if they were involved in a qualified manner and, to assess this qualified involvement, the pre-existing (non-family) relationship with the best friend does play a role.[15] The OGH also stresses that, due to the objective indicator of the mental shock suffered, the circle of persons eligible for compensation can be drawn more widely than in mere bereavement cases, where no mental shock reaching the level of an injury to health was suffered.[16]

Compensation is not only possible if the primary victim was killed but also in cases of primary victims suffering most severe permanent injury.[17] Damage to property or death of an animal, on the other hand, cannot justify compensation.[18] As the cases of mental shock are considered to fall under § 1325 ABGB on personal injury, compensation is possible both under fault-based and strict liability. Moreover, close relatives covered by the protective purpose of a contract between the primary victim and the person responsible for their death/most serious injury will also be able to claim compensation for their non-pecuniary loss.[19] Finally, we would like to briefly address the question of contributory negligence on the part of the primary victim.[20] Here, court practice reduces compensation awarded to secondary victims if their personal relationship with the primary victim was decisive for awarding compensation.[21] If, however, secondary victims would have had a claim for compensation even without a close rela-

[15] OGH 2 Ob 208/23m (see above fn 7).

[16] OGH 2 Ob 126/23b (see above fn 14).

[17] OGH 2 Ob 163/06v, SZ 2007/96; 2 Ob 77/09a, ZVR 2010/120, 264 (comment *G Kathrein*). See on this *Karner*, FS Danzl (fn 1) 103 ff.

[18] See OGH 2 Ob 100/05b (property damage), JUS Z/3960; 10 Ob 3/20v (death of an animal), Zeitschrift für Wirtschaftsrecht (ecolex) 2020/251 (comment *T Schoditsch*) = ZVR 2021/197 (comment *BC Steininger*); also discussed by *S Nitsch* in: E Karner/BC Steininger (eds), ETL 2020 (2021) 1, nos 24–31; 2 Ob 12/25s EvBl 2025/215 (comment *F Artner*) = ZVR 2025/176 (comment *BC Steininger*) = AnwBl 2025/174 (comment *M Zoppel*) (airplane crash into claimants‘ home).

[19] 9 Ob 83/09k, interdisziplinäre Zeitschrift für Familienrecht (iFamZ) 2010, 329 (comment *M Ganner*) = Österreichische Zeitschrift für Pflegerecht (ÖZPR) 2010, 127 (comment *K Mayr*) = Zivilrecht aktuell (Zak) 2010/613 (comment *D Schmaranzer*); 9 Ob 12/24s, EvBl 2025/113 (comment *K Mayer*) = DAG 2025, 17 (comment *J Zahrl*) = ZVR 2025/77 (comment *BC Steininger*).

[20] See on this *Karner*, FS Danzl (fn 1) 107 ff; *idem*, ZVR 2001, 288 f.

[21] 2 Ob 178/04x, ZVR 2004/105 (comment *K-H Danzl*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2004 (2005) 142, nos 51–54; 4 Ob 36/10p, iFamZ 2010, 281 = Zak 2010/480 (comment *A Kletečka*) = RdM 2010, 149 (comment *E Bernat*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 1, nos 30–42.

tionship with the primary victim (eg because they were directly involved in the accident), no such reduction is justified.[22]

While court practice has therefore quite clearly defined groups of cases and answered many of the questions relevant for awarding compensation to shock damage victims since the OGH issued this landmark decision, new aspects are nevertheless likely to arise in the future, particularly as awards for non-pecuniary loss – though generally comparatively low in Austria – seem to be highly important for secondary victims as acknowledgement of their suffering.

2. OGH 16 May 2001, 2 Ob 84/01v[23]

Less than three months after the decision just outlined, which set out the conditions for awarding compensation in cases of mental shock of secondary victims, the OGH was confronted with a case in which parents of a child killed in a car accident suffered mental harm not reaching the level of an injury to health. § 1325 ABGB on bodily injury, which expressly provides for compensation of non-pecuniary loss, was therefore not applicable. Consequently, the OGH had to decide whether compensation for 'mere bereavement' – ie mental harm suffered without a mental shock on the part of the secondary victim – is possible.

Notwithstanding the standard practice of the OGH mentioned earlier,[24] according to which compensation of non-pecuniary loss is only permissible if expressly provided for by the law, the 2nd panel of the OGH came to the conclusion that compensation for bereavement is, in principle, possible. The OGH argued that differentiating between mourning reaching the level of an injury to health and mourning which does not is often difficult. Moreover, it held that denying mourning parents compensation for their bereavement while compensation for non-pecuniary harm is available in cases of minor injuries and, under certain circumstances,

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[22] *E Karner*, FS Danzl (fn 1) 109.

[23] ECLI:AT:OGH0002:2001:0020OB00084.01V.0516.000; ecolex 2001/235 (comment *E Helmich*) = ZVR 2001/73 (comment *E Karner*); also discussed by *BC Steininger* (fn 1) nos 69–74. See also *A Fötschl*, Neue Entwicklungen in der Rechtsprechung des OGH zum Schmerzensgeld, Versicherungsrecht Beilage Ausland (VersRAI) 2001, 60; *L Stärker*, Seelische Schmerzen als ersatzfähiger Schaden – OGH erweitert Umfang der Ersatzpflicht bei qualifiziertem Verschulden, Arbeits- und Sozialrechtskartei (ASoK) 2001, 323; *G Christandl/D Hinghofer-Szalkay*, Ersatzansprüche für immaterielle Schäden aus Tötung naher Angehöriger – eine rechtsvergleichende Untersuchung, Zeitschrift für Rechtsvergleichung (ZfRV) 2007, 44.

[24] See above at fn 5.

even in cases of property damage (according to § 1331 ABGB), is disconcerting. After stressing the importance of defining the group of persons eligible for compensation narrowly, the OGH therefore considered the law to have a gap which has to be filled by analogy and referred to several provisions: apart from the already mentioned § 1331 ABGB on property damage, it named § 1328 ABGB on sexual abuse, § 1329 ABGB on deprivation of liberty and § 213a *Allgemeines Sozialversicherungsgesetz* (General Social Insurance Act, ASVG) on occupational diseases and work accidents as well as § 8 (3) *Mietrechtsgesetz* (Tenancy Law Act, MRG). On the basis of these provisions and with reference to the general rule of §§ 1323 and 1324 ABGB, the Supreme Court deduced that compensation of non-pecuniary loss comparable to that suffered in the case at hand, without a bodily injury, requires a higher degree of fault which means that compensation of non-pecuniary loss for bereavement (*Trauerschmerzengeld*) is only possible in cases of gross negligence or intent. As the defendants were only liable on the basis of strict liability, the OGH denied the claim in the case at hand.

Taking into account the otherwise restrictive court practice for awarding compensation for non-pecuniary loss, this decision marks a major step and, therefore, clearly qualifies as a landmark decision. Just like in the shock damage cases, the question of who is entitled to compensation was at the heart of several cases following this decision. As there is no objective indication as to the mental shock suffered by the secondary victim in 'mere' bereavement cases, the formal family relationship plays a more important role here.[25] What is decisive is again the existence of an intense emotional relationship between the primary and the secondary victim. The OGH has, for example, considered parents – as in the case at hand[26] – and children (even if the children are grown-up and were no longer living in the same household as the parent in question),[27] spouses[28] and non-marital partners[29] as eligible for bereavement damages. For siblings, the OGH looks at the existence of a common household: if the siblings lived together in the same household, a close emotional relation-

[25] *Karner*, FS Danzl (fn 1) 100 f.

[26] Also, in the case of the death of their unborn children, 1 Ob 114/16w (see above fn 9).

[27] 2 Ob 141/04f, JBl 2004, 792, discussed in ETL 2004 by *BC Steininger* (fn 21) nos 25–32.

[28] 2 Ob 148/15a, EvBl 2017/11, 87 (comment *R Rohrer*) = ZVR 2017/92 (comment *C Huber*); also discussed by *J Pehm* in: E Karner/BC Steininger (eds), ETL 2016 (2017) 1, nos 25–31.

[29] OGH 2 Ob 212/04x, Österreichisches Anwaltsblatt (AnwBl) 2006, 254; 2 Ob 15/07f, Zak 2007/523.

ship is presumed, whereas without such common household, the family relationship will typically not suffice for awarding compensation for bereavement to siblings.[30] Yet the existence of a close emotional relationship remains decisive, which means that even in atypical scenarios, compensation can be awarded if the claimant succeeds in proving that such an intense emotional relationship existed.[31] The courts combine awards for shock damage and bereavement damages.[32]

Parts of doctrine have criticised the limitation to cases of gross negligence or intent,[33] instead advocating compensation also if the tortfeasor acted with slight negligence or is liable on the basis of a strict liability regime. This is also provided for by all three drafts for reforming Austrian tort law[34] and by art 10:301(1) Principles of European Tort Law (PETL),[35] but has, so far, not been accepted by court practice. While it can be argued that compensation should – just like in cases of shock damage – equally be available if the close relative was severely injured, this has so far not

[30] OGH 2 Ob 90/05g, ZVR 2005/73 (comment *E Karner*); also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2005 (2006) 118, nos 40–43.

[31] OGH 2 Ob 90/05g (see fn 30 above).

[32] OGH 2 Ob 143/15s, EvBl 2016/39 (*C Huber*) = ZVR 2015/214 (comment *G Kathrein*); 1 Ob 114/16w (see fn 9); 2 Ob 109/19x, ZVR 2021/6 (comment *C Huber*). See also *K-H Danzl/E Karner* in: P Bydlinski/S Perner/M Spitzer, Kommentar zum ABGB (7th edn 2023) (KBB[7]) § 1325 no 29.

[33] *R Reischauer/M Neumayr* in: P Rummel/M Lukas/A Geroldinger, ABGB (4th edn 2025) § 1325 no 28; *M Hinteregger*, Trauerschmerzengeld und der Anspruch auf immateriellen Schadenersatz im österreichischen Recht, in: FS Danzl (2017) 71, 75 ff, 85; *Karner*, FS Danzl (fn 1) 98; in this sense already *E Karner/H Koziol*, Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform, 15. ÖJT 2003 Band II/1 (2003) 81 Fn 375. See also *L Beisteiner*, Angehörigenschmerzengeld – Der Ersatz von Schock- und Trauerschäden bei Tötung oder Schwerstverletzung naher Angehöriger (2009) 99 ff; *K-H Danzl,* 60 Jahre EKHG, ZVR 2019, 184, 190 f; *D Hinghofer-Szalkay/M Prisching*, Schwerste Verletzung eines Angehörigen: Fortentwicklung des „Trauerschmerzengeldes"? ZVR 2008, 444, 446; *S Nitsch,* Schock- und Trauerschadenersatzansprüche nach österreichischem und deutschem Recht, ZfRV 2019, 20, 26, 34.

[34] See *E Karner*, Geldersatz für ideelle Schäden, Minderung der Ersatzpflicht, Beweislast, Verjährung, in: I Griss/G Kathrein/H Koziol (eds), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 83, 86; *R Reischauer/K Spielbüchler/R Welser*, Reform des Schadenersatzrechts Band III – Vorschläge eines Arbeitskreises (2008) 73, 76 f; *G Kathrein* in: BMJ (ed), 200 Jahre ABGB – RichterInnenwoche 2011 in Lochau 16.-20. Mai 2011 (2012) 237, 251. For a comparison of the three drafts, see *BA Koch*, Zukunftsfähiges österreichisches Haftungsrecht, 22. ÖJT 2025 Band II/1 (2025) 72 ff.

[35] See also art 2:202 [1] PEL Liab Dam (= art VI-2:202 DCFR).

been decided by court practice either.[36] Both questions concern areas where a broadening of the group of cases eligible for awards of mere emotional harm without a mental shock or the like in the future is, at least in our view, not unlikely.

3. OGH 20 January 2009, 4 Ob 204/08s[37]

Contributory negligence and liability for auxiliaries (vicarious liability) are both familiar and well-established cornerstones of European tort laws (compare arts 6:102 and 8:101 PETL). It is also commonly accepted that they can be combined, meaning that a compensation claim may be reduced where a *victim's* auxiliary contributed negligently to the occurrence of harm (art 8:101(3) PETL). However, under Germanic legal systems, it was, and remains, a very controversial issue whether a victim is responsible for auxiliaries only under the same conditions as a tortfeasor (in the context of a larger 'mirror image' or 'equality thesis', *Spiegelbildthese* or *Gleichbehandlungsthese*, which calls for the same conditions for contributory and actual negligence), or whether their responsibility for others must be broadened to cover a wider range of tasks (in the context of a 'differentiating thesis', *Differenzierungsthese*).[38] This is so important under Germanic legal systems because their rules on liability for auxiliaries are infamously narrow:[39] on the tortfeasor's side, general attribution only occurs within the boundaries of special relations, such as contractual relations in particular (in Austria: § 1313a ABGB). In contrast, attribution rules within tort law proper (in Austria: § 1315 ABGB) are so narrow as to be essentially inoperative in practice.[40] Thus, the question is whether

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[36] See *Karner/Koziol* (fn 33) 88 ff; *Hinghofer-Szalkay/Prisching*, ZVR 2008, 446; *Karner*, FS Danzl (fn 1) 98.

[37] ECLI:AT:OGH0002:2009:0040OB00204.08S.0120.000 ecolex 2009, 315 (comment *A Kletečka*) = ZVR 2010/8 2 (comment *C Huber*). The case is also discussed by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 1, nos 15–23.

[38] For an in-depth discussion in English, see *Koziol*, Basic Questions (fn 5) no 6/204 ff.

[39] Compare *B Markesinis/J Bell/A Janssen*, Markesinis' German Law of Torts (5th edn 2019) 115 ff.

[40] § 1313a states: 'Whosoever is under an obligation of performance to another is liable to that person for the fault of his legal representative, and of persons he engages to perform the obligation, as if it were his own fault.'
§ 1315 states: 'Whosoever, for the conduct of his affairs, avails himself either of an unfit person, or knowingly of a dangerous person, is liable for the harm such a person causes to another in that capacity.' Translations are by *BC Steininger* in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law: Basic Texts (2nd edn 2018) 1 ff.

these narrow rules also apply where the victim made use of auxiliaries, or whether broader attribution is possible.

Before the decision we are about to introduce, about half of Austrian academia and the OGH itself[41] supported a broader attribution of auxiliary conduct on the victim's side.[42] In this view, Austrian attribution and contributory negligence rules[43] did not properly address 'vicarious contributory negligence' and had to be interpreted liberally when addressing this issue, with a view to the differences in context. Supporters of this view argued that losses remain where they fall in general, and therefore, the injured party should be responsible for a wider scope of delegated tasks than the tortfeasor. Not only the employment of a negligent auxiliary for contractual tasks, but also their assignment to *protect* the victim's person or assets should weigh against compensation in the apportionment of liability. The other half of Austrian authors[44] argued for equality between tortfeasor and injured party in a more narrow sense, ie a more direct transposition of the rules on the tortfeasor's auxiliaries to the victim: even if one agrees that attribution rules are too narrow, they argued, the arguments for a broader attribution on the claimant's side are inconsistent with the system's value judgements for the tortfeasor's side. Therefore, this part of academia assumed that a special relation between claimant and defendant is usually necessary for 'vicarious' contributory negligence.

The facts of the present case, which is where the Supreme Court took its present stance on this basic question, provided a seemingly perfect, vivid example on which the issues at stake could be exemplified. The claimant was injured by the defendant in a skiing accident. When skiing, the claimant relied on a trained guide using voice commands, since he continued skiing despite being almost completely blind. The defendant failed to monitor the area and collided with the claimant although he

[41] OGH 7 Ob 27/91, SZ 64/140.

[42] Among others *S Dullinger*, Zum Mitverschulden von Gehilfen ex delicto, JBl 1990, 20 and 91, 31 ff; *Koziol*, Basic Questions (fn 5) no 6/221 ff; *R Reischauer* in: Rummel, ABGB (3rd edn 2007) § 1304 no 7d.

[43] The central rule is § 1304: 'Where damage has been suffered and there is also fault on the part of the person harmed, he has to bear the loss proportionately with the harm-doer, and if the proportion cannot be determined, in equal shares.'

[44] *A Kletečka*, Mitverschulden durch Gehilfenverhalten (1991) 28 ff; further, among others, *F Bydlinski*, Gehilfenmitverschulden beim Arbeitgeber und betriebliche Hierarchie, in: H Krejci et al (eds), Festschrift für Theodor Tomandl (1998) 45; *M Karollus*, Gleichbehandlung von Schädiger und Geschädigtem bei der Zurechnung von Gehilfenverhalten, ÖJZ 1994, 257 (with a nuanced view).

could have seen the guide and the claimant in time to avoid them. The impact injured the claimant. The defendant claimed, among other things, that the trained guide was (also) skiing too fast, and could have slowed down to prevent the accident.

The OGH engaged with the relevant literature at length, and followed the 'mirror' or 'equality thesis' which has dominated court practice ever since.[45] Thus – in contrast to the lower courts – the Supreme Court did not reduce the claimant's award by reference to his guide's potential negligence. The significance of this case is considerable: it is common that a claimant entrusted their property or – as in the case itself – even their person to someone who then takes negligent care of them. One need only remember that a large amount of assets is held by companies, and therefore generally maintained by its employees. Where such employees fail in their task to protect the company's property, a tortfeasor now generally has to pay in full rather than having a defence of contributory negligence. While the tortfeasors have a recourse claim against the negligent auxiliary, they still assume the risk of its enforcement against the auxiliary.

Critics of the case (including one of the authors)[46] have reiterated that 'equality' in contributory negligence need not be understood mechanically, that contributory negligence under Austrian law does not require wrongfulness or a similarly rigid standard, and that activities such as skiing in spite of blindness pose a specific risk that should be attributed to the claimant rather than the defendant. Critics also underline that the victim who relied on a negligent auxiliary to protect their assets would not be deprived of full compensation altogether, since they can pursue another, unlimited claim against the auxiliary itself. It should be their risk whether this claim is effective or not.[47] It also turned out that the new case law on this standard case has some complex implications, relating to whether the tortfeasor may pursue recourse claims against the negligent auxiliary although the auxiliary is protected by employment law.[48]

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[45] For a recent confirmation, see OGH 4 Ob 38/23a ZVR 2024/57 (comment *G Kathrein*).

[46] *E Karner*, Gehilfenzurechnung auf Seiten des Geschädigten, ZVR 2010, 9, 12 f; *BC Steininger* (fn 37) no 19 ff; similarly *Koziol*, Basic Questions (fn 5) no 6/223 ff.

[47] *Karner*, ZVR 2010, 12; *BC Steininger* (fn 37) no 21.

[48] If the employee has to (partly) reimburse the primary tortfeasor, there is a risk that this functionally undercuts liability privileges under employment law. For an overview on the complex interpretative responses to this issue, see *D Messner*, Gesamtschuld und Regress bei Schädigung durch DN und Dritte, ÖJZ 2014, 584; *M Trenker/BA Oberhofer* in: M Schwimann/G Kodek, ABGB-Praxiskommentar (5th edn 2022) § 2 DHG no 80 ff.

Ascribing this decision landmark status is also a good occasion to ask whether the facts may have been a bit *too* vivid for a decision of the general issue concerned. In a personal injury case involving a disabled person who was highly dependent on their auxiliary, it may have seemed more humane to award full compensation than it would have seemed, for example, to the benefit of a company that uses negligent employees to maintain their buildings or machines. Similarly, it may have seemed severe to demand that the claimant should primarily pursue their claim against the auxiliary in the case discussed here, as this would have threatened to deteriorate a longstanding personal relationship between guide and claimant. Would Austrian practice be the same if the OGH had dealt with a mundane case of property damage enabled by a negligent office worker?[49]

While we cannot say for sure, the now-predominant Austrian view exemplified in this landmark case is strongly shaped by its national statutory law and its methodological commitments. It is not necessarily the best overall system, and does not suggest that the general European tendency to accept a broader liability for others on the victim's side (compare again art 8:101[3] PETL) is in any way problematic. The present case also serves as a reminder that landmark decisions do not always close the debate, since defenders of the difference thesis remain faithful to their views.[50]

4. OGH of 17 February 2010, 2 Ob 113/09w[51]

As a consequence of personal injury, the injured person's prior arrangements may become pointless. For example, they cannot proceed with their already booked holiday, they must drop out of a sports class, or cannot use their rental car – although they still have to pay for such arrangements. This is known as the problem of 'frustrated expenses' (*frustrierte Aufwen-*

[49] Reconsidering this issue, even from the perspective of the 'difference thesis', it may have been denied that the guide was an 'auxiliary' rather than an independent contractor in the first place. This is generally the case where the person in question is 'too' independent, such as for independent contractors or guardians – see *Koziol*, Haftpflichtrecht (fn 5) C/9/142 FN 392, C/9/145 – or even closer to the case, with the driver of a car (OGH 2 Ob 187/01s ZVR 2003/27; Rummel/*Reischauer* [fn 42] § 1304 no 7d).

[50] KBB[7]/*Karner* (fn 32) § 1304 no 7; *Koziol*, Haftpflichtrecht (fn 5) C/9/138 ff.

[51] ECLI:AT:OGH0002:2010:E93578, ZVR 2010/157 (comment *C Huber*). The case is also discussed in ETL 2010 by *BC Steininger* (fn 21) nos 17–22.

dungen) in the Germanic juridical jargon.[52] Although a tortfeasor's duty to compensate for these costs may seem intuitive at first glance, there are doctrinal problems with the justification of such claims and with assessing how far they may go. The injured has already incurred the relevant monetary costs *before* the injury, and so the tortfeasor cannot have caused *them* – rather the tortfeasor can only have reduced or eliminated the effective utility of these expenses at the time of the tort. Prior to the present decision, case law did not award compensation for frustrated expenses.[53] Notably, in one decision from 1987 concerning the costs of a booked camping van, the OGH stated that the losses actually caused by the injury were non-pecuniary in nature.[54] Since the compensation of non-pecuniary interests is limited to narrow (if controversial) conditions,[55] the claimant would usually not receive reimbursement. An exception was only made for the 'general costs' of maintaining a harmed thing for the time during which it was not usable (eg, tax and insurance costs for a damaged car).[56]

The facts of the present leading decision featured the common and clear-cut example of a holiday that had to be cancelled after personal injury. The claimant collided with a snowmobile negligently driven by the defendant. As a result of the accident, she had to cancel a pre-booked holiday to India, incurring financial loss via the cancellation fee.

In the decision, the OGH cites a number of relevant decisions and academic opinions, which had overwhelmingly denied compensability. In a surprising turn from the majority view at the time,[57] the OGH nonetheless

[52] See generally *Koziol*, Basic Questions (fn 5) no 5/29 ff.

[53] OGH 2 Ob 279/77, ZVR 1978/264; 8 Ob 27/87, SZ 60/102; 22 September 1988, 8 Ob 650/88; 7 December 1995, 2 Ob 72/94.

[54] OGH 8 Ob 27/87, SZ 60/102.

[55] See above at fn 5.

[56] OGH 2 Ob 20/64 ZVR 1965/114; most recently 11 April 2025, 4 Ob 50/25v.

[57] Interestingly, the court of appeals had already taken a claimant-friendly stance in a judgment for the claimant, by following the approach of an in-depth monograph by *T Schobel*. Der Ersatz frustrierter Aufwendungen: Vermögens- und Nichtvermögensschäden im österreichischen und deutschen Recht (2003). Schobel argues for a 'flexible system' (bewegliches System) under which a test with several factors would have decided on the compensability of frustrated expenses. He first singles out cases where the claimant has a transferable, valuable *claim-right* – even if to an *immaterial* benefit! – as cases of *pecuniary* harm, but only if the tort impairs the transferability. Otherwise, Schobel points to the measurability of the non-pecuniary deprivation in pecuniary terms, its perceptibility, moral hazard, the notions of society, the risk produced by the tortfeasor, foreseeability of harm for the tortfeasor, and finally the connection to the type of wrong committed by the tortfeasor. For cases like ours, however, he demands gross negligence (ibid 293), which is why the OGH concluded that even if one were to follow Schobel's approach, it would not result in compensation.

decided for the claimant and set forth a test under which frustrated expenses are *compensable*. The claimant must have a *legal position* which is 1) valuable in monetary terms, transferable and exploitable, and 2) susceptible to being used only *one time*, rather than continuously (as, eg, an annual railway ticket would be).[58] The use of this position must have been frustrated by the tort.

The importance of this shift is universally acknowledged.[59] The OGH characterised the case discussed here as a leading one in a significant later decision,[60] where the Court explicitly extended the reasoning to consequences of property damage. In this later decision, the defendant had driven into the claimant's rally car[61] between two parts of a rally tournament, making the claimant's prior arrangements (a general lease fee, fuel, tyres) pointless. Here, the OGH declined to compensate the claimant, by arguing that the expenses were not transferable and exploitable *after the rally began*. Nonetheless, the OGH reiterated that the invalidation of prior expenses is compensable even where they are a consequence of damage other than personal injury if the criteria set out by the test in the leading decision of 2010 are met.

The later decision on the rally driver's losses also highlights some difficulties with the test proposed by the OGH in the case primarily discussed here. Why exactly the driver's expenses do not fulfil the test is not entirely clear for all items. While the lease was not transferable, the Court specifically notes that fuel and tyres could, in theory, have been sold to hobby/ordinary drivers at a lower price – thus they were transferable and retained *some* economic value. At the same time, fuel and – at least for a professional – racing tyres are made for one-time use. Would the claimant at least have succeeded if his vehicle had been damaged *before* the rally? Is compensation really categorically excluded for positions that are valuable in the abstract but non-transferable in the specific instance?[62] Does it matter whether the entitlement represents something with a clear

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[58] This is stressed by *C Huber* in his case note, ZVR 2010/157 and by a later decision, 2 Ob 93/21x EvBl 2022/104 (comment *S Jahn*).

[59] *E Bernat/P Schwarzenegger*, (Kein) Anspruch auf Ersatz von „frustrierten" Aufwendungen? ZVR 2022, 253, 255 f; *E Karner*, Rechtsprechungswende beim Ersatz frustrierter Aufwendungen – Bemerkungen zu OGH 2 Ob 113/09w, ÖJZ 2010/86, 830; *S Jahn*, Case note to 2 Ob 93/21x, EvBl 2022/104.

[60] OGH 2 Ob 93/21x EvBl 2022/104 (comment *S Jahn*).

[61] Technically a leased car, but still protected as quasi-property under Austrian case law, see *Jahn*, EvBl 2022/104.

[62] *Bernat/Schwarzenegger*, ZVR 2022, 256 f raise sound arguments against this distinction.

objective (person-independent) value at the time of injury (compare the 'objective' and 'subjective' assessments under Austrian law)?[63] Despite the landmark decision in the 2010 case, some rather basic questions concerning frustrated expenses still remain to be resolved. Nonetheless, the case represents a very impactful decision regarding a common category of losses.

5. OGH 21 November 2023, 3 Ob 9/23d[64]

In this case, an amplified panel of the OGH had to decide whether the parents of a child whose physical disability had negligently not been detected by the mother's obstetrician, which meant that the parents were deprived of the possibility to opt for an abortion, were entitled to compensation for the girl's maintenance costs. The OGH's decision in this last of our five landmark cases drew a line under a long debate on the question of compensation in wrongful birth cases, a topic that had been discussed controversially and quite emotionally both in legal doctrine and in the public in Austria since a first OGH decision on this topic was issued in 1999.[65] While the OGH's denial of compensation for wrongful life, ie of claims by the child itself, in this first decision was generally accepted, the situation was different in respect of claims for compensation of maintenance costs brought by parents arguing that, but for the negligence of the

[63] In this sense, *Jahn*, EvBl 2022/104.

[64] ECLI:AT:OGH0002:2023:0030OB00009.23D.0707.000; AnwBl 2024, 212 = DAG 2024, 19 (comment *J Zahrl*) = EF-Z 2024/25 (comment *M Schickmair*) = EvBl 2024/49 (comment *E Karner*) = iFamZ 2024, 16 (comment *M Neumayr*) = JBl 2024, 178 (comment *A Kletečka*) = Journal für Medizin- und Gesundheitsrecht (JMG) 2024, 104 (comment *M Salcher*) = Medizinrecht (MedR) 2024, 344 (comment *E Bernat*) = ÖZPR 2024/15 (comment *M Rief*) = RdM 2024/24 (comment *BC Steininger*) = VbR 2024/11 (comment *P Leupold*/*M Leitner*). Reported in ETL 2023 by *Messner-Kreuzbauer/Steininger* (fn 7) nos 56–67. See on this also *S Oechsner/S Lagger-Zach*, "Wrongful birth", "wrongful conception" und Art 5 UN-BRK, Zak 2024, 68; *C Huber*, Wronful conception infolge einer fehlerhaften Spirale – Die Karten werden (womöglich) neu gemischt, ÖJZ 2024, 460; *D Prisching/B Sommer*, Schadenersatzrechtliche Gleichstellung von "wrongful birth" und "wrongful conception", Zak 2024, 104; *P Schwarzenegger*, Wrongful birth und wrongful conception – weiterführende Überlegungen zu OGH (verstärkter Senat) 3 Ob 9/23d, JBl 2024, 366; *H Koziol*, Die Bedeutung des Selbstbestimmungsrechts der Eltern für die Schadenersatzansprüche wegen unerwünschter Elternschaft, JBl 2024, 553.

[65] OGH 1 Ob 91/99k, RdM 1999, 177 (comment *C Kopetzki*). For a summary of this decision in English see *BC Steininger*, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 68, no 13 f. See also *C Hirsch*, Arzthaftung infolge unerwünschter Geburt eines Kindes – Anmerkung zu OGH 25.5.1999, 1 Ob 91/99k, RdM 1999, 163.

defendant in treating or informing the mother/parents,[66] their child would not have been born or even conceived. Based on differing theories put forward in legal doctrine,[67] different panels of the OGH developed two inconsistent lines of reasoning. According to the first group of decisions, compensation of maintenance costs is only possible exceptionally in cases in which these maintenance costs place an extraordinary burden on parents, be it because of the extraordinarily high costs (typically due to a disability of the child) or because of the particularly limited funds of the parents.[68] The second group of decisions considered the entire maintenance costs for a child born with a disability to be compensable –

[66] Typically, a hospital or medical practitioner, but there was also a case on product liability, see 8 Ob 69/21m, DAG 2022, 97 (comment *J Zahrl*) = iFamZ 2022, 178 = JBl 2022, 665 (comment *S Dullinger*) = ÖZPR 2023, 29 (comment *M Rief*) = VbR 2023, 13 (comment *P Leupold/B Gelbmann*), reported by *S Loibl/S Nitsch* in: E Karner/BC Steininger (eds), ETL 2022 (2023) 1, no 33 ff.

[67] For an overview of the positions in doctrine, see *Koziol*, Haftpflichtrecht (fn 5) B/1/29: One line of argument stressed the complexity of the family relationship, arguing that looking exclusively at financial aspects is not permissible and that, therefore, compensation is only possible exceptionally in cases of an extraordinary burden (see eg *C Hirsch*, Arzthaftung bei fehlgeschlagener Familienplanung [2002] 50 ff). The other line of argument looks at the financial side and stresses that maintenance costs which would otherwise not have occurred are compensable loss according to the general rules (see eg *S Engel*, Haftung Dritter für unerwünschte Geburt eines Kindes, ÖJZ 1999, 621).

[68] OGH 6 Ob 101/06f, ecolex 2006 (comment *G Wilhelm*) = EF-Z 2006, 131 (comment *M Leitner*) = EvBl 2006/171 (comment *BC Steininger*) = FamZ 2006, 198 (*M Neumayr*) = RdM 2007, 20 (comment *C Huber*); reported in ETL 2006 by *BC Steininger* (fn 65) no 18 ff; see on this *BC Steininger*, Wrongful birth revisited: Judikatur zum Ersatz des Unterhaltsaufwands nach wie vor uneinheitlich, ÖJZ 2008, 436; *D Hinghofer-Szalkay/C Hirsch*, Wrongful Conception die Zweite – (k)ein Ende in Sicht, EF-Z 2007, 89; *A Hollaender*, RdM 2007, 7; *A Kletečka*, JBl 2011, 749; 2 Ob 172/06t ecolex 2007/69 (comment *G Wilhelm*); see on this *D Hinghofer-Szalkay/C Hirsch*, Wrongful birth/Wrongful conception quo vadis? Mögliche und unmögliche Entwicklungsvarianten der Haftungsproblematik von "ungewollter" Geburt und "ungewollter" Empfängnis, ÖJZ 2007, 519; *R Pletzer*, "Recht auf kein Kind?" – Überlegungen anlässlich der jüngsten Entscheidung des OGH zu "wrongful birth", JBl 2008, 490; 6 Ob 148/08w, ecolex 2008/397 (comment *H Friedl*); reported by *BC Steininger* in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 108, no 55 ff; see on this *E Karner*, Unerwünschte Zeugung und ungeplante Geburt – (k)eine Rechtsprechungsdivergenz, EF-Z 2009, 91; *R Fucik*, Wieder Neues zu "wrongful birth", ÖJZ 2008, 3; 9 Ob 37/14b, RdM 2015, 149 (comment *E Bernat*); reported by *BC Steininger/J Pehm* in: E Karner/BC Steininger (eds), ETL 2015 (2016) 1, no 6 ff; see on this *P Schwarzenegger*, Der OGH, ein unerwünschtes Kind und die Einheitstheorie, EF-Z 2015, 166; 8 Ob 69/21m (see fn 66); also 1 Ob 91/99k (fn 65).

irrespective of the question of an extraordinary burden being placed on the parents.[69]

If the OGH has to decide a legal issue of fundamental importance which has not been answered uniformly in the past, § 8 of the *Bundesgesetz über den Obersten Gerichtshof* (OGH Act, OGHG) requires a decision by an amplified panel. The OGH had, however, rejected the need for such an amplified panel with the argument that there was no contradiction between the two lines of decisions as the first related to cases of children with no disability who would not have been conceived but for the negligence on the part of the defendant (the OGH uses the term *wrongful conception*[70]), while the second group of decisions – according to the OGH's reasoning – concerned situations in which the parents were negligently not informed of the child's disability and were therefore unable to opt for an abortion (referred to as *wrongful birth* cases by the OGH).[71] The first important aspect of the current decision therefore is that the OGH accepted the contradiction between its two lines of reasoning: either maintenance costs are generally compensable, then no extraordinary burden is required and the entire maintenance costs for all children in question can be compensated irrespective of the question of their disability, or such costs can only be compensated exceptionally, in which cases it remains unclear why the basic maintenance costs for disabled children should automatically be considered to be an extraordinary burden and therefore compensable.[72]

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[69] OGH 5 Ob 165/05h, EF-Z 2006, 53 (comment *E Bernat*) = FamZ (comment *M Neumayr*) = JAP 2006/2007, 115 (comment *F Parapatits*), reported in ETL 2006 by *BC Steininger* (fn 65) no 5 ff; see also *G Luf*, Kind als Schadensquelle? AnwBl 2007, 547; *S Merckens*, Kein Schaden ohne Kind – Rechtliche Erwägungen zur jüngsten "wrongful birth"-Judikatur des OGH, 5 Ob 165/05h; *BC Steininger*, ÖJZ 2008, 436; *eadem*, Verpflichtung zu paternalistischer ärztlicher Aufklärung statt eigenverantwortlicher Patientenentscheidung? Einige Bemerkungen zur E 5 Ob 165/05h, JBl 2007, 198; *R Rebhahn*, Ersatz des vollen Unterhalts bei "wrongful birth"! Zak 2006, 206; 5 Ob 148/07m, ecolex 2008/109 (comment *G Wilhelm*) = RdM 2008, 47 (*C Kopetzki*); reported in ETL 2007 by *BC Steininger* (fn 10) no 61 ff; see on this *BC Steininger* ÖJZ 2008, 436; *D Hinghofer-Szalkay/ C Hirsch*, Die Ersatzfähigkeit immaterieller Schäden bei Geburt eines unvorhergesehen behinderten Kindes, RdM 2008, 136; *A Kletečka,* JBl 2011, 749; *R Pletzer,* JBl 2008, 490.

[70] The use of this term is misleading, as, outside of this Austrian debate, it only refers to the moment at which the negligence occurred, namely before or after conception, while the question of whether the child suffers from a disability is irrelevant.

[71] See OGH 6 Ob 101/06f (fn 68); 2 Ob 172/06t (fn 68); 5 Ob 148/07m (fn 69); 6 Ob 148/08w (fn 68).

[72] In this sense *BC Steininger*, ÖJZ 2008, 438 f.

As soon as the contradiction was acknowledged, the OGH had to decide under which circumstances compensation is possible and it convincingly did so by opting for the practically much easier option of considering maintenance costs generally compensable, which not only avoids differentiating between ordinary and extraordinary burdens, but also the problematic focus on the question of the child's disability to be observed in the OGH's past practice and the ensuing debate.[73] A detailed doctrinal justification of this result was later provided by *Helmut Koziol*, formerly one of the main proponents of a limitation of compensation to cases of an extraordinary burden.[74] He stressed the defendant's encroachment upon the parents' right to self-determination, the violation of which allows for compensation of consequential damage. Because the latter is, as now argued by *Koziol*, assessed on the basis of a subjective concept, the decisive point is whether parents consider the coming-into-existence of the family relation with their child as advantageous.

When stating that the OGH has drawn a line under the topic, this is clearly not a final one, as other aspects are already being dealt with. In this sense, the OGH has just requested a preliminary ruling from the CJEU on the question as to whether the loss of income suffered by a woman who became pregnant with an IUD can be considered as bodily injury in the sense of the Product Liability Directive.[75] Moreover, when looking at developments in other jurisdictions, the non-pecuniary harm aspects of such cases might also come up more prominently in the future.

[73] See *BC Steininger*, RdM 2024, 116 f.
[74] *Koziol*, JBl 2024, 559 ff.
[75] OGH 18 November 2025, 2 Ob 77/25z.

II. Belgium

Sébastien De Rey

Over the past 25 years, Belgian tort law has been marked by a series of judicial decisions of particular doctrinal and practical significance. Yet, the most far-reaching development did not originate in the courts themselves, but in the entry into force, on 1 January 2025, of a new Belgian tort law.[1] This reform brought to an end more than two centuries of application of the almost legendary arts 1382–1386 of the *Code Napoléon*, which had remained formally unchanged since 1804. Far from constituting a rupture with the past, the new provisions build to a large extent on the case law over that period, and on the decisions of the Supreme Court in particular, which progressively shaped the requirements of personal misconduct, damage, causation and the principle of full compensation well beyond the very limited indications of the text in the Code. That case law has been widely codified, but not followed without qualification: in several respects, the legislature deliberately departed from established judicial solutions when defining the new tort law.[2] Against this background, the present chapter discusses five decisions of the Belgian Supreme Court (*Cour de cassation/Hof van Cassatie*), selected for their importance and their contribution to the development of Belgian tort law, and analyses these decision against the background of the new statutory framework in Book 6 'Tort Law' of the Belgian Civil Code.

[1] See Act 7 February 2024 containing Book 6 'Tort Law' of the Civil Code, Belgian Official Gazette 1 July 2024, 79, 393.

[2] For a general overview of this reform in English, see *S De Rey*, The Reform of Belgian Tort Law: Overview, Methodology, and Why it Succeeded, European Review of Private Law (ERPL) 2025, 135–172; *S De Rey,* Belgium, in: E Karner/BC Steininger (eds), European Tort Law 2024 (2025) 37–62. In French, see *B Dubuisson*, Le livre 6 du Code civil portant réforme de la responsabilité extracontractuelle. La fin d'un long héritage (1804–2024), Journal des tribunaux (JT) 2025, 1–31. For a comparative analysis from a French perspective, see *JS Borghetti*, Le soleil se lève au nord: ou comment la réforme belge de la responsabilité extracontractuelle fait pâlir le projet français, Recueil Dalloz (D) 2024, 643 ff.

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1. Cass 1 June 2006[3]

A first landmark case worth mentioning is a judgment of the Supreme Court delivered on 1 June 2006. That decision marked a decisive step in the development of the doctrine of *State liability* under Belgian tort law.[4]

From an early stage, the Supreme Court had accepted that the State may incur liability for wrongs committed by the executive branch, holding as early as 1852 that the general rules of tort law of the former Civil Code (arts 1382–1386) apply to the State as well, subject only to statutory exclusions or to acts excluded by their political nature.[5] A decisive step was taken in the *Flandria* judgment of 5 November 1920[6], in which the Supreme Court clarified that the principle of separation of powers, as understood under Belgian constitutional law, does not prevent the judiciary from assessing whether the executive has committed a wrong, even when acting in the exercise of its political functions. Towards the end of the 20th century, this reasoning was extended to the judicial branch itself, as the Supreme Court accepted in the famous *ANCA* case that no principled objection exists to holding the State liable for damage caused by wrongs committed by the judiciary.[7] The judgment of 1 June 2006 completed this evolution by accepting that the State may also be held liable in tort for wrongful acts committed by the legislative branch, even where those acts form part of the legislative function. The case arose from an alleged defamatory statement contained in a report issued by a parliamentary committee of inquiry into religious sects. The Court reiterated that the State is subject to the rules of tort law, as are citizens. According to the Court, the principle of the separation of powers and the independence of the legislator does not mean that the State is exempt from the obligation to compensate for damage caused to others by wrongful conduct in the exercise of the legislative function, and it is the task of the judiciary to protect these civil interests. Ultimately, this decision brought to an end the long-standing dogma of the State's immunity from liability for wrongful acts or omissions of the legislator. With this first milestone laid down by the 2006 judgment, the foundation was set for the further development of

[3] Cour de cassation (Cass) 1 June 2006 (C.05.0494.N), ECLI:BE:CASS:2006:ARR.20060601.9.

[4] For an overview, see *M Kruithof*, Tort Law in Belgium, International Encyclopaedia of Laws: Tort Law (2018) nos 112–120.

[5] Cass 27 May 1852, Pasicrisie belge (Pas) 1852, 370.

[6] Cass 5 November 1920, Pas 1920, 193.

[7] Cass 8 December 1994 (C.93.0303.F), ECLI:BE:CASS:1994:ARR.19941208.10.

State liability in respect of the legislative branch.[8] Against the backdrop of climate litigation and the potential liability of a passive executive, or even legislative branch, the importance of this body of case law in the 21st century cannot be overstated.

The reform of tort law has not altered this line of case law. Today, the Civil Code restates the underlying principle of the former arts 1382 and 1383, but with a new formulation: 'Any person is liable for the damage they cause to others through their fault' (art 6.5). Fault is then defined as 'a breach of a statutory rule imposing or prohibiting specific behaviour or of the general standard of care that applies in social relations' (art 6.6 § 1). It is art 6.6 § 2 that clarifies the scope of the general standard of care by stating that it 'requires behaviour consistent with that of a prudent and reasonable person placed in the same circumstances'.[9] This framework is fully applicable to State liability, as confirmed in the Explanatory Memorandum.[10] In that regard, art 6.6 § 2 para 3 identifies a non-exhaustive list of factors relevant to the assessment of the general standard of care: (1) the reasonably foreseeable consequences of the behaviour; (2) the proportionality between the risk that the damage would occur, its nature, and extent, and the efforts and measures necessary to avoid it; (3) the state of the art in technology and scientific knowledge; (4) the rules of the art and good professional practices; and (5) the principles of good administration and organisation.[11] In the context of liability of public authorities, the last criterion is of particular relevance. However, the Explanatory Memorandum clarifies that the assessment of fault in the case of State liability will have to be marginal whenever the act of which the public authorities are reproached results from the exercise of a discretionary power: in that case, only manifest misconduct may constitute a fault.[12]

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[8] See also Cass 28 September 2006 (C.02.0570.F), ECLI:BE:CASS:2006:ARR.20060928.7; Cass 10 September 2010 (F.09.0042.N), ECLI:BE:CASS:2010:ARR.20100910.4; Cass 15 December 2022 (C.21.0003.F), ECLI:BE:CASS:2022:ARR.20221215.1F.5.

[9] Cf art VI.–3:102(b) Draft Common Frame of Reference (DCFR).

[10] Explanatory Memorandum of Book 6, DocParl Chamber 2022-23, no 55-3213/001, 46 ff.

[11] Interesting is a comparison with the criteria in art 4:102(1) Principles of European Tort Law (PETL).

[12] Explanatory Memorandum (fn 10) 48.

2. Cass 27 November 2006[13]

A second landmark case was delivered by the Supreme Court on 27 November 2006. It is situated against the background of the long-standing debate on the *concurrence between contract and tort*. This question is particularly relevant in Belgian law because of its broad concept of damage, resulting in almost any contractual damage also qualifying as recoverable harm under tort.

Until the early 1970s, the Court consistently held that the former art 1382 of the *Code Napoléon* laid down a general rule applicable in all circumstances and to all persons, which did not lose its force merely because the parties were bound by a contract or because the damage resulted from the non-performance of a contractual obligation.[14] On that basis, an injured party was free to choose between a claim based on contract or tort, provided that the conditions of the respective regimes were satisfied. This approach was fundamentally revised by the famous *Stuwadoors* judgment of 7 December 1973,[15] in which the Court broke with its earlier case law and accorded exclusive application to the rules of contractual liability between contracting parties for damage caused by the non-performance of a contractual obligation. Under this so-called prohibition of concurrence, recourse to tort liability was excluded, even where the conduct constituting the breach also amounted to a tort, and this applied not only to fault-based liability but also to strict liability. By way of exception, however, the Court continued to allow a claim based on tort where the contractual non-performance constituted a criminal offence, or where the damage was the result of such an offence, an exception that has found frequent application in practice, particularly in cases involving personal injury or death. In its judgment of 27 November 2006, the Supreme Court recognised another exception by holding that a claim based in tort remained available where the contract forms part of a public law regulatory relationship. According to the Court, the impossibility for contracting parties to rely on the rules of tort within the framework of their contract stems from the assumption that the parties intend their contractual legal relationship, and any non-performance occurring within that framework, to be governed exclusively by the rules of contractual liability, unless otherwise agreed. However, according to the Court, that assumption does not hold where the legal relationship, as in that case,

[13] Cass 27 November 2006 (C.05.0310.N), ECLI:BE:CASS:2006:ARR.20061127.4.

[14] Cass 13 February 1930, Pas 1930, 115.

[15] Arresten van het Hof van Cassatie (Arr Cass) 1974, 395 and Pas 1974, 376.

concerns the provision of a public service and is therefore not contractual but regulatory in nature, being governed by a public law regulation. The case arose from damage suffered by an electricity user as a result of a fire in an electricity meter box owned by the distributor of the electricity. The claimant sought compensation on the basis of tort law, whereas the distributor relied on the prohibition of concurrence between contract and tort. The Supreme Court accepted that the claimant could bring an action in tort and rejected the defence based on the prohibition of concurrence. As a result, this judgment constituted another important brick in shaping the wall between contract and tort.

During the reform of Belgian tort law, the question of concurrence received extensive attention and sparked considerable debate. At one stage, the adoption of the tort law reform seemed to depend on this issue, as the legislator expressed the desire to depart from the established Supreme Court case law. After consideration of multiple draft versions, the legislature ultimately adopted a solution that entails a reversal of the principle as articulated by the Supreme Court: in the absence of a stipulation to the contrary in the contract or any statutory provision to the contrary, the aggrieved party is at liberty to elect whether to base their claim on a breach of contract or on tort (art 6.3 § 1 para 1). Despite the absence of explicit mention in the text, it is evident from the legislative trajectory that an aggrieved party opting for tort liability must demonstrate the fulfilment of all the requisite conditions for such liability. Indeed, although already controversial in legal scholarship, in this instance, it is not possible to consider that any breach of contract automatically amounts to personal misconduct under the law of torts.[16] However, in the event that the aggrieved contracting party elects to pursue a claim in tort because the conditions of tort are met, the party in breach may then raise defences derived from the contract itself, from provisions on specific contracts (such as on sales, lease, etc), or from the specific prescription periods applicable to the contract. This 'correction' preserves, to a certain extent, the contractual equilibrium and the risk allocation reflected in the contract. An exception to this correction is made for claims seeking compensation for physical or psychological harm or for intentional wrongdoing, where 'full' concurrence is possible without the party in breach being able to invoke such defences (art 6.3 § 1 para 2).

[16] See *Dubuisson*, JT 2025, 1 para 5; *F Auvray/R Jafferali*, Une cure de jouvence pour le droit de la responsabilité, le Livre 6 du nouveau Code civil, Tijdschrift voor Belgisch Burgerlijk Recht/Revue Générale de Droit Civil Belge (TBBR/RGDC) 2025, 82 para 17.

3. Cass 5 June 2008[17]

A third landmark case was delivered by the Supreme Court on 5 June 2008. The case concerned *causal uncertainty* and recognised under Belgian tort law the doctrine of 'loss of a chance'.

As a rule, the injured party bears the burden of proving causation between the damage and a fact giving rise to liability. Where such causation remains uncertain, the damage, in principle, remains with the injured party. Yet where there is a strong correlation between the damage and the wrongful conduct, and thus a real possibility that the damage was caused by that conduct, this outcome appears unsatisfactory from the perspective of both victim protection and equity. In several legal systems, legislators and courts have developed responses to certain forms of causal uncertainty, either by adjusting the rules of evidence or by relaxing the causation requirement.[18] In Belgium, under the *Code civil* of 1804, it ultimately fell to the Supreme Court to take a position. While initial steps were taken in a judgment delivered on 19 January 1984,[19] the doctrine was articulated, after some doubts, in a landmark case of 5 June 2008. In this case, the Supreme Court recognised that the loss of a chance to obtain an advantage or to avoid a disadvantage constitutes compensable damage under the law of torts. The loss of a chance is a specific type of damage, distinct from the lost advantage or the harm ultimately suffered to which the chance relates: compensation is awarded not for that final outcome, but for the loss of the chance itself. In the case giving rise to this judgment, an Arabian horse exhibiting symptoms of colic was examined by a veterinarian, who failed to perform a gastric intubation. The horse subsequently died as a result of a gastric rupture. The Court found that the performance of a gastric intubation would probably have prevented the animal's death and awarded the owners compensation for the loss of the horse's chance of survival, assessed at 80% of the damage ultimately suffered. Subsequent case law has applied this doctrine across a wide range of factual situations, including failed medical treatment or legal proceedings, the loss

[17] Cass 5 June 2008 (C.07.0199.N), ECLI:BE:CASS:2008:ARR.20080605.5.

[18] For a comparative overiew on the different approaches on causation, see *M Infantino/E Zervogianni*, The European Ways to Causation, in: M Infantino/E Zervogianni (eds), Causation in European Tort Law (2017) 85–128; *C Van Dam*, European Tort Law (2013) 293.

[19] Cass 19 January 1984, ECLI:BE:CASS:1984:ARR.19840119.12. In this case, the Court held it lawful to find causation between the faults committed by a doctor and the fact that the victim of an accident lost a chance of avoiding an amputation or of undergoing a less severe amputation.

of a public procurement opportunity, the failure to obtain an expected profit, or the loss of promotion prospects, or opportunities to participate in competitions or examinations.[20] The Supreme Court nevertheless needed several additional judgments to decide on further requirements of this doctrine, for example by holding that the loss of a chance is compensable where a *conditio sine qua non* exists between the fact generating liability and the loss of that chance, and where the chance in question is a real one.[21] In particular, it held that where the injured party claims compensation solely for the damage as such, and the court finds that there is no certainty as to the causal link between that damage and the fact relied upon, the court may, of its own motion, award compensation instead for the damage consisting in the loss of a chance.[22]

Turning to the reform of tort law, from just one word in the old art 1382 of the *Code Napoléon*, the legislature now devotes six provisions to causation (arts 6.18–6.23). As a starting point, the legislator enshrines the principle of *conditio sine qua non* and the principle of the equivalence of conditions (art 6.18 § 1). However, it is no longer necessary to apply the doctrine that establishes a separate form of damage in the loss of a chance. Instead, art 6.22 of the Civil Code provides for the concept of 'proportional liability'. This approach provides compensation for the damage suffered by the injured party, albeit exclusively for the proportion of the actual damage that is commensurate with the probability that the wrongful conduct caused the damage. In the spirit of the legislator, compared to the former solution on loss of a chance, 'this does not alter the ultimate outcome'.[23]

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[20] For an overview, see *S Goldman/R Jafferali*, La perte d'une chance à la croisée des chemins. Evolutions et applications jurisprudentielles, TBBR/RGDC 2019, 191–211; *C Joisten*, L'incertitude causale en droit de la responsabilité civile (2024).

[21] See Cass 17 December 2009 (C.08.0145.N), ECLI:BE:CASS:2009:ARR.20091217.8; Cass 23 September 2013 (C.12.0559.N), ECLI:BE:CASS:2013:ARR.20130923.2; Cass 9 March 2018 (C.17.0517.F), Revue critique de jurisprudence belge (RCJB) 2020, 7, cmt *J Van Drooghenbroeck*, TBBR/RGDC 2019, 239, cmt *S Goldman/R Jafferali*; Cass 13 January 2022 (C.19.0153.N), ECLI:BE:CASS:2022:ARR.20220113.1N.9.

[22] Cass 14 December 2017 (C.16.0296.N), ECLI:BE:CASS:2017:ARR.20171214.5; Cass 9 March 2018 (fn 21); Cass 5 September 2019 (C.18.0302.N), ECLI:BE:CASS:2019:ARR.20190905.3; Cass 27 April 2020, (C.19.0415.N), Rechtskundig Weekblad (RW) 2020-21, 986.

[23] Explanatory Memorandum (fn 10) 9.

4. Cass 14 November 2014[24]

A fourth landmark case to be mentioned was delivered by the Supreme Court on 14 November 2014. With this judgment, the Court made legal history by ruling for the first time on a *wrongful life* claim. Although Belgian tort law assumes a very broad concept of damage, the Supreme Court held that, as a rule, wrongful life claims under Belgian tort law fail.

The case that gave rise to the judgment was brought by a child born with a disability as a result of an erroneous diagnosis by a doctor during the pregnancy of the mother, which prevented the mother from opting for a therapeutic abortion. The existence of a medical fault was not disputed; the central issue was rather whether the child itself could claim damages. The question was approached through the notion of damage. Under Belgian tort law, as a rule, damage is defined as the negative outcome of a comparison between two situations: the actual condition of the injured party after the harmful event and the hypothetical condition of that same person in the absence of the harmful event.[25] However, where the comparison must be drawn between the condition of a disabled person's existence and non-existence, the Supreme Court decided that one cannot make a comparison between a person's disabled existence and their non-existence, and that, as a result, no compensable damage can be identified. According to the Court, no compensable damage exists where the required comparison must be made between a life with a disability and non-existence. It follows that, according to the Court, life is regarded as a higher good than non-life. In other words, no legally compensable damage arises, since the comparison between existence with a disability and non-existence does not yield a negative, but invariably a positive outcome. This decision provoked extensive commentary;[26] however, it has been repeatedly confirmed in subsequent decisions.[27] In other juris-

[24] Cass 14 November 2014 (C.13.0441.N), ECLI:BE:CASS:2014:ARR.20141114.1.

[25] See *Kruithof* (fn 4) para 53 ff.

[26] See eg, *B Dubuisson*, L'arrêt de la Cour de cassation du 14 novembre 2014 sur la vie préjudiciable. L'être ou le néant: l'alternative illégitime, JT 2015, 209; *G Génicot*, Comparaison sans raison n'est pas solution (cmt under Cass 14 November 2014), Revue de Jurisprudence de Liège, Mons et Bruxelles (JLMB) 2015, 269–278; *Y-H Leleu*, Refuser de comparer pour exonérer (cmt under Cass 14 November 2014), JLMB 2015, 278–285; *A Huygens*, Wrongful-life vordering overleeft cassatietoets niet, Revue de droit de la santé (Rev dr santé) 2015, 195.

[27] Cass 21 April 2016 (C.15.0286.N), ECLI:BE:CASS:2016:ARR.20160421.8; Cass 17 October 2016 (C.090.414.F), ECLI:BE:CASS:2016:ARR.20161017.1; Cass 13 April 2018, JLMB 2018, 1074, cmt *G Génicot*.

dictions, courts have likewise rejected wrongful life claims,[28] whereas in some legal systems, such claims have been accepted.[29]

Nothing indicates that this case law has been called into question by the reform of tort law,[30] even though damage continues to be defined in broad terms. Article 6.24 para 1 of the Civil Code defines damage as 'the economic and non-economic consequences of harm to a legally protected personal interest', thereby conferring an open-ended scope on the interests eligible for protection. Unlike other legal systems, the Belgian Civil Code does not limit negligence liability to the infringement of a closed list of specifically enumerated protected interests.

5. Cass 26 November 2021[31]

The fifth landmark case is noteworthy for its originality from a comparative perspective. In its judgment of 26 November 2021, the Supreme Court accepted that an *apology order* may constitute a legal remedy under the law of torts.

The case arose from the leakage to the press of a memorandum originating from a closed meeting of a parliamentary committee. In that memorandum, the claimant, a baron and prominent businessman, was named and associated with extreme right-wing organisations. Following its publication in a newspaper, the claimant's reputation was seriously damaged, and he became publicly known as the 'Black Baron'. It later emerged, however, that these allegations were neither substantiated nor verified. After a lengthy procedural dispute with the Belgian State, the claimant sought not only monetary compensation for non-material harm, but also an order requiring the State to address a letter to him, co-signed by the Minister of Justice and the Administrator-General of State Security, formally retracting the allegations and offering apologies, and to publish that letter on two governmental websites. The Court of Appeal acknowledged that the claimant had suffered damage to his reputation and held the Bel-

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[28] For England, see *McKay v Essex AHA* [1982] Queen's Bench (QB) 1166. Criticism of the damages portion of this decision can be found in *T Weir*, Wrongful Life – Nipped in the Bud, 41 Cambridge Law Journal 1982, 225. For Germany, see BGH 18 January 1983, BGHZ 86, 240, JZ 1983, 447.

[29] See for the Netherlands: Hoge Raad (HR) 18 March 2005, ECLI:NL:HR:2005:AR5213, Nederlandse Jurisprudentie (NJ) 2006/606; for France, see Cass (Plenary) 17 November 2000, La Semaine Juridique: Juris Classeur Périodique (JCP) 2000, II, 10, 438 (*Perruche*).

[30] See also Explanatory Memorandum (fn 10) 146 f referring to that case law.

[31] Cass 26 November 2021 (C.20.0578.F), ECLI:BE:CASS:2021:ARR.20211126.1F.5.

gian State liable on the basis of an unlawful act under arts 1382 and 1383 of the former Civil Code. While it awarded monetary damages, it rejected the claim seeking the apology. The claimant appealed.

The Supreme Court set aside that decision, holding that the Court of Appeal could not dismiss the claim for an apology as such. According to the Supreme Court, the victim of a civil wrong is entitled to non-monetary relief (*réparation en nature*, *Naturalrestitution*, *herstel in natura*), including in cases of moral harm, and a court must grant such relief where it is sought, unless it is impossible or constitutes an abuse of rights. The Supreme Court therefore held that the Court of Appeal should have examined the specific form of non-monetary relief requested, namely the apology letter. It follows from this judgment that apologies may constitute a form of non-monetary relief for emotional harm under Belgian tort law, by virtue of the general provisions on tort liability.[32] Indeed, following the referral of the case by the Supreme Court to another Court of Appeal, the claimant ultimately obtained the apologies he had sought.[33]

Also, after the tort law reform, the Civil Code does not allow for monetary damages only, but for non-monetary relief as well. To this end, the court may alter the legal situation of the parties or order measures to be taken by the tortfeasor or a third party, at the expense of the tortfeasor, and may authorise the injured party to substitute for the tortfeasor for this purpose (art 6.33 § 1). In regard to the relationship between monetary damages and non-monetary relief, the Civil Code clarifies in art 6.33 § 2 that if non-monetary relief is requested by the injured party, it should be granted by the court, unless the requested measure turns out to be impossible or clearly unreasonable, requires the use of coercion against the tortfeasor, or is contrary to human dignity. Rather than monetary damages, the tortfeasor may offer non-monetary relief, but the injured party is entitled to refuse such an offer if there are 'valid reasons' to do so.

A quick journey around the globe shows that apologies are accepted as a legal remedy in several jurisdictions, either as a general or a specific remedy, but that most European legal systems are not familiar with apol-

[32] For an overview of this Belgian approach, see *S De Rey*, Court-Ordered Apologies under the Law of Torts? Non-Monetary Relief for Emotional Harm – A Comparative Outlook from a Western European Perspective, in: N Brutti/R Carroll/P Vines (eds), Apologies in the Legal Arena (2021) 203; *J Van de Voorde*, L'excuse contrainte par justice (l'amende honorable) reconnue par la Cour de cassation, Revue générale des assurances et des responsabilités (RGAR) 2022, no 15.851.

[33] Court of Appeal of Liège (3e chambre A), 14 November 2023, JT 2024, 29.

ogy orders.[34] It remains to be seen whether this Belgian decision will lead the field for other jurisdictions to follow. It touches upon one of the fundamental questions of tort law, which particularly concerns the objectives to be pursued by this field of law: is it about the money and thus about purely pecuniary interests, or is there more within the tort law arena?

[34] *S De Rey*, Apologies as a Private Law Remedy: Emerging on the European Continent, and Beyond? ERPL 2023, 1013–1022, followed by ten country reports on the subject.

III. Bulgaria

Viktor Tokushev and Hristina Tancheva

1. Supreme Court of Cassation (SCC) Interpretative Decision No 1 from 21 June 2018 on Interpretative Case No 1/2016, General Assembly of the Civil, Commercial and Criminal Chamber[1]

For a long time, Bulgarian case law adopted a restrictive approach to determining the circle of persons entitled to compensation for non-pecuniary damage resulting from the death of a close relative. The right to compensation was strictly limited to first-degree relatives in the ascending and descending line (parents and children), as well as the spouse, as established in Supreme Court (SC), Decree No 4 from 25 May 1961, Plenum and Supreme Court, Decree No 5 from 24 November 1969, Plenum.

Subsequently, SC, Decree No 2 from 30 November 1984, Plenum explicitly refused to recognise the rights of siblings, grandparents and grandchildren to receive compensation for non-pecuniary damage. It was accepted that these relatives were not sufficiently close to the injured party (the deceased), thus they failed to meet the 'proximity' requirement, and also that such recognition could lead to an uncontrolled number of claims for compensation, consequently to an abuse of rights.

Thus, with SCC, Decision No 212 from 26 April 2010 on Criminal Case No 143/2010, Criminal Division, 3rd Bench, the Court ruled that the Supreme Court's decrees, which are legally binding, exhaustively list those persons entitled to compensation for non-pecuniary damage in the event of the death of a relative. Since siblings are not among them, their claims should not have been examined on the merits. In effect, the proceedings should have been terminated by the first instance court as having been initiated by an unentitled person.

In SCC, Decision No 219 from 14 July 2010 on Criminal Case No 163/2010, Criminal Division, 3rd Bench, it was declared that the claims of the grandchildren of a murdered woman were correctly dismissed on the grounds that they were not legally entitled to claim non-

[1] Reported in *V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2018 (2019) 56, nos 7–16.

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pecuniary damages as a result of her death, this being clearly stated in the theory and case law expressed in SC, Decree No 4 from 25 May 1961, Plenum and SC, Decree No 5 from 24 November 1969, Plenum.

In SCC, Decision No 526 from 1 February 2011 on Criminal Case No 441/2010, Criminal Division, 2nd Bench, the SCC concluded that binding case law limits the circle of eligible persons and does not include siblings, regardless of the non-pecuniary damage they have suffered owing to the loss of a close relative.

In SCC, Decision No 181 from 30 November 2012 on CC No 958/2011, Commercial Division, 2nd Bench, the Court acknowledged that from a medical and psychological point of view, the bond between twins may be stronger than the biological bond between parent and child, whereby the claimant experienced severe emotional pain and suffering as the result of the death of his twin brother. Nevertheless, these circumstances are irrelevant to the proceeding, since the mandatory directions in SC, Decree No 2 from 30 November 1984, Plenum exclude the legal possibility of compensation. The claim was therefore dismissed.

The SCC, Interpretative Decision No 1 from 21 June 2018 on Interpretative Case No 1/2016, General Assembly of the Civil, Commercial and Criminal Chamber changed the standing practice and ruled that the persons identified in SC, Decree No 4 from 25 May 1961, Plenum and SC, Decree No 5 from 24 November 1969, Plenum, as well as (exceptionally) any other person who had created a lasting and deep emotional connection with the deceased, and as a result experiences continuing pain and suffering, should be fairly compensated. Compensation is to be awarded once a particularly close connection with the deceased, in addition to damage actually incurred as a result of their death, have been proven.

Following the adoption of this Decision, the practice was reversed. Thus, for example, in SCC, Decision No 50399 from 5 June 2023 on CC No 1624/2022, Commercial Chamber, 1st Bench, the right of a brother to receive compensation for non-pecuniary damage resulting from the death of his brother in a traffic accident was confirmed. The Court found that exceptional circumstances had been proven in this case, which justified the payment of compensation. The testimony of the witnesses and a social report established that, to the claimant, his deceased brother was like a father, given that his actual father had become disinterested in him. The bond between the two brothers was extremely strong and the sudden death of the brother had a very negative impact on the claimant's psyche. It was concluded that persons outside the immediate family circle (parents, children and spouse) are recognised

as 'victims' and entitled to compensation for emotional damage only where, due to specific life circumstances, the attachment had become so strong that the death of the relative caused a degree of emotional pain and suffering exceeding the intensity and duration that would normally be present in the family relationship concerned. It was accepted, in this case, that an emotional relationship had been proved, differing from the norm in terms of type, intensity and duration, and in which a relationship similar and extremely close to that existing between the closest circle of persons had been established.

In other cases, if no evidence of a particularly strong relationship between the deceased and the person claiming compensation (most often brothers, sisters and grandparents) is presented, the claim was dismissed.[2]

It appears that the interpretation set out in the Interpretative Decision is being successfully applied by the courts, which shows that the fear of an excessive number of claims being filed, and compensation being awarded to a large number of relatives and others closely associated with the deceased, was unjustified. Without a doubt, the decision of the SCC can be described as 'revolutionary', not only because it results in the changing of a conservative, 50-year-old, practice but because it extends the concept of 'proximity' in order to give a right to claim compensation to any person who can prove a close and lasting relationship with the deceased, resulting in considerable moral pain and suffering being caused by their loss. As long as such a relationship can be proved, it is no longer only relatives of the deceased who can claim compensation – emotional connections are also relevant. This interpretation gives the courts freedom to review each particular case. Nevertheless, the courts have correctly concluded that the idea is not to compensate all those close relatives who suffer negative emotions from someone's death, but only those closest who, as a rule, suffer the most (parents, children and spouse), and others who, in a particular case and owing to extraordinary circumstances, suffer significantly with this suffering having been proved.[3]

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[2] Eg SCC, Decision No 50555 from 21 October 2023 on CC No 2011/2022, Civil Division, 4th Bench; SCC, Decision No 50078 from 26 October 2023 on CC No 2045/2022, Civil Division, 1st Bench; SCC, Decision No 50562 from 13 October 2023 on CC No 2078/2022, 1st Bench; SCC, Decision No 60374 from 17 June 2021 on CC No 1753/2020, Civil Division, 1st Bench; SCC, Decision No 50610 from 14 November 2022 on CC No 2573/2021, Commercial Division, 2nd Bench; SCC, Decision No 646 from 25 November 2020 on CC No 457/2020, Commercial Division, 2nd Bench, etc.

[3] Eg SCC, Decision No 3479 from 13 November 2023 on CC No 1011/2023, Civil Division, 3rd Bench.

2. SCC, Decision No 71 from 6 April 2020 on Civil Case (CC) No 3804/2019, Civil Division, 4th Bench[4]

For the first time in Bulgarian judicial practice, the tort liability of the National Assembly was recognised in Supreme Court of Cassation (SCC), Decision No 71 from 6 April 2020 on Civil Case (CC) No 3804/2019, Civil Division, 4th Bench. The decision was rendered in a seemingly simple case, which nevertheless is of substantial importance for the understanding and application of numerous legal principles, including those relating to the Constitution of the Republic of Bulgaria.

The dispute before the SCC arose from the following circumstances: the claimant is a company, an owner of photovoltaic power stations. The company was affected by an amendment in the legislation from 2014 according to which, a fee of 20% is due on all income from the production of solar and wind energy. By Decision No 13 from 13 July 2014, effective as of August 2014, the Constitutional Court declared the statutory provision establishing this 'fee' unconstitutional. The company then sought compensation for all 'fees' paid in this eight-month period, amounting to approximately € 200,000 from the National Assembly for adopting an unconstitutional law.

The main legal issue stemmed from art 151, para 2 of the Constitution, which provides that a law declared unconstitutional ceases to apply as of the date on which the Constitutional Court's decision enters into force, meaning that decisions of the Constitutional Court produce effects for the future (*ex nunc*). Consequently, compliance with the law as applicable at a given moment was considered not to constitute damage and therefore not subject to compensation. This was the reasoning adopted by the Sofia City Court and the Sofia Court of Appeal in rejecting the claim.

The SCC took a revolutionary step with its decision. First, it held that since the Constitution itself provides that the State is liable for damage caused by unlawful acts and actions of its bodies, this implies that all representatives of the executive, judiciary and legislative branches can bear such liability. This was the first time that a court accepted that the legislative body, namely the National Assembly, could be held liable (alongside executive and judicial authorities). At the same time, the SCC clarified that the liability of the National Assembly is not related to the immunity of members of Parliament for their individual actions as such. Secondly, and even more significantly, the SCC overturned the idea that

[4] Reported in *V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2020 (2021) 53, nos 3–10.

the effect for the future of decisions of the Constitutional Court declaring a law or part of it unconstitutional blocks any path for seeking compensation for damage when this law was in force. The SCC declared that the adoption of an unconstitutional law is a tort since its adoption represents an unlawful act (to a high degree) and the application of such an unconstitutional law inevitably causes damage to legal subjects – both to the State itself and to citizens and entities that are equally subordinate to the law until it is brought into accordance with the Constitution. It is the National Assembly's responsibility to adopt laws that are compliant with the Constitution as members of Parliament undertake under oath, as their main obligation, to comply with it.

Furthermore, the SCC based its reasoning on art 22, para 4 of the Constitutional Court Act, according to which, the authority that adopted the unconstitutional act is obliged to eliminate the adverse legal consequences resulting from its application. This means that the failure of the National Assembly to address the legal consequences of an unconstitutional law also constitutes a tort, as such inaction is just as unlawful as the adoption of the law itself. As long as the National Assembly does not settle all legal consequences deriving from the application of the unconstitutional law by adopting the appropriate legal provisions, including provisions enabling compensation for the continuing violation of rights, the constitutional order remains 'damaged', which is unacceptable for the rule of law.

Owing to the depth and coherence of its reasoning, the decision may properly be characterised as a milestone in Bulgarian case law as it served as a basis for a series of subsequent decisions in similar cases.[5]

An interesting evolution in judicial reasoning may be observed in later decisions. While other SCC benches accepted the principle of the National Assembly's liability for damage, they sought alternative legal grounds to justify it. Thus, in SCC, Decision No 91 from 26 August 2021 on CC No 1489/2020, Civil Division, 4th Bench, it was argued that claims for the restitution of sums paid under a law later declared unconstitutional should be characterised as claims based on unjust enrichment rather than tort. The reason for this can again be traced to the legal significance of a law that was applicable until it was declared unconstitutional.

The resulting inconsistency in case law prompted the adoption of SCC, Interpretative Decision No 1 of 20 April 2023 on Interpretative Case No 1/2022, General Assembly of Civil and Commercial Chambers.

[5] Such as in SCC, Decision No 204 from 9 March 2021 CC, No 3812/2018, Civil Division, 3rd Bench, and in SCC, Decision No 91 from 26 August 2021 on CC, No 1489/2020, Civil Division, 4th Bench

In this binding decision, the SCC ruled that the adoption by the National Assembly of unconstitutional law is a tort, as is the failure of the National Assembly to comply with its obligation to redress the effects of the law declared unconstitutional. In this sense, the legal basis for a claim brought against the State in this factual situation is tort law and the liability of the State is tortious, strict, no-fault based, and is effective regardless of whether the conduct of the officials concerned was culpable.

In conclusion, notwithstanding the divergent lines of reasoning previously adopted by individual SCC benches, the jurisprudence initiated by the 2019 decision has firmly established the possibility of holding the National Assembly liable for damage caused by the adoption of unconstitutional legislation and by the failure to remedy the legal consequences of its application.

3. SCC, Interpretative Decision No 2 from 12 January 2023 on Interpretative Case No 3/2021, General Assembly of Civil and Commercial Chambers[6]

In recent years, the question of the standard of proof required for lost profit in cases of a tort has become increasingly relevant. This and contradictory practice from different benches of the SCC is the reason for this significant Interpretative Decision from 2023. The Supreme Court decided that the lost profits caused by a tort must be proven with certainty, in the same manner as lost profits caused by a breach of a contractual obligation. This decision could be significant for the future and could significantly reduce the number of claims for lost profit in tort cases.

It should be considered that all the cases examined by the SCC in connection with contradictory case law are related to the fact that, as a result of a tort, the owner of a movable or immovable property was deprived of the opportunity to use it or to receive income from it. Therefore, the relevant question is whether the lost profit in the form of lost rent should be compensated if it is not proven that the claimant tried to rent out the real estate. However, instead of initiating an interpretative case on this practical issue, the SCC issued an interpretation on the question: 'Should the loss of profits caused by a tort be proved with certainty, just as the loss of profits caused by a breach of a contractual obligation must be proved with certainty?'

In order to understand the meaning of the interpretative question, the SCC Interpretative Decision 3 from 12 December 2012 on Interpretative

[6] Reported in *V Tokushev/H Tancheva*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 69, nos 11–19.

Case No 3/2012, General Assembly of Civil and Commercial Chambers should be considered. In this decision, it was decided that for damages in the form of lost profits resulting from delayed performance of an obligation to build a construction to be awarded, there must be a degree of certainty that there would have been an increase in the value of the creditor's property, as such certainty is not assumed. In addition, in the grounds of the decision, the SCC refers to its key argument: '...the lost profit represents a real and not hypothetical damage, this assumption must always be based on a proven possibility of a certain increase of the property and cannot lie on a logical assumption of lawful occurrence of the increase.'

In fact, the 2023 decision of the SCC was in a sense predetermined by the manner in which the interpretation question was defined. Thus, the answer that the lost profits in the case of tort should be proved in the same way as in the case of a breach of a contractual obligation is logical and there is no legal basis for them to be treated differently, at least not in Bulgarian law. The problem is that, by introducing the requirement that the lost profits must be proven with certainty, the possibility of them being claimed is significantly limited, which makes it difficult for the injured party to receive full compensation.

In the authors' opinion, the interpretative question should have been: Can there be certainty in the case of lost profits? Bulgarian theory unanimously adheres to the understanding, quoted also in the decisions of the SCC, that lost profit is a lack of increase in the value of property. In this sense, by definition, the lost profit is not real: it is assumed, because it would have been realised if there had been no breach of contract or damage to the interests of the party injured by the tort. As far as there is a breach of an obligation or a tort, the profit has not materialised and is 'lost'. In this sense, the requirement of certainty should be understood not as a requirement for the 'reality of the damage', but as a requirement for a greater probability of its occurrence.

If we move from theoretical discussions and look at the cases that provoked the Interpretative Decision, we can assume that when the party injured by the tort could not use their property due to the actions of the tortfeasor, it is not enough merely to state that they intended to rent them in order for them to be awarded damages for lost profits. In such a case, the Court should investigate whether the injured party had another home to rent, whether the property was suitable for renting and whether the injured party made any efforts to rent it (by placing advertisements, having interviews with tenants, etc). It seems that the SCC wants to reduce its workload and, by introducing the certainty requirement, it appears that the Court is saying that lost profits can only be certain if there is a lease

agreement. This ultimate understanding of the standard of proof is not acceptable, because even when an agreement has been concluded, there is no guarantee that it will be rightfully executed for its entire term.

In this sense, the interpretation of the SCC cannot be supported and, as mentioned above, can be very problematic for future case law. There is no presumption of lost profit but requiring it to be proven with certainty is too burdensome and will certainly not be helpful in practice. It would have been far better if the instructions of the SCC had been directed towards a more nuanced approach, based on the usual development of events and the specific circumstances of the case, in the sense of the recommendations of theory and the dissenting opinions.

4. Varna District Court, Decision No 1164 from 18 October 2011 on CC No 1489/2011

According to prior case law, it was generally accepted that the destruction of, or damage to, property could not cause non-pecuniary damage. Thus, in SCC, Decision No 1102 from 9 April 1981, on CC No 623/81, Civil Division, 1st Bench, a decision awarding compensation for non-pecuniary damage, comprising 'fear and anxiety' suffered by the claimants while watching their home burn down due to gross negligence on the part of the defendant, and the subsequent 'suffering and inconvenience' caused by its restoration was overturned. The argument was that not every unpleasant sensation or feeling, and not every depressive feeling gives grounds for awarding compensation for non-pecuniary damage, only those that justice requires to be compensated. The Court clearly considered that in this case, justice did not require an award of compensation. Nevertheless, it then seemed to leave the door open for another specific case in which compensation could be awarded.

More recently, in Varna District Court, Decision No 1164 from 18 October 2011 on CC No 1489/2011, the claimant's right to compensation for non-pecuniary damage, suffered as a result of the killing of his pet by the defendant's dog, was recognised. Compensation was claimed for non-pecuniary damage, consisting of negative changes in the claimant's mental and emotional state resulting from the killing of his pet (a cat). The Court accepted that contemporary Bulgarian society has elevated the value of the humane treatment of animals, protecting them with legal means. The Decision also states that it is a 'moral duty of mankind to respect all living creatures', and that pets have a special relationship with humans contributing, as they do, to the quality of life, thus being of value to society. Considering the nature and character of the suffering and

negative emotions experienced by the claimant in the case in relation to the loss of his pet cat, which he had owned for ten years from a kitten, the Court decided that it was fair to award compensation for this non-pecuniary damage in the amount of € 500.

Similarly, in SCC, Decision No 60456 from 17 December 2021 on CC No 3132/2021, Civil Division, 2nd Bench, the Court refused to grant a Cassation Appeal against the decision of the Appellate Court, which upheld that of the Regional Court. This latter ordered the defendant to pay compensation in the amount of € 3,750 in non-pecuniary damages, resulting from the claimant's pet being killed by the defendant's dog.

In Sofia Regional Court, Decision No I-31 from 9 July 2015, on CC No 16443/2015, the Court dismissed a claim for compensation of non-pecuniary damage in a similar case, albeit one in which the animal did not die. The case established that while on a walk, the claimant's dog, a Pomeranian, was attacked by the defendant's dog, which was not on a lead or wearing a muzzle. The claimant's Pomeranian suffered a severe laceration, for which it was rushed to a veterinary clinic, where it underwent surgery and was hospitalised and medicated. This was followed by a recovery period under home care. The claimant sought compensation of non-pecuniary damage, consisting of pain and suffering, fear and anxiety for the life and health of his dog, and worry over whether it would survive and recover from the trauma. The Court acknowledged that it is not impossible, and indeed quite normal, for an act of damage against property to also cause mental suffering to its owner, especially in the case of animals, which are living creatures to which people can become attached. However, it dismissed the claim, arguing that awarding compensation for the non-pecuniary damage suffered by the owner of an injured pet, when compensation for non-pecuniary damage suffered by an injured loved one could not be awarded, constitutes a devaluation of the worth of human life and is immoral. In other words, the Court accepted that, since compensation is not payable to relatives when a person suffers bodily injury, there is even less reason to award compensation when an animal is injured.

The Decision was appealed, and overturned, by the Sofia City Court, Decision No 9265 from 21 December 2016 on CC No 96/2016. The Court held that it had been established in the case that the claimant had suffered non-pecuniary damage as a result of the incident involving his own dog. To wit, he had experienced pain and suffering in connection with the injury to his own dog. Contrary to the findings of the court of first instance, the Sofia City Court held that it was permissible to award compensation for non-pecuniary damage suffered in connection with an injury to one's pet, finding that the fair amount of compensation was € 500.

The SCC also ruled on a similar case. Through SCC, Order No 3733 from 23 November 2023 on CC No 1239/2023, Civil Division, 1st Bench, the SCC confirmed a Court of Appeal Decision which awarded € 5,000 in non-pecuniary damages to the claimant. The claimant and his dog were both bitten by the defendant's dogs and the claimant sought non-pecuniary damages, both for the pain he himself suffered and the suffering caused to him by the injury to his dog. The Court established that, after the incident, the claimant fell into an emotional state of depression, increased anxiety, and fear of which he had had no previous experience. The claimant looked after the dog intensively, visiting the vet for treatment of its wounds for about two months. He himself suffered considerably as a result of his pet's suffering. It was established that the dog had been kept by the claimant's family for several years, and that the deep emotional bond between the dog and its owner was normal and understandable, which is why compensation was awarded both for the pain and suffering caused by the claimant's own injuries and for the negative emotions experienced in connection with those of the dog.

As can be seen, the practice of the last 15 years shows that the courts now consider certain cases of damage to, or destruction of, property as causing non-pecuniary damage when it is fair and justified by the specific circumstances of the case (most often in the case of pets, which, although considered 'chattel', are nevertheless animate objects, not only when killed but also when injured). Non-pecuniary damage should always be subject to compensation when it is actually suffered (proved), as art 52 of the Bulgarian Obligations and Contracts Act does not impose restrictions on who is to be compensated, what type of property must have been damaged, or how. On the contrary, the rule is so broad that it allows for discretion by the judicial authority. This in no way means that all claims for non-pecuniary damages should be upheld. Only those for which it has been proved that pain or suffering has been experienced, and that it is 'fair' and reasonable to compensate should be deemed to merit an award.

5. SCC, Interpretative Decision No 1 from 23 December 2015 on Interpretative Case No 1/2014[7]

Contributory negligence – understood as the injured party's contribution to the harmful result – represents one of the principal grounds on which the liability of the person who caused the damage may be reduced.

[7] Reported in *C Takoff/V Tokushev*, Bulgaria, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 54, nos 4–10.

For this reason, its precise delineation is of enduring importance for practice. In this respect, particular significance attaches to SCC, Interpretative Decision No 1 from 23 December 2015 on Interpretative Case No 1/2014. In point 7 of this Decision, the Court addresses the question of whether the conduct of an injured person qualifies as contributory negligence in cases where they willingly accepted a ride with a driver who had consumed alcohol.

The SCC found that there is contradictory case law on this issue. According to the first group of decisions, in such cases, the injured person voluntarily consents to take a known risk, which could be qualified as contributory negligence. The reasoning is that, even if the injured person did not contribute to the occurrence of the accident, they contributed to their injury. According to the second group of decisions, in such cases, there is no contributory negligence. The reasoning is that the person's conduct neither caused nor contributed to the accident, and that their knowledge of the fact that the driver consumed alcohol, by itself, is not a ground to establish contributory negligence.

After considering these two views, the SCC held that the first is correct. The Court reasoned that a person's conduct may be qualified as contributory negligent in at least two forms. In the first, the person's negligence contributed to the occurrence of the accident, while in the second, it contributed to the occurrence of the injury suffered (in both, the injured person's conduct can be qualified as contributory negligence). The definition of the second form of contributory negligence is the key outcome from this decision, which will prove to be significant in the coming years.

According to the SCC, the acceptance of a predictable known risk or its total disregard objectively constitutes a contribution of the injured person to the injury caused. Such contribution is unlawful and there is a direct causal link between the negligent conduct and the injury caused by the traffic accident. Therefore, the SCC ruled firmly that: 'The conduct of an injured person qualifies as contributory negligence in cases where they accepted a ride with a driver who had consumed more than the legally permissible amount of alcohol if the injured person had known this fact'.

The SCC held further that a party claiming contributory negligence (eg the person who caused the accident or the insurer) as a defence has the burden of proving it. The extent of the contributory negligence is to be considered in each individual case. Thus, the compensation awarded to the injured person should be reduced by the extent to which they were liable, but it can never be totally barred.

The interpretative decisions of the SCC are binding on all lower courts in Bulgaria and therefore any interpretative decision is a ground

for consolidation of the court practice on the matter. The decision should generally be supported. Although it may seem unfair to injured parties, the decision correctly recognises that the subjective knowledge about the driver's consumption of alcohol constitutes voluntary consent to encounter a known risk and, thus, is grounds for receiving less compensation.

This decision has proven to be significant because the question of whether there is contributory negligence in such cases has almost never been raised in the recent practice of the SCC – an issue which is relevant to other cases of contributory negligence in motor vehicle accidents, for example the wearing of seat belts.

IV. Croatia

Marko Baretić

1. Presuda Županijskog Suda u Varaždinu (Judgment of the County Court in Varaždin) No Gž 2587/2021-10 of 16 January 2014[1]

In this case, for the first time in Croatia, the State was found liable for damage caused by passing the law.

After the Croatian Parliament repealed the Public Enforcers Act, a number of individuals appointed as public enforcers based on this Act filed a constitutional claim requesting that the Constitutional Court of the Republic of Croatia (CCRC) proclaim the Act on Cessation of Applicability of the Public Enforcers Act as unconstitutional. The CCRC dismissed the request but, however, confirmed that all those who had been appointed public enforcers based on the Public Enforcers Act are entitled to claim compensation for damage sustained as a result of passing the Act on Cessation of Applicability of the Public Enforcers Act.

Based on the said findings of the CCRC, the County Court in Varaždin affirmed the first instance court's interim judgment in which the Republic of Croatia was found liable for damage sustained by the victim (a person appointed a public enforcer). The County Court in Varaždin confirmed Parliament's prerogative to regulate social affairs as it sees fit, but also reminded that every parliamentary act must be in line with the basic constitutional values, a justifiable balance between public interests and private interests of those affected by a particular act, being one of them. In this respect, the County Court in Varaždin reminded that, when enacting a particular act, the Parliament must consider the justifiable expectations of the individuals affected by that particular act.

In Croatian legal doctrine, it was well-established that the State can be held liable for improper work of its bodies. However, this is only true with respect to the wrongdoings of administrative bodies and the judiciary, whereas the legislative bodies enjoyed de facto immunity from civil liability. A common justification for this stance suggested that the lawmaker cannot be held liable for damage sustained by passing laws

[1] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 88, nos 24–35.

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since passing laws represents the constitutionally guaranteed prerogative of the lawmaker, and consequently, passing laws cannot be regarded as a wrongful act.

This decision of the County Court in Varaždin, however, offers a new reading of the dogma of the lawmaker's immunity from liability for passing laws. According to this Court, in exercising its lawmaking powers, lawmakers have to act within constitutionally imposed boundaries, including the principle of justifiable expectations of those affected by the law in question and the principle of the justifiable balance between public and private interests. Should these constitutional principles be breached in the course of enacting a law, the State could be held liable for the damage thereby caused. Hence, this decision undoubtedly sets new, more sophisticated standards of due care in lawmaking.

Even though the Supreme Court of the Republic of Croatia (SCRC) subsequently quashed the decision of the County Court in Varaždin, its relevance remained unchallenged. In its decision No Rev-1532/14-3 of 28 January 2018, the SCRC quashed a judgment of the County Court in Varaždin for insufficient reasoning, but at the same time it explicitly confirmed that the County Court was right in taking the position that the State can be found liable for damage caused by the non-observance of constitutional principles in the course of adopting laws, such as the principle of justifiable expectations and the justifiable balance between public and private interests.

In the years that followed, a number of decisions were reached based on the Varaždin County Court's argumentation from this case, in which the courts found the State liable for damage caused by the non-observance of constitutional principles while passing laws.[2] Hence, this decision set a new trend in treating the State's liability for damage, which was readily accepted by other courts. Moreover, subsequent decisions reached by other Croatian courts on the basis of this decision have further developed and refined the County Court in Varaždin's position on State liability, by adding clarity to the question as to the scope of liability in cases where damage is inflicted by passing a law.

Finally, it is worth noting that this case clearly demonstrates the ever-growing trend of the 'constitutionalisation' of tort law, consisting in

[2] See judgment and decision of the County Court in Varaždin No Gž 397/2019-2 of 28 May 2019, commented by *M Baretić* in: E Karner/BC Steininger (eds), ETL 2019 (2020) 71, nos 42–47 and judgment and decision of the County Court in Velika Gorica No Gž 2587/2021-10 of 28 February 2023, commented by *M Baretić* in: E Karner/BC Steininger (eds), ETL 2023 (2024) 87, nos 21–38.

interpreting basic concepts of tort law in accordance with principles of the Constitution and international conventions.

2. Presuda Županijskog Suda u Zagrebu (Judgment of the County Court in Zagreb) No 71 Gžn-1778/2 of 2 September 2014[3]

This judgment represents the first case in which Croatian courts awarded compensation for non-material damage to a legal person.

The case involved an action brought by the Croatian Composers' Society against a distributor of recording and blank data storage devices. Based on the relevant EU directives, the Copyright Act provided for the so-called blank tape levy, an author's remuneration for the use of a private copy of the author's work, which had to be paid by producers and/or importers of sound/video/phono/data recording devices, data carriers, blank data storage and similar devices. Based on the Copyright Act, the Croatian Composers' Society is authorised to collect a private copy levy on behalf of music composers represented by the Society. The tortfeasor launched an advertising campaign in which it accused the Croatian Composers' Society of robbery and warned potential buyers of recording and blank data storage devices that, by imposing and collecting a private copy levy on behalf of musical composers, the Croatian Composers' Society is robbing them.

The County Court in Zagreb awarded the Croatian Composers' Society an amount of HRK 50,000 (approx € 6,527) as compensation for violation of its non-material right to dignity, thus representing the first case in Croatia in which this type of compensation was awarded to a legal person.

The former Croatian Civil Obligations Act (COA) of 1978, which was taken over from the former Socialist Federal Republic of Yugoslavia, accepted the subjective concept of non-material damage, according to which this type of damage is defined as the infliction of physical or mental pain and/or fear to another person. An obvious consequence of such a concept of non-material damage was that legal persons cannot obtain compensation for non-material damage, as they are incapable of experiencing physical or mental pain or fear. Such an understanding of the concept of non-material damage was frequently criticised by legal doctrine for being unjust and discriminatory.

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[3] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2015 (2016) 76 no 60 f.

Obviously enlightened by these doctrinal considerations, with the new COA of 2006, the legislator decided to accept the objective concept of non-material damage, according to which non-material damage is defined as a violation of personality rights. Moreover, the COA explicitly recognised that legal persons can also have personality rights. This new legislative framework clearly created a possibility for legal persons to claim just pecuniary compensation for a violation of their personality rights.

However, it was almost ten years before the first case of liability for non-material damage sustained by a legal person was heard. This case merits mention, not only for being the first case in which compensation for non-material damage was awarded to a legal person, but also for setting out criteria to determine whether a threshold of gravity of violation of the personality rights of a legal person is reached and for defining the approximate amount of just pecuniary compensation which legal persons can expect when claiming compensation for a violation of their personality rights.

Pursuant to the COA of 2006, just pecuniary compensation can only be awarded if justified by the gravity of violation of the victim's personality rights. Hence, not every violation, but only 'serious' violations of a person's personality rights, will justify pecuniary compensation. How and on what criteria to measure the 'seriousness' of a violation of the personality right of a legal person was unknown territory before this judgment.

The first instance court, for instance, concluded that, even though the victim's right to dignity was violated, it nonetheless dismissed the claim, holding that the violation in this particular case did not reach the threshold of a 'serious' violation. The County Court in Zagreb disagreed. This court reasoned that in determining whether a violation of the legal person's right to dignity reached the required threshold of 'seriousness', the same criteria should apply as in cases of violation of the right to dignity of a natural person. In this respect, the County Court in Zagreb confirmed that the number of persons confronted with the defaming statements and the duration of such exposure should be decisive. Measured against these criteria, the violation of the victim's right to dignity in this case was assessed serious enough to justify pecuniary compensation.

Finally, this decision is rather informative as to the amount of compensation a legal person whose right to dignity is infringed can expect. When it comes to non-material damage, the extent of damage cannot be assessed precisely since there is no appropriate measurement for determining a pecuniary value of the infringed personality rights. Moreover, as regards the personality rights of legal persons, not even the Orientation Criteria for determining the amount of just pecuniary compensation for

non-material damage, issued by the SCRC, are of any assistance, since they provide criteria to determine the amount of compensation with respect to natural persons only. By awarding an amount of approximately € 6,500, the County Court in Zagreb has defined what could be considered an approximate amount which legal persons can expect in the case of a violation of their right to dignity committed by defamation in the media with nationwide coverage.

3. Presuda i Rješenje Županijskog Suda u Varaždinu (Judgment and Decision of the County Court in Varaždin) No 15 Gž-2529/15-2 of 30 March 2016[4]

This decision is one of those that marks a stark departure from the way in which Croatian courts normally approached the issue of legal costs awarded in the case of partial success in tort law cases.

The case concerned a public servant who was unlawfully discharged from service. The Public Servants Court ordered the employer to re-hire the victim, which the employer failed to do. The victim addressed the issue to the civil court, claiming compensation for non-material damage for violation of his right to mental health and dignity. The first instance court upheld the victim's claim as to the merits, but awarded him only a portion of the compensation sought. Based on the fact that the victim was only partially successful in his claim, the court of first instance ordered each party to bear their own legal costs.

The County Court in Varaždin reversed the first instance court's decision as to the legal costs and ordered the tortfeasor to reimburse the victim his legal costs in full. This court reasoned that the notion of 'partial success' should not be assessed exclusively from a quantitative, but also from a qualitative perspective. In this regard, this court opined that, in reaching a decision on legal costs, the courts should not only be concerned with the issue of whether a plaintiff was successful in obtaining the compensation in the exact amount as sought, but whether a plaintiff was successful in proving that his claim was well-founded as to the merits.

As far as the legal costs are concerned, in Croatian civil procedure, as in many other national legal systems, the principle of the 'loser pays' is applied. According to this principle, a losing party has to compensate a successful party for their legal costs. In the case of partial success, according to this rule, a party will be able to recover its legal costs only

[4] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2016 (2017) 80, nos 44–54.

partially. For a number of years, Croatian courts have predominantly understood the notion of 'partial success' as to imply that the success in litigation should exclusively be measured based on the percentage of the amount sought that was actually awarded to the party. Where a court finds that a claim for damages is well-founded as to the merits, but excessive in quantum, it will normally order the tortfeasor to compensate the victim for the damage and, at the same time, it will order the victim to pay the tortfeasor's legal costs in proportion to the percentage of the claim that was dismissed.

Such an, admittedly questionable understanding of the notion of 'partial success' has resulted in particularly adverse affects for victims who claim compensation for non-material damage. Non-material damage is inherently difficult to assess. Therefore, it occasionally happens that victims set the compensation sought too high. Taken to the extreme (which is not merely hypothetical, but rather a realistic scenario), a party who was successful in proving a violation of their personality right but who set the quantum of damages too high might actually be ordered to reimburse the other party's legal costs in an amount exceeding what it obtained in damages.

This controversial understanding of the 'loser pays' principle was brought to the attention of the European Court of Human Rights (ECtHR), which, in 2013 in the case *Klauz v Croatia,*[5] found such a practice to violate the European Convention on Human Rights (ECHR). In this case, the ECtHR observed that, although the 'loser pays' principle generally pursues a legitimate goal as it discourages ill-founded and excessive claims, Croatian courts applied that principle mechanically, without having sufficient regard to the specific circumstances of each victim's case, thus violating basic human rights.

The County Court in Varaždin's decision on costs in this case obviously echoes the ECtHR's position in the *Klauz* case, thus marking a stark shift from the previous controversial application of the 'loser pays' principle to cases of partial success. The County Court in Varaždin refused to apportion legal costs solely based on the victim's success as to the quantum, but engaged instead in a rather substantiated analysis of all the circumstances of the given case.

As is evident from this case, the new reading of the 'loser pays' principle, inspired by the ECtHR's decision in the *Klauz* case, has quickly taken roots in Croatian case law. Many Croatian courts embraced it in the same way that the Country Court in Varaždin did in this case. In fact, this

[5] ECtHR *Klauz v Croatia*, 18.7.2013, no 28963/10.

newly developed practice prompted the Croatian Parliament, in 2019, to amend the Civil Procedure Act with a view to adapting its provisions on bearing legal costs to this new understanding of the 'loser pays' principle. Although this new understanding of the 'loser pays' principle has general application, its importance is particularly evident in tort law cases, especially those relating to compensation for non-material damage.

Finally, this case not only represents a good example of the evolution of procedural rules applicable in tort law cases, but the fact that the County Court in Varaždin's decision on costs in this case was inspired by the ECtHR's decision in *Klauz v Croatia* also clearly demonstrates the benefits international justice brings domestically.

4. Odluka Ustavnog Suda Republike Hrvatske (Decision of the Constitutional Court of the Republic of Croatia) No U-III-1095/2017 of 21 September 2017[6]

This case clearly demonstrates the importance of the CCRC in protecting basic human rights in tort-related cases.

The case involved a 12-year-old boy who was unjustifiably and unlawfully detained and searched by a private security officer in a shopping centre. In the civil proceedings initiated by the victim for violation of his personality right to honour and dignity, two expert witnesses in the field of psychology established that a sense of personal honour and dignity is not yet developed with a 12-year-old, which implied that the victim suffered no non-material damage. Notwithstanding such finding, the first instance court sustained the claim, opining that a child's honour and dignity must be protected throughout their life, irrespective of the child's personal perception. The County Court in Karlovac, acting as an appellate court, reversed the first instance decision and denied the victim compensation for non-material damage, arguing that the first instance court inappropriately dismissed the expert witnesses' opinion. The SCRC declined the victim's petition for revision, reasoning that the question posed was not relevant for the harmonised application of law.

The victim lodged a constitutional claim before the CCRC for protection of his constitutional right to honour and dignity. The CCRC accepted the claim, revoked the County Court's and SCRC's decisions and remitted the case for re-examination. Citing the Charter of Fundamental Rights of the European Union, the Convention of the Rights of the Child

[6] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 73, nos 68–78.

and the Constitution of the Republic of Croatia, the CCRC concluded that the child's right to honour and dignity is unconditional. In other words, it cannot be conditional on the child's cognitive capabilities and the child's personal perception of their own identity.

Although the concept of basic human rights has been known for decades, judging from the decisions of the County Court in Karlovac and the SCRC in this case, it seems that a basic understanding of this concept occasionally poses a serious problem for Croatian courts. Luckily, the CCRC is obviously ready and willing to restore to the right path the understanding of human rights in Croatia.

The CCRC thus justifiably reminded the courts in Croatia that human rights are of universal applicability; they equally apply to any person, irrespective of race, colour, gender, language, religion, political and other conviction, national or social, origin, property, birth, education, social status or any other characteristics. In short, every person has equal human rights and no-one can be discriminated against for their personal characteristics when the enjoyment and/or respect of human rights is concerned. In this respect, the CCRC clearly established that the concept of human rights is an objective one: every person has equal human rights regardless of whether they are aware of, and capable of, perceiving their human rights. In this respect, human rights of those not capable of perceiving their identity or their rights, such as minors or mentally handicapped persons, must be equally protected. Accordingly, as clearly reminded by the CCRC in the case at hand, every serious violation of basic human rights entails liability for non-material damage, regardless of whether or not a victim is capable of perceiving their rights.

Indeed, this CCRC decision particularly resonates in these times of questioning some of the basic values on which our democratic societies are founded.

5. Rješenje Vrhovnog Suda Republike Hrvatske (Decision of the Supreme Court of the Republic of Croatia) No REV 2008/15-2 of 23 February 2016[7]

This SCRC decision could best be described as a sign of the final transition of Croatian tort law from the subjective to the objective concept of non-material damage.

The victims claimed compensation for non-material damage due to a violation of their personality right to honour and dignity, committed

[7] See in more detail in *Baretić* (fn 4) nos 67–79.

through an article published in a magazine in which they were unfoundedly connected to drug smuggling. The first instance court partly accepted the victims' claim and awarded them compensation for non-material damage, even though no medical expertise was conducted in the course of proceedings with the aim of establishing the existence of any pain and/or fear suffered by the victims. Since the second instance court upheld the first instance decision, the tortfeasor lodged a request for extraordinary revision before the SCRC, requesting that this court issues its general legal position regarding the question of whether a court can, in the case of an alleged violation of a personality right, establish the gravity of that violation and award just pecuniary compensation without establishing the gravity and duration of the victim's mental pain, ie without a report conducted by a medical expert.

The SCRC dismissed the request for revision as inadmissible. This decision was based on the SCRC's understanding that physical and mental pain and fear, although important, are not the only criteria to be taken into consideration when deciding on the quantum of just pecuniary compensation. In this respect, the SCRC clearly suggested that under the new, objective concept of non-material damage adopted in the COA 2006, it is not necessary to call on a medical expert in order to establish the existence of non-material damage.

As already explained, the old COA of 1978 accepted the so-called subjective concept of non-material damage, according to which this type of damage was defined as the infliction of physical or mental pain and/or fear to another. Under this concept of non-material damage, it was absolutely crucial in every single case of non-material damage to precisely determine the existence, gravity and duration of the physical and/or mental pain and fear, for an obvious reason: the law itself defined non-material damage as the infliction of pain and fear on another. In other words, in the absence of any pain or fear, no non-material damage could have been established. It goes without saying that determining the existence, gravity and duration of pain and fear could only be established with the assistance of a medical expert. This implied that, pursuant to the COA of 1978, in every single case concerning non-material damage, medical experts had to be called in in order to establish the existence of this type of damage.

The COA of 2006 marked a significant shift in this regard. Pursuant to the COA of 2006, a mere violation of a personality right, even without establishing any pain or fear sustained therefrom, represents non-material damage.

Notwithstanding the rather clear wording of provisions of the COA of 2006 concerning non-material damage, the fact is that Croatian courts

have had a rather difficult time grasping the new, objective concept of non-material damage introduced by this Law and that for a number of years after this novel concept was introduced, the courts in Croatia continued to award compensation for the infliction of pain and fear, and not for violations of personality rights.[8] Consequently, Croatian courts routinely insisted on reports from medical experts in order to confirm the existence of pain and/or fear before determining the existence of non-material damage. In many instances, this was entirely redundant and unnecessary. Old habits, however, die hard.

The approach of the first and second instance courts in this case clearly suggests that Croatian courts have gradually started to understand and accept the novel concept of non-material damage introduced by the COA of 2006. What was needed was the approval of this new practice from the SCRC, as the highest court in the country, and this approval came with this decision. Dismissing the tortfeasor's request for revision, the SCRC explicitly confirmed that, under the COA of 2006, non-material damage can arise even in the absence of pain and/or fear. Hence, calling on medical experts in order to establish the existence of non-material damage is no longer necessary. In this respect, it might be argued that, with this SCRC decision, the new concept of non-material damage has fully come to life in Croatian case law.

However, even though the conclusions of the courts in this case perfectly resonate with the objective concept of non-material damage, they should not be understood as to imply that, in cases involving non-material damage, expert statements regarding pain and fear are obsolete altogether. As provided for in art 1100 para 2 of the COA 2006, and as established by the SCRC in the case at hand, pain and fear are still relevant for establishing the quantum of just pecuniary compensation for non-material damage. Hence, whenever the quantum of damages depends on the existence and gravity of pain and fear, statements from medical experts will be needed.

[8] See in more detail in *M Baretić*, Croatia, in: E Karner/BC Steininger (eds), European Tort Law 2013 (2014) 93, nos 115–120.

V. Cyprus

Michael Chatzipanagiotis

In matters relating to tort law and civil procedure, Cyprus follows the common law tradition, as applied in the UK. Landmark judgments in Cyprus mostly follow developments of UK law.[1]

1. Supreme Court 8 May 2001, *T Yiallouros v E Nicolaou*[2]

This is a landmark judgment because it, first, established that violations of fundamental rights by private persons can create an actionable right in tort; second, it provided for the method of assessing damages in such cases.

The defendant was a director of the Nicosia Sewerage Board. Over a period of one year, he illegally monitored and recorded the telephone calls of the plaintiff, who was an engineer and member of the same board. The disclosure of the recordings led to the plaintiff being placed on compulsory leave for one year. He filed an action for damages, citing a violation of his constitutional rights to private life and secrecy of communications, under arts 15 and 17 of the Cypriot Constitution (CC). No material damage was proven. The trial court found for the plaintiff and awarded CYP 5,000 (€ 8,543) in general damages, with punitive elements. The defendant appealed on the grounds that (a) a violation of constitutional rights does not grant a right to compensation via civil proceedings unless it is a recognised civil wrong under the Civil Wrongs Law (CWL); and (b) the damages awarded were too high.

The Supreme Court ruled that the violation of fundamental rights directly enshrined in the Constitution is an actionable wrong and grants the right to a remedy through the courts. This upholds the principle of *ubi jus ibi remedium* (where there is a right, there is a remedy). Courts have a duty to protect the fundamental rights of citizens under art 35 CC and this includes protection from violations by any person by awarding remedies.

[1] The European Case Law Identifier (ECLI) for the Cypriot judgments referred in this chapter is cited where available.

[2] (2001) 1 Apophaseis Anotatou Dikasteriou (Supreme Court Reports, AAD) 558.

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Otherwise, fundamental rights would be demoted to mere declarations of good conduct.

The leading principle in awarding damages is *restitutio in integrum*. Damages must be fair and may be aggravated or even punitive in exceptional cases. Citing English authorities and the case law of the European Court of Human Rights (ECtHR), the Court observed that the governing principle for compensation in cases of human rights violations is 'equitable compensation', which covers non-pecuniary damage (moral damage) caused by the violation and includes factors like distress, sorrow, anxiety, feelings of injustice, adverse effects on lifestyle, and pain and suffering. The Court affirmed the CYP 5,000 award, noting that it was not punitive.

The third-party effect of fundamental rights had been analysed in previous judgments of the Supreme Court.[3] However, this was the first case in which the Court (almost) explicitly ruled that provisions on fundamental rights may directly apply to private disputes. Such a conclusion was unambiguously confirmed in a later judgment of the Supreme Court.[4] The *Yallouros* judgment has been positively accepted by legal doctrine, albeit with reservations.[5]

Some uncertainties remain regarding the exact scope of the application of fundamental rights to private disputes. The judgment implies that the constitutional provisions will directly apply only when ordinary tort law does not provide (adequate) protection against the violation of a person's fundamental rights, ie in the case of a *lacuna*.[6] This was affirmed by subsequent judgments of the Supreme Court.[7]

As to compensation for such violations, it has been correctly observed that the judgment appears to combine (or conflate) three different categories of damages under 'equitable compensation': special damages for pecuniary loss, general damages for feelings of pain, sorrow, humiliation,

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[3] Eg *Police v Andreas Georghiades* (1983) 2 Cyprus Law Reports (CLR) 33.

[4] *Republic v V Vassileiou* (2015) 1 AAD 1169, ECLI:CY:AD:2015:A376.

[5] *P Polyviou*, Civil wrongs in the law of Cyprus (2020) (in Greek) 1023, who criticises its generic scope; *C Paraskeva*, Cyprus Constitutional Law: Fundamental rights and liberties (2015) (in Greek), who points to unclarities as to the scope of the judgment regarding common law and the freedom of contracting under art 26 Cypriot Constitution; *P Jougleux*, Civil liability of the State (2012) (in Greek), who questions the foundation of the judge's authority in such cases; *P Constantinides*, The horizontal effect of fundamental rights and its reception in Cypriot legal order (2025) (in Greek) 297–299, who finds preferable an indirect application of the fundamental rights through progressive development of the case law.

[6] See *Paraskeva* (fn 5) 132.

[7] Eg *Alitheia Publishing Company & Anor v Alonefti* (2002) 1 AAD 1863, commented below.

etc, and damages for the violation per se.[8] Recent case law of the Supreme Court has adopted a similar view.[9]

2. Supreme Court 29 November 2022, *Alitheia Publishing Company and A Constantinides v A Alonefti*[10]

This judgment clarifies the relationship between tort law and fundamental rights enshrined in the Constitution and adopts the *Reynolds* defence[11] in Cypriot law.

A newspaper and its editor-in-chief (defendants) published twelve articles from December 1992 to January 1993, shortly before the presidential elections. The articles alleged that the plaintiff, who was then Minister of Defence, had conspired with arms dealers to defraud the public and damage Cyprus. The defendants denied that the publications were defamatory, and claimed that the articles presented true facts and fair comments. During the trial, the defendants changed their position and admitted, subject to the raised defences, that the publications were defamatory. The defendants did not present any evidence to substantiate their claims of conspiracy.

The trial court found bad faith on the part of the defendants, an intention to defame the plaintiff and awarded general and exemplary damages. The defendants appealed, challenging, among others, the compatibility of the provisions on defamation of the CWL with art 19 CC on freedom of speech.

The Court found that the defamation provisions of the CWL aim to protect an individual's reputation, a restriction recognised by art 19(3) CC. Such restrictions must not violate the core of the guaranteed right. The presumption of innocence, guaranteed as a fundamental human right by art 12(4) of the Constitution, excludes the attribution of a criminal act to a person by anyone other than a state court, which, as art 30(2) CC provides, is the sole judge of their criminal responsibility.

The Court underlined that the presumption of innocence under art 12(4) CC is as equally fundamental as the right to freedom of speech. Its protection through the civil wrong of defamation is not only permissible but also

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[8] *Polyviou* (fn 5) 1042 f.

[9] *Attorney General v L.I.K, F.I et al*, Civil Appeals nos 142/2019 to 149/2019, 189/2019 to 191/2019, 216/2019 to 220/2019, 241/2019, 269/2019 and 270/2019, ECLI:CY:AD:2022:A353.

[10] (2002) 1 AAD 1863.

[11] *Reynolds v Times Newspapers Ltd and Others* [1999] United Kingdom House of Lords (UKHL) 45.

imperative. The defamation provisions of CWL balance the safeguarding of the two rights with reference to the truth of what is written. Thus, the restrictions imposed by the provisions of the CWL on defamation find support in art 19(3) CC for the protection of an individual's reputation and their fundamental rights.

The *Aloneftis* judgment exemplified how constitutional and tort law provisions apply side by side in the law of defamation. It can be seen as a follow-up to the *Yiallouros* judgment, commented on above, regarding the role of fundamental rights in tort law. It was the first time that the tort law provisions on defamation were specifically examined in the light of both their constitutional compatibility and recent developments in English case law. Its grounds have been influenced by the judgment of the House of Lords in *Reynolds*,[12] which, accounting also for the Human Rights Act 1998, extended the common law defence of qualified privilege in defamation to ascertain whether the publication related to a matter of public interest and was the product of responsible journalism.[13]

Since *Aloneftis,* Cypriot courts have consistently applied the defences to defamation, mainly the defences of fair comment and the qualified privilege, with reference to a balance of conflicting fundamental rights, especially the right to free speech and the right to private life.[14] They put particular emphasis on the case law of the ECtHR, since the section of the Consitution on fundamental rights was modelled on the European Convention on Human Rights. Nevertheless, under Cypriot law, issues of public interest publications and responsible journalism are still governed by common law principles, as these have been codified in art 17 ff CWL.

3. Supreme Court 24 September 2010, *A Varianou v A Vorca*[15]

This judgment signalled a departure from the traditional *Bolam* test in medical negligence in informed consent cases, as well as a deviation from the standard but-for test regarding factual causation in such instances.

The case concerned a patient who sued an ophthalmologist for negligence, regarding severe corneal damage allegedly caused by cosmetic laser eye surgery (excimer laser) in 1999 to correct high myopia. The

[12] Ibid.

[13] *A Mullis/R Parkes* (eds), Gatley on Libel and Slander (12th edn 2013) para 15.1.

[14] Eg *L Loukaidis v Alitheia Publishing Co Ltd* (2003) 1 AAD 22; *K Mavri v Arktinos Publishing Ltd* (2015) 1 AAD 1151, ECLI:CY:AD:2015:A365.

[15] (2010) 1 AAD 1541.

plaintiff's main claim was the doctor's negligent failure to warn her of significant potential risks and complications, especially since the surgery was purely cosmetic and not medically necessary. The evidence supported the view that a major medical school of thought considered the procedure inappropriate for high myopia.

The trial court dismissed the claim. It found no negligence and stated that, even if there was negligence, the plaintiff had failed to prove a causal link between the doctor's behaviour and the resulting damage. The plaintiff appealed. The Supreme Court allowed the appeal.

The Court found that in cases of informed consent, it was not appropriate to apply the usual *Bolam* test, which was laid down in *Bolam v Friern Hospital Management Committee*[16] and had been applied by Cypriot courts to all categories of medical negligence up to that date,[17] including the trial court of the particular case. Under the *Bolam* test, a doctor is not guilty of negligence if they acted in accordance with a practice accepted as proper by a responsible body of medical practitioners skilled in that particular art. Under the *Bolam* test, there is no breach of the doctor's duty of care for failure to warn patients of risks of potential treatments if the possibility of the risks is close to zero. Moreover, it is required that the patient proves that they would not have undertaken the treatment should they have known about the undisclosed risks.

The Supreme Court, adopting the ruling of the English Court of Appeals in *Pearce v United Bristol Healthcare NHS Trust*,[18] argued that in cases of a patient's informed consent, the appropriate standard of care is what a reasonable patient would like to know under the circumstances. In the case at hand, the average patient would want to have known, before consenting, that a large segment of the medical profession considered the surgery unsuitable for the plaintiff's condition (high myopia), because it involved serious risks, such as those suffered by the plaintiff. Therefore, the doctor would have to have disclosed such information.

Moreover, the Court argued that in cases of a doctor's failure to warn a patient, a partial deviation from traditional causation principles is necessary to achieve justice. The appropriate approach is to inquire whether a reasonable patient would have consented to the particular treatment if they had known about the risks that the doctor had failed to disclose.

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[16] [1957] 1 Weekly Law Reports (WLR) 582.

[17] Eg *K Athanasiou v A Kounouni* (1997) 1 AAD 614; *Ch Aggeli v A Vorca* (2007) 1 AAD 761.

[18] [1998] England & Wales Court of Appeal, Civil Division (EWCA Civ) 865.

Thus, an objective test is required, not a subjective one, ie with reference to the particular plaintiff, as the Cypriot courts had been applying until then. The Court referred in this regard to the judgment of the English Court of Appeal in *Chester v Affshar*[19] and cited passages from the judgment of the House of Lords on the same case,[20] which underline that reasons of policy and corrective justice, including the need to respect the patient's autonomy, require that a less stringent causation test is applied. The Court observed that such a relaxed, objective standard of causation also aligns with art 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention).

This judgment aligned Cypriot case law with what had already been followed in other common law jurisdictions in cases relating to informed consent of a patient. It is remarkable that the Court made explicit reference to art 5 of the Oviedo Convention, something that the UK Supreme Court also did five years later in *Montgomery v Lanarkshire Health Board.*[21] Subsequent developments in UK case law, especially in *Montgomery*, developed the law of informed consent even further: the duty to disclose risks was expanded to risks that have a very low probability of materialising but which may have grave consequences for the particular patient, and risks for which the doctor is, or should reasonably be, aware that the particular patient would be likely to attach significance to them.[22] Trial courts in Cyprus have accounted for such developments in UK case law, citing *Montgomery* alongside *Varianou v Vorca*.[23] Nevertheless, a 2025 judgment of the (new) Court of Appeal[24] affirmed that a doctor's standard of care in such cases is objective, without referring to any subjective standards. Although it is doubtful whether the recent judgment consciously ignored the developments in the UK, the issue has yet to be clarified at the highest level in Cyprus.

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[19] [2002] 3 All England Law Reports (All ER) 532.

[20] [2004] 4 All ER 587.

[21] [2015] United Kingdom Supreme Court (UKSC) 11, para [80].

[22] See *Montgomery* (fn 21) paras [87] and [89].

[23] Eg *Sotiriou v Attorney General*, 19.8.2020, ECLI:CY:EDLEF:2020:A599; *K Moleskis v Apollonio Private Hospital Ltd*, action no 8015/2007, 30.3.2018, ECLI:CY:EDLEF:2018:A210.

[24] *N Neophytou v M.X.T*, Civil Appeal no 145/2016, 11.3.2025. In 2023, a judicial reform was completed in Cyprus, and a new Court of Appeal was created as an intermediate instance.

4. Supreme Court 21 September 2022, *Attorney General v L.I.K, F.I et al*[25]

This judgment is important because it clarifies various issues regarding torts and especially causation in mass torts.

A shoe sole factory operated in a mixed residential area from 6 am to 1 am daily, causing noise, odours, and emitting dichloromethane (DCM), a suspected carcinogen. The factory operated without proper planning permission, which was later denied due to DCM use. Local residents sued the company, its director, and the Republic of Cyprus for nuisance, personal injury (various cancers allegedly caused by DCM exposure), breach of statutory duty, and violation of fundamental rights under the ECHR and the Cypriot Constitution, namely the rights to life, respect of private and family life, and protection of property.

The trial judge ruled for the claimants and adjudicated damages. He found the defendant company and its director liable for private nuisance (noise and odours) and breach of statutory duty regarding unsafe workplace conditions and for causing a cancer cluster through DCM emissions. The Republic was found liable for breach of statutory duty under pollution control laws.[26]

On appeal, the Supreme Court upheld liability for private nuisance regarding noise and odour. However, citing English case law,[27] it clarified that private nuisance cannot be claimed for personal injury (cancer). Moreover, the Court clarified that private nuisance does not depend on building permits or statutory breaches, although the lack of permits was connected to the nuisance suffered. In this regard, it cited English law[28] and its own previous recent judgments on public nuisance concerning the distinction between unlawfulness and illegality.[29]

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[25] Civil Appeals nos 142/2019 to 149/2019, 189/2019 to 191/2019, 216/2019 to 220/2019, 241/2019, 269/2019 and 270/2019, ECLI:CY:AD:2022:A353. See also *M Chatzipanagiotis*, Cyprus, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 113, nos 8–28.

[26] Pollution Control Law 70/91 and the Atmospheric Pollution Control Law 187(I)/2002, which transposed Directive 1999/13/EC on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations [1989] Official Journal (OJ) L 85/1.

[27] *Transco v Stockport MBC* [2003] UKHL 61; *Hunter and others v Canary Wharf Ltd* [1997] 2 WLR 684.

[28] Eg *Attorney-General v Cole & Son* [1901] 1 Law Reports, Chancery Division (Ch) 205; *M Jones,* Textbook on Torts (1986) 140.

[29] *Attorney General v Cyfield-Nemesis & Ors,* Civil Appeal E52/21, 10 February 2022, ECLI:CY:AD:2022:A79; *Attorney General v Cybarco Contracting Ltd & Ors,* Civil

As to breach of statutory duty and potential violations of fundamental rights, the Court underlined the necessity of a causal link between the breach or violation and the damage suffered. Such link requires two stages: (a) general causation, ie epidemiological evidence showing the defendant's conduct can generally cause the type of harm suffered; and (b) specific causation, ie additional evidence linking the harm to each particular claimant. The plaintiffs had not pleaded on specific causation, while the trial judge had examined only general causation and had not considered evidence that there was no significant statistical link between the operation of the factory and most forms of cancer developed by the plaintiffs (save for the brain cancer).

Moreover, the Court observed that the trial judge had improperly conflated general damages for tort and equitable compensation for violations of fundamental rights.

As a result, the Court quashed the judgment of the trial judge, except for the part relating to damages for interference with the enjoyment of property in the context of private nuisance.

The most important contribution of the present judgment lies in clarifying the role of epidemiological evidence in personal injury claims. Regardless of the legal basis, ie public nuisance, negligence, breach of statutory duty, violation of fundamental rights, there must be proof of causation between the defendant's behaviour and the claimant's injury. The Court followed English case law, especially the judgment of the UK Supreme Court in *Sienkiewicz*,[30] according to which, epidemiological evidence must be accompanied by additional proof of the causal link between the defendant's behaviour and the damage to the particular claimant. It is also interesting that the Court quoted specific passages from the *Sienkiewicz* judgment, which did not exclude the possibility of using epidemiological evidence as such to establish causation.[31] This implies that the Court did not exclude the use of such evidence on a standalone basis either.

Furthermore, the Court did not exclude the application of less strict rules for the establishment of causation in the vein of the *Fairchild* ex-

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Appeal E53/21, 10 February 2022, ECLI:CY:AD:2022:A81. See details and comments in *Chatzipanagiotis* (fn 25) nos 2–7.

[30] *Sienkiewicz v Greif* [2011] UKSC 10. The Court referred also to *Hotson v East Berkshire AHA* [1987] Appeal Cases (AC) 759; *Wardlaw v Farrar* [2003] EWCA Civ 1719 and *The Claimants appearing on the Register of the Corby Group Litigation v Corby District Council* [2009] England & Wales High Court (EWHC) 1944.

[31] *Sienkiewicz v Greif* [2011] UKSC 10, para 192 (Lord Mance) and para 221 (Lord Dyson).

ception regarding the material increase in the risk of damage.[32] However, since neither the plaintiffs' pleadings nor the trial judge had made any references to causation as to the particular claimants, the Court ruled that it could not apply the *Fairchild* exception.

In general, there have been no cases before Cypriot courts that required them to deal with elaborate issues of causation, such as material contribution to the risk, significant increase in risk, doubling the risk, etc. This is the first major case of such kind.

5. Supreme Court 20 July 2011, *L Ioannides v M Kallias as Receiver and Administrator of Intercosmetics Ltd* [33]

This is one of the very few Cypriot cases on product liability based on the tort of negligence and the Product Liability Directive (PLD),[34] and clarifies various aspects of both causes of action.

The plaintiff had purchased a hair-straightening product, manufactured abroad, and imported and distributed by the defendant. The plaintiff claimed that, following the application of the product, he suffered severe hair loss, scalp dermatitis, redness, and swelling. He filed an action on negligence, breach of the Defective Products (Civil Liability) Law of 1995 transposing the PLD,[35] and breach of statutory duty under the law on product safety,[36] seeking damages for physical injury, mental distress, and loss of income.

The trial judge dismissed the action, noting that the plaintiff's loss was due to inappropriate use of the product. As to negligence, the judge found that the defendant had not breached its duty of care to the plaintiff by failing to provide adequate warnings or by importing a dangerous product. The *res ipsa loquitur* doctrine was inapplicable, since the plaintiff had produced evidence to prove the defendant's negligence. Moreover, no causal link was proven between the alleged negligence and the loss suffered. As to breach of the Defective Products (Civil Liability) Law 1995, the trial judge noted that there was no 'defective product'. The fact that the safety instructions of the product were changed after the lawsuit was filed and following an investigation of the competent authority did not suffice as such to prove defectiveness. The plaintiff appealed.

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[32] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

[33] (2011) 1 AAD 1522.

[34] 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.

[35] Law 105(I)/1995.

[36] Consumer Product Safety Law of 1994 (Law 74(I)/1994).

The Supreme Court dismissed the appeal. The Court distinguished between two causes of action, ie negligence and breach of the Defective Products (Civil Liability) Law 1995. Regarding the latter, the Court observed that suppliers and distributors have a duty of care to the consumer, but not to the same extent as the manufacturer. They may have to inspect the product and, if there are risks that they ought to be aware of, they may need to provide the consumer with warnings additional to those provided by the manufacturer. Given the proven facts, namely that the product did not contain any prohibited substances, that the manufacturer provided adequate warnings for the safe use, and that the defendant did not make any representations that the product was safe to use under any circumstances, there was no breach of the duty of care. Furthermore, the trial judge did not err by not applying the doctrine of *res ipsa loquitur*, since such application required that the defendant was allegedly unaware of the cause of his loss, which was clearly not the case here.

Concerning the breach of the Defective Products (Civil Liability) Law 1995, the Court noted that, under the Law, 'defectiveness' exists when the product is not safe taking into account all the circumstances of the case, including any instructions and warnings. The fact alone that a safer product was later put into circulation does not prove defectiveness. Besides, a product may be safe for one use but unsafe for another In this case there were adequate warnings, while the fact that after an investigation of the competent product safety authority, following a complaint by the defendant, the distance of the application of the product from the head skin was increased from 0.5cm to 1cm did not prove defectiveness.

The Court's judgment relied on English authorities regarding both negligence and the strict liability under the PLD.[37] Although its analysis could have been more extensive and clearer as to the distinction between the elements of the two causes of action, the judgment has provided useful guidance to trial courts, especially regarding the duty of care of suppliers and distributors.[38] In addition, it has highlighted the importance of instructions and safety warnings for the evaluation of 'defectiveness' under the law transposing the PLD.

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[37] *Donoghue v Stevenson* [1932] AC 562; *Watson v Buckley* [1940] 1 All ER 174; *A v National Blood Authority* [2001] 3 All ER 289; *WVH Rogers,* Winfield and Jolowicz on Tort (17th edn 2006) para 10-3.

[38] Eg *Ch Pilakoutas Ltd v A Dimosthenous*, 25 January 2016, ECLI:CY:EDLEF:2016:A41; *Diexodos Ltd v Dan-Form Ltd*, 14 April 2020, ECLI:CY:EDLEF:2020:A194; *A Hadjishammoutti v Pop Life Electric Shops Ltd & Ors*, 20 May 2022, ECLI:CY:EDLEF:2022:A338.

VI. Czech Republic

Jiří Hrádek

In 2012, the Czech Republic adopted a new Civil Code which became effective as of 1 January 2014. In terms of the basic liability concept in Czech civil law, the Civil Code introduces a new concept of damage to Czech law, a change which takes into account the German approach to compensation of dividing damage into contractual and non-contractual forms. In contrast to the former Civil Code, the compensation of damage is no longer based on a general clause but on specific cases of non-contractual compensation for damage (§§ 2904, 2909, 2910) and a clause on contractual damages (§ 2913). This and other fundamental changes are the main reason why all the cases mentioned were heard by the highest judicial instances upon the adoption of the Civil Code and represent new trends in the development of Czech civil law.

1. Constitutional Court of the Czech Republic, 28 May 2024, PL ÚS 14/24

The first case deals with causation and secondary victims. It is of exceptional importance as the Constitutional Court attempted to alter long-standing case law concerning the interruption of the causal link, which has been inferred even when, under the theory of adequacy, a chain of causes and consequences exists.

Regarding the interruption of the causal link, Czech law understands this as a situation where the chain of causes does not establish a causal link between the wrongdoer's actions and the damage caused because another event, independent of the wrongdoer's actions, intervenes and is decisive for the damage. While such a conclusion is a question of causal connection, the same conclusion is reached also in cases where 'the cause of the damage is a fact that is itself a consequence for which the wrongdoer is liable for another legal reason.' This approach does not consist in the denial of the causal nexus itself, but rather in the fact that Czech case law disregards the standard normative criterion of imputability.[1]

[1] *J Hrádek* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2024 (2025) 127, no 85.

https://doi.org/10.1553/978OEAW51463-CzechRepublic

The question of the interruption of the causal link also arose here, where the claimant suffered damage to her health due to shock upon discovering that her family had died in a car accident. The car accident constituted a substantive and decisive cause of the damage to health and without the accident, there would have been no interference in the claimant's absolute rights.

The Constitutional Court refused the past approach and insisted on an examination of the question of the adequacy of the cause as it applies in other jurisdictions. Consequently, if there is a causal link between the harmful event and the injury caused, there is no reason why the general courts should deny liability for damage to health under § 2956[2] of the Civil Code (damage to the primary victim) and instead establish liability for damage suffered by secondary victims (spouse, family, child or other close persons) as laid down under § 2959[3] of the Civil Code.

With this conclusion the Court clearly distinguishes between two results of the wrongful event: a medically detectable interference with physical and mental integrity which often results in a mental illness and a 'mere' interference with private and family life. According to this differentiation between the interferences with the health of a person, the courts are obliged to examine the causal link between the wrongful event and harm suffered by third parties.

Such conclusion means that if a damaging event, such as a road traffic accident, results in serious bodily injury or the death of a person close to the victim, it usually imposes an enormous psychological burden on the person close to the victim as a secondary victim. It is therefore reasonably foreseeable that the accident and the death of a close person may negatively affect the secondary victim's psychological health, with a causal link to those events.

For this reason, the general courts should approach the awarding of compensation with great care and are obliged to examine the causal link, rather than automatically denying compensation based on the doctrine of interruption of the causal link. Consequently, the Constitutional Court's

[2] 'If the wrongdoer comes under an obligation to redress harm to another's natural rights as protected by the provisions of the first part of this Code, he shall compensate the damage and immaterial loss caused thereby; mental suffering caused by such harm shall also be redressed by the wrongdoer as compensation for immaterial loss.'

[3] 'Where death or especially serious harm to health is caused, the wrongdoer shall redress any mental suffering of the spouse, parent, or child of the injured party or other person close to him by means of a monetary sum fully compensating their suffering. If the compensation amount cannot be determined in this way, it shall be determined in accordance with the principles of equity.'

conclusion opened the way for giving priority to the objective criteria of the case over the theoretical conclusions of earlier causation theories.

2. Supreme Court of the Czech Republic, 16 May 2023, 25 Cdo 2202/2021

This decision represents a milestone in Czech civil case law, as the Supreme Court addressed a wrongful birth claim for the first time and, in doing so, had to establish criteria for compensation.

In the case at hand, the claimants (parents) sought compensation for interference with their reproductive self-determination, as well as for the impact of raising a disabled child (interference with private and family life), because the examining physician failed to correctly enter all the necessary data, meaning that biochemical markers were not included in the calculation of the risk of the most common congenital developmental defects in the foetus. As a result, the parents lost the opportunity to decide whether to keep the unborn child or to terminate the pregnancy. The Court acknowledged that such interference can occur as a consequence of wrongful medical treatment.

The Court explicitly concluded that Czech law allows for a claim for compensation of non-pecuniary damage caused by a healthcare provider's error during a prenatal examination. The prerequisite for such a claim is the breach of legal duty of the healthcare provider consisting in failure in the prenatal examination, which results in an interference with particular personal rights of the parents. Therefore, proof of a causal connection between an unauthorised interference with a specific partial personal right and non-pecuniary damage must be established.

In the court's decision, it was stated that *non lege artis* medical treatment by a healthcare provider establishes three possible breaches of personality rights: (1) non-pecuniary damage caused by interference with the parents' right to family planning, because they were not properly informed about the condition of the foetus; (2) non-pecuniary damage caused by the discovery of the child's actual state of health; and (3) non-pecuniary damage arising from the fact that parents have to witness the life of their disabled child and that they experience fear about the child's development.

As regards the interference with the parental right to family planning, this fact of the case consists in the misconduct in prenatal genetic examinations, which consequently resulted in a failure to detect the genetic disease. Since the main reason for the unlawful result consists in an error during the prenatal genetic examination and modern analytical prenatal

investigations result in high likelihood that the genetic disease could have been detected, there is a causal connection between the defendant's unlawful conduct and the interference with the personal rights of the claimants. Thus, all prerequisites for the emergence of a civil law obligation to compensate for this non-pecuniary damage are met.

The second and third interference, involving ongoing concerns about the development and future of a child affected by a genetic disease and its impact on the entire family's life, is conditioned by the finding that, but for the healthcare provider's error, the child would not have been born. Thus, it must be proven that, had the prenatal diagnosis been carried out correctly, the claimants would not have only undergone the recommended examinations but also would have chosen to terminate the pregnancy (eg health reasons or their worldview would not have precluded it).[4]

If there is an unauthorised interference with a person's personality, under § 82 of the Civil Code, the injured party has the right to demand that the unauthorised interference be stopped or that the consequences of this interference be removed. Alternatively, under § 2951 of the Civil Code, the injured party has the right to demand adequate monetary satisfaction.[5]

Which form of satisfaction should be deemed adequate will depend on the individual facts of the case. The court must consider the intensity, nature and method of the unauthorised interference or the character and the extent of the affected personality value. Taking into account all these facts, the court should award pecuniary damages as only monetary compensation may compensate for all wrongful results.

As Czech law does not provide for a uniform claim, the courts must award particular satisfaction for each interference separately, taking into account the above criteria for each claimant. As a result, the mother or father can be awarded different amounts of satisfaction if conditions for such an approach are met.

3. Supreme Court of the Czech Republic, 26 October 2021, 25 Cdo 1029/2021

The importance of this decision arises from the fact that the Civil Code in force changed the former approach to vicarious liability and laid down new rules for the liability of a helper. In this decision, the Supreme Court for the first time addressed the issue of the helper's liability under

[4] *J Hrádek* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2023 (2024) 133, no 121.

[5] *Hrádek*, ETL 2023 (fn 4) no 122 f.

the Civil Code and the decision is both topical and fundamental, as the Supreme Court's conclusions directly contradict the position of the doctrine.

Based on the wording of the provision of § 2914[6] of the Civil Code, the crucial issue regarding the helper's potential liability toward third parties is whether the helper is directly liable to them or only secondary liability applies.

The Supreme Court did not deny the direct liability of the helper, stating that 'the injured party is not in principle denied a direct claim for damages against the helper'. However, the Supreme Court presented a certain value analysis and stated that § 2914 of the Civil Code is based on the premise that the person who benefits from the helper's activities should also bear the risks associated with the helper's activities. The purpose of § 2914 is to strengthen the protection of the injured party, because, in the case of a breach of a legal obligation (§ 2910) by a helper, the injured party can claim compensation from both the helper and the principal. Nevertheless, as the Supreme Court concluded, a direct claim will not be possible in all cases and will depend on the relationship between the principal and the helper. Explicitly, the helper's liability is excluded if the helper is in the position of an employee.[7]

As regards the notion of a helper, helpers who do not fulfil a principal's contractual obligations are divided into two separate groups and those groups then directly influence the scope of the principal's liability:

A so-called dependent helper is a person who performs activities for a natural (legal) person under their appropriate supervision and according to their instructions or orders. Thus, the helper is in a subordinate position towards the principal. The principal's liability for this type of helper is based on the rule 'as if it had caused it by itself'.

Whoever carries out activities for another in their own name and at their own risk (a so-called independent helper or subcontractor) is responsible for the damage themselves. However, if such a helper has not been

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[6] 'A person who uses an agent, employee or other helper in conducting his activities shall be obligated to compensate damage caused by this agent, employee or other helper in the same way as if he had caused the damage himself. If a person undertakes to carry out a certain activity independently but this performance serves as another person's performance of his obligation, the person acting independently shall not be deemed the other person's helper. If the other person did not choose him diligently or did not supervise him sufficiently, that person shall guarantee the fulfilment of his duty to compensate for damage.'

[7] *J Hrádek* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2021 (2022) 91, no 52.

carefully selected or insufficiently supervised by the principal, the principal is liable in surety for the due fulfilment of the helper's obligation to provide damages.[8]

The Supreme Court's conclusion is based on the interpretation of § 2914, which allows for the establishment of a separate obligation on the part of the principal to provide compensation, even if the damage was caused by a helper. According to the court, the phrase 'by itself' presupposes that no one else is liable for the same damage. However, this statement of the Court, which is reasoned by the interpretation, is incorrect for the following reasons:

Firstly, if we interpret § 2914 teleologically, we can conclude that the purpose of the provision in question is to render another entity liable for the damage, not at the expense of the helper, but to strengthen the position of the injured party. The Court, however, does the opposite. It reduces the number of liable persons instead of multiplying them in relation to the injured party.

Secondly, with its interpretation, the Supreme Court introduced two categories of dependent helpers within the meaning of the first sentence of § 2914 of the Civil Code: *genuinely dependent helpers* (employees), who are so dependent on their principal that their direct liability is always ruled out; and *'semi-dependent' helpers*, whose autonomy in relation to the principal is not strong enough for them to be considered independent helpers (typically subcontractors) within the meaning of the second sentence of § 2914, but who have at least some autonomy, justifying their direct liability to the injured parties.[9]

The creation of additional categories of helpers beyond what the legislator intended cannot be considered correct. However, the most important conclusion is that the Supreme Court effectively created a single category of employees for whom personal fault is no longer decisive, since they are not liable to the injured party merely by virtue of being employees.

Furthermore, it must be mentioned that Czech law already provides several mechanisms for reducing a helper-employee's liability. If the Supreme Court wished to restrict an employee's liability toward injured third parties for harm caused in the course of their work, it could rely on arguments derived from the Labour Code. The Labour Code limits an employee's liability to the employer (that is, within the employment relationship) to 4.5 times the employee's average monthly earnings when the damage results from negligence.

[8] *Hrádek*, ETL 2021 (fn 7) no 53.

[9] *Hrádek*, ETL 2021 (fn 7) no 58.

Rather than relying on the statutory framework, the Supreme Court introduced a new concept of a 'helper', defined by the individual's dependence on the principal or their degree of autonomy.

However, the Czech Civil Code also recognises the liability of a helper used in the performance of the principal's contractual duty. This liability of the principal is directly established by § 1935 of the Civil Code.[10] In such a case, the activity of the helper is directly attributable to the principal.

In recent decisions, the Supreme Court has sought to restrict the unlimited scope of its conclusion that a helper who is an employee is not liable directly towards the injured party. However, the conclusion stemming from the given case has never been denied or substantially amended.[11]

4. Constitutional Court of the Czech Republic, 2 November 2021, I ÚS 668/21

With this significant decision, the Constitutional Court opposed the decision of the Supreme Court No 25 Cdo 27/2020, which was part of a series of decisions of the Supreme Court on compensation for damage caused by defamation and untrue information published by the media, especially the tabloid media.[12] In these cases, the Supreme Court did not find any reason to deviate from the existing settled case law, according to which the preventive role of monetary satisfaction is not excluded, but its main function is compensatory. In other words, awarded satisfaction should always reflect the injury caused but should never lead to punishment of the wrongdoer.

The Supreme Court held that the preventive-sanctioning function of monetary compensation for non-pecuniary damage resulting from unjustified interferences with personal rights by the media cannot be ruled out in principle, but applies only within the framework of the primary compensatory-satisfaction function. The preventive-sanctioning function

[10] If a debtor performs through another person, the debtor is liable in the same way as if they performed themselves.

[11] Supreme Court File No 25 Cdo 1221/2020 (liability of a legal entity), File No 25 Cdo 108/2020 (liability for interference with personality rights by the media), File No 25 Cdo 2613/2022 (liability of an employee in the position of a sole shareholder of his employer), File No 25 Cdo 612/2022 (liability of a president of a hunting society).

[12] *J Hrádek* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2020 (2021) 94, no 21 ff, in particular cases Nos 25 Cdo 1004/2020 (Dagmar Havlova) and 25 Cdo 1752/2019 (Karel Roden).

cannot justify significantly higher compensation amounts to be paid by a media company compared to other similar cases in order to punish the media in an exemplary way and to discourage them from repeating such conduct.[13]

However, the Constitutional Court opposes the narrow (but correct) view of the Supreme Court and points out that in determining the amount of such compensation, it is necessary to consider the degree of fault of the perpetrator (unverified dissemination of information to increase publicity), the nature of its activities (gainful activity based on publishing intimate information about celebrities) and property relations (high earnings from sales of printed media).[14]

Combined with the partial conclusion that the principle of deterrence does not fully apply in the case of such media, the Constitutional Court de facto concludes that the amount of pecuniary satisfaction to compensate non-pecuniary damage must always significantly affect the tabloid medium, meaning probably in amounts exceeding the usual hundreds of thousands of Czech crowns. However, the publication of a false 'bombastic' report on the personal life of a celebrity in the tabloid media will almost always fulfil those criteria which, according to the Constitutional Court, justify the award of higher satisfaction using rules corresponding to the punitive nature of damages.[15]

Nevertheless, it appears that the Constitutional Court uses the concept of sanction in the sense of a deterrent or dissuasive function of this institute of private law protection, which, together with its preventive function, serves to promote respect for the rights of others. The main aim of this approach is to discourage the continuation of the conduct or the idea of further intervention.[16]

Moreover, the preventive-sanctioning function of monetary compensation should also reflect time aspects. From the point of view of time, the courts adjudicate that it is important to focus on the flow of information. If a longer break occurs between articles on a similar topic, it might be necessary to qualify the subsequent article already as a new negative act and not merely as an extension of the previous intervention. If the wrongdoer continues its activities, increasing the intensity of its conduct, the subsequent article should be regarded as a new wrongful act.

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[13] *Hrádek*, ETL 2021 (fn 7) no 101.

[14] *Hrádek*, ETL 2021 (fn 7) no 102.

[15] *Hrádek*, ETL 2021 (fn 7) no 103.

[16] *K Eliáš*, Velký akademický komentář [Large academic commentary] (2008) 157; Decision of the Constitutional Court, 6 March 2012, File No I ÚS 1586/09.

The fact that the illegal intervention into the claimant's rights continued for a longer period should be reflected in the amount of satisfaction awarded pursuant to § 2957 of the Civil Code.[17] The circumstances listed in § 2957 set out the general principles for determining the amount of compensation for non-pecuniary damage; however, they are merely illustrative. Accordingly, other circumstances relating both to the injured party and to the wrongdoer will be taken into account. In this context, the fact that the publishing house released the articles as a series should be regarded as a relevant factor.

5. Supreme Court of the Czech Republic, 31 August 2017, File No 25 Cdo 2245/2017

The significance of this decision lies in the fact that the Supreme Court had to determine how the scope of compensation for damage to health set forth in § 2958[18] of the Civil Code should be interpreted. Specifically, it needed to clarify whether, in cases of health damage, compensation for pain suffered, impairment of social position and other non-material damage constitute separate claims or form a single claim for non-pecuniary damage to health encompassing all these components.

When interpreting § 2958 of the Civil Code, the legislator has clearly used the same terminology as in the past law, ie the concepts of pain suffered and impairment of social position, without defining or further elaborating upon these terms. It only added the concept of 'other non-pecuniary damage' that cannot be easily defined but is intended to capture the infinite variability of private life and various life situations that have not yet been compensated. Consequently, the Supreme Court concluded

[17] 'The amount of the reasonable satisfaction and the means of providing it must be determined in a manner that also ensures that there is redress for circumstances deserving special merit. Such circumstances include the intentional causing of harm, particularly harm caused by the use of a trick or threat or the abuse of the injured party's dependence on the wrongdoer, the compounding of the effects of an interference by publicly disclosing it, or discrimination against the injured party on the basis of gender, medical conditions, ethnic origin, religion or other similarly serious bases. An injured party's fear of losing his life or being seriously injured shall also be taken into consideration if such fear is evoked by a threat or other cause.'

[18] 'Where harm to health is caused, the wrongdoer shall redress such harm by means of a monetary sum fully compensating the pain suffered and other immaterial loss; if the harm to his health interferes with the future prospects of the injured party, the wrongdoer shall also compensate him for the difficulties in attaining his proper social position. If the amount of compensation cannot be determined in this way, it shall be determined in accordance with the principles of equity.'

that when interpreting the new civil law, it is not possible to conclude that the legislator's intention was to depart from the existing concept of independent claims for non-pecuniary damage to health. There is, therefore, no reason to deviate from this concept when, in addition, such a diversion could restrict the injured party in their claim.

Other non-pecuniary damage to health, which was explicitly added by the legislator to § 2958, is associated with a health intervention that does not consist of temporary pain or long-term (permanent) physical or psychological harm. It covers specific circumstances that do not occur regularly, but which increase the severity of the harm suffered above the usual level. Given the thin boundary between the types and the potential for disputes, the Supreme Court limited the new type of claim to extraordinary cases that do not clearly fall under the definition of pain suffered or impairment of social position, but are nevertheless worthy of compensation.

Particularly in the case of serious and complicated health effects requiring a long recovery period, when convalescence and stabilisation of the health condition of the injured person may last for several years, there is no reason for the injured person not to file a particular claim for pain suffered, ie compensation for the physical and mental hardship associated with the harmful event and subsequent treatment immediately after their occurrence. If there were another approach which accepts the concept of a single claim, the injured party would have to wait for their health condition to stabilise in order to assess the total non-pecuniary damage.[19]

However, there is strong disagreement in the doctrine on the concept of independent claims. The main argument is that assessing personal injury as a single concept better suits the ideas of the legislator, which establishes compensation in similar cases on the basis of equity and proportionality. In such a case, the individual categories mentioned by the legislator only describe the way in which the assessment of the compensation should be considered.

This theoretical distinction has also a practical substantive and procedural significance. In the case of separate claims, although derived from the same damaging event and having the same intangible nature, each claim has its own limitation period unlike the single claim, where only one limitation period exists. Such a limitation is then fundamentally influenced by its commencement, namely the time the injured party gained knowledge about the injury and the responsible party. Moreover, in the

[19] *J Hrádek* in: E Karner/BC Steininger (eds), European Tort Law 2017 (2018) 107, no 80.

case of a single claim, a decision on a claim for pain suffered would possibly constitute an obstacle to *res judicata* for possible redress of social impairment or other non-pecuniary damage.

Despite the different arguments, views and theoretical opinions, in light of the above decision of the Supreme Court, claims for compensation for damage to health under § 2958 of the Civil Code constitute individual, partial and separate claims for compensation for pain, social impairment and other non-pecuniary damage.

VII. Denmark

Søren Bergenser and Andreas Bloch Ehlers

1. *Bullying*, Højesteret (Supreme Court) 15 November 2011[1]

The bullying case was an important and long-awaited decision in Danish tort law concerning liability for purely mental harm. Prior to the judgment, Danish courts had generally been reluctant to award damages for psychological injuries unaccompanied by physical harm or immediate risk of incurring such harm, creating significant uncertainty for both practitioners and scholars. The case provided much-needed clarification on the conditions under which mental harm may constitute a compensable personal injury and has since been regarded as a leading authority on causation and adequacy.

A was employed at a kindergarten where tensions existed among the staff. In an effort to improve the working environment, a weekend seminar was arranged at a summer cottage for the employees, and a professional mediator (M) was engaged to facilitate the process. On the first day of the seminar, A – who suffered from a back injury and was therefore frequently absent from work – chose to raise her own situation during a plenary session. She stated, among other things, that her request for more flexible working hours had not been given proper consideration. This issue, however, was not discussed in detail. Instead, M redirected the discussion toward whether A's absenteeism constituted a problem for the kindergarten. The other employees were asked, in turn, to comment on this issue.

The following day, M continued this discussion and, despite A's reluctance, maintained the focus on her absenteeism. At one point, the head of the kindergarten (H) stated that A's absenteeism made it problematic to employ her. M then called for a time-out and asked H and the deputy head to join her in another room to discuss the matter further, while the remaining employees stayed behind. A felt extremely uncomfortable and began to cry. After approximately 15–20 minutes, M, H, and the deputy head returned, and H announced that it had been decided to 'work to-

[1] Ugeskrift for Retsvæsen (Weekly Law Report, UFR) 2012.524H. Reported on by *S Bergenser/A Bloch Ehlers*, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 151, nos 12–14.

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wards' terminating A's employment at the kindergarten. A was shocked and requested that the meeting be ended.

Following the weekend seminar, A experienced significant mental distress and was unable to work for an extended period. As a result, she brought an action against the kindergarten (the municipality), claiming compensation for pain and suffering under secs 1 and 3 of the Danish Liability for Damages Act.[2]

A's claim was rejected by both the City Court and the High Court. The City Court held that the kindergarten had acted negligently but dismissed the claim on the ground that A's injury could not be regarded as a personal injury within the meaning of sec 1 of the Danish Liability for Damages Act. The High Court disagreed with the City Court on this point and found that the mental harm suffered by A constituted a personal injury under that provision. The Court further observed that, although liability for mental harm is generally established only where the claimant has suffered an initial physical injury or has been exposed to a risk of such injury, compensation may also be awarded where the mental harm reaches a certain level of severity. However, on the facts of the case, the High Court concluded that the mental harm suffered by A was not sufficiently severe to justify an award of damages.

Before the Supreme Court, a statement from a psychiatrist was presented. This statement indicated, inter alia, that the events at the seminar had caused A to develop anxiety and depression and that, immediately following the seminar, she exhibited symptoms resembling a mild form of post-traumatic stress disorder. The Supreme Court agreed with the High Court that the kindergarten had acted negligently and that A's mental harm constituted a personal injury under sec 1 of the Danish Liability for Damages Act. The remaining issue was whether the requirement of legal causation (adequacy) was satisfied. In this respect, the Court found that the negligent conduct had increased the risk of mental harm of the kind suffered. It further held that the management of the kindergarten

[2] Consolidated Act No 885 of 20 September 2005. Section 1 of said Act reads as follows: 'A party who is liable in damages for personal injury shall pay compensation for loss of earnings, recovery costs and other losses resulting from the injury together with compensation for pain and suffering'. Section 2 'If the injury has had lasting consequences, compensation shall also be paid for permanent injury and loss or impairment of earning capacity'. Section 3 'The value of work in the home shall rank equally with earned income'. Section 2 reads as follows: 'Compensation for pain and suffering shall amount to DKK 130 for each day the injured person is sick. In special cases compensation can be paid for pain and suffering even if the injured person is not sick. The compensation cannot exceed DKK 50,000.'

was aware that A was in a mentally vulnerable position, leading to the conclusion that the mental harm was a foreseeable consequence of the kindergarten's negligence. Accordingly, damages were awarded in the amount of DKK 50,000 (approx € 6,700). As correctly noted by the High Court, the established starting point in Danish law is that compensation for mental harm cannot be awarded unless the claimant has suffered an initial physical injury or has been exposed to a risk of such injury. In the present case, however, the Supreme Court awarded damages despite the fact that A's mental harm had not materialised in either of these ways. This decision opens the door to compensation claims in a broader range of harm scenarios. Most notably, it suggests that damages may now be claimed in situations where a person has been subjected to bullying or harassment.

The extent to which courts will permit such claims in the future remains uncertain. Although the Supreme Court does not provide a definitive answer, it does lay down several important guiding principles. First, the judgment indicates that the tortfeasor's negligent conduct must have significantly increased the risk of the mental harm in question. In essence, this requires a sufficiently strong causal connection between the negligent act and the resulting mental harm for liability to arise. Second, the Court emphasised that the management of the kindergarten knew, or ought to have known, that A was in a psychologically vulnerable and stressful situation. This finding is relevant to the assessment of the degree of negligence attributable to the kindergarten. Finally, the Court stressed that A's mental harm was caused 'directly' by the kindergarten's conduct. This excludes claims by individuals who merely witnessed the events, meaning that other participants in the seminar would not have been able to bring a successful claim against the kindergarten (municipality). This constitutes an important limitation on the scope of liability for mental harm.

The Supreme Court's decision is therefore significant, and it will be interesting to observe how far Danish courts will be willing to go in awarding damages for mental harm in future cases.

2. *Lauritzen*, Højesteret 13 September 2017[3]

The *Lauritzen* case was a long-awaited case for both scholars and practitioners in the field of product liability, as the uncertainties before the decision had troubled Danish courts, producers and liability insurers for years. The case brought the needed clarity in the grey zone area be-

[3] UfR 2018.98H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2017 (2018) 134, nos 2–18.

tween the law of sales and product liability regulation and has been the leading case since it was delivered.

The litigants in this case are *J Lauritzen A/S (Lauritzen)*, a Danish shipping company, and *MAN Diesel & Turbo German (MAN)*, a company that produces large-bore diesel engines and turbomachinery primarily for marine and stationary applications. MAN delivered, as producer, a number of engines to a Korean shipyard, which constructed seven ships that contained the engines produced by MAN. Subsequently the shipyard sold the seven ships to Lauritzen.

In the engines, there were a special integrated lubricating system called Alpha Lube. After the ships were put into use, Lauritzen determined that the engines were exposed to an unusual and extraordinary degree of wear and tear. This wear and tear implied that several components had to be replaced much sooner than expected. The presumption was that the wear-related damage was caused by the Alpha Lube system in the engines. The contract between the shipyard and Lauritzen contained limitations of liability, which was one of the reasons why Lauritzen filed their claims against MAN instead. No contractual relationship existed between MAN and Lauritzen.

The main question in this case was whether MAN could be held liable for the damage according to the rules on product liability developed by court decisions, outside the area of regulation of the Product Liability Directive. Because of this, the primary dispute in relation to product liability in this case concerned whether the Alpha Lube system should be regarded as a separate product or as a part of the engine.

The judgment in this case was decisive for the question as to whether damage had occurred to something other than the defective product, which would result in applying the regulations on product liability. The other possible outcome of the decision would be that the damage was only in the product itself – an instance of 'self-harm' – which would result in applying the liability rules in the law of sales.

The litigants in the case could not agree on whether the condition for damage to something other than the product itself was fulfilled. The Alpha Lube system was, before its integration in the engines, introduced on the market as a separate product by MAN, which resulted in the fact that it could be a separate product. The counterargument here was that the engine with the Alpha Lube system was sold as a unit. This disagreement was the primary reason for the commencement of the case.

The Maritime and Commercial Court made a decision in the matter before it was appealed to the Supreme Court. The Maritime and Commercial Court found that the Alpha Lube system under these circumstances,

where it was sold for use in the engines of the seven ships, must be regarded as a separate product. The wear-related damage to the engines therefore fulfilled the conditions for damage according to the rules of product liability.

Therefore, it was awaited with suspense whether the Supreme Court would uphold the decision from the Maritime and Commercial Court, or they would use their reasons from an earlier decision, which is very comparable to this case. The comparable case is the *Masnedø* case (UfR 2010.1360H), where the main question likewise was whether a component of a given product should be regarded as a separate product or as a part of the product.

Not surprisingly, the Supreme Court maintained their reasons from the earlier decision in the *Masnedø* case. Therefore, they took into account that the Alpha Lube system was a part of the engines when Lauritzen acquired them from the shipyard.

The Supreme Court found that the engines and the integrated Alpha Lube system must be regarded as a unit. It could not arrive at another conclusion, even though Lauritzen specifically chose the Alpha Lube as the lubricating system. The decisive question was still whether the engines with the Alpha Lube system were sold as a unit.

Therefore, Lauritzen could not raise their claims against MAN according to the rules of product liability developed by court decisions.

The judgment of the Supreme Court was not a surprise, as it complies with the principles laid down in the Products Liability Act § 2 (2) and also complies with the Supreme Court decision in the above-mentioned *Masnedø* case. Based on the two cases, the legal status is presumably clarified where an originally incorporated defective component causes damage to a product in which the component is installed – in any case, when the claim is based on the rules of product liability, which are developed by court decisions.

In such cases as above, it would not be possible to raise a claim against the producer of the defective component in the product, because it would comprise damage to the product itself.

Whether the product is sold as one unit, or if it is sold as separate products can cause difficulties in practice. Following this, an interesting question could be what the outcome would be in cases which should be decided in accordance with the rules in the product liability legislation, which are based on the Product Liability Directive. Ultimately, it will be up to the European Court of Justice to determine the scope of application, even after the 2024 updated Directive on Product Liability 2024/2853.

3. *Memory Card Technology*, Højesteret 27 March 2015[4]

This case is a landmark case in the area of causation in relation to auditors' liability, setting the boundaries for many other court cases and disputes in this important area of liability and establishing the division of risks between the management of companies, auditors' liability and readers of annual reports of companies.

Memory Card Technology (MCT), a company producing computer chips, was very successful in the 1990s. The Financial Statements of MCT for the first quarter of the financial year 2000/2001 showed that the equity in MCT was lost and, after a short period, the company went bankrupt.

The bankruptcy estate sued both the management and the auditors of the company.

Regarding the auditors, the bankruptcy estate claimed that, due to negligence in auditing the company, the management was misled, and further that if the auditors had not acted negligently, the management would not have been able to borrow money to pay for the additional stock of raw materials, stating that the downfall of the company was caused by the decrease in the value of the raw materials.

The Supreme Court found that the auditors had shown considerable negligence in auditing the two annual reports up until the bankruptcy but held that the bankruptcy estate did not prove to the Supreme Court that the management would have acted differently even if the auditors had not acted negligently: a 'classic' ruling that the causation requirement was not met.

The interesting angle in this decision is that the Supreme Court does not lower the requirements of proof regarding causation when the professional party, the auditor, has shown considerable negligence. In Danish law, it is a known fact[5] that the requirements for proof regarding causation is lowered when the professional party has shown substantial negligent behaviour.

The Supreme Court does not provide any reasons as to why the requirements for causation were not lowered in this case, but the defending lawyer had drafted a spread sheet before the Supreme Court hearings that showed how the two annual reports, which had been drafted prior to the bankruptcy, would have been had the auditor addressed the problems in

[4] UfR 2015.2075H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 134, nos 2–12.

[5] *B von Eyben/H Isager,* Læreborg i erstatningsret (2024) 126 f.

these two annual reports, which first and foremost revolved around the valuation of the stock of raw materials and the receivable of an American customer of the company.

This landmark case has paved the way for subsequent important and high value Danish cases, such as the *Hesalight* case (FED 2023.266Ø High Court East).

4. *Capinordic Bank*, Højesteret 15 January 2019[6]

This case represents the first of many high profile court cases where the Danish State sued former management boards of banks that went bankrupt during the years of the financial crisis from 2008–2012.

These cases – this one being the first– have given a wealth of clarity to the legal position of many questions within the area of civil liability of management boards in companies, including the legal principle referred to as the 'business judgement rule'. It is well-established that even if these cases revolve around the management boards of banks, the legal principles laid down in this case are also relevant for management liability in other types of legal entities.

This decision concerns the liability of the managers of Capinordic Bank A/S.

Capinordic Bank A/S was declared bankrupt on 11 February 2010 as the bank was unable to meet the requirements set by the Danish Financial Supervisory Authority for the bank's solvency.

Finansiel Stabilitet A/S, a company owned 100% by the Danish State, took over the bank's assets under the Financial Stability Act and subsequently brought this suit against the CEO (A), a board member (B) and the chairman of the board (C) of the former Capinordic Bank A/S.

The main issue in the case was whether the defendants, as the bank's former management, had acted negligently and therefore must compensate the bank's loss in relation to 11 loan commitments issued in the period 2007–2009.

This case represents a breakthrough for the business judgement rule in Danish law. For many years several court cases[7] revolved around this doctrine, but it was not until the *Capinordic* case that this doctrine was established clearly in Danish law.

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[6] UfR 2019.1907H. Reported on by *S Bergenser/A Bloch Ehlers*, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2019 (2020) 132, nos 2–26.

[7] Eg UfR 2013.1312H and UfR 2015.2075H.

Initially, the Supreme Court expressed that the members of the management of a bank are subject to a common fault-based negligence standard, and that there is no basis for establishing a stricter standard of liability.

The Supreme Court further found that a decision to grant a loan is largely based on a business judgement, in particular on the basis of a credit rating of the borrower, and that this business judgement must be made on reasonable grounds. In the credit rating, the bank should include factors such as the purpose of the loan, the borrower's financial circumstances, the security provided for the loan and the borrower's ability to run their business, namely considering the common economic cycles. It will, however, depend on the specific situation which factors should be included. The Supreme Court stated that one should generally be reluctant in setting aside business judgements.

The Supreme Court found, however, that in circumstances where it is assumed that the loan was not only granted with regards to the bank's interests, but also other interests irrelevant to the bank, more stringent requirements should be met.

The Supreme Court found that the defendants were liable for the bank's losses in nine of the 11 loan arrangements, as the members of the management board had acted negligently by granting loans or making other transactions in these specific instances, while there was no basis for liability regarding two of the arrangements.

This decision explicitly sets out the boundaries for the Danish version of the business judgement rule.

The judgment of the court aligns with what among scholars has been the understanding of the Danish version of this rule,[8] which is not in fact a rule, but is a principle which sets out the limits for the assessment of the civil liability of directors and officers in Danish limited companies.

This decision also adds new and important knowledge in the area of the civil liability of directors and officers of Danish limited companies as it sets out standards for the legal position when supervisory authorities have been involved in situations that give rise to civil liability disputes concerning directors and officers. There have previously been no court decisions in Danish law that underline as clearly as this decision that the civil liability of directors and officers is much less strict when supervisory authorities have been involved in the situation that gave rise to liability questions.

[8] *T Sofsrud*, Bestyrelsens beslutnig og ansvar (1999); *M Samuelsson*, Bestyrelsesansvaret (1997); *S Bergenser*, Tilsynsrådets erstatningsansvar (2012); *J Winther Høy*, Bestyrelsens ansvar – med særlig fokus på finansielle virksomheder (2020), and *S Bergenser*, The Business Judgment Rule in Danish Law (2022).

The decision is of great importance in Danish law as it is the first Supreme Court decision in a complex of 13 court cases regarding the civil liability of directors and officers that the Danish State has filed against directors and officers of Danish banks that went bankrupt in the period from August 2008 until 2013. This decision addresses a number, but not all, questions regarding management liability that have been addressed in this complex of large (in the sense of their factual circumstances and the economic values involved) court cases regarding the bankruptcy of Danish banks during the financial crisis.

VIII. England and Wales

Colm Peter McGrath

Each decision described below represents a moment of invention rather than evolution. They each mark a fundamental shift in the tort rules themselves rather than an important but ultimately incremental step in the development of an existing framework. They stand collectively as a powerful reminder both of the central and inescapable importance of judicial decision-making in English tort law, and of the fact that even in a system which regards conservative, careful expansion as its hallmark, moments of stark invention and novelty are nevertheless vital. It is only through balancing these two modes that the common law persists.

1. *Lister*[1]

In *Lister*, the claimants were adults who had been sexually abused as children at the hands of a warden, employed by the defendant, to manage a boarding house in which they had been residents, attached to their school. Suing in respect of the personal injuries they had sustained, the claimants had foundered in the Court of Appeal on the matter of whether the defendant could be held vicariously responsible. At the heart of the claim were two interconnected problems. The first was the contemporary and long-settled test for the circumstances in which D could be held vicariously liable for T's act in relation to C; in the argot of the old cases, when would a servant's tort be within the 'scope of employment' such that their master would be liable? The so-called 'Salmond Test' – drawn from the work of the great textbook author of the same name – required what T had done to either be a wrongful act authorised by the master, or (and, naturally, more commonly) a wrongful and unauthorised mode of carrying out something that the master had authorised.[2] The second was the clearly intentional, indeed criminal nature of the wrong at hand here, a matter with which earlier courts had struggled in the context of vicarious liability.

[1] *Lister v Hesley Hall Ltd* [2001] United Kingdom House of Lords (UKHL) 22, [2002] 1 Appeal Cases (AC) 215.

[2] Para 15 per Lord Steyn.

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Whilst by the time of *Lister* the courts had recognised that vicarious liability could apply in the context of intentional wrongdoing,[3] it was clear that, combining these two features, the Salmond test was inapt here. As Lord Steyn observed in his leading judgment in *Lister*, the test, 'does not cope ideally with such cases'. This was perhaps understandable: in what circumstances could it be said that abusing children in your care was simply an unauthorised way of *caring* for them, which was the task that had been entrusted in the first place? As Lord Millet put it, to suggest this would be 'stretching language to breaking-point'.[4] Indeed, the claimants lost in the Court of Appeal largely on the basis that clear authority in the previous Court of Appeal decision in *Trotman* had refused to apply the test in closely analogous circumstances where a child had been indecently assaulted by a teacher whilst on a school trip. As Butler-Sloss LJ had put it there, the act was 'far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer'.[5] If the claimants in *Lister* were to succeed, *Trotman* would have to be overcome or distinguished.

Before the House of Lords, the former was preferred, and the claimants discovered that a greater degree of flexibility and innovation was possible. Subsequent to *Trotman* in the same year, a pair of decisions by the Supreme Court of Canada had adopted a test for this aspect of vicarious liability focused on whether there was a so-called sufficiently 'close connection' between the act the tortfeasor had been employed to do and the wrongful act.[6] This logic proved seductive to a majority of their Lordships, who viewed such an approach as better attuned to the question of whether vicarious liability could be justified on a given set of facts. Not least, as they acknowledged, given even the second limb of the Salmond test itself hinged crucially on the detail and level of abstraction one adopted in framing the act that the employer had authorised.[7] The knotty question of vicarious liability for intentional and even criminal wrongdoing was settled through careful, authoritative interpretation of a range of past authorities.[8] In doing so, various Lords emphasised that identifying the relevant risk that an employer took on in entrusting a task helped explain vicarious liability here. Deploying something akin to this approach through the lens of the close connection test, it was clear that

[3] Para 19 f per Lord Steyn.

[4] Para 68.

[5] Para 22 per Lord Steyn.

[6] *Bazley v Curry* (1999) 174 Dominion Law Reports (DLR) (4th) 45; *Jacobi v Griffith* (1999) 174 DLR (4th) 71.

[7] Para 23 per Lord Steyn; para 43 per Lord Clyde; para 60 per Lord Hobhouse.

[8] Para 19 f per Lord Steyn; paras 71–78 per Lord Millet.

entrusting the care of children to the warden had carried with it a risk of just such abuse such that it was fair to impose vicarious liability on the defendant.[9] Conversely, had the employment merely furnished the opportunity for the abuse rather than been bound up with it, the close connection test would not have been satisfied.[10] Naturally, *Trotman* could not withstand this assault and was overruled as incorrectly decided, standing now as a mark of an older, more mechanically-minded approach that *Lister* ultimately rejected.

Lister heralded the start of a process that has taken almost 25 years to come to some sort of fragile truce within the cases here. In adopting the 'close connection' test, it set English law on a path towards expansion of vicarious liability here into areas that would previously have been unthinkable. Indeed, some of the most controversial cases that have followed have hinged on the spongy uncertainty that was always inherent in such an open-ended test.[11] The crucial matter of exactly how close the supposed connection needs to be such that it is just and fair to impose vicarious liability is one that a majority of their Lordships in *Lister* opted not to grapple with, albeit later practice perhaps reveals that there may be no certainty to be reached here in any case. The stark warning in *Lister* from Lord Hobhouse – less enamoured by the song of the Canadian sirens, albeit reaching the same result on the facts – has proven to be fiercely perceptive of the challenge with which, having taken this step, future English courts would be faced: 'an explanation of the policy reasons for a rule (or even a description) is not the same as defining the criteria for its application. Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be.'[12] Indeed, given the ructions that have followed *Lister*, what perhaps stands out most in retrospect is the entirely plausible alterna-

[9] Para 28 per Lord Steyn, describing it as 'inextricably interwoven'; para 79 per Lord Millet.

[10] To take the example memorably explored by Lord Hobhouse, had it been the school's groundsman that had committed the abuse, the defendants may not have been liable, given the groundsman would not have been entrusted with the care and authority over the boys of the actual tortfeasor.

[11] *Mohamud v WM Morrison Supermarkets* [2016] United Kingdom Supreme Court (UKSC) 11, [2016] AC 677; *Bellman v Northampton Recruitment Ltd* [2018] Court of Appeal (Civil Division) (EWCA Civ) 2214, [2019] 1 All England Law Reports (All ER) 1133; *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] UKSC 15, [2024] AC 567.

[12] Para 60 per Lord Hobhouse.

tive path not taken but nevertheless canvassed by Lord Hobhouse in *Lister*.[13] The need to expand the scope of vicarious liability might have been avoided had the court instead declared that the defendants owed a non-delegable duty to ensure that care was taken by those agents to whom the practicalities of the duty had been entrusted. As it was, the pressure of these cases was, through *Lister*, funnelled into vicarious liability and although the Supreme Court has stood by that decision such that it is now unthinkable that they would depart from it, the doctrinal and practical consequences of doing so mark *Lister* as a generationally important tipping point.

2. *Fairchild*[14]

In *Fairchild*, a number of claimant employees had all been exposed to asbestos dust during successive periods of employment by the respective defendants. The claimants then suffered from mesothelioma. Suing in the tort of negligence, the claimants faced a simple problem. Due to the state of knowledge about the aetiology of that disease, it was possible that they had contracted it following the inhalation of a single fibre and that, having done so, further exposure would not worsen or aggravate the condition. As such, whether the defendant was in breach of a duty of care to the claimant, the necessary link of factual causation was rather muddied. On the orthodox application of the relevant principles, which required proof on the balance of probabilities,[15] each defendant would be able to point to the negligence of the other and, in so doing, defeat the claim. It was, in short, impossible for the claimants to satisfy the relevant requirement of factual causation in such overdetermined circumstances where they had nevertheless undoubtedly been wronged by *someone*. Having failed before the Court of Appeal, the claimants appealed to the House of Lords, who granted the appeal in all cases.

To achieve this result, their Lordships were willing to make an exception to the orthodox rules, basing their logic on the authority of a previous House of Lords decision from the 1970s. That earlier decision, *McGhee v National Coal Board*, had,[16] in the interim, been read as hinging on a robust factual inference. Now instead, it transpired that their

[13] Para 55.

[14] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32.

[15] *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Queen's Bench (QB) 428.

[16] *McGhee v National Coal Board* [1973] 1 Weekly Law Reports (WLR) 1.

Lordships could identify in *McGhee* authority for a principled solution to the problem in *Fairchild*. That a defendant was responsible for a material contribution to merely the *risk* of harm, rather than the harm itself, would suffice for a causal connection. The exceptional nature of the decision here was clearly acknowledged, with Lord Nicholls rightly noting that such an exception from normal principles required a clear and principled basis,[17] and Lord Hoffmann acknowledging that the decision about what causal connection was appropriate in a given case was itself one that depended on the purpose of the law's inquiry.[18] There was a clear and pressing concern that were an exception impossible, the undisputed duty of care imposed on defendant employers in this context would be, as Lord Hoffmann put it, 'empty … of content',[19] with clear acknowledgement throughout of the underlying policy arguments for and against the claimant's position. Central to the justification that underpinned the decision was the fact that the uncertainty with which the claimants were faced was an epistemic one grounded in the current state of medical science. As Lord Roger powerfully stressed, whilst there was an element of 'rough justice' to applying the newly resuscitated principle in *McGhee*, it was to require from the claimants no more than the most that could be asked of them when faced with such an insurmountable gap in human knowledge.[20] This 'rock of uncertainty' – as Lord Bingham put it[21] – could not be let stand in the way of claimants who had suffered a wrong and could demonstrate that a particular defendant had at the very least increased the risk of the consequences of that wrong occurring. Of particular note in *Fairchild* was the appearance of a wide-ranging comparative survey by Lord Bingham,[22] with further comparative and indeed historical views canvassed by Lord Roger;[23] strong evidence of the utility in looking beyond one's own borders on such essentially universal matters as what connection is sufficient to justify, all other things being satisfied, liability in tort. As Lord Bingham put it, whilst the point of such an exercise was not to suggest decision-making by jurisdictional head-count, any choice to remain an outlier could only be taken after 'anxious review' and ulti-

[17] Para 36. See also Lord Hoffmann at para 60.
[18] Paras 49, 56.
[19] Para 62.
[20] Para 155.
[21] Para 7 per Lord Bingham.
[22] Para 23 ff; discussed in *K Oliphant*, Fairchild v Glenhaven Funeral Services Ltd (2002), in: C Mitchell/P Mitchell (eds), Landmark Cases in the Law of Tort (2010) 355.
[23] Paras 158–160.

mately 'there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.'[24]

The consequence of the decision in *Fairchild* has been incalculable. A long line of cases, many before the apex court, have followed as successive panels of judges have attempted to constrain and cohere the logic that was unleashed that day. If *Fairchild* itself appears to civilian eyes as a classic case of alternative causation, English courts were shortly thereafter forced to wrestle with the consequences of confirming a causal link here. What about alternative causation with additional chance?[25] What is the threshold for holding that a material contribution to the risk of harm is present at all?[26] To what extent are differences between two or more types of agents to which a claimant might have been exposed substantial enough to defeat the logic of *Fairchild*?[27] Perhaps most surprisingly, what are the practical consequences for the quantum of liability the defendant is faced with here – a rather crucial question that was not part of the decision in *Fairchild* itself. Indeed, as the cases here have developed, it has also brought censure from Parliament, who were moved to enact a statute essentially repealing the applicability of the *Fairchild* line of cases in the specific context of *Fairchild* itself: asbestos-related mesothelioma.[28] Likewise, a substantial pushback from the insurance industry in an effort – entirely understandably, if practically unsuccessful – to clarify that they would not be liable for the mere *creation* of risk.[29] As such, the hope for a narrow, perhaps even contextually-grounded, exception to the orthodox rules of factual causation has been strained as successive claimants, who would otherwise be faced with a causally complex hurdle to surmount, have attempted to bring themselves within the relief provided by the *Fairchild* enclave. The saga stands as a sobering reminder that the common law strives to make abstract rules that cannot easily be constrained to a given context, type of damage, or exact causal relationship, and that courts must be wary of the broader consequences of the logic of justice beyond the precise case before them.

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[24] Para 32.

[25] *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.

[26] *Sienkiewicz v Greif (UK) Lt*d [2011] UKSC 10, [2011] 2 AC 22.

[27] A subject of some discussion in *Fairchild* itself but that has required a number of later decisions to better pin down, and even then this now-so-called 'single agent' rule is not without substantial controversy. See *Heneghan v Manchester Dry Docks Ltd* [2016] EWCA Civ 86; [2016] 1 WLR 2036; *S Green*, Fairchild and the single agent criterion (2017) 133 Law Quarterly Review (LQR) 25.

[28] Compensation Act 2006 sec 3.

[29] *Durham v BAI (Run Off) Ltd* [2012] UKSC 14, [2012] 1 WLR 867; *International Energy Group Ltd v Zurich Insurance Plc* [2015] UKSC 33, [2016] AC 509.

3. *Campbell*[30]

In *Campbell*, the iconic fashion model Naomi Campbell had been awarded damages and an injunction in relation to publication by the defendant newspaper of details about her drug addiction and the fact that she attended an anonymous self-help group by way of treatment. Whilst she accepted that the fact of her addiction and treatment could be published, she claimed there had been a tortious breach of her rights in the decision to publish additional details about the therapy group along with covertly obtained photographs of her leaving a group meeting. Whilst the claimant succeeded at first instance, the defendant won their case on appeal, resting on the fact that the claimant had publicly denied her addiction – entitling them in the public interest to correct the record – and that elements of the details were insufficiently central or significant to amount to an actionable breach. On appeal to the House of Lords, whilst there was a split as to the result on the facts of *Campbell* itself (with a bare majority holding that she could recover), their Lordships reached a landmark decision about tort's role in the protection of private information. The main barrier to recovery lay in the fact that whilst there was *some* protection given to what could be thought of as 'private' information, this was primarily through the form of the equitable action for breach of confidence such that the cases here were largely centred on contexts where confidence was expressly afoot – say, state or commercial secrets – or where it could be easily implied.[31] The heart of the question their Lordships faced was to what extent this paradigm remained authoritative and exclusive, and to the extent it was not, what was the nature of any further available action?

Famously, their Lordships extended the protection tort could offer here, marking the emergence of the tort now known as Misuse of Private Information. Whilst the root of this lay in the equitable action for breach of confidence, as Lord Nicholls put it, the law had shaken off the need for an 'initial confidential relationship' and it was more accurate to characterise the information that would potentially fall to be protected here as 'private' rather than confidential.[32] Drawing on the impact that arts 8 and 10 of the European Convention on Human Rights had had in cognate areas relating to the publication of information, it was clear that

[30] *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[31] See, for instance, *Argyll v Argyll* [1967] Chancery (Ch) 302 concerning, in the context of a divorce, at attempt to prevent disclosure of information exchanged by the parties during marriage.

[32] Para 14 per Lord Nicholls.

the common law had developed 'in harmony' with those articles such that Lord Nicholls declared: 'The time has come to recognise that the values enshrined in arts 8 and 10 are now part of the cause of action for breach of confidence.'[33] Once it was established that the defendant had or was proposing to disclose information that was private – that is to say, information in relation to which there was a reasonable expectation of privacy, thus engaging art 8 – the analysis turned to balancing the competing interests involved,[34] without according one precedence over the other.[35] Where this engages the defendant's right to freedom of expression, then the two rights must be weighed against one another in a judicial balancing exercise to assess whether interference with the claimant's right can be justified. Such an exercise looks to the proportionality of the interference given the countervailing interest, taking into account the facts of the given case.[36] In *Campbell* itself, a bare majority was prepared to find that disclosure of the relevant information gave rise to an action. Lords Nicholls and Hoffmann were less convinced, in part on the basis that the *additional* details added little to the information the claimant conceded could be disclosed, given the well-known nature of the relevant therapy group,[37] and the fact the photos showed 'nothing untoward' or embarrassing, adding little beyond the text itself.[38] In any case, they felt the balancing exercise fell squarely in favour of the defendant given the 'comparatively minor degree' of intrusion into the claimant's life,[39] and the need to provide some latitude for editors in taking decisions about what to publish.[40] For the majority, the information clearly gave rise to a reasonable expectation of privacy and the resulting balancing exercise instead fell to the claimant's advantage. The fact the additional details went beyond what was required to credibly report the story and that the photographs – taken intentionally and covertly in a public place – likewise added little, such that their publication alongside the article would have represented to any person in that position a 'gross interference with

[33] Para 17 per Lord Nicholls, see also Lord Hoffmann at para 51 noting 'a shift in the centre of gravity of the action for breach of confidence' as a result of the Human Rights Act 1998.

[34] Para 134 per Baroness Hale.

[35] Para 138 per Baroness Hale.

[36] Para 139 f per Baroness Hale.

[37] Para 28 f per Lord Nicholls; para 60 per Lord Hoffman.

[38] Paras 30–32 per Lord Nicholls; paras 72–75 per Lord Hoffmann.

[39] Para 28 per Lord Nicholls.

[40] Para 62 per Lord Hoffmann.

her right to respect for private life',[41] sufficed to outweigh the defendant's right to freedom of expression.[42]

Campbell is of foundational importance within the modern law of tort, and whilst sometimes this is not always obviously how the judges themselves see it in the moment, that was not the case here. As Baroness Hale rather magnificently put it, 'this case raises some big questions'.[43] *Campbell* is the wellspring for many cases that have followed and, as in other cases discussed here, its contribution was not only in identifying the normative values to which the law would respond, but in defining the basic shape of the legal analysis that lay at the heart of the tort it recognised. Beyond this, it is a signal instance of the law of tort drawing on the force and logic of the Convention rights as a light by which to develop.[44] That move involved not only accepting the values set out there as important in their own right, but in acknowledging a hierarchy of influence between the more abstract shape of the action available in tort, and those values. The latter could and were indelibly drawn on to give form and utility to the former. This has not always been the case otherwise, and certainly other torts have generally suggested a relationship that is separate but parallel at best, leaving *Campbell* and the powerful action it enabled all the more significant by example.

4. *Rhodes*[45]

In *Rhodes*, the claimant was the son of the defendant, a renowned and famous classical pianist, and, through his mother, sued to injunct the publication of the defendant's autobiography in which he detailed the history of his own sexual abuse as a child. The fear was that this would cause psychological harm to the claimant. What action in tort would provide the basis for such a claim? Injunctions are, after all, a relatively rare remedial option in English tort as is usually any hope of remedial intervention in advance of either harm to or interference with a claimant. Whilst there were a number of options suggested by the claimant in the lower courts, whether to be found in the torts of misuse of private information or negligence, the Court of Appeal focused on the action

[41] As Baroness Hale bluntly noted of their publication, at para 56, 'There was no need to do this.'

[42] Para 124 per Lord Hope.

[43] Para 126 per Baroness Hale.

[44] See paras 49–51 per Lord Hoffmann.

[45] *O (A Child) v Rhodes* [2015] UKSC 32, [2016] AC 219.

supposedly available through the 19th century decision of *Wilkinson v Downton*.[46] In *Wilkinson*, Wright J had granted an action where, as he famously put it, the defendant had 'wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her'.[47]As such, the *Wilkinson* tort focuses on an intentional act causing harm to the claimant and on that basis the Court of Appeal in *Rhodes* had granted an injunction to the claimant, rejecting the argument in the High Court that *Wilkinson* was limited to merely false or threatening words.[48] This was somewhat surprising for a range of reasons, not least the sense that the *Wilkinson* tort had long ossified and diminished in utility, if not, in fact, disappeared altogether. Other torts, primarily the tort of negligence, had, in the century after *Wilkinson*, come to offer meaningful protection in the area where it appeared to have been most useful in the handful of cases where it had been relied on: the recovery of damages for psychiatric (rather than physical) injury. The appeal to the Supreme Court was nakedly about the role and scope of the *Wilkinson* tort. Did it have a role in the modern law? What were its boundaries? Would it apply even in the context of true statements? In what sense did an interference have to be intended by the defendant?

The Supreme Court, over a carefully reasoned pair of judgments, held that there was indeed a role for the *Wilkinson* tort – or as they came to describe it, the tort of intentionally inflicting physical or psychological injury – within modern tort law. Parsing the preceding case law, in particular a decision marking the nadir of the tort's relevance in the earlier 2000s,[49] the Supreme Court held that the tort would ordinarily require three elements. The first was a mental element on the part of the defendant, who must intend the claimant to suffer physical injury or severe emotional distress.[50] The second was a conduct element, which required words or conduct on the part of the defendant, directed towards the claimant, which lacked justification or reasonable excuse, with the burden of proof falling on the claimant.[51] The third was a consequence element, requiring the claimant to prove psychiatric illness or physical harm.[52] In reaching this conclusion, the court rejected the idea that recklessness would suffice

[46] *Wilkinson v Downton* [1897] 2 QB 57.
[47] Ibid at 58.
[48] Paras 21–23 per Baroness Hale.
[49] *Wainwright v Home Office* [2004] 2 AC 406.
[50] Paras 85–87.
[51] Para 74.
[52] Para 73 per Baroness Hale.

for the mental element, that the conduct needed to be 'extreme, flagrant or outrageous',[53] or that it would be enough if all that the claimant suffered was distress falling short of a recognised psychiatric illness, albeit this last matter earned some dissent from Lord Neuberger in an otherwise concurring judgment. He was understandably curious about the obvious imbalance between what needed to be intended and what needed to result.[54] As to the tort's relevance on the facts of *Rhodes* itself, it was clear that there was neither a sufficient mental element present nor a sufficient conduct element. Indeed, in relation to the latter, Baroness Hale was at pains to note that the context here, 'the curtailment of freedom of speech … gives rise to its own particular considerations',[55] not least the relevant human rights implications, which suggested that assessment of the conduct element will always mould itself to the particular context of the case. It was neither plausible to think the conduct in *Rhodes* was directed to the claimant, nor that there was anything that would justly bar the defendant from telling the world his own story. Indeed, short of speech that was deceptive, threatening or abusive, the court doubted that truthful speech could in fact be caught by the newly refreshed tort at all.[56]

Rhodes is an essential case in modern English tort law, albeit not for its practical importance. Given the understandably narrow parameters that the Supreme Court set for the tort, it is not often that a defendant will satisfy the requirements in a situation where other forms of action are themselves, for whatever reason, unavailable.[57] Yet the confirmation of the action's continued role is of undoubted importance. It fills the abstract doctrinal space for an intentional but indirect interference with the claimant and so, alongside the tort of trespass – whose concern is intentional but *direct* interferences – *Wilkinson* provides a degree of conceptual scaffolding, clarity and completeness to the law of tort more generally. Even if in practice it cannot be expected that it will be frequently drawn on, it both gives confidence that English tort law is built on something more abstractly stable than a response to the facts of a given case and that the modern courts are willing and able to undertake the sort of architectural reasoning necessary to identify and clarify the role of a particular action within the broader constellation of possibilities. Even accepting

[53] Para 88, noting this bar had been accepted by the analogous Canadian authorities.
[54] Para 119 per Lord Neuberger.
[55] Para 74.
[56] Para 77 per Baroness Hale; para 107 f per Lord Neuberger.
[57] For an example of *Rhodes* in action, see *C v WH* [2015] England & Wales High Court (EWHC) 2687 (QB).

the characteristic flexibility of English tort law, a formal shift away from describing something as 'the tort in…' *Wilkinson v Downton* to, however inelegant, the tort of intentionally causing physical or psychological harm must be celebrated.

5. *Robinson*[58]

Of the cases selected here it is *Robinson* that stands out for the blinding simplicity of its facts. Elizabeth Robinson, 76-years-old, was bundled to the ground when she happened to be caught in the midst of an attempt by two of the defendant Chief Constable's police officers to arrest a suspected drug dealer on a high street in the middle of the day. Ending up at the bottom of this pile of bodies understandably left the 'relatively frail' Mrs Robinson suffering personal injury.[59] Nevertheless these simple facts apparently required a decision of the UK Supreme Court to settle…

The central issue was thus: in the years running up to *Robinson*, the English courts had been wrestling with the methodology of assessing whether there was a duty of care owed to a given claimant by a defendant. The 20th century had explored a range of approaches to this question, culminating, it was generally thought, in an approach that rested primarily on the three matters of whether harm was foreseeable, whether there was a relationship of 'proximity' between the defendant and claimant, and whether imposing a duty of care would be fair, just and reasonable. This was famously drawn from the decision of the House of Lords in *Caparo*.[60] Whilst decided cases could provide a degree of scaffolding around which the parties would have to argue, and the burden of argument lay on the claimant, this invitation to open policy reasoning formed the crux of many, if not all, cases where duty was disputed. Crucially, even where previous cases had decided the matter one way or another, the opportunity for such open policy reasoning always provided the defendant a conceptual space whereby they could plead that imposing such a duty would be unfair in their particular circumstances.

A further complication in *Robinson* was the fact that the claimant was suing the police. In a series of cases over the years beforehand, the courts had signalled that there were often compelling policy reasons why a duty of care would *not* be owed by the police in the execution of their duties. Notably, in the *Michael* decision in 2014, a majority of the Su-

[58] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.
[59] Para 1.
[60] *Caparo Industries plc v Dickman* [1990] 2 AC 605.

preme Court declared there was no duty of care where they were aware a claimant was in immediate life-threatening danger from a third party.[61] This was justified partly on the basis of open policy reasoning, but also on the dual bases that, setting policy reasoning aside, there was generally no duty of care where D's behaviour was an omission rather than a positive act, and that there was no distinct or different approach to the duty of care in the context of public authorities. The duties they would owe were the same as any private individual: *ergo*, no duty there.

Robinson marked the apotheosis of these strands of reasoning and heralded a seismic shift in the methodology of the duty of care in all cases that will follow. The core of the reasoning was that the decision in *Caparo* itself had been misunderstood! Far from permitting free-for-all policy arguments over the duty of care in any case, in fact it was authority for the opposite. Their Lordships in *Caparo* had, in fairness, emphasised the importance of, 'attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.'[62] In *Robinson* this appeal to the power of precedential, analogy-driven reasoning was anointed as the dominant methodology for tackling duty questions. Setting out a two-step process, the Supreme Court confirmed that where, considering previous authorities, a case fell within an 'established category' (where what has been 'established' is whether there is a duty or not) then, unless the relevant party is seeking to overturn those authorities, nothing further is needed and there is simply no scope for policy reasoning, the answer is automatic.[63] Conversely, where there is not an established category into which the case can be coherently sorted, there is scope for the parties to introduce policy reasoning, working from the closest analogous cases and conscious of the emphasis on, and supposed importance of, merely incremental development.[64] Applied to the case at hand, far from a situation where either policy reasoning was permissible, or where the facts could be framed as a form of omission or otherwise as a more abstractly complex relationship between the parties,[65] this was, in the end, a straightforward case of causing personal injury by a positive act in a situation where it was foreseeable that carelessness

[61] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732.
[62] *Caparo* (fn 60) at 618 per Lord Bridge.
[63] *Robinson* (fn 58) paras 21–26.
[64] Ibid, paras 27–30.
[65] Ibid, paras 43–72, canvassing a broad range of authorities concerning the police in execution of various aspects of their role.

would result in such injury.[66] As such, a duty of care was straightforwardly owed and, given the other findings, Mrs Robinson would recover damages.[67] Whereas preceding cases had begun to gently reformulate classic cases from the *Caparo* era as being justified on the basis of a fundamental act/omission distinction within the duty of care cases, *Robinson* marked the triumph of this approach with the evident centrality of that distinction proving vital to the decision that was reached. Alongside the shift in the broader methodology of the duty of care that *Robinson* confirms, whilst this is far from the only relevant categorical distinction in the cases, it is clearly a crucial one around which many important authorities now turn. Likewise, *Robinson* confirmed beyond contestation the parity of approach to duty of care whether the defendant is an individual or the state.[68] Any suggestion that the latter requires or invites special approaches or reasoning must now be rejected.

That said, *Robinson* is telling for the fact that whilst all five judges agreed in the result and the basic categorisation of the case itself, a very strong pairing of Lords Mance and Hughes was not entirely convinced by the entire logic of the plurality (Baroness Hale, and Lords Reed and Hodge). They highlighted the evident role of policy reasoning in the very act of constructing and developing by analogy the established categories upon which the methodology of *Robinson* depends.[69] As Lord Mance noted, it was not even necessarily the case that the category in which *Robinson* itself was thought to fall would inevitably generate a duty on *any* set of facts, whether concerning the police or otherwise.[70] Equally, Lord Hughes doubted that the act/omission distinction was clear enough to yield simple answers in many cases, not least, as he noted, as 'the rule against liability for omissions is by no means general',[71] and 'there is no firm line capable of determination between a case of omission and of commission'.[72] Their arguments deserve close consideration by future scholars and judges and form a yardstick against which the broader success of *Robinson* can be measured as a body of cases grow from it.

Certainly, the effect of *Robinson* was immediate and will likely be of lasting impact. Subsequent cases at all levels have now adopted the two-step logic it set out and there are clear examples of cases being decided in

[66] Para 73.
[67] Para 74.
[68] Para 32 f.
[69] Para 84 per Lord Mance.
[70] Paras 85 ff, 93.
[71] Para 115 per Lord Hughes.
[72] Para 117.

line with each step. Where a decision is regarded as merely evidencing an existing 'established category', the consequences have been immediate.[73] Where no sufficiently close analogy can be found, there, and only there, do we find explicit consideration of the policy factors that might sway the court either way.[74] Yet the concerns raised by Lords Mance and Hughes echo loudly. The decision as to whether a case falls within an 'established category' is clearly not always so clear cut as to make that a straightforward assessment. The act of parsing the past cases to (re-)construct them as categories is an exercise which is itself clearly susceptible to policy reasoning and the process of seemingly needing to appeal a case through the courts to have an authoritative view confirmed only appears to emphasise this.[75]

Recognising this, it is impossible not to wonder whether, for all the flaws of the high-policy era, it may not have been preferable to adopt such open and ultimately transparent reasoning. The somewhat more opaque methodology confirmed in *Robinson* is not without risks itself. It imbues duty of care cases with something of the quality of a magic show, where answers may appear instantly and strikingly, but without convincing explanation. Seeing a rabbit pulled from a hat may impress some in the audience some of the time, but to learn from that experience the question always remains: how *did* they do that? On that score, *Robinson* reveals a continuing preference for mystique over candour in this important area of English tort law.

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[73] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] AC 831; *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780.

[74] *James-Bowen v Commissioner of Police of the Metropolis* [2018] UKSC 40, [2018] 1 WLR 4021.

[75] *Sumner v Colborne* [2018] EWCA Civ 1006, [2019] QB 430; *Rushbond Plc v JS Design Partnership LLP* [2021] EWCA Civ 1889; *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25, [2022] 4 WLR 104.

IX. Estonia

Janno Lahe and Irene Kull

Over the past two decades, the development of Estonian tort law has been closely shaped by the case law of the Supreme Court, which has clarified and refined key doctrinal concepts such as unlawfulness, causation, and liability for non-pecuniary damage. Since the adoption of the Law of Obligations Act in 2002, Estonian courts have gradually moved from Soviet-era conceptions of liability toward a modern, structured tort law system influenced by German legal doctrine. This transformation has been neither instantaneous nor purely legislative; rather, it has evolved through a series of significant judicial decisions that have provided interpretation, balance, and practical coherence to the law.

The authors of this report have followed and analysed these developments for more than 20 years, documenting the gradual emergence of consistent principles and their adaptation to the Estonian legal environment. Some of the Supreme Court's judgments have had a particularly lasting impact – defining the scope of unlawfulness, introducing the notion of a general duty to maintain safety, clarifying the rules of apportionment of liability in mutual motor vehicle accidents, and elaborating the conditions for compensation of non-pecuniary damage suffered by close relatives. These cases, taken together, reflect the dynamic evolution of Estonian tort law and its increasing alignment with European private law traditions, while maintaining a distinctly domestic interpretation shaped by local courts and legal scholarship.

1. Supreme Court Judgment of 31 May 2007, in Civil Case no 3-2-1-54-07

The first Estonian Supreme Court judgment to be commented on had a significant impact on Estonian legal theory and practice, as it clarified the concept of unlawfulness. The Civil Code of the Estonian SSR,[1] which regulated, among other institutes, rules on tort law, was in force in the Republic of Estonia (re-established in 1991) until 30 June 2002. On 1 July 2002, the

[1] Eesti NSV tsiviilkoodeks (Civil Code of the Estonian SSR) of 12 June 1964.

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Law of Obligations Act (LOA)[2] came into force, containing provisions on tort law comparable to those regulated in §§ 823(1) and (2) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). In other words, by adapting the LOA, the three-stage general structure of tort known in German law, which distinguishes between the objective elements of the act (the act causing the damage, the infringement of the victim's legal interest, the causal link between them), unlawfulness, and the fault of the person causing the damage was introduced into the Estonian legal system.

The adoption of German tort law concepts was a fundamental change, as the Civil Code of the Estonian SSR did not contain a similar catalogue of protected interests – it only provided for provisions on general tort. According to the concept of general tort, causing damage is unlawful if the person causing the damage violated a rule arising from the law.

In this case, the plaintiff used the defendant's (shopping centre) car park. After paying for parking, the plaintiff headed toward his car. As there were no appropriate markings in the car park, the plaintiff, while walking towards his car, walked straight into a barrier placed in front of the car park's entrance, which fell on his head. The barrier caused the plaintiff to suffer a concussion and an injury to his forehead, as a result of which the plaintiff required medical assistance. The plaintiff claimed approximately € 3,200 in non-pecuniary damages from the defendant.

The county court dismissed the plaintiff's claim, noting that the sole basis for tort liability is a violation of mandatory legal provisions. The circuit court upheld the county court's decision. The Supreme Court overturned the circuit court's decision, noting that the existence of bodily injury and its causation by the defendant's actions (which may also consist of inaction) provides grounds for considering the defendant's actions unlawful under § 1045(1)2) of the LOA, which stipulates the unlawfulness of causing bodily injury or damage to health.

Therefore, the district court's position that the defendant did not commit an unlawful act by installing barriers in the car park is irrelevant. Similarly, the county court's reference to the presumption of unlawfulness (breach of a legal obligation) in § 1045(1)7) of the LOA is also irrelevant because the defendant's act is unlawful in the event of bodily injury to the plaintiff already under § 1045(1)2) of the LOA.

In the new review of the case, the circuit court had to assess whether the conditions for general tort liability were met. First, it had to assess whether the defendant's actions caused bodily injury to the plaintiff. If

[2] Võlaõigusseadus (Law of Obligations Act, LOA) of 26 September 2001 <https://www.riigiteataja.ee/en/eli/ee/527122023005/consolide/current>.

it is proven that the defendant caused bodily injury to the plaintiff, the defendant has committed an unlawful act pursuant to § 1045(1)2) of the LOA, and if the defendant does not prove any circumstances that would exclude unlawfulness, they can exonerate themselves by proving the absence of fault pursuant to § 1050 (1) of the LOA.

With this judgment, the Supreme Court changed the doctrine of unlawfulness established during the Soviet era, according to which only causing damage by violating legal norms was unlawful. More specifically, the Supreme Court based its judgment on the theory of wrongful outcome (*Erfolgsunrecht*), according to which, in the event of damage to absolutely protected legal interests, unlawfulness arises from the harmful consequence itself.

This theory of wrongful outcome (*Erfolgsunrecht*) is expressed in Estonian law in § 1045(1) of the LOA in cases where the damage is caused by causing the death of the victim (§ 1045(1)1) LOA); causing bodily injury or damage to health (§ 1045(1)2) LOA), deprivation of liberty (§ 1045(1)3) LOA) and violation of property or similar rights or possession (§ 1045(1)5) LOA). In the case of other torts, however, the theory of wrongful act (*Handlungsunrecht*) must be applied, which means assessing the act of the person who caused the damage. This theory must be applied in cases of a violation of personal rights (§ 1045(1)4) LOA), interference with a person's economic or professional activities (§ 1045(1)6) LOA), behaviour which violates a duty arising from law (§ 1045(1)7) LOA) and causing damage by intentional behaviour contrary to good morals (§ 1045 (1)8). This basic principle has also been followed in later case law.[3]

However, it is not correct to proceed from the wrongfulness of the consequence in cases where the damage has been caused by inaction or indirect action (unintentionally). In such cases, in order to hold the person who caused the damage liable, it is necessary to identify the legal norm or general duty to maintain safety that they violated.[4] In light of the above, apparently, the Supreme Court resolved the case described above (injury caused by a barrier) incorrectly. It would have been necessary to identify a violation of an obligation by the defendant. However, this does not

[3] The 'theory of wrongful outcome' can be found in the following cases: judgments of the Civil Chamber of the Supreme Court of 9 March 2011 in civil case no 3-2-1-174-10, at 12; of 10 April 2013 in civil case no 3-2-1-21-13, at 15; of 26 October 2021, in civil case no 2-19-7379, at 19.

[4] See *T Tampuu*, Lepinguvälised võlasuhted [Non-contractual obligations] (2017) 232. See also judgment of the Civil Chamber of the Supreme Court of 17 December 2012 in civil case no 3-2-1-161-12, at 10.

change the significance of the decision in question, as subsequent case law has been based on the principles set out in this decision.

It should also be added that, in borderline cases, the determination of unlawfulness is not yet entirely clear in Estonian case law. For example, it is not clear how Estonian courts would approach a case where a careless hunter mistakenly shoots a mushroom picker in the head, causing bodily injury: would the unlawfulness of causing damage be derived from the bodily injury to the mushroom picker, or would an additional legal norm or duty to maintain safety be sought that the hunter violated?

2. Supreme Court judgment of 20 June 2013, in Civil Case no 3-2-1-73-13[5]

The second Estonian Supreme Court judgment to be discussed is important primarily because it clarifies the concept of a general duty to maintain safety. In the early 2000s, the concept of tortious liability based on a general duty to maintain safety was still unfamiliar to many Estonian lawyers, because only a short period of time had passed since the entry into force of the Law of Obligations Act, and the regulations of the Civil Code of the Estonian SSR did not require knowledge of the concept of a general duty to maintain safety. However, with the entry into force of the Law of Obligations Act on 1 July 2002, the entire approach to unlawfulness changed, which in turn made it necessary to 'adopt' the concept of a general duty to maintain safety (*allgemeine Verkehrssicherungspflichten*) originating in German law

More specifically, this means that if the victim's absolutely protected legal interest has been harmed by the inaction of the person who caused the damage, or if the violation of the victim's legal interest is a more distant/indirect consequence of the behaviour of the person who caused the damage, the obligation which has been violated must be identified in order to hold the person who caused damage liable. In these cases, unlawfulness cannot be established solely by the harmful consequence. Such an obligation may be an obligation arising from the law (§ 1045(1)7) LOA) or a general duty to maintain safety.

The Supreme Court dealt with liability based on breach of duty to maintain safety in more detail for the first time in its judgment of 20 June

[5] The judgment has been commented on by *J Lahe*/*I Kull*, Estonia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 213, nos 24–31. See also *J Lahe*, German Transplants in Estonian Tort Law: General Duties to Maintain Safety (2021) 30 Juridica International (JI) 132–139.

2013.[6] It should be added that, in a sense, the Tallinn Circuit Court was the first to pave the way for the application of tortious liability based on a breach of a general duty to maintain safety, referring to the existence and significance of a general duty to maintain safety four years before the Supreme Court's aforementioned decision.[7]

According to the circumstances of the Supreme Court judgment in question, the plaintiff visited her daughter, who rented an apartment in a building belonging to the defendant. The plaintiff left the apartment late in the evening at 11:15 p.m. The plaintiff did not reach the bottom of the stairs before the lighting went out. While in the dark, the plaintiff searched for support on the stone wall to her right until she reached a place where there was an opening in the wall. The plaintiff fell through this opening from the second floor to the first floor. As a result of the fall, the plaintiff suffered health damage. The plaintiff sought compensation for non-pecuniary damage in the amount of € 5,112 from the defendant.

The Harju County Court upheld the claim, but the Tallinn Circuit Court dismissed the claim. The Supreme Court overturned the circuit court's decision and issued a new judgment, partially upholding the claim and ordering the defendant to pay the plaintiff € 4,112 in compensation for non-pecuniary damage. The Supreme Court found that in this case, the defendant could be held liable for the damage caused to the plaintiff if the defendant had violated any duty to maintain safety.

The Supreme Court noted that the general duty to maintain safety entails a person's obligation to do everything reasonably necessary to prevent other persons from being harmed as a result of their actions. The general duty to maintain safety and its violation must be established in order to hold the person who caused the damage liable on the basis of tort in cases where the damage was caused by inaction or insufficient action. The more serious the threatened damage, the greater the likelihood of damage occurring, and the lower the cost and effort required to prevent damage, the greater the likelihood that there is a duty to take measures to prevent or eliminate the danger. The Supreme Court noted that the duty to maintain safety, or the general duty to act, cannot require the impossible from a person, and that the behaviour expected of the defendant as the owner of the building must be reasonable.

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[6] Previously, however, the Supreme Court had already briefly mentioned liability based on a duty to maintain safety in its judgment of 17 December 2012 in civil case no 3-2-1-161-12, at 10 (apartment owner's duty to maintain safety).

[7] Tallinn Circuit Court decision of 16 December 2008 in civil case no 2-06-9067.

The Supreme Court found that, according to the facts established by the courts, the defendant had created a dangerous situation for the plaintiff by leaving an opening in the wall of the stairwell, from which the plaintiff and other persons could fall, and that the lighting in the stairwell was installed in such a way that it did not ensure the safe descent of persons who were on the stairwell for the first time. The Civil Chamber emphasised that the dangerousness of the situation in the present case was evident from the combined effect of two factors: the opening and the lighting. It is clear that, for example, placing a barrier in front of the opening would have easily prevented the danger in question from materialising. Thus, the defendant, as the owner of the building, violated a general duty to maintain safety.

It can be said that since this decision, the concept of tortious liability based on a breach of a general duty to maintain safety has been recognised in Estonian case law. The Supreme Court itself has referred to a breach of a general duty to maintain safety as a basis for liability in several judgments.[8]

Estonian legal literature has found that the concept of the general duty to maintain safety helps to distinguish between persons who caused damage through inaction and persons who had a duty to act with care toward the victim. If a person did not owe such a duty, their liability cannot be considered.[9] Thus, on the one hand, the concept of general duties to maintain safety is necessary in order to hold persons who have caused damage through inaction or indirectly accountable; on the other hand, it also serves as a filter that allows the circle of persons liable under tort law to be defined (narrowed).

Recognition of tortious liability based on a breach of a general duty to maintain safety also has a broader significance: 'recognition' of duties to maintain safety affects how the structure of tort law is understood, the composition of the general elements of tort, and the connections between different prerequisites for tortious liability.

Due to the scarcity of court decisions, current case law does not allow fundamental conclusions to be drawn as to whether the standard of conduct (duty to maintain safety) expected by the courts from legal subjects has become too high or too low. However, it cannot be said that the duty

[8] Judgments of the Civil Chamber of the Supreme Court of 10 June 2015 in civil case no 3-2-1-48-15, at 24 (parachute jump organiser's duty to maintain safety) and of 24 March 2021 in civil law case no 2-18-8345 (public park owner's duty to maintain safety).

[9] *Tampuu* (fn 4) 233.

to maintain safety has come to be interpreted as a duty to 'refrain' from causing harm to another person or a duty to 'ensure' that no harm is caused to another person.

3. Judgment of the Supreme Court of 19 March 2013, in Civil Case no 3-2-1-7-13[10]

The third Supreme Court judgment to be commented on is important because it provides explanations on how to apportion liability in the event of damage caused by two motor vehicles and operational risk. Estonian law does not contain a separate legal provision on how to apportion liability in the event of damage caused by motor vehicles. However, the final amount of compensation may be adjusted in accordance with the general rule on reduction of compensation according to § 139(1) of the LOA, which stipulates that if the damage was caused in part by circumstances attributable to the injured party or as a result of a risk for which the injured party is responsible, the compensation for damage shall be reduced to the extent that these circumstances or risks contributed to the occurrence of the damage. This approach was established by the Supreme Court in its judgment of 24 September 2007 in civil case no 3-2-1-75-07.[11] However, this decision did not state any information on what circumstances should be considered when applying § 139 of the LOA.

The Supreme Court's decision is important precisely because it clarifies for the first time the new approach of apportionment of liability in cases involving damage caused by two motor vehicles. According to the facts of the case, on 3 June 2007, a car belonging to the claimant and a motorcycle were involved in a traffic accident. The accident happened when the car driver started turning left and collided with the oncoming motorcyclist. The motorcyclist did not have a licence to drive a motorcycle. The courts of lower instances held that the car driver did not give way to the motorcyclist driving on the priority road, although the car driver should have given way. The claimant filed a claim for damages against the defendant in the amount of € 16,768.

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[10] The judgment has been commented on by *Lahe*/*Kull* (fn 5) nos 2–13. See also *J Lahe/I Kull*, Motor Vehicle Operational Risk and Awarding Damages in the Event of a Traffic Accident (2014) 5 Journal of European Tort Law (JETL) 105–120.

[11] According to previous case law, the situation was somewhat different. In its judgment of 4 November 2006 in civil case no 3-2-1-118-06, the Supreme Court noted that in the event of damage caused jointly by several possessors of major sources of danger, liability must be determined on the bases of the fault of each operator of a major source of danger.

The Civil Chamber of the Estonian Supreme Court held that circumstances arising from the risk as well as circumstances characterising the behaviour of drivers can be taken into account when determining the amount of damages for the purposes of § 139 of the LOA. Upon identifying the level of involvement of the direct possessor of each motor vehicle, the sum of all causes must be assessed. Above all, the degree of a potential threat objectively arising from each vehicle involved in an accident must be considered as circumstances arising from the risk. The extent of a potential threat depends, among other things, on the mass, speed, technical condition, safety equipment, etc, of the vehicle. Additionally, the objective nature and dangerousness of each specific manoeuvre of a vehicle because of which an accident occurred (eg overtaking, a failure to give way to another vehicle) can be assessed.

On the other hand, the behaviour of the drivers of the motor vehicles involved in causing an accident, especially the failure to exercise due care and disregarding traffic regulations can also be considered.

The Supreme Court noted that damages can be reduced to the minimum or precluded altogether only by way of an exception, notably if it has been identified that the accident was caused solely by a serious mistake of one party, as a result of which the other party, who did not break the traffic rules, was reasonably (ie exercising due care) unable to prevent the damage.

The positions presented in this decision have also served as a basis for the resolution of traffic accident cases in subsequent practice. However, the positions presented in the judgment under review have since been supplemented. For example, the Supreme Court has found that if it becomes apparent that both drivers violated the safe driving requirements set out in the Road Traffic Act[12] and their involvement in the traffic accident was, considering both their behaviour and the operational risks of their vehicles, more or less equal, the court has grounds, pursuant to § 139(1) of the LOA, to reduce the compensation for property damage awarded to the victim by 50 % on a presumptive basis.[13]

The Supreme Court has also noted that compensation for damage may be reduced pursuant to § 139 of the LOA even if it cannot be proven that either party violated traffic regulations, ie, the circumstances of the traffic

[12] Liiklusseadus (Road Traffic Act) of 17 June 2010 <https://www.riigiteataja.ee/en/eli/502092025003/consolide>.

[13] Judgment of the Supreme Court of 26 November 2015 in civil case no 3-2-1-64-15, at 11.

accident remain unknown.[14] In this case, compensation will be reduced solely on the basis of the risk associated with operating the vehicles.

Special attention should be paid to the position presented in the Supreme Court judgment in civil case no 3-2-1-7-13, according to which it is possible to reduce compensation to zero on the basis of § 139 of the LOA if the accident was caused solely by the gross negligence of one party, and therefore it was no longer reasonably possible for the other party to avoid the accident. This position means that, according to the doctrine applicable in Estonia, in the case of damage caused by two motor vehicles, there cannot be one 'party at fault' and one victim (ie, one party whose damage is compensated to 100 % and the other party is left without any compensation for damage). Compensation for traffic accidents is paid through the traffic insurance system. However, in practice, traffic insurance providers take the opposite approach to that of the Supreme Court. Almost always, one party is found to be liable, and the other party is the victim, and they are awarded compensation for the entire loss. When asked why the Supreme Court's guideline is ignored, it generally seems that both the parties involved in the traffic accident and the insurers are satisfied with a simple, black-and-white picture. It is easier and, in terms of damage assessment, 'cheaper' to consider one party as the victim and the other as the guilty party.

4. Judgment of the Supreme Court of 9 April 2008, in Civil Case no 3-2-1-19-08[15]

The fourth Supreme Court ruling discussed here is significant, in the authors' opinion, because the very narrowly defined right to claim compensation for non-pecuniary damage of a close relative of the direct victim in this judgment has been gradually expanded in subsequent court practice. Compensation for non-pecuniary damage of a close relative of the direct victim is provided for in § 134(3) of the LOA. The provision stipulates that in the event of an obligation to compensate damage caused by the death of a person or by causing them serious bodily injury or damage to their health, the relatives of the deceased or injured person

[14] Judgment of the Supreme Court of 26 November 2015 in civil case no 3-2-1-64-15, at 15.

[15] The judgment has also been discussed by *J Lahe/I Kull,* Estonia, in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 240, nos 17–26. See also *J Lahe*/*I Kull*, Compensation of non-pecuniary damage to persons close to the deceased or to the aggrieved person (2016) 2 International Comparative Jurisprudence 1−7.

may also claim compensation for non-pecuniary damage if exceptional circumstances justify the payment of compensation.

In the judgment in civil case no 3-2-1-19-08, the Supreme Court explained for the first time how to interpret the exceptional circumstances referred to in § 134(3) of the LOA. According to the facts of the case, the defendant's employee (a bus driver) caused a traffic accident in which the bus collided with a van driven by the plaintiff's spouse. The plaintiff's spouse died as a result of the injuries sustained. The plaintiff claimed approximately € 64,000 in compensation for non-pecuniary damage from the defendant. Both the County Court and the Circuit Court dismissed the claim. The Supreme Court left the Circuit Court's judgment unchanged and dismissed the appeal. The Supreme Court noted that the law does not define the circle of 'close relatives.' This is left to the court to determine. In the opinion of the Civil Chamber of the Supreme Court, each individual case must be assessed separately, taking into account, among other things, the kinship of the persons, family ties, previous living arrangements, and other circumstances. Close relatives generally include the spouse who lived with the deceased person.

The Supreme Court found that the causation of death or a serious bodily injury cannot serve as an 'exceptional circumstance' within the meaning of § 134(3) of the LOA, but there must be additional circumstances justifying monetary compensation. The loss of a close person in the abstract sense, mourning and the pain of loss, which inevitably occur to a lesser or greater extent upon the death of every close person, cannot serve as an exceptional circumstance. Neither can the loss of family and a decline in the quality of life, as claimed by the plaintiff, serve as such a circumstance. These circumstances often accompany the loss of a close person.

According to the Civil Chamber, a claim for compensation of damage incurred by a close person would be justified particularly by the spatial closeness of the close person to the deceased or seriously injured person at the time of the damage, eg being in the same car at the time of the accident or immediately observing the accident or its consequences (being in the same 'danger zone'), as well as subsequent suffering caused by witnessing the injury or suffering of the deceased or seriously injured close person. The Court added that a claim would be justified if there had been a deliberate desire to attack or damage persons close to the victim, as well as the special circumstances of the damage, such as the tortfeasor's intention to cause damage to the victim in combination with the subsequent suffering of the close persons.

These positions have also been taken as a basis for the further application of § 134(3) of the LOA. Although the Supreme Court did not provide

an exhaustive list of exceptional circumstances in this decision, Estonian courts have regarded the examples provided by the Supreme Court (spatial proximity, etc) as an exhaustive list of exceptional circumstances. As a result, the possibilities for the relatives of direct victims to obtain compensation for non-pecuniary damage have remained very limited. For example, the plaintiff was not considered entitled to compensation in a case where the defendant drove a motor vehicle without having an independent right to drive (he was under 18) and caused a traffic accident in which a total of three people died, including both the plaintiff's parents. The plaintiff argued that there were exceptional circumstances in this case within the meaning of § 134(3) of the LOA as the defendant's criminal act caused the premature death of both of the plaintiff's parents. However, the Circuit Court took the view that the requirement for exceptional circumstances was not met in this case.[16] The Supreme Court did not accept the appellant's appeal for review.

Only in 2022 did the Supreme Court extend the interpretation of exceptional circumstances (in criminal case 7 October 2022 no 1-21-3082). In this case, the direct victim was a moped driver who died in a traffic accident. The claim for compensation for non-pecuniary damage was filed by the moped driver's two children and spouse.[17] The Supreme Court noted that the examples of exceptional circumstances in the above-mentioned judgment should not be taken as an exhaustive list, which mean that 'exceptionality' may also result from, among other things, the severe manner of death of the direct victim. The Criminal Chamber found that the particularly traumatic experiences of the victim's relatives can be referred to in order to conclude that the victim's death was unusually 'severe'. In the opinion of the Criminal Chamber, the circumstances of the death in this case exceeded the threshold at which it can be argued that the impact of the incident on the relatives of the deceased is more severe than usual, and therefore the claim for compensation for non-pecuniary damage is justified.

It cannot be directly stated that the Supreme Court changed its previous practice in interpreting § 134(3) of the LOA with the described judgment. However, it is possible that the explanation given by the Supreme Court may lead to changes in the future application of § 134(3) of the

[16] Decision of Tallinn District Court of 22 March 2011 in civil case no 2-10-779.

[17] In this case, the three victims each claimed € 15,000 in damages, but the court awarded € 3,000 to each of them, justifying this on the grounds of negligence, admission of guilt, sincere and heartfelt remorse, and apologies to the victims. See judgment of the Criminal Chamber of 7 October 2022 in criminal case no 1-21-3082, at 31.

LOA and courts will also assess whether the death of the direct victim occurred in a particularly severe and tragic manner. This is by no means rare in the case of traffic accidents or crimes.

5. Judgment of the Supreme Court of 26 September 2006, in Civil Case no 3-2-1-53-06

In the fifth judgment in question, the Supreme Court for the first time stated general principles for establishing a causal link and even more significant, gave its opinion on how to resolve a case when it has been established that the damage was caused alternatively by the circumstances brought about by the victim themselves or by another person's behaviour.[18] The Law of Obligations Act (§ 127(4)) establishes the *conditio sine qua non* principle, according to which, a person is liable for damages only if the circumstance on which their liability is based is related to the occurrence of the damage in such a way that the damage is a consequence of that circumstance. This principle is applied by means of the elimination and substitution method.

The elimination method is primarily used in cases of active conduct, asking whether the damage would have occurred if the breach of contract or unlawful act had not taken place.[19] If the consequences would have occurred even without the actions of the defendant, the actions would not have caused the damage. The method of substitution is applied in cases of inaction on the part of the party who caused the damage, replacing the passive behaviour of the party causing the damage with lawful behaviour.

Since the application of the *conditio sine qua non* rule alone in determining causality would result in overly broad liability for a tortfeasor, both in terms of the damage to be compensated and the circle of persons to be held liable, the causal link is also examined at the level of legal cause. The legal cause of the damage is determined through the theory of the purpose of the provision, assessing whether the purpose of the violated provision was to oblige the person who caused the damage to protect the victim and whether it was intended to apply to damage such as that which was caused in the particular case. In a situation where the claimant is unable to prove that there is a causal link between the damage

[18] The judgment is commented on by *J Lahe/I Kull*, Estonia, in: E Karner/BC Steininger (eds), ETL 2006 (2008) 178, nos 10–17.

[19] *K Sein*, § 127, comments, in: P Varul et al (eds), Võlaõigusseadus I, Kommenteeritud väljaanne [Law of Oblgations Act I, commented edition] (2017) at 4.10.

suffered and the defendant's actions, no compensation for damage will be awarded.

According to the circumstances of the case, there was an accident in 2003 at the defendant's, ie, employer's, workplace that caused severe bodily harm to one of the employees, who was buried under an unsupported partition wall. The employee was hospitalised and remained in hospital for a period of one month. After being referred for home treatment, the victim died. The victim's death certificate states that the immediate cause of death was acute pulmonary heart failure and the underlying cause was pulmonary artery thromboembolism. The plaintiff, who was the victim's son, asked the employer to pay monthly compensation of € 255 for the damage caused by the death of the victim as the plaintiff's breadwinner, from the date of the victim's death until the filing of the claim in October 2008, and a one-time compensation sum of € 5,400. The court of first instance dismissed the action. The circuit court agreed, finding that the plaintiff had not provided reliable evidence that the defendant had unlawfully caused the death of the victim, as the pulmonary embolism could have been caused by reasons other than the trauma sustained in the accident at work.

The Supreme Court overturned the circuit court's decision and explained that the courts had to examine whether the victim would still have been alive if the accident had not occurred. If the pulmonary artery thromboembolism would also have developed without the injuries caused by the accident, there would be no causal link between the victim's death and the injuries caused by the accident and thus the accident itself. In a case where the cause of death alternatively is injuries caused to the victim by the defendant or an event which is not linked with the actions of the defendant (eg victim's poor health), then, according to the Supreme Court, it is not in compliance with the principal of good faith for the plaintiff to be obliged to prove that the cause of damage was something other than the defendant's actions.

Therefore, in order to hold the defendant liable under tort law for causing bodily injury to another person and for causing the death of that person, the plaintiff must prove only the defendant's act – causing bodily injury – as the possible cause of the damage. In the event of competing causes of damage, the defendant must prove that their act was not the cause of death, ie that the cause of death was one of the alternative circumstances, to be released from the obligation to compensate the damage.

The above principle, according to which the burden of proof is reversed in cases of alternative causation in causing damage to health or

death, has become a general principle that the Supreme Court has also applied in subsequent decisions.[20]

In this court ruling, the Supreme Court, for the first time in the context of compensable damage, also clarified the protective purpose of the obligation or provision. The Law of Obligations Act (§ 127(2)) stipulates that damage is not compensable to the extent that the prevention of damage was not the purpose of the obligation or provision whose breach gave rise to the obligation to compensate the damage. The Supreme Court explained that, in the case of torts where the unlawfulness of the act arises from harmful consequences (§ 1045(1)1), 2), 3) and 5) LOA), the protective purpose of the provision is generally limited, within the meaning of § 127(2) of the LOA, by the relevant provisions of Chapter 7 of the LOA, which regulate the scope of compensation claims by type of violated legal object (§§ 129–132 LOA). This means that, in general, no other additional damage is subject to compensation. The purpose of contractual liability protection is also limited in the event of damage to the legal objects specified in these provisions in accordance with § 127(2) of the LOA, and damage must be compensated to the extent specified in these provisions, unless otherwise provided by contract or law.[21]

[20] See for example judgment of the Supreme Court of 3 October 2006 in civil case no 3-2-1-78-06 (at 13). In this judgment, it was found that if the claimant's health impairment could alternatively have been caused by medical malpractice or other circumstances (eg, his own health condition) for which the doctor is not responsible, a causal link between the medical malpractice and the damage must be presumed, ie the claimant does not have to prove that the other circumstance was not the cause of the damage. If the claimant's health damage and injury were caused by both medical malpractice and other circumstances for which the doctor is not responsible, this does not release the defendant from liability, as his actions also caused the injury. Thus, the burden of proof is reversed. The position that the victim's own violations do not preclude the liability of the party in breach has also been clarified by the Supreme Court, for example in its judgment of 27 June 2025 in civil case no 2-19-14759, at 12.6.

[21] The relevant positions of the Supreme Court have been discussed, for example, in the article by *T Tampuu/J Lahe*, Võlaõigusseadus I. Kommenteeritud väljaanne [Law of Obligations I. Commented Edition.] Comments on Chapter 7 of the Law of Obligations Act (2007) 5 Juridica 315 f. See also *E Kalev*, The Possibility of Compensation for Health Damage in Cases of Uncertain causes within the Victim's Sphere (2014) 21 JI 206 ff.

X. Finland

Päivi Korpisaari

The Finnish system of tort law operates on relatively clear and structured principles. The assessment begins with a determination of the type of damage sustained, after which Chapter (hereinafter: ch) 5 of the Tort Liability Act (TLA) is consulted to ascertain the conditions under which damage of that nature is compensable. Personal injuries and damage to property, for instance, are compensated on the basis of fault (negligence or intent), whereas the recovery of pure economic loss is subject to stricter requirements (see Supreme Court [*Korkein oikeus*, KKO] 2005:105 and KKO 2022:22 below). Such loss is compensable only if it has been caused by an act criminalised by law, in the exercise of public authority, or where exceptionally weighty reasons otherwise justify compensation. In addition, non-material damage in the form of mental anguish is governed by its own specific preconditions distinct from those applicable to bodily injury or property damage.

The Finnish tort law system is, when viewed in this form, relatively clear, yet it is also notably rigid and schematic in its operation. In judicial practice, this has occasionally led to outcomes regarded as disproportionate, which the legislature has subsequently sought to remedy through amendments to the TLA.

The introduction of compensation for non-material suffering payable to a close relative of a deceased person illustrates this development: the reform was adopted as a response to Supreme Court decision KKO 1991:146 (21 October 1991), which concerned a case in which a man had abducted and killed two eight-year-old girls and, after the homicides, burned the victims' bodies. The mothers' claims for compensation for the non-material suffering caused by the killings of their daughters was dismissed on the ground that such compensation lacked a statutory basis in the TLA. The mothers were not regarded as direct victims of the damage but were instead treated as third parties whose loss fell outside the scope of compensable injury. As will be shown by the Supreme Court judgment KKO 2004:3, discussed below, the preconditions for compensation still remain stringent, and the Supreme Court applies them in a strict and literal manner.

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Of the five cases selected for this book, cases KKO 2004:3, KKO 2005:105 and KKO 2022:21 exemplify a literal mode of interpretation, whereas cases KKO 2001:1 and KKO 2008:10 represent situations in which the Supreme Court has, instead of adhering to a traditional literal approach, applied the TLA by choosing – between two plausible interpretative alternatives – the option that is less strictly bound to the wording of the statute and earlier interpretative practice, and at the same time more favourable to the injured party.

1. KKO 2001:1, Supreme Court, 2 January 2001[1]

KKO 2001:1 concerned the liability of the owner of a commercial centre open to the public when a person visiting the property suffered harm.

Person A, a customer in the commercial centre owned by B Ltd, was injured when a glass pane made of tempered glass shattered and pieces of glass fell on them. The reason for the glass pane breaking was unknown. The case concerned the liability of the company which owned the property for the injuries caused to A.

The Supreme Court stated that the premises owned by the company were intended for the general use of customers and other people moving around the business centre. The company was obliged to ensure that the structures of the property did not pose a risk to the safety of people visiting the property.

The broken glass structure was made on behalf of B Ltd, which had also designed it. Even though similar glass was commonly used in these types of structures and the glass structure in question had been installed appropriately, one glass pane broke and fell. It was not established that a third party had broken it or that another external reason (such as an explosion or construction work nearby) for the breakage existed. The reason for the breakage was thus left unclear.

The Supreme Court stated that B Ltd had not shown that the breakage was caused by circumstances for which the company was not responsible. Consequently, the company was liable for the damage caused to A by the falling glass.

The case concerned the assessment of the basis of liability as well as the allocation of burden of proof. In previous case law, managers of public spaces had not been subject to strict liability. However, even prior to

[1] *J Norio-Timonen*, Finland, in: H Koziol/BC Steininger (eds), European Tort Law 2001 (2002) 176, nos 15–17.

the case in question, the required level of safety for such areas had been assessed quite strictly. The case law had placed a heightened duty of care on managers of such places. Within this framework, a stricter liability standard had been established, firstly, by setting high safety standards and, secondly, by imposing a burden of proof on managers of premises to evidence their diligent conduct. Usually, the burden of proof of negligence in these types of tort liability cases would be on the injured party.

This judgment demonstrates that the liability of an entity maintaining spaces open to the public is, by its nature, subject to a heightened standard of care. The judgment also indicates that uncertainty regarding the cause of the damage is to be assessed to the detriment of the person or the entity in a position of responsibility. In other words, if the reasons for the damage remain unclear, evidence of the general appropriateness of the responsible entity's conduct may not be sufficient to exempt it from liability. In order to be exempt from liability, it is required that the operator demonstrates that the damage was caused by circumstances falling outside of its sphere of responsibility and influence.

It is possible that the outcome of the decision was influenced by the fact that the injured party had suffered a personal injury since the compensation for such injuries is generally regarded as more significant than compensation for material or property damage. From a risk-allocation perspective, the owner of the business centre, as a large operator, is better able to internalise and spread the costs of the damage through insurance and rental income than an individual who could not have foreseen or prepared themselves for such an accident.

2. KKO 2004:3, Supreme Court, 15 January 2004[2]

KKO 2004:3 concerned the prerequisites for awarding compensation for anguish to a close relative of a deceased victim. The case involved an assessment of whether a five-month-old child could suffer such damage according to ch 5 sec 4a of the TLA.

In this case, a fatal act of violence was committed by an offender, who had intentionally killed the victim, and the victim's next of kin claimed compensation for the anguish caused by the death. Earlier domestic practice had been restrictive because, prior to the 1999 reform, legislation did not expressly recognise a relative's own right to be compensated for mental anguish.

[2] *S Hakalehto-Wainio*, Finland, in: H Koziol/BC Steininger (eds), European Tort Law 2004 (2005) 264, nos 12–17.

First, the Supreme Court stated that the TLA is based on the premise that liability for personal injuries, as a main rule, covers only damage suffered by the person immediately and directly injured as a result of the harmful event.[3] The compensability of damage incurred by another person rested on explicit special provisions. Such provisions were laid down in ch 5 secs 3, 4 and 4a of the TLA.

According to ch 5 sec 4a (61/1999), which was applicable in this case: 'The parents, children and spouse of a killed person and another comparable person particularly close to the killed person are entitled to damages for anguish arising from the death if the death was caused intentionally or through gross negligence and if awarding damages is deemed reasonable in view of the close relationship between the killed person and the person seeking the damages, the nature of the act, and other circumstances.'

The Supreme Court referred to a government bill[4] according to which the compensation referred to in the provision constitutes redress for the sudden loss of a close person and for anguish that is primarily comparable to grief and a sense of bereavement. The central purpose of this form of compensation was to facilitate the mourning process and to support the grieving person in coping with the unexpected alteration in life circumstances caused by the death of their loved one. The aim of the provision was therefore to enable reparation for the anguish experienced at the time of the death by an individual who was particularly close to the deceased victim. A claimant would not be required to present specific evidence demonstrating that such mental anguish had materialised. Rather, distress comparable to grief and a feeling of loss might, as a starting point, be presumed where the conditions laid down in that section for awarding compensation were fulfilled.

The issue to be assessed in the case was whether a five-month-old child could suffer such anguish as was referred to in ch 5 sec 4a of the Tort Liability Act.

The Supreme Court held that the loss of a parent due to death was capable of adversely affecting the development and emotional well-being of a young child. However, unlike in the legal systems of certain other countries, Finnish law did not proceed from the assumption that the loss

[3] HE 187/1973 vp, Hallituksen esitys Eduskunnalle vahingonkorvausta koskevaksi lainsäädännöksi [Government proposal to Parliament for legislation on damages] 13, 23.

[4] HE 116/1998 vp, Hallituksen esitys Eduskunnalle laiksi vahingonkorvauslain muuttamisesta [Government proposal to Parliament for an act amending the Tort Liability Act] 8, 10 f.

of a parent as such constitutes compensable damage. While a child is entitled to compensation for the loss of maintenance resulting from a parent's death, the detriment caused by the death to the child's emotional or psychological development had not, as such, been defined as compensable damage under Finnish law. Such harm resulting from the loss of a parent is also independent of the nature of the act by which the parent's death was caused. Accordingly, damage resulting per se from the loss of a parent was not to be compensated.

In addition, the Supreme Court stated that a five-month-old child was not capable of understanding the reasons leading to a parent's absence, nor could the adverse consequences resulting from that absence be presumed to be linked to the cause of the parent's death or to the nature of the act by which it was brought about. Where a child of such a young age experiences the loss of a parent, the resulting adverse effects were of a different nature from the anguish referred to in ch 5 sec 4a of the TLA.

Having regard to the content and purpose of the provision, liability for compensation could not – contrary to the approach taken by the lower courts – be based on the fact that knowledge of the father's death might, at a later stage, cause the child mental anguish. The claim for damages was therefore dismissed.

In a decision delivered on the same day, KKO 2004:2, the Supreme Court likewise dismissed a compensation claim brought on behalf of an 18-month-old child, which was based on the killing of the child's parent as excessive self-defence. Both decisions reflect an interpretation according to which the starting point is the non-compensability of damage, and any claim for compensation must always have an explicit legal basis.

These cases confirm that awarding compensation under ch 5 sec 4a of the TLA to a child requires that the child's level of development enables the experience of anguish that is temporally immediate and directly connected with the death.[5]

3. KKO 2005:105, Supreme Court, 29 September 2005

KKO 2005:105 outlined the conditions for compensating pure economic loss in the context of business competition.

[5] Other criteria concerning the compensability of mental anguish caused by the death of a close relative are discussed in *P Korpisaari*, Finland, in: E Karner/BC Steininger (eds), European Tort Law Yearbook 2023 (2024) 229, no 13 ff in connection with the Supreme Court judgment KKO 2023:85, ECLI:FI:KKO:2023:85 (ibid no 25 ff).

According to ch 5 sec 1, pure economic loss is a loss of economic value that is not connected to a personal injury or property damage. It is compensated where the damage was caused by an act punishable under the law or in the exercise of public authority, or where there are especially weighty reasons for compensation in other cases. As the mention of 'especially weighty reasons' was only included in the Tort Liability Act during the parliamentary process, no guidance on the interpretation of this phrase can be found from the preparatory works for the Act.

In the case at hand, Company R Ltd had placed a rake on the market during the spring of 1997. After the sales had commenced, industry leader F plc (public limited company, Oyj) sent a letter to the distributors of the rake imported by company R Ltd claiming that the product was in violation of design rights registered by F plc. The industry leader F plc argued that the shape and the colour of the rake's blade as well as the amount of the spikes on it were substantially similar to the protected design of the blade in the rake marketed by F plc. According to the statement in the letter, R Ltd thus sought to benefit from the good reputation which had been achieved by F plc, thereby using an unfair business practice. The company wrote that they monitor their design rights closely and warned that any violations of said rights following the receipt of the letter would be considered as intentional with the effect of greater compensation claims when compared to unintentional actions. The company forbade the distributors from continuing to market the products in question and claimed infringement of the exclusive right conferred by the Registered Designs Act[6]. The letter had been based on a report prepared by the patent office on behalf of F plc, and it had been signed by F plc's General Legal Counsel.

Sometime after this, F plc lost a design right infringement case against SRF Ltd, a distributor of rakes imported by R Ltd. The selling of the rakes was not considered to be contrary to good business practice nor otherwise inappropriate.

The recipients of the letter had decided to terminate the sales of the rake imported by R Ltd because of the contents of said letter. Thus, there was a causal link between the conduct of F plc and the decrease in sales of the rakes imported by R Ltd.

R Ltd demanded compensation for the damage it incurred in the form of the unpaid licence fees, the decline in the product sales, and the decrease in the value of their rake's trademark, arguing that the conduct of F plc constituted an unfair business practice.

[6] Mallioikeuslaki (221/1971).

The Court stated that the sending of the letters had, in principle, an acceptable purpose, as F plc had sought to defend itself against the suspected infringement of the design right. In addition, prior to sending the letters, F plc had obtained a patent attorney's statement supporting the existence of a violation.

As for the contents of the letters, the Court drew attention to the strict tone and to the fact that the statements about the sanctions threatening sellers were drastic and unconditional. However, when it was uncertain whether or not there had in fact been an infringement of a design right, there was no justification for presenting such strict prohibitions of, or warnings about, potential compensatory sanctions in the letters to the distributors. The Court stated that the tone of the letter and F plc's significant market position were also likely to give a false impression that the infringement had occurred.

Overall, the Supreme Court considered the procedure to be inappropriate, basing its position on the unreserved and threatening wording of the letters and on the fact that the letters were addressed to rake resellers. Sending similar letters to R Ltd might have been considered acceptable, since R Ltd could subsequently have independently decided on how they would respond to the demands presented in the letters. The chosen procedure, however, in a predictable way, led to the distributors being intimidated by the risk of F plc taking legal action against them and consequently they stopped selling the rakes. This in turn led to R Ltd losing its resale opportunities without being able to take a stand on how to react to F plc's claims.

In previous case law, the fact that an act is contrary to good practice has often been considered an especially weighty reason for compensating pure economic loss (see KKO 1991:79 and 1997:181). The court followed the previous practice and specified the conditions for the application of TLA ch 5 sec 1 as follows:

> 'If a person engages in intentional conduct in the course of their business that is contrary to good business practice or otherwise unfair, and thus contrary to the law, knowing that their conduct is likely to cause financial losses in the business of another, the fulfilment of the condition laid down in Chapter 5, Section 1 of the Tort Liability Act is, in principle, a question of circumstances that speak in favour of liability for damages. In these types of cases, specific counter-reasons must exist to avoid liability for damages.'

When compared to earlier case law, the statement by the Supreme Court includes a clearer ruling on the relationship between the violation

of good business practices and especially weighty reasons in accordance with TLA ch 5 sec 1. According to the judgment, these concepts are directly linked to each other, and thus compensation for pure economic loss can only be prevented on the basis of special counter-reasons if the conduct was contrary to good business practices.[7]

Private injunction claims are permissible, even if the violation is somewhat open to interpretation. However, the liability risks of the act increase if the injunction is directed against the distributors or other actors who are not the originators of the violation. It is likely that claims against the importer could be expressed in more straightforward and drastic terms compared to distributors of goods.

4. KKO 2008:10, Supreme Court, 8 February 2008

As described above, the Finnish system of tort law is clear but formalistic. Only damage mentioned by law will be compensated and only in the circumstances specified by law. In this case, there was no basis for liability in the law, but the State was nevertheless ordered to pay damages based on a violation of fundamental and human rights.

In the Finnish penal system, a person serving a fixed-term sentence of imprisonment is usually conditionally released once they have served two-thirds of their sentence.[8] This case concerned a situation in which the court sentenced A to a term of imprisonment while also ordering that he 'lose' the parole that had been granted from a previous prison sentence. However, A had already been detained in custody prior to the judgment of the court for such a long time that the amount of the prison sentence had already been served, taking into account that he would have been conditionally released after two-thirds of the sentence. However, provisions required that, since A had not been deprived of his liberty for the entire duration of his new sentence, he was required to go to prison, from where he would be immediately released on parole based on his new sentence.

A had been apprehended based on a warrant for the purpose of enforcing a prison sentence on 14 October 2004 in Helsinki. He was taken from the place of apprehension to his placement prison in another municipality

[7] See *M Hemmo*, KKO 2005:105, Perusteettomasta kieltovaatimuksesta johtuva korvausvastuu, in: P Timonen (ed), KKO:n ratkaisut kommentein II 2005 (2006), online in Alma Insights Verkkokirjahylly.

[8] According to Criminal Code ch 2C sec 5(1), 'Conditional release means the release of a prisoner sentenced to unconditional imprisonment so that they can serve the rest of their sentence in freedom.'

on 18 October 2004. There, the prison officials discovered that A had already served more than two-thirds of the prison sentence imposed on him and for this reason, the deputy prison warden released him on parole on the same day. The deprivation of his liberty had lasted for four days.

The lower courts had decided that A was entitled to damages for the anguish caused by the deprivation of his liberty under the Act on Compensation from State Funds for the Arrest or Detention of an Innocent Person (CSADA).[9] The State of Finland appealed to the Supreme Court against the decision of the court of appeal.

The Supreme Court stated that A was not entitled to compensation based on the aforementioned Act, since he was neither imprisoned as an innocent person nor met other conditions for compensation under the said Act.

Next, the Supreme Court examined the matter on the basis of the TLA. The Court stated that case law had been reticent about compensating anguish not based on an explicit provision of the law (see eg, KKO 1998:80). Then again, the government proposal for the Tort Liability Act showed that when the law was enacted, there had been no attempt to exhaustively regulate the general principles of liability for damage. For this reason, the Court was required to assess whether the legal environment affecting the compensability of anguish caused by deprivation of liberty had changed significantly since the TLA and CSADA were enacted in the 1970s.

The Supreme Court concluded that the anguish caused by deprivation of liberty could not be compensated based directly on the provisions of the TLA on the compensation of damage for anguish arising from a violation because the conditions laid down in the Act were not met. The Supreme Court then assessed the matter from the point of view of personal liberty and freedom guaranteed as a fundamental and human right. In this regard, the Court pointed out that even though the officials had acted in accordance with instructions and orders, compliance with them had led to A having been unjustifiably deprived of his liberty for four days.

The Supreme Court held that A had been deprived of his liberty due to negligence in the exercise of public authority in a way that could be considered a violation of his fundamental right to personal freedom. He was, therefore, entitled to a legal remedy allowing him compensation for the infringement. Thus, the Court found that A was entitled to compensation for the anguish caused by the deprivation of his liberty.

[9] Laki syyttömästi vangitulle tai tuomitulle valtion varoista vapauden menetyksen johdosta maksettavasta korvauksesta (422/1974).

The ambiguity of the case is illustrated by the fact that two of the five judges would have rejected the claim, and one would have awarded compensation on the basis of the TLA.

The legal principle emerging from the case was that the anguish caused by the unjustified deprivation of liberty had to be compensated from State funds, even though the procedure was formally in accordance with regulations and instructions. The Supreme Court reached the decision by relying on fundamental and human rights.[10]

5. KKO 2022:21, Supreme Court, 1 April 2022

Public authorities are subject to an elevated duty of care regarding the accuracy of the advice they provide. Where advice is sufficiently precise, it may amount to the exercise of public power, in which case pure economic loss is compensable under ch 5 sec 1 of the TLA. This principle was clarified and reinforced in KKO 2022:21, which illustrates the far-reaching nature of public liability for negligent advice.[11]

In this case, a municipality had provided – in line with the Disability Services Act12 – a severely disabled person with written guidance concerning the employment of a personal assistant. The instructions stated that an employee's group life insurance was voluntary. A collective agreement making such insurance mandatory entered into force later during the employment relationship. The municipality failed to update its guidance or inform the employer of the change. After the assistant's death, her heir claimed compensation corresponding to the unpaid insurance benefit.

The claim was based on ch 3 sec 2 of the TLA, pursuant to which a public authority is liable for damage caused by an error or negligence in the exercise of public power where the requirements reasonably set for the performance of the activity or task, taking into account its nature and purpose, have not been met. The Supreme Court first held that the municipality had breached its statutory duty to advise under the Disability Services Act by failing to provide correct and up-to-date information on the applicable collective agreement.

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[10] See also *S Hakalehto-Wainio*, Finland, in: H Koziol/ BC Steininger (eds), European Tort Law 2008 (2009) 256, no 17 ff.

[11] See also *P Korpisaari*, Finland, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 201, nos 28–42 (in connection with the Supreme Court judgment KKO 2022:21, ECLI:FI:KKO:2021:21).

[12] Vammaispalvelulaki (380/1987).

The Court further held that the duty to advise was closely connected to the municipality's obligation to organise personal assistance and therefore constituted the exercise of public power within the meaning of ch 3 sec 2(1) of the TLA. As the damage consisted of pure economic loss, liability depended on whether the negligence occurred in the exercise of public power, a question which the Court answered in the affirmative. The municipality had not complied with the standards reasonably required under ch 3 sec 2(2) of the TLA as it had failed to revise its guidance following a significant legal change.

With regard to causation, the Court found it plausible that the employer would have taken out group life insurance had correct advice been provided. Given that the personal assistance was free of charge for the disabled person and that employment costs were ultimately borne by the municipality, it was foreseeable that incorrect guidance could result in the absence of insurance coverage and consequent financial loss to the employee's relatives. The municipality's negligence was, therefore, causally linked to the damage suffered.

The Supreme Court held the municipality liable for the claimed loss under ch 5 sec 1 of the TLA, with liability shared with the employer in the parallel decision KKO 2022:22. The judgment strengthens the protection of legitimate expectations by confirming that individuals are entitled to rely on the correctness of legal advice provided by authorities within their own field of competence, and that high standards of accuracy may justifiably be imposed on public authorities when advisory functions are closely linked to statutory duties.

XI. France

Jonas Knetsch

Looking back on 25 years of tort-related case law is not only a way to celebrate the accomplishments of both the European Centre of Tort and Insurance Law and the Institute for European Tort Law, but also to assess the legal developments during a pivotal period for the private law in France. In 2004, the French authorities celebrated with much fanfare the bicentennial of the *Code civil*, triggering new impetus for a reform of its law of obligations, which had remained almost unchanged for the previous 200 years. While the law of contracts and the general part of the law of obligations underwent a comprehensive reform in 2016, the provisions on civil liability (*responsabilité civile*) are still waiting for legislative review. Unfortunately, one cannot help but notice that the 2017 draft project presented by the Ministry of Justice is comfortably sitting on the shelf collecting dust.[1]

The reform project being at a dead end and despite three one-off amendments, adopted in 2024 and 2025, to the tort law provisions of the Civil Code,[2] it is all the more important to present the case law developments of the last quarter-century. The concise nature of the French legislative framework is well-known among comparative lawyers and, in France, it has always been the courts, and above all the *Cour de cassation*, which have been the creative forces of tort law.[3]

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[1] For a comprehensive survey of the reform plans, see *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2016 (2017) 191, nos 13–21; *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 187, nos 1–8; *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 186, nos 1–5; *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 178, nos 1–5; *J Knetsch*, France, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 174, no 1 f. See also the collective work of *JS Borghetti/S Whittaker* (eds), French Civil Liability in Comparative Perspective (2019), which presents in Annex a translation in English of the 2017 Draft (479–502).

[2] For a commentary on the 2024 amendment on 'troubles de voisinage', see *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2024 (2025) 174, nos 1–5; as for the 2025 amendments on 'sanction civile' and parental liability, see *J Knetsch/Z Jacquemin*, France, in: E Karner/BC Steininger (eds), ETL 2025 (forthcoming).

[3] See already *R David*, The Civil Code in France To-Day (1974) 34 Louisiana Law Review 907–919, at 911.

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Below is a selection, a subjective one, of important cases which contributed to amend and even reshape the rules on civil liability in several respects: the relationship between contractual and extra-contractual liability, liability for the acts of others, causation, scope of reparable losses, interplay with labour law. It may be noted that three out of the five cases, presented here, concern personal injury claims. This is hardly surprising. One of the characteristic features of French tort law is the prevalence of the compensation for personal injury (*dommage corporel*), which has always been the chosen field for legal innovations and policy changes.[4]

1. Cour de Cassation (Cass), Labour Chamber (Soc), 28 February 2002, No 00-11793

The Curious Case of the Employer's *Faute Inexcusable*. It is merely fortuitous and due to the chronology of events that the first case selected for this book concerns an issue of tort law which, despite its practical importance, is often overlooked: the interplay between tort law and labour law and, in particular, the civil liability of employers vis-à-vis their employees for work-related damage. In 2002, the Labour Chamber of the *Cour de cassation* decided to perform a genuine revolution in theory and practice in the field of civil liability applied to occupational safety.

In 30 distinct, yet related cases, employees (or their surviving descendants) filed compensation claims against their employers on the grounds that they had been exposed to asbestos during their employment. They argued that the employers were liable on the grounds of *faute inexcusable*, that is a specific form of gross negligence, which, in accordance with the legislation on work-related accidents and diseases, determines the amount of social security benefits. Indeed, in case the employer's conduct amounts to an 'inexcusable fault', employees are entitled to an increased pension and to additional benefits for the compensation of non-pecuniary loss, paid by the health insurance fund (*caisse d'assurance maladie*), but funded by the employer. Although the French Social Security Code bars a classic compensation claim in tort against the employer,[5] it allows claims

[4] On the prevalence of personal injury and, more largely, of damage to persons ('atteintes aux personnes') in the scholarly debate on tort law in France, see *J Knetsch*, L'influence du droit des personnes sur la responsabilité civile: une révolution silencieuse? in: B Teyssié (ed), Les métamorphoses du droit des personnes (2023) 401.

[5] For a presentation in English of the French compensation regime for work-related accidents and diseases, see *F G'sell/I Veillard*, France, in: K Oliphant/G Wagner (eds), Employers' Liability and Workers' Compensation (2012) 203.

for additional benefits that are not completely separated from the rationale of civil liability and, in particular, of liability based on fault.

In its 2002 judgments,[6] the Labour Chamber redefined the scope of the employer's *obligation de sécurité*, holding that 'under the terms of the employment contract binding them to their employees, employers are bound to an *obligation de sécurité de résultat*' and that 'a breach of this obligation constitutes a *faute inexcusable* if employers were, or should have been, aware of the danger to which their employees were exposed and failed to take the necessary measures to protect them'. While employees previously had to demonstrate an 'error of exceptional seriousness', as defined in a case dating back to 1941,[7] the Court of Cassation decided in 2002 to hold employers liable for not having *guaranteed* their employees' safety, making it considerably easier to obtain a more generous compensation for occupational accidents or diseases than the fairly low lump-sum benefits provided for in the Social Security Code.

With hindsight,[8] the 2002 'asbestos cases' have resulted in two major legal developments at the intersection of tort and labour law.

First, the cases triggered a wide-ranging debate on the appropriateness of the occupational injuries compensation scheme, which dates back to an Act of 1898.[9] More and more voices are speaking up for a comprehensive reform of the scheme, arguing that victims of workplace accidents and occupational diseases are subject to discrimination as compared to other categories of victims of bodily injuries, for example in the case of traffic accidents or terror acts.[10] Despite the enactment of a specific compensation regime for asbestos-related diseases, the statutory developments over the last decades have made this unequal treatment even more visible.

Second, the recognition of the employer's *obligation de sécurité* has provoked a new field of litigation arising from employees who invoke

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[6] Commented on, in English, by *P Brun*, France, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 179, nos 97–99; see also *G'sell/Veillard* (fn 5) 241–243.

[7] Cass, Chambres réunies, 15 juillet 1941, Veuve Villa.

[8] For a detailed assessment of the aftermath of the 2002 cases, see *D Serre/M Keim-Bagot/X Aumeran*, Les accidents du travail et les maladies professionnelles sur la scène judiciaire (2022) 228–325.

[9] The debate is even more intense, as legislation and case law on the assessment of benefits in the case of *faute inexcusable* have undergone significant changes over the last five years. See eg *D Asquinazi-Bailleux*, L'indemnisation des victimes d'accidents du travail ou de maladies professionnelles: dernier épisode de la saga de la rente, Bulletin Joly Travail 2025, no 5, 56–60.

[10] On the different fund-based compensation regimes under French law, see *J Knetsch*, Tort Law in France (2nd edn 2025) nos 207–211.

'new' forms of suffering at work, such as sexual or moral harassment, not recognised in the occupational disease tables (*tableaux des maladies professionnelles*). Surprisingly, while the ousting of tort law was long considered as an achievement for the benefit of employees, fault-based civil liability is now regaining its vigour in work-related litigation for damages.[11]

2. Cass, Assemblée Plénière (Ass Plén), 6 October 2006, No 05-13255

Reassessing the Grey Zone Between Tort and Contract. Regardless of the legal system, the liability of contracting parties towards third parties is always a major source of complexity when it comes to delineating the boundary between tort and contract.[12] In the famous *Bootshop/Myr'Ho* case of 2006,[13] a commercial building had been leased to a company called Myr'Ho, which then sublet it to another company named Bootshop. Arguing that the owners were not maintaining the building as they should, Bootshop filed a compensation claim against them on the grounds of extra-contractual liability. The Court of Cassation sitting in full bench (*assemblée plénière*) decided that 'if the non-performance of a contractual obligation causes a loss to a third party, the contractual failing (*inexécution contractuelle*) may be invoked by the defendant as the legal grounds for a compensation claim in tort without further proof of fault under Article 1240 Civil Code'. In other words, a breach of contract is regarded *per se* as a source of liability for the contracting party vis-à-vis a third party.

While the interplay between contract and tort had always given rise to debate among French tort law scholars, the *Bootshop/Myr'Ho* case met with massive opposition from both practitioners and scholars.[14] The

[11] For an assessment of those 'blind spots' of the compensation regime for work-related accidents and diseases, see, for example, *M Keim-Bagot*, Faut-il élargir le champ des maladies professionnelles? Droit social 2017, 929–934.

[12] *M Martín-Casals* (ed), The Borderlines of Tort Law: Interactions with Contract Law (2019).

[13] Presented in English by *O Moréteau*, France, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 196, nos 32–41. See also *JS Borghetti*, Breach of Contract and Liability to Third Parties in French Law: How to Break the Deadlock? Zeitschrift für Europäisches Privatrecht (ZEuP) 2010, 279–303.

[14] See *P Stoffel-Munck*, Liability of Contracting Parties Towards Third Parties, in: JS Borghetti/S Whittaker (eds), French Civil Liability in Comparative Perspective (2019) 55–76. For a summary of the scholarly reactions to the *Bootshop/Myr'Ho* case, see also *H Capitant/F Terré/Y Lequette/F Chénedé*, Les grands arrêts de la jurisprudence civile, vol 2 (14th edn 2024) 322–343.

comments were critical of two different aspects of the solution. First, the case was analysed as being in clear contradiction with the doctrine of privity of contracts, known under French law as the *effet relatif des contrats*. There had been a common understanding that the doctrine of privity was mitigated by the contract's *opposabilité*, which allows third parties to 'oppose' a situation arising from the contractual performance (or non-performance) as a *fait social*.[15] However, the doctrine of *opposabilité* had always been received in the sense that only contractual conduct qualifying as an extra-contractual *faute* entitles third parties to damages in tort. With the *Bootshop/Myr'Ho* case, the Court of Cassation allows third parties to invoke the non-performance of a contractual duty without any proof of the violation of a general duty. The maintenance of the premises (in particular, the building entrance and a service lift) was, indeed, due only to the commercial tenant and not to anyone else.

A second point of criticism was a more practical one. The solution arising from the *Bootshop/Myr'Ho* case affects the legitimate expectations of contracting parties, as exemption or limitation clauses do not apply to the action in tort brought by the third party. One can imagine, for example, that the owner agrees to rent a building for a nominal rent, asking the tenant to agree to an exemption clause that bars claims for damages in the case of lack of maintenance. In that context, considering that a breach of contract could be 'as such' a source of liability for the contracting party vis-à-vis others means that third parties are disproportionately privileged. They are entitled to invoke contractual terms to establish *faute* without being bound to clauses specifically designed to shape the scope of liability.

Despite massive criticism, the Court of Cassation decided, 14 years later, in the *Bois Rouge* case to maintain this solution.[16] In this judgment, also given by the *assemblée plénière*, it was reasserted that 'if the non-performance of a contractual obligation causes a loss to a third party, it qualifies as a *fait illicite*'. Thus, in order to not 'hinder the compensation of this loss … the third party that proves causation between the contractual failing and its loss is not required to establish an extra-contractual fault distinct (*faute délictuelle ou quasi délictuelle*) from this failing'. While this case has an extended motivation according to the drafting style

[15] On the 'opposabilité' doctrine under French law, see *J Bell/S Boyron/S Whittaker*, Principles of French Law (2nd edn 2008) 335–340.

[16] Cass Ass plén, 13 January 2020, no 17-19963, presented by *Knetsch/Jacquemin*, ETL 2020 (fn 1) nos 16–22.

adopted by the Court of Cassation,[17] it raised a new blaze of criticism with commentators denouncing the 'ideological dimension'[18] of this reassertion and its 'simplistic'[19] grounds.

Clearly, the *Bootshop/Myr'Ho* and *Bois Rouge* cases have always faced resistance, even among the Court of Cassation judges, in particular within the Third Civil Chamber and the Commercial Chamber. In its latest act of defiance, the Commercial Chamber decided in 2024,[20] in reaction to the criticism, that 'in order not to defy the expectations of the debtor who has committed himself in consideration of the general scheme of the contract and not to confer on the third party who invokes the contract a more advantageous position than that which the creditor himself can claim, the third party to a contract which invokes, on the basis of tort liability, a contractual breach which caused it damage may be subject to the conditions and limits of liability which apply in the relations between the contracting parties'. For now, it is not certain whether the other chambers of the Court of Cassation will endorse this adjustment or whether the Commercial Chamber only took the initiative to launch a trial balloon, the wording of which is close to what the 2017 Draft Reform suggested on this issue.[21]

3. Cass, First Civil Chamber (Civ 1), 22 May 2008, Nos 05-20317 and 06-10967

Scientific Causation v Legal Causation in Product Liability Cases. One of the thorniest difficulties in product liability litigation is related to the assessment of the causal link between the product's defectiveness and the damage. Unsurprisingly, this has been one of the key issues during the review process of the European product liability rules. While art 4 of the 1985 Directive states that 'the injured person shall be required to prove the

[17] See *D Fairgrieve/F Lichère*, Style and Form of Judgments in France, in: M Heidemann (ed), The Transformation of Private Law – Principles of Contract and Tort as European and International Law (2024) 99–124.

[18] *M Mekki*, Dorénavant on fera comme d'habitude! La Semaine Juridique Édition générale (JCP G) 2020, 167–171.

[19] *JS Borghetti*, Responsabilité des contractants à l'égard des tiers: pas de pitié pour les débiteurs! Recueil Dalloz 2020, 416–425.

[20] Cass, Chambre commerciale (Com), 3 July 2024, no 21–14947, presented in ETL 2024 by *Knetsch/Jacquemin* (fn 2) nos 19–27. See also the more detailed case note from a comparative point of view by *J Knetsch*, Haftung der Vertragsparteien gegenüber Dritten in Frankreich: Ist der gordische Knoten endlich gelöst? ZEuP 2025, 868–880.

[21] *Stoffel-Munck* (fn 14) 71–76.

damage, the defect and the causal relationship between defect and damage', the revised 2024 Directive implements new rules on evidence.[22] Among the most important innovations, art 10 introduces a series of presumptions for the proof of defectiveness and causation. According to art 10(3), national courts are entitled to presume 'the causal link between defectiveness of the product and the damage … where it has been established that the product is defective and that the damage caused is of a kind typically consistent with the defect in question'. When looking closely at the origins of this provision, it turns out that it provides the EU product liability regime with a certain *touche française*, as it reiterates the French case law. Already in 2008, the Court of Cassation allowed presumptions for the demonstration of the causal link between defectiveness and damage.

The 2008 cases reported here[23] are part of the broader context of product liability litigation between pharmaceutical manufacturers and patients considering themselves to be affected by a drug. In the present cases, the claimants sued the French pharmaceutical company Sanofi Pasteur in order to receive compensation for damage resulting from multiple sclerosis allegedly caused by their vaccination against hepatitis B. The Court of Appeal held that 'no one can currently explain how this vaccination could cause this disease (and) that this finding precludes any presumption, no statistical link nor sufficient probability of a causal link having been demonstrated'. In its judgments of 22 May 2008, the Court of Cassation changed its position. Quashing the Court of Appeal judgments, the First Civil Chamber argued that the appeal judges had followed 'a probabilistic approach based exclusively on the lack of scientific and statistical link between the vaccination and the development of the disease', whereas they should have considered whether the facts of the case allowed for a presumption that the vaccine had caused the claimants' disease.

As the trial courts were implementing this new solution, the stance taken by the Court of Cassation, originally acclaimed by both patients' associations and personal injury lawyers, has increasingly given way to a certain disenchantment. During the following years, courts adopted different approaches to the issue of causation between allegedly defective drugs and a patient's serious health condition. In cases presenting similar

[22] On these provisions, see for example *G Howells/D Fairgrieve*, The New Product Liability Directive: Steadily Expanding Liability or Business as Usual? (2025) 33 European Review of Private Law (ERPL) 2025, 549, nos 43–50.

[23] Commented on by *O Moréteau*, France, in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 264, nos 24–26. For a more detailed presentation in English, see *JS Borghetti*, Litigation on hepatitis B vaccination and demyelinating diseases in France, in: M Martín-Casals/DM Papayannis (eds), Uncertain Causation in Tort Law (2015) 11–42.

patterns, in some cases they decided to acknowledge causation, in others to reject the proof of a causal link, with the Court of Cassation refusing to review the assessment of facts by the trial judges (*pouvoir d'appréciation souveraine des juges du fond*). This 'trial lottery' being regularly denounced by tort law scholars, it has been suggested that the Court of Cassation follow in the footsteps of the *Conseil d'État*, the French Supreme Court with jurisdiction to decide State liability cases.[24] Indeed, the *Conseil d'État* specified the elements which entitle claimants to a presumption of the causal link. However, despite the criticism, the Court of Cassation has maintained its position for now, perhaps due to the fear of non-compliance with EU law.

Indeed, this concern led the First Civil Chamber of the Court of Cassation to apply to the European Court of Justice (ECJ) for a preliminary ruling on the question of whether the presumption of causation complies with the 1985 Directive. In its *Sanofi Pasteur* case of 2017,[25] the ECJ held that presumptions of both causation and defectiveness were in line with the 1985 Product Liability Directive insofar as 'certain factual evidence relied on by the applicant constitutes serious, specific and consistent evidence'. The Court made clear, however, that 'national courts must (…) ensure that their specific application of those evidentiary rules does not result in the burden of proof introduced by art 4 (of the 1985 Directive) being disregarded', thus validating only presumptions on a case-by-case approach.

The *travaux préparatoires* of the 2024 Product Liability Directive clearly indicate that the judge-made presumption of defectiveness and causation, enshrined in art 10(3), has been considered by the drafters as a mere codification of the ECJ case law.[26] Will the future of causation in the field of EU product liability be a French one and, if so, with all related uncertainties?

4. Cass, Criminal Chamber (Crim), 25 September 2012, No 10-82938

Recognition of Pure Ecological Harm. As in other fields of law, some major legal developments in tort law in France are closely related to scandals, which are increasingly considered as a significant factor for

[24] *Borghetti* (fn 23) 25–27 with further references.

[25] On this ECJ case law, see *T Verheyen*, Full Harmonization, Consumer Protection and Products Liability: A Fresh Reading of the Case Law of the ECJ (2018) 26 ERPL 119; *M Rizzi*, A Dangerous Method: Correlations and Proof of Causation in Vaccine Related Injuries (2018) 9 Journal of European Tort Law (JETL) 289.

[26] *European Economic and Social Committee*, Opinion: Revision of the Product Liability Directive, INT/1002, no 4.8.

legal reforms.[27] This is the case for the acknowledgement of the existence of 'pure ecological harm' (*préjudice écologique pur*), eligible to compensation under French law. Without the sinking of the old single-hull oil tanker Erika off the Britanny coast in December 1999, the Court of Cassation would never have taken the step towards the implementation of the environmental dimension of the law of damages.

In the present case,[28] the State, a number of local authorities, associations and individuals initiated criminal proceedings, together with claims for damages by means of an *action civile*, against Total (the French multinational oil company, which owned the cargo), the carrier and other protagonists of the catastrophe. With 15,000 tonnes of heavy fuel oil being spilt into the Atlantic Ocean, the sinking of the Erika polluted wide stretches of the coastline and oiled thousands of seabirds and provoked more damage to the environment itself than to individual losses to (human) health or property. The Paris court of first instance found the ship owner as well as Total guilty and civilly liable. A total of € 165 million was awarded to a wide range of victims, including an amount to compensate for 'damage resulting from harm to the environment' as separate from harm to property. Both the Paris Court of Appeal and the Court of Cassation confirmed this solution and, thus, sanctioned the existence of *préjudice écologique pur* under French tort law.

Recognising the importance of this case law development and taking up the proposals of several reports, Parliament decided to enact new legislation laying the foundation of a general and genuine environmental civil liability. However, the wide scope of the proposal was not to the liking of the government, which feared an excessive burden on industry. Instead, it was considered preferable to add a series of provisions governing redress for ecological harm to the Act on Biodiversity, which entered into force on 10 August 2016.[29] According to arts 1246–1252 Civil Code, an action

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[27] On the issue of scandals and their legal aftermath, see, for example, in the field of corporate law, *H Fleischer*, Unternehmensrechtliche Skandalforschung: Ein Primer, Zeitschrift für Wirtschaftsrecht (ZWiR) 2025, 1699–1709.

[28] Presented by *O Moréteau/AD On*, France, in: ETL 2012 (2013) 229, nos 48–55. See also in English *D Papadopoulou*, The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of Erika (2009) 21 Journal of Environmental Law 87.

[29] For a commentary on this legislation in English, see *S Taylor*, Extending the Boundaries of Tort Law: Ecological Harm in the French Civil Code (2018) 9 JETL 81–103; *J Foulon*, Recent Developments in French Environmental Law: Recognition and Implementation of Ecological Damage in French Tort Law (2019) 21 Environmental Law Review 309–317. See also *Knetsch/Jacquemin*, ETL 2017 (fn 1) nos 4–8.

to 'repair ecological harm' is now open to the State, the French agency for the environment, local authorities and environmental protection associations, but unlike in the *Erika* case, priority was given to 'reparation in kind' (*réparation en nature*) as a remedy for ecological harm rather than to monetary compensation. Only if it is impossible to remedy the environmental harm will the judge be able to make an order for damages.

There is no doubt that these rules have provided a more secure legal framework for environmental litigation by giving public authorities and associations more leeway to enforce environmental standards. However, the 2016 Act on Biodiversity failed to implement a specific liability regime for environmental harm since the provisions in arts 1246–1252 Civil Code only apply to the consequences of liability and not to the assessment of whether there is an action in tort or not. To that extent, the general rules on civil liability, whether strict or fault-based, remain applicable.

While the legal framework on the compensation for pure ecological loss still raises several issues, such as the appropriate legal instrument to guarantee priority to the reparation in kind (monitoring of the allocation of damages, establishment of a dedicated trust [*fiducie*]…),[30] it is important to recognise that arts 1246–1252 Civil Code have been a key factor in the development of climate change litigation before French administrative courts. Against all expectations, the administrative courts have decided to apply the provisions, initially designed for proceedings before civil courts, to cases in which the liability of the State is raised by individuals exasperated by allegedly insufficient environmental policy decisions.[31]

5. Cass, Ass Plén, 28 June 2024, No 22-84760

Rewriting the Requirements of Parental Liability. For almost 200 years, French tort law has imposed on parents liability based upon a presumption of fault (*présomption de faute*).[32] According to art 1242(7)

[30] On these issues, see the collective work by *J Rochfeld/B Parance* (eds), Les grandes notions de responsabilité civile à l'aune des mutations environnementales (2024) 109–204.

[31] For a detailed assessment, see in English *M Torre-Schaub*, Climate Change Risk and Climate Justice in France: The High Administrative Court as Janus or Prometheus? (2023) 14 European Journal of Risk Regulation 213–227 and *eadem*, Climate Change Litigation in France: New Perspectives and Trends, in: I Alogna/C Bakker/JP Gauci (eds), Climate Change Litigation: Global Perspectives (2021) 124–142.

[32] For a presentation in English of the development of parental liability under French law, see *P Giliker*, Vicarious Liability in Tort: Comparative Perspectives (2010) 213–217 and, *eadem*, Parental Liability for Harm Caused by Children: A Comparative

Civil Code, parents are liable towards a third-party victim unless they can 'prove that they could not have prevented the act which gave rise to that liability'. In practical terms, the defendants had to establish that the damage caused by the child was not due to a lack of supervision or education (*faute de surveillance* or *faute d'éducation*). From the 1960s to the early 2000s, parental liability progressively shifted from a fault-based regime to a super-strict liability, subject only to the defences of force majeure and contributory fault.[33] The reason for this spectacular drift, without any change in the wording of relevant provisions of the Civil Code, does not only lie in the difficulties in upholding a consistent approach to the *faute de surveillance ou d'éducation* test but also more generally to evolutions in French society. Harm caused by children is no longer considered as an ordinary risk of life by a large part of the population but as a loss which cannot remain uncompensated, especially when their parents are covered by third-party liability insurance (which nowadays is generally the case).

The shift towards a strict liability regime is also evident when it comes to the requirement of *cohabitation*. In its original version dating back to 1804, art 1242(4) Civil Code provided that parents are 'liable for the damage caused by their minor children *who live with them*'.[34] The proof of cohabitation was particularly important under a fault-based parental liability regime since the courts had to determine whether the defendant(s) had properly supervised their child, something that is only possible when there is physical proximity between them. Over the years, the cohabitation test had progressively become less and less consistent. French courts were increasingly considering that it should be sufficient that the child 'usually lived' with their parents, a standard very widely interpreted by the judges.

In light of these case law developments, the cohabitation requirement was seen by many authors as a purely 'virtual' one, an assessment which was finally endorsed, in 2024, by the Court of Cassation, sitting in *assemblée plénière*.[35] A 14-year-old boy had been found guilty of setting fire to different plots of woodland on 17 occasions. The owners of the burned land claimed compensation from both parents of the child, although the parents were divorced and the child lived permanently with his mother

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Analysis, in: R Probert/S Gilmore/J Herring (eds), Responsible Parents and Parental Responsibility (2009) 335–352.

[33] On the case law developments, see also in English *L Francoz-Terminal/F Lafay/O Moréteau/C Pellerin-Rugliano*, Children as Tortfeasors under French Law, in: M Martín-Casals (ed), Children in Tort Law, vol 1 (2006) 169–215.

[34] Emphasis added by the author.

[35] Presented by *Knetsch/Jacquemin*, ETL 2024 (fn 2) nos 12–18.

alone. The outcome of the *cohabitation* test was of the upmost importance for the mother, as the coverage limit of her insurance policy was € 1 million only, leaving her to compensate the victims for the remainder. She therefore decided to bring the case before the Court of Cassation, so as not to bear the share of the compensation not covered by her insurance alone.

The Court decided to abandon its previous interpretation of art 1242(4) Civil Code. According to the case, 'from now on, the notion of cohabitation is to be interpreted as the consequence of the joint exercise of parental authority'. This means that '(the) cohabitation (of parents) with a minor child over whom they jointly exercise parental authority only ceases when administrative or judicial decisions entrust the minor to a third party'. As a result, cohabitation is directly inferred from parental authority so that even in cases in which a child lives with one parent exclusively, *both* parents will bear civil liability, a solution well received in scholarship. For years, both practitioners and scholars had been arguing that it was inequitable that the cohabitation test may lead to the consequence that only the parent with whom the child resides was subject to parental liability while the other parent (in most cases, the father) could escape civil liability.

The 2025 Juvenile Offenders Accountability Act enshrined this new position, providing another illustration of case law-driven legislation in the field of French tort law.[36] Since 25 June 2025, art 1242(4) Civil Code now reads that 'parents, insofar as they exercise parental authority, are jointly and severally liable for the damage caused by their minor children, except where the children have been entrusted to a third party by an administrative act or a court decision'. The removal of the cohabitation test can thus be seen as a collaborative effort of the Court of Cassation and French lawmakers.[37]

[36] On this legislation, see, *JS Borghetti*, Autorité parentale et responsabilité du fait d'autrui, Droit de la famille 2025, dossier no 5.

[37] For a broader analysis of this issue, see *E Steiner* (ed), Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions (2015).

XII. Germany

Jens Kleinschmidt and Wolfgang Wurmnest

Selecting five cases among the rich German case law is a difficult, if not impossible task, and readers may easily wonder why we have left out a particular case. We believe, however, that the five landmark cases presented below are not only important for their contribution to the law of delict but reflect changes in legal or social norms, in the procedural landscape or in legal policy and therefore offer a perspective that extends beyond doctrinal developments. We have kept references in footnotes to a minimum. Readers are kindly referred to the respective reports in the Yearbooks on European Tort Law for details.

1. ECtHR 24 June 2004, no 59320/00 (*Caroline von Hannover v Germany*)[1]

The first landmark case is actually a set of cases initiated by Princess Caroline of Monaco (who later became Caroline von Hannover by marriage). Since the 1990s, she sued publishers of the yellow press to protect the privacy of herself and of her family. The yellow press had published private information and unauthorised photographic material. In the course of the various lawsuits, the balance between the freedom of the press and the protection of privacy shifted significantly towards the latter.

A first important decision was already handed down in 1994. The *Bundesgerichtshof* (BGH) ruled that if the yellow press intentionally violates the 'general right to personality' (*allgemeines Persönlichkeitsrecht*) of a person to generate more profit through increased sales, the principle of prevention requires that the calculation of the amount of monetary compensation takes into account that the infringer intended to maximise profits by infringing the law. Even though in cases of such a 'ruthless commercialisation' the *Bundesgerichtshof* did not call for proper

[1] European Court of Human Rights (ECtHR) Neue Juristische Wochenschrift (NJW) 2004, 2647 = European Tort Law (ETL) 2004 (2005) 300, no 11 ff (*J Fedtke*); Federal Court of Justice (Bundesgerichtshof, BGH) 28 September 2004 – VI ZR 305/03, NJW 2005, 56 – Charlotte Casiraghi II = ETL 2004 (2005) 300, no 18 ff (*J Fedtke*).

https://doi.org/10.1553/978OEAW51463-Germany

'disgorgement of profits', it made clear that the amount of monetary compensation must 'have a genuine deterrent effect',[2] which blurs the line between compensatory damages and punitive damages (which are alien to German tort law) and also the line between tort law and the law of unjust enrichment. As a consequence, in 1996, the Higher Regional Court (*Oberlandesgericht*, OLG) Hamburg awarded Caroline the sum of DM 180,000 (€ 92,000) for unlawful publication of false information and unauthorised photographic material.[3] At that time, this was a very high amount for an infringement of personality rights by the press.

In addition to the increased sums awarded by courts to remedy blatant violations of personality rights, the lawsuits initiated by Caroline led to a much broader protection of privacy. Under German law, infringements of personality rights have to be balanced, inter alia, with the rights of the press to inform the general public. Courts had ruled that so-called 'absolute persons of contemporary interest' (*absolute Personen der Zeitgeschichte*) enjoy less protection against the taking of photos or videos when they act in public areas that cannot be qualified as secluded zones (*örtlich abgeschiedene Bereiche*). Put simply, German courts were of the opinion that absolute persons of contemporary interest, which may include celebrities that do not hold a public office, must accept that they are photographed when they appear in public even while pursuing everyday activities. An exception applied for secluded zones, ie public areas that are well shielded against outside views, as even exposed persons may expect privacy in such areas. The publication of certain photos of Caroline was therefore considered as lawful by the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG).[4]

To overcome the German approach, Caroline lodged an application with the European Court of Human Rights in Strasbourg. She invoked a violation of art 8 of the European Convention on Human Rights (ECHR), according to which everyone has the right to respect for his private and family life, his home and his correspondence. The European Court held that the decision of the *Bundesverfassungsgericht* to deny monetary compensation for photos of Caroline that were taken when she was in the public sphere – for example, while she was shopping, doing sports, cycling or visiting a beach club – infringed art 8 ECHR.[5]

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[2] BGH 15 November 1994 – VI ZR 56/94, NJW 1995, 861, 865 – Caroline von Monaco.

[3] OLG Hamburg 25 July 1996 – 3 U 60/93, NJW 1996, 2870 – Caroline von Monaco.

[4] BVerfG 15 December 1999 – 1 BvR 653/96, NJW 2000, 1021 – Caroline von Monaco.

[5] ECtHR *Caroline von Hannover v Germany*, 24 June 2004, no 59320/00, NJW 2004, 2647 = ETL 2004 (2005) 300, no 11 ff (*J Fedtke*).

The European Court emphasised that Caroline of Monaco did not exercise a public function in either Monaco or Germany and that the photos displayed activities of her everyday life which – even though they were exercised in public – were of a purely private nature. As the photographs were published merely to please the interest of a certain audience, and were not intended to foster a discussion of public interest, the European Court of Human Rights ruled that the right to privacy (art 8 ECHR) must prevail in such scenarios over the freedom of expression (art 10 ECHR). The European Court also made clear that the framework developed by German courts, which granted absolute persons of contemporary interest less privacy protection when acting in the public sphere, does not protect the European right to privacy sufficiently.

As a consequence, German courts had to adapt their assessment, which they did swiftly. Since then, celebrities and other persons of public interest do not have to accept the publication of photographs displaying everyday activities unless the photographic material serves a discussion of public interest. A perfect example is a decision handed down by the *Bundesgerichtshof* only a few months after the judgment of the European Court of Human Rights.[6] In this case, Charlotte Casiraghi, a minor daughter of Princess Caroline, had sued a magazine for publishing photographs of a riding tournament in which she had participated to illustrate a story which was not related to this event at all but to Charlotte's general life and to speculations about a not yet existing interest in the opposite sex. Referring to the decision of the European Court, the *Bundesgerichtshof* held that Charlotte was not exercising any public function and therefore the interest of the public and the press in photographic reporting on her everyday life without consent violates the daughter's right to privacy – even though she might soon become a member of the international 'jet set'.

Although some publishers have complained that the judgment of the European Court of Human Rights is a form of censorship as it allows persons of public interest to control information and images when acting in public, the judgment of the European Court of Human Rights is to be applauded. Everyday activities are of a private nature even if pursued in public, unless such material is necessary to foster a public debate.

[6] BGH 28 September 2004 – VI ZR 305/03, NJW 2005, 56 – Charlotte Casiraghi II = ETL 2004 (2005) 300, no 18 ff (*J Fedtke*).

2. BGH 17 June 2014, VI ZR 281/13 (Bicycle Helmet)[7]

The second landmark case is the bicycle helmet case of 2014, which addresses the delicate issue of under which circumstances courts can, as a factual matter, introduce increased safety measures for riding bicycles even though the legislature did not make such measures mandatory.

The facts of the case are simple: a motorist parks her car at the side of a street and opens the door without paying attention to a cyclist attempting to ride past the car. The cyclist cannot avoid the collision with the open door, falls off the bike, and suffers severe brain damage. It was out of dispute that the motorist, as keeper of the vehicle, was strictly liable. The motorist and her insurer relied, however, on the defence of contributory negligence. The cyclist did not wear a protective helmet so the defendants argued that a helmet would have prevented at least some of the damage, as it usually absorbs parts of the impact's force. They argued that the cyclist's claim should be reduced by 50% in accordance with § 9 Road Traffic Act (*Straßenverkehrsgesetz*, StVG) and § 254 (1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

Whereas the Regional Court (*Landgericht*, LG) Flensburg[8] rejected the contributory negligence defence in line with the prevailing view, the *Oberlandesgericht* Schleswig[9] reduced the victim's claim by 20%. The *Oberlandesgericht* took the position that a reasonable cyclist would have worn a helmet to protect herself against head injuries. This judgment stirred a heated debate in Germany, as the legislature had not made the use of such helmets for cyclists mandatory in Germany – and this remains the case even today. With regard to other activities such as horse riding or downhill skiing, however, it was widely accepted by the lower courts that – even though wearing a protective helmet is not prescribed by statute – the claim of a rider or skier not wearing a protective helmet must be reduced for contributory negligence insofar as compensation is claimed for injuries that could have been avoided or mitigated by wearing such a helmet.[10] The *Bundesgerichtshof* had also ruled that motorcyclists were partly responsible for their head injuries resulting from an accident if they did not wear a protective helmet, even before the legislature made

[7] NJW 2014, 2493 = ETL 2014 (2015) 216, no 2 ff (*J Fedtke*).

[8] LG Flensburg 12 January 2012 – 4 O 265/11, Beck online Rechtsprechung (BeckRS) 2014, 8138.

[9] OLG Schleswig 5 June 2013 – 7 U 11/12, Straßenverkehrsrecht (SVR) 2014, 263.

[10] OLG München 25 November 2011 – 8 U 3652/11, Zeitschrift für Sport und Recht (SpuRt) 2014, 26, 27 (ski accident); LG Bonn 21 October 2011 – 3 O 272/06, BeckRS 2013, 6187 (horse riding accident).

it mandatory to wear one.[11] The bicycle helmet case therefore presented the perfect opportunity for the *Bundesgerichtshof* to clarify the law of contributory negligence with regard to dangerous conduct that is not prohibited by law.

The *Bundesgerichtshof* rejected any contributory negligence on the part of the cyclist. Contributory negligence presupposes that the claimant fails to exercise the care that a reasonable and prudent person would apply in order to avoid harm. This standard is determined not only by the rules of the Road Traffic Regulation (*Straßenverkehrsordnung*, StVO) but also by general rules of good conduct for participating in road traffic. These general rules can also flow from a general belief that certain conduct is regarded as dangerous and that persons engaging in such conduct would therefore usually take measures of precaution to mitigate possible harm. These beliefs can also change over time. To assess whether a general belief has been established, courts can rely on statistics and official or unofficial surveys. The court therefore examined publicly available data and emphasised that, according to a survey, around 11% of cyclists in inner cities actually wore protective helmets in 2011, ie the year when the accident took place. This figure, the court reasoned, cannot support the finding that, at the time of the accident, cyclists generally regarded helmets as a reasonable precautionary mechanism. So it cannot be expected of a reasonable cyclist to wear such a helmet. 'At least' for accidents that took place in 2011, the court refused to reduce compensation claims for head injuries if the injured cyclist was not wearing a helmet.

Even though reliance on empirical data can be questioned, as sufficient data is not available for all scenarios, it at least provides an indication of when contributory negligence can be assumed because it is generally accepted that one should take a certain precaution. Although the court did not specify what percentage must be met in order to find that a helmet is generally regarded as a reasonable precautionary measure that cyclists can be expected to take, one can assume that it must lie above 50%.

Against this background, even today, the average adult inner-city cyclist not wearing a helmet does not face a reduction of their claim for damages, even though more and more bike riders actually wear helmets. In 2024, 34% of cyclists across all age groups already did so on a regular basis according to an official survey.[12] This survey also reveals that with regard to some groups, the figures are much higher. 80% of children up

[11] BGH 9 February 1965 – VI ZR 253/63, NJW 1965, 1075.

[12] See the survey of the Bundesanstalt für Straßen- und Verkehrswesen, availabe at <https://www.bast.de/DE/Publikationen/DaFa/2025/2025-01.html>.

to the age of ten and 60% of adult cyclists with e-bikes regularly wear helmets. Thus, with regard to these groups, a general conviction that a helmet should be worn can be assumed. In practice, this matters mainly for e-bike riders, given that children up to the age of seven are not liable at all (and consequently their contributory negligence cannot be invoked, either), and children from seven to ten years of age are largely shielded by § 828 (2) BGB.

In addition, cyclists who use their bikes for sporting activities outside regulated events, such as mountain biking or slipstreaming, will also face the contributory negligence defence in case they sustain head injuries. Although to our knowledge no data is available, one can observe that, in these contexts, helmets are worn regularly.

3. BGH 25 May 2020, VI ZR 252/19 (Diesel Emissions Scandal)[13]

The third selected judgment is the first in a series of five decisions handed down in 2020 by the *Bundesgerichtshof* on a manufacturer's delictual liability in the wake of the diesel emissions scandal. After US authorities had, back in 2015, discovered the use of software in a particular type of diesel engine manufactured by Volkswagen that was found to be an improper defeat device, large numbers of affected buyers brought actions for compensation.[14] While claims directed against car retailers revolve around contractual remedies, there is no contractual link to the manufacturer and claims must therefore be delictual in nature. In 2014, the claimant had bought a used car equipped with an affected diesel engine for € 31,490 gross from a car dealer. In 2017, the claimant requested that Volkswagen refund the purchase price and concurrently tendered transfer of the car.

The very careful and detailed reasoning of the *Bundesgerichtshof* can be sketched here in very broad strokes only (at the risk of oversimplification). The court held that the defendant was liable under §§ 826, 31 BGB for intentionally inflicting damage *contra bonos mores*. The *Bundesgerichtshof* found that the defendant had acted *contra bonos mores* in marketing the affected cars: the deception of the competent Federal Motor Transport Authority showed indifference towards a potential

[13] ECLI:DE:BGH:2020:250520UVIZR252.19.0, NJW 2020, 1962 = ETL 2020 (2021) 206, no 34 ff (*J Kleinschmidt*).

[14] See the reports on the state of play in diesel litigation in ETL 2018 (2019) 221, no 7 ff (*J Kleinschmidt*); ETL 2019 (2020) 205, no 14 ff (*W Wurmnest/M Gömann*).

detriment to the individual buyer as well as towards the protection of health and of the environment and equalled a direct deception of the individual buyer. In order to hold the defendant corporation liable, such individual conduct must be attributed to the defendant via § 31 BGB. In a key aspect of the decision, the BGH surmounted the lasting uncertainty as to what exactly the defendant's board members had been aware of by taking the claimant's assertions to this effect as conceded for procedural reasons: as the claimant had supplied sufficient facts to make the defendant's board members' knowledge appear likely, it would have been the defendant's task, under a so-called 'secondary burden of producing evidence' (*sekundäre Darlegungslast*), to elucidate the relevant facts, which it failed to do. This procedural device prevents corporations from being able to hide behind a non-transparent structure. The court went on to hold that the claimant had suffered harm due to the defendant's conduct. The harm consisted in the conclusion of a contract for purchase of the affected car. Here, the BGH clarified that economic loss may also follow from normative considerations even if damage is not measurable. The undesired obligation in itself constitutes legally relevant damage: § 826 BGB protects the general freedom of action and individual economic self-determination. It was therefore regarded as sufficient that the claimant had received a performance that had not been fully fit for purpose. Finally, the BGH found that the relevant persons within the defendant corporation who were aware of the strategic decision acted with the required intention of inflicting harm.

As a consequence, the claimant can request that the undesired sales contract be unwound. If he surrenders his car to the manufacturer (from whom it had not been bought), he will receive a refund of the purchase price paid as damages; however, significant compensation for the benefit of using the car (in the present case about € 5,874) will be deducted. According to the general principle referred to as *Vorteilsausgleichung*, a claimant must not be placed, because of the damaging event, in a better position than he would have been in without the event. Without this deduction, liability would contain a punitive element which in this form is alien to German tort law. Before the judgment, the issue as to whether compensation for use would be deducted had been very controversial, and it is this aspect that received criticism from a number of authors who feared that the longer aggrieved buyers had used their cars, the less attractive it would become to seek redress in money – against giving up their cars (which may be economically and ecologically unsound in itself).

The decision is therefore an example of a vigorous and logical application and evolution of tort law principles to a factual situation of

enormous societal importance. Its real value, however, lies in the fact of providing, almost five years after the discovery of the software, legal certainty to potential claimants who may henceforth evaluate the potential outcome of initiating legal proceedings and to lower courts for whom the judgment lays the ground stone for ruling on various issues on which they (and legal scholarship) had previously been split. It must not be overlooked, however, that the judgment was just the beginning. Many related aspects in other cases called (and continue to call) for clarification. In 2021, the *Bundesgerichtshof* even created a temporary 'auxiliary Senate', whose only task it still is to deal with appeals in tort cases based on the allegation of improper defeat devices in cars with diesel engines. To give just some examples,[15] the court could clarify in later judgments that compensation for use may reduce the amount of damages to zero and that the manufacturer does not owe delictual interest,[16] that no liability exists if the claimant had bought the car after Volkswagen had publicly admitted to using the software,[17] and that the general three-year prescription period applies and commences at the latest with the expiry of 31 December 2016.[18]

On one apparent side aspect, however, the present judgment later had to be reversed. The *Bundesgerichtshof* had rejected a concurrent claim based on § 823 (2) BGB, which provides for damages in the case of a violation of a 'protective norm' (*Schutzgesetz*) aimed at the protection of the individual and which, importantly, does not require intent but merely negligence. The court regarded the relevant EU legislation on type approval as aiming only at the interest of the general public. When in March 2023 the CJEU clarified that these provisions did indeed also protect the individual,[19] the BGH had to open up a second avenue of redress based on § 823 (2) BGB, which entailed a further expansion of diesel litigation because it could also concern other manufacturers and other allegations,

[15] For further examples, see ETL 2020 (2021) 206, no 61 (*J Kleinschmidt*); ETL 2021 (2022) 194, no 50 ff (*W Wurmnest/J Kleinschmidt/S Gasche*); ETL 2022 (2023) 233, no 61 ff (*J Kleinschmidt*).

[16] BGH 30 July 2020 – VI ZR 354/19, NJW 2020, 2796 = ETL 2020 (2021) 206, no 59 (*J Kleinschmidt*).

[17] BGH 30 July 2020 – VI ZR 5/20, NJW 2020, 2798 = ETL 2020 (2021) 206, no 60 (*J Kleinschmidt*).

[18] On this aspect, see the cases reported in ETL 2022 (2023) 233, no 62 (*J Kleinschmidt*) as well as BGH 17 December 2020 – VI ZR 739/20, NJW 2021, 918 = ETL 2020 (2021) 206, no 61 (*J Kleinschmidt*).

[19] CJEU 21.3.2023, C-100/21, *QB v Mercedes-Benz Group AG*, ECLI:EU:C:2023:229 = ETL 2023 (2024) 721, no 57 ff (*BA Koch/T Thiede*).

such as the use of a so-called 'thermal window'.[20] This results in a private enforcement of EU law by a claim for damages under national law.

In view of the high number of potential litigants and of the considerable waiting period up to a ruling by the German Supreme Court, the litigation triggered by the diesel emissions scandal also fuelled the debate on how to deal with mass claims (in tort law and beyond) and on how to proceed with establishing means of collective redress in particular. While a decrease in docket numbers in civil courts has generally been observed over the past years, events affecting multiple persons (including the diesel emissions scandal or the 'Facebook data leak') led to thousands of similar (albeit not identical) cases flooding first instance courts. As a first intervention, the legislator introduced, in 2018, a 'model declaratory action' (*Musterfeststellungsklage*), which, however, falls short of a 'true' representative action, as the action merely aims at a declaratory ruling on specific factual and legal issues that are relevant for the existence or non-existence of individual claims and, in a second step, participating consumers still have to pursue their claims for damages, based on the binding findings of the model declaratory action, individually in separate proceedings.[21] In the diesel emissions scandal, the *Verbraucherzentrale Bundesverband* had initiated a model declaratory action against Volkswagen, which was terminated by a settlement out of court shortly before the decision presented here was rendered.[22] A second legislative initiative aimed at countering procedural tactics to avoid an unfavourable appeal decision that could potentially have provided guidance and orientation to many other pending proceedings. Created in 2024, the 'guideline decision procedure' (*Leitentscheidungsverfahren*) enables the Federal Court of Justice to express its opinion on the merits of a case even though the underlying appeal procedure has been terminated by the parties.[23] The new provisions were applied in the context of the so-called 'Facebook data leak'.[24]

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[20] BGH 26 June 2023 – VIa ZR 335/21, NJW 2023, 2259.

[21] ETL 2018 (2019) 221, no 1 ff (*J Kleinschmidt*); on a first unsuccessful attempt, see ETL 2017 (2018) 207, no 13 ff (*W Wurmnest/M Gömann*); on the implementation of the EU Directive on representative actions, see ETL 2023 (2024) 263, no 1 ff (*W Wurmnest/N Riemann*).

[22] ETL 2020 (2021) 206, no 49 f (*J Kleinschmidt*); ETL 2019 (2020) 205, no 9 ff (*W Wurmnest/M Gömann*), also on other examples.

[23] ETL 2024 (2025) 241, no 1 ff (*J Kleinschmidt/L Glöckner*).

[24] BGH 18 November 2024 – VI ZR 10/24, NJW 2025, 298 = ETL 2024 (2025) 241, no 55 ff (*J Kleinschmidt/L Glöckner*); see also OLG Hamm 15 August 2023 – 7 U 19/23, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2023, 1791 = ETL 2023 (2024) 263, no 36 ff (*W Wurmnest/N Riemann*).

4. BGH 29 November 2021, VI ZR 258/18 (Helmut Kohl)[25]

Turning again to personality rights, the Helmut Kohl case has to be mentioned in this compilation. Helmut Kohl served as German chancellor from 1982 until 1998. After his political career, he planned to publish his memoirs. For this reason, he worked with a ghost writer. In the course of preparing the multi-volume oeuvre, Helmut Kohl agreed that discussions and talks he had with the ghost writer, a historian, could be recorded. In the beginning, the cooperation worked well and three volumes of the book project were published. Later, Helmut Kohl terminated the collaboration as he mistrusted the ghost writer. Subsequently, the defendant publisher published a book written by the historian (who interviewed the former chancellor) and a co-author, which was based on the recordings made with Helmut Kohl, against the latter's explicit will. This book, entitled *'Vermächtnis: Die Kohl Protokolle'* (Legacy: The Kohl Protocols), became a bestseller as it contained several quotes about the former chancellor's political allies and opponents, which the authors had, however, 'beefed up' in part. Helmut Kohl sued the publisher and the two authors on the grounds that the recordings were confidential and many statements were distorted or quoted out of context or were even untrue. He claimed compensation for infringement of his general right to personality (*allgemeines Persönlichkeitsrecht*). Given the prominence of the claimant and the fact that many of the 'quotes' in the book were not very flattering to other politicians, the case received considerable media coverage.

In the beginning, the lawsuit went well for Helmut Kohl. The *Landgericht* Köln awarded him the sum of € 1 million as damages as many quotes were not correct. This was a record-breaking amount.[26] The defendants appealed. This move saved the defendants a lot of money as Helmut Kohl died after the appeal had been lodged and German law restricts the inheritability of claims for infringements of personality rights.

Kohl's surviving spouse and sole heir, Meike Kohl-Richter, pursued the compensation claim. The *Oberlandesgericht* Köln dismissed the action, however, holding that claims for monetary compensation awarded for infringements of personality rights cannot be inherited. The heirs cannot claim compensation unless, prior to the death of the claimant, a final judgment has been obtained (and the latter was not the case given

[25] ECLI:DE:BGH:2021:291121UVIZR258.18.1, NJW 2022, 868 = ETL 2021 (2022) 194, no 60 ff (*W Wurmnest/J Kleinschmidt/S Gasche*).

[26] LG Köln 27 April 2017 – 14 O 323/15, BeckRS 2017, 125934 = ETL 2017 (2018) 207, no 41 ff (*W Wurmnest/M Gömann*).

that the defendants had appealed).[27] The *Bundesgerichtshof* endorsed this reasoning.[28] The court affirmed that claims for an infringement of personality rights do not devolve to the heirs because the primary aim of monetary compensation is to give the victim satisfaction, and a payment to heirs cannot provide satisfaction to the deceased. The judgment was no surprise. The *Bundesgerichtshof* had already held in 2017 that bringing the case before a court does not make a claim for compensation for infringements of personality rights heritable (because it is unclear at that stage whether the law was infringed or not).[29] Based on this reasoning, the *Bundesgerichtshof* did not make an exception for scenarios in which the victim had already obtained a non-final judgment (which is provisionally enforceable), as did Helmut Kohl. Such a judgment can be reversed on appeal and consequently a claimant who provisionally enforces the judgment (or their heirs) would have to compensate the defendant. An heir can only enforce the claim of the deceased if it is endorsed in a final judgment or – as the BGH stated obiter – if there was an abusive delay of proceeding by the defendant (which was not so in the case at hand). As a consequence, the defendants prevailed and no compensation had to be paid to the widow. Meike Kohl-Richter filed a complaint before the *Bundesverfassungsgericht* but the Constitutional Court held in 2022 that no constitutional standards had been breached[30] so that the reasoning of the *Bundesgerichtshof* is still good law today.

It is obvious from a legal policy perspective that the outcome of the case is plainly wrong. In cases of elderly victims, a tort may pay off – if the claimant dies before they have obtained a judgment with *res iudicata* effect, unless the defendant had delayed the proceedings. This runs counter to the basic principle that unlawful behaviour deserves a remedy. But setting aside this legal policy argument, there are other arguments speaking in favour of the heritability of such claims. First, § 1922 BGB, according to which the assets are transferred as a whole to one or more heir(s) upon the death of a person, does not exclude the transfer of claims based on personality right violations. The reason why the *Bundesgerichtshof* decided otherwise lies in a 'technicality'. The BGB

[27] OLG Köln 29 May 2018 – 15 U 64/17, BeckRS 2018, 17910 = ETL 2018 (2019) 221, no 63 f (*J Kleinschmidt*).

[28] BGH 29 November 2021 – VI ZR 258/18, NJW 2022, 868 = ETL 2021 (2022) 194, no 60 ff (*W Wurmnest/J Kleinschmidt/S Gasche*).

[29] BGH 23 May 2017 – VI ZR 261/16, NJW 2017, 3004 = ETL 2017 (2018) 207, no 28 ff (*W Wurmnest/M Gömann*).

[30] BVerfG 24 October 2022 – 1 BvR 110/22, NJW 2023, 757 = ETL 2022 (2023) 233, no 2 f (*J Kleinschmidt*).

of 1900 generally restricted the heritability of compensation claims for pain and suffering. Even though the legislature altered this restriction in 1990 (so that today heirs can claim compensation for the pain a deceased victim suffered before passing away), the *Bundesgerichtshof* held that this reform does not affect compensation claims for violations of personality rights. Courts have derived claims for infringements of personality rights from the basic rights enshrined in the German Constitution (and not directly or analogously from § 253 (2) BGB, which applies merely to claims for pain and suffering). This reasoning is rather formalistic as it does not take into account the *ratio legis* that led the legislature to change the law. In addition, the satisfaction argument is not very strong as satisfaction is not only obtained when compensation is paid to the victim but already when the victim is certain that the tortfeasor will have to pay one day because the compensation claim will be passed on to the heir(s).

In any event, the German legislature decided to step in and correct the case law. A first attempt to alter the law was started in 2024 but was not pursued further.[31] In April 2025, a new draft bill to amend § 1922 BGB was, however, submitted to the German *Bundestag*.[32] The government proposes to add a new sentence to § 1922 (1) BGB to clarify that the assets which are transferred upon death include claims for monetary compensation for infringements of personality rights. The draft bill has not yet been debated by the *Bundestag* at the time of writing (December 2025). If this bill is passed by the German *Bundestag*, which is generally expected, the Helmut Kohl case will be 'overruled' and – which might be even more important – the legal term 'personality right' will for the first time be expressly mentioned in the BGB.

5. BGH 6 December 2022, VI ZR 168/21 (Nervous Shock)[33]

In the fifth and final case, the *Bundesgerichtshof*, in a somewhat unexpected but highly welcome decision, revised its long-standing approach to dealing with nervous shock suffered from witnessing or learning of injury to a close relative. The claimant, a father of a daughter, claimed

[31] See ETL 2024 (2025) 241, no 10 ff (*J Kleinschmidt/L Glöckner*).

[32] Printed Documents of the German Parliament (Bundestagsdrucksache, BT-Drucks) 21/15 of 2 April 2025, available at <https://dserver.bundestag.de/btd/21/000/2100015.pdf>. See ETL 2025 (forthcoming 2026) (*W Wurmnest/P Grasse*).

[33] ECLI:DE:BGH:2022:061222UVIZR168.21.0, NJW 2023, 983 = ETL 2022 (2023) 233, no 14 ff (*J Kleinschmidt*).

damages for pain and suffering. He submitted that he had suffered from a severe depressive reaction and been diagnosed with an adjustment disorder, after having learned that the defendant had repeatedly sexually abused the claimant's daughter who, at the time, had been between five and six years of age.

As German tort law, save for very few exceptions (§ 844 f BGB), does not compensate damage suffered exclusively as an indirect consequence of direct injury to a third party, the claimant in nervous shock cases must establish damage to their own health. It has long been accepted that psychological harm may amount to such injury if it gives rise to a medically recognisable illness. However, previous case law had erected a second condition that, in addition, the impairment go beyond the health issues to which close relatives of a deceased or seriously injured person are generally exposed.[34] In the present decision, the *Bundesgerichtshof* bids farewell to this second condition. Regarded as a hallmark of a restrictive German approach towards nervous shock cases, this additional threshold had been justified with the general reluctance to grant compensation to indirect victims. The court now accepts that, as legal scholarship had not tired of pointing out, this argument is in fact flawed, since claimants in nervous shock cases do not claim compensation for damage to a third person but for injury inflicted upon their own (mental) health. Furthermore, the *Bundesgerichtshof* rightly fears that a requirement to compare the claimant's individual impairment with the reaction generally expected of close relatives in a comparable situation may lead to inequitable results. Where serious psychological harm could likely be regarded as understandable and appropriate if triggered by intentional criminal conduct towards a close relative (so that the threshold would not be met), the same reaction could give rise to compensation if it resulted from a minor offence. Again, legal scholarship had already criticised that it is indeed inherently uncertain, even inappropriate (and prone to causing additional pain) to establish and assess which kinds of reaction fall outside the 'normal' range. Although the lower courts had in fact held that the claimant's reaction had passed the threshold (and, therefore strictly speaking, the case did not necessarily call for giving up the condition), the *Bundesgerichtshof*'s change of mind has the fortunate consequence of removing any need for speculation about what can be expected of a father who must live through such horrific news.

It is an important achievement of the decision to have placed physical and psychological harm on the same footing. One commentator has

[34] The seminal case is BGH 11 May 1971 – VI ZR 78/70, NJW 1971, 1883.

offered a very convincing explanation of the decision in describing a profound change in how society (and judges) have experienced and regarded traumatic events and rationalising the revised approach as a (however belated) reflection of this change.[35]

Fears that the revised approach might open the floodgates to compensation are not justified. A claimant will still have to show a medically recognisable illness. Furthermore, the requirement of attribution (*Zurechnungszusammenhang*) will continue to work as a filter and exclude compensation where merely the general risk of life materialises. Therefore, the claimant and the person whose injury triggered the psychological impairment must be in a close personal relationship.[36] However, the decision clarifies that it is not a requirement that the claimant actually witness the injury ('distant shock') and that, moreover, neither an accident (which had previously shaped the image of nervous shock cases)[37] nor death or serious injury of the primary victim must be ascertained in order to attribute the psychological harm to the defendant's conduct.[38]

From a broader perspective, the decision can be described as part of a more general trend to extend compensation for immaterial damage. In 2002, a reform of the law of damages made available damages for pain and suffering, which had previously been limited to (fault-based) delictual liability, also for claims based on strict liability (or on contract law).[39] Furthermore, in 2017, the legislator introduced (as one of the last legal systems in Europe) a German version of 'bereavement damages', ie a claim by secondary victims for reasonable monetary compensation (*Hinterbliebenengeld*) of the emotional distress suffered in the case of fatal injury inflicted upon a person with whom the victim had been in a particularly close personal relationship.[40] The new provision does not require

[35] *N Jansen*, Zeit, Sprache und dogmatische Jurisprudenz, JuristenZeitung (JZ) 2023, 573, 579 f.

[36] Eg, no claim exists for psychological harm caused by witnessing one's dog being fatally run over by a tractor, BGH 20 March 2012 – VI ZR 114/11, NJW 2012, 1730.

[37] A first extension in this regard had been brought about by a decision which applied the case law on nervous shock to psychological harm caused to the wife of a victim of medical malpractice, see BGH 21 May 2019 – VI ZR 299/17, NJW 2019, 2387 = ETL 2019 (2020) 205, no 57 (*W Wurmnest/M Gömann*).

[38] For further details, see *G Wagner* in: Münchener Kommentar zum BGB (9th edn 2024) § 823 no 250 ff.

[39] § 253 (2) BGB; see ETL 2002 (2003) 206, no 1 ff (*J Fedtke*); ETL 2001 (2002) 229, no 1 ff (*J Fedtke*).

[40] § 844 (3) BGB; see ETL 2017 (2018) 207, no 1 ff (*W Wurmnest/M Gömann*); ETL 2016 (2017) 214, no 1 f (*J Fedtke*). Parallel provisions were introduced in various statutes on strict liability, eg § 10 (3) StVG.

the distress to be medically recognisable and thereby offers compensation below the requirements imposed in nervous shock cases.[41]

[41] See BGH 6 December 2022 – VI ZR 73/21, NJW 2023, 1438 = ETL 2022 (2023) 233, no 40 ff (*J Kleinschmidt*), where it was convincingly argued that, because of this gradation, the amount awarded to a claimant under § 844 (3) BGB must, as a rule, fall short of the amount recoverable had they suffered a medically recognisable condition. On the amounts awarded, see also ETL 2024 (2025) 241, no 90 ff (*J Kleinschmidt/L Glöckner*).

XIII. Greece

Zafeirios Tsolakidis

1. Greek Supreme Court (Areios Pagos) 1227/2007

The decision was the judgment of the Greek Supreme Court which clarified the issues related to medical error as a condition for the establishment of the tortious liability of a doctor. Its reasoning has been followed since by a series of decisions by the Supreme Court.[1] The patient, a 36-year-old woman, was admitted to a surgical clinic for a scheduled surgical procedure. During the administration of anaesthesia, the anaesthesiologist caused a three-centimetre rupture of her trachea, resulting in her death.

The Supreme Court held that:

(a) For the establishment of tortious medical liability, an unlawful and faulty causation of damage is required. These prerequisites (unlawfulness and fault) are fulfilled simultaneously on the basis that negligence is considered both as a form of unlawful conduct and as conduct at fault (*the dual function of negligence*). Therefore, if, in the process of a medical procedure, the rules and principles of medical science are infringed and/or the duties of care, which arise from the general duty of providence and safety and are incumbent upon the average prudent physician of the tortfeasor's specialty, are breached, such conduct is unlawful and, at the same time, culpable.

(b) Medical services fall within the scope of art 8 of Law 2251/1994, which establishes liability of the provider of services, as physicians act independently, without being subject to specific instructions or directions from the recipient of the services (the patient), and has the discretion to determine the manner in which their services are offered. As a result of the application of art 8, the injured party (the patient) only bears the burden of proving the provision of the services, the damage sustained, and the causal link between that damage and the overall provision of the services, but not the

[1] Indicatively Areios Pagos (Greek Supreme Court, henceforth AP) 693/2020; 655/2019; 1478/2018; 853/2017; 427/2015; 974/2014; 1693/2013; 726/2012.

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specific act or omission that produced the harmful result. Conversely, in order to be discharged from liability, the service provider (the physician) must prove either the absence of any unlawful and faulty act on their part, or the lack of a causal link between such act and the damage, or the existence of a ground leading to the exclusion or reduction of their liability.

Until decision 1227/2007, it was unclear under which conditions a doctor should be held liable in tort and to what extent a violation of the principles of medical science fulfill the prerequisite of illegality, fault, or both. The decision clarified that if, during the performance of a medical act, the rules and principles of medical science, or the obligations arising from the general duty of care and safety of the average prudent doctor in the doctor's specialty are infringed, such conduct is unlawful and, at the same time, culpable.[2] The definition of diligent behaviour is based on the fundamental principles of medical science. A doctor is liable if they failed to act in a *lege artis* manner, and, in particular, as an average, prudent and diligent doctor would have done under the same conditions and circumstances and with the same medical equipment and devices at their disposal. The first stage of the examination of medical liability is, therefore, whether the doctor acted in a *lege artis* manner, that is to say, whether they complied with medical standards as regards the diagnosis of the disease, the choice of the treatment method, and the performance of the treatment. The standard is determined by the objective circumstances, the rules of science and the findings of experience at the time of medical treatment.

The provision of medical services falls within the concept of 'service' provided for in art 8 of Law 2251/1994, and allows for the application of this rule, which reverses the burden of proof of unlawful and culpable conduct on the part of the service provider in favour of the service recipient. The application of this rule to medical liability is of great importance, because in this field it is particularly difficult for a patient to invoke in a specific manner and prove the doctor's error that caused damage to the patient's health.

2. Areios Pagos 1768/2009

The Supreme Court ruling accepted the establishment of tort liability on the part of a bank due to a breach of its duty of care, because the bank

[2] See *K Fountedaki/M Gerasopoulou/V Maroudas*, Civil Medical Liability (in Greek) (2023) 200 f.

failed to check the solvency of its customer who requested the issuance of a cheque book. The decision, which was criticised as it was considered to expand banks' duty of care beyond a reasonable limit, sparked a renewed theoretical debate on the limits of duties of care and of tort liability in general.

A, who presented himself as the representative of company B, issued four cheques drawn on a cheque book that had been provided to B by bank T. The cheques were not covered by sufficient funds, thereby causing loss to the bearer, who could not cash it. The bearer filed a claim against the bank for failing to properly evaluate the creditworthiness of A and B before issuing a cheque book.

The Supreme Court held that the agreement for the issuance of a cheque book between the bank and its customer is intended to protect the legitimate interest of the lawful bearer of the cheque to receive the amount due from the drawee bank upon the cheque's lawful presentation for payment. The bank is obliged, in accordance with the principles of good faith and fair dealing, to verify the reliability and creditworthiness of a customer prior to issuing a cheque book, given that such issuance constitutes a potential source of risk for the legitimate interests of the bearers of cheques. Therefore, the negligent omission by the bank's agents to ascertain, prior to the issuance of a cheque book, the customer's creditworthiness and reliability, followed by the subsequent drawing of cheques by the recipient of that cheque book, which were not honoured upon their lawful presentation, constitutes a tort. Accordingly, the bank is liable to compensate for damage and/or to pay monetary satisfaction to the bearer of the cheques.

In the Greek legal order, 'unlawful' conduct within the meaning of art 914 of the Greek Civil Code (henceforth GrCC) is any conduct that violates a prohibitive rule of law, or a rule that establishes an absolute right or protects a private legal interest. At the same time, the scope of tort liability has been broadened since the 1970s with the recognition of a duty of care based on the principle of good faith (art 288 GrCC), ie a duty of every person to exercise diligence and care for the safety and protection of persons and property with whom they come into contact.[3] Case law tends to recognise extensive duties and often refers to a general duty to 'not culpably cause harm to others (*neminem laedere*)'.[4] However, the prevailing view in legal theory argues that such a general duty cannot be recognised towards everyone, since in fact in this way the condition of

[3] See *M Stathopoulos,* Law of Obligations, General Part (5th edn 2018) (in Greek) § 15 no 39 ff.

[4] See already AP 967/1973.

the 'unlawful' occurrence of damage, which is expressly provided for in art 914 GrCC, is overlooked.[5] The duty of care must be specified with obligations related to the facts of each case under consideration. The scope and extent of the requirements of good faith must be proportionate to the risks arising from the activities of the parties. The position of the parties, their previous relationship, the type of activity carried out, and the risks inherent in it must also be taken into account.

The decision in question revived the debate on the scope of these duties, based on the observation that, in this case, the Court's judgment may have resulted in an excessive extension of the bank's obligations towards any potential bearer of the cheque.[6] The case law of the Supreme Court continues to refer to a duty to 'not culpably cause harm to others'.[7] However, the limits of duties of care still remain debated.

3. Areios Pagos (Plenary Session) 9/2015

The plaintiff company had entered into a commercial agency agreement with the defendant company, which was terminated by the latter. This termination was found to be untimely, unjustified, and abusive, thus constituting an illegal act under Greek law, and the Court awarded the plaintiff company € 70,000 in damages and € 30,000 as monetary satisfaction for moral harm. The defendant company appealed to the Supreme Court, asserting that the amount of monetary compensation awarded infringed the principle of proportionality.

The Plenary Session of the Supreme Court, by a majority of 29 votes to 11, held that, according to para 1 of art 25 of the Constitution of Greece: 'Restrictions of any kind which …. may be imposed upon [fundamental] rights…. should respect the principle of proportionality'.

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[5] See indicatively *K Christodoulou,* The tendency toward expansion of illegality and its practical implications for the Greek liability system, Essays in Honour of K. Beys, V (2003) 4257 ff, 4270 ff; *A Karabatzo*s, Compensation for damage suffered by a third party, in particular, liability of specialists towards third parties, Chronicles of Private Law (Chronika Idiotikou Dikaiou, Journal in Greek) 2018, 409 ff; *Z Tsolakidis*, Illegality as a prerequisite for tortious liability in case of an infringement of environmental goods, Chronicles of Private Law 2016, 96 ff.

[6] Regarding this decision, see *M Stathopoulos*, The illegality in art 914 GRCC and the specification of good faith (on the occasion of a critical commentary of AP 1768/2009), Essays in honour of E. Kounougeri-Manoledaki (2016) 825 ff; *K Karagiannis*, The granting of a block of cheques by a credit institution to an 'untrustworthy-insolvent' person as a 'source of risk' giving rise to tortious liability? Applications of Civil Law (Efarmoges Astikou Dikaiou, Journal in Greek) 2014, 443 ff.

[7] Indicatively AP 91/2025; 1924/2024; 1027/2024; 1135/2021.

The principle of proportionality, understood as the requirement of maintaining a reasonable balance between the burden imposed and the benefit pursued, applies to every form of State activity, as well as in cases of conflicting interests within the field of private law, since the scope of this principle is not confined to specific areas of law. This principle must be taken into account in the interpretation and application of any rule of law. Moreover, pursuant to the explicit wording of art 25 para 1 of the Constitution, the protection of human rights established therein 'applies also to the relations between individuals to which they are appropriate'. Consequently, the courts are likewise under an obligation, when called upon to resolve private disputes, to settle them in such a manner as to ensure a fair balance between the conflicting interests, while simultaneously safeguarding fundamental rights. Considering the above, the aforementioned constitutional provision, even though it does not expressly refer to the judiciary, is likewise directed towards it as well.

The purpose of art 932 GrCC, as indicated by its wording, is to secure, in a broad sense, the restoration of the injured party for the moral harm suffered as a result of the tort, so that they may receive fair and adequate relief and comfort, while at the same time ensuring both that the morally protected value is not commercialised by the injured party, and that the amount awarded for moral harm, which cannot be precisely assessed in monetary terms, is not expanded to an excessive degree. The assessment of the court must, in every case, adhere to the principle of proportionality in the sense that the amount awarded must not exceed the limits established by common experience and the prevailing sense of justice at a given place and time, as reflected in the customary practice of the courts. This is because a judgment awarding either a trivial or an excessively high amount as reasonable monetary relief for moral harm undermines either the respect for human dignity of the victim, or the right to property of the tortfeasor respectively.

In view of all the foregoing, the assessment of the court concerning the amount of monetary satisfaction awarded must be subject to review by the Supreme Court, both as to whether the principle of proportionality has been infringed and as to whether the court has exceeded the outer limits of its discretionary power.

The decision of the plenary session of the Greek Supreme Court was the conclusion of a lengthy debate, lasting approximately 15 years, during which a series of decisions were issued by the Supreme Court on whether the amount of monetary compensation awarded for moral harm could be reviewed after a cassation before the Supreme Court, based on the principle of proportionality.

Initially, the case law of the Supreme Court accepted that the principle of proportionality is to be applied not only by the legislator but also by a judge, who has the power to enforce the principle of proportionality directly.[8] Subsequently, the case law shifted and the Supreme Court ruled that the principle of proportionality is only addressed to the legislator. Therefore, the judge is not entitled to invoke the principle. This position was also adopted by the plenary session of the Supreme Court in 2009, 2010, and 2011.[9] However, decisions by divisions of the Supreme Court continued to accept that the principle of proportionality could also be directly applied by courts.[10] In view of this, the issue was brought back before the full plenary session of the Supreme Court, which, in the judgment under discussion, accepted that the principle of proportionality may also be applied by courts and, specifically, by the Supreme Court, when revising decisions. Therefore, the Supreme Court may, after a cassation has been filed, review whether the monetary compensation awarded for moral harm complies with the principle of proportionality and, if not, overturn the decision and refer the case to the Court of Appeal for a new judgment.

4. Areios Pagos 1159/2022

With decision no 1159/2022, the Greek Supreme Court changed its established case law by recognising the right to monetary compensation for emotional distress to a person with whom the deceased had lived in a free union. In a traffic accident, the truck driven by the defendant collided with the plaintiff's car, resulting in the injury of the plaintiff and the death of his co-driver, with whom the plaintiff lived in a long-term partnership and had three children.

The main parts of the judgment of the Supreme Court are as follows:

(a) The European Court of Human Rights (ECtHR) has repeatedly held that art 8 European Convention on Human Rights (ECHR) does not distinguish between 'legal' and 'de facto' families, stating that the notion of 'family life' protected under this provision is not limited to marriage-based relationships, but extends to other de facto relationships of cohabitation, which also create family ties.

[8] AP (plenary session) 43/2005; AP 132/2006; 1662/2005; 1020/2004; 1043/2001; 899/2001.

[9] AP (plenary session) 6/2011; 5/2010; 6/2009; AP 606/2015; 139/2014; 79/2010; 1220/2008; 769/2007.

[10] AP 491/2015; 265/2015; 531/2014; 78/2014.

(b) According to the prevailing opinion in jurisprudence, the application of art 932 GrCC in the case of a person living in a free union with the deceased is not permitted, neither by the wording of the article (which mentions the 'family' of the deceased) nor by its purpose. Therefore, the possibility of granting monetary compensation for emotional distress caused to the surviving partner by the death of their companion is not provided for by law.

(c) The prevailing view is considered to refer only to free unions within which no children have been born. Regarding free unions which include children as well, art 21 of the Greek Constitution, which establishes the 'family' as a constitutionally protected institution, urges the legislator to adopt positive measures for its protection. The legislator is not prevented by the above constitutional provision from recognising, within the framework of the principles of freedom of personal development, equality, and protection of private life, alternative forms of cohabitation and the creation of family ties through them.

(d) In light of the above, taking into account not only modern social perceptions, which recognise free unions as an alternative form of common life, but also the reforms that family law has undergone in recent years, it is clear that the national legislator, following the example of almost all European legal systems, is moving away from the narrow, traditional view that a 'family' is formed solely through marriage. As a result, individuals who have neither been married nor entered into a civil partnership, but live in a free union from which they have had children should be accepted to fall within the concept of 'family' and are included in the protective scope of art 932 GrCC and art 8 ECHR.

Article 932 GrCC provides that, in the case of death, monetary compensation for emotional distress is granted to the 'family' of the victim. Regarding individuals living in a free union without having entered into a civil partnership, the Greek Supreme Court has consistently ruled that they are not considered a 'family' within the meaning of art 932 GrCC and, consequently, are not entitled to monetary compensation.[11] The Court's primary argument has been that the legislator, despite being aware of the institution of free union and having regulated other aspects of family law over time, did not grant rights to individuals cohabiting in a free union.

[11] AP 51/2018; 775/2011; 1541/2009;1735/2006; 434/2005.

The jurisprudence of the Greek Supreme Court shifted in 2022 with the judgment under discussion. The Court acknowledged that free unions should fall within the notion of 'family', provided that children have been born within such unions and there is evidence of a serious and stable intention for cohabitation between the partners to continue in the future. The Supreme Court's primary argument relied on the case law of the ECtHR, according to which, de facto cohabitation relationships, not based on marriage or civil partnerships, also fall under the protection of 'family life'. Additionally, it referred to specific legislative provisions through which the Greek legislator has recognised legal consequences for free unions. Decision no 1194/2023 of the Supreme Court followed the same direction, adopting similar reasoning.

The Greek Supreme Court, in both cases, accepted that 'the notion of family' includes cases where two individuals cohabit, without having entered into a legal marriage or civil partnership, provided that close personal ties between them existed and their cohabitation is the result of love, devotion, and a serious and stable intention for companionship and togetherness. However, it is unclear why the Supreme Court imposed the additional requirement that children must be born from such cohabitation, as it is evident that close ties could also exist where partners cohabit but no children have been born. This additional condition may be considered as a transitional step for courts to deviate from the established case law of recent decades.

5. Areios Pagos 1904/2022

In the decision under discussion, the Supreme Court accepted that a general rule establishing strict (risk-based) liability could exist in Greek law, even though legislative provisions only regulate specific cases. Another section of the Court issued a decision in 2025 in the opposite direction, and the debate on the limits of strict liability remains open in Greek academia.

The plaintiff companies filed a lawsuit against the main electricity supplier in the country, seeking compensation because, due to a fire at the defendant's substation, the power supply to their businesses was interrupted.

The main parts of the judgment of the Supreme Court are as follows:

(a) Damage caused by a source of increased risk places the injured party in a difficult position to recover their loss, as the principle of subjective liability (fault-based liability), governing the rules of non-contractual liability, excludes compensation when the dam-

age cannot be attributed to fault. A different legal approach to liability for damage caused by such sources of increased risk is therefore required, commonly referred to as 'risk-based liability'. This is the recognition of an obligation to compensate regardless of fault when the damage is associated with sources from which an 'increased risk' emanates. The person liable for compensation is the owner or controller of the source of particular risks.

(b) The legislator did not establish a general rule for strict liability but instead regulated it on a case-by-case basis. In cases not regulated by law, such as liability for damage caused by electricity generation facilities and distribution networks, the obligation of the owner or the controller of the source of 'increased' risk is directly grounded in constitutional provisions, which impose on private individuals the duty to respect and protect the rights of others. In any case, the aforementioned legislative 'imperfection', consisting in the absence of relevant regulation, which is deemed necessary based on the principle of equal treatment of similar situations, can be addressed through the application by analogy of the provisions governing the already regulated cases. The legislator, by regulating only certain cases in this manner, did not intend (given the universality of the aforementioned constitutional provisions) to regulate only those exceptional cases and exclude others from similar provisions, but rather, due to the case-by-case regulation that was adopted, articulated the scope of the law more narrowly than was ultimately intended.

In the Greek legal system, the general principle is that liability for compensation presupposes the fault of the wrongdoer. By exception, the law obliges, in specific cases, the individual who caused damage to compensate the victim, even if they were not at fault (strict liability).

Risk-based liability has not been established by the legislator as a general basis of liability. While tortious liability is regulated by a general provision (art 914 GrCC), the legislator has chosen to regulate specific cases of strict liability on a case-by-case basis (liability for cars, aeroplanes, defective products, etc). Many sources of risk still remain unregulated. In Greek legal theory, following an international debate dating back to the 1940s, the introduction of a general clause on strict liability has been proposed *de lege ferenda.*[12]

[12] *P Kornilakis,* Law of Obligations, Special Part (3rd edn 2023) (in Greek) § 240 no 14; *Stathopoulos* (fn 3) § 15 no 93.

Decision 1904/2022 of the Greek Supreme Court ruled that even in unregulated cases, when 'the damage is associated with a source of increased risk', the owner of that source should have an obligation to compensate any damage resulting from such source. This judgment contradicts the clear legislative choice to limit strict liability only to cases explicitly provided by law and to refrain from establishing a general clause that would encompass all activities creating a specific source of risk.

The reasoning of the Court is supported by two main arguments. First, it follows the path of analogy. However, taking into account that the debate on this issue has been ongoing for decades and the legislator continues, even recently, to regulate only specific sources of risk, no legislative intent for a general establishment of risk-based liability could be inferred. Thus, an application by analogy is not possible.

The second argument relies on constitutional provisions. According to this reasoning, an application by analogy is mandated by the Constitution, which imposes an obligation to protect certain legal interests, such as health and property. However, this argument does not appear convincing either. The Constitution may safeguard specific goods, however, it is up to the legislator to balance this protection with other constitutionally protected rights, such as individual freedom of action. This balancing act cannot be argued to have been directly entrusted to the judge by constitutional provisions.

As has already been mentioned, a different approach was adopted by another section of the Supreme Court under decisions nos 110–111/2025. The Court held that the legislator provided for the liability of electricity suppliers and distributors for their fault in the operation and maintenance of the electricity network, where it considered it necessary to do so and therefore there is no unintended legal vacuum that would make it possible to establish liability based on risk by analogy to the specific provisions. Furthermore, it ruled that such liability may not arise even by reference to the constitutional provisions, as the legislator, implementing those provisions, has regulated certain cases of liability for risk on a case-by-case basis.

Due to the disagreement between the two sections of the Court, the issue may be referred to the plenary session. In any case, the issuance of the decisions has reignited the debate on whether it is appropriate and feasible to establish a general provision on strict liability.

XIV. Hungary

Attila Menyhárd

There are some clear trends that underlie the development of Hungarian tort law in the past 25 years, with the issues relating to areas such as assessing uncertainties, compensation for personal injury, medical malpractice, protection of inherent rights of persons and constitutional rights, and State liability. As to State liability, there was no landmark case due to the contradictory tendencies that still make court practice rather confusing and unsatisfactory. In general, there has been an expansion in tort law, marked by a widening of the scope of potential plaintiffs, such as relatives who may claim damages for personal injury or health damage of a member of their family, increasing amounts of non-pecuniary damages and strict standards in medical malpractice cases, also supported by a reversal of the burden of proof.

1. Supreme Court, Legf Bír Pfv III 22.188/2010, BH 2012 no 10[1]

This case addresses the issue of reversing the burden of proof of the causal link in the case of lack of information. While the plaintiff's mother was being transported in an ambulance, she suffered a cardiac arrest and was successfully resuscitated by the attending paramedic physician. Upon arrival at the hospital, the admitting physician reviewed the portable electrocardiogram (ECG) and, without performing further life-saving interventions, pronounced the patient dead. Despite a subsequent control ECG indicating ventricular tremors, the absence of functional cardiac activity led to a final confirmation of death without admission to a clinical ward. The Supreme Court determined that while the cessation of cardiac function may indicate clinical death, such a state does not preclude the possibility of resuscitation. The hospital staff failed to provide medical treatment or initiate resuscitation protocols, instead prematurely declaring death. The Court reasoned that the patient was in a terminal state rather than a state of irrevocable death. Consequently, the defendant's

[1] See also *A Menyhárd*, Hungary, in: K Oliphant/BC Steininger (eds), European Tort Law 2012 (2013) 333, nos 8–13.

https://doi.org/10.1553/978OEAW51463-Hungary

omission constituted a breach of duty. While the success of a hypothetical resuscitation remains speculative, the failure to attempt it deprived the patient of a chance of survival, constituting actionable harm. In litigation relating to the loss of a chance, the requisite causal nexus is established between the professional negligence and the deprivation of the opportunity to survive, rather than the death itself. The burden of proof shifts to the defendant to demonstrate that the fatality was inevitable notwithstanding immediate intervention. Furthermore, the Court affirmed that the absence of contemporaneous medical documentation cannot be replaced by testimonial evidence.

The case did not address the question of assessing probabilities but rather the issue of assessing uncertainty. The case has been reported as a typical case of loss of a chance in medical malpractice, but neither inherent uncertainties were involved nor probabilities considered. Thus, the court actually simply reversed the burden of proof of causation instead of applying the doctrine of loss of a chance. One of the possible solutions for assessing uncertainty in causation is the doctrine of loss of a chance. Although such a doctrine is generally rejected by Hungarian courts,[2] it has been accepted in medical malpractice cases.[3] The judgment refers to this doctrine, presumably in order to justify the conclusion of the court by anchoring the judgment in settled court practice. But the court in this case did not assess loss of a chance but reversed the burden of proof for causation. Although loss of a chance is an issue also discussed in Hungarian legal professional literature, the courts have solved the problem so far by establishing partial causation and partial liability. The reversed burden of proof for causation was a new approach, which is established and presented clearly in this judgment. The *ratio decidendi* that decreasing the chance of recovery can lead to the establishment of a causal link is misleading as, in this context, this decision did not concern the loss of a chance but rather proof of the absence of a causal link. In another judgment concerning the liability of a motorway operator for damage that was caused by game gaining access to the road,[4] the Supreme Court required the operator to prove either that the fence was not defective at the time of the accident at all or that, notwithstanding the defect in the fence, game could not get onto the highway in order to be relieved of liability. In this case, reversing the burden of proof of causation was also a tool to allocate the risk of lack of information.

[2] Supreme Court, Legf Bír Pfv 21.129/2009 BH 2009 no 356.
[3] Supreme Court, Kúria Pfv III. 21.056/2020/9 BH 2021 no 307.
[4] Supreme Court, Legf Bír Pfv III. 21.682/2008 BH 2010 no 7.

The current judgment also confirmed that hospitals bear the risk of a lack of documentation or if the documentation of treatment is incomplete. This is also a tool to assess uncertainty because the risk of absence of information is shifted to the defendant. This judgment was also the reference point for the rules on necessity of evidence (*Beweisnotstand*) introduced in civil procedural rules in 2016. According to § 265 subpara (3) of the Civil Procedure Act,[5] in a privileged case of inability to prove, the fact to be proved by the party concerned may be accepted by the court as the truth if it does not have any doubt regarding its veracity. This also shows that uncertainty may be assessed via procedural rules like evidence, burden of proof as well as by substantive law doctrines such as loss of a chance or awarding general damages. With such rules, the Civil Procedure Act provides a procedural solution to the same problem that was solved in material law with reversing the burden of proof of causation in court practice. This solution highlights that the problem of probabilities can be assessed both on a procedural and on a substantial level. At this point, procedural and substantive law cannot be functionally distinguished.

2. Constitutional Court, Resolution no 28 of 2014 (IX 29)[6]

The right of policemen to their image was the focus of this case. From the beginning of the 2000s, there was an emerging trend in Hungarian court practice that publishing the image of a policeman in service is to be deemed as an unlawful interference with the policeman's inherent rights, that is, the right to one's own image. This was how the courts responded to the challenge that they faced as a result of policemen often being exposed to insults and harassment after having been identified on the basis of press reports which included their photo. The courts approached the issue from the angle of whether the doctrine of the lower level of protection provided to public figures should be applied to policemen and other officers, like guards of arrested people escorting them to a court hearing. The Supreme Court concluded that policemen and other officers do not qualify as public figures so they are to be protected just like ordinary people. The Supreme Court confirmed this practice in its Resolution no 1 of 2012 BKMPJE, by stating that persons performing official duties or working in a public place or public space are not considered to be public

[5] Act no CXXX of 2016 on the Code of Civil Procedure.

[6] See also *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 249, nos 2–4.

figures in the course of their activities, therefore their consent is required for the publication of an image or sound recording that identifies them in an identifiable manner.[7] This court practice has been challenged by the press continuously. They argue that this court practice undermines freedom of speech and also the public control of the central power.

In the case at hand, the Regional Court of Budapest, in line with the practice settled by the Supreme Court, initially awarded non-pecuniary damages to a police officer whose image was published by an internet media service provider without authorisation during the reporting of a public demonstration. The media service provider challenged this ruling, asserting that the prevailing judicial practice – which held that police officers do not qualify as public figures – violated the fundamental rights to freedom of expression and freedom of the press as enshrined in the Fundamental Laws of Hungary. Upon review, the Constitutional Court repealed the lower court's judgment. The Court determined that the publication of a recognisable image of a police officer acting in an official capacity necessitates a proportionality assessment between competing constitutional values: the individual's right to their image (personality rights) and the public's right to be informed.

The Court established that there is a presumption of disclosure, that is, in the context of public interest vested in reporting on contemporary events, priority should generally be given to freedom of speech and freedom of the press. This freedom, however, is limited by the right to human dignity of the involved person. Thus, the publication is held unlawful only if it infringes upon the subject's human dignity (eg, an image depicting a wounded officer). Provided human dignity is respected, the lack of explicit consent does not, per se, render the publication of an officer in action unlawful.

The Constitutional Court concluded that freedom of speech and freedom of the press are to protect the possibility of discussing public affairs without limits, which raises the question of what the informative function of the press encompasses in order to ensure the free discussion of public affairs. It found that the right to freedom of the press is a fundamental right enshrined in the Fundamental Law and of particular importance in a democratic system. In contrast, the subjective right to protect the external manifestation of human personality, the image used to identify a person, is not an independent fundamental right: it should receive constitutional protection through the protection of human dignity and may serve to restrict other fundamental rights. The Constitutional Court

[7] <https://kuria-birosag.hu/hu/joghat/12012-szamu-bkmpje-hatarozat>.

also considered the extent to which the right to freedom of the press may be constitutionally restricted with regard to the protection of the image of persons exercising public authority. The Constitutional Court, in this context, distinguished between public figures and persons exercising public authority. According to the Constitutional Court's resolution, the activities of persons exercising public authority and the images identifying them in connection with those activities constitute information only in the context of public events ('the completeness of reporting on current events'). In such cases, the freedom of the press must also be weighed in contrast to the protection of the human dignity of persons exercising public authority. The Constitutional Court also made it clear that the use of images cannot be an end in itself, but must be related to the discussion of the public event. The shift in Hungarian court practice highlights a critical transition from a formalist application of personality rights to a value-based approach. It underscores that the right to one's image is not an absolute barrier to freedom of the press, but rather a protection meant to safeguard human dignity.

The challenge for the Supreme Court is not only to find a proper balance in the light of the opinion of the Constitutional Court but also the fact that one's image can be considered as personal data, which is also covered by data protection legislation. At the very heart of the problem lies the fact that the right to one's image is protected as a specific right inherent to persons and not as an element of one's right to privacy. This could lead courts to providing protection against the publication of an image, even if it did not result in a violation of human dignity nor had anything to do with providing protection against the commercial exploitation of attributes of an individual's personality. This development in Hungarian court practice highlights the consequences and pitfalls of applying written law without having regard to the fundamental values that are to be protected by personality rights, that is, protecting human dignity and liberty of commercial exploitation.

Under art 28 of the Fundamental Laws, ordinary courts are now required to interpret the Civil Code in light of constitutional goals, with the result that judges can no longer rely solely on a literal reading of the Civil Code (which requires consent for photos to be published). They must perform a balancing test between the individual's right to image/privacy on the hand and the public's right to be informed about the exercise of State power on the other. Initially, the *Curia* (Supreme Court) was hesitant to follow this lead. In a subsequent 2015 case, the *Curia* tried to maintain its old practice by arguing that the 28/2014 decision was only applicable to that specific case. However, the Constitutional Court issued further

rulings (eg, 1/2015 (I. 16.) AB) reinforcing its stance. Today, the practice is unified: identifiable photos of police officers in public service are permissible as long as the depiction is not 'self-serving' or 'malicious'.[8]

3. Supreme Court, August 2020, Kúria Pfv IV 21.556/2019, BH 2020 no 238[9]

The case is the most important case on segregation. Between 2003 and 2013, systematic unlawful ethnic segregation was established and maintained at the elementary school in Gyöngyöspata, a small town in Hungary. Defendant 1 (the local municipality operating the school) maintained the institution until 2012, at which point defendant 3 (the central authority) assumed operational control. Defendant 2 (the school) was actually committing the segregation. The plaintiffs, pupils belonging to the Roma minority, were systematically enrolled in 'B' classes, resulting in physical separation from the general student body and the provision of an inferior standard of education. This infringement of inherent rights was established as a matter of law in a prior *actio popularis* proceeding.

In the subsequent judicial proceedings initiated for awarding non-pecuniary damages, the court of second instance modified the first instance award, increasing the quantum of non-pecuniary damages (*solatium doloris*) from HUF 400,000 to HUF 500,000 per academic year per plaintiff. The total aggregate amount of compensation was approximately HUF 100,000,000. The court rejected the defendants' motion for reparation in kind (specifically, the provision of supplementary education). The court held as a matter of law that non-pecuniary losses – specifically feelings of humiliation and frustration arising from a violation of inherent rights – are conceptually incapable of being remedied via restitution in kind.

In response to the judgment, the legislator enacted an amendment to sec 59(4) of Act CXC of 2011 on National Public Education. This provision mandates that where an educational institution unlawfully interferes with a student's inherent rights, the court shall award compensation in the form of educational services rather than paying non-pecuniary damages. This amendment resulted in a significant systemic inconsistency within the civil law regime, because it had never been assumed that non-pecuniary damages should be provided in kind and as previously determined by

[8] *Menyhárd*, ETL 2014 (fn 6) no 4.

[9] *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law 2020 (2021) 278, nos 22–36.

the judiciary, educational services cannot conceptually offset the psychological injury of discrimination. This *ad hoc* legislation, designed to circumvent a specific judicial award, raises fundamental concerns regarding the principle of separation of powers and the stability of the legal system.

The judgment and its consequences had a socio-economic impact and consequences as regards the limits of private law. The enforcement of the judgment reveals the 'vicious circle' of institutional liability. The withdrawal of financial resources from underfinanced municipalities to satisfy damages awards increases the probability of further systemic failures, mirroring the 'malpractice crisis' in the healthcare sector. Furthermore, the case demonstrates the limits of private law in achieving broad socio-political objectives. While the judgment terminated the formal segregation, it led to children belonging to non-Roma families leaving the school, which reduced the number of the students by 50% and resulted in a de facto segregated institution. With the judgment, the courts actually assigned the social costs of anti-discrimination measures to the school: a cost the institution was unable to bear. This may lead to potential insolvency and the eventual cessation of services, which ultimately harms the protected class. Private law, modelled on horizontal relationships between equals, is an insufficient instrument to address vertical, systemic social exclusion.

It seems that it is not society that pays the price of managing a social problem and it even may happen that those being protected by the law have to bear the social costs. Moreover, the outcome, closing the school, has negative consequences for those who should be the beneficiaries of the policy. Private law cannot re-allocate the (social) costs of anti-discrimination measures and, for this reason, the costs of enforcing anti-discrimination measures may only be shifted to certain market players or to those who belong to the protected group of society. In a great number of anti-discrimination cases, courts try to solve the problem of social segregation with means not designed for this purpose. Even if the aims and the decisions in a great number of cases are clear, courts are unable to address consequences that surely have an impact beyond the relationship of the parties. We have to face the problem that the application of private law rules and principles modelled on horizontal relationships may involve pursuing social policies but the effects of such regulation or practice require further coordination and cost allocation going beyond the scope of private law.

The intersection of the *Gyöngyöspata* judgment and the subsequent legislative step illustrates a crisis in social governance. The use of regulatory power to overrule judicial findings undermines the function of li-

ability and leaves the fundamental issue of social integration unresolved, shifting the burden of social exclusion from the school system to other, equally ill-equipped social structures.

4. Supreme Court, Kúria Gfv VII 30.135/2020, 22 September 2020, BH 2021 no 172[10]

The case addresses the issue of liability for reflective loss and shareholder standing. The plaintiff's legal predecessor held an equity interest in a private limited company (the 'company'). The company entered into a fixed-term service agreement with defendant 1, the entity vested with the management and trusteeship of public roadways. The subject of the agreement was the installation and maintenance of a 16-duct optical fibre network along a motorway. Following the completion of the technical installation, a substantial delay occurred in the issuance of the final authorisation for commencement of operations, the operating licence. During the pendency of this delay, the plaintiff's legal predecessor executed a Share Purchase Agreement and an Assignment of Claims, transferring both its equity stake and its potential causes of action for damages to the plaintiff. The plaintiff asserts that the delay in the licensing procedure caused a diminution in the value of the company, which directly resulted in a reduced share price at the time of divestment. The court of first instance dismissed the claim, applying the principle that a shareholder lacks standing to recover for reflective loss. The court's main finding can be summarised as follows: a shareholder is generally precluded from claiming compensation if the diminution in the value of their shares is a mere reflection of the loss sustained by the company. The enforcement of the company's own claim against the tortfeasor is a condition-precedent or preliminary issue to assessing the admissibility of a shareholder's individual claim. The court concluded that a shareholder may only seek compensation for that portion of the share value diminution that remains unredressed after the company has exhausted its own legal remedies or asserted its claims.

The case highlights a persistent lack of coherent doctrine in Hungarian civil law regarding the intersection of corporate assets and shareholder rights. The company's loss of physical or liquid assets is substituted by a claim, that is, a claim for damages. From this follows that there is an identity of the claim of the company and the claim of the shareholder as an asset. Thus, while the company's book value may fluctuate, the claim

[10] *A Menyhárd,* Hungary, in: E Karner/BC Steininger (eds) European Tort Law (ETL) 2021 (2022) 266, nos 23–25.

itself constitutes an asset. However, the market value of a litigious claim rarely equals its nominal value, creating a realised loss for shareholders who leave the company prior to adjudication. A critical temporal dimension also exists when a shareholder suffers a loss by selling their interest at a reduced price *before* the company receives indemnification. In such instances, the shareholder's loss becomes permanent and depends on the company's future recovery. While the judgment aligns with the developmental trajectory of the past two decades, it fails to provide a definitive legal standard for the liquidation of claims and for predictability. Liquidation of claims refers to whether the liquidation, that is, the formal quantification and pursuit of the company's claim, must be completed before a shareholder's derivative claim can be deemed admissible, while predictability is the absence of a consistent doctrine regarding whether establishing the loss of share value is precluded per se or merely suspended pending the company's action.

5. Supreme Court Resolution no 2 of 2022 JEH (Jpe.III.60.011/2022/15)[11]

The case addresses how material damages in wrongful birth cases should be assessed. The resolution establishes that the costs of bringing up a child born with a genetic or teratological deficiency, as a compensable loss in the context of liability of the healthcare provider in wrongful birth cases, should be the difference between the costs of bringing up a healthy child and a child with such deficiency. In Hungarian tort law, claims for wrongful life, asserted on behalf of the child, are precluded under Resolution 1/2008 of the Supreme Court, while the judiciary recognises wrongful birth claims. These actions arise where a healthcare provider's failure to provide accurate or timely prenatal information constitutes an unlawful interference with the mother's inherent right to self-determination and reproductive choice. Following the enactment of the Civil Code (2013), such cases typically give rise to a claim for *solatium doloris* to address non-pecuniary loss. However, alongside claims for non-pecuniary damages, claims for damages compensating pecuniary loss as covering the financial burdens of child-rearing are emerging.

The assessment of the appropriate amount of pecuniary damages in such cases has been a point of contention within the Hungarian courts.

[11] *A Menyhárd*, Hungary, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 295, nos 2–9.

The Supreme Court's 2015 ruling[12] became the leading judgment. In this case, the Supreme Court adopted a broad theory of causation, stipulating that the healthcare provider was liable for the full costs of the child's upbringing. This approach was predicated on the 'but-for' principle, asserting that no maintenance costs would have been incurred had the medical negligence not deprived the parents of their choice to terminate the pregnancy. Under this standard, overruled by Supreme Court Resolution no 2/2022, all expenditures causally linked to the birth were held to be recoverable losses.

The legal standard that prevailed in line with the leading judgment of 2015 was subsequently redefined by the Supreme Court in Resolution 2/2022 JEH, which expressly overruled that practice. The *Curia* shifted the focus from purely factual causation to a value-based concept of compensable loss. Central to this resolution is the principle that human life constitutes an utmost protected constitutional value; consequently, the existence of a child cannot, under any legal theory, be categorised as a harm or loss within the scope of tort law. The Court established that the law must not distinguish between healthy and disabled lives in a manner that suggests non-existence is a more advantageous or preferable state.

Under this binding interpretation, the compensable loss is strictly limited to the additional burden placed upon the family unit. The healthcare provider's obligation to compensate the victim is restricted to the marginal difference between the costs associated with raising a child with health impairments and the hypothetical costs of raising a healthy child. The basic costs of subsistence and upbringing are excluded from the scope of liability, as these expenses arise from the existence of the child rather than the medical impairment itself. Furthermore, the Court clarified that a difficult life or a general change in the quality of life resulting from the birth of a child – whether healthy or handicapped – does not constitute an adverse change in legal status sufficient to warrant compensation for basic maintenance. Therefore, the defendant healthcare provider shall only be held liable for specific, incremental costs related to care, education, and maintenance necessitated by the genetic or teratological defect. Any judicial award that extends beyond these additional expenses is deemed contrary to the fundamental legal principle that the birth of a child cannot be treated as a compensable loss.

If the court does not limit compensation to the additional expenses, this is contrary to the general principle of law that the existence of a child cannot be considered as a loss under any circumstances. Taking all this

[12] Supreme Court, Kúria Pfv 20.069/2015/3 EBH 2015 P.11.

into account, the *Curia* held that, since the existence of a child born with a genetic or teratological deficiency cannot be deemed as damage, the concept of material damage cannot include all the costs of bringing up a child, but only the additional costs arising from the health impairment. In this respect, the compensation of the basic upbringing costs cannot be covered by the liability of the healthcare provider.

XV. Ireland

Eoin Quill

1. *Glencar Explorations Plc v Mayo County Council (No 2)*[1]

In this case, the two applicants (Glencar and another company – Andaman Resources plc) brought a judicial review application against the respondent Council in respect of the imposition of a mining ban. Included in the pleadings was a claim for damages, based on several grounds; the relevant aspect of the claim that made the case a landmark one was the claim in negligence. The applicants alleged that the unlawful mining ban caused them loss by bringing about the collapse of a joint venture between the applicants and a third company.[2] The Irish High Court (IEHC) found the mining ban to be *ultra vires* and granted a declaration to that effect. The subsequent damages hearing resulted in the rejection of the claim by the IEHC.[3] The appellants appealed to the IESC.

As the negligence claim was based on the exercise of a statutory power, it stood no prospect of success on established authority.[4] The power in question in this instance – planning policy in relation to mining in the county – was one exercised for the benefit of the public at large, not one for the protection of a limited class of persons of which the applicants were members; nor was there any other basis for close proximity between the parties. This is precisely the basis on which the IEHC found no duty of care arose.[5] However, in the IESC, Keane CJ conflated the

[1] [2001] Irish Supreme Court (IESC) 64, [2002] 1 Irish Reports (IR) 84, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2001 (2002) 554 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 293, nos 3–5; *M Peart*, Neighbourhood Watch [2001] 95(10) Law Society of Ireland Gazette (Gaz) 22.

[2] [1993] 2 IR 237, Blayney J.

[3] The IEHC judgment of Kelly J is included in [2002] 1 IR 84, 89 ff.

[4] *Ward v McMaster* [1988] IESC 3, [1988] IR 337, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1988 (1989) 407 ff. Interestingly, the IESC decision in *Sunderland v Louth County Council* [1990] Irish Law Reports Monthly (ILRM) 658, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1990 (1991) 545 ff, was not even cited in *Glencar*. The case had held that planning functions were not suited to the imposition of a duty of care in negligence.

[5] [2002] 1 IR 84, 103 f (Kelly J).

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discussion of negligent exercise of statutory powers with breach of statutory duty and commenced an extensive review of the general approach to be taken to the analysis of duty of care in negligence.[6] In essence, the Chief Justice adopted the three-stage approach to duty of care in *Caparo Industries plc v Dickman*,[7] in place of the two-step approach in *Anns v Merton LBC*,[8] which had been influential in Ireland in the two decades prior to *Glencar*.

While the *Caparo* decision had, at least initially, a significantly negative impact in English law on the development of novel duties and the reversal or narrowing of some duties developed in the 1960s, 1970s and 1980s, *Glencar* has not had quite the same impact in Ireland. In *Caparo*, the House of Lords not only reformed the general test for a duty of care, but also significantly narrowed the interpretation of the *Hedley Byrne* principles governing claims for negligent misrepresentation.[9] In *Wildgust v Bank of Ireland*,[10] the IESC acknowledged the link between the three-stage approach and the more focused principles in respect of negligent misrepresentation, but did not adopt the *Caparo* interpretation of the *Hedley Byrne* principles. The court expanded the duty under *Hedley Byrne* to a situation involving third party reliance on a statement about the plaintiff, causing economic loss to the plaintiff. The IESC did, however, later use the third stage of the three-stage approach (policy factors – whether

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[6] The conflation of statutory powers and duties is evident at [2002] 1 IR 84, 137; the discussion of negligence is at 131 ff. Fennelly J, at 153, agrees with the Chief Justice's analysis of negligence but provides a more focused discussion of the negligence issue in the present case, 153 ff. The other three members of the court agreed with both judgments (Denham, Murray & McGuinness JJ, at 143).

[7] [1990] 2 Law Reports, Appeal Cases (AC) 605; the Chief Justice was also influenced by the Judgment of Brennan J in High Court of Australia (HCA) decision in *Sutherland Shire Council v Heyman* (1985) Commonwealth Law Reports (CLR) 157, 424. The stages are proximity, reasonable foreseeability and whether it is fair, just and reasonable to impose a duty.

[8] [1978] AC 728. In this approach, proximity was subsumed within reasonable foreseeability, giving rise to a prima facie duty that could be negatived by policy considerations.

[9] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] United Kingdom House of Lords (UKHL) 4, [1964] AC 465.

[10] [2006] IESC 19; [2006] 1 IR 570, noted by *R Byrne/W Binchy,* Annual Review of Irish Law 2006 (2007) 547 ff; *E Quill*, Ireland in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 281, nos 6–10; *R Ryan/D Ryan* (2006) 1(3) Quarterly Review of Tort Law (QRTL) 13. See also *P Fahy*, Liability of Pension Scheme Advisers – The Irish and Common Law Position (2007) 14 Commercial Law Practitioner (CLP) 121 and *M Austin*, Negligent Misstatement – Where Now Following *Patchett v Swimming Pool & Allied Trades Association*? (2010) 28 Irish Law Times (ILT) 122.

the imposition of a duty would be fair, just and reasonable) to allow defendants considerable latitude in the use of disclaimers to preclude a duty arising.[11]

Another area involving duties in respect of pure economic loss – defective buildings – had developed in Ireland in the 1980s.[12] In *Glencar*, the IESC hinted that these should not change, despite their virtual abolition in English law in *Murphy v Brentwood District Council*.[13] Duties in this area have been applied by the IESC as recently as 2017,[14] though the parties had agreed the applicable principles and it was only the limitation period that was disputed, so the case is slender authority for the continued application of the duties. Nonetheless, the fact that the parties were in agreement that duties still arise in this context suggests that the IESC in *Glencar* was effective in indicating the continuing validity of these duties in Ireland. An area of duty in respect of pure economic loss that is more susceptible to retraction is the field of relational loss – where a plaintiff suffers economic loss due to damage to a third party's property, eg damage to a utility such as electricity or gas, on which the plaintiff's business is dependent. Irish law traditionally excluded such claims but began to allow them in the 1990s in the wave of influence of *Anns v Merton*.[15] The IESC did not specifically refer to these in *Glencar* but did articulate a strong policy of excluding pure economic loss claims except in limited established pockets (such as negligent misrepresentation and defective buildings) or in truly exceptional cases. The issue has not subsequently been litigated in the Superior Courts, but one would anticipate the denial of duty in a routine relational loss situation.

Another area where *Glencar* has been used in the development of duties is assumption of responsibility: it was part of the reasoning in imposing an affirmative duty on the electrical infrastructure company, the Electricity Supply Board (ESB) in the management of dams at a hy-

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[11] *Walsh v Jones Lang Lasalle Ltd* [2017] IESC 38, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2017 (2018) 601 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 283, nos 17–20.

[12] *Ward v McMaster* (fn 4); earlier cases on the developments are discussed in that case.

[13] [1991] 1 AC 398, discussed in [2002] 1 IR 84, 142 f, Keane CJ; Fennelly J, 156.

[14] *Brandley v Deane* [2017] IESC 84, [2018] 2 IR 741, noted by *Byrne/Binchy* (fn 11) 440 ff.

[15] The traditional position can be seen in *Irish Paper Sacks Ltd v John Sisk & Son (Dublin) Ltd* Unreported IEHC, 18 May 1972, O'Keeffe P (damage to an electricity cable). The more expansive approach to duty can be seen in *McShane Wholesale Fruit & Vegetables Ltd v Johnston Haulage Ltd* [1996] IEHC 57, [1997] 1 ILRM 86, Flood J, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1996 (1997) 573 f.

droelectrical power station.[16] More recently, in *Barlow v The Minister for Communications, Marine & Natural Resources*,[17] Murray J engaged in an extensive review of authorities on duty of care, with a detailed examination of *Glencar*, to impose an affirmative duty on the minister in respect of the management of certain fisheries, having encouraged the plaintiffs to invest heavily in developing their capacity to exploit them.

One area in which *Glencar* has the potential for a more restrictive impact on the development of duty is psychiatric injury claims. The leading decision in the field, *Kelly v Hennessy*,[18] included the following as one of its criteria:

If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.[19]

It seemed clear on the face of the judgment that the criterion, as explained by the Chief Justice, was focused on the foreseeability of the particular form of injury – psychiatric illness, as opposed to injury in general. It was probably intended to exclude the decision reached earlier the same year by the House of Lords in *Page v Smith*,[20] though that case is not expressly cited. Despite this, the Irish courts have incorporated the

[16] *University College Cork v Electricity Supply Board* [2020] IESC 38, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2020 (2021) 724 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2020 (2021) 302, nos 18–22; *D Ryan*, The Duty of Care in Negligence: *University College Cork v Electricity Supply Board* [2022] 4 Irish Supreme Court Review (ISCR) 185; *IB Harper*, Opening the Floodgates? (2020) 25 Bar Review (Bar Rev) 174. Control over the hazard was the principal reason for the imposition of the duty, but the discussion of this aspect of affirmative duty also alluded to the *Glencar* decision, particularly as interpreted in *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2016] IESC 6, [2017] 1 IR 119, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2016 (2017) 606 ff.

[17] [2025] IESC 14; see also the imposition of a non-delegable duty by the IESC on the health service in respect of the cervical screening scheme in *Morrissey v HSE* [2020] IESC 6, [2024] 1 IR 103, noted by *Quill* (fn 16) no 3 ff; *W Binchy*, *Morrissey v Health Service Executive*: Professional Negligence, Damages and the Non-Delegable Duty of Care [2021] 3 ISCR 25; the discussion of the issue in part 13 of Clarke CJ's judgment does not cite *Glencar* specifically but does use the three elements of proximity, reasonable foresight and policy considerations.

[18] [1995] IESC 8, [1995] 3 IR 253, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1995 (1996) 520 ff.

[19] [1995] 3 IR 253, 259 (Hamilton CJ) citing Dean and Brennan JJ in *Jaensch v Coffey* (1984) 155 CLR 549.

[20] [1995] UKHL 7, [1996] 1 AC 155.

full three-stage test from *Glencar* into this criterion.[21] This runs the risk of cases being excluded by proximity considerations, other than those specifically addressed in *Kelly*. It also lacks sense, as it includes the full policy element of the three-stage test, even though the IESC in *Kelly* had cautioned against the use of policy constraints beyond those already in the criteria to restrict claims.[22]

2. *Hickey v McGowan*[23]

This was the first Irish case where a victim successfully established the vicarious liability of a member of a religious institution for sexual abuse committed by another member of that institution. The plaintiff was taught by the second defendant, a teacher and a member of the Marist Order of Brothers between 1969 and 1972, and he was sexually abused by the second defendant during this period. The first defendant was the Provincial of the Order at the time of the litigation. The claim succeeded before the IEHC;[24] the appeal to the IESC addressed three aspects of vicarious liability – the relationship between the tortfeasor and the person sought to be made vicariously liable (limb one); the behaviour that could be regarded as falling within that relationship (limb two); and whether two or more persons could be vicariously liable for the same tort.

On the first limb of vicarious liability, the IESC rejected the IEHC analysis, based on an English case,[25] applying quasi-corporate status to

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[21] *Harford v Electricity Supply Board* [2021] Irish Court of Appeal (IECA) 112, [2022] 2 IR 541, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2021 (2022) 283, nos 18–21; *Sheehan v Bus Éireann/Irish Bus* [2022] IECA 28, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2022 (2023) 535 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2022 (2023) 307, nos 16–24. The plaintiff in *Sheehan* succeeded, despite the incorporation of the additional factors.

[22] [1995] 3 IR 253, 262 (Hamilton CJ) and 273 f (Denham J).

[23] [2017] IESC 6, [2017] 2 IR 19, noted by *Byrne/Binchy* (fn 11) 625 f; *Quill* (fn 11) no 4 ff; *J Gallen*, Vicarious Liability and Historical Abuse: A Critical Analysis of *Hickey v McGowan* (2017) 58 Irish Jurist (Ir Jur) 184; *L Beechinor/S Moorhead*, *Hickey v McGowan*: Recent Developments in Classroom Sexual Abuse Cases (2017) 22 Bar Rev 44; *C Fitzgibbon*, The Vicarious Liability of Religious Orders in Child Abuse Civil Actions (2017) 35 ILT 104.

[24] [2014] IEHC 19; noted in *R Byrne/ W Binchy*, Annual Review of Irish Law 2014 (2015) 680 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2014 (2015) 263, nos 18–24.

[25] *Various Claimants v Catholic Child Welfare Society* (CCWS) [2012] United Kingdom Supreme Court (UKSC) 56, [2013] 2 AC 1, noted by *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger (eds), ETL 2012 (2013) 163, nos 46–56; *C McIvor* (2013) 29 Professional Negligence (PN) 62.

the Marist Order. The IESC affirmed established authority that the members of an unincorporated association could be vicariously liable for the torts of another member but such liability only applied to members at the time the tort took place.[26] The Provincial had failed to plead and prove that he was not a member at the time, so was found personally liable; he was not liable as the leader of the organisation or as a representative for the membership. In practice, this ruling presents significant challenges for plaintiffs in properly identifying appropriate defendants, particularly where membership is large and the tort is historic. The IESC also affirmed that a recipient of gratuitous services could be vicariously liable for torts committed by the provider of the service. There was slender authority for this proposition in Ireland, but it had been questioned as a distortion of vicarious liability, based on the fact that the recipient of the service was insured and the tortfeasor was not (ie, it was seen as a deep-pockets decision).[27] Without adopting in full the 'akin to employment' approach in English law, the IESC did accept that the exercise of control, enterprise risk and justice considerations (though not 'unbridled discretion') were relevant to determining a sufficient relationship between the tortfeasor and the defendant.[28] The IESC has subsequently affirmed that the approach to a sufficient relationship has broadened, but does not extend to applying vicarious liability for independent contractors.[29] This broadening should be of considerable benefit to persons injured by workers in non-traditional work relationships (eg, in the gig economy or volunteers).

The IESC decision also affirms the close connection test as the appropriate mechanism for determining whether the tort is sufficiently linked to the tortfeasor's work for the purposes of vicarious liability. There was

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[26] *Murphy v Roche* [1987] IR 656, noted by *R Burne/W Binchy*, Annual Review of Irish Law 1987 (1988) 336 ff.

[27] *Moynihan v Moynihan* [1975] IR 192. The HCA refused to follow this decision in *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333, noted by *P Handford* (2001) 9 Tort Law Review (Tort L Rev) 97. Hardiman J was also critical of it in *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 IR 302, [45] f; Fennelly J in *O'Keeffe* [248] expressly reserved his opinion on the correctness of the decision.

[28] See in, particular, O'Donnell J at [37] ff; the 'unbridled discretion' comment is at [38]. See also *D Ryan*, Vicarious Liability for Independent Contractors: Orthodox Principles "on the Move"? (2019) 16 Irish Employment Law Journal (IELJ) 4.

[29] *Morrissey v HSE* [2020] IESC 6, [2024] 1 IR 103. This is similar to the English position in *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] AC 973. The IESC also examined business integration in determining the nature of the relationship, reminiscent of *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 Times Law Reports (TLR) 101, England and Wales Court of Appeal, Civil Division (EWCA Civ).

already significant judicial support for this approach,[30] but this was the first case to successfully apply the test to allow a plaintiff to succeed. The IESC was not specific on the precise details of which version of the close connection test should apply in Ireland, as the case itself was fairly clear-cut on any version of the test.[31] It remains to be seen how this test will develop in Ireland, but it does offer plaintiffs a broader range of circumstances in which vicarious liability can be used to obtain redress.

The case also introduced dual vicarious liability in Ireland (ie, two employers or persons in a sufficient relationship with the tortfeasor being vicariously liable for the same tort).[32] In this instance, the school manager, who had not been sued and was deceased at the time of the litigation, was also found to be vicariously liable. In this instance, the concept worked against the plaintiff, as he was allocated responsibility for the school manager's liability under a statutory provision on imputed contributory negligence.[33] The IESC unanimously indicated that instances of dual vicarious liability would be rare, as one employer or responsible person could usually be identified as being in control of the activity to the exclusion of the other; this unanimity is somewhat undermined by the fact that there was a four to one split on how to apply the concept on the facts – the majority applying dual vicarious liability. There will probably be cases where this concept is beneficial to plaintiffs, enabling them to get compensation from a solvent or insured entity, where another responsible

[30] *O'Keeffe v Hickey* [2008] IESC 72; [2009] 2 IR 302, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2008 (2009) 6225 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2008 (2009) 364, nos 2–5; *C Feeny* (2009) 6(2) IELJ 43; *C Feeney* (2009) 14 Bar Rev 81. The majority, in obiter dicta, supported the development. Some doubt had arisen (at least in respect of adult victims) from the IESC decision in *Reilly v Devereux* [2009] IESC 22; [2009] 3 IR 660, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2009 (2010) 747 f; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 313, nos 12–14.

[31] On the differences between Canadian, English and Australian versions of close connection and the lack of clarity on the Irish position, see *D Ryan*, Making Connections: New Approaches to Vicarious Liability in Comparative Perspective (2008) 15(1) Dublin University Law Journal (DULJ) 41; *D Ryan*, 'Close Connection' and 'Akin to Employment': Perspectives on 50 Years of Radical Developments in Vicarious Liability (2016) 56 Ir Jur 239, 241 ff; *D Ryan*, Connecting Cautiously: Vicarious Liability in Ireland in Comparative Perspective, in: P Giliker (ed), Vicarious Liability in the Common Law World (2022).

[32] Based on *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] Law Reports, Queen's Bench (QB) 510.

[33] Sec 35(1)(i) of the Civil Liability Act 1961. The majority noted that the effect of the imputed contributory negligence provision was harsh and that it may be suited to parliamentary scrutiny for legislative reform.

person is not a viable financial target. It will also be useful for defendants to offset a share of responsibility in some cases.

3. *GE v Commissioner of An Garda Síochána*[34]

The plaintiff was an applicant for subsidiary protection; while awaiting a decision on his application, he travelled to Northern Ireland; on his return to the Republic, he was arrested, detained and transferred to prison by the Garda Síochána (the Irish Police). His detention was deemed to be unlawful by the IESC and he was released; he was subsequently detained, following use of the correct procedures, as identified by the IESC.[35] The plaintiff brought a claim for false imprisonment in respect of his initial detention; the defendant asserted that only nominal damages should be awarded. The IEHC awarded € 7,500;[36] the IECA upheld the award;[37] the defendant appealed to the IESC, which upheld the IECA decision and reasoning.

While false imprisonment cases are rare, the case is important, as it engages in a discussion of high-level principle on the functions of damages awards and both the IECA and IESC diverged from the approach of the UKSC and the HCA.[38] Those courts used a 'but-for' analysis to determine that where a lawful detention would have happened if the unlawful detention had not occurred, then only nominal damages should be awarded. The factual scenario in the Irish case was that a lawful detention could

[34] [2022] IESC 51, [2022] 2 ILRM 393, noted by *Byrne/Binchy* (fn 21) 584 ff; *Quill*, ETL 2022 (fn 21) nos 8–11; *D Gilligan*, Damages and the 'Essence' of False Imprisonment (2024) 44 Legal Studies (LS) 560.

[35] *GE v Governor of Cloverhill Prison* [2011] IESC 41; this was a *habeas corpus* application. There was a further brief period of unlawful detention, based on a failure of timely release after the IESC ruling, *GE v Governor of Cloverhill Prison* [2011] IEHC 351.

[36] *GE v The Commissioner of An Garda Síochána* [2018] IEHC 293, Faherty J.

[37] *GE v Commissioner of An Garda Síochána* [2021] IECA 113, noted in *R Byrne/W Binchy*, Annual Review of Irish Law 2021 (2022) 495 f; *Quill*, ETL 2021 (fn 21) nos 22–26; *S Walsh*, *GE v Commissioner of An Garda Síochána & Others*: Sea Changes Rejected and an Age-Old Tort Reassessed (2022) 21 Hibernian Law Journal (Hibernian LJ) 140.

[38] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, noted by *A Morris/K Oliphant*, England and Wales, in: K Oliphant/BC Steininger ETL 2011 (2012) 162, no 38 ff and *Lewis v Australian Capital Territory* [2020] HCA 26, (2020) 381 Australian Law Reports (ALR) 375, analysed by *SC Blashki*, What World are We Imagining?: Counterfactual Reasoning and the But For Test in Lewis v ACT (2021) University of New South Wales Law Journal Forum (UNSW Law Jl F) No 4.

have taken place, but that it was unlikely in practice as the police were unaware of the procedural deficiency in the original process until it was pointed out to them by the IESC – ie, it was a systemic misunderstanding and not an error by the individual officers conducting the arrest, detention and transfer. Rather than rely on this point of distinction, the courts proceeded to examine the issue as if the counterfactual could be satisfied and still drew the conclusion that nominal damages would not be appropriate. While the IESC focused on vindication of liberty as being important, independently of the consequences of the deprivation, they also endorsed the IECA decision, which had emphasised due process rights in addition to the issue of consequences on liberty. In a carefully reasoned note on the IESC decision, Gilligan observes that the IESC approach is dubious (perhaps simply wrong) if one focuses exclusively on the autonomy aspect of liberty – the freedom of choice aspect, as Gilligan puts it (generally conceived as freedom of movement). However, he rightfully points out that liberty has another element – freedom from subordination to the will of another – and only the following of proper procedures by the authorities can legitimise a subordination. Thus, a substantial award, taking cognisance of all the circumstances, including limiting the size of award based on the lack of substantial impact on autonomy and the plaintiff's underlying wrongful behaviour, is appropriate and he does not take issue with the quantum awarded in the case. On balance, Gilligan's analysis is clearer than that of either the IECA or the IESC, but both Courts were correct that due process and vindication of liberty are important even where the deprivation of liberty would otherwise have occurred and led to the same period and conditions of detention. Their approach also serves to ensure a level of accountability for state failure to follow procedures, which is welcome.

4. *Herrity v Associated Newspapers (Ireland) Ltd*[39]

The plaintiff and her husband were going through a marriage breakdown. The husband provided one of the defendant's newspapers with information on a relationship between the plaintiff and a priest. The paper ran a series of stories on the relationship, including photographs of the parties and transcripts of phone conversations, obtained by a private investigator acting for the plaintiff's husband. The plaintiff claimed damages for invasion of privacy against the media company that owned

[39] [2008] IEHC 249, [2009] 1 IR 316; noted by *Byrne/Binchy*, Annual Review 2008 (fn 30) 630 ff; *Quill*, ETL 2008 (fn 30) nos 9–13; *N Cox* (2008) 3(2) QRTL 18.

the newspaper that ran the stories. Dunne J upheld the claim and awarded the plaintiff € 60,000 in compensatory damages, including aggravated damages, and a further € 30,000 in exemplary damages. The case is significant, as it was the first reasoned superior court decision awarding damages to a plaintiff against a private entity for violation of the constitutional right to privacy.

Twenty years earlier, it was established that the state could be held liable for damages in respect of violation of an individual's constitutional right to privacy.[40] In the interim, there were a few decisions, mainly on interlocutory applications and evidential issues, indicating that the constitutional right was enforceable against private individuals.[41] There were some successful damages claims in the Irish Circuit Court (IECC) and one of these was upheld by the IEHC in a brief *ex tempore* decision.[42] Building on these earlier decisions, Dunne J identified some general principles in respect of claims for violation of privacy. First, she confirmed the existence of an action for enforcement of the constitutional privacy right against a private defendant. Secondly, she accepted that some information by its very nature is private and unsuitable for disclosure to third parties without consent, while other private information is susceptible to disclosure, based on a balancing of competing considerations. Thirdly, she noted that privacy may be violated either by the obtaining of private information or by its use. The case itself concerned the balancing of competing interests; the unlawfulness of the recording and its use tipped the balance in favour of the plaintiff.[43] Dunne J's judgment has been cited favourably in several subsequent cases developing the law on privacy claims in Ireland.[44]

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[40] *Kennedy v Ireland* [1987] I IR 587, noted by *Byrne/Binchy* (fn 26) 99 ff.

[41] *M v Drury* [1994] 2 IR 8, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1994 (1996) 120 ff; *Devoy v Dublin Corporation* Unreported IEHC, 18 October 1995, Irish Times Law Report, 22 January 1996 (a brief note); *Cogley v RTE* [2005] IEHC 180, [2005] 2 ILRM 529, *R Byrne/W Binchy*, Annual Review of Irish Law 2005 (2006) 721.

[42] *O'Connor v McKenna* Unreported IECC, Nov 2007, noted in the Irish Times 14 November 2007; *Sinnott v Carlow Nationalist* Unreported IECC, June 2006; Unreported IEHC, January 2007, noted by *Byrne/Binchy* (fn 10) 540.

[43] The recording of the phone conversations was a breach of sec 98 of the Postal and Telecommunications Services Act 1983, as the husband had no authority to give a valid permission for the recordings. The section also precludes disclosure of the information obtained.

[44] Cases include *Hickey v Sunday Newspapers Ltd* [2010] IEHC 349; [2011] 1 IR 228, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2010 (2011) 634 ff; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 286, nos 19–22; *K (a mi-*

5. *Lavin v Dublin Airport Authority Plc*[45]

The plaintiff was injured when she fell on an escalator going from the floor with the check-in desks to the floor with the departure gates at the defendant's airport. The fall occurred when the plaintiff was adjusting her hand baggage, which was on the same step she was standing on, and she was not holding the handrail. The bulk of the pleadings focused on claims that the escalator was defective. However, during the trial, the focus shifted to a lack of sufficient signage on the availability of elevators as an alternative route up to departures. The escalator was found not to be defective, complying with accepted standards and functioning correctly.[46] The IEHC accepted that the case argued was sufficiently pleaded and found the defendant liable, with a one-third deduction for contributory negligence.[47] The IECA expressed significant doubts about the sufficiency of pleadings but, in any event, found that the defendant was not in breach of the duty of care. The three elevators were close to the escalator, prominently visible and there were several airport employees in pink high-visibility jackets nearby that the plaintiff could have asked about an alternative route to the departures floor. Additionally, the CCTV footage showed the plaintiff simply following her companions to the escalator, without any hesitation and without paying any obvious attention to signage. The case is significant as it was influential in a stream of subsequent cases rejecting claims on the basis of plaintiffs' self-responsibility.

By way of background, the Civil Liability Act 1961 abolished the common law defence of voluntary assumption of risk and narrower defences of waiver or a defence under a contractual provision were introduced.[48] Other cases where the common law defence would have applied were to be treated as contributory negligence, leading to an apportionment of damages between the parties. Despite this change, there remained a few situations outside the contractual or waiver defences where a defendant could be completely freed of liability based on the plaintiff's self-respon-

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nor) v Independent Star Ltd [2010] IEHC 500, noted by *Byrne/Binchy* (supra) 633 f; X *(an infant) v Sunday Newspapers Ltd (trading as 'The Sunday World')* [2014] IEHC 696; *Nolan v Sunday Newspapers Ltd (trading as Sunday World)* [2019] IECA 141, [2020] 2 IR 490; *Hyland v The Commissioner of An Garda Síochána* [2025] IESC 43.

[45] [2016] IECA 268, noted by *Byrne/Binchy* (fn 16) 618 ff.

[46] It conformed to the relevant British Standard; even the plaintiff's expert witness accepted that it was compliant and working properly.

[47] Unreported, 8 October 2013 (*ex tempore*) (not available online).

[48] Section 34(1)(b). On the interpretation of the contractual and waiver defences, see *O'Hanlon v ESB* [1969] IR 75, *McComiskey v McDermott* [1974] IR 75 and *Regan v RIAC* [1990] 1 IR 278.

sibility. One method is to find that the defendant does not owe a duty of care.[49] A second possibility is to find the plaintiff's behaviour as the sole legal cause of their injury.[50] A third possibility is to apportion 100 % liability to a plaintiff under contributory negligence.[51] The final possibility is to consider self-responsibility as a factor in the standard of care and use this factor to find there has been no breach of duty. This option is expressly provided for in the Occupiers' Liability Act 1995 and was used in *Lavin* to preclude any liability on the defendant's part. There was a prior example of this being used by the IESC but this initially had little impact on the case law.[52] Since *Lavin,* the use of self-responsibility within the standard of care has occurred in many cases.[53] While most of these are occupiers' liability cases, it can also be seen in other areas.[54] Despite this,

[49] *John C Doherty Timber Ltd v Drogheda Harbour Commissioners* [1993] 1 IR 315, noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 1992 (1994) 554 f; *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, nos 17–20, *PMcD v The Governor of X Prison* [2021] IESC 65, [2022] 1 IR 741, noted by *Byrne/Binchy* (fn 37) 480 f; *Quill*, ETL 2021 (fn 21) nos 3–8.

[50] Irish courts had generally shown a preference for apportionment prior to *Lavin*, see *Stakelum v Bank of Ireland* Unreported, IEHC, 27 April 1999 noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 1999 (2000) 510 ff. Rare examples of a full denial of liability on causal grounds arose in a few cases – *O'Carroll v Diamond* (fn 49), solicitor failing to advise of certain risks in a proposed transaction; *O'Mahoney v Hanlon* [2018] IEHC 657, cyclist hit by a car; *Turner v The Curragh Racecourse* [2020] IEHC 76, plaintiff hit by a horse in an established horse training location.

[51] *McCord v Electricity Supply Board* [1980] ILRM 153; 100% apportionment was discussed but not applied in *GE v The Commissioner of An Garda Síochána*, case three above (citation in fn 34).

[52] *Weir-Rogers v The SF Trust* [2005] IESC 2; [2005] 1 IR 47, noted by *Byrne/Binchy*, Annual Review 2005 (fn 41) 685 ff; *E Quill*, ETL 2005 (fn 49) nos 14–16; *W Binchy* (2005) 1(1) QRTL; *R Ryan/D Ryan* (2005) 23 ILT 59. A non-occupiers' liability example is *Fitzpatrick v White* [2007] IESC 51, noted by *R Byrne/ W Binchy*, Annual Review of Irish Law 2007 (2008) 543 ff; *E Quill*, Ireland in: H Koziol/BC Steininger ETL 2007 (2008) 352, nos 15–17 (medical negligence).

[53] *Byrne v Ardenheath* [2017] IECA 293 did not actually cite *Lavin* but was decided in a similar fashion and could easily have been selected as the landmark case, as it is also often cited in the stream of cases on this issue. Another prominent example is *White v Doherty* [2019] IECA 295, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2019 (2020) 689 f; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 289, no 34. A range of similar cases are noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2018 (2019) 299, nos 37–40; *Quill*, ETL 2020 (fn 16) nos 34–36; *Quill* ETL 2021 (fn 21) nos 39–41; *E Quill*, Ireland, in: E Karner/ BC Steininger (eds), ETL 2024 (2025) 343, no 33.

[54] A pre-*Lavin* example is *Fitzpatrick v White* (fn 52); recent examples include *O'Connor v Wexford County Council* [2018] IEHC 232; *O'Grady v Abbott Ireland* [2019]

the IECA has emphasised that apportionment for contributory negligence is still an option in occupiers' liability cases.[55] Determining which is the appropriate choice is likely to be a matter of some difficulty. The recent cases denying liability give some encouragement to defendants to seek a total rejection of claims where plaintiffs are at fault to some significant degree and undermine the legislature's abolition of the voluntary assumption of risk defence in the Civil Liability Act 1961. The legislature, however, has reacted favourably to the exclusion of liability in the cases by reintroducing a voluntary assumption of risk defence for occupiers' liability cases in a recent amendment to the 1995 Act.[56]

A final worrying point of note in respect of the *Lavin* judgment is that the IECA considered the 1995 Act to be a codification of the existing common law and held that the plaintiff, as an invitee under the common law classification of entrants, was only owed a duty in respect of unusual dangers and that, in the case of usual dangers, no duty to exercise reasonable care arose.[57] As Byrne and Binchy rightly point out, the 1995 Act expressly abolished the common law provisions on occupiers' liability and new definitions were provided for the categories of entrant and the duties owed.[58] While the 1995 Act retained a limited number of specified aspects of the prior law, none of the retained aspects included invitees or unusual dangers.[59] Even in the revised list of criteria for the duties, set out by the

IEHC 79 (both workplace injuries); *Reilly v Mangan* [2019] IEHC 91; *Tumusabeyezu v Muresan* [2021] IECA 191 (both road traffic accidents).

55 *Carroll v Phelan* [2023] IECA 91, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2023 (2024) 590 ff.

56 Part 6 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023, noted by *Byrne/Binchy* (fn 55) 192 ff; *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 333, nos 16–18. The new defence can be implied from the circumstances, unlike the waiver defence under the 1961 Act, which requires communication between the parties about the risk – *O'Hanlon v ESB* [1969] IR 75; *McComiskey v McDermott* [1974] IR 75.

57 Relying on the duty set out by Murnaghan J in *Long v Saorstát and Continental Steamship Company Ltd* [1959] 93 Irish Law Times Reports (ILTR) 137 (IESC).

58 *Byrne/Binchy*, Annual Review 2016 (fn 16) 619 f. They emphasise that, while there may be considerable overlap between the old standard of care and the statutory standard, they are not coextensive and the reasonable care standard under the Act is broader and allows for liability in circumstances not permitted under the standard set out in *Long*. Section 2 provides for the replacement of the old provisions with the provisions in the Act.

59 Section 8 provides for the retention of the common law on the defence of persons and property, some special categories of relationship (such as under contracts of carriage for payment or hire of vehicles, bailment contracts, employers and employees) and non-delegable duties.

legislature in the recent amending legislation, there is no mention of usual or unusual dangers; neither is there any reference to invitees as entrants. A judicial insertion of sub-categories of entrants within the statutory category of visitor and placing restrictions on the standard of care applicable to some visitors, but not others, is plainly at odds with the clear wording of the 1995 Act. There is nothing wrong with considering the nature of the danger as usual or unusual to be one relevant circumstance in evaluating compliance or breach of the standard of care to visitors, but there is no basis for making it determinative – ie, that there can only be a breach of the standard if the danger is unusual. The distinction between usual and unusual dangers has, nonetheless, been used in some subsequent cases.[60] One is reminded of a wise and pithy statement in the context of medical negligence that is generally applicable in respect of the standard of care across a range of circumstances – '[n]eglect of duty does not cease by repetition to be neglect of duty.'[61] In the occupiers' liability context, this could be used to argue that some dangers are usual because a wide range of occupiers do not take readily available precautions, but the failure to take precautions does not make the occupiers' behaviour reasonable.

[60] *White v Doherty* (fn 53); *Carroll v Phelan* (fn 55); *Scanlan v Michael McDonnell t/a The Woodlands Caravan and Camping Park* [2024] IEHC 324; *Kandaurova v Circle K Ireland Energy Group Ltd* [2025] IECA 13.

[61] *O'Donovan v Cork County Council* [1967] IR 173, 193 (Walsh J).

XVI. Italy

Elena Bargelli

As tort law is strongly influenced by social developments and upcoming needs of protection, many decisions have introduced innovative solutions and changed the interpretation of legal provisions over the last 25 years. This is particularly evident in Italy, where an extensive interpretation of the prerequisites of the right to damages has led to the evolution of a victim-oriented system of tort law over time. In a legal system where the boundaries of civil liability are considered 'flexible',[1] it has not been easy to identify five landmark cases in 25 years.

The following factors have been considered when selecting the decisions listed below: the fact that they were issued by the Grand Chamber of the Supreme Court as a result of conflicting interpretations arising among its sections; the fact that they were preceded by an extensive academic debate and followed by a great deal of commentary; and the fact that they provided solutions that have been followed by subsequent case law without *revirement*.

It is evident that there have been far more than five important decisions of the Grand Chamber of the *Corte di Cassazione* that meet such criteria in the past 25 years. In addition to the five selected cases, the Grand Chamber addressed, inter alia, the following crucial issues: the damage suffered by the residents of Seveso as a consequence of the chemical pollution (*Corte di Cassazione, Sezioni Unite*;[2] the victim's right to damages for loss of life in the event of a fatal accident;[3] the scope of *compensatio lucri cum damno*;[4] the burden of proof relating to causality and other issues of medical liability[5] and the concurrence between tortious and unjust enrichment claims.[6]

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[1] *F Galgano*, Le frontiere mobili del danno ingiusto Contratto e impresa (1985) 1 ff; *C Castronovo*, Le frontiere nobili della responsabilità civile (1989).

[2] Cass SS UU 21 February 2002, no 2515, Responsabilità civile e previdenza (Resp civ e prev) (2002) 385.

[3] Cass SS UU 22 July 2015, no 15350, Foro italiano (Foro it) (2015) 9, I, 2682.

[4] Cass SS UU 22 May 2018, no 12565, Resp civ e prev (2018) 1158.

[5] Cass SS UU 11 November 2019, no 28985-28994, Resp civ e prev (2020) 477.

[6] Cass SS UU 5 December 2023, no 33954, Foro it 2024, I, 120.

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Nevertheless, precedence has been accorded to those rulings that concentrate on the requirements of the right to damages, and, more specifically, on the nature and concept of damage, the scope of wrongfulness, as well as the definition and proof of causation. Judgments concerning the commencement of the prescription period in cases of latent damage deserve to be highlighted, given the significant change in the interpretation of the wording of the Civil Code that they have brought about. Indeed, it is these aspects of the action for damages that better delineate the trajectory of tort law and its boundaries over time.

1. Cassazione, Sezioni Unite Civili (Italian Supreme Court, Grand Chamber, Cass SS UU) 11 November 2008, nos 26972, 26973, 26974 and 26975

The Grand Chamber of the Italian Supreme Court passed the four cited decisions on the same day (11 November 2008), with the aim of providing uniform interpretative tools regarding all controversial issues concerning non-pecuniary loss other than personal injuries (*danno biologico*). Indeed, compensation for *danno biologico* had been uncontroversially recognised since the Constitutional Court's 184/1986 judgment, which maintained a constitutionally-oriented interpretation of the general tort law rule (art 2043 of the Italian Civil Code) based on art 32 of the Constitution ('right to health'). The question subsequently arose as to whether damages for non-pecuniary losses other than personal injuries should also be awarded beyond the strict limits of art 2059 of the Civil Code, which restricted such compensation to cases expressly provided for by legislation. For example, in one of the above mentioned four cases, the plaintiff had a testicle removed due to medical negligence and claimed compensation for personal injury and, in addition, loss of amenities of life. This raised the question of whether the latter claim should be upheld in addition to *danno biologico* in the absence of an express provision that allowed compensation for non-pecuniary loss in such cases. A further example of non-pecuniary loss other than personal injury is given by cases of bereavement damage, that is the grief and mourning following the death of a family member.

The Court addressed several questions: firstly, whether, and if so under what conditions, compensation for loss of enjoyment of life (*danno esistenziale*) might be awarded; secondly, whether loss of enjoyment of life constitutes a distinct form of damage from pain and suffering, and whether it should be compensated under the general tort law rule (art 2043 CC) or the rule on non-pecuniary loss (art 2059 CC); thirdly,

whether non-pecuniary loss should be allowed in cases of both extra-contractual and contractual liability; and fourthly, how damages for loss of enjoyment of life should be calculated.

The first two questions were fundamental and lay at the heart of a decade-long debate that had divided scholars and case law. According to one view, loss of amenities should be compensated for under art 2043 of the Civil Code, which requires only that a legally protected interest be violated, either intentionally or negligently. It is then up to the courts to decide which interests deserve compensation. According to an alternative doctrine, loss of amenities of life should fall under the more restrictive rule on non-pecuniary loss (art 2059 CC). However, to overcome the strict boundaries of such a provision, this doctrine advocated a constitutionally-oriented interpretation of art 2059 CC, which, therefore, should be read in conjunction with art 2 of the Constitution protecting all human rights.

In these landmark decisions, the Supreme Court upheld this second line of thought, which led to allowing claims for compensation for non-pecuniary loss as long as the violation of an inviolable human right having constitutional relevance takes place, regardless of whether a legal provision expressly states that compensation is available. Although the Court rejected the idea of a closed list of protected interests, it mentioned life, bodily and mental health, personality rights, and human dignity as interests deserving tort law protection. Consequently, all non-pecuniary losses arising from violations of human rights (including personal injury) were consolidated under the innovative interpretation of art 2059. Conversely, pain and suffering arising from the violation of other rights (for example, property rights) should not be covered by art 2 of the Constitution, with the consequence that they should be only compensable in cases provided for by law. Thus, the Court clearly rejected the fairly generous approach that had sometimes been upheld by case law. This approach allowed plaintiffs to claim compensation for any deterioration in their daily life that was causally linked to wrongful behaviour, regardless of whether the infringed right fell under the heading ‘human rights’.

In addition to the violation of a constitutionally relevant human right, the Court also required a certain degree of seriousness of the infringement and excluded compensation for trivial losses. In assessing damages, the Supreme Court recommended that all losses suffered by the victim be covered, but rejected the idea of awarding punitive damages. Regarding the proof of non-pecuniary loss, the Court reaffirmed that it is a consequential damage and deemed all the circumstances of the case relevant.

Finally, the Court ruled in favour of compensation for non-pecuniary loss in cases of contractual liability, contrary to the prevailing opinion at the time. The main argument was, again, that in the case of an infringement of constitutionally relevant human rights, compensation for non-pecuniary loss is a form of minimal protection to be granted to the injured party.

The four rulings marked a turning point in the doctrine of non-pecuniary damage in Italy, establishing a system of interpretative rules that are still followed by case law today.

2. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 11 January 2008, no 577

The present decision is one of several (nos 578, 579, 580, 581, 582, 583, 584 and 585) concerning causality and prescription in tort law that the Plenary Session of the *Cassazione* passed on the same day (11 January 2008). All of them dealt with personal injury claims relating to hepatitis C and/or HIV contracted by the plaintiffs in the period from 1978–1980 and caused by infected blood transfusions carried out in public hospitals. The claims were brought against the Ministry of Health, which was held liable for failing to control the transfusion service in violation of its duties to supervise and manage the use of human blood for therapeutic purposes.

These decisions represent a significant shift in understanding regarding both proof of causality in tort law and the starting point of the limitation period in typical cases involving latent damage and an uncertain causal link. As they are all expressions and applications of the same doctrines, they will be reported together.

With regard to causation, the decisions reiterated the prevailing opinion that criminal and tort liabilities are subject to the same rules (arts 40 and 41 of the Criminal Code). Consequently, they also concluded that the application of material causation (*conditio sine qua non*) must be limited by the adequate causation theory, which selects the consequences that were foreseeable according to an ex ante prognosis. The cited judgments, however, established a fundamental difference between criminal and tort liability concerning the proof of causation. In fact, in line with the Grand Chamber's decision of 11 September 2002 no 30328 (known as the *Franzese* judgment), the Grand Chamber ruled that the 'beyond reasonable doubt' standard of proof applies in criminal law and that the 'more likely than not' standard of proof applies to tortious liability.

Since then, such understanding of the probatory rule of causation has become uncontroversial in Italian tort law.

With regard to the prescription period, the decision in question upheld and reinforced a victim-oriented interpretation of the strict rule enshrined in art 2947 of the Italian Civil Code, which states that 'the right to compensation for damage resulting from an unlawful fact expires five years after the date on which the fact occurred'. Prior to the Grand Chamber's judgments of 2008, a line of case law had softened the interpretation of such a rule by requiring that the limitation period could not begin before the injured party was aware of the damage.

The 2008 decisions represent a further step forward, as they clarified that this knowledge must encompass both the harm and its unlawful cause. In other words, the Supreme Court established that the prescription period does not start when hepatitis C or HIV manifests itself and becomes known by the victim, but from the moment the disease can be perceived as unjust damage using ordinary diligence and in light of the state of scientific knowledge. Conversely, if the cause of the infection is unknown, the limitation period cannot begin, because the disease itself is not sufficient to constitute the 'fact' identified in art 2947, para 1 of the Italian Civil Code as the start of the limitation period. For example, in the cases that led to the decisions, medical science had identified the hepatitis B virus in 1978, the HIV virus in 1985, and the hepatitis C virus in 1988.

This innovative anti-literal interpretation of art 2947 of the Italian Civil Code had a significant impact on subsequent case law (for instance, in the case of consumption of medicines with teratogenic effects during pregnancy and consequent birth of a child affected by phocomelia;[7] in the case of damage allegedly caused by the flooding of a river where the plaintiff had no knowledge of the deficiencies in designing and maintaining the hydraulic works).[8] From this point onwards, to establish whether the limitation period for the right to extra-contractual damages has started to run, it is necessary to determine whether an average person could have identified the event that caused the damage in light of the available scientific knowledge.

3. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 22 December 2015, no 25767

This judgment settled a dispute over the interpretation of the right of a child born with malformations to claim damages resulting from a

[7] See Cass 24 January 2024, no 2375.

[8] Cass SS UU 29 November 2021, no 2146, Guida al diritto 2021, 10.

failure to diagnose the malformations prenatally, which prevented the mother from choosing to have an abortion. In addressing this question, the Supreme Court was tasked with determining the extent to which the boundaries of tort law can be transcended.

It should be noted that, under Italian law, both parents of a child born with a malformation can seek compensation for pecuniary and non-pecuniary damage suffered as a result of an incorrect or failed prenatal diagnosis, provided the mother can prove that she would have chosen an abortion had she been informed.

On this occasion, however, the Grand Chamber was asked to rule on whether the child itself could claim damages for being born. The facts were as follows. A medical doctor failed to recognise the fact that a foetus was suffering from Down's syndrome. After the birth of the child, the mother affirmed that, had she known about the Down's syndrome, she would have had an abortion. Not only did she claim compensation from the hospital for the damage she suffered because of the wrongful birth, but she also claimed for the child's damage of having been born.

The aforementioned question has been the subject of extensive discussion among scholars of tort law, philosophy, and bioethics since 2012, when the Supreme Court recognised a right to damages for a child with Down's syndrome in a case involving an erroneous prenatal diagnosis.[9] A similar debate had been raised by the 2000 French *Perruche* decision, which had clearly influenced the analogous Italian judgment of 2012, but had been subsequently contradicted by the 2002 *Loi Kouchner*. In fact, this Law denied compensation to children born with a malformation.

Given the 2012 precedent and the great deal of discussion it had raised, in the present case the Third Section of the Supreme Court decided to refer the question to the Grand Chamber, which affirmed that no damages may be awarded to the child.

In particular, the Court rejected both a 'right not to be born' and a 'right to be born healthy', affirming that life itself, rather than its denial, is the supreme good protected by the legal system. Consequently, the Grand Chamber refused the idea that the medical misconduct had violated a legally protected interest of the child.

Since there was neither wrongful injury nor proper damage, the plaintiff's claim was rejected, inasmuch as the requirements of art 2043 of the Civil Code, in particular, the existence of *danno ingiusto* (that is, the violation of a legally protected interest), had not been met.

[9] See Cassazione civile (Cass civ) 2 October 2012, no 16754, Giustizia Civile 2013, I, 640.

The present decision provides a clear demarcation of the scope of tortious claims related to wrongful birth without challenging a pregnant woman's self-determination. Following this ruling, the question of whether a child born with a birth defect can claim damages for being born when their mother could have opted for an abortion had they been properly informed has not been raised again.

4. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 5 July 2017, no 16601[10]

This decision resolved a conflict in case law concerning the recognition of foreign judgments relating to punitive damages. At the same time, it sparked a lively debate on the functions of civil liability in Italian law.

In the present case, an American company (the plaintiff) sold a defective crash helmet produced by an Italian company (the defendant). After compensating the victim (a motorcycle racer) for the punitive damage on the basis of a compromise agreement, the American company obtained a reimbursement order from the Florida court against the producer of the helmet, and, subsequently, requested its recognition and enforcement in Italy. The defendant quoted the well-established doctrine which denied any recognition of foreign judgments awarding punitive damages,[11] and, as a consequence, raised the public order defence.

The present judgment overturned the prevailing opinion at that time that punitive damages could never be recognised in Italy. In doing so, it posited two primary arguments.

Firstly, while previous judgments had emphasised the purely compensatory function of tort law, the Grand Chamber argued that damages might fulfil additional roles under Italian law. The Grand Chamber openly stated that, while compensation plays a key role, there are cases where damages also fulfil a deterrent and punitive function where legal provisions allow so. This is particularly true in the area of non-pecuniary loss.

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[10] Foro it 2017, I, 2613, with comments by *d'Alessandro, Palmieri, Pardolesi, Simone* and *Monateri.* See also *C Consolo*, Riconoscimento di sentenze, specie USA e di giurie popolari, aggiudicanti risarcimenti punitivi o comunque sopracompensativi, se in regola con il nostro principio di legalità, Corriere giuridico (CG) 2017, 1050; *C Scognamiglio*, Le Sezioni Unite ed i danni punitivi: tra legge e giudizio, Resp civ e prev 2017, 1109.

[11] Cass 19 January 2007, no 1183, Resp civ e prev (2007) 1890.

Although this part of the judgment was not substantially innovative, it explicitly stated a reading of the current civil liability system that has not been contested since that time.

Secondly, the Supreme Court reinterpreted the public order as a set of principles common to different EU legal systems (art 67 Treaty on the Functioning of the European Union [TFEU]) and fundamental rights based on international charters. Against this background, it concluded that the recognition and enforcement of foreign judgments awarding punitive damages should be consistent with arts 23 and 25 of the Italian Constitution. The former prohibits the imposition of financial obligations on citizens unless expressly stated by legal provisions, while the latter proclaims that no one may be punished except under a law that existed before the act was committed. It further reminded that the principles of legality and proportionality are also stated by art 49 of the EU Charter of Fundamental Rights.

On the basis of such assumptions, the Supreme Court concluded that a foreign judgment awarding punitive damages can be recognised and enforced in Italy if it is based on a legal provision in force in the foreign legal system, and, in addition, if the damages are predictable and subject to a certain ceiling. Furthermore, it clarified that Italian courts must assess the compliance of punitive damages with the principle of proportionality.

This aspect of the judgment represented a significant innovation in legal jurisprudence by overcoming the prevailing negative attitude towards the recognition of punitive damages. The judgment introduced a complex enforcement test that has been consistently applied by Italian courts ever since.

5. Cassazione, Sezioni Unite Civili (Italian Supreme Court Grand Chamber, Cass Civ SS UU) 15 November 2022, nos 33645 and 33659

Both decisions dealt with the question of whether, in the case of the illegal occupation of an immovable, the owner's impediment to use their property is in itself damage to be compensated. The fundamental question under consideration is that of the concept of 'damage' and, more specifically, whether damage *in re ipsa* is consistent with the general tort law rule set out in the Civil Code (art 2043) for obtaining damages.

Before the Grand Chamber's rulings, the Second and Third Sessions of the Supreme Court had developed different attitudes regarding the right to damages for loss of possession of an immovable. According to the Second Session, the plaintiff would not be required to prove a specific

loss as, the immovables being profitable assets, the damage is presumed in the case of illegal occupation. The defendant, however, could prove that the owner of the immovable did not suffer any actual damage. Conversely, the Third Session required the plaintiff to prove immediate and direct consequential damage according to art 1223 of the Civil Code, while holding the mere violation of a property right as an unlawful event which, in itself, would not give rise to the right to damages.

The Second and Third Sessions of the Supreme Court both decided to refer the same question to the Grand Chamber, which delivered the aforementioned twin judgments. The Court unequivocally dismissed the notion of 'damage *in re ipsa*', reaffirming the principle that the right to compensation is contingent on the occurrence of a consequential loss. It also confirmed the distinction between 'material' causation, ie why the harmful event occurred, and 'legal' causation, ie the link between the unlawful act and its harmful consequences, as recalled by the doctrine established through the rulings of the Grand Chamber of the Supreme Court on 11 January 2008 (see 2. above).

The concept of 'presumed damage' was upheld, as opposed to 'damage *in re ipsa*', through the differentiation of two distinct situations: the damage to property and the prevention of its use. In the reasoning of the Grand Chamber, this distinction would have consequences for the assessment of the immediate and direct consequential loss required for the right to damages. In fact, in the former situation, compensation would necessitate both an unlawful violation of the property right and proof of an actual detrimental consequence. In the latter case, the onus is on the plaintiff to demonstrate that their entitlement has been infringed and that they have been prevented from enjoying the property occupied by the tortfeasor. In other words, in the case of violation of the right to use a thing, the consequential loss would consist of preventing the owner from actually enjoying their property. Such loss can be merely alleged by the plaintiff, as a presumption of 'normal' use by the owner takes place. This presumption may be reversed by the defendant, who is required to prove that the owner was not making use of the occupied immovable. As a means to assess damages, the Grand Chamber mentioned the market rent, unless the plaintiff demonstrates a higher loss (ie, loss of earnings due to missed chances to sell or rent the property at higher prices).

The Grand Chamber's doctrine aims to reconcile cases in which the plaintiff has not incurred any actual loss with the rules of tort law. In doing so, it reaffirmed the need for consequential losses to be compensated, as opposed to damages being awarded for merely the violation of a right. However, it acknowledges that such consequential loss arises from the

deprivation of enjoyment of a property. Although the decisions ended the conflict between two chambers of the Supreme Court and affirmed a uniform solution regarding loss of use of immovable property, they did not establish a systematically consistent doctrine. For example, the Supreme Court continues to rule that where a vehicle owner is unable to use their vehicle due to an accident, they must provide evidence of specific expenses incurred due to their inability to use their vehicle.[12]

[12] Cass 17 December 2024, no 32946, Cass 21 September 2023, no 27052, both in <www.dejure.it>.

XVII. Latvia

Agris Bitāns

This selection of different judgments and rulings can show not only substantial developments already made in relation to tort liability over the last 25 years in Latvia, but also highlight some potential necessary developments for the future.

1. Judgment of the Riga Regional Court, Collegium of Civil Cases, 24 February 2022, no C04406812[1] and Decision of the Senate of the Republic of Latvia, Department of Civil Cases, 26 October 2022, no SKC-646/2022 (C04406812)[2]

This case explores the duty of care that a sport's doctor, a coach and sports club have towards a minor; how joint and several liability is applicable under the Civil Law for jointly committed personal injury, as well as the duty of care of care owed by different individuals and the legal concept of 'the best interests of the child'.[3] This case is also remarkable regarding the establishment of joint and several liability for a violation committed by different actions under art 1675 of the Civil Law.

In 2012, the claimant brought an action against his coach, his hockey club and the Republic of Latvia (as the owner of the sport medical centre, which was not a separate legal entity) as jointly and severally liable for compensation for non-pecuniary loss in the amount of € 711,436 for personal injury.

The claimant was a young hockey player with potential to become a professional player. He was the most successful player of his age, and he played in the national youth team in international tournaments. During a training session in 2002, the claimant suffered clinical death and, due to immediate medical assistance, his life was saved. After long-term treat-

[1] ECLI:LV:RAT:2022:0224.C04406812.9.S (not published).

[2] ECLI:LV:AT:2022:1026.C04406812.13.L – see on the Latvian Supreme Court website: <https://www.at.gov.lv/downloadlawfile/8661>.

[3] See on this case the description and comments by *A Bitāns* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 349, nos 45–91.

https://doi.org/10.1553/978OEAW51463-Latvia

ment, the claimant was recognised as a disabled person of category 2 for the rest of his life as a result of irreparable damage to his health.

The claim was based on the following breaches; (1) the team's coach used improper training methods for the minors and instructed the claimant to wear a belt with lead weights of approx 15–20 kg during training; (2) the sports medical centre doctor did not inform the coach and/or the player's parents about the changes she discovered in the claimant's heart and did not request a reduction in the intensity of training or to suspend training temporarily; and (3) and the hockey club did not supervise the training methods used by the coach.

Since at the moment of suffering personal injury the claimant was a minor, the best interests of the child are a primary consideration in all actions concerning children, under part 1 art 3 of the United Nations Convention on the Rights of the Child, part 1 art 6 of the Law on the Protection of the Rights of the Child and also part 2 art 24 of the Charter of Fundamental Rights of the European Union.

This case is remarkable because the court provided a clear interpretation of art 1675 of the Civil Law regarding joint and several liability for a tort under art 1635 of the Civil Law. The doctrinal position was that despite the reference to a 'criminal offence' in art 1675, this legal norm is generally applicable also to torts. Article 1675 is also applicable if the persons, independently from each other, caused the same damage to the victim by their acts or omissions, or if there is no reasonable basis to attribute a certain part of the damage to only one of the liable persons. The Senate referred to clause (b) para 1 and para 3 of art 9:101 of the Principles of European Tort Law to justify joint and several liability in this civil case.

Three individuals were held liable as a result of violating their duties, namely, improper training procedures followed by a coach, lack of supervision of a medical doctor as well as a lack of control by a sports club. A person can be liable not only for personal acts but also for omissions to perform their duties when they become aware of conduct contrary to the best interests of a child.

The court further elaborated on the concept of 'due care' for a sport doctor, a coach and a sports club in relation to a minor athlete.

The 'due care' owed by a sport doctor includes not only an obligation to perform medical tests in respect of frequency and content prescribed by normative acts or logic, or a duty to properly inform a minor's parents about their child's state of health, but also an obligation to ensure that the rights of the child are respected and promoted by taking all steps that are reasonably necessary to prevent possible harm, especially when it

became known that other persons acted contrary to the best interests of the child, even parents.

For the first time, a court determined the due care owed by a sports coach in relation to minors: a coach has an obligation to use training methods specifically developed for minors and to evidence what training methods they used in the course of training sessions.

Also for the first time, a sports club's 'due care' in relation to minors was determined. It includes an obligation to ensure that athletes attend medical examinations, to ensure that only those athletes who pass a medical examination and receive approval to train participate in training sessions and competitions, and to ensure that doctors' recommendations are consistently implemented. Furthermore, a sports club, as the institution responsible for training procedures, should also pay due attention to the work of a coach with children, making sure that the methods they use in training correspond to the physiological characteristics and health status of minors.

Unfortunately, the court's awarded € 40,000 as damages for personal injury shows lack of clear methodology as to how this amount for non-pecuniary compensation for personal injury was calculated and what amount was awarded for caused mutilation. Nevertheless, the court recognised that the claimant suffered serious non-pecuniary harm in connection with the damage to his health and disfigurement.

The most controversial conclusion related to the co-liability of the claimant's parents. Although they were not heard in the case, even if the parents could potentially be co-liable for personal injury, this has not been attributed to the claimant as a victim under the *culpa mixta* concept, which could lead to a reduction of compensation under Latvian law.

Moreover, in this case, the Latvian court, for the first time, recognised the concept of loss of a chance and the possibility to claim compensation for loss of opportunity under Latvian law, although claims for such compensation had been rejected in the present case.

2. Judgment of the Senate of the Republic of Latvia, 24 April 2019, Civil Case no SKC-46/2019 (C04394710)[4]

This case centres on the issue of the determination of the moment when a company can establish losses caused by its board members and, thus, when the prescription period starts to run. The question of the pro-

[4] ECLI:LV:AT:2019:0424.C04394710.10.S – see on the Latvian Supreme Court website: <http://www.at.gov.lv/downloadlawfile/5823>.

cedure and limits of liability for losses caused by board members, even if this board member had majority voting rights while concluding economically disadvantageous transactions, is also addressed.[5]

The claimant, one of the largest commercial banks in Latvia ('the bank'), brought an action on 30 June 2010 against its former board members, A and B, for compensation of pecuniary loss in the amount of € 85,465,376, holding them jointly and severally liable under arts 1672, 1674 and 1676 of the Civil Law. The claim was based on arts 34, 169, 292, 301 and part 3 art 309 of the Commercial Law, arts 76 and 96 of the Law on Joint Stock Companies, as well as arts 1587, 1635, 1672, 1674, 1676, 1771–1773, 1775, 1779, 1784, 2289, 2295, 2301 and 2304 of the Civil Law.

The defendants were former board members of the bank and had been shareholders of the bank since 1992 with a decisive majority. Due to the 2008 banking crisis, the Republic of Latvia entered into an agreement with the defendants as shareholders of the bank and took control of the bank. Following the bank's takeover, several deposit and loan agreements which had been concluded between the defendants and their relatives were discovered and these did not conform with market conditions. Part of these loss-making contracts were concluded on 1 January 1995, and between 20 March 2002 and 19 March 2008.

The claim was related to compensation of losses the board members caused to the banks in their position as board members due to concluding economically disadvantageous contracts for the bank without prior acceptance from the management board and the Supervisory Council. For the period from 1 January 1995 to 10 December 2008, the defendants were not entitled to enter into transactions with the bank since the management board and the Supervisory Council had not provided their required approval.

This case was reviewed in third instance several times and a final judgment was handed down in 2022. The claim was satisfied, and A and B were held jointly and severally liable and ordered to compensate the claimant € 85,695,927 as damages for pecuniary loss.

First, this case is remarkable because it clarifies the determination of the starting point of the prescription period for losses suffered as a result of commercially disadvantageous contracts concluded a long time previously. Moreover, the case establishes clear principles as regards knowledge of a legal entity, which, until this decision, had not been determined in modern Latvian case law.

[5] See on this case the description and comments by *A Bitāns* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2019 (2020) 331, nos 21–47.

Pursuant to part 9 art 100 of the Law on Joint Stock Companies, a special limitation period of three years for the filing of a claim against a member of a board or the Supervisory Council of a joint stock company begins to run on the date on which the right to the claim arises.

The starting moment of the prescription period is when the creditor knew or ought to have known about the infringement of rights (if not otherwise provided by the law). This point in time is also applicable to legal entities. Knowledge of one member of the company is not sufficient and is not recognised as knowledge of the company. Instead, the will (and consequently knowledge) of the company has to be expressed by decisions of the relevant institution, for instance, the board, the Supervisory Council or shareholders meeting. Moreover, the moment of discovery of any suffered losses can be defined after all three necessary preconditions for civil liability, ie (1) unlawful behaviour; (2) the existence of losses; and (3) a causal link between the behaviour and suffered losses, are established.

Under art 1771 of the Civil Law, it is essential to find out when the loss was incurred and when the conditions for its compensation were given. Therefore, the fact that the ascertainment of the specific losses can only be obtained after a financial due diligence process and preparation of a report by external specialists means that the prescription period for the claim should start to run after the completion of the due diligence process, even though the transactions causing the losses were concluded and performed several years earlier.

Furthermore, sometimes the determination of losses can require some time after knowledge about violation of the rights or unlawful behaviour of the infringer has been gained. It is legally permissible that the prescription period for a claim for compensation starts to run two years after the takeover of a company (a victim) and even 15 years after the conclusion of disputable transactions.

Second, the principle of 'an honest and careful manager' finds no exemption in cases in which a board member is a majority or sole owner of a company. Factual power to make any decision in a company, including confirming transactions under dispute or bringing about a release from liability by the shareholders meeting, do not release board members from their duty to act as 'an honest and careful manager'.

Third, the notion of 'losses' includes lost profit as a result of concluding questionable transactions with related persons, such as relatives and other close persons. Board members are liable even if the company generally was making a profit. In order to claim damages for losses, it is not necessary to challenge the legality of the transaction under question.

Fourth, if the board members seek an exemption from civil liability from the shareholders meeting, it is important that the shareholders meeting was informed about a particular breach and losses. Without having knowledge about the particular breach and losses, the shareholders meeting cannot legally release the board member from civil liability in advance or generally.

3. Judgment of the Supreme Court of the Republic of Latvia, 7 June 2016, Civil Case No SKC-7/2016 (C39072411)[6]

This case changed existing case law regarding the determination of losses which have already arisen and elaborated on the substance of a board member's 'due care'.[7]

An insolvent company brought an action to the court against the former chair of its management board for compensation of losses in the amount of € 48,590, since the company suffered losses following a tax audit of the company. The State Revenue Service established that a considerable amount of money had been transferred to fictitious companies in order to avoid payment of value added tax and corporate income tax. Accordingly, the State Revenue Service obliged the company to pay an additional tax payment in the amount of € 114,761, which includes a fine of € 35,100 and a late payment charge of € 13,490.

The claim was based on art 1779 of the Civil Law and art 169 of the Commercial Law, because the defendant had not performed his duties as a member of the management board as an honest and careful manager.

First, the judgment of the Senate in this case marks a positive development as it deviates from the previous case law regarding the notion of 'already arisen losses'. Following this decision, additional obligations, such as tax debts, penalties and late payments calculated by the State Revenue Service, also now qualify as a decrease of the company's current property and therefore constitute already arisen (pecuniary) losses even if these amounts are not paid into the State budget. It is very important because only losses which have actually arisen are subject to a right to claim compensation, ie damages, under art 1771 of the Civil Law. In other cases, future losses legally qualify as anticipated losses and not only give rights to security but also for compensation.

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[6] See on the Latvian Supreme Court website: <https://www.at.gov.lv/downloadlawfile/164>.

[7] See my brief description and comments in *A Bitāns*, Latvia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2016 (2017) 313, nos 11–37.

Therefore, it is not necessary to pay actual money for the additional obligation in order to claim compensation, which is very important for an insolvent company because usually it does not have funds to pay additionally calculated payments before filing a claim for compensation of losses against a member of its board.

The increase of liabilities caused by the unlawful action of a member of a management board, especially in a situation when the company has become insolvent (which makes it impossible to cover these liabilities due to a lack of assets), should be regarded as material deprivation within the meaning of art 1770 of the Civil Law. However, there is a risk that the interpretation of 'already arisen losses' in fact may be interpreted too broadly as a future violation.

Second, the court elaborated on the concept of a board member's 'due care'. A board member's 'due care' includes obligations to ensure the legitimacy of the operation of the company. Failure to observe the requirements of art 2 of the Law on Accountancy must be qualified as a breach of their duties as an honest and careful manager (part 1 of art 169 of the Commercial Law).

4. Judgment of the European Court of Justice, 10 December 2020, Case C-735/19[8]

This case deals with State Liability for an infringement of a rule of EU law. The judgment of the Court of Justice of the European Union (CJEU) affected not only Latvia but also other EU Member States because not only Latvia incorrectly transposed art 5 of Directive 2004/25/EC[9] of the European Parliament and of the Council of 21 April 2004 on takeover bids. Also, this judgment provides an explanation about rights that the State has to limit its liability for a violation of this Directive.

In this case, a company submitted a claim before the Administrative Court against the Financial and Capital Market Commission (FCMC) of Latvia, with a request to compensate damage caused as a result of executing a mandatory bid, because the FCMC chose an inappropriate method to calculate the value of shares when determining the equitable price for a compulsory takeover bid. The share price was calculated too

[8] *Euromin Holdings (Cyprus) Limited*, ECLI:EU:C:2020:1014 (Request for a preliminary ruling from the Augstākā tiesa [Senāts]).

[9] Directive 2004/25/EC of the European Parliament and of the Council of 21 April on takeover bids [2004] Official Journal (OJ) L 142/12.

high and consequently, the company suffered losses, amounting to € 7.2 million.[10]

There are two main issues in this case: (1) whether the FCMC correctly calculated the price for the mandatory buyback; and (2) whether the Republic of Latvia has the right to limit its liability for an incorrectly determined price for a mandatory buyback under part 3 art 13 of the Law on Indemnification of Losses Caused by State Administration Institutions.

The Senate sent a request for a preliminary ruling to the CJEU and asked five questions, two of which were connected with liability issues.

The CJEU ruling is important because there the court stated that art 5(4) subpara 2 of Directive 2004/25 must be interpreted as precluding national legislation which provides that, for the purposes of a takeover bid, the share value is obtained by dividing the net assets of the target company, including non-controlling minority interests, by the number of shares issued unless that method of determining the share price is based on an objective valuation criterion that is generally used in financial analysis and may be regarded as 'clearly determined', within the meaning of that provision, which is a matter for the referring court to verify.

Also, the CJEU ruling provided clear guidelines regarding State civil liability. It is clear that the offeror may claim compensation from the State for a violation of Directive 2004/25. Thus, the State is to be held liable for application of the incorrect determination of price for a takeover bid.

EU law precludes a Member State from limiting their liability for pecuniary losses caused by an administrative authority of the State, because it is not legally permitted to limit State liability for caused damage as a result of the incorrect application of EU law. Therefore, this ruling will be a clear guideline to legislators to remove existing civil liability limits for State and public institutions under several laws[11] and encourage national courts in Latvia, including the Constitutional Court, to challenge the legality of prescribed limits of awardable damages for violations committed by the State or public institutions.

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[10] See the brief description and comments by *A Bitāns* in: E Karner /BC Steininger (eds), European Tort Law (ETL) 2020 (2021) 349, nos 33–41.

[11] See the brief description and my comments in *A Bitāns*, Lavia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2017 (2018) 330, nos 16–19 and *id* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2018 (2019) 344, no 27 f.

5. Judgment of the Constitutional Court, 27 June 2025, No 2024-07-01[12]

In this case on just and proportionate compensation for the death of a person, the Court held that part 1 art 7 and part 4 art 7^1 of the Law on State Compensation to Victims, insofar as they determine the maximum amount of State compensation to be granted in the event of the death of a person, providing for its distribution in proportion to the number of victims and thus failing to ensure fair and proportionate compensation, do not comply with the third sentence of art 92 of the Constitution of the Republic of Latvia. Therefore, the Constitutional Court held that the contested provisions were incompatible with the third sentence of art 92 of the Constitution and invalid as of 1 January 2026.

On 18 May 2006, the Latvian Parliament adopted a Law on State Compensation to Victims in order to transpose into Latvian Law Council Directive 2004/80/EC[13]. The aim of the Law was to guarantee natural persons, who are declared victims within a criminal procedure, rights to receive compensation for moral harm, physical pain and material damage caused by an intentional offence if the crime was committed against the life and health of a person and it caused death or grievous or medium bodily harm, or the offence was a sexual offence (violent intentional crime).[14]

Part 1 art 7 of this Law determines the maximum amount of State compensation to be awarded to a victim of a criminal offence, ie an amount equivalent to five minimum monthly wages determined in the Republic of Latvia at the time when the person was recognised as a victim. Part 4 art 7^1 of this Law determines that if in the case of the death of a person as a result of a criminal offence several persons have been recognised as victims in criminal proceedings, the State compensation shall be disbursed to such persons dividing it in proportion to the number of victims.

Five natural persons, including one minor child, had been declared as victims in criminal proceedings and they sought compensation from the State. As a result of regulations provided by the Law, each of the five persons received € 620 as compensation. These five natural persons initiated

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[12] See on the Constitutional Court website: <https://www.satv.tiesa.gov.lv/wp-content/uploads/2024/04/2024-07-01_spriedums.pdf#search=2024-07-01>.

[13] Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261/15.

[14] See the brief description and comments by *A Bitāns* in: H Koziol /BC Steininger (eds), European Tort Law (ETL) 2006 (2008) 311, nos 11–20.

administrative proceedings in order to seek a more favourable administrative act – in this case, to receive a higher compensation amount.

The case was initiated before the Constitutional Court on the basis of the application submitted by the Administrative District Court, because it considers that the amount of compensation to be paid by the State under this Law in the case of the death of a person is not fair and proportionate for each victim if its maximum amount is distributed proportionally among several victims.

The Constitutional Court stressed that the amount of State compensation for several victims in the case of the death of a person may be merely symbolic and manifestly insufficient, therefore failing to achieve the purpose of the Law on State Compensation to Victims and contrary to human dignity.

The Constitutional Court concluded that although the proportional distribution of compensation according to the number of victims was consistent with the provisions of the Directive, in the case under examination, the compensation granted to each victim – € 620 – for the death of a person resulting from a criminal offence could not be regarded as fair and proportionate.

Moreover, the Constitutional Court concluded that the proportional distribution of compensation according to the number of victims may not always be just and proportionate. In order for compensation to be just and proportionate, importance shall be given to its maximum amount, its distribution among the victims, as well as other circumstances. The legislator must decide on the most suitable solution for determining the amount of just and proportionate compensation in cases where several victims have sought compensation in connection with the death of a person.

The current practice would be even more unfair and disproportionate in cases where the number of victims is even higher. Compensation in such cases will inevitably be symbolic and clearly insufficient. Such compensation is contrary to human dignity. Thus, the contested provisions, insofar as they determine the amount of State compensation to be paid by the State in the event of the death of a person, providing for its distribution in proportion to the number of victims, do not always ensure fair and proportionate compensation.

In his separate opinion, judge J Neimais rightly pointed out that payment of compensation by the State to victims under this Law does not create a compensation mechanism for the violation of rights in the sense of the third sentence of art 92 of the Constitution. By providing such a compensation mechanism, the State does not become liable for violations of fundamental rights committed by private individuals.

However, this judgment could make a positive contribution in the field of tort liability, because the conclusion of the Constitutional Court that the proportional distribution of the amount of compensation between family members is not always fair could provide grounds to revise the unreasonably established practice in Latvian courts that compensation for the loss of a family member is determined as an overall amount for the family as a whole, without assessing the damage caused to each specific family member.

XVIII. Lithuania

Simona Drukteinienė and Loreta Šaltinytė

Lithuanian tort law has undergone a particularly profound transformation since it had to be rebuilt after a fundamentally different legal system. Under Soviet law, there was no private property in the Western sense, and personal injury was not treated as a matter of individual rights and compensation. Harm to life and health was largely considered to be a social risk, addressed through State social insurance payments, while non-pecuniary (moral) damage was not compensated at all. After the restoration of independence, Lithuania moved away from this restrictive and collectivist model towards a modern system based on individual rights, constitutional protection of human dignity, and European legal standards. The cases discussed illustrate how Lithuanian courts have developed a normative concept of causation, expanded the right to claim non-pecuniary damages (including for secondary victims and heirs), and strengthened State responsibility, including for breaches of EU law. Together, they show how personal injury law in Lithuania has been transformed into an important tool for protecting individuals and ensuring fair compensation.

1. *LB, IV and IZA v The 'Medvėgalis' Homeowners' Association and UAB 'Telšių Šilumos Tinklai'*, Supreme Court of Lithuania (LSC) 26 November 2007, no 3K-7-345/2007

This extended chamber judgment marks a decisive shift, abandoning the Soviet-era view of causation as a technical or scientific sequence and affirming that causation is a legal category determined normatively by the courts. Building on two earlier 2005 medical liability cases,[1] the Court consolidated a two-stage causation model: first, factual causation assessed through the *conditio sine qua non* test, and second, legal causation, requiring an evaluation of whether the damage is not too remote, considering foreseeability, the protective purpose of the breached norm, the nature of the infringed interest and ordinary social risk. This structure clear-

[1] LSC 30 March 2005, no 3K-3-206/2005 and LSC 9 November 2005, no 3K-3-556/2005.

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ly mirrors modern European tort law doctrine, particularly the approach reflected in the Principles of European Tort Law (PETL). This normative step marks a clear break from the mechanically factual approach that had persisted from the pre-1990 doctrinal environment. Because the case was decided by an extended chamber, its doctrinal weight is exceptional: such a panel is convened specifically to clarify and, where necessary, re-orient precedents. The Court used this opportunity to firmly anchor the normative conception of causation in Lithuanian tort law.

The dispute arose after a multi-apartment building was disconnected from the district heating and hot water network. As a result, several residents lived for years without heating or hot water; their apartments became damp and affected by mould, and they ultimately had to install individual gas-based heating and hot water systems at their own expense. Earlier litigation had already established that both the issuance of the technical conditions and the physical disconnection from the district network were unlawful.

Against this background, claims were brought against two actors: the body that had issued the technical conditions, and the group of apartment owners acting through their association, which had executed the disconnection. The extended chamber noted that this raised a fundamental question of proper defendant identification. Decisions to disconnect or modify heating installations are not legally attributable to the association as a separate legal person, but to the individual co-owners exercising their disposal rights over the common property. Accordingly, liability for the harmful decision lies with those co-owners, not with the association that merely acted as an organisational vehicle. The lower courts therefore misidentified the association as a defendant and, in addition, failed to analyse the distinct causal contribution made by each participant – namely, whether each actor's conduct was a direct or only an indirect cause of the ensuing harm. This misalignment of defendants, combined with the failure to correctly establish a causal link, resulted in an incorrect application of solidary liability.

The judgment clarified the circumstances in which multiple tortfeasors may be held liable *in solidum*. Although the Civil Code (CC) presumes solidarity where several persons contribute to the same harm (arts 6.6(3)[2] and 6.279(1)[3] CC), courts in independent Lithuania had

[2] Art 6.6(3) CC reads: The solidary liability of debtors is presumed when the obligation is related to … the compensation of damage caused by the actions of several persons.

[3] Art 6.279(1) CC reads: Persons who have jointly caused damage are solidarily liable to the injured party.

long been reluctant to apply solidary liability in practice. Influenced by criminal law reasoning, they tended to attribute responsibility only for the precise and narrowly defined consequences caused by each individual actor. The extended chamber broke with this approach and confirmed that liability for damage is solidary when the harm is produced by the combined conduct of several persons. At the same time, it emphasised that this presumption applies only when the conduct of each person is connected to the loss by the same type of causal link. If one person's conduct is a direct cause of the damage and another's contribution is merely indirect or auxiliary, liability may need to be apportioned rather than treated as solidary. This clarification is particularly significant for complex cases involving sequential or interdependent conduct. However, the judgment did not yet define what precisely constitutes a 'direct' versus an 'indirect' causal contribution, and questions concerning the boundaries of solidary liability continued to arise in later Supreme Court jurisprudence.

This ruling is a cornerstone in the modernisation and Europeanisation of Lithuanian tort law. It firmly rejects the former technocratic causation model and aligns Lithuania with contemporary civil law doctrine. The referred cases from 2005 had already stressed that causation is a legal, not a biological or physical, concept: experts may assist with facts, but courts determine causation. The 2007 extended chamber judgment expanded that principle to general tort law and integrated it into the rules on multi-party liability. It has since served as an authoritative reference point for understanding the concept of causation in Lithuanian tort law.

2. *VP v DD and Others*, LSC 3 March 2014, no 3K-7-144/2014[4]

This extended chamber judgment marks a further step in Lithuania's shift away from a formalistic distinction between 'direct' and 'indirect' causation towards a modern, normative approach to multi-party liability. Building on the 2007 extended chamber ruling on causation, the Court redefined solidary liability in situations where several actors contribute to the same harm, including where one actor is merely the negligent keeper of a dangerous object. The judgment links the CC's presumption of solidarity (arts 6.6(3), 6.279(1) CC) with the special

[4] Commented by *S Selelionytė-Drukteinienė*/*L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 339, nos 19–27.

regime on dangerous objects in art 6.270(3)[5] CC, confirmed as constitutional in 2013.[6]

The dispute arose out of a violent robbery. After prior surveillance and planning by EŠ, two perpetrators, GŽ and DD, broke into the claimant's apartment armed with a firearm and a gas pistol. During the robbery, DD twice shot the claimant with the gun, causing a serious and life-changing injury. A fourth accomplice, JM, hid the stolen property. The gun used in the shooting had been taken shortly before the crime by one of the robbers from a wardrobe in his aunt's home. Although the weapon was lawfully owned by her cohabiting partner VS, it had been stored improperly – not in a safe – enabling easy access. The claimant brought a civil action against all four accomplices and the gun owner.

The case reached the Supreme Court twice. The first instance court imposed liability only on the shooter; the Court of Appeal extended solidary liability to the two direct perpetrators. In 2010, the Supreme Court remitted the case, indicating that all participants, including the organiser and the gun owner, could be liable *in solidum*. On remand, the Court of Appeal awarded LTL 80,000 (approx € 23,000) in non-pecuniary damages from all five defendants. Both the claimant (regarding the questions of quantum and interest) and the gun owner (as regards his liability) lodged cassation appeals, examined by an extended mixed chamber of seven judges.

On the merits, the Supreme Court confirmed that the gun owner VS was solidarily liable under art 6.270(3) CC. Relying on the ruling of the Constitutional Court of 2013 and a research paper written by one of the co-authors of this report,[7] it emphasised that the keeper of a dangerous

[5] The keeper of a source of increased danger is not liable for the damage if he proves that he lost the ability to control the source of increased danger due to the unlawful actions of other persons. In such a case, liability for the damage lies with the person or persons who unlawfully took control of the source of increased danger. If the loss of control was also due to the keeper's fault, both the keeper and the person who unlawfully took control of the source of increased danger are liable in solidum. After compensating the damage, the keeper acquires a right of recourse to recover the amounts paid from the person who unlawfully took control of the source of increased danger.

[6] Ruling of the Constitutional Court of the Republic of Lithuania of 6 December 2013 'On the liability of the possessor of a source of increased danger'. The texts of all rulings of the Constitutional Court are available in English at <http://www.lrkt.lt>.

[7] *S Selelionytė-Drukteinienė*, Bendraskolio pareigos atlyginti žalą apimtis taikant deliktinę atsakomybę: solidarioji ar dalinė atsakomybė? [The multiple debtors' case: the extent of the tortious duty to compensate damage: solidary or proportional liability?], Jurisprudencija 2010, No 3 (121) 233–250, commented by *H Gabartas*/*L Šaltinytė*,

object owes a heightened duty to prevent others from gaining control thereof. If the object is lost through the keeper's fault and then used to cause harm, liability is solidary with the unlawful taker. Interpreting the duty to 'ensure the safekeeping of weapons and ammunition' in line with the Law on the Control of Weapons and Ammunition, the Court held that weapons must be stored and transported so that third parties cannot access them. The theft of the gun from the owner's home was sufficient to establish a breach. Although the robbers caused the injury, the negligent storage of the gun created the conditions for the crime and was therefore one of the factual causes of the harm.

The judgment also clarified when multiple persons are liable *in solidum*. It distinguished cases where actors act together from those where they act separately, but the harm results only from the interaction of their contributions. In such situations, the harm is indivisible because the separate causes are interdependent, and each actor's conduct is a *conditio sine qua non* of the outcome. This approach abandons vocabulary of 'direct' versus 'indirect' causation and replaces it with a two-stage model: establishing factual causation and then determining whether the damage is sufficiently connected to each contribution to justify solidarity, especially where one actor breached a statutory duty.

The Court reaffirmed that art 6.6(3) CC presumes solidarity when several persons contribute to the same damage and that art 6.279(1) CC requires persons who jointly cause harm to be held solidarily liable. It treated art 6.270(3) CC as a specific solidary liability regime for dangerous objects: where the keeper's faulty loss of control combines with the unlawful taker's intentional use, their liability is solidary. The dissenting view that the robbery would have occurred anyway because the perpetrators had a gas pistol was rejected: the claimant was in fact wounded with the stolen firearm, and the gas pistol was not comparable in effect. Consistent with art 6.247 CC and prior case law, the Court underlined that legal causation does not require the defendant's conduct to be the sole cause of damage.

Overall, this 2014 ruling is a major step in the modernisation of Lithuanian tort law. It consolidates the normative concept of causation introduced in 2007 and extends it to complex scenarios involving both intentional wrongdoing and negligent omissions. It confirms that solidary liability is appropriate where several equivalent causes combine to produce indivisible harm.

Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2010 (2011) 353, nos 101–104.

3. *LZ and Others v Marijampolė Hospital*, LSC 18 April 2005, no 3K-7-255/2005

This case is an undisputably landmark decision that shaped the law on compensation of personal injury damage.

It concerned the tortious liability of a hospital, which, on 30 December 2001, accepted delivery of premature twins. As they could not yet adequately regulate their own body temperature, they were placed on hot water bottles which led to sustained severe burns requiring multiple skin graft surgeries. Their survival and long-term prospects were initially uncertain.

The family claimed a record compensation of LTL 1 million (€ 290,000) for non-pecuniary damage both on behalf of their children as primary victims and themselves as secondary victims. The court of first instance granted the claim in full, but on appeal the court reduced the damages by half. It awarded LTL 200,000 (€ 58,000) to each of the twins and LTL 50,000 (€ 14,480) to each of the parents. In its cassation appeal, the hospital argued that the courts erred – first, by awarding non-pecuniary damages to the parents as secondary victims because the CC did not specify that this damage is compensable, and, second, because the award to the twins was allegedly excessive – in its view, an adequate total compensation would have been LTL 30,000 (€ 8,690). The hospital also invoked its difficult financial situation as a ground to reduce compensable damage under art 6.268 (2) of the CC. Having dismissed these grounds, the LSC affirmed the decision of the Court of Appeal.

The decision is significant because it marks a departure from the dominant legal discourse on compensation of non-pecuniary damage that affected the development of tort law from Lithuania's occupation by the Soviet Union in 1940 until restoration of its independence in 1990. During this period, compensation of such damage was perceived as 'immoral'.[8]

In 1992, the Constitution of the Republic of Lithuania enshrined the right to compensation of moral damage as a constitutional principle.[9] However, before the entry into force of the CC on 1 July 2001, general issues of tort law were regulated by the CC of 1964, which hindered the development of compensation of non-pecuniary damage. At that time,

[8] *S Cirtautienė*, Neturtinės žalos atlyginimas kaip civilinių teisių gynimo būdas [Compensation of non-pecuniary damage as a legal remedy], Justitia 2008, 46.

[9] Art 30 (2) of the Constitution of the Republic of Lithuania provides: 'The law shall establish the procedure for compensating material and moral damage inflicted on a person'.

compensation could not exceed 500 minimal monthly salaries, which amounted to LTL 25,000–LTL 32,500 (€ 7,240–€ 9,420).[10]

Because of the systemically imposed upper limits for non-pecuniary damages, the effect of this remedy was described as more reminiscent of a *fine* rather than a *legal remedy* serving a compensatory function.[11] It became the latter only after the entry into force of the CC of 2000, which, in contrast to the earlier laws, did not provide for upper limits of compensation for non-pecuniary damage.[12] On the other hand, its art 6.250(2) provided that non-pecuniary damage is to be compensated *only* in cases provided for by laws. Thus, although under that same provision non-pecuniary damage was to be compensated in all cases where it was inflicted by a crime, health impairment or deprivation of life, and other laws, it suggested that the explicit legal expression of the duty to compensate non-pecuniary damage was an essential prerequisite, in the absence of which non-pecuniary damages would not be awarded.

In this case, this provision was tested on the point whether the parents of the twins had the right to compensation for non-pecuniary damage as secondary victims. The hospital pleaded that under art 6.285 CC, which regulates compensation awarded for damage caused to the health of a minor under the age of 14, it had a duty to compensate only the expenses connected with the health impairment of the twins and their non-pecuniary damage, but not that of the parents. The LSC rejected this argument, pointing out that, under the facts, reasons of justice dictated awarding non-pecuniary damages also to a person who suffered for the injury of their helpless newborn child.

Despite the narrow legal formulation, suggesting that this derogation from the explicit text of the CC was limited to the specific circumstances of the case, this decision led to the general recognition allowing secondary victims to claim non-pecuniary damages.[13] Already in this decision, the LSC specified that the key criterion enabling the secondary victim to be able to claim non-pecuniary damages was the proximity of the emotional relationship with the victim, which needed to be assessed under the facts, and this set the standard for the future.

The second point which makes the case a landmark decision is the record award of compensation of non-pecuniary damage. The court of first

[10] Lietuvos Respublikos sveikatos sistemos įstatymas, Valstybės žinios, 1994-08-17, no 63-1231.

[11] Ibid, 49.

[12] Ibid.

[13] See eg, *MP, LP, AP, DM, NS and GS v Akvasanitas*, LSC 5 July 2019 no 3K-3-242-421/2019.

instance awarded LTL 1 million (€ 290,000) as claimed by the family. The Court of Appeal reduced the assessment by half, awarding € 60,000 to each of the twins and € 15,000 to each of their parents, but even the reduced award stood out as exceptionally high at that time. It is important that while the LSC clarified the legal criteria for assessing non-pecuniary damage, it left the record award intact.

One of the issues raised by the hospital was that both the twins and the parents were awarded non-pecuniary damages for possible consequences that could arise in the future rather than actual inflicted damage, allegedly in breach of art 6.250 CC. The LSC dismissed this argument, clarifying that mental anxiety over uncertainty of future consequences of physical damage that has been inflicted constituted a separate ground for awarding non-pecuniary damages and that anxiety over the future prospect of removing physical consequences of damage is both real and understandable, and, consequently, compensable within the meaning of art 6.250 CC.

Decided in April of 2005 by the LSC, this case set a pattern of interpretation of art 6.250 CC, which had introduced a right to compensation of non-pecuniary damage. This case remains one of the most frequently invoked personal injury cases by Lithuanian courts both in respect of criteria assessing non-pecuniary damage and in respect of the right of secondary victims to claim damages.

4. Constitutional Court Ruling of 19 August 2006, Case no 23/04[14]

Although the earlier discussed case, decided by the LSC, had set an important precedent for compensation of non-pecuniary damage in personal injury cases, a more general impact on the understanding of compensation of non-pecuniary damage was made by the Constitutional Court in its ruling of 2006 on compliance with the Constitution of the Law on the Compensation for Damage, inflicted by unlawful conduct of interrogatory and investigative institutions, prosecutors and courts.[15] This

[14] 2006-08-19 LR Konstitucinio Teismo nutarimas 'Dėl Lietuvos Respublikos žalos, padarytos neteisėtais kvotos, tardymo, prokuratūros ir teismo veiksmais, atlyginimo įstatymo … atitikties Lietuvos Respublikos Konstitucijai' Byla Nr. 23/04 [On the compensation for damage inflicted by unlawful actions of interrogatory and investigatory bodies, the prosecutor's office, and a court, Case no 23/04]. The official English translation of the ruling is available at <https://lrkt.lt/en/court-acts/search/170/ta1337/content>.

[15] Ibid.

Law was adopted in 1997 and provided that the State was to compensate damage inflicted on individuals as a result of unlawful sentencing, unlawful arrest, unlawful deprivation of liberty, administrative arrest or unlawful correctional work.

The Constitutional Court was asked to assess the constitutionality of two provisions of this Law in respect of compensation of non-pecuniary damage: first, the provision specifying that this right could not be inherited, and second, that the compensation of such damage could not exceed LTL 10,000 (€ 2,900).

In this ruling, the Constitutional Court found that both referred provisions conflicted with the Constitution. The Court found that it was an imperative requirement of the Constitution that a person who has suffered damage can always claim just and fair compensation for it.

It then emphasised that the Constitution does not provide for any exceptions from the obligation to compensate moral and (or) material damage and, therefore, the legislator did not have discretion to state an exhaustive list of instances when such damage was compensable or to exclude the possibility of compensating damage inflicted by certain wrongful acts. Therefore, the Court found the imposition of an upper limit for compensation for non-pecuniary damage unconstitutional. The Court further emphasised that a person may claim compensation of damage even in the absence of any legislative provision explicitly allowing for it, whereas the courts hold constitutional powers to award damages in such cases based on the Constitution itself, as a directly applicable legal act.

Specifically, the provision at issue had imposed an absolute upper limit of possible compensation; thus even if the damage inflicted were substantially higher and such an award would not be adequate to compensate the victim's damage, the courts would still not be able to award a higher compensation amount than that defined by the law. The amount was fixed, stable and did not depend on either a standard of living or other financial and economic criteria. Accordingly, the provision was unconstitutional.

In respect of the second legislative provision which precluded the possibility to inherit claims for compensation of non-pecuniary damage, the Court considered that the Constitution did not provide for a general requirement to compensate only the direct victim or that the compensation could not be paid to anyone else on the victim's behalf. It reasoned that under the Constitution, legal regulations must ensure that the State would not escape its duty to compensate damage inflicted by its institutions and public servants, especially if the direct victim cannot personally claim such damages because the public tort contributed to their death.

Accordingly, the State cannot escape liability merely because the direct victim died before he could claim compensation of damage in person, disregarding whether he died before the conduct at issue was found wrongful or before the limitation period for filing such a claim had expired.[16] The Court concluded that an absolute prohibition from inheriting the right to compensation of damage, as provided by law, would breach both art 30(2) and art 109 of the Constitution.

This ruling shaped the underlying principles of interpretation of the notion of moral damage, or non-pecuniary damage.

Most significantly, with this ruling, the Constitutional Court de facto amended the model on compensating non-pecuniary damage of the CC pursuant to which, non-pecuniary damage was compensable only if it was specifically provided by law.

Also, the Constitutional Court encouraged awards of non-pecuniary damages by finding that even in the absence of any explicit legislative provision on compensation of non-pecuniary damage, the legal ground to compensate such damage was the Constitution applied directly. For example, already in 2007, the LSC decided that excessive duration of judicial proceedings entailed public liability, even though this went beyond the text of art 6.272 of the CC.[17] The LSC substantiated its finding on art 138 of the Constitution, which provides that international treaties ratified by the Republic of Lithuania constitute a part of its legal system. Although no legislative provision explicitly provided for a possibility to be compensated for excessive duration of judicial proceedings, as this constituted a breach of art 6 of the European Convention on Human Rights (ECHR), the resulting damage was compensable. Other examples include compensating non-pecuniary damage to an advocate for damage resulting from her unlawful exclusion from the list of practising lawyers by the Council of Advocates,[18] the relatives of freedom fighters who became victims of crimes against humanity,[19] and the owner for loss of her pet.[20]

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[16] Ibid, part 8.

[17] LSC 6 February 2007, no 3K-7-7/2007.

[18] LSC 30 January 2007, no 3K-3-26/2007.

[19] *MB v VV and MŽ*, LSC 28 February 2011, no 3K-7-70/2011, reported by *S Selelionytė-Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2011 (2012) 386, nos 11–24, Ruling of the Constitutional Court of 29 November 2010 'On the right of the victims of genocide to demand damage compensation from the natural persons who committed this crime' summarised ibid, at no 18 f.

[20] *IM v RG*, LSC 25 July 2013, no 3K-3-417/2013, reported by *S Selelionytė- Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2013 (2014) 387, nos 31–47.

The Court's observations in respect of the right to inherit claims for compensation of non-pecuniary damage set the direction for judicial practice. Relying on this ruling, the LSC entrenched the right to claim non-pecuniary damages for indirect victims. In the first case, it affirmed that compensation was due both to the secondary victims and the primary victim, who died before he could claim damages in person. The CoA awarded the estate € 5,792 on this ground; the LSC *ex officio* added € 3,475 on the ground of excessive duration of the proceedings.[21]

In the second case the LSC affirmed the right of relatives of the primary victim to continue the claim for compensation of non-pecuniary damage initiated by the primary victim.[22]

Finally, in 2019, the LSC affirmed that the employment-related tort claims for the bereavement damage of secondary victims could also be inherited.[23]

The position of the Supreme Administrative Court of Lithuania (SACL) in respect of the right to claim damages on behalf of a deceased victim was expressed in 2020, when the SACL agreed that the State had to compensate a record € 250,000 in non-pecuniary damages to the estate of an adolescent girl who was burned alive in a car while trapped in its boot.[24] For an hour before her death, she called the European emergency number 112 ten times from her mobile phone, but the police could not trace her. The Vilnius District Administrative Court, as the court of first instance, had agreed that the State contributed to the damage and was liable for bereavement damages of the secondary victims, as it had failed to properly implement the Universal Services Directive, which required Member States to ensure that callers' location data was transferred to emergency centres. However, it rejected the claim to compensate the direct victim for her non-pecuniary damage, reasoning that art 5.1(3) CC only allowed a claim for non-pecuniary damages on behalf of a direct victim if the victim

[21] *AG and RG v the Republic of Lithuania*, represented by the Prosecution Service and the Ministry of Justice, LSC 5 February 2014, no 3K-3-4/2014, reported in ETL 2014 by *Selelionytė-Drukteinienė/Šaltinytė* (fn 4) nos 8–18.

[22] *RT and others v the Republic of Lithuania*, Represented by the General Prosecutor's Office, the Ministry of Justice and the Police Department to the Ministry of the Interior, LSC 30 September 2016, no 3K-3-399-687/2016, reported by *S Selelionytė-Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2016 (2017) 341, nos 72–81.

[23] *MP, LP, AP, DM, NS and GS v Akvasanitas*, LSC 5 July 2019, no 3K-3-242-421/2019.

[24] *IK v the Republic of Lithuania*, represented by the Ministry of Internal Affairs, Emergency Response Centre, Communications Regulatory Authority of the Republic of Lithuania, SACL 8 June 2020, case no A-3669-756/2020, reported by *S Selelionytė-Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2020 (2021) 379, nos 7–27.

had already expressed her willingness to pursue the claim by referring the issue to the court or if the compensation had already been assessed by a court of law.[25]

The SACL disagreed, considering that the primary issue was whether the damage would have been compensable if the victim had survived rather than whether the damage was claimed by the victim herself or someone else on her behalf. As the failure to implement the Universal Services Directive under the facts also constituted a breach of the State's obligation under the ECHR, the SACL accepted the mother's claim on behalf of her deceased daughter, because the ECHR allows family members to file claims for breaches of the right to life on behalf of the victim, regardless of whether the victim had expressed her intention to pursue a claim for damages. The SACL concluded that such claims are exceptionally allowed as far as they concern the right to life and freedom from torture.[26]

To conclude, the ruling of the Constitutional Court of 2006 has both entrenched the Constitution as a directly effective legal instrument and paved the way for the application of the CC by setting the principles of its interpretation in respect of the assessment of non-pecuniary damages. The significance of the ruling exceeds the issues of constitutionality of the law which the Court had assessed.

5. *DB v Lithuania*, SACL 20 October 2021, no eA-3411-556/2021[27]

Although *DB v Lithuania* was not the first case on State liability for breaches of EU law decided by the SACL,[28] it is the most recent one where the SACL offered a complete analysis of liability conditions.[29] This case merits discussion also because it illustrates the difficulties in

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[25] *S Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2019 (2020) 359, no 78.

[26] Ibid.

[27] *DB v Lithuania*, 20 October 2021, SACL no eA-3411-556/2021. Commented by *L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2021 (2022) 339, nos 108–121.

[28] See *UV v Lithuania*, represented by the Ministry of Economy, SACL 8 May 2017, no eA-990-502/2017 (claiming damages for an incorrect implementation of the Travel Packages Directive; *S Drukteinienė/L Šaltinytė* in: European Tort Law (ETL) 2017 (2018) 360, nos 35–52; *EP v Republic of Lithuania*, SACL 28 November 2017, no eA-697-662/2017 (failure to register a vehicle in breach of EU law), ETL 2017 *Drukteinienė/Šaltinytė* (supra) nos 93–99.

[29] Note that in *VR v Lithuania*, 18 May 2012, SACL A-556-105/2012, the SACL focused only on the failure to comply with EU law in registering animals as a prerequisite of State liability, which led to the claim to compensate pecuniary damage.

developing a coherent system for compensating personal injury damage and non-pecuniary damage in Lithuania and the role of EU law in this process.

The case concerned compensation for non-pecuniary damage caused by a traffic accident that occurred in 2015. Under the Motor Insurance Directive (the Directive),[30] the minimum amount of insurance coverage was € 5,000,000 for personal damage per accident, regardless of the number of victims.[31] Although the limit for insurance coverage for personal damage in Lithuania was the same, the law restricted coverage for non-pecuniary damage to € 5,000 per accident. In 2013, in *Drozdovs* the CJEU held that similar restrictions were precluded by EU law, but in Lithuania it was removed only from 1 November 2018.[32]

The accident that gave rise to the case at hand left one person dead, one slightly injured and one quadriplegic for life. The insurance company paid the quadriplegic victim € 3,800 in non-pecuniary damages, as € 1,200 had been paid out to the other two victims of the same accident. The victim then claimed € 58,000 from the State for the incorrect implementation of the Directive.

The court of first instance held that the State did not incur liability, arguing that there was no direct causal link between the failure to implement the Directive correctly and the non-pecuniary damage claimed.

The SACL disagreed, finding that Lithuania had breached an obligation to ensure the effective protection of EU law and that this protection was denied to the victim by the disproportionate restriction on her right to obtain full compensation. Relying on the CJEU's finding in *Drozdovs* that personal injuries include physical and psychological suffering, the SACL concluded that the EU law rule breached was clear, precise, and that failure to comply with it constituted a sufficiently serious breach of EU law.[33]

In contrast to the court of first instance, the SACL found that *it was not possible to deny* a direct causal link. Had the Directive been adequately implemented, the insurer would have paid out a much higher amount.[34] Consequently, the case was remitted to the court of first instance for the assessment of damages.

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[30] Directive 2009/103/EC of the European Parliament and of 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 insure against such liability [2009] Official Journal (OJ) L 263/11.

[31] Ibid, art 3.

[32] Ibid.

[33] *DB v Lithuania*(fn 27) para 38.

[34] Ibid, para 40.

This decision concerns a long-standing problem, namely whether the notion of personal injuries in art 1(1) of the Directive 84/5 covers non-pecuniary damage.[35]

In Lithuania, the first law on compulsory insurance of civil liability of motor vehicles was adopted in 2001,[36] setting LTL 30,000 for personal damage[37] and LTL 30,000 for property as coverage limits.[38]

On 5 March 2004, an amendment allowed insurance holders to choose between limits of LTL 30,000 per person for personal damage and LTL 30,000 for property damage or € 500,000 per person for personal damage and € 100,000 for property damage.[39] On the same day, the law was restated in a new edition, setting a € 500,000 limit for personal damage, which would include a € 500 limit for non-pecuniary damage.[40]

On 17 May 2007, the law specified transitional coverage limits: € 500,000 until 10 December 2009 (including € 1,000 for non-pecuniary damage), € 2,500,000 until 10 June 2012 (including € 2,500 for non-pecuniary damage), and, starting from 11 June 2012, € 5,000,000 for personal damage (including € 5,000 for non-pecuniary damage).[41]

These amendments were confusing, as, in 2006, the Constitutional Court famously held that any limitations on compensable amounts were unconstitutional.[42]

Also, the LSC's practice regarding the extent to which insurers had to compensate non-pecuniary damage in traffic accidents was uncertain.

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[35] *R Volodko*, Draudiko pareigos kompensuoti neturtinę žalą problema esant transporto priemonės valdytojo atsakomybės draudimui [Insurer's obligation to compensate non-pecuniary damage in case a Motor Vehicle Insurance Agreement is concluded] Teisė 66(2) (2008) 112–126.

[36] Lietuvos Respublikos transporto priemonių savininkų ir valdytojų civilinės atsakomybės privalomojo draudimo įstatymas, Žin, 2001, no 56-1977.

[37] The usage of the term 'personal damage' is conditional – a possibly more accurate way to translate would be 'per person' rather than 'personal damage' because of confusion surrounding the understanding of the notion as discussed here.

[38] Lietuvos Respublikos transporto priemonių savininkų ir valdytojų civilinės atsakomybės privalomojo draudimo įstatymas, Žin, 2001, no 56-1977, art 13.

[39] Lietuvos Respublikos transporto priemonių savininkų ir valdytojų civilinės atsakomybės privalomojo draudimo įstatymo 13 straipsnio papildymo įstatymas [The law on civil liability insurance] Žin, 2004, no 39-1273.

[40] Lietuvos Respublikos transporto priemonių savininkų ir valdytojų civilinės atsakomybės privalomojo draudimo įstatymo pakeitimo įstatymas, Žin., 2004, no 46-1498, art 11(1).

[41] Lietuvos Respublikos transporto priemonių valdytojų civilinės atsakomybės privalomojo draudimo įstatymo pakeitimo įstatymas, Žin., 2007, no 61-2340.

[42] See the discussion of the Ruling of the Constitutional Court of 19 August 2005, under 4. above.

For example, in 2005, an extended panel decided that *personal damage* cannot be equated with *non-pecuniary damage*, and that, under arts 6.250 and 6.263 CC, it was the tortfeasor's, not the insurer's, duty to compensate non-pecuniary damage.[43] However, later that year, the extended panel of the LSC ruled that the insurer was obliged to compensate both pecuniary and non-pecuniary damage unless the insurance contract provided otherwise.[44]

In 2006, the Vilnius District Court sought guidance from the Constitutional Court on whether the upper limit of € 500 for non-pecuniary damage contradicted the Constitution, arguing that this restriction protected insurers rather than victims or tortfeasors who had taken out civil liability insurance. In 2009, the question was repeatedly raised by two other municipal courts.

Unexpectedly, in 2010, the Constitutional Court upheld the constitutionality of this provision, because the upper limit 'guaranteed the possibility for insurance companies to comply with their contractual obligations.' Although the Court acknowledged that the regulation was adopted to implement the Directive, it concluded that 'issues of compensation for non-pecuniary (moral) damage were not regulated by the EU directives', because EU legal regulations clearly defined only insurance coverage for damage to property and for personal injury.[45]

Accordingly, it did not even consider referring the question to the CJEU for a preliminary ruling. Apparently, the Constitutional Court was influenced by the position of the Insurance Oversight Commission officials, who argued that non-pecuniary damage was traditionally classified as a 'non-insurable risk', and it was therefore necessary to restrict it because unlimited insurer liability for such damage would increase insurance premiums and reduce the ability of insurers to assume insurance risks or even cause them to refuse to assume such risks altogether.[46]

It follows that, despite the intention of the EU legislator to protect victims of traffic accidents by simplifying their capacity to claim damages directly from compulsory insurance providers, in Lithuania up until recently this right remained elusive due to the differences between legal

[43] 26 April 2005, LSC no 3K-7-159/2005; an opposite statement made by the LSC 29 September 2004 no 3K-3-475/2004; LSC 12 July 2004 no 2K-3-367/2004; LSC no 3K-3-86/2005.

[44] LSC 11 April 2006, no 3K-7-115/2005.

[45] Ruling of the Constitutional Court of 3 February 2010 on compulsory motor insurance benefits for non-pecuniary damage, Case no 36/2006-8/2009-49/2009, para 1.5.

[46] Ibid, para V.

systems, legal errors, and failures to apply available EU legal remedies. However, it is already clear that the Directive has had a significant impact on the evolving understanding of personal injury damages in Lithuanian tort law.

XIX. Malta

Giannino Caruana Demajo and
Lawrence Quintano

1. *Liliana Farruga v Francis Gauci*, Court of Appeal, 28 March 2014[1]

In *Liliana Farrugia v Francis Gauci* the Court of Appeal evolved new criteria for the assessment of *lucrum cessans* in cases where the victim is unemployed.

The parameters for quantifying damages for loss of future earnings (*lucrum cessans*) in personal injury cases were articulated in *Michael Butler v Peter Christopher Heard*.[2] This seminal judgment introduced the 'multiplier' method, whereby compensation is calculated based on the plaintiff's age at the time of the accident, the degree of permanent disability, and the level of current earnings.

However, this framework revealed a conceptual and practical lacuna in instances where the injured party was unemployed or engaged in non-remunerated labour, most notably in the case of housewives. The courts were thus confronted with the challenge of valuing work that, while economically significant, is not reflected in a formal wage structure.

The case of *Liliana Farrugia v Francis Gauci* exemplifies this issue. The plaintiff sustained serious injuries when a shelving unit in the defendant's shop collapsed. In assessing *lucrum cessans*, both the court of first instance and the Court of Appeal affirmed that the domestic labour performed by a housewife possesses intrinsic economic value and must be factored into the computation of damages, although it still adopted a conservative approach by using the national minimum wage as the multiplicand.

Significantly, the Court of Appeal further observed that domestic responsibilities do not cease upon reaching retirement age. This insight informed its determination of the appropriate multiplier, acknowledging

[1] *G Caruana Demajo/L Quintano/D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 369, nos 57–62.

[2] Court of Appeal, 22 December 1967.

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the continuity of unpaid household work beyond conventional employment years.

Moreover, the Court reaffirmed that the assessment of disability should not be confined to medical classification alone. Instead, emphasis must be placed on the functional impact of the injury on the victim's habitual activities, thereby aligning the legal evaluation with the lived realities of the injured party.

2. *Jane Agius v the Attorney General and Others*, Constitutional Court, 14 December 2015[3]

This case opens the door to moral damages where the action for damages caused by an unlawful event can be formulated other than in tort.

In *Butler v Heard* cited above, the Court of Appeal, reflecting the prevailing *favor debitoris* orientation of the time, adopted a restrictive interpretation of the law that effectively excluded compensation for non-pecuniary harm. This encompassed categories such as pain and suffering, loss of enjoyment of life, and general discomfort or inconvenience. Although courts of first instance occasionally attempted to challenge this orthodoxy by awarding damages for moral harm, such decisions were routinely overturned on appeal, thereby reaffirming the doctrinal exclusion of non-pecuniary redress within the framework of civil liability.

This impasse was eventually codified through an amendment to the Civil Code enacted in 2018[4]. The revised provision expressly limited judicial discretion in awarding moral damages, confining such compensation to cases involving criminal offences that either impinge upon the dignity of the person or constitute wilful bodily harm punishable by a term of imprisonment of not less than three years. Consequently, the amendment foreclosed the possibility of awarding moral damages in tort, thereby entrenching a narrow and exceptionalist framework for non-pecuniary compensation.

A significant challenge to this restrictive framework emerged in *Jane Agius v Attorney General and Others*. The plaintiff's nephew, a detainee, died following the accidental administration of an overdose of medication prescribed for drug dependency. The plaintiff initiated proceedings before the ordinary courts, alleging that the death resulted

[3] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2015 (2016) 381, nos 43–55.

[4] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 401, nos 1–6.

from culpable negligence on the part of the authorities. Both the court of first instance and the Court of Appeal upheld the claim for pecuniary loss but dismissed the claim for moral damages, reaffirming that the relative provisions of the Civil Code[5] did not allow for damages other than for pecuniary loss.

The plaintiff subsequently filed a separate action before the court of constitutional jurisdiction, seeking additional damages and a declaration that the Civil Code's failure to provide for moral damages constituted a breach of her right to an effective remedy under art 13 of the European Convention on Human Rights. The first instance constitutional court upheld the claim for moral damages, finding that the authorities' negligence amounted to a breach of the state's positive obligations under art 2 of the Convention. It further affirmed that constitutional courts are empowered to award moral damages for violations of fundamental rights, and noted that the Civil Code provisions did not afford a full remedy, although it stopped short of declaring their invalidity.

On appeal, the Constitutional Court adopted a nuanced approach. It held that the impugned Civil Code provisions govern tortious liability and do not extend to breaches arising from other sources of obligations. In the case at hand, the relationship between the victim and the prison authorities, while not contractual in the conventional sense, was deemed to arise *ex lege* and was a source of obligations which were breached by the defendants. Accordingly, the Court concluded that the matter was not governed solely by tort law provisions, and that no statutory barrier precluded the award of moral damages by the ordinary courts.

While the reliance on a pre-existing legal relationship may be viewed as tenuous, in effect the Constitutional Court's reasoning reflects a broader interpretative principle: that ordinary law should be construed and applied in a manner consistent with fundamental rights, thereby obviating the need for constitutional recourse. By grounding its decision in the nature of the legal relationship rather than undertaking a direct re-interpretation of the Civil Code, the Court effectively opened the door to moral damages in cases where civil harm may be assessed under legal frameworks other than tort. In doing so, it avoided a formal declaration of incompatibility between domestic law and the Convention, while nonetheless facilitating a more expansive and rights-compliant approach to non-pecuniary compensation.

[5] Arts 1045 and 1046 as then in force, prior to the 2018 amendments mentioned above.

3. *Vincent Gauci and another v the Chief Government Medical Officer and others*, Court of Appeal, 28 June 2019[6]

Few areas of law have undergone as pronounced a transformation from a *favor debitoris* orientation to a more victim-centric approach as medical malpractice litigation. Historically, plaintiffs faced formidable hurdles: not only did the burden of proof rest squarely upon them, but success required demonstrating gross negligence on the part of the medical practitioner, a threshold difficult to meet.

This restrictive paradigm has gradually given way to a more liberal and equitable framework, notably consolidated in the Court of Appeal's judgment in *Vincent Gauci et v Tabib Ewlieni tal-Gvern et.* In that case, the plaintiff, having undergone an angioplasty at a state hospital, subsequently experienced impaired mobility necessitating the use of crutches. He initiated proceedings against both the hospital and the attending surgeon, alleging that the latter had negligently struck a nerve while inserting the sheath for the guidewire during the procedure.

The defendants contended that the applicable standard of care was no higher than that of the *bonus paterfamilias*, and that no evidence had been adduced to show a deviation from this standard. Citing *Roe v Minister of Health*,[7] they argued that imposing liability for every adverse outcome would be detrimental to the medical profession and broader public interest. As Lord Denning famously stated, 'we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong ... we must not condemn that which is only misadventure'. Thus, the mere failure to achieve the desired medical outcome does not, in itself, constitute negligence

Significantly, both the court of first instance and the Court of Appeal recognised the evolving jurisprudential trend of framing medical malpractice claims within the realm of contract law rather than tort, even in cases involving public hospitals and salaried medical professionals. While the standard of care remains consistent across both domains, the evidentiary burden shifts: once a contractual relationship is established and the expected outcome is not achieved, the onus falls upon the defendant to demonstrate that the medical obligations were fulfilled *diligenter et secundum artem*.

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[6] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2019 (2020) 391, no 29 ff.

[7] 1954, 2 All England Law Reports (All ER) 131.

The Court of Appeal further nuanced this position by distinguishing between obligations of conduct and obligations of result. While the medical professional's duty is generally one of conduct, it also encompasses a negative obligation of result, namely, not to inflict harm. Although the occurrence of harm does not automatically imply negligence, it does trigger a rebuttable presumption, placing the burden on the practitioner to prove that the injury was not attributable to any fault on his part. This evidentiary shift is both logical and equitable, given the asymmetry of information and control between surgeon and patient.

Although moral damages were neither claimed nor awarded in *Gauci*, the contractual framing of medical malpractice has far-reaching implications. As illustrated in *Jane Agius* (referenced above), such a perspective enhances the patient's prospects of securing compensation not only for pecuniary loss but also for non-pecuniary harm, including pain and suffering, diminished quality of life, and general inconvenience.

4. *Judith Cordina v Michael A. Cordina*, Court of Appeal, 27 January 2021[8]

In a precedent-setting judgment, the Family Court at first instance adjudicated upon a novel claim concerning the civil liability of a parent for psychological harm inflicted upon a child during her upbringing. The plaintiff, the biological daughter of the defendant, instituted proceedings in tort, alleging that she had been raised in an environment marked by persistent physical and psychological abuse perpetrated by her father. She contended that such maltreatment, commencing from an early age, had materially impaired her psychological development and educational attainment, thereby depriving her of the opportunity to pursue higher academic qualifications and, consequently, more remunerative employment.

Rejecting the defendant's pleas, the Court declined to frame the matter within the confines of family law, opting instead to ground its reasoning in the general principles of tort. It awarded the plaintiff € 82,984 in damages, calculated on the basis of the average income she would likely have earned had she been afforded the opportunity to complete her education and attain the professional status she aspired to. On appeal, the Court of Appeal substantially upheld the lower court's reasoning but revised the quantum of damages downward to € 43,200. In doing so, it took into account the plaintiff's current circumstances – namely, her marital status,

[8] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2021 (2022) 392, nos 2–10.

relative stability, and youth – emphasising her capacity to avail herself of educational opportunities as a mature student and thereby mitigate the long-term consequences of the harm suffered.

5. *Paul Pullicino v Director General, Works Department*, Court of Appeal, 30 March 2022[9]

This judgment elaborated upon the concept of alternative causation in Maltese tort law.

Between 30 November 1981 and 3 January 1983, the plaintiff was employed as a full-time apprentice with the Works Department, reporting to a government garage three days per week and attending vocational training on the remaining two. During his time in the garage, he participated in the maintenance of motor vehicles and was exposed to asbestos-containing components. Upon completion of his apprenticeship, the plaintiff established a limited liability company through which he operated a business importing motor vehicle parts, an occupation that likewise entailed exposure to asbestos. In 2008, he was diagnosed with mesothelioma.

The plaintiff instituted proceedings against the Works Department, alleging that his illness was causally linked to the inhalation of asbestos fibres during his apprenticeship. Tragically, he passed away before judgment was delivered, and the action was continued by his heirs.

In its defence, the Department contended that it could not be definitively established that the disease was contracted during the plaintiff's employment with the Department, given his subsequent occupational exposure to asbestos.

The court of first instance found in favour of the plaintiff, concluding that the mesothelioma had been contracted 'solely and exclusively' during his employment with the Department. It awarded damages amounting to € 204,633.65 for loss of earnings. The Department appealed.

On appeal, the Court acknowledged that the plaintiff's employment with the Department was of limited duration. Nonetheless, it accepted the medical evidence that even a single exposure to asbestos may suffice to trigger mesothelioma, which can remain latent for decades. The Court, however, rejected the categorical finding of the lower court. It held that the evidence did not exclude the possibility that the disease may have been contracted during the plaintiff's subsequent business activities, or

[9] *G Caruana Demajo*/*L Quintano*/*D Zammit*, Malta, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 415, nos 2–14.

that multiple exposures – both during and after his employment with the Department – may have contributed to the onset of illness.

The Court of Appeal identified three equally plausible and probable scenarios:

1. that the fatal exposure occurred during the plaintiff's employment with the Department;
2. that it occurred during his subsequent business operations;
3. that it resulted from cumulative exposures across both periods.

Importantly, the Court clarified that the mere possibility of post-employment exposure does not absolve the defendant of liability. In such cases, the burden shifts to the defendant to demonstrate that the probability of causation lies outside its sphere of responsibility. Given that the probabilities were evenly balanced, the Court apportioned liability accordingly and reduced the damages award by half, to € 102,317.

Although the doctrine of alternative causation is not novel – indeed, the Court cited Ulpian[10] and Julian[11], whose respective commentaries on the *Lex Aquilia* reflect early grappling with multi-causal harm and evidentiary uncertainty, as historical support of its reasoning – this judgment marks the first explicit judicial articulation of the principle within the Maltese jurisprudential context. In the absence of an express legislative provision akin to § 830(1) *Bürgerliches Gesetzbuch* (German Civil Code) or art VI.–4:103 of the Draft Common Frame of Reference, the judgment constitutes a landmark decision, offering doctrinal clarity and practical guidance in cases where harm may have resulted from the conduct of more than one potential wrongdoer, but definitive attribution is not possible. This approach reflects a probabilistic conception of causation, relieving the plaintiff of the burden of pinpointing the precise tortfeasor when several actors may have contributed to the harm.

[10] Digesta (Dig) 9.2.11.2 Ulpianus 18 ad ed.
[11] Dig 9.2.51.2 Iulianus 86 dig.

XX. The Netherlands

Emanuel GD van Dongen and Anne LM Keirse

1. Hoge Raad (Supreme Court, HR) 20 December 2019 (*Urgenda*)[1]

The tort law decision from the Dutch Supreme Court (*Hoge Raad*) that, without a doubt, has received most attention nationally and internationally of all tort law decisions since the turn of the century is the historic climate case *Urgenda* against the Dutch State, putting climate change at the top of everyone's agenda.[2]

Already four years earlier, the decision in first instance in the Dutch tort law case *Urgenda* against the Dutch State became worldwide breaking news, covered by The Guardian, the New York Times, Al Jazeera, Le Monde, the BBC, The Economist and many more. Dutch citizens sued their government over inaction on climate change and they won; not once, not twice, but three times in a row! In the *Urgenda* case, in 2015, the Dutch district court (*Rechtbank*) in The Hague legally imposed an obligation on the Dutch State to take better precautions against climate change.[3] It was ruled that the State has done too little to prevent dangerous climate change and is doing too little to catch up, at least in the short term. The court ordered the State to limit the total volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume would have reduced by at least 25% at the end of 2020 compared to the level of 1990.

Following this decision, the significance of this Dutch case for climate change policy and litigation has been extensively discussed both in the Netherlands and also abroad. It was the world's first successful climate litigation case. Around the world, one wondered, would *Urgenda* survive the appeal? Against several odds, in appeal, the Court of Appeal

[1] ECLI:NL:HR:2019:2006.

[2] See also *EGD van Dongen/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), European Tort Law (hereinafter ETL) 2019 (2020) 409, no 45 ff.

[3] Rechtbank (Rb) Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145. See also *JM Emaus/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 401, nos 42–54.

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(*Gerechtshof*) decided to uphold the initial verdict and to reject the appeal of the Netherlands.[4] The Dutch State still maintained that the legal arguments it raised were valid and appealed to the *Hoge Raad*. In cassation proceedings, the State addressed the question of principle regarding the government's freedom of choice in relation to policy.

There were believers and non-believers. The rightful place of activism is not the courtroom, but the House of Parliament, so the non-believers say. It has been argued that the court did not respect the constitutional principle of separation of powers. The *Hoge Raad* was urged to put the government back in charge, and restore the balance of powers. But, on the other hand, the *Urgenda* ruling has also been applauded. Many consider it a major victory for the climate and for future generations. States are meant to protect their citizens and if politicians do not do so of their own accord, then the courts are there to help. The Dutch Supreme Court agreed, shared Urgenda's view on this matter and Urgenda won again. The order that the Netherlands has to reduce its emissions by a minimum of 25% by the end of 2020 compared to 1990 levels was confirmed in this final decision.[5]

Although the district court and Court of Appeal reached the same conclusions, the substantiation for the decision was somewhat different. Whereas the district court based its decision on the general tort clause, as laid down in the Dutch Civil Code, the Court of Appeal grounded its judgment on the basis of the duty of care under arts 2 and 8 of the European Convention on Human Rights (ECHR). In cassation, the Dutch Supreme Court based its judgment on the UN Climate Convention (1992) and on the legal obligations of the State to protect the lives and wellbeing of citizens in the Netherlands. The Netherlands is included among the Annex I countries that must take the lead in combatting climate change and have committed themselves to reducing greenhouse gas emissions. These legal obligations are anchored in arts 2 and 8 ECHR.[6] The view of the State that decisions on the reduction of emissions are to be made by politicians failed. According to the *Hoge Raad*, it is a constitutional duty of the State to apply rulings from the European Court of Human Rights (ECtHR). Judges have to offer legal protection as an essential element of democracy, and have to protect the limits of law. The point of view of the State that an obligation to reduce emissions is not based on international

[4] Gerechtshof Den Haag, 9 October 2018, ECLI:NL:GHDHA:2018:2591. See also *Emaus*/*Keirse* (fn 3) nos 55–72.

[5] *Van Dongen/Keirse* (fn 2) no 53.

[6] Ibid, no 48.

obligations also failed. The *Hoge Raad* ruled to the contrary because of European rules (ECHR), the liability which arises under UN conventions, the fact that the Netherlands is party to various climate agreements and is an Annex I country.

This case was exceptionally influential. The rulings have proven its merits and boosted global climate litigation. In the Netherlands another famous case is that of *Milieudefensie c.s. v Sh*ell,[7] which is now pending at the *Hoge Raad*.[8] Climate litigation even reached the ECtHR in its recent decision, where references are made to the *Urgenda* case.[9]

2. and 3. HR 24 February 2017[10] and HR 20 January 2023[11] (*Landje Pik I and II*)

Since the turn of the century, annually, the *Hoge Raad* has delivered two or three compelling decisions regarding the rules on prescription of tort claims. Prescription is the legal defence that bars civil actions on a claim after the expiry of a certain period of time. Due to these ongoing developments in case law, the rules and limits of the legal institution of prescription are rapidly changing. Considering that the doctrine of prescription aims to serve legal certainty, this may be regarded as striking. In this section, we will address the ongoing developments relating to prescription in Dutch tort law and will discuss the criticised cases *Land grabbing I* and *II*, highlighting the fact that the *Hoge Raad* does not shy away from taking a unique legal standpoint in Europe.

First, an overview shows a flexible interpretation and relativisation of the rules on prescription in Dutch tort law. Over the years, prescription has become less and less strict, making more belated claims enforceable. Justice in individual cases predominates over legal certainty. Second, a comparative overview brings to light the fact that Dutch law has a much more flexible prescription regime than most other (European) jurisdictions. In other countries, plaintiffs are more likely than they are in the Netherlands to be prevented from enforcing tort claims against defendants because a specific period of time has elapsed. A recent study of the European Group on Tort Law shows that the effects of the passage of

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[7] Rb Den Haag 26 May 2021, ECLI:NL:RBDHA:2021:5337; Gerechtshof Den Haag 12 November 2024, ECLI:NL:GHDHA:2024:2099.

[8] See eg, <https://milieudefensie.nl/klimaatzaakshell/tijdlijn-klimaatzaak-tegen-shell>.

[9] ECtHR *Verein KlimaSeniorinnen Schweiz et al v Switzerland*, 9.4.2024, no 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020, at 451.

[10] ECLI:NL:HR:2017:309.

[11] ECLI:NL:HR:2023:62.

time on the enforceability of tort claims differ strongly across Europe.[12] We observe a wide range of approaches, from rather strict and rigid to less strict and flexible. The Netherlands is without a doubt to be placed at the latter end of the spectrum, and the recent developments in case law seem to make the Netherlands even more of an outliner.

An overview of the prescription regime

A full overview of the Dutch prescription regime can be found in the aforementioned comparative study and in the Yearbooks on European Tort Law but for the purposes of this contribution, the regime boils down to the following rules, to be found in art 3:310 of the Dutch Civil Code and case law interpreting this statute. A right of action to sue for damages is prescribed on the expiry of five years after the plaintiff becomes aware of both the damage and the identity of the tortfeasor; and in any event, on the expiry of 20 years following the event which caused the damage. In other words, Dutch law distinguishes between a subjective period of five years, starting with certain knowledge, and an objective period of 20 years, commencing at the time of the tort. In cases of pollution or toxic exposure, the objective period is extended to 30 years. In cases resulting in injury or death, caused after 1 February 2004, there is no objective prescription. Claims for compensation of damage in the form of injury or death only prescribe five years after the damage and the identity of the tortfeasor become known to the plaintiff. If at that moment the plaintiff is still a minor, the right of action is prescribed only on the expiry of five years after their 18th birthday. If the damage is caused by a criminal offence, the claim does not prescribe, provided the right to prosecute has not lapsed as a result of prescription in criminal law. This can be indefinite for certain severe crimes, such as manslaughter and rape.

While these five-, 20- and 30-year periods seem clear and strict, in practice they can be extended. It has been repeatedly established in case law that, under certain circumstances, both the subjective period and the objective period can be set aside if the principles of reasonableness and fairness so require. Furthermore, interpreting the statutes of limitations in light of the principles of reasonableness and fairness, the *Hoge Raad* has ruled that the subjective prescription period only starts running after the plaintiff is actually able to file a claim for damages. This will be the case if the plaintiff has obtained sufficient certainty – which does not have to

[12] *I Gilead/B Askeland* (eds), Prescription in Tort Law: Analytical and Comparative Perspectives (2020).

be absolute certainty – that the damage was caused by inadequate or tortious actions of a known party. The answer to the question at what time the plaintiff has obtained sufficient insights and is therefore truly able to file a claim depends on the particular circumstances of the case.

Based on the above, the Dutch law of prescription can be summarised thus: the decisive point in time is the moment the plaintiff should have acted. From the moment that it could be expected from the plaintiff to file a claim onwards, the clock on the prescription period starts ticking. As long as plaintiffs are unaware of one or more elements of their alleged cause of action, they are not truly able to file a claim and their claims will not be time-barred and thus their claims may still be accepted.

In general, these developments and this relativisation of prescription are perceived as improvements and have been applauded by Dutch practitioners and legal scholars. So far so good. However, one of the developments brought by the *Hoge Raad* faces severe criticism and the *Hoge Raad* was in fact asked to reconsider one of these new lines.

Prescription and Land grabbing cases I and II

And this brings us to the highlighted *Land grabbing cases I and II*. *Land grabbing I* was a groundbreaking and unexpected decision by the *Hoge Raad*, presented in the form of an *obiter dictum*.[13] *Land grabbing I* offered a helping hand to municipalities which have to deal with residents who take possession of municipal land in bad faith and become the owners thereof as a result of prescription. Up until then, it was widely assumed that a claim based on tort against a landgrabber would be time-barred at the same time as the claim for restitution of the land and thus after 20 years following the grabbing of the land.

But this turns out not to be the case: after losing ownership of the property and the expiry of the prescription period, the legal race is not over yet, for the *Hoge Raad* found that 20 years after the grabbing of the property, a new claim can emerge: a tort claim with a new prescription period, of a minimum of five years and a maximum of 20 years. Anyone who takes something into possession and holds it, knowing that another person rightfully owns it, is acting unlawfully towards this other person – the (previous) owner. This previous owner who has lost their property due to the expiry of the prescription period can claim damages from the possessor, being the new owner. And since they can seek compensation

[13] See also *ALM Keirse/T Bouwman*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2017 (2018) 412, no 10 ff.

in kind, the transfer of the property can be ordered and the property has to be returned. For this claim, a new prescription period starts running: five years following the awareness of the loss of ownership or 20 years after the loss of ownership (and thus adding up to a maximum of 40 years after the initial loss of possession).[14]

This unexpected turn was challenged in *Land grabbing II*.[15] This case concerns two neighbours. One neighbour had planted a conifer hedge on his neighbour's land and had thus taken some land into possession, to be more precise 46 square metres. After 20 years, this landgrabber became the owner of this 46 square metre piece of land. But then, a few years later, his neighbour filed a claim against him, not long after he had discovered the true borderline of demarcation, stating a tort was committed. And it was indeed decided that the landgrabber had to put the previous owner in the position he would have been in without the unlawful possession. And thus the piece of land was returned.

The view of the Hoge Raad

This decision was challenged before the *Hoge Raad*. The ruling was obviously fully in line with *Land grabbing I*, but the *Hoge Raad* was asked to reconsider this line. The most far-reaching complaint in cassation entails that the approach of the *Hoge Raad* in *Land grabbing I* was not well thought through, was claimed to be unjust and puts the Netherlands in a unique position: because no other country accepts a shift of ownership due to prescription, it is assumed that the landgrabber is liable in any case. And even the Grand Chamber of the European Court of Human Rights ruled in the *Pye* judgment that 'losing' property due to prescription is not in itself an infringement of art 1 First Protocol to the European Convention on Human Rights.

However, the *Hoge Raad* dismissed the complaints and saw no reason to revoke the rule given in the case *Land grabbing I*. Some find the stance of the Hoge Raad in the *Land grabbing* cases difficult to comprehend, while others have applauded the rulings, pointing out the fairness of the outcome which penalises unlawful land grabbing. We concur with the latter. It is true that the plaintiff failed to file an action on the claim for restitution of possession during the running of the first term of 20 years, but, first of all, this was due to the surreptitious behaviour of the land grabber

[14] *EGD van Dongen*/*ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 459, no 7.

[15] See also *van Dongen/Keirse* (fn 14) no 3 ff.

and more importantly the plaintiff could still have filed a claim for losing ownership. Therefore, besides moral grounds that can be put forward, we acknowledge a legal justification to support the outcome by distinguishing two tort claims: one reclaiming possession and another reclaiming ownership, each of them giving rise to two separate prescription periods.

Conclusions

To conclude, the discussed developments illustrate the struggle of finding a good balance between legal certainty, on the one hand, and justice in individual cases, on the other hand. We believe that the current balancing acts of the *Hoge Raad* in prescription cases strengthens the trust and credibility of the legal system and its fairness, but we do realise that (many) others have another standpoint. In other European jurisdictions, the outcome of cases such as these would certainly be different. But is standing alone not all about embracing individuality, ie bringing justice in individual cases, even if this is at odds with the principle of legal certainty?

4. HR 31 March 2006 (*Nefalit/Karamus*)[16]

First application

In 2006, when the call for proportional liability was growing within Dutch tort law doctrine,[17] and proportional liability was already once applied before in lower case law,[18] the *Hoge Raad* ruled on the important decision in the case of *Karamus v Nefalit*,[19] opting for proportional liability in cases of causal uncertainty. The rule is only intended for cases where it is clear that damage has occurred, but it remains unclear what caused the damage. The case was discussed in the Tort Law Yearbook of 2006[20] and can be summarised as follows. The case involves a former employee

[16] ECLI:NL:HR:2006:AU6092.

[17] See *AJ Akkermans*, Proportionele aansprakelijkheids bij onzeker causal verband (dissertation Tilburg, 1997); *ALM Keirse*, Going Dutch: How to Address Cases of Causal Uncertainty, in: I Gilead/M Green/BA Koch (eds), Proportional Liability: Analytical and Comparative Perspectives (2013).

[18] See Ktr Middelburg 1 Februari 1999, Tijdschrift voor Milieuschade en Aansprakelijkheid no 6 (1999) (*Schaier v De Schelde*).

[19] HR 31 March 2006, Nederlandse Jurisprudentie (NJ) 2011/250, with note *TFE Tjong Tjin Tai* (*Nefalit v Karamus*).

[20] *M Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 338, no 22ff.

and heavy smoker who was exposed to asbestos during his employment and later developed lung cancer. The employee filed a claim against his employer under the employer's liability provision set out in art 7:658 of the Dutch Civil Code (DCC), asserting that his lung cancer resulted from asbestos exposure. The employer, however, contended that the illness could have been caused by factors other than asbestos, specifically the employee's smoking habits.[21]

The *Hoge Raad* rejects the all-or-nothing approach – arising from the rules on the burden and reversal of proof – which would entirely shift the effects of causal uncertainty to either the employer or the employee. Instead, it abandons this traditional method and introduces a proportional approach as an alternative. Under the theory of proportional liability, judges neither fully grant nor entirely deny damages based solely on the presence or absence of proof of causation. Instead, they award damages in proportion to the probability of causality. However, according to the *Hoge Raad*, 'if it appeared that this likelihood is very small, the result would generally be that the judge rejects the claim, whereas, if the likelihood were very high, he would sustain the claim.'[22]

With respect to situations where the probability is neither very low nor very high, the *Hoge Raad* held that, given the purpose of the breached norm – to prevent damage to the health of employees and the nature of the wrongful act – it would be inconsistent with reasonableness and fairness to place the entire risk on either the employee or the employer. In order to resolve the matter of causal uncertainty, the *Hoge Raad* ruled: 'Taking into account the principles which underlie arts 6:99 and 6:101 DCC, it has to be accepted that when an employee suffers damage, which, considering the aforementioned possibilities, can be caused both by attributable negligence on the part of the employer in his duty to exercise reasonable care … as well as through a circumstance which can be attributed to the employee himself or … through a combination of these, where it cannot be established with sufficient certainty to which extent the damage suffered by the employee has been caused by all of these circumstances or one of them, the judge can order the employer to compensate the entire damage of the employee, but reducing the employer's duty to compensate proportionally, based on a well reasoned estimate, to the extent to which circumstances can be attributed to the employee have also contributed to his damage.'[23] In legal doctrine, the proportional solution is generally

[21] Ibid, no 22.

[22] Ibid; HR 31 March 2006, ECLI:NL:HR:2006:AU6092, at 3.13.

[23] Ibid 22-24; HR 31 March 2006, ECLI:NL:HR:2006:AU6092, at 3.13.

regarded as a fairer alternative to the all-or-nothing approach, or the reversal of the burden of proof (which continues to coexist alongside the proportional solution).

Extending the boundaries

When the ruling came out, it was considered important but also received critical comments. However it may be, while accepting proportional liability, the *Hoge Raad* still left enough leeway for further refinements to be made.[24] Some years later, in 2010, in the case *Fortis v Bourgonje*,[25] the *Hoge Raad* ruled that proportional liability as accepted in *Nefalit v Karamus* can be applicable beyond the particular case of occupational diseases/employers' liability to all kinds of cases, while still emphasising that it should be applied with caution and that an exceptional justification is required, which can especially be present if '… the liability of the defendant has been established and if there is a more than very small possibility that a *conditio sine qua non* relationship between the violated norm and the damage exists, while the rationale of the violated norm and the nature of the norm violation also justifies the application of the said rule.'[26]

In 2012, in *Nationale Nederlanden v Mother and Son*, the doctrine of proportional liability was affirmed. It was decided that causal probabilities are decisive in cases of proportional liability and that in assessing proportional liability, an equity correction such as is applicable in cases of contributory negligence on the basis of art 6:101 DCC is not applicable here.[27] Ten years later, in 2022, in *Cardiologist/State*, the *Hoge Raad* overturned the ruling, as the Court of Appeal had not considered the requirement of 'restraint', nor whether the chances were not 'very small' (as claimed by the State), nor had it examined whether the scope of the violated standard and the nature of the violation (including the nature of the damage suffered by the cardiologists) justified the application of proportional liability in the specific case.[28] In conclusion, proportional liability remains important, and has even become more important because

[24] *Faure/Hartlief* (fn 20) no 25.

[25] See also *I Giesen/ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2010 (2011) 403, no 82 ff.

[26] HR 24 December 2010, ECLI:NL:HR:2010:BO1799.

[27] HR 14 December 2012, Rechtspraak van de Week (RvdW) 2013, 37 (*Nationale Nederlanden v Mother and Son*); *JM Emaus/ALM Keirse*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2012 (2013) 469, nos 72–85.

[28] HR 14 December 2022, ECLI:NL:HR:2022:1454.

of its possible broad applications, being not only confined to personal injury and health cases.

Relationship with loss of a chance

An important development in case law, on which much has been written in doctrine, is the distinction drawn between proportional liability and loss of a chance. Already in 2012, proportional liability was described by the *Hoge Raad* as a concept intended to provide a solution for certain situations in which there is uncertainty about the *conditio sine qua non* relationship between the breach of the standard and the damage, while the doctrine of loss of a chance is intended as a solution for cases in which it is established that the wrongdoer acted negligently, but it cannot be determined what damage was caused by that negligence.[29] The amount of compensation owed is equal to the percentage of the chance of improvement thus determined, multiplied by the monetary value of the hypothetical better scenario. It must, however, be a realistic, not insignificant, chance of success.[30] Also small chances that are nevertheless real may be compensated.[31] Judges will often base their assessment on the opinion of experts. In the absence of precise information, the extent of the lost chance and therefore the amount of damages must be estimated by the court.

5. HR 22 February 2002 (*Taxibus*)[32]

When someone is involved in an accident, it impacts not only the injured party but also their loved ones (secondary victims). This is especially true if the victim dies. The question arises whether material and immaterial losses can be compensated in a financial way for secondary victims.

For immaterial losses suffered by the injured party, the possibility of compensation for pain and suffering (*smartengeld*) was already possible under Dutch law preceding the Napoleonic times, but compensation for pain and suffering was not incorporated in the *Code civil* nor the Dutch Civil Code of 1838. In case law, compensation for pain and suffering in

[29] HR 21 December 2012, ECLI:NL:HR:2012:BX7491, NJ 2013/237, with note *SD Lindenbergh* (*Deloitte*/*Hassink*).

[30] See HR 21 December 2012, NJ 2013/237; HR 27 October 2017, NJ 2017/422 (*Caudasyndroom*).

[31] HR 19 July 2019, NJ 2019/356 (Srebrenica) shows that 10% is a real compensable chance of success.

[32] ECLI:NL:HR:2002:AD5356.

the event of personal injuries was disputed until a decision of the *Hoge Raad* in 1943.[33] Since then, awarding moral damages became established case law, for example in the case of injury. The possibility for compensating immaterial damage became codified in the Dutch Civil Code in 1992. According to this established rule, immaterial damage only qualifies for compensation to the extent that the law confirms a right to damages therefor. A right to immaterial damages arises if the liable person had the intention to inflict such harm; under certain conditions: if the harm consists of injury to the memory of a deceased person; and if the person suffering the immaterial loss sustained physical injury, their honour or reputation has been negatively affected or if they have been harmed otherwise in person (*op andere wijze in zijn person is aangetast*).

Over the years, the limits of the scope of the open norm 'if he is harmed otherwise in person' of art 6:106 para 1 sub b final part DCC have changed: first, for an eligible mental injury, a recognised psychiatric illness was initially required, but that is no longer the case. Even if there is no physical or mental injury, compensation for immaterial damage might be granted in cases of moral damage (such as anxiety) resulting from movement of soil as a result of the construction or operation of a mining work if certain conditions are met.[34] An award of compensation for damage resulting from shock also falls in the category 'if they are harmed otherwise in person' (art 6:106 para 1 sub b DCC), but will in most cases also result in compensation for the material damage caused by the severe shock. Furthermore, in 2019, awards for affection damage or bereavement damage for relatives of the victims of an unlawful act became possible.[35]

Case law: it started with Taxibus

Compensation for material and moral damage resulting from the shock experienced by secondary victims was first awarded in 2002, with a ruling of the *Hoge Raad* (*Taxibus*) that received considerable attention both in the general media as well as in legal doctrine.[36] In this decision, the *Hoge Raad*

[33] See eg, *EGD van Dongen/GLH van Rosmalen*, De vergoeding van immateriële schade in Nederland en Italië: een vergelijkend-rechtshistorische analyse, Tijdschrift voor Privaatrecht (TPR) 2022, 1415 ff.

[34] See HR 19 July 2019, ECLI:NL:HR:2019:1278 (Earthquake Damage Groningen); *van Dongen/Keirse* (fn 2) no 28 ff.

[35] See also *van Dongen/Keirse* (fn 2) no 1.

[36] See also *M Faure/T Hartlief*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 305, nos 24–28.

first accepted the possibility of compensation for damage resulting from shock, holding that a person who kills or injures another by a wrongful act may also act unlawfully towards the person to whom the confrontation with that act or its consequences causes a severe emotional shock. Whether this is justified in a particular situation will depend on a weighing of the circumstances of the case. In this ruling, four (cumulative) requirements were formulated for such unlawful acting: (i) an infringement of a violation of traffic or safety standard, (ii) leading to the injury or death of the primary victim. The third party should have (iii) observed the accident or have been directly confronted with the consequences thereof, and (iv) because of that confrontation, this led to a severe emotional shock resulting in mental injury, qualifying as a recognised psychiatric illness.[37] It is important to note that, at the time of the ruling, no compensation for bereavement damage (*affectieschade*) could be claimed.[38] *The Hoge Raad*, in this ruling, also rejected compensation for bereavement damage, clarifying that a legislative intervention was needed to regulate compensation of this damage. As to the requirement of direct confrontation in the *Vilt* decision from 2009,[39] the *Hoge Raad* did not accept the attempt to abandon the criterion of direct confrontation in the light of the seriousness of the norm violation, eg an intended norm violation. Some years later, this requirement, as well as the different views that have emerged since the decision of 2002 on the question in which cases damages for emotional shock should be awarded, was discussed in an elaborate Conclusion of the Advocates-General,[40] attempting to obtain a response from the *Hoge Raad* to several recommendations in this area. At that time, the *Hoge Raad* did not address these (because the case was not suitable, in terms of procedural law).[41]

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[37] Later, the Hoge Raad decided that damage caused by an unlawfully induced emotional shock is limited to damage resulting from mental injury, which must be serious by nature and duration and substantiated by objective standards, not necessarily limited to recognised psychiatric disorders, but always diagnosed by an appropriately qualified and competent practitioner. A psychiatric qualification is no longer required. See HR 29 June 2021, ECLI:NL:HR:2021:1024.

[38] See Law on Affection Damage, which entered in force on 1 January 2019.

[39] HR 9 October 2009, ECLI:NL:HR:2009:BI8583; *ALM Keirse/I Giesen*, The Netherlands, in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 426, nos 52–60.

[40] Conclusion A-G TNBM Spronken and A-G SD Lindenbergh, ECLI:NL:PHR:2022:166, to HR 12 April 2022, ECLI:NL:HR:2022:560.

[41] Art 81 Judiciary Organisation Act (Wet op de rechterlijke Organisatie): If the Hoge Raad considers that a complaint that has been filed cannot result in cassation and does not warrant the answering of questions of law in the interests of the uniform application of the law or the development of the law, it may confine itself to this consideration when stating the grounds for its decision.

The Hoogeveen case

This changed shortly thereafter in the *Hoogeveen* ruling, in which the *Hoge Raad* realised that clarification was awaited, stating that, to the extent that its previous case law on this issue could be read differently, this was now reconsidered. In this ruling,[42] the *Hoge Raad* clarified the criteria for awarding compensation for serious mental injuries resulting from shock. While the criteria formulated in the *Taxibus* case still apply, the question of whether those criteria are met must be answered using (non-exhaustive) points of view. In this 'multi-factor approach', the points of view that play a role in this assessment are: (a) the nature, the circumstances and the consequences of the unlawful act committed against the primary victim, including the intention of the perpetrator and the nature and severity of the suffering inflicted, (b) the manner in which the secondary victim is confronted with the unlawful act committed against the primary victim and its consequences, and (c) the nature and closeness of the relationship between the primary and the secondary victim.

Judges have to assess the (un)lawfulness towards the secondary victim on a case-by-case basis, taking into account, inter alia, these points of view in their interrelationship, without giving *a priori* decisive importance to any of them. If one of these points of view does not provide a clear indication to assume unlawfulness, unlawfulness may nevertheless be assumed if the relevant circumstances, from other points of view, are sufficiently substantial. In this way, the *Hoge Raad* makes clear that other circumstances can make the factor of direct confrontation less decisive, and it moves from a cumulative approach to a multi-factor approach with more discretionary power for judges.

The right to compensation for damage caused by an unlawfully induced emotional shock is limited to the material and moral damage resulting from mental injury. The existence of mental injury must be established according to objective criteria – this does not mean that it only applies in cases of an illness recognised in psychiatry, nor that this mental injury can only be diagnosed by a psychiatrist or psychologist.[43] If such mental injury is established, both material and immaterial damage caused by this shock are eligible for compensation.

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[42] *EGD van Dongen/ALM Keirse*, The Netherlands, in: E Karner/BC Steininger (eds), ETL 2022 (2023) 437, nos 38–46, and nos 73–79. When this case was heard at the court of first instance, in 2018, a request for bereavement damages was not yet possible under Dutch law.

[43] HR 29 June 2021, ECLI:NL:HR:2021:1024.

XXI. Norway

Knut Tande

Identifying watershed verdicts in Norwegian tort law is challenging, as the legal framework primarily evolves through the incremental refinement of established precedents rather than revolutionary shifts. Most judgments function as an evolution and adjustments of existing doctrines, adapting long-standing principles. Still, certain decisions distil or develop core principles with such precision and clarity that they become indispensable reference points for all subsequent judicial reasoning. I have chosen such verdicts from the first half of the period from 2001 to 2015 in order not to repeat myself from previous country reports from Norway, and because these older verdicts have proved their importance over time. The verdicts are chosen to illustrate different general conditions for liability, such as damage and causation, different bases of liability such as employers' liability and non-statutory strict liability, and lastly the extent of damages.

1. HR-2013-2640-A (*Fosterdiagnostikkdommen*)

The Supreme Court (*Høyesterett*, HR) verdict in HR-2013-2640-A concerns a hospital's liability for a mother's psychiatric injuries and economic loss within the context of a wrongful birth claim.

The claimant A, and her husband B, already had twins born prematurely with significant disabilities, as well as a third child with normal health. In 2007, A became pregnant unexpectedly and, due to the existing care burden, decided to terminate the pregnancy if diagnostic tests revealed the child had a functional disability. Although A was referred to Kvinneklinikken (the women's clinic) at Haukeland University Hospital and informed that only a prenatal diagnosis could definitively rule out chromosomal abnormalities, the hospital failed to offer this test or perform further investigations.

Consequently, daughter C was born in 2008 and was shortly thereafter diagnosed with Down's syndrome. Following the birth, the mother, A, was diagnosed with generalised anxiety disorder and recurrent periods of depression, which she attributed to the hospital's failure to provide the

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necessary diagnostic foundation for an informed choice regarding abortion. A submitted a claim for pecuniary compensation based on sec 2, first paragraph, letter (a) of the Norwegian Patient Injury Act, which provides for compensation when an injury is caused by a failure in the provision of healthcare.

However, the central legal dispute in this case was not whether a failure of care had occurred, as the parties agreed that the hospital had failed to offer the required diagnostic services, but rather whether the damage or injury in the case at hand was protected under Norwegian tort law.

The verdict in HR-2013-2640-A is important because it examines the legal definition of injury, including the connection between tort law and the evaluation of human life within Norwegian tort law. In addition, the majority in this Supreme Court verdict lays the foundation for quite extensive value-based verdicts in Norwegian tort law, as demonstrated by the later Supreme Court verdict in HR-2017-2352-A described below.

The majority in the Supreme Court in HR-2013-2640-A based their decision partly on the preparatory works of the Act,[1] which suggest that the birth of a child should generally not be classified as a compensable injury. Furthermore, the Court examined the case through the lens of international human rights, specifically arts 3 and 8 of the European Convention on Human Rights (ECHR), to determine if the denial of diagnostic testing constituted a violation of the right to private life or a form of degrading treatment.

In its reasoning, the majority of the Supreme Court also relied extensively on the precedent set by the Supreme Court verdict in *Norsk Retstidende* Rt-1999-203 (sterilisation), which held that the birth of a healthy child following a failed medical procedure did not trigger a right to compensation for the costs of raising the child.

The majority of judges in Rt-2013-2640 argued that the same value-based logic must apply in Norwegian tort law when a child is born with a disability, asserting that all human lives are equally valuable and that the existence of a person should not be subjected to economic measurement. The Court expressed concern that recognising such a claim could stigmatise the child by labelling their existence as damage, which would conflict with the fundamental legal principles of equality and dignity found in the Biotechnology Act and the Discrimination and Accessibility Act. Regarding the ECHR, the majority distinguished this case from the European Court of Human Rights' (ECtHR) ruling

[1] Specifically Norges offentlige utredninger (Official Norwegian Reports, NOU) 1992:6 and Ot prp no 31 (1998–1999).

in *RR v Poland,*[2] noting that in A's case, there were no specific clinical indications of abnormality, the risk was statistically low, and A was not subjected to the same level of degrading treatment or systematic denial of a legal abortion.

The majority of the Supreme Court concluded that while the mother's psychiatric suffering was real and directly linked to the hospital's failure, psychiatric injuries so closely tied to the birth of a child fall outside the scope of legally protected interests in tort law. By a 3-2 dissent, the Court ruled that the State, represented by the Patients' Injury Compensation Board, should be acquitted.

The dissenting minority in the Supreme Court argued that the claim should be viewed as compensation for the mother's specific health injury, her clinical depression and anxiety, rather than a claim based on the value of the child. Thus, compensating the mother's health injury would not undermine the respect for life, the minority stated.

The verdict in HR-2013-2640-A can be considered a landmark decision because the Court handles such a sensitive topic, and because the majority of the judges extends the considerations from the verdict in 1999 further than what follows from the basic structures of Norwegian tort law, at least considering the approach of the minority judges.

In addition, in the Supreme Court verdict HR-2017-2352-A (*Prostitusjon*), which concerns the compensation for lost income from prostitution following a robbery, the court majority referred to the verdict in HR-2013-2640-A as a precedent to define the limits of compensation in Norwegian tort law. More specifically, the majority referred to HR-2013-2640-A to reinforce the principle in Norwegian tort law that certain interests may be excluded from the scope of legal protection based on a value-driven assessment of whether the interest deserves the protection of the legal order.

In the 2013 case, the Supreme Court had ruled that a psychological injury closely tied to the birth of a child was not legally protected, and in the 2017 case, the Court argued that a similar logic applies to the income derived from prostitution. The Court asserted that the nature of the injury, whether it is a psychological trauma as in the 2013 case or a physical injury resulting in lost earnings as in the 2017 case, does not alter the necessity of this threshold test for legal protection.

Furthermore, the 2017 verdict adopts the methodology established in HR-2013-2640-A, which requires a broad overall assessment to determine the limits of legal protection of Norwegian tort law. This assessment

[2] ECtHR *Case of RR v Poland*, 26.5.2011, no 27617/04.

involves a concrete evaluation of both the interests of the injured party and the general interests of society. By following the general approach in the precedent from 2013, the court majority in 2017 concluded that even though selling sexual services is not technically illegal, the surrounding legislative framework, which criminalises the purchase of such services and regards prostitution as socially undesirable, negates the legal protection for lost income. Ultimately, the 2013 case provided the judges in the 2017 case with a precedent that makes it possible to deny a claim on the grounds of consistent values in the legal system, arguing that it is legally incoherent to award compensation for the loss of an activity that is fundamentally discouraged by the State's criminal policy.

2. Rt-2008-755 (*Hjemmehjelpdommen*)

The Supreme Court verdict in Rt-2008-755 addresses the scope of an employer's vicarious liability under the Norwegian Damages Act for intentional criminal acts committed by employees.

The litigation arose from a severe breach of trust by a home helper, identified as B, employed by the Municipality of Trondheim. The victim, A, was a 92-year-old widow who was wheelchair-bound and entirely reliant on municipal care services for her daily life. Between September 2005 and January 2006, B misappropriated A's debit card and PIN code, utilising them for unauthorised cash withdrawals and purchases totalling NOK 310,799. This criminal activity was made possible by the helper's access to the victim's private sphere. In a unanimous decision, the Supreme Court ordered the Municipality of Trondheim to pay the full amount in damages, along with interest and substantial legal costs for all three instances of the court system.

The core legal question before the Supreme Court was the scope of the employer's vicarious liability for intentional criminal acts committed by employees under the objective liability regime established by sec 2-1, no 1 of the Norwegian Damages Act (*skadeserstatningsloven*, skl). The judges focused specifically on the requirement of proximity between an employee's assigned duties and the subsequent tortious conduct. The verdict in Rt-2008-755 establishes a fundamental principle that had not been fully clarified by previous rulings: that damage caused intentionally and fraudulently by employees generally falls within the scope of employers' liability according to sec 2-1, provided there is a sufficient link to the work environment.

The Supreme Court noted that skl sec 2-1, no 1, holds an employer liable for damage caused wilfully or negligently by an employee during

the performance of their work or duties. While the second sentence of this provision limits liability if the damage results from the employee going beyond what is 'reasonable to expect' considering the nature of the work, the Court had to weigh this against the literal wording of the statute. The judges analysed the legislative history, noting that while older preparatory works suggested intentional acts might be excluded, the wording of skl sec 2-1, no 1 explicitly includes both intentional and negligent acts. This signalled a shift toward protecting the victim over the employer in specific organisational contexts.

To define the limits of proximity, the Court engaged in an extensive comparative analysis of prior case law. The judges referred to Rt-1982-1349 *(Rengjøringsbyrå-dommen*), where a cleaning agency was not held liable for a cleaner's theft. In that instance, the Court had emphasised that the client had significant opportunities for control and the cleaner had no professional reason to handle the stolen items. The verdict in Rt-2008-755 distinguished itself from this precedent by highlighting the extreme vulnerability of the victim and the inherent lack of oversight in home care. Unlike a commercial office, a private home where a disabled elderly person resides offers almost no opportunity for the victim to monitor or control the movements of the employee.

In addition, the Court made comparisons to Rt-2000-211 (*DnB-dommen*), where a bank was found liable for an employee's fraud, because banking naturally involves a systemic risk that employees may exploit their position for financial gain. In contrast, in Rt-2007-1665 (*Vekterdommen*), a security company was acquitted of liability for a guard's intentional arson. In that specific case, the act was deemed extraordinary and remote, driven by a personal psychological need rather than a risk typical of the security industry. By synthesizing these cases, the Supreme Court concluded that intentional damage by the employee leads to vicarious liability if there is sufficient proximity between the employment and the act. The decisive criterion was whether the damage represents a realisation of the risk inherent in the employment itself, rather than a particular risk associated with the individual employee's specific traits.

The Court emphasised the asymmetry of the relationship between the tortfeasor and the victim. A user of municipal services cannot choose which helper is sent to their home and, due to age and infirmity, is physically unable to supervise them. Thus, the Supreme Court argued that theft in the home care sector is a known, albeit infrequent, problem that cannot be eliminated through vetting. This makes the risk an inherent component of the service model itself, the Court noted.

Furthermore, the verdict in HR-2008-937-A emphasised risk allocation and insurance: Since the alternative to home care is often institutionalisation, it is unreasonable to place the burden of service-related theft on the vulnerable individual. A municipality can absorb such losses or insure against them, whereas a private individual generally cannot obtain insurance covering theft by persons with legal access to their home.

The long-term importance of Rt-2008-755 is evidenced by a later Supreme Court verdict in HR-2015-981-A (*Advokatpartnerdommen*). In this later verdict, the Supreme Court explicitly referenced Rt-2008-755 to clarify that the historical main rule that was expressed in the preparatory works, which exempted employers from liability for intentional wrongdoing, was no longer sustainable.

Also, in applying the proximity test, referencing Rt-2008-755, the Court in HR-2015-981-A determined that a law firm was liable for a partner's fraudulent acquisition of a client's family shares. This expansion was justified by the argument that a business must answer for the risks inherent in its organisational model, especially when that model is marketed based on high ethical and professional standards, creating a high level of trust that the employee eventually exploits. This can be seen as a logical extension of the reasoning in Rt-2008-755.

3. Rt-2003-1546 (*Røykedommen*)

The Supreme Court verdict in Rt-2003-1546 addresses whether a tobacco manufacturer can be held liable for the personal injuries and subsequent death of a consumer under the non-statutory Norwegian doctrine of strict liability.

This case was the first major tobacco ruling in Norway, originating from a lawsuit filed by Robert Lund. Lund had smoked a particular brand of tobacco consistently from 1954 until his death from lung cancer in 2000. Following his passing, his widow continued the legal battle, seeking to hold the manufacturer accountable. It was undisputed between the parties that the decedent's lung cancer was directly caused by his long-term tobacco consumption, which averaged approximately 20 cigarettes per day over several decades.

The legal framework for this dispute was governed by a non-statutory rule of strict liability developed over decades of judicial practice by the Supreme Court, as the Product Liability Act of 1988 was not applicable to injuries whose causal origins predated the statute's enactment. Under this non-statutory doctrine, liability can be imposed without proof of negligence if a business or activity creates a risk that is constant, typical,

and extraordinary. The verdict in Rt-2003-1546 is particularly important because, for the first time, the Supreme Court made it clear that the traditional criteria for the non-statutory rule of strict liability must be supplemented by a broader consideration of grounds for liability. In addition, the judgment took significant account of the role of the victim in a way that had not been done before in Norwegian tort law.

In its thorough examination, the Court started with the requirement of a constant, typical, and extraordinary risk. The Court acknowledged that the health hazards associated with cigarette smoking satisfy the criteria of being a constant and persistent risk, as the danger is inherent in the product's regular use over time. Furthermore, the Court confirmed that the risk is typical because the manufacturer possessed the best available knowledge regarding the potential for serious health damage, making the resulting injury a foreseeable consequence of the production and sale of cigarettes.

However, the Court's analysis of the extraordinary risk requirement served as the primary hurdle for the plaintiff's claim. The doctrine of unwritten strict liability typically distinguishes between the inherent risks of daily life and those that are so exceptional that the victim cannot be expected to protect themselves. While the Court admitted that the severity of lung cancer exceeds the common dangers of everyday existence, it emphasised that the extraordinary nature of a risk is inextricably linked to whether that risk is unexpected or unpredictable for the consumer. In this case, because the risks of smoking were deemed to be common knowledge by 1964, the Court reasoned that the danger was no longer 'unexpected', thereby failing to meet the threshold for an extraordinary risk that necessitates legal protection through strict liability.

The Supreme Court's analysis focused heavily on the temporal development of public knowledge, identifying 1964 as a decisive turning point. The Court noted that the publication of the US Surgeon General's report and the subsequent report by the Norwegian Director of Health, provided authoritative evidence of the causal link between cigarettes and lung cancer. Consequently, the Court found that any smoking after 1964 was conducted at the smoker's own risk. Regarding the period between 1954 and 1964, the Court acknowledged that while medical certainty was still developing, it was already 'commonly known' that smoking could cause health damage, meaning the risk was not unexpected.

In the final stage of its reasoning, the Court performed a broad assessment (*helhetsvurdering*), weighing several socio-economic variables. One central variable is the principle of loss-spreading: while strict liabil-

ity is often justified by a defendant's ability to distribute costs, the Court found this inapplicable here due to the massive scale of tobacco-related illnesses, which would overwhelm traditional insurance models. The Court also considered the legal disharmony that would arise if the judiciary imposed massive financial penalties on a product that the State has explicitly accepted as legal, regulated, and heavily taxed, noting this could result in liability for other products like alcohol.

Furthermore, the Court addressed the variable of equal treatment among victims, noting that many smokers who suffered similar injuries in the past would be unable to claim compensation due to statutes of limitation, making a judgment in favour of this specific plaintiff appear arbitrary. This temporal dimension led the Court to conclude that the current social landscape has already shifted toward public health initiatives and personal responsibility.

The Supreme Court verdict in Rt-2003-1546 is referred to in the later Supreme Court verdict in HR-2009-1931-A (*Nordsjødykker*) to define the extent of non-statuary objective liability. This case concerned the health damage and neurological injuries suffered by pioneer divers in the North Sea during the early decades of the Norwegian oil drilling. In this ruling, the 2003 tobacco verdict is specifically referenced to confirm that non-statutory strict liability now rests on a dual foundation of risk considerations and balancing of interests.

In HR-2019-52-A (*Spinning*), where the question before the Supreme Court was if a fitness centre should be held responsible for the personal injury caused by a broken seat bolt, the Court makes an indirect reference to Rt-2003-1546 by explicitly quoting the legal summary from the *Nordsjødykker* decision. Finally, the Supreme Court case in HR-2025-1055-A (*Stup*) also considered the 2003 verdict indirectly by adopting the summary of objective liability criteria found in the *Spinning* verdict when deciding if the municipality of Oslo was liable for the personal injury of a person diving into shallow water at a recreational area with a concrete element immediately under the surface.

4. Rt-2007-172 (*Schizofrenia*)

The Supreme Court verdict in Rt-2007-172 (*Schizofrenia*) examines the application of the proximity (adequacy) requirement in Norwegian tort law regarding a claimant's right to economic compensation for a psychiatric injury after a physical workplace accident.

The case involved an electrician, A, who fell four metres from a lifting cage, sustaining spinal fractures but no brain injury. Previously a robust

individual and a national-level dart player, his life derailed post-accident. A suffered chronic pain, lost his job, failed at academic retraining due to underlying dyslexia, and experienced the collapse of his domestic partnership. Approximately 18 months later, A was diagnosed with paranoid schizophrenia. His claim for pecuniary compensation was based on sec 11 of the Occupational Injury Insurance Act, which the Court confirmed incorporates the unwritten general principles of Norwegian tort law regarding causation and adequacy. While both parties agreed the accident was a necessary condition for the illness, the insurer contested the proximity (adequacy) between the accident and the personal injury of A.

The evolution of Norwegian tort law through the verdicts of the Norwegian Supreme Court over recent decades has provided clarifications regarding the protection afforded to psychiatric injuries, specifically where physical trauma causes mental disorders. The boundaries for pecuniary compensation in such cases have been the topic of several Supreme Court verdicts. While the threshold for establishing factual causation, the 'but-for' test (*betingelseslæren*), may be relatively low in these cases, the condition of proximity (the theory of adequacy, *adekvanslæren*) serves as a limit on liability in instances where the causal chain becomes complex, or dominated by extrinsic factors.

The judgment in Rt-1997-1 (*Rossnes*) established that for a psychiatric injury to be compensable, the psychological reaction must be a natural and foreseeable consequence of the traumatic incident, The injury must stem from the immediate trauma or shock of the event rather than a remote or attenuated chain of consequences. Liability is reserved for individuals who possess a sufficiently close and direct connection to the accident or the deceased to prevent an unmanageable expansion of tortious claims.

In Rt-2000-15 (*Thelle*), the Supreme Court refined the criteria for proximity by asserting that a loss is only compensable if it is not deemed too unpredictable and remote.

These cases also demonstrate the delicate balance between the eggshell skull rule, the principle that a tortfeasor must take the victim as they are (*sårbarhetsprinsippet*), and the necessity of imposing reasonable limits on liability through the lens of legal causation.

The Supreme Court's methodological approach in Rt-2007-172 represents an important evolution from earlier precedents. According to this verdict, the condition of proximity is not fulfilled if the injury is a so unpredictable, distant, and indirect consequence of the tortious act that it is not reasonable that the act leads to liability. This is the formulation of the rule of proximity that has since been used by the Norwegian Su-

preme Court and legal theory in all cases regarding this rule. Although the verdict in Rt-2007-172 makes a reference to the previous verdict in Rt-2007-158 (*Pseudoanfall*), it is the later verdict that adds the consideration of what can be considered reasonable, all relevant criteria considered. The verdict in Rt-2007-172 makes it clear that the overarching question when considering proximity as a condition for pecuniary compensation is whether it is reasonable to restrict the pecuniary compensation or not.

Thus, the Supreme Court verdict in Rt-2007-172, building on the verdict in Rt-2007-158, is an important precedent for the assessment of proximity in Norwegian tort law, and not only regarding compensation for psychological consequences following physical accidents. The importance of the judgment is also related to the methodological clarification of how the assessment of proximity should be carried out.

Crucially, the Court in Rt-2007-172 clarified that unpredictability (low frequency) of the injury in the case at hand is not, by itself, sufficient to conclude that the condition of proximity was not fulfilled. Instead, it must be viewed in tandem with how distant and indirect the injury is in relation to the tortious act.

In Rt-2001-320 (*Nilsen*), a psychiatric paralysis with a frequency of less than 1 in 770 was deemed adequate because the development of the symptoms was immediate and uninterrupted. The verdict in Rt-2007-172 established that even if a psychiatric reaction is generally foreseeable after an accident, the specific manifestation of schizophrenia was an exceedingly rare and unexpected outcome of a fall. Thus, the outcome was not foreseeable.

Regarding the next step in the consideration of proximity, whether the injury was too remote or indirect, the Court observed that the causal chain had been broken by subsequent, intervening circumstances. It was not the trauma of the fall that directly triggered the psychosis, but the 'ripple' effects: the loss of his career as an elite athlete, professional failure, and the extrinsic factor of his relationship breakdown. Thus, the Supreme Court concluded that the illness lacked a close and immediate connection to the accident, characterising it as a distant indirect causal relationship. This distinguishes the case from Rt-2001-320 (*Nilsen*), where the symptoms manifested themselves within two days without the interference of external social factors.

Thus, the verdict in Rt-2007-172, in the same way as previous verdicts, demonstrates the limits of the eggshell skull principle: The tortfeasor bears the risk of a victim's medical or psychological fragility, but they do not necessarily bear the risk of a victim's inability to master the long-term life changes after an accident.

This reasoning was mirrored in the previously mentioned Rt-2007-158 (*Pseudoanfall*) that was referenced in HR-2007-172. There, a claimant's dissociative seizures were considered not to fulfil the proximity test because they were driven by her fixed belief, contrary to medical counsel, that her issues were physically based, a belief that was thought to be driven by her desire for compensation. The Court held that when a disease's progression is rooted in behaviour that defies clear medical advice, the claimant must bear the responsibility for that development.

Viewed together, the two cases from 2007 demonstrate that when an injury is primarily mediated through a claimant's subjective processing or social misfortunes, the proximity is severed.

5. Rt-2002-1436 *(Bråtane*)

The Supreme Court verdict in Rt-2002-1436 (*Bråtane*) clarifies the right to compensation for future care expenses related to personal injuries under sec 3-1 of the Damages Act when public welfare services are insufficient.

The case involved a claimant, A, who sustained catastrophic injuries at the age of 11 when she was struck by a truck. These injuries resulted in a complete motoric spinal cord injury at the C3/C4 level, leaving her permanently paralyzed from the shoulders down and necessitating the amputation of her left leg. Despite a medical invalidity rated at 100%, A demonstrated remarkable cognitive resilience, completing her secondary education with distinction and pursuing a degree in theology. At the time of the proceedings, she lived independently in Oslo, utilising User-Controlled Personal Assistance (a service model enabling individuals with disabilities to manage their own care, aiming for an active, independent life [BPA, *brukerstyrt personlig assistanse*]) to facilitate her studies and social life. Through this personal assistance scheme, she was able to choose the time and place herself for help related to such activities. Still, the medical experts maintained she required 24-hour continuous supervision due to the risk of life-threatening complications.

The legal framework governing this dispute is centred on the supplementary principle that compensation in tort law serves as a private supplement to the collective provisions of the welfare state. Under sec 3-1 of the Norwegian Damages Act, compensation must cover necessary and reasonable future expenses. In the Norwegian context, public health and social services are presumed to represent the baseline for such care. Consequently, the judiciary must determine the extent to which a private insurer should provide additional funds to bridge the gap between

'defensible' public care and the full compensation required to ensure a claimant's autonomy, independence, and quality of life.

In a narrow 3-2 split, the Supreme Court majority awarded A an annual supplementary amount of NOK 175,000. The majority's reasoning was based on an assessment of future public provision, arguing that regardless of where A chose to reside, the municipality would be legally obligated to fulfil its duty to provide a defensible level of care. The Court concluded that while purely medical and nursing needs are primarily a public responsibility, the private supplement was necessary to enable the BPA model, which granted A the flexibility and self-determination required for a socially active life. The dissenting minority argued for a higher annual sum of NOK 250,000, contending that A's extreme physical dependency and the inherent risk of medical emergencies meant the standard public baseline could not be safely assumed to meet her unique requirements.

The verdict in Rt-2002-1436 is a refinement of the trilogy of verdicts consisting of Rt-1993-1547 (*Skoland*), Rt-1996-958 (*Stokstad*), and Rt-1999-1967 (*Rott*). While Rt-1993-1547 established that public care services generally represent the starting point for reasonable expenses, the later cases, including Rt-2002-1436, are distinguished by the fact that the claimants resided in a private home rather than an institution. Furthermore, while Rt-1993-1547 introduced the distinction between medical nursing (public) and quality-of-life enhancements (private), Rt-2002-1436 applied this logic to a young claimant with a significantly higher degree of physical impairment compared to the young claimant in Rt-1996-958, as emphasised by the Supreme Court itself. In addition, the significance of the verdict in Rt-2002-1436 lies in is its explicit recognition of the BPA model as a compensable form of aid, confirming that such individually-oriented services must be included in the assessment of full compensation for high-functioning young adults even when they have a very high degree of physical impairment. This makes it possible for such claimants to live independently of their family in their own apartment and have an active social life.

Subsequent jurisprudence, such as the verdict in Rt-2003-1358 (*Psykolog*) and Rt-2009-425 (*Hjernesvulst II*), has continued to utilise the precedent in Rt-2002-1436 to define the boundaries of the supplementary principle. While Rt-2002-1436 solidified the supplementary principle, these later verdicts refined its application by introducing nuanced distinctions between acute therapeutic needs and long-term care, as well as emphasising the claimant's individual capacity to utilise the awarded aid.

In Rt-2003-1358, the Supreme Court addressed the compensability of private therapeutic costs for victims of sexual abuse by a therapist.

The Court explicitly relied on the *Bråtane* precedent to establish a jurisdictional boundary for compensation. While the Court allowed for the full recovery of private psychological fees because public alternatives were unavailable, it distinguished these 'acute' medical costs from the 'long-term future expenses for care, nursing, and supervision' discussed in Rt-2002-1436. Citing this previous Supreme Court verdict, the Court reaffirmed that for long-term care needs, the ordinary public healthcare services must, as a starting point, form the limit for what is considered a reasonable compensable expense. Still, the Court argued, there must be room for compensation for specialised medical treatment where the welfare state's capacity is demonstrably insufficient.

In Rt-2009-425, the Supreme Court offers a more detailed analysis of the utilisation principle than in Rt-2002-1436. In this case, the Court was tasked with determining the care supplement for a young man who suffered brain damage due to misdiagnosis. The Court cited Rt-2002-1436 to justify that a private supplement is particularly relevant when it aims to provide autonomy and quality of life beyond purely medical nursing. However, the court also referenced Rt-2002-1436 to argue that the extent of such a supplement must be measured against the claimant's actual ability to benefit from it. While the victim in Rt-2002-1436 was described as having an extraordinary ability to utilise aid to live an active life, the Court in Rt-2009-425 noted that the claimant's cognitive and psychological state limited his ability to utilise similar levels of assistance. Consequently, the Court used the framework in Rt-2002-1436 to justify a lower annual award, proving that the precedent functions as a double-edged sword: it justifies the supplement but also mandates a strict, individualised assessment of its restorative effect.

Furthermore, Rt-2009-425 applied the reasoning in Rt-2002-1436 to address the role of informal care provided by family members. By leaning on the necessary and reasonable standard from the verdict in 2002, the Court in 2009 concluded that parental efforts should be treated as part of a total discretionary assessment rather than a calculable hourly loss.

Together, these two subsequent Supreme Court cases demonstrate that the verdict in Rt-2009-425 has become a standard when assessing damages in tort law for personal injuries in the Norwegian Supreme Court.

XXII. Poland

Ewa Bagińska

The selection of cases which have had the greatest impact on Polish tort law in the last 25 years was based on two criteria: their influence on legislative reforms and their weight on the development of tort law in the modern society. Thus, this article presents two cases decided by the Constitutional Tribunal, the first one regarding public authorities' liability (1), and the second concerning the prescription of tort claims (2), as well as three Supreme Court cases relating to: wrongful birth (3), vicarious liability for self-employed physicians (4), and the compensation to closest family members for their non-pecuniary loss in cases of permanent injury suffered by a surviving victim (5). All the cases were reported in the Yearbooks series.

1. Judgment of the Constitutional Tribunal of 4 December 2001[1]

In the seminal judgment of 4 December 2001, the Constitutional Tribunal (*Trybunał Konstytucyjny*, TK) held that art 77 of the Constitution, by creating a subjective right to claim damages from public authorities, gave individuals a means of protection of their personal rights and freedoms. The Tribunal's interpretation of the said constitutional rule opened a new phase in the development of the liability of public authorities for unlawful conduct. Not only was it followed in subsequent case law, but also determined the shape of the new Civil Code rules.

The Polish Constitution of 1997 provides in art 77 (1): 'Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law'. Article 77 (2) states that statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging an infringement of freedoms or rights. The Constitutional Tribunal heard jointly two cases brought by individuals.[2] In the first one,

[1] *E Bagińska*, Poland, in: H Koziol/BC Steininger (eds), European Tort Law 2001 (2002) 378, nos 13–23.

[2] According to art 79 (1) Constitution, 'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity

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the tax office denied the plaintiffs the reimbursement of the execution fee that had been claimed and paid without a legal ground. The office kept the money for over five years. The plaintiffs sued for damages, but their claim was dismissed on the grounds that they failed to prove the public servant's 'qualified fault', pursuant to (former) art 418 Civil Code (*kodeks cywilny*, KC). In the second case, a policeman was made redundant in 1974 for concluding a Roman Catholic marriage. After the political change in 1989, his unemployment period was taken account of for social and retirement benefit purposes according to the Act of 1989 on Rehiring Workers Dismissed on the Grounds of their Political Views, Religious Beliefs, and Activity in Independent Trade Unions.[3] In 1993, he brought a claim for damages for non-pecuniary loss and lost income, but was finally denied compensation by the Supreme Court on the ground that he had failed to prove damage and the fault of the functionary.[4]

The Tribunal first acknowledged that the primary function of art 77 (1) is to guarantee an effective protection of individual rights and freedoms. Since the article has normative contents and thus itself establishes the conditions for liability of public authorities, art 77 (1) is directly enforceable. The Tribunal, having noted divergent legal opinions as to the direct enforceability of art 77 (1) and to the constitutionality of (former) arts 417–420 KC, took the middle ground. On the question of the direct effect, the Tribunal held that even though the Constitutional norms are in principle directly applicable (art 8 (2) Constitution), common courts cannot refuse to apply a statutory norm (here: the Civil Code) and adjudicate cases based on the Constitution unless the norm has been pronounced unconstitutional by the TK. The courts should rather use their right to ask the Tribunal for an interpretation of the norm in question (arts 188 and 193 of the Constitution).

The Tribunal emphasised that the change to the scope of liability marks a conceptual change. The liability is now strict and dependent only on the unlawful exercise of public authority, and independent of anyone's fault. Statutory provisions cannot limit a constitutionally guaranteed right to claim damages. The TK referred to the autonomous constitutional interpretation of concepts referred to in the Constitution. Thereby, by virtue of art 10 of the Constitution, an organ of public authority is an

to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution'.

[3] Dziennik Ustaw (Journal of Laws, Dz U) no 32, 172.

[4] See *Bagińska* (fn 1) no 13.

organ of the legislative (the *Sejm* and Senate), executive (the President and the Council of Ministers) and judicial (courts and tribunals) powers. The executive branch covers not only the Cabinet, but also the head of provinces (*voivodes*), and local administration organs. By virtue of arts 16 and 163 of the Constitution, public authority is also exercised by local self-government organs. An organ of public authority is not an organ of a legal entity (or even of the State) in the sense of civil law, where it usually relates to a natural person (an agent) endowed with a set of rights defined in the organisational charter and manifesting the will of the organisation. The term 'public authority' is thus wider, and covers all organisations or institutions, whether public or private, that exercise the powers and prerogatives transferred to them by an organ of the State or local self-government. The TK explained further that the liability based on art 77 of the Constitution rests on the institution (structure), not its agents (functionaries), and relates to the exercise of public authority, ie the prerogatives and official powers. Thus, the definition of an organ of public authority is based on a functional criterion.

The Tribunal further explained that 'exercise of public authority' refers to all kinds of activities which usually, but not always, entail the ability to affect the rights, liberties or interests of individuals (referred to as *imperium* or *actes de pouvoir*). It also includes the judiciary, whose liability has so far been rejected by the Supreme Court.[5] Although the formal link between a direct tortfeasor and an organ of public authority is not decisive, the establishment of such a relationship facilitates the proof of the fact that the damage arose from the exercise of public authority. The TK underlined that the new principle of strict State liability only covers *actes de pouvoir*.

Moreover, the obligation to repair damage regulated in art 77 (1) arises only when the act causing the damage was unlawful (illegal). This includes any illegal action or omission, including physical acts, administrative acts (decisions, orders and decrees), as well as normative acts. Liability for omissions arises when the organ of public authority had a duty to act and the damage would not have occurred had it fulfilled its duty. However, only acts violating the norms of the Constitution may be considered unlawful within the meaning of art 77 (1).

Illegality of a public authority's conduct is to be regarded as a sufficient premise for the establishment of liability. For the question of illegal-

[5] Sąd Najwyższy (Polish Supreme Court, SN) 27.1.1999, II CKN 201/98, 7-8 OSNC, Orzecznictwo Sądu Najwyższego Izba Cywilna (Decisions of the Supreme Court, Civil Chamber, OSNC) 1999, item 135.

ity, it may be important to examine to what extent the acting authority was free to act when it caused the damage, especially regarding legislative or policy-making administrative acts, where authorities usually have wide margins of discretion.

Against this background, the Tribunal carried out an analysis of the Civil Code rules and concluded that the interpretation of art 417 § 1 KC considerably restricted the liability of the State.[6] The Tribunal stated that when the new Constitution entered into force in 1997, the 30-year-old interpretation of the rule lost its validity and legal justification insofar as it required proof of the negligent act or omission of the functionary. Hence, the Tribunal held that the judicial construction of art 417 § 1 KC infringed art 77 (1) of the Constitution.[7] As to art 418 KC, the Tribunal held that it was unconstitutional.

The long-awaited ruling of the Tribunal was groundbreaking. In a historical context, it should be recalled that strict liability of public authorities was first introduced in the Polish Constitution of 1921, but after World War II, under the new political regime, the scope of State liability was narrowed down. The Constitution of 1997 reintroduced the modern standard of liability of public authorities into civil law. The statutory provisions should have been adjusted to the new Constitution within two years after it entered into force. However, the proposed amendments to the KC had not yet been enacted. This caused confusion in the practice and theory of law. Only some court judgments regarded art 77 of the Constitution as a self-executing rule and the sole ground for a claim for damages.

Although art 418 KC was rightly abolished, in fact the former art 417 § 1 KC was not held unconstitutional, which would have been much simpler. Despite this, the TK judgment was of great importance for the development and enactment of the new rules in the Civil Code in 2004.[8] The new rules contained in art 417 § 1 KC currently provide for a general rule of liability for damage resulting from an unlawful exercise of public authority. New arts 417^1 and 417^2 KC were inserted into the Code, and arts 419, 420, 420^1 and 420^2 KC repealed. The revision of 2004 also repealed the relevant provisions of the Code of Administrative Procedure

[6] Art 417 § 1 KC provided: 'The State Treasury is liable for damage caused by a state functionary in the performance of the entrusted scope of activity.'

[7] The Tribunal also held that art 417 KC is not contrary to art 64 of the Constitution, which provides for the protection of the right of ownership and other property rights.

[8] Law on the Revision of the Civil Code of 17 June 2004, Dz U 2004, no 162, item 1692.

and, thus, the legislator ensured that almost all cases of governmental liability are embraced by the rules contained in the Civil Code.[9]

It should be observed that legal scholarship did not agree with the TK on some points. Notably, the narrow interpretation of illegality was regarded as incompatible with the understanding of unlawfulness in civil law, which means conduct contrary to law and to established customs and moral norms (referred to in the Code as principles of equity, or of community life). The TK judgment did not, however, prevent the legislature or the courts from attributing the traditional civil law meaning of unlawfulness with respect to the liability of public authorities. This issue was nevertheless the subject of abundant case law.

One of the most significant ramifications of the judgment is the acceptance of liability for legislative wrongs and for judicial wrongs. Contrary to the previous position of the courts, the TK rightly held that the Constitution did not exclude the possibility that the legislature could be held liable for damages. This marked a milestone in the protection of individuals against unlawful acts of organs exercising legislative powers in Poland, following the trend in other European countries, and in the European Union.

2. Constitutional Tribunal Judgment of 1 September 2006 (SK 14/05)[10]

The TK judgment abolished the prescription rule in the Civil Code (art 442) for tort claims. The case involved an injured soldier who had been exposed to radiation when he served in the army in the 1980s, but the harm occurred later. His claims were rejected by the State and eventually he questioned the constitutionality of art 442 KC.

The TK observed that the question is essentially whether the grammatical interpretation of art 442 § 1 sent 2 KC, ie the interpretation approved by the Supreme Court in the judgment of 17 February 2006, is constitutional. The Tribunal stated that even though the Constitution does not regulate the limitation of claims, the prescription rules may have an impact on the protection of subjective rights, including constitutional subjective rights. Consequently, the TK reviewed art 442 § 1 KC from two perspectives. First, against the background of State liability for the

[9] *E Bagińska*, The Liability of Public Authorities in Poland, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 355 ff.

[10] OTK 8/2007, item 97, OTK, A-2006, no 8, item 97; *E Bagińska*, Poland, in: H Koziol/BC Steininger (eds), European Tort Law 2006 (2008) 373, nos 83–90.

exercise of public authority (art 77 (1) of the Constitution) and, secondly, through the lens of the relation of the general structure of the prescription of tort claims in the Civil Code to the prescription of such claims against the State.

The Tribunal stressed that the liability of public authorities guarantees that the risk and losses arising from public administration will not be shifted onto individuals. The conditions for the establishment of this liability must be so formulated as to provide an injured person with a genuine possibility of receiving compensation. The scope of the liability may not be freely determined by statutory law. Moreover, less legislative discretion is permitted because of the greater risk of losses arising from military service and due to the stronger public interests pursued by military activity. The regulation of the prescription of claims provided for in art 442 KC cannot be accepted in the case of liability of public authorities, because it leads to an illusory protection of the subjective right to redress guaranteed by art 77 (1) of the Constitution.

The Tribunal ruled that the rules on the prescription of claims cannot treat diverse categories of defendants differently, as this would be contrary to the requirements of justice and equal treatment. The only allowed distinction can be made between damage to persons and damage to property, with better protection granted to the former, in line with art 30 of the Constitution, which guarantees the protection of life and dignity. However, the rules on redressing personal injury should apply equally to all categories of defendants. The constitutional standard is infringed when a pecuniary right becomes fictitious due to the rules on the prescription of claims.

The Tribunal opined that art 442 is flawed because it fixes the 'wrong' point in time as the beginning of the period of limitation. The correct rule is art 120 KC. Thus, a claim for damages cannot arise until damage occurs. In consequence, the Tribunal held that the rule in art 442 § 1 sent 2 KC violated arts 2 and 77 (1) of the Constitution because it deprived an injured party of a right to claim compensation of personal injury that occurred after the lapse of the ten-year limitation period. The Tribunal declared that the situation where some claims may be limited in time before the victim is even aware of the damage was unconstitutional.

The presented judgment should be read as a reaction by the Tribunal to the position taken by the Supreme Court in the Resolution of the Full Civil Chamber of 17 February 2006, III CZP 84/05,[11] according to which

[11] III CZP 84/05, OSN 7–8/2006, item 114; *Bagińska* (fn 10) nos 75–82.

the maximum ten-year period must always commence from the day of the tort (*a tempore facti*), and not from the day of the awareness of the damage. This interpretation applied equally to future losses and to losses that the victim was unaware of. The Supreme Court held that when interpreting art 442 § 1 KC, no reference should be made to the notion of 'accrual of claims'.

This judgment should first be put in the historical context. Until 2007, tort claims were limited to three years from the time the victim learned of the damage and the person responsible, but in any case, to ten years from the time when the tort occurred. The key practical problem was long-tail damage. The case law was largely inconsistent. The problem did not lie in the extending of the period of limitations but in identifying the proper moment of its commencement. The doctrine agreed that the prescription of pecuniary claims should rather be coupled with the moment when the claim arose and, hence, could be settled. While the Tribunal offered a new interpretation of art 442 § 1 KC, it became obvious that the prescription rules violated constitutional values. The situation called for an urgent intervention of the legislator.

Consequently, the rules on the prescription of tort claims were amended in 2007.[12] Pursuant to a new art 442^1 § 1 KC, a claim for redress of damage caused by a tort is barred after a period of three years from the date on which the injured person learned of the damage and about the person obliged to redress it. However, this period cannot extend beyond ten years from the date on which the event causing the damage occurred. Another new rule stipulates that a personal injury claim cannot expire before the lapse of three years from the day on which the injured person learned about the injury and about the person obliged to redress it (art 442^1 § 3 KC). Hence, the absolute periods of ten or twenty years are 'suspended' in personal injury cases. Nevertheless, the periods running *a tempore facti* may remain more convenient for the injured party regarding evidentiary burdens. Finally, the claims of minors for redress of personal injury may not expire earlier than two years from the day when they reached maturity. Under the new regime on prescription, the 'suspension' of the period of prescription in personal injury cases does not prevent a declaratory judgment being given that the defendant is liable for any future damage originating from the same event (tort).

[12] Act of 16 February 2007 on the amendment of the Civil Code, Dz U 2007, item 538; see *E Bagińska*, Prescription in tort law: Poland, in: I Gilead/B Askeland (eds), Prescription in Tort Law. Analytical and Comparative Perspectives (2020) 522 ff.

3. Supreme Court Judgment of 13 October 2005, IV CK 161/05[13]

In the seminal case referred to as the *Lomzynska* case (from the name of a city: Łomża,) the Supreme Court for the first time approved a claim for compensation for wrongful birth. The plaintiffs were the parents of a child born with a serious genetic illness. After the plaintiff had become pregnant, she was refused a eugenic abortion, to which she was entitled by the law of 7 January 1993 on family planning, protection of a human foetus and the conditions for admissibility of an abortion (hereafter 'the Law on Family Planning').[14] The plaintiffs' daughter was born with the same serious dystrophy that her older sibling suffers from. Although the doctors knew about the sibling's condition, they did not adequately inform the plaintiff of the risks associated with her pregnancy (the risk that the genetic condition would occur in the second child was 25%–50%). The patient presented medical documentation relating to the first child's dystrophy. The conduct of the physicians was negligent. They failed to refer the plaintiffs to another hospital for an abortion or specialised prenatal diagnosis. The plaintiffs sought assistance from other hospitals, and the genetic defect of the child was discovered only in the 26th week of pregnancy, that is when an abortion could no longer be performed. Suing the public hospital, the doctor and the director of the hospital jointly and severally, the plaintiffs claimed compensation for non-pecuniary loss arising from the violation of the mother's personal interests and of her patient's rights, as well as damages for pecuniary losses. The plaintiffs did not raise any claims on behalf of their child.

The regional court held that the public hospital was liable for the negligence of its physicians, the violation of the plaintiffs' right to plan a family and their right to information and to a referral to a specialist in genetics. The court awarded the mother PLN 60,000 (€ 15,400) in non-pecuniary damages, in addition to the damages for the lost income and medical expenses linked to the mental breakdown she suffered after the child's birth. Both plaintiffs were awarded a monthly annuity to cover the additional costs of the treatment and maintenance of the handicapped child (ie the difference in expenses in comparison to the cost of maintenance of an average healthy child).

The court of appeals held that personal injury rules do not embrace any parental claims for the maintenance of a child born with certain de-

[13] IV CK 161/05, OSP 6/2006, item 71. See *Bagińska* (fn 10) nos 49–61.

[14] Dz U no 17, item 78, with later amendments.

fects and dismissed the claims of the parents (ie for wrongful birth), but, *obiter dicta*, stated that it would have allowed the claims of a child (ie for wrongful life), if those had been raised. Also, in this case, the plaintiffs' statutory right to this procedure was not enforceable since the condition of the foetus was diagnosed after the point in time when an abortion would still have been legally possible. Hence, there is no causal link between the damage and the hospital's conduct.

The Supreme Court expressly referred to wrongful birth actions. Regarding the ground for a legal abortion, the Supreme Court held that a genetic defect need not be established with certainty or solely through prenatal examinations. It is sufficient that there is a high probability that such a defect will be present, which may be evidenced due to other medical preconditions. The Court held that the physicians had negligently violated the plaintiffs' right to plan a family and the right to abortion provided for in art 4a sec 1.2 of the Law on Family Planning and hence the parents were entitled to claim compensation for the non-pecuniary loss stemming from the breach of the right of parents to plan a family. Also, they could seek pecuniary losses such as the increased cost of the maintenance of the handicapped child.

The Court openly rejected any wrongful life claim, stating that the birth of a child per se does not constitute damage to its parents. However, it is their loss to have to bear the additional costs of raising a handicapped child, which they neither planned nor agreed to bear and which they would not have had to bear had their right to plan a family not been breached. The child has no claim for pecuniary loss since there is no right to not be born.

On remand, the Court of Appeals in Białystok[15] awarded PLN 60,000 (€ 15,000) to the mother and half of this sum to the father as compensation for the infringement of their right to plan a family and for burdening them with the obligation to raise a second handicapped child. It ruled that where prenatal examinations or any other medical findings indicate a significant probability of grave and irreversible impairment of the foetus, the parents have a right to make an informed decision about whether they want to burden themselves and their family with the consequences of the birth of a disabled child. In such a case, they have a right to decide to terminate the pregnancy. If a negligent breach of that right leads to the birth of a disabled child against their will, the parents can claim pecuniary compensation for the violation of their personal rights (art 448 KC).

[15] Judgment of 4.7.2008, I ACa 278/08, Prawo i Medycyna 2/2009, cmt by *M Nesterowicz* 126.

This was a landmark decision, which relied on comparative law and followed the solutions taken by foreign courts. However, the decision was not widely approved of in the Polish doctrine, partly due to the ethical background of some scholars and partly due to some doubts as regards the details of the decision. Most importantly, it was debatable whether the pecuniary damages should have been limited to the increased costs of child maintenance instead of the full costs thereof. Nevertheless, the Supreme Court confirmed this line of interpretation in the subsequent judgment of 6 May 2010 (II CSK 580/09),[16] in which it rightly corrected the legal basis of parents' claims for pecuniary losses to be the general clause of liability (art 415 KC). Since then, the case law has been consistent.

What is important from a dogmatic point of view is that the presented ruling confirmed that the Polish judicature treats the mother's and father's harm as consisting in the violation of personal rights or as an infringement of the sphere of reproductive autonomy. The protection of personal rights has thus become the main theoretical concept underlying the remedying of infringements that constitute damage in wrongful birth actions. Wrongful conception claims have also been accepted in the Polish jurisprudence on that ground.[17]

4. Supreme Court Judgment of 26 January 2011, IV CSK 308/10[18]

The case concerns the question of the basis of liability for damage caused by physicians who work in a medical institution pursuant to a contract for the performance of services (so-called self-employed physicians). The defendants in this medical malpractice suit are the attending physician and the hospital, operated by the local authority. The two-year-old patient was hospitalised with pneumonia. The child was a victim of flagrant malpractice which led to her paraplegia and irreversible brain damage. The attending doctor was found guilty by a criminal court (whose conviction was binding on the civil court). The defendant hospital, however, objected to its joint and several liability. The physician and the hospital had a contract to perform medical services (not a contract of

[16] OSP 2/2011, item 13, cmt by *M Nesterowicz*.

[17] See *E Bagińska*, The development of liability for 'reproductive torts' in Polish law, in: H Koziol/U Magnus (eds), Essays in Honour of Jaap Spier (2016) 8 ff.

[18] OSP 11/2011, item 112 cmt by *M Nesterowicz*, OSP 11/2011, 789; see *E Bagińska*, Poland, in: K Oliphant/BC Steininger (eds), European Tort Law 2011 (2012) 489, nos 37–49.

employment), in which the parties agreed that the physician, as an independent contractor, would be solely liable for damage caused to patients in connection with her services performed in the hospital. On the facts, it was established that the physician worked under the supervision of the manager of the hospital as well as of the chief physician of the paediatric ward. Hence, from an organisational perspective, she was dependent on the hospital and was obliged to follow professional advice and instructions of the chief physician. The lower courts found the hospital liable pursuant to art 430 KC (vicarious liability) and held both defendants jointly and severally liable. The trial court awarded compensation for pecuniary and non-pecuniary losses. Before the Supreme Court, the hospital questioned its liability, and the physician questioned the assessment of damages as well as the non-application of the ad hoc reduction clause.

The Supreme Court, upholding the Court of Appeal's decision, stated that the contract between the defendants could not prevent the application of the proper legal basis to claims brought by third persons based on tort law. If damage resulted from acts or omissions by a physician or other medical staff, the health care institution in question may be held vicariously liable for a 'subordinate' (auxiliary, servant) in accordance with art 430 KC.[19] This liability is based on risk, but all the conditions of liability must be met: the fault of a physician (or other personnel), the conduct in the course of the performance of an entrusted task, subordination and acting on account of the principal. According to the prevailing opinion and case law, the subordination (understood as working under someone's leadership with a duty to follow the principal's instructions) is interpreted broadly, and includes both the organisational dependence and the duty to follow all orders and instructions, whether general or specific. The master-servant relationship covers both those performing simple tasks and those who are largely independent. Since professional qualifications and skills have become more advanced in the last few years, the instructions given by managers have become less detailed and the control more general. Physicians may be deemed auxiliaries for the purpose of art 430 KC if they are subject to the organisational management of a health care institution where they perform health care services for the institution. This should be determined in the light of all circumstances of a given case. On the facts, the defendant physician could be regarded as an auxiliary.

[19] Article 430 KC reads: '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.'

The Court stated that the source and nature of damage remain the same regardless of whether a physician works as an employee or as an individual practitioner (self-employed). Although the defendants are tortfeasors liable on two different liability grounds, their liability is joint and several pursuant to art 441 KC. Moreover, the principles of fairness do not support an ad hoc reduction of damages in this case (art 440 KC).

The case concerns the interesting issue of the basis of liability for damage caused by physicians who work in a public medical institution as self-employed physicians. First of all, the judgment confirmed that the legal bases of liability for physicians and other medical personnel after the reform of the State liability rules in 2004 are 'common' torts, thus, physicians employed by public hospitals trigger liability that is based on the same grounds as the liability of private hospitals for their employees. However, as the number of hospital-based doctors who do not hold the status of an employee has risen dramatically in recent years in Poland, the courts were faced with the problem of apportioning the liability between the physician and the medical entity. The Court made it clear that a medical institution cannot exempt itself easily from vicarious liability and the protection of patients, who are usually unaware of the internal legal relationships between the medical institution and its personnel, cannot be diminished. Until this judgment, the dominant view accepted a contrary solution. Physicians who had contracted to perform health care services as self-employed entrepreneurs (individual practitioners) were regarded as independent contractors. Hence, their liability was joint and several with the hospital's liability. The analysed judgment confirmed that the hospital's liability is vicarious, however, the self-employed medical personnel cannot avail themselves of the immunities granted to employees by labour law, hence they can be sued directly and the recourse by the paying tortfeasor (hospital) is full.

5. Supreme Court Judgment of 27 March 2018, III CZP 60/17[20]

The significance of the judgment lies in the extension of the pecuniary protection of the family bonds between the closest persons and the victim of a tort. The presented judgment is one of three resolutions issued on the

[20] OSNC 2018/9, item 83; see *E Bagińska*, Poland, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 474, nos 2–23.

same day and regarding the same material issue, sharing essentially the same motives.[21]

On the facts, the plaintiffs' child was born with severe brain damage due to oxygen deficiency, because its mother was forced to have a natural birth. The plaintiffs, who were immigrants, claimed compensation on behalf of their child as well as for their own non-pecuniary losses due to the violation of family bonds. The Court of Appeal in Warsaw awarded, amongst others, compensation for non-pecuniary losses to the child and its parents. The Supreme Court referred the case to the panel of seven judges. The preliminary question in this case was whether the rules on the pecuniary protection of personality rights can be applied as a legal basis for non-pecuniary compensation to the relatives of a seriously injured victim who survived the tort.

The first argument of the Supreme Court referred to the open catalogue of personal rights in art 23 KC. The Court stated that wrongful death could cause a violation of a personal 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. The differences in naming the said right are illusory and should be ignored. Moreover, the right to close family bonds in fact transforms an indirect victim into a direct victim who can assert their own rights and claim compensation for their moral damage.

If such a personal right was accepted to enhance the protection of indirect victims in wrongful death cases where the death occurred before 3 August 2008 (ie the date of the entry into force of art 446 § 4 KC regulating bereavement claims), then the present inquiry is whether it can also be accepted in a situation where a tort caused grave injuries to the surviving victim. The Court answered this question in the affirmative.

The Court dismissed the interpretation of art 446 § 4 KC as an exceptional rule. In consequence, art 446 § 4 KC simply limits the subjective scope of the entitlement to claim bereavement damages. Hence, any close persons who can prove a strong emotional (family-like) bond, its violation, fault and the moral harm stemming therefrom can claim compensation on the ground of art 24 in conjunction with art 448 KC.[22] The

[21] SN 27 March 2018, III CZP 69/17, OSNC 11/2018, item 104; SN 27 March 2018, III CZP 36/17, OSNC 11/2018, item 103.

[22] Article 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.'

fact that indirect victims were vested with a right to seek bereavement damages does not mean that they had previously been prevented from seeking compensation pursuant to the rules on the protection of personal interests in other situations, especially in cases of particularly grave brain injury. The evolution of case law reflects the change in the moral views and the values that society attaches to certain rights and interests. 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, especially when a victim is comatose or is in a persistent vegetative state. The violation of a family bond can be established in exceptional cases, based on objective assessment criteria.

However, the entitlement of the relatives should not be unlimited. 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 due to the severe and significant impairment of vital functions. The violation of a family bond in such situations can be regarded as creating grave and indefinite moral harm. Additionally, the Court referred to art 10:301(1) Principles of European Tort Law (PETL) and art 2 § 202 sec 1 Draft Common Frame of Reference (DCFR).

There were two dissenting opinions to the presented judgment, which questioned both the recognition of a personal right of an emotional family bond and the possibility of applying art 448 KC to claims of indirect victims. According to one opinion, there is no such legal ground in the present law and, according to the other, the discussed claims could be based on art 446 § 4 construed *per analogiam*.

The impact of the three Supreme Court judgments of 27 March 2018 on the development of the law of damages, embracing the protection of traffic victims and medical malpractice victims, is unprecedented. They should be seen in a wider normative context. Over several years, the Supreme Court has extended the protection of the civil law to other personal rights, which it recognised. A personal right is recognised not only in the constitutional context but also in light of the development of legal, ethical and moral societal views. The judgment also indirectly attested that the 2008 revision of the Civil Code, which granted a claim for bereavement damages to the closest persons (art 446 § 4 KC)[23], was formulated too narrowly. Although that legislative change improved the

[23] Act of 30 May 2008 amending the Civil Code Dz U 2008, item 731, which entered into force on 3 August 2008.

protection of family members in cases of wrongful death, it immediately opened another question of compensating surviving victims who suffered grave irreversible injuries.

This context notwithstanding, it should be observed that the judgment contradicted the traditionally recognised principle of Polish civil law, pursuant to which compensation in money for non-pecuniary loss can be awarded in cases provided by the law. Albeit in recent years, the number of such provisions has grown: Polish law has always followed the rule that indirect victims are protected by way of exception. Thus, the doctrinal controversy which arose around the Supreme Court's concept of the family bonds as a personality right has not vanished completely. In a few court decisions, family bonds were not qualified as a personal interest and subsequently compensation for moral harm caused by the violation of a personal interest was denied.

Most importantly, however, the judgment led to a successful legislative action in 2021.[24] A new art 446^2 KC has permitted compensation for moral damage suffered by the next of kin when a direct victim has suffered serious and permanent injuries.[25] The purpose of the amendment was to remove the disparity regarding the possibility of awarding damages for moral harm caused to indirect victims. Article 446^2 KC applies to events which occurred prior to the date of entry into force of the amending act, which is an exception to the *lex retro non agit* principle. On the positive side, the changes have brought Polish law in line with art 10:301 (1) PETL.

[24] Act of 24 June 2021 amending the Civil Code, Dz U 2020, item 1740.

[25] Article 446^2 KC reads: '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.'

XXIII. Portugal

André Pereira, Inês de Oliveira Martins and Rui Cascão

Over the past 25 years, Portuguese tort law has undergone a profound transformation, characterised by both an expansion of liability and the progressive refinement of doctrinal principles. Among the most salient developments is the broadened recognition of liability for third-party damage, which signals a heightened commitment to victim protection extending beyond the immediate sphere of wrongdoing. In tandem, jurisprudence has firmly entrenched the principle of informed consent within the framework of medical liability, thereby reinforcing the patient's right to autonomy and the necessity of adequate disclosure prior to medical interventions. Equally significant is the evolution toward acknowledging the concurrence between no-fault (or risk-based) liability and the contributory fault of the victim, a doctrinal shift that reflects a more nuanced and equitable distribution of responsibility.

Yet, despite these advances, Portuguese case law has remained subject to criticism. The European Court of Human Rights (ECtHR) has repeatedly censured Portugal for deficiencies in the adjudication of medical malpractice claims, underscoring a persistent divergence between domestic jurisprudence and European human rights standards. In the domain of financial liability, Portuguese courts have adopted a markedly cautious approach. Judicial reluctance to extend liability to cases involving banking and investment losses reflects a prioritisation of systemic stability and legal certainty over expansive victim compensation. This restraint is particularly evident in the treatment of causation presumptions in instances of wrongful financial information, where courts have resisted broadening liability. This conservative posture stands in contrast to the broader trajectory of tort law, which otherwise demonstrates a gradual but discernible shift toward enhanced protection of victims and the expansion of compensatory mechanisms.

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1. Supreme Court of Justice, 4 October 2007[1]

The facts of the case are, unfortunately, all too familiar. The claimant, A, aged ten at the time of the accident, cycled onto a main road where the defendant was driving her car. When bicycle and car collided, A was thrown onto the road and suffered severe injuries. As she entered the main road, A failed to comply with the traffic sign giving priority to vehicles already on that road. The defendant had obtained her driving licence only six months earlier; nonetheless, she was found to have committed no fault or breach of traffic regulations.

In the context of the case law as it stood at that time, the outcome appeared straightforward. Article 505 of the Civil Code provides that strict liability for the risks associated with motor vehicles is excluded where the accident is attributable to the victim. Antunes Varela – a leading scholar and the Minister of Justice who oversaw the drafting and enactment of the Civil Code – interpreted this provision to mean that *any* contribution by the victim, irrespective of whether it involved fault, would bar compensation. This view shaped decades of case law, leading to an all-or-nothing approach: if the victim contributed to the accident, compensation was denied. Full stop. The first and second instance courts that heard the case had followed this settled understanding.

Yet this rigid approach all too readily left victims unprotected, treating them with equal severity whether they had acted recklessly or were not even capable of fault. The consequences were particularly unsettling in cases like the present one, where the victim – although above the (low) legal threshold for delictual capacity (seven years old, under art 488, no 2, of the Civil Code) – was still a child.

The Supreme Court broke with this orthodoxy. It held that strict liability and the victim's fault could coexist – and that the law itself allowed for apportionment. The decision is remarkable in several respects. First, it went beyond the appellant's own arguments: the claimant had insisted on finding fault in the defendant, while the Court exercised its inherent power to assess strict liability even where only fault-based liability is invoked. Moreover, the judgment illustrates the powerful influence of academic commentary and developments in European law on Portuguese jurisprudence.

Indeed, the traditional view had long been criticised. The author of the Civil Code's first draft of the tort provisions had rejected it,[2] and scholarly

[1] Process (Proc) no 07B1710 (Santos Bernardino). ECLI:PT:STJ:2007:07B1710.6F.

[2] Eg, *A Vaz Serra*, Conculpabilidade do prejudicado, Boletim do Ministério da Justiça (BMJ) 1959, 131, 160 ff.

criticism gained traction throughout the 1990s and 2000s. The Supreme Court drew extensively on some of these sources, quoting them at length.[3] First, it examined the wording of art 505 of the Civil Code. The first part of the provision, which refers to the provision on contributory negligence (art 570 of the Civil Code), suggested that a similar apportionment could be made between risk and fault. Moreover, the victim's fault could in any event be conceived, at least partially, as a risk inherent in the operation of motor vehicles. Furthermore, the Civil Code's rigid all-or-nothing approach was not logically necessary and had become out of step with more recent legislation – such as the Labour Code and the product liability regime – which expressly provide for apportionment between strict liability and the victim's fault. Finally, the traditional view clashed with the case law of the European Court of Justice (ECJ) (*Candolin* and *Farrell*) on compulsory motor insurance. The ECJ held that excluding or disproportionately limiting compensation where the victim contributed to the harm was incompatible with the directives on liability insurance in respect of the use of motor vehicles.[4] Although those rulings concerned insurance rather than civil liability, the protective purpose of the directives, encompassing victims that were at fault, would be frustrated if national liability rules systematically denied compensation in such cases.

From all this, the Supreme Court concluded that art 505 must be read together with art 570 of the Civil Code, which governs contributory negligence. Liability should thus be apportioned according to the respective contributions of the defendant's risk and the victim's fault. Only where the victim was the *exclusive* cause of the accident would the defendant's strict liability be extinguished. In the present case, taking into account the

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[3] Especially *JC Brandão Proença*, Responsabilidade pelo risco do detentor do veículo e conduta do lesado: a lógica do tudo ou nada? Cadernos de Direito Privado (CDP) 2004, 19, 25 ff; *J Calvão da Silva*, Acidentes de Viação concorrência do risco com a culpa do lesado (art 505ºCC), Revista de Legislação e Jurisprudência (RLJ) 2001, 102, 115–118; *JC Moitinho de Almeida*, Seguro obrigatório automóvel: o direito português face à jurisprudência do Tribunal de Justiça das Comunidades Europeias, available at <https://www.stj.pt/wp-content/uploads/2022/09/moitinhoalmeida_seguroobrigatorio.pdf>; see also *J Sinde Monteiro*, Responsabilidade por culpa, responsabilidade objectiva, seguro de acidentes, Revista de Direito e Economia (RDE) 1980-1981, 123, 139 ff; *JC Brandão Proença*, A conduta do lesado como pressuposto e critério de imputação do dano extracontrattual (1997) 263 ff; *A Prata*, Responsabilidade civil: duas ou três dúvidas sobre ela, in: Estudos em comemoração dos cinco anos da Faculdade de Direito da Universidade do Porto (2001).

[4] At the time, those were Directive 72/166/CEE of 24 April 1972, Directive 84/5/CEE of 30 December 1983, Directive 90/232/CEE of 14 May 1990, Directive 2000/26/CE of 16 May 2000 and Directive 2005/14/CE of 11 May 2005.

victim's immaturity, on the one hand, and the defendant's inexperience – which increased the risks associated with her driving – on the other, the Court attributed 40% of the responsibility to the victim.

The importance of this shift cannot be overstated in a country plagued by road traffic accidents. Although the new interpretation did not meet with immediate and universal acceptance, support for it grew steadily. Today, apportionment of liability is firmly established case law, and the focus has rightly moved to developing principled criteria for such sensitive assessments – notably, replacing the elusively simple reference to the victim's conduct being the 'exclusive cause of the accident' by material criteria regarding the degree of the victim's fault.[5]

2. Supreme Administrative Court, 26 February 2013[6]

In this case, the Supreme Administrative Court decided an appeal on a medical liability case. The plaintiff, the bereaved widow of a previously healthy 41-year-old patient, brought a lawsuit against two public hospitals in the greater Porto region, *Centro Hospitalar de Vila Nova de Gaia – Hospital Eduardo Santos Silva* (CHVNG) and the *Hospital Geral de Santo António* (HGSA), for extra-contractual civil liability. She sought the joint and several liability of the defendants for compensation of € 279,580 for her bereavement and a lump sum of € 8,978 plus a monthly payment of € 75 to each of the deceased's underage children until they reach adulthood.

The Porto Administrative and Tax Court (*Tribunal Administrativo e Fiscal do Porto*) ultimately ruled the action as unfounded, finding the defendants not liable. This verdict in the first instance was confirmed on appeal by the Central Administrative Court North (*Tribunal Central Administrativo Norte*).

The Supreme Administrative Court established the following key facts: the deceased underwent a scheduled micro-surgery of the paranasal sinuses to extract nasal polyps at CHVNG in November 1997. The surgery was postponed due to a lack of surgery time slots and a failure in an anaesthesia device but was eventually performed on 27 November, 1997. Following the surgery, the deceased developed severe symptoms including agitation and headaches and was admitted to the emergency service of CHVNG

[5] On all of these points, *C Lopes do Rego*, A problemática da concorrência da responsabilidade objetiva, decorrente dos riscos de circulação do veículo, com a culpa do lesado, Julgar 2022, 33; in recent case law, see eg, Supreme Court of Justice, 4 July 2024 (Barateiro Martins), 2777/22.3T8PRT.P1.S1; Supreme Court of Justice, 27 February 2024 (Jorge Arcanjo), 313/18.5T8GMR.G1.S1.

[6] ECLI:PT:STA:2013:0775.12.44.

on 29 November 1997. Initial medical responses were inadequate, with sedatives administered but diagnostic tests delayed. A lumbar puncture confirmed bacterial meningitis caused by a multi-resistant *Pseudomonas* bacterium, usually a hospital-acquired infection (HAI). The patient was treated with multiple antibiotics including ceftriaxone, vancomycin and metronidazole. The meningitis was cured, but the aggressive antibiotic treatment caused gastrointestinal complications including stress ulcers and colitis, which were inadequately managed with gastro-protective medication initially. He was discharged from CHVNG in December 1997 but returned with worsening symptoms and was admitted to HGSA in February 1998, suffering from severe gastrointestinal disease caused by *Clostridium difficile*, a common hospital-acquired infection, and ultimately duodenal ulcer perforation. Medical care at HGSA was found to have been delayed and insufficient with late surgical intervention for the ulcer perforation occurring only on 7 March 1998. The patient died on 8 March 1998, from peritonitis-related sepsis, caused by the ulcer perforation.

The Supreme Administrative Court reviewed the evidence and found no conclusive proof of a breach of medical standards or a direct causal link between the defendants' actions and the patient's death. The court acknowledged the difficulty in definitively identifying the source of the infection and the complex medical facts involved. It also noted that the antibiotics administered were appropriate for the infection and that the meningitis was cured. The court held that the plaintiff failed to provide sufficient evidence to overturn the factual findings of the lower courts. While the gastrointestinal complications were recognised as iatrogenic, the court could not demonstrate a breach of the standard of care by the defendants. Consequently, the court confirmed the decisions of the first and second instance courts and absolved the defendants of liability.

The plaintiff's husband, a previously healthy 41-year-old man, died on 8 March 1998 in circumstances associated with a surgical procedure he underwent on 29 November 1997 at a public hospital. A thorough analysis of the medical adverse event's accident trajectory revealed that too many things went wrong during his treatment. After almost 15 years since his death, the Supreme Administrative Court rendered a final decision on 26 February 2013.

Ultimately, the bereaved widow made an application to the European Court of Human Rights in the *Lopes de Sousa Fernandes v Portugal* case.[7] In a judgment of 15 December 2015, the Fourth Chamber of the

[7] ECtHR *Lopes de Sousa Fernandes v Portugal* [Fourth Chamber] 15.12.2015, no 56080/13.

European Court of Human Rights held by five votes to two that there had been a violation of art 2 (right to life) of the European Convention on Human Rights (ECHR), under its substantive head, and unanimously a violation of art 2 under its procedural head.[8] The case was referred to the Grand Chamber, which found no violation of art 2 (right to life) of the ECHR under its substantive limb as Portugal's regulatory framework for medical treatment was deemed adequate. Regarding the exceptional category of imputation of liability to the State, the Grand Chamber acknowledged the inherent difficulty in distinguishing between cases of 'mere medical negligence' and those in which there is a denial of access to emergency healthcare in a life-threatening situation. This is particularly challenging when a complex causal process with multiple contributing factors is involved. The Grand Chamber's majority decision was criticised by Portuguese judge Paulo Pinto de Albuquerque in his scorching dissenting opinion. He argued that such a distinction is artificial, inaccurate and incomprehensible and that Portugal also violated the substantive limb of art 2 ECHR, as held in the ECtHR's decision by the Fourth Chamber, implying that there were well-known systemic failures in the Portuguese National Healthcare System (and in CHVNG in particular) at the time of the tragic event. However, the Grand Chamber found a violation under the procedural limb as the domestic investigation into the applicant's husband's death was deemed inadequate and untimely, and awarded € 23,000 in non-pecuniary damages.

This case highlights the excessively rigid standards of proof regarding fault and causation in the administrative courts, the complexity of medical liability cases involving hospital-acquired infections, as well as the recurrent excessive length of procedures in Portuguese courts – especially in the administrative courts, which have jurisdiction over medical liability cases related to treatment in public healthcare units, worsening a well-known compensation gap.[9]

This case is consistent with a pattern of non-compliance by the Supreme Administrative Court with ECHR standards in the field of medical

[8] ECtHR *Lopes de Sousa Fernandes v Portugal* [GC], 19.12.2015, no 56080/13. See annotation *R Cascão*, Lopes de Sousa Fernandes c. Portugal (queixa n.º 56080/13, acórdão de 19 de dezembro de 2017): direito a prestações de saúde, negligência médica em hospital público, in: A Pereira/I Godinho, O TEDH e a Saúde através das Opiniões do Juiz Paulo Pinto de Albuquerque (2024) 25–42.

[9] *AD Pereira/RP Cascão*, Why is Tort Law Reform so Difficult in Portugal? The Example of Medical Liability (2025) 33 European Review of Private Law (ERPL) 293–306.

liability.[10] Similarly, in *Fernandes de Oliveira*[11] the ECtHR examined the Supreme Administrative Court's decision of 29 May 2014, finding no *in vigilando* liability of a public psychiatric hospital for the suicide of a mentally ill patient who had been voluntarily admitted there after a failed suicide attempt.[12] The Grand Chamber found a violation of the procedural limb of art 2 ECHR, since the proceedings had lasted over 11 years for two levels of jurisdiction.[13]

Also, in *Carvalho Pinto de Sousa Morais v Portugal*, the ECtHR found a violation of art 14 in conjunction with art 8, considering that there was discrimination on grounds of gender and age.[14] In a decision of 9 October 2014, the Portuguese Supreme Administrative Court had reduced the damages award on the grounds of the claimant's sex and age, particularly as regards loss of sexual function, considering that she was already 50 years old at the time of the botched surgery and had two children. It concluded that at this age sexuality is less important than in younger years and that her primary responsibility was likely to be caring for her husband.[15]

3. Supreme Court of Justice, 16 January 2014[16]

This decision concerns a traffic accident involving a sanitation worker (AA) who was riding on the rear platform of a properly marked refuse collection vehicle when a car collided with it. AA sustained severe injuries requiring prolonged hospitalisation and resulting in permanent partial disability of 80%. The injured party's spouse (BB) claimed damages, and the Supreme Court affirmed that third parties may seek compensation in tort. Articles 483(1) (general rule of tort liability) and 496(1) (non-pecuniary damages) of the Civil Code are interpreted to allow compensation

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[10] *F Castro Moreira*, Direito à Saúde, in: P Pinto de Albuquerque (ed), Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais, vol I (2019) 619–645.

[11] ECtHR *Fernandes de Oliveira v Portugal* [GC], 31.1.2019, no 78103/14.

[12] ECLI:PT:STA:2014:0922.11.DB.

[13] See annotation *J Pinto Monteiro*, Fernandes de Oliveira c Portugal (queixa n.º 78103/14, acórdão de 31 de janeiro de 2019): cuidados de saúde prodigados a doente mental com tendência suicida, in: A Pereira/I Godinho, O TEDH e a Saúde através das Opiniões do Juiz Paulo Pinto de Albuquerque (2024) 19–24.

[14] ECtHR *Carvalho Pinto de Sousa Morais v Portugal* [Fourth Chamber], 25.7.2017, no 17484/15.

[15] ECLI:PT:STA:2014:0279.14.B3.

[16] Proc no 6430/07.0TBBRG.S1 (João Bernardo).

for 'particularly serious' non-pecuniary harm suffered by a spouse. In exceptional cases, compensation may also extend to other third parties beyond the spouse.

This ruling marks a pivotal shift in Portuguese tort law, aligning it more closely with the Principles of European Tort Law (PETL). It reflects a broader recognition of non-pecuniary damages for individuals maintaining a close relationship with the primary victim, mirroring the PETL standards regarding liability and compensation. In fact, art 10:301 PETL explicitly provides for this. Paragraph (1) states that non-pecuniary damage may be compensated not only for the victim of personal injury but also for persons having a close relationship with a victim who suffers a fatal or very serious non-fatal injury. This includes harm to interests such as human dignity, liberty, and personality rights, and recognises the emotional suffering of close relatives as compensable. Paragraphs (2) and (3) guide the assessment of such damages, emphasising factors like gravity, duration, and consequences, and ensuring similar sums for objectively similar losses. Thus, under PETL, third parties with a close relationship to the victim (eg, spouse, family member) can claim compensation for severe non-pecuniary harm, aligning with the interpretation adopted by the Portuguese Supreme Court.

The case law of the Courts of Appeal and of the Supreme Court itself has repeatedly cited Judgment no 6/2014 as a key interpretative precedent for the admissibility of serious non-pecuniary damages claimed by third parties – namely, spouses and parents – in cases where the direct victim suffers particularly severe injuries. For example, in another uniformising judgment dated 20 April 2021, the Supreme Court expressly recognised that, considering Judgment no 6/2014, parents may claim compensation for non-pecuniary damage when their child sustains 'particularly serious' injuries. The Supreme Court of Justice held that, in light of the guidance provided by the Uniformising Judgment no 6/2014, it must be understood that the parents of a surviving child who was particularly gravely injured and suffers particularly serious non-pecuniary harm are entitled to compensation for such damage. Where compensation to be awarded is determined in subsequent liquidation proceedings, default interest accrues from the date of service in the declaratory action, when claimed, and not from the date of the judgment or from service in the liquidation proceedings. In assessing compensation for biological damage, which takes into account the functional deficit and its impact on future professional activity, the assessment concerns pecuniary damage, even though biological damage may also give rise to non-pecuniary harm.

4. Supreme Administrative Court, 16 December 2021[17]

On 20 May 2004, the plaintiff underwent thyroid surgery following the detection of a nodule during a routine examination. However, she was not provided with the information necessary to give her informed, free, and conscious consent. The procedure resulted in laryngeal nerve damage – a risk acknowledged in medical literature as inherent to thyroid surgery. Had the plaintiff been adequately informed of the general risks, and specifically of the possibility of vocal cord paralysis, hemilaryngeal immobility, and nerve injury, she would have refused to consent to the procedure.

The appellate court overturned the lower court's judgment, which had awarded € 1,000 in non-pecuniary damages, and instead granted € 16,000 in non-pecuniary damages and € 175 in pecuniary damages. The court emphasised that compensation for non-pecuniary harm must reflect the societal value attributed to the protected interests, requiring an amount that is neither symbolic nor inadequate, but proportionate to the gravity of the harm.

The court further clarified that valid informed consent must be free and fully informed, requiring disclosure of diagnosis, prognosis, nature and purpose of the intervention, foreseeable risks (including frequent or unavoidable ones), alternative treatments, and economic implications, as recognised in medical literature. Except in urgent cases or where legally mandated, prior informed consent is generally required for any preventive, diagnostic, or therapeutic intervention. Consent operates as a justification for medical intervention, and adequate information is a prerequisite for its validity. Consequently, the burden of proving informed consent rests with the defendant hospital, including in cases of hypothetical consent.

Given the violation of the duty to inform, resulting in invalid consent, and considering that harm to physical integrity and personal freedom is unlawful, the hospital was held liable for both pecuniary and non-pecuniary damages. Compensation must, as far as possible, restore the hypothetical situation that would have existed absent the wrongful act (arts 562–566 Civil Code). Awards for non-pecuniary harm are linked to human dignity and freedom and must be determined objectively, considering the seriousness of the harm, the purposes of compensation, and jurisprudential practice in similar cases (arts 496 and 8(3) Civil Code).

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[17] Proc no 0884/12.0BEBRG (Carlos Carvalho); see *AD Pereira*/*I de Oliveira Martins*, Portugal, in: E Karner/BC Steininger (eds), European Tort Law 2021 (2022) 493, nos 69–79.

The burden of proving that consent was given in an informed manner rests with the defendants, namely the hospital, including in cases of hypothetical consent. Where a breach of the duty to inform results in invalid consent and given that harm to physical integrity and personal freedom is unlawful, an obligation arises to compensate both the pecuniary and non-pecuniary damage suffered by the patient. Compensation for non-pecuniary harm is intrinsically linked to the dignity and freedom of the human person and must be determined objectively, considering the seriousness of the harm, the purposes of compensation, and jurisprudential practice in similar cases, rather than subjective sensitivities of the injured party (arts 496 and 8(3) Civil Code).

This judgment constitutes a significant precedent in the domain of health law and the doctrine of informed consent. The decision reflects fundamental values concerning human dignity, notably respect for patient autonomy, while emphasising the importance of non-pecuniary harm and the indispensability of honouring individual will, as it is prescribed in the Convention on Human Rights and Biomedicine, the Criminal Code and the Health Basic Law of 1990.

In the context of private healthcare, there is a higher incidence of liability cases arising from the lack of informed consent.[18] Collectively, these and several other cases affirm three core principles: (i) informed consent must be specific, intelligible, and adapted to the procedure and the patient's circumstances; (ii) the burden of proof lies with medical professionals; and (iii) breach of the duty to inform invalidates consent and establishes liability.[19]

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[18] The following Supreme Court decisions illustrate this trend: Proc no 1263/06.3TVPRT.P1.S1 (6 June 2015) – a case of lack of consent in an aesthetic procedure. Proc no 7053/12.7TBVNG.P1.S1 (22 March 2018). In a case involving complications from a colonoscopy, the Court emphasised that generic consent is insufficient. Repeated procedures require updated information regarding evolving risks. The duty to inform is a fundamental prerequisite for lawful intervention, and the burden of proof lies with the medical provider. Proc no 359/10.1TVLSB.L1.S1 (12 February 2020). In an aesthetic surgery case, the Court held that informed consent must be 'free and clarified', and that failure to comply with this duty establishes liability. In such procedures, disclosure of even rare but significant risks is required. The burden of proving valid informed consent rests with the hospital or physician. Proc no 26936/15.6T8PRT.P2.S2 (10 January 2024). In the context of spinal surgery, the Court ruled that serious but infrequent risks – such as spinal injury – must be disclosed. Consent must be 'free and informed' to exclude unlawfulness, and the burden of proof lies with the medical team.

[19] See *André Pereira*, O Consentimento Informado na Relação Médico-Paciente, 2003 – <https://estudogeral.uc.pt/handle/10316/89350> and *André Pereira*, Direitos dos pacientes e responsabilidade médica, 2014 – <https://estudogeral.uc.pt/handle/10316/31524>.

5. Supreme Court of Justice, 3 November 2022[20]

The receding economic tide that followed the financial and sovereign debt crisis did, as the saying goes, expose who in the banking sector had been 'swimming naked'. Several banks were placed under administration, sold, or even wound up, and a considerable number of small investors were left holding valueless bonds issued either by those banks or by their holding companies, more or less insistently suggested to them by the banks' clerks. A substantial number of claims concerning the liability of financial intermediaries soon reached the courts and, as the topic had not previously been discussed in much depth, this quickly gave rise to contradictions in the case law.

This is the background to the present judgment for the uniformisation of case law. In the case in question, the claimants were clients of Bank X who, at the suggestion of the bank's clerks, invested in bonds issued by the company that owned the bank. They did not wish to invest in products entailing financial risk and were told that they were investing in a product that entailed no risk to either capital or interest, and that they could be reimbursed the amounts invested at any time through the assignment of the credit. The claimants did not know what a bond was, and no one explained to them that investing in the issuing company was different from investing in Bank X. The issuing company was eventually declared insolvent, and as the investors were not repaid, they brought an action against Bank X for breach of its duties to properly inform investors.

After being adjudicated at first and second instance, the case came before the Supreme Court. The Court held that the bank had provided the investors with sufficient information and had therefore acted lawfully: moreover, it found that the claimants had not proved that they would have refrained from making the investment had they been given more information, so that causation could not be established. As this ruling directly contradicted a previous Supreme Court decision based on identical facts,[21] the plenary session of the Civil Sections of the Supreme Court accepted the claimants' plea to resolve the contradiction and decide the case accordingly.

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[20] Proc no 1479/16.4T8LRA.C2.S1-A (Pedro de Lima Gonçalves), ECLI:PT:STJ:2018:1479.16.4T8LRA.C2.S1.CC. See *MI de Oliveira Martins/A Dias Pereira*, Portugal, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 501, nos 13–42.

[21] Supreme Court of Justice, 25 October 2018, Proc no 2581/16.8T8LRA.C2.S1 (Bernardo Domingos). See *MI de Oliveira Martins/A Dias Pereira/J Pinto Monteiro*, Portugal, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 501, no 21 ff.

The question of the scope and breach of the duties to inform was relatively straightforward, since the provisions of the Securities Code then in force (even before the transposition of the Markets in Financial Instruments Directive [MiFID]) imposed stringent requirements on financial intermediaries in this regard. It was the issue of causation that stood out. On the question of who should prove causation, the Court considered that causation is a constituent element of a claim and must therefore be proved by the claimant under the general rules on the burden of proof (art 342 Civil Code): there was no reason to shift the burden of proving (the absence of) causation to the financial intermediary. In order to establish factual causation under the *conditio sine qua non* test, the claimants therefore had to show that they would not have made the same decision had they been properly informed.

Applying this reasoning, the Court concluded that the claimants could establish that they had not been properly informed, but not that, once duly informed, they would have refrained from making the investment.

The ruling was far from consensual. Of the 29 justices participating in the decision, 12 delivered dissenting opinions. Many of them considered the judgment to be wrong on the facts. From the facts that the claimants did not intend to place their money in products entailing financial risk, and that they purchased the bonds only because they were convinced that the investment entailed no risk to the reimbursement of either capital or interest, it followed that they would not have made their decision had they been informed of the bond's credit risk. Other dissenting opinions argued that the provision of the Securities Code, establishing a presumption of fault on the part of the financial intermediary, should be broadly construed as also encompassing a presumption of causation by analogy with a well-known principle concerning the presumption of fault in contractual liability.[22] One particularly consequential opinion challenged the very framing of the subject matter of proof: requiring direct evidence of a decision-making process amounted to demanding a *probatio diabolica*. Such an approach would entirely deprive the rules on the liability of financial intermediaries for breach of their duties to inform of their practical effect and might even run counter to the MiFID. The courts should instead apply an inversion of the burden of proof, or at least resort to a carefully developed system of factual presumptions.

[22] See especially *M Carneiro da Frada*, Contrato e Deveres de Protecção, vol XXXVIII, Suplemento ao Boletim da Faculdade de Direito da Universidade de Coimbra (BFDUC) (1994) 333.

It is open to question whether, as the dissenting opinions suggest, the investors would indeed have refrained from the investment had they been properly informed – after all, the bonds were issued by a company that was the sole owner of a seemingly solid bank, at a time not yet overshadowed by banking crises. One should be wary of hindsight bias. Even so, the ruling fails to address the well-known difficulty faced by those entitled to information in proving how they would have decided had they been duly informed. Despite the criticism it has attracted, the judgment has had a clear impact on subsequent case law.

Judgments issued in proceedings for the uniformisation of case law have merely persuasive value; they do not constitute binding precedents. Nevertheless, they carry significant practical weight, as courts that decide differently risk having their decisions overturned by the Supreme Court or by its plenary session. Several subsequent decisions have applied the ruling with little discussion.[23] Others, while criticising its reasoning, accept its core holding that causation must be proved by the claimant and therefore focus on whether causation can be inferred from the facts.[24] More broadly, the ruling altered the course case law might otherwise have taken. The shifting of the burden of proof of causation in cases involving breaches of duties to inform enjoys substantial support in Portuguese scholarship and case law (including the judgment relied upon by the claimants):[25] its extension to the liability of financial intermediaries was possibly halted by this decision.

[23] Eg Supreme Court of Justice, 25 January 2024, Proc no 3805/21.5T8LRA.C1.S1 (Ferreira Lopes); Appellate Court of Porto, 22 January 2024, Proc no 11103/20.5T8PRT.P1 (Paulo Dias da Silva).

[24] Eg Supreme Court of Justice, 14 February 2023, Proc no 3129/16.0TOSTR.E1.S2 (Maria Clara Sottomayor); Supreme Court of Justice, 14 March 2023, Proc no 291/17.8T8BGC.G2.S1 (Maria João Vaz Tomé).

[25] Very influential in this regard *P Mota Pinto*, Interesse contratual negativo e interesse contratual positivo, vol II (2008) 1385 ff.

XXIV. Romania

Lucian Bojin and Sergiu Căileanu

In Romania, the general framework of civil tort law was established under the Old Romanian Civil Code (1864), through the case law of the Old Supreme Court. In that period, Romanian civil law acknowledged new concepts, such as objective liability, loss of amenity or ricochet damage and other nuanced concepts, such as direct/indirect damage, causal link, force majeure and fortuitous events. Most of this case law has been incorporated in the provisions of the Romanian New Civil Code, which entered into force on 1 October 2011. However, the XXI century has brought new challenges for law in general and particularly for tort law. In this respect, although the general legal framework in this field has been updated relatively recently, there are still various problems left to resolve in respect of tort liability, but there are also new questions that must be answered, and the task of offering such answers lies, mainly, within the case law. The following judgments are examples of such answers. Some of the judgments have already been analysed in our contributions to the annual reports on the evolution of tort law in Europe over the years, but there are also new judgments, which, over time, have proved to be landmark cases in civil tort case law in Romania.

1. Constitutional Court of Romania, Decision no 342 of 9 July 2024[1]

The first decision deals with the non-pecuniary loss suffered by close relatives of an injured primary victim of a tort. The judgment delivered by the Constitutional Court clarified that such non-pecuniary loss is compensable despite the unclear provision of the Civil Code in this matter, which was previously interpreted by ordinary courts as authorising compensation for such non-pecuniary loss only if the primary victim died.

This judgment was delivered following a procedure of plea of unconstitutionality raised in relation to art 1.391 para (1) of the Romanian Civil Code, which stipulates as follows: 'In cases of a violation of physical

[1] Discussed in *L Bojin/S Căileanu*, Romania, in: E Karner/BC Steininger (eds), European Tort Law 2024 (2025) 605, nos 3–17.

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integrity or health, compensation may also be granted for diminished opportunities for a family or social life.' The plaintiff, who was the spouse of the victim of bodily harm suffered as a result of a traffic accident, sought material compensation for ricochet damage, consisting in the restrictions of their own family and social life caused by the wrongful deed. The question addressed through this plea to the Constitutional Court, which in Romania is the authority facilitated by law to solve pleas of unconstitutionality, was whether it was justified that the compensation for diminished opportunities for a family or social life is limited to the direct victim or whether it should also be granted to the relatives of the direct victim, who must take care of the latter and, by this, suffer themselves a limitation of their own opportunities for a family or social life.

The Constitutional Court declared unconstitutional art 1391 para (1) of the Civil Code 'to the extent that it limits the possibility of indirect victims to obtain compensation for diminished opportunities for family or social life resulting from the harm to the physical integrity or health of the immediate victim', stressing that such limitation represents a breach of arts 22 (right to life, to physical and mental integrity) and 26 (personal and family life privacy) of the Romanian Constitution.

For lawyers, this judgment was a genuine surprise since the Constitutional Court had already found, in several decisions, that art 1.391 (1) was compliant with the Romanian Constitution. In this respect, it must also be stressed that art 1.391 (1) of the Romanian Civil Code was drafted on the basis of consistent case law of the old Supreme Court, case law which was also embraced by the High Court of Cassation and Justice in a preliminary ruling procedure,[2] namely in Decision no 12/2016 on the interpretation of the provisions of art 1.391 (1).[3] In this latter decision, as in general in the previously mentioned case law, the courts decided that a very clear distinction must be drawn between the immediate victim (who is entitled to compensation for all the material and moral damage suffered as a result of a wrongful deed, as long as there is a direct causal link between the deed and the damage), and the indirect victim (who is not entitled to compensation for the moral damage suffered as a result of the suffering of the direct victim, even if the indirect victim is a family

[2] The 'preliminary procedure rule' is a procedure regulated by art 514-518 of the Romanian Civil Procedure Code, the purpose of which is to provide a general interpretation of an ambiguous legal provision, an interpretation that become mandatory for all courts.

[3] *C Alunaru/L Bojin*, Romania, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 533, nos 35–39.

member or a close friend of the direct victim). The only exception admitted in jurisprudence to this prohibition was the case in which the direct victim died. This exception is explicitly regulated by art 1.391 (2) of the Romanian Civil Code, which stipulates the following: 'The courts may also grant compensation to ascendants, descendants, brothers, sisters and spouse for the pain and suffering caused by the death of the victim, as well as to any other person who can prove the existence of such injury.'[4]

This judgment is a landmark decision in the field of Romanian tort law as it has changed the previously prevailing approach in case law. Its major importance, both for the theoretical approach of tort law, and mostly for future case law, can be summarised as follows.

Firstly, by this decision, the Constitutional Court stated very clearly that, in regard to compensation for diminished possibilities of family and/or social life, the difference between direct and indirect victims cannot be drawn *a priori*, but only *a posteriori*, by a court, after taking into consideration all the particularities of a given case. Such an analysis is mandatory because it is inequitable to place in the same situation a spouse who has a legal duty to take care of the other spouse, who was injured to the point that they cannot survive without permanent care, and a cousin who has not maintained any relationship with the direct victim over the years but claims that he suffered severe pain when he heard the news of the damage inflicted on his relative. Analysing the first situation, the Constitutional Court acknowledged that the wrongful deed activates new duties for the other spouse or 'reconfigures' the way in which this spouse must fulfil their obligations (art 309 para (1) and art 325 para (1) of the Romanian Civil Code).[5] In such a case, the spouse, as well as any other person who can prove a real restriction or diminution of their own possibilities of social and/or family life, must be considered a direct victim.

Secondly, the Constitutional Court draws a distinction between moral damage, in general, and ricochet damage consisting in restrictions of possibilities in social and/or family life, as a special type of moral damage. In this respect, although the right to compensation for moral damage in general remains unavailable for the relatives of the direct victim, the former can access this remedy for any restriction that they suffer in respect of their own possibilities of family and/or social life.

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[4] *C Alunaru/L Bojin*, Romania, in: K Oliphant/B Steininger (eds), European Tort Law Basic Texts (2016) 298.

[5] Art 309 para (1) of the Romanian Civil Code stipulates that 'spouses owe each other mutual respect, fidelity and moral support' while art 325 para (1) provides that 'spouses have the obligation to provide mutual material support.'

However, the courts must not only determine whether the indirect victim has indeed suffered a restriction or diminution of their possibilities to maintain their social and/or family life, but also the amount of compensation to which they are entitled. Thus, the Constitutional Court underlined that the duty of the legislative authority is to establish criteria on the basis of which the courts can establish the persons entitled to compensation and the amount of compensation, such as the severity of the damage, the irreversibility of the damage, the type of relationship between the direct victim and the plaintiff, etc. This is the second reason why Decision no 342 of 9 July 2024 is very important.

2. High Court of Cassation and Justice, Preliminary Procedure Ruling no 19 of 3 June 2019

The second decision concerns the issue of commencement of the statutory limitation period for claims made by public authorities for compensation of damage. It specifically deals with the hypothesis when the existence of the damage was not ascertained by the authorities themselves, but by the Court of Auditors and whether, in such a case, the limitation period starts from the date of communication from the Court of Auditors.

This judgment was issued in a preliminary procedure initiated by the Court of Appeal Constanța, which addressed a question to the High Court of Cassation and Justice regarding the statute of limitations of claims for compensation of damage consisting in pecuniary sanctions applied by the Court of Auditors because of irregularities discovered after an auditing activity. Briefly, the High Court was requested to answer whether the report issued by the Court of Auditors or by another public authority empowered by law with controlling the activity of other entities, through which the authority found irregularities and issued sanctions against those entities, could be considered the moment from which the statute of limitations period begins for claims for damages filed by the respective entities against those persons who they hold responsible for the respective damage.

This question was raised in the context in which some courts were of the opinion that the statute of limitations begins on the date on which the Court of Auditors issues a report regarding an irregularity and applies a pecuniary sanction, while other courts opined that such a report has no bearing on this matter and that the statute of limitation begins, according to the general rule, when the victim knows, or should have known, about the existence of the damage and the person responsible for it. This divergence of interpretation has led to uncertainty in the daily practice of pub-

lic entities and, in many cases, to a cessation of economic activity given the possibility that a director or another person in charge could be held responsible for a certain damage for eternity, and not merely in theory.

The High Court, by its Decision no 19 of 3 June 2019, issued in a preliminary procedure ruling, stated that the report issued by the Court of Auditors or by another public authority empowered by law with controlling other entities, by which the controlled entity was obliged to repair the damage caused to it by its public employees or resulting from the payment of an undue amount of money, does not mark the beginning of the statute of limitations period for a claim for compensation for the respective damage, irrespective of its contractual or tort basis.

This decision is a landmark case because it ended the practice of public authorities' managers filing claims for damages against a previous manager and third parties, for alleged damage caused five or ten years earlier. The importance of this decision lies in the fact that the High Court clarified that the reports issued by the Court of Auditors or by any other authority empowered by law with controlling the financial activity of other entities do not have any bearing on the statute of limitations for at least three reasons: (a) the Court of Auditors is a third party in respect of the legal relationship between the entities subject to auditing activities and other natural or legal persons. Therefore, its acts and deeds, including its reports, cannot influence the statute of limitations for claims raised on the basis of a legal relationship established between other parties; (b) the Court of Auditors is a public authority which is empowered to conduct financial audits based on the documents provided by the entity subject to inspection. Consequently, the controlled entity cannot claim that it should have had knowledge of damage only when the Court of Auditors issued its report; (c) the audit conducted by the Court of Auditors is purely facultative. There is no mandatory provision that stipulates that this authority will conduct an audit enquiry over a certain entity over a certain period. Thus, its reports cannot serve as a marker for the beginning of the statute of limitations because the issuance of such a report is an uncertain event.

Finally, the High Court underlined that, in all cases, a court of law or other entities empowered by law, must decide whether, in a certain case, all the conditions for the establishment of civil tort liability are met and this power cannot be exercised by the Court of Auditors or by any other authority empowered by law to conduct financial audits of other entities. Moreover, the source of tort liability is a wrongful deed and not a report which states that a public entity has wrongly managed its financial resources.

3. High Court of Cassation and Justice, Decision no 1589 of 10 June 2015

The third decision deals with the limits of the legitimate exercise of freedom of speech and their consequences in the field of tort law and compensation for damage.

In this judgment, the High Court of Cassation and Justice had to solve a dispute in which claimant X sought relief (compensation of damage) for an alleged violation of his personal right to dignity and private life and also non-pecuniary compensation for an alleged violation of the honour of his late father by defendant Y. Briefly, both X and Y were public figures (politicians) who were competing for a seat in the Romanian Parliament. During the 2012 campaign, Y appeared several times on a television show, in which he presented X as the child of a general of *Securitate* (the political police under the former communist regime in Romania). This topic was, and still is, one of the major subjects of debate in Romanian society, a collaborative relationship with *Securitate* being a sufficient motive to end one's political career. The allegations made by Y were based on a series of press articles from 2008. The Bucharest Tribunal, as the court of first instance, awarded X RON 5,000 (approx € 1,000) as compensation for moral damage and ordered Y to publish, at his own expense, the decision in two nation-wide newspapers. This decision was appealed by Y, an appeal which was dismissed by the Bucharest Court of Appeal. Y filed a request for review of this decision.

The High Court dismissed the request filed by Y, upholding the decisions issued by the lower courts, underlining that the defendant clearly violated the claimant's personal right to honour and the memory of the claimant's late father. Thus, the High Court decided that the defendant must be held responsible based on civil tort liability, for two main reasons. Firstly, the information regarding X and his father, presented in the newspapers used by the defendant to endorse his statements, were false, since, after the publication of the respective press articles, an enquiry was conducted by the National Council for Studying the Archives of Securitate and the investigation concluded that X's father was not a general of *Securitate*. The result of the enquiry was also published and discussed in the media. Secondly, all these facts could have easily been discovered by Y because he made the allegations approximately seven years after the publication of the press articles which he used. Therefore, the High Court concluded that Y deliberately chose to present only such information that could discredit his opponent, with this precise purpose, and that such conduct cannot be acknowledged as a legitimate manifestation of freedom of expression.

This is a landmark decision in Romanian case law regarding the limits of the freedom of expression in public discourse in relation to one of the most difficult social topics in Romanian society. The importance of this decision lies, firstly, in the fact that the High Court acknowledged that balancing competing rights is a necessary and autonomous step in any legal reasoning concerning liability for a violation of human rights, and will thus be decisive for future case law in this type of litigation.[6] The High Court of Cassation and Justice devoted important parts of the *ratio decidendi* to the issue of 'solving the conflict between rights', more precisely between the rights protected by art 8 of the European Convention on Human Rights (ECHR) (the right to private life, right to honour, dignity and one's own image) and the freedom of expression protected by art 10 of the ECHR. In order to solve this conflict, the High Court has provided consistent reasoning, analysing the provisions of the Romanian Civil Code regarding the freedom of expression through the principles established by the European Court of Human Rights (ECtHR)[7] following the lines suggested by the second paragraph of the above-mentioned provisions: any interference with the rights recognised by the ECHR must be in response to a pressing social need and must be necessary in a democratic society.

Secondly, this decision is a landmark case because it makes a more accurate distinction between information of public interest and information regarding the private life of an individual. Therefore, in the case discussed, the High Court stated that an allegation of a collaboration between an individual, whether living or deceased, with the political police of the ex-communist Romanian regime is a topic of public interest and the disclosure of such information is justified and protected under freedom of expression. However, even though such disclosure is not per se a viola-

[6] See eg, High Court of Cassation and Justice, Civil Section 1, Decision no 319 of 5 February 2020, discussed by *C Alunaru/L Bojin/B Şerb*, Romania, in: E Karner/BC Steininger (eds), European Tort Law 2020 (2021) 535, nos 31–42.

[7] According to art 20 of the Romanian Constitution, in a case regarding human rights, the courts are obliged to interpret the national regulations in accordance with international regulations concerning the human right. These legal provisions stipulate as follows: '(1) Constitutional provisions concerning citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.'

tion of one's private life, an accusation regarding a collaboration with the *Securitate* has a strong social significance in Romanian society and can have serious consequences for the life of the accused and can represent a violation of the victim's right to honour and own image. Therefore, the High Court established that such an allegation must be treated as an allegation of a certain fact and not as a value judgement. Consequently, such an allegation must be proved and, if the allegation is not proved, it can be considered a wrongful deed and the wrongdoer can be subjected to tort liability.

Finally, the importance of this decision also lies in the fact that it emphasises that freedom of expression is protected when the purpose of a disclosure is to inform the public about a matter of general interest. For this purpose, the information presented must be correct and complete, considering the reasonably accessible information. Thus, as in the case discussed, if a person has exercised freedom of expression against its purpose and brought to the attention of the public opinion only information likely to create a negative image of another person, concealing information that could have contradicted that image and that could have been obtained as easily as the negative information, insisting on presenting erroneous information and pursuing only their own interests must be considered as conduct that can be subjected to compensation on the basis of tort law.

4. High Court of Cassation and Justice, Decision no 836 of 13 April 2022

The fourth decision deals with tort responsibility of healthcare institutions for injuries due to nosocomial infections and stresses the duties of care and security of the healthcare institutions towards patients.

In this judgment,[8] the High Court of Cassation and Justice dealt with one of the most widely debated subjects in the last decade in Romania – nosocomial infections (pseudomonas aeruginosa) in public hospitals. Briefly, this case involved claimant A, who filed a lawsuit against the defendant Timișoara Medical Institution for Cardiovascular Diseases (IBCT) in which she alleged that her husband (B), during his period of hospitalisation there (approx one month, in which he underwent a surgical intervention), contracted a nosocomial infection that caused his death. After the surgery, B developed a fever and tests subsequently showed that

[8] This decision has been analysed in detail by *L Bojin/S Căileanu*, Romania, in: E Karner/BC Steininger (eds), European Tort Law 2022 (2023) 523, nos 4–22.

he had contracted a nosocomial infection, which led to his death after two weeks. The claimant requested that the defendant be ordered to pay RON 45,000 (approx € 10,000) as material damages (funeral expenses) and € 750,000 as moral damages for shock and emotional pain and suffering caused by her husband's death.

The request was dismissed by the court of first instance, which reasoned that B's death was caused by his precarious state of health prior to hospitalisation, which made him more susceptible to the development of the aggressive biological agent. This judgment was upheld by the Timișoara Court of Appeal. The claimant filed a request for review against this decision before the High Court of Cassation and Justice, which granted the request and ordered a retrial, giving the Court of Appeal two mandatory instructions. The first one concerned the factual premise of the case, namely that nosocomial infections are caused by infectious agents usually present in medical institutions due to deficiencies in hygiene, sterilisation procedures, and similar factors, and that they are associated with the disease for which the patient was hospitalised. The second one is a judicial interpretation of art 655 para (1), point (a) of Law no 95/2006 concerning the reform in the field of public healthcare, which provides as follows: 'The public and private health institutions, as providers of medical services, are liable, according to the generally applicable rules, for damage that occurred during their activities of prevention, diagnosis or treatment, as a consequence of nosocomial infections, unless an external cause, outside of the control of the institution, is proven.' The High Court emphasised that the liability regulated by this norm is strict or objective in nature. Such liability is triggered without the necessity of alleging, proving or presuming any fault of the medical institution because it is based on a duty of warranty, due to the risky nature of prevention, diagnosis or treatment, which, in turn, are associated with the risk of nosocomial infections.

Although this case is not complicated, it can be considered a landmark one because it offered a possibility for the High Court to change its case law in the field of medical tort liability (especially in the case of nosocomial infections but also in other hypotheses regulated by art 655[9]), switch-

[9] The other hypothesis in which the medical institution can be held liable, pursuant to art 655, are: 'b) known defects in medical devices and equipment, assistive technologies and devices used improperly, without being repaired; c) the use of sanitary materials, medical devices, assistive technologies and devices, medicinal and sanitary substances, after the warranty period or their validity period expired, as the case may be; d) the acceptance of medical equipment and devices, assistive technologies and devices, sanitary materials, medicinal and sanitary substances from suppliers without

ing from general subjective liability, based on the fault of the wrongdoer, to an objective liability, which does not require fault or in which the fault is implicitly assumed. In this respect, the High Court stated that while the risks associated with medical procedures (including the risk of death) may be accepted by the patient through their informed consent, the risk of nosocomial infections is assigned by law to the medical institutions and cannot be transferred to the patient or assumed by them. Therefore, there is no liability for nosocomial infections unless it can be proved that the infection has a cause which is external to the medical institution (ie, a source located outside the institution, and which could not be detected by the activities of supervision, prevention and control of infections associated with medical treatment). In other words, the exemption from liability provided by art 655 is applicable only when the external source of the infection is identified, and the burden of proof rests with the medical institution. By applying these principles to the facts of the case, the High Court concluded that the state of the patient's health (the main reason for which the claimant's request for compensation was dismissed at first instance and on appeal) can represent the 'external cause' only when the patient themself was the carrier of the infectious agent and this fact could not have been detected and/or controlled by the medical institution. In order to avoid such situations, medical institutions are under a duty to examine patients prior to hospitalisation.

Another consequence of great importance of this judgment concerns the concept of legal duties of security owed by healthcare institutions (and doctors) to patients. The duty of security is a duty ancillary to the duty of care owed to a patient. It covers the organisation of patient care to maintain the physical and psychological integrity of the patient. The High Court argued that such duties, among which is the duty to investigate the existence of infectious agents at the time of hospitalisation, are duties to achieve a specific result and not mere duties of diligence. This also represents a shift in perspective in the field of legal duties that are traditionally considered to be duties of diligence.

This is a landmark decision in the field of tort law because, although it puts pressure on public financial resources given the fact that nosocomial infections are a systemic problem of the national healthcare system, the High Court explicitly stated that victims of nosocomial infections must be compensated and that the medical actors involved in a case, given their

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the insurance provided by law, as well as the subcontracting of medical or non-medical services from suppliers without insurance for medical liability'.

legal responsibilities, have a burden of proving a situation of exemption of liability.

5. High Court of Cassation and Justice, Decision no 2532 of 24 November 2020

The fifth decision deals with non-pecuniary rights of corporations (and legal persons in general) and with reparation of non-pecuniary loss suffered by them following violation of such non-pecuniary rights.

This case resulted in the High Court of Cassation and Justice being faced with a new question with respect to civil tort liability, namely whether a legal person is entitled to moral damages for violation of its non-pecuniary rights. In this case, claimant A (a legal person) filed a lawsuit against defendant B, requesting that the defendant be ordered to pay RON 360,000 (approx € 72,000) as compensation for moral damage for violating and denigrating the company's reputation. The claimant argued that this damage resulted from numerous reports to the police and lawsuits filed against it by the defendant over the course of the past ten years. The Brașov Tribunal dismissed the request at first instance, a decision which was upheld on appeal by the Brașov Court of Appeal. The reason acknowledged by both courts was that, according to the provisions of the Romanian Civil Code, only a natural person is entitled to the right of dignity, honour and reputation.

The claimant filed a request for review against this decision before the High Court of Cassation and Justice, which granted this request and ordered a retrial of the case by the Brașov Court of Appeal. This decision is a landmark case in the field of civil tort liability because the High Court acknowledged that a legal person has not only patrimonial rights, but also certain non-pecuniary rights, including the right to reputation and professional prestige.

In order to render this decision, the High Court stated that even though art 72 of the Romanian Civil Code (which expressly stipulates that 'any person has the right for their dignity to be respected' and that 'any damage to a person's honour and reputation, without their consent or in violation of the limits provided by art 75, is prohibited') can be interpreted as referring only to natural persons,[10] such a distinction is not justified in light of the new provisions of the Civil Code regulating the defences in the case

[10] Given the fact that this provision is included in a section of the Civil Code entitled 'respect of the private life and of the dignity of the human being' – Book I (On persons), Title II (Natural person), Chapter II (Respect owed to the human being and to

of violation of non-pecuniary rights. In this respect, the High Court emphasised that the provisions of art 252 of the Civil Code (which provides that 'every natural person has the right to the protection of the values inherent to the human being, such as life, health, physical and mental integrity, dignity, intimacy of private life, freedom of conscience, scientific, artistic, literary or technical creation') must be connected with art 257 of the Civil Code, which provides the following: 'the provisions of this Title apply by analogy to the non-pecuniary rights of legal persons'.[11]

It is important to stress that the High Court did not acknowledge that all the non-pecuniary rights enjoyed by a natural person can be recognised to a legal person, but only those rights that are compatible with the nature and characteristics of the legal person. Consequently, the right to life or health cannot be attributed to a legal entity because such entities do not have a biological body. However, the right to reputation and professional prestige can, and must be, acknowledged to legal persons in their capacity as economic agents. Or, given the fact that both natural and legal persons can act as economic agents, it would be discriminatory to recognise only natural persons as having the right to reputation and professional prestige.

In addition, the High Court stressed that we must take into consideration that the legal person is also a subject of law, a holder of rights and obligations, and the right to reputation of such a subject of law cannot be limited to the role it can have as an element of goodwill, but must be viewed (similarly to the case of a natural person) as the way in which the legal person is perceived and appreciated by other subjects of law. Therefore, although a legal person cannot argue that it suffered pain because of the violation of its reputation, it must be noted that the reputation of a legal entity is directly linked with its economic activity and has a great influence on this activity. Thus, it may suffer damage as a result of a violation of its reputation and, consequently, can claim compensation of such damage from the wrongdoer on the basis of civil tort liability.

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their inherent rights), Section III (Respect of the private life and of the dignity of the human being) of the Romanian Civil Code.

[11] Book I (On persons) Title V (Defence of the non-pecuniary rights) of the Romanian Civil Code.

XXV. Scotland

Martin Hogg

In choosing five significant Scottish cases from the last quarter century, the decision was made to select five appeals which went either to the House of Lords (which was the final court of civil appeal until 2009) or to the United Kingdom Supreme Court (which has been the apex civil court since 2010). The five judgments span the topics of liability for remote harm (so-called 'remoteness of damage'), the apportionment of liability in cases involving the contributory negligence of the victim, medical negligence, and the liability of professional legal advisers to parties other than their clients.

1. *Simmons v British Steel plc*[1]

The decision of the House of Lords in *Simmons v British Steel plc* is an important judgment on the so-called 'remoteness of damage' issue, that is the extent to which a wrongdoer can be held liable for consequential losses which follow on from the initial harm caused.

The respondent, Mr Simmons, worked for the appellants, British Steel plc, at the latter's steelworks. He injured his head at work, injuries for which British Steel were held liable at first instance. Following the accident, Mr Simmons had also gone on to suffer an exacerbation of an existing skin condition as well as a personality change which caused him severe depression. He additionally claimed damages for these further injuries, but at first instance the judge held that they had not been caused by the accident; rather, the judge considered that the further injuries had resulted from Mr Simmons' anger at his initial injury and the way he had been treated following it, and that British Steel were not responsible for his reaction to the original injury. On appeal to the Inner House of the Court of Session, the appeal bench overturned the finding that British Steel were not liable for these further injuries. British Steel appealed that decision to the House of Lords, which dismissed its appeal. Their Lord-

[1] [2004] United Kingdom House of Lords (UKHL) 20; 2004 Session Cases House of Lords (SC(HL)) 94; 2004 Scots Law Times (SLT) 595.

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ships took the view that Mr Simmons' anger had arisen at the time of the initial injury he suffered, and that such anger was an emotion likely to arise from an injury of this sort.[2] It had therefore been caused at least in part by the injury itself. Whilst anger is not itself a compensable form of injury, this anger had materially contributed to (ie was a significant cause of) the exacerbation of his skin condition and his depression. Because of the causal connection between the initial injury (and the attendant anger of the victim) and the subsequent injuries, British Steel were also liable for those subsequent injuries of Mr Simmons.

The judgment is significant because of the extended discussion in the House of Lords of the proper approach to be taken in delictual cases in respect of liability for subsequent injuries following an initial injury for which a wrongdoer is liable. In the House of Lords, their Lordships expressed concern that, in oral pleadings before the Inner House, doubt had been expressed by counsel that the law on the liability for consequential damages was unclear. Their Lordships thought that the Scottish law on the matter was clear, and to the following effect: (1) the basic rule had been set out in *Allan v Barclay*,[3] namely that '[t]he 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';[4] (2) given this rule (with its focus on reasonably foreseeable consequences), the Scottish courts had never adopted the approach briefly followed in English law (as a result of the decision in *Re Polemis*[5]) of imposing liability for all the direct consequences of wrongdoing, an approach quickly ditched in *Overseas Tankship*[6] in favour of a reasonable foreseeability approach; (3) though the language of liability for 'natural' and 'direct' damage is vague and not easy to interpret (and hence to be avoided), the 'ultimate test is whether the damage was reasonably foreseeable';[7] and (4) the current principles could be summed up as being that, once liability for harm is established, any question of the remoteness of damage is to be approached along the following lines –

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[2] See speech of Lord Rodger, para 55.

[3] (1864) 2 M (Macpherson's Session Cases) 873.

[4] Lord Kinloch, 874.

[5] *Re Polemis and Furness, Withy & Co* [1921] 3 King's Bench (KB) 560.

[6] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] Appeal Cases (AC) 388.

[7] Lord Rodger in *Simmons*, para 66.

(a) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable.
(b) While a defender is not liable for damage that is not reasonably foreseeable, it does not follow that it 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.
(c) Subject to the qualification in (b), 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.
(d) The defender must take his victim as he finds him (what is sometimes referred to as the 'thin skull' rule).
(e) Subject again to the qualification in (b), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of their wrongdoing.[8]

Given the existence of a multiplicity of cases on the topic of remoteness of damage, not always consistent and not always adopting the same language, it is immensely helpful to have an authoritative judgment setting out the key principles applicable to cases concerning the extent to which a wrongdoer is liable for consequential injuries flowing from an initial injury for which it has been found liable.

The judgment in *Simmons* has been applied in a number of later Scottish judgments[9] as well as followed in some English judgments.[10]

2. *Jackson v Murray*[11]

This decision of the UK Supreme Court analyses and applies the statutory provision on the apportionment of liability between parties in respect

[8] See, for a recitation of these principles, Lord Rodger in *Simmons*, para 67.

[9] Including *D v The Bishops' Conference of Scotland* [2022] Court of Session, Outer House (CSOH) 46; and *Henderson v Sutherland* 2008 Scottish Civil Law Reports (SCLR) 219.

[10] Including *Sparrow v Andre* [2016] England & Wales High Court (EWHC) 739 Queen's Bench (QB); and *Hicks v Young* [2015] EWHC 1144 QB.

[11] [2015] United Kingdom Supreme Court (UKSC) 5, 2015 Session Cases (SC) (UKSC) 105, 2015 SLT 151, [2015] 2 All England Law Reports (All ER) 805. The case was

of wrongfully caused injuries when contributory negligence of the victim is present.

The facts concerned a thirteen-year-old girl, who had been severely injured when, having stepped out from behind a minibus to cross a country road, she was struck by a car. The driver of the car had seen the minibus but had not contemplated that anyone would get off it and immediately cross the road. He failed to properly observe the road conditions, was driving too fast, and so did not see the girl when she stepped out. Had he been driving at a reasonable speed, and had he been properly observing the road conditions, he would not have hit her. At first instance the court held that the accident had in part been caused by the negligence of the driver, but also by the contributory negligence of the victim. The court assessed the level of contributory negligence as being 90% and therefore awarded the victim damages valued at only 10% of the loss suffered. On appeal to the Inner House of the Court of Session, the court reduced the level of the victim's contributory negligence to 70%. The victim further appealed to the Supreme Court. A majority of the Supreme Court bench held that, in the absence of any identifiable error made by the first instance court, only a difference of view regarding the apportionment of responsibility which exceeded the ambit of reasonable disagreement would merit a conclusion that the lower court had erroneously assessed the appropriate level of contributory negligence. On the facts of the present case, the majority took the view that there was no satisfactory explanation for the view that the major share of responsibility for the victim's injuries was properly attributable to her. The conduct of the driver has played at least an equal role in causing the victim's injuries and was at least equally blameworthy. As the lower courts had therefore made an error which exceeded the ambit of reasonable disagreement, the girl's appeal was allowed and a 50% reduction of the damages award was ordered on account of her contributory negligence.

The judgment is noteworthy in relation to the court's interpretation of the statutory provision which governs apportionment of liability in cases of contributory negligence, the Law Reform (Contributory Negligence) Act 1945. The principal provision of that Act (sec 1 (1)) states that:

'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be

discussed by *M Hogg* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 519, nos 10–16.

reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'

The adoption of this legislative provision represented a leap forward in a fair approach to cases involving contributory negligence, as, prior to the coming into force of the provision, the presence of contributory negligence on the victim's part was a bar to recovery at common law by the victim. However, the provision is inherently vague: specifying that the appropriate reduction in damages is to be such as 'the court thinks just and equitable' given the victim's 'share in the responsibility' for an injury leaves it unclear how such responsibility is to be judged. Greater responsibility could in theory be merited for conduct of the victim which is more blameworthy than that of the wrongdoer, or for conduct which is causally more potent, or by reference to some other criterion relevant to assessing responsibility. As different courts might take different approaches to this key issue, the vagueness of the provision opened the door to conflicting decisions on this point.

In an earlier English judgment on the provision, *Davies v Swan Motor Co (Swansea) Ltd*,[12] Denning LJ had suggested that causation was the 'decisive factor' in the judicial determination of the appropriate share to be borne by each party.[13] But that approach has not proven popular in more recent decisions, which have more commonly proceeded from an approach that blameworthiness and causal potency are equally important factors. A dual approach is approved of in the judgments in *Jackson*: for instance, Lord Reed refers to both considerations, stating that the defender's conduct 'played at least an equal role to that of the pursuer in causing the damage and was at least as blameworthy'.[14] In analysing the facts of the case before him (in which the victim had walked out on to the road some distance ahead of the car), Lord Reed contrasted cases where a pedestrian might walk out directly in front of a car, saying that in such cases the pedestrian's conduct would be the 'more direct and immediate cause of the damage', interrupting circumstances in which an accident would not otherwise have happened.[15] However, nothing is said by the Justices on the extent to which other factors beyond causal potency and blameworthiness may be taken into account: the lack of consideration of any such additional issues might suggest either that none were relevant on the facts before the court, or that the court thought that no other issues

[12] [1949] 2 KB 291.
[13] At 326.
[14] See judgment of Lord Reed, para 43.
[15] See judgment of Lord Reed, para 40.

would be relevant even if present. Clarification on this matter would be of great assistance. Furthermore, including 'causal potency' in the consideration is itself problematic, albeit having the renewed imprimatur of the Supreme Court in this judgment: it is unclear what exactly makes a cause 'potent', and the suspicion is raised that employing causal language of this sort may be a substitute for other, unexpressed considerations masked by the use of such language or else may simply repeat considerations already addressed under the head of blameworthiness.[16]

Although there is some general discussion of the interaction of causal potency and blameworthiness in the case, this is largely undertaken by reference to specific case law. A fuller, theoretical discussion of the relationship between the two matters (and more fundamentally of whether causal potency is an appropriate consideration) is not present in the judgments of the Supreme Court, though it has generated some recent academic commentary.[17]

So, while this is a significant judgment in this area of law, its significance in part lies in the fact that it has highlighted the need for further judicial examination and clarification of this key legislative provision, in particular the appropriate matters for inclusion in a judicial assessment of a just and equitable apportionment of liability.

The decision has been applied in later Scottish[18] judgments, as well as followed in some English[19] decisions.

3. *Montgomery v Lanarkshire Health Board*[20]

This decision of the UK Supreme Court marks a major shift in the appropriate determination of medical negligence liability in the light of a shifting paradigm in the doctor-patient relationship. An older paternalistic

[16] See the concerns expressed about the usage of causal potency in *J Goudkamp*/*L Klar*, Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion (2016) Alberta Law Review (Alta L Rev) 849.

[17] See *J Goudkamp*, Apportionment of Damages for Contributory Negligence: Appellate Review, Relative Blameworthiness and Causal Potency (2015) 19 Edinburgh Law Review 367; and *Goudkamp*/*Klar* (2016) Alta L Rev 849.

[18] See *Cameron v Nwankwo* [2022] CSOH 7; *McCreery v Letson* [2015] CSOH 153.

[19] See, for instance, *Palmer v Timms* [2024] EWHC 2292 (KB); *Gul v McDonagh* [2021] England & Wales Court of Appeal, Civil Division (EWCA Civ) 1503; *Chisholm v D & R Hankins (Manea) Ltd* [2018] EWHC 3407 (QB).

[20] [2015] UKSC 11, 2015 SC (UKSC) 63, [2015] AC 1430. The case was discussed in ETL 2015 by *Hogg* (fn 11) nos 17–28.

view of the doctor-patient relationship has been replaced by a modern approach based on open discussion and informed patient decision-making.

The pursuer, Mrs Montgomery, was expecting her first child. She suffered from insulin-dependent diabetes, making it more likely that she would give birth to a baby which was larger than normal. As a result of complications during the delivery of her child, the baby was born with severe disabilities. Mrs Montgomery raised an action seeking damages for her child's injuries, alleging negligence on the part of the consultant obstetrician and gynaecologist who had been responsible for her prenatal care, her labour, and the delivery of her baby. Her claim rested on the arguments that (1) the consultant had failed to advise her about the risk that her baby's shoulders might not pass through her pelvis during vaginal birth (so-called 'shoulder dystocia') or to advise her of the alternative possibility of delivery by caesarean section; and (2) the doctor had negligently failed to perform a caesarean section when presented with abnormalities in labour disclosed by cardiotocograph (CTG) data. Her claim was rejected both at first instance and on appeal to the Inner House of the Court of Session, on the basis of expert evidence of standard medical practice,[21] and because, even if she had been given advice about the risk of serious harm to her baby as a consequence of shoulder dystocia, it would have made no difference in any event, because she would not have chosen to have her baby delivered by caesarean section. The Supreme Court overturned the decision of the lower courts, holding the defenders liable for negligence on the part of its medical staff.

The Supreme Court took the view that Mrs Montgomery had been entitled to decide which form of treatment she wanted, and that her consent was necessary before undertaking any treatment. It held that the doctor had been under a duty to take reasonable care to ensure that Mrs Montgomery was made aware of any material risks involved in treatment to be recommended, and of reasonable alternatives or variants. A 'material risk' meant one to which, in any given case, a reasonable person in the patient's position would be likely to attach significance, or a risk of which the doctor was, or should reasonably have been, aware that the particular patient would be likely to attach significance. A doctor was entitled to withhold from the patient information as to a risk if the doctor reasonably considered that its disclosure would be seriously detrimental to the health of the patient, but this therapeutic exception was limited; a

[21] This approach was consistent with the leading English authority of *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

doctor was also excused from conferring with a patient in circumstances of necessity. On the facts of the present case, the court held that it had been incumbent on the doctor to advise Mrs Montgomery of the risk of shoulder dystocia associated with vaginal delivery, and to have discussed with her the alternative of a caesarean section. The doctor's failure to do this was negligent.

As noted earlier, the decision represents a major change in the approach to medical negligence. The approach in the courts prior to the decision in *Montgomery* had supported the view that the doctor had not been negligent, because the risk of shoulder dystocia in vaginal delivery was less than 1%. Under that previous approach, doctors would not ordinarily be held to be negligent if they followed the practice of a responsible body of medical opinion, the medical consensus being that risks of less than approximately 1% need not ordinarily be communicated to patients. However, the new approach of the Supreme Court radically changed the prior law, departing from the previous paternalistic spirit (where doctors made appropriate choices about minor risks) and placing a much greater emphasis on patient autonomy and decision-making in relation to risks relating to medical treatment. The decision represents an authoritative formulation of what had been an emerging tendency in the lower courts towards a more patient-oriented approach in the years before the *Montgomery* decision.[22] The Supreme Court additionally developed this emerging view by making it clear that the assessment of 'significant' risk is not a matter of percentages: a 'material' risk (the description used in *Montgomery*) is a subjective, patient-focused assessment, signifying a risk to which a reasonable person in the patient's shoes would attach significance. A reasonable patient might conceivably take the view that even a statistically insignificant risk was significant if materialisation of the risk would result in serious, adverse consequences. So, doctors must appreciate that risks which they might previously have decided not to mention must now proactively be raised with their patients and, if a patient wishes, must become the subject of discussion and appropriate 'comprehensible' advice.[23]

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[22] So, for instance, in *Pearce v United Bristol Healthcare Trust* (1998) 48 Butterworths Medico-Legal Reports (BMLR) 118, Lord Woolf had remarked (at 124) that 'if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or he should adopt'.

[23] See para 85.

The decision of the Supreme Court (which has been followed in later Scottish and English cases[24]) was a welcome one, reflecting a paradigm shift in the way that medical practitioners and patients were already approaching the doctor-patient relationship. Patients are no longer viewed as the passive recipients of care decisions made in their best interests, but rather as co-operative partners in a doctor-patient dialogue intended to ensure appropriately informed consent by the patient to proposed treatment.

4. *Steel and another v NRAM Ltd*[25]

This decision of the UK Supreme Court is significant in what it confirms about the extent of a practising lawyer's liability to a third party (a party other than the lawyer's client) and about the centrality of the requirement that any reliance placed upon a misrepresentation by a representee must be reasonable if it is to found an assumption of responsibility in delict by the representor.

The relevant facts concerned dealings between the respondent, NRAM Ltd (who were commercial lenders), and the appellant, Ms Steel, a solicitor acting for Headway Caledonian Limited (HCL), to which third party NRAM had extended loan facilities. The loan was for HCL's purchase of four commercial premises, in return for which loan HCL had granted a security over the whole premises. In response to a communication by NRAM indicating that they wished to discharge the security in relation to a portion of the whole premises, Ms Steel replied by email with attachments constituting 'discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that'. Relying on this request, NRAM argued that they were misled by Ms Steel into discharging the entire security when it ought to have been left in place in relation to two of the premises. NRAM argued that their error had been caused by Ms Steel's email, the contents of which constituted a negligent misstatement for which she was responsible. As HCL had gone into liquidation, NRAM claimed damages amounting to approximately £ 458,000 from Ms Steel and her employer.

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[24] Including *Butler v Ward* [2025] EWHC 877; *Bilal v St George's University Hospital NHS Foundation Trust* [2023] EWCA Civ 605; *General Dental Council v Williams* [2023] EWCA Civ 481; *McNab's Executor v Greater Glasgow Health Board* [2020] CSOH 53; it was also applied in *McCulloch v Forth Valley Health Board* [2023] UKSC 26, which is analysed as case number 5 in the main text.

[25] [2018] UKSC 13, 2018 SC (UKSC) 141, 2018 SLT 835, [2018] 1 Weekly Law Reports (WLR) 1190, [2018] 3 All ER 81. The case was discussed in *E Karner/BC Steininger* (eds), European Tort Law 2018 (2019) 563, nos 7–13.

At first instance, the judge held that Ms Steel had owed no duty of care to NRAM when she made the erroneous statement because (1) it had not been reasonable for NRAM to rely on Ms Steel's statements without verifying whether they were accurate; and (2) Ms Steel could not reasonably have foreseen that NRAM would rely on her statements without carrying out such verification. On appeal to the Inner House of the Court of Session, the appeal court (by a 2:1 majority) reversed the judgment at first instance, holding that Ms Steel was liable in delict because she had 'assumed a responsibility' to NRAM in relation to the statements she had made. Ms Steel appealed this decision to the Supreme Court.

The Supreme Court upheld the appeal, affirming that: (1) in an arm's length transaction such as the one before the court, a solicitor owes a duty to their client but will generally not owe a duty to the other party to the transaction; and (2) a representee is required to establish both that it was reasonable to have relied on a representation and that the representor should reasonably have foreseen such reliance. The court stated that a superior court should only set aside the evaluation of a judge at first instance that (a) it was reasonable for the solicitor not to have foreseen that the other party would rely on her representations without first checking their accuracy; and (b) that the reliance placed on those representations by the other party had been unreasonable, if it were satisfied that such evaluation was wrong. In this case, as that evaluation at first instance had been correct, the appeal would be allowed.

The decision provides Supreme Court confirmation of the well-established rule that solicitors in general only assume a duty to advise their own clients, and not the other side in any transaction. There are exceptions to that general rule, and the Supreme Court mentions examples of cases where an exception has applied: for instance, the New Zealand case of *Allied Finance and Investments Ltd v Haddow and Co*,[26] in which a solicitor had issued a certificate to the other party falsely certifying the truth of a particular matter. The Supreme Court thought that the instant case was not an exceptional case of that sort, and considered that the majority of the Inner House had been wrong in thinking that it was. While one of the Inner House judges (Lady Smith) had endeavoured to evaluate the matter of liability by asking whether the solicitor had assumed a responsibility for her representation (holding that the email she had sent indicated that she had), the Supreme Court believed this to be an insufficient enquiry: it was, in addition, necessary to evaluate the reasonableness of any purported reliance on the solicitor's representation.

[26] [1983] New Zealand Law Reports (NZLR) 22.

In reaching its decision, the Supreme Court undertook a full review of the authorities relating to liability for negligent misstatements, beginning with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[27] In that seminal judgment, the House of Lords had emphasised the need for *reasonable* reliance on a representation. Summing up that line of authority, the Supreme Court observed that, '[i]f it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it'.[28] The requirement of reasonable reliance has been reaffirmed in many cases following *Hedley Byrne*, including *Caparo Industries plc v Dickman*.[29] This central requirement is one which a court cannot ignore when deciding whether a representor should be taken to have assumed responsibility for a representation, for (as the Supreme Court notes):

'neither the general jurisprudence relating to liability in negligence for a misrepresentation leading to economic loss nor the focussed jurisprudence relating to a solicitor's liability to the opposite party in that regard supports a conclusion that it is not always necessary for the representee to establish that it was reasonable for him to have relied on the representation. On the contrary, the reasonableness of his reliance on it is … central to the concept of an assumption of responsibility'.[30]

Crucially therefore, even if a representor could foresee that its representation would or might be relied upon by the party to whom it is made, if any such reliance were unreasonable, it cannot give rise to an assumption of responsibility by the representor. The reliance of the representee in this case was not reasonable, so the court held: it is unreasonable to rely, without checking, on a factual matter which is wholly within the knowledge of the representee.[31]

The decision has been followed in some later Scottish[32] and English[33] decisions.

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[27] [1964] AC 465, [1963] 3 WLR 101, [1963] 2 All ER 575.

[28] See para 19.

[29] [1990] 2 AC 605, [1990] 2 WLR 358, [1990] 1 All ER 568.

[30] See para 35.

[31] See para 38.

[32] See *Franks v Inglis* [2021] Sheriffdom of Tayside Central and Fife at Perth (SC PER) 41.

[33] Including *McLean v Thornhill* [2023] EWCA Civ 466; *Benyatov v Credit Suisse Securities (Europe) Ltd* [2023] EWCA Civ 140; and *Ashraf v Lester Dominic Solicitors* [2023] EWCA Civ 4.

5. *McCulloch v Forth Valley Health Board*[34]

The Supreme Court's groundbreaking medical negligence decision in *Montgomery v Lanarkshire Health Board* was discussed above.[35] Its later decision in this case draws a distinction between a doctor's duty to disclose risks of treatment to a patient (the subject of the decision in *Montgomery*), where a 'reasonable patient' test applies, and the extent of any duty of disclosure of possible alternative treatments (the subject of this decision), where the traditional *Hunter v Hanley*[36] test of a responsible body of medical opinion was said by the Supreme Court to continue to apply. The decisions in *Montgomery* and *McCulloch* must therefore be read together to gain a full appreciation of the scope of liability for medical negligence in Scotland.

In *McCulloch*, the courts were faced with a claim in medical negligence brought by the relatives of a 39-year-old man who had died from a cardiac arrest. They alleged that his death had been caused (or materially contributed to) by the negligence of Dr Labinjoh, a consultant cardiologist employed by the defenders. On 1 April 2012, Mr McCulloch had been admitted to hospital with symptoms of severe pleuritic chest pains and vomiting, something for which he had been previously treated the month before. Dr Labinjoh, reviewing the results of an echocardiogram, discounted the likelihood of pericardial constriction and stated that she was 'not certain where to go for a diagnosis from here'. Mr McCulloch thereafter appeared to improve and was discharged, against the wishes of his wife. The following day, Mr McCulloch suffered a cardiac arrest and died. The deceased's family alleged that Dr Labinjoh had been negligent in her assessment of Mr McCulloch's state of health before his release, given the evidence she had had presented to her. It was further argued that, adopting the approach taken by the Supreme Court in *Montgomery*, Dr Labinjoh had failed to warn Mr McCulloch of material risks attendant upon her recommended treatment and of any reasonable alternative treatments (including the use of anti-inflammatory drugs).

At first instance, the judge had held that Dr Labinjoh had been negligent in failing to prescribe anti-inflammatory drugs, but that there had been no breach of a duty to warn of risks of the sort imposed in *Montgomery*, as such a duty could only arise in respect of risks associated with a recommended course of treatment – it did not extend to risks associated

[34] [2023] UKSC 26, 2023 SC (UKSC) 91, 2023 SLT 725, [2024] AC 925, [2023] 3 WLR 321, [2023] 4 All ER 943.

[35] See case number 3.

[36] 1955 SC 200.

with courses of treatment that were *not* regarded, in the doctor's exercise of professional judgement, as reasonable alternatives. In relation to the negligent failure to prescribe the drugs, the judge held that that this negligence had not been demonstrated to be a cause of death. On appeal to the Inner House of the Court of Session, this finding of negligence had been overturned (while the finding on a lack of causation was affirmed).

On appeal to the Supreme Court, the Court affirmed first that the legal test for establishing negligence by a doctor in diagnosis or treatment is whether the doctor has acted in accordance with a practice accepted as proper by a responsible body of medical opinion (the *Hunter* test); and second, that the professional practice test did not apply to a doctor's advisory role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved (the *Montgomery* exception). As to which of those tests should be applied to the assessment of whether an alternative treatment is reasonable and requires to be discussed with the patient, the Court held that the identification of reasonable alternatives was as much a matter falling within medical expertise and professional judgement as the identification of risks associated with any treatment. The narrowing down from possible to reasonable alternatives was an exercise of clinical judgement to which the professional practice test should be applied. It was only once the reasonable alternatives had been identified that the doctor's advisory role arose, and the duty of reasonable care required the doctor to inform the patient not only of the recommended treatment option but also the reasonable alternatives (plus 'no treatment', if that were a reasonable alternative) indicating their respective advantages and disadvantages and the material risks involved.

In this case, because the doctor had decided that prescribing anti-inflammatory drugs was not a reasonable alternative treatment, and because that view was supported by a responsible body of medical opinion, there had been no breach of any duty of care owed to the patient. The appeal by the deceased's relatives was therefore dismissed.

This decision offers a welcome clarification on the proper test to be applied in certain circumstances of patient-doctor interaction. The Supreme Court's view is that, at stage one, when deciding whether it is reasonable to give specific advice or information to a patient, the medical professional can exclude matters which a reasonable body of medical opinion would consider it inappropriate to raise with a patient, this extending to unreasonable forms of treatment (the *Hunter* test); thereafter, at stage two, having exercised professional judgement at the first stage consideration, the medical professional must provide the advice or infor-

mation that a reasonable patient would wish to have in the circumstances, including information about material risks relating to any treatments which have not been excluded at stage one (the *Montgomery* test).

XXVI. Slovakia

Anton Dulak

1. Judgment of the Supreme Court of the Slovak Republic, 31 July 2017, Case No 6 Mcdo 1/2016[1]

The court decision in this case deals with liability for the non-pecuniary loss suffered in cases of death of a close relative and the question as to whether insurers will be liable for such damage.[2]

The claimants filed a claim for damages after the death of their mother in a motor accident. The claim was brought against defendant 1 (driver of the motor vehicle) and defendant 2 (insurance company). The court of first instance confirmed the claim to its full extent and the appellate court affirmed this ruling. The Supreme Court examined the decisions of both courts and concluded that the conditions for filing an extraordinary appeal had been met.

Slovak courts began dealing with the issue of compensation for damage caused by the death of a loved one about 20 years ago. One of the first cases is an unpublished judgment of the Prešov District Court (6C 67/04-89) of 18 October 2006. In her claim, the claimant alleged that, on 24 September 2002, her mother died during childbirth due to the incorrect and non-professional conduct of a physician, the defendant's employee. According to the claim, as a result of the death of the claimant's mother, the claimant suffered emotional distress and her right to the protection of privacy and family life was violated (§ 11 of the Civil Code).

In its interpretation of the law and its application to private law, the Court went beyond the previously narrow understanding of damage caused by unlawful and unauthorised interferences with privacy, invoking, in its reasons for the decision, also the case law of the European Court of Human Rights (ECtHR), more specifically the judgments in *Niemnitz v Germany*[3] and *Marckx v Belgium*[4]. The Court's decision was based on the provisions of the Constitution of the Slovak Republic (art 19

[1] ECLI:SK:NSSR:2017:4613209266.1; Coll no 61/2018.

[2] Case reported by *A Dulak*, Slovakia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2018 (2019) 589, nos 2–11.

[3] ECtHR 16.12.1992, no 13710/88.

[4] ECtHR 13.6.1979, no 6833/74.

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para 2), the Convention for the Protection of Human Rights and Fundamental Freedoms (art 8 para 1) and § 11 of the Civil Code governing the protection of private and family life.

This broader, Euro-compliant understanding of non-pecuniary damage, advocated from the outset by some theorists[5] and some judges,[6] has not been accepted without strong reservations. The Constitutional Court of the Slovak Republic also expressed its opposition to the possibility of claiming damages for such harm in a 2014 ruling.[7] The argument was that there is no basis to file a claim for compensation based on the protection of personality rules. It was argued that there is a difference between 'compensation for damage' and 'non-pecuniary damages'.[8] It was also stated that demands for compensation of immaterial damage, raised by the claimant, are already covered by art 444 of the Civil Code. Proponents of a broader concept of harm, on the other hand, argued that both claims are separate legal remedies for the protection of natural persons. As regards the mutual relationship between the two claims, judicial practice has established that these claims are not mutually exclusive: on the contrary, these institutions are interlinked.[9]

Later, the dispute focused on determining whether the party responsible for this damage should only be the person who actually inflicted the damage or whether the insurance company could also be held liable. The main argument was that the term 'damage', as defined in Act no 381/2001 on Compulsory Contractual Motor Vehicle Third-Party Liability Insurance, does not cover a claim for compensation of immaterial damage caused by the infringement of personal rights of the deceased and compensation is not covered by insurance, as defined by art 4, para 2, letter a of Act no 381/2001.

This legal opinion has also been confirmed by the highest judicial authorities. First, the Constitutional Court of the Slovak Republic stated in its 2014 ruling[10] that 'damage suffered as a result of an infringement

[5] *A Dulak*, Liability for Damage, in: M Števček/A Dulak et al, Civil Code – Commentary I, §§ 1–450 (2015).

[6] See the dissenting opinion of Judge Rudolf Pirč in the decision of the Supreme Court of the Slovak Republic of 20 April 2011, Case No 4 Cdo 168/2009.

[7] Judgment of the Constitutional Court of the Slovak Republic of 13 August 2014, Case No I. ÚS 426/2014-31.

[8] Judgment of the Supreme Court of the Slovak Republic of 20 April 2011, Case No 168/2009.

[9] Judgment of the Supreme Court of the Slovak Republic of 28 May 2014, Case No 7 Cdo 65/2013.

[10] Judgment of the Constitutional Court of the Slovak Republic of 13 August 2014, Case No I. ÚS 426/2014-31.

of privacy is to be compensated by the party who is responsible for this infringement only and not by the parties who did not infringe personal rights'. A later decision by the Supreme Court in 2016[11] states that the answer to whether damage caused by the death of a close person is covered by mandatory contractual insurance should be found in the contents of the insurance contract itself. A semantic interpretation of the terms of the insurance contract shows that the term 'damage' only applies to a loss in the material sphere of the injured party, and not to compensation for immaterial harm. In the case of immaterial damage, claims, as defined by art 13 CC, are to be brought only against those who have committed the act of violating another's personal integrity and this is not applicable in relation to an insurance company.

The judgment of the Supreme Court of the Slovak Republic of 31 July 2017, Case No 6 MCdo 1/2016 can be considered important because its publication in the Collection of Court Decisions is intended to prevent the continuation of controversial interpretations of the provisions on compensation for non-pecuniary damage caused to third parties by the operation of a motor vehicle. Thus, the Supreme Court of the Slovak Republic has provided a legal opinion on two previously disputed issues: firstly, damage, as defined by Law no 381/2001 Coll on Compulsory Motor Third-Party Liability Insurance, includes any immaterial harm which is based on the breach of personal rights of the surviving relatives of a victim of a motor road accident caused by the operation of a motor vehicle. Secondly, in the dispute regarding the compensation of this damage, the insurance company is passively legitimised. By publishing it in the Collection, this decision should be considered a model interpretation of legal norms. The Supreme Court's ruling thus has very strong precedential significance.

2. Judgment of the Constitutional Court of the Slovak Republic, 24 October 2017, Case No II. ÚS 716/2016[12]

The Constitutional Court's decision addresses the issue of causality in certain medical cases where the requirement to prove causality beyond reasonable doubt is inappropriate.

In a healthcare facility where blood and blood plasma were collected, an epidemic of infectious viral hepatitis C broke out between 1976 and

[11] Judgment of the Supreme Court of the Slovak Republic of 31 March 2016, Case No III. Cdo 301/2012.

[12] ECLI:SK:USSR:2018:2.US.716.2016.1.

1977 due to an unprofessional blood plasma extraction process. Claimant 1 was one of more than 300 donors who contracted infectious viral hepatitis C while donating blood for plasmapheresis. In 1986, at the request of the hospital and in order to save lives, he also donated blood for his newborn children (claimant 2 and claimant 3). Claimant 1 did not know that he was infected because, for political reasons, it was forbidden at that time to disseminate information about the epidemic. Had he known about the infection earlier, he would have refused to donate blood. Health problems caused by the infection later manifested themselves in all three claimants.

The district court dismissed the action in its judgment of 6 November 2007. The regional court in Bratislava overturned the judgment and referred the case back for further proceedings. The district court again ruled to dismiss the claimants' action in its entirety as unfounded. Claimant 1 lodged an appeal against the regional court's judgment.

The defendant's main argument was that the causal link between blood plasma donations between 1972 and 1977 and the diagnosis of hepatitis C had not yet been proven. Referring to the conclusions of expert opinions, the causal link had not been clearly proven, as other forms of hepatitis C infection, which can also be transmitted in other ways (medical procedures, sexual intercourse, unknown transmission, etc), could be ruled out. According to the defendant, it is not sufficient to make a general consideration of the possible consequences of the tortfeasor's actions or to admit the possibility of damage occurring as a result of their unlawful actions, but causality must be established with certainty. Given that the existence of a causal link cannot be presumed, it must be proven beyond reasonable doubt: mere probability is not sufficient.

The Constitutional Court considered it necessary to state that, from the point of view of evidence in court proceedings, determining the degree of procedural knowledge of decisive facts with absolute certainty is a relatively difficult task. Any evidence of an alleged fact is, in principle, only evidence of its probability. For this reason, there is always a degree of uncertainty involved in proving anything. Absolute certainty that does not allow for any theoretical doubts about a different course of events cannot, for this reason, be considered as a measure of proof if, at the same time, such a requirement places the party bearing the burden of proof in an objectively insurmountable evidentiary situation.

One area where these problems are particularly prominent is in medical-legal disputes. A characteristic feature of these relationships is a significant information asymmetry between the level of knowledge of the healthcare facility and the patient, to the detriment of the patient.

The objective limitations associated with proving causality, as well as the weaker position of the injured patient, are factors that, within the framework of standard evidentiary syllogism, often lead to unfair outcomes. The burden of proof regarding the causal link between the harmful event and the damage suffered by the patient is, as a rule, the reason for the patient's failure in the dispute when the 'all-or-nothing' principle is applied. Such a solution appears to be unfair, especially in cases where the truthfulness of the plaintiff's factual allegations is supported by a high degree of probability.

In such cases, it is necessary to take into account other elements on which the system of liability law is based and to consider them in the context of objective causal uncertainty and unequal positions so that the outcome corresponds to the principles on which liability for damage is constructed. In principle, it is a matter of balancing two conflicting interests, namely the right of the injured party to compensation and, on the other hand, the interest in ensuring that the obligation to pay compensation is borne only by the person who actually caused the damage or could have prevented it by their actions. It is therefore necessary to distribute the uncertainty regarding the causal link fairly. The requirement for a fair balance between the factual inequality of the parties to the dispute is, in principle, fulfilled if, in case of doubt, the decision is made in favour of the party who suffered the damage.

Therefore, according to the Supreme Court, the task of the regional court in further proceedings will be to assess the likelihood of transmission of this viral disease to the claimant, using the method of excluding less probable variants and determining the most probable variant, established by the criterion of an objective, rationally thinking person, taking into account the usual course of events at the time when the viral disease was transmitted to the claimant in the first instance (so-called prima facie evidence) so that there are no reasonable doubts as to the veracity of the facts thus established, even if alternative possibilities for the course of decisive events cannot be completely ruled out in theory.

The Constitutional Court's ruling changes the previous rigid view of causality. For a long time, the *conditio sine qua non* test was recognised as a standard test in establishing liability for damage in Slovakia in all types of cases (see R 7/1992, R 21/1992). The courts often emphasised that the cause of the damage must be substantial, significant and the relationship between cause and effect must be direct.[13] The directness

[13] Judgment of the Supreme Court of the Czech Republic of 30 November 1976, Case No 2 Cz 36/76, published under R 7/1979.

of the cause and effect is sometimes referred to as the 'immediacy' of the cause of the damage, otherwise it would be a mediated relationship.[14]

The abandonment of 100% causal connections came gradually in the context of medical disputes.[15] The cited ruling of the Constitutional Court from October 2017 is not the first decision on the application of the probability test.[16]

The significance of the Constitutional Court's 2017 decision lies in emphasising that in certain cases, particularly in disputes arising from relationships between doctors (healthcare facilities) and patients (clients), the requirement to prove causality beyond reasonable doubt is inappropriate. It is too early to say whether this ruling will also apply to other (similar) situations involving an asymmetrical position between the plaintiff and the defendant. It is equally doubtful that the concept of probability will become the standard for all relationships arising between doctors and their patients in cases of medical malpractice.

3. Judgment of the Regional Court of Trnava, 23 March 2022, Case No 24 Co/71/2021[17]

The decision of the Court of Appeal represents a turning point in the approach to proving causality in medical disputes. It addresses the exceptional situation of the injured party – the impossibility of proving causation where it cannot be objectively determined by any means.[18]

The plaintiff was examined at the University Hospital in 2009. On the third day after her admission to hospital, the plaintiff underwent a cerebral Digital Subtraction Angiography (DSA), after which her condition deteriorated. The plaintiff claimed compensation for damage from the University Hospital in Trnava (the defendant). The court of first instance

[14] Judgment of the Supreme Court of the Slovak Republic, Case No 2 Cdo 292/2006, published under No 2 ZSP 1/2008.

[15] Judgment of the Constitutional Court of the Czech Republic of 26 April 2012, Case No II. ÚS 2682/11; Judgment of the Regional Court in Prešov of 30 November 2016, Case No 10 Co/95/2016.

[16] One of the very first is the decision of the Constitutional Court of the Czech Republic, file no I. ÚS 1919/08. Here, the appellate court argued that the 70% to 80% probability cited by the experts was sufficient to conclude that there was a causal link between the defendant's incorrect procedure and the death of the injured party.

[17] ECLI:SK:KSTT:2022:2112218563.3.

[18] Case reported by *A Dulak*, Slovakia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 573, nos 35–50.

awarded damages for the social hardship and dismissed the claim for pain and suffering on the grounds that it was time-barred. The Court of Appeal upheld the decision of the court of first instance.

In determining causation, the court took into account the expert's opinion, which determined that the most likely (up to 99%) cause of the injury was the performance of the DSA. The court pointed out that sometimes proving the existence of a causal link is difficult or impossible. The impossibility of proving causation arises in particular in the case of liability for damage caused by malpractice in the provision of health care. In medicine, with the present level of knowledge, in the vast majority of cases it is not possible to be absolutely certain about causation, but only to state a certain probability, and that absolute proof of the causal nexus is unrealistic, unattainable and unsustainable in medicine.

This is due in particular to the nature of the human body as a living organism. This is reflected in the fact that, even when effective treatment is provided, the desired consequence of eliminating the disorder is not always guaranteed. In other words, it will not always be possible to establish that it was the failure to provide medical care which caused the consequence of the patient's failure to recover.

According to the court's decision, the theory of loss of a chance is an alternative to the classical concept of liability for damage in cases where the plaintiff (the injured party) is unable to establish with certainty a causal link between the defendant's breach of a legal duty and the occurrence of the damage. The most characteristic feature of this theory is that the plaintiff does not have to prove a 100% causal link between the defendant's conduct and the damage: they must, however, show that, but for the defendant's conduct, they would have had a better chance of a more favourable outcome. In other words, the plaintiff must show both that there was a possibility of a better outcome and that this possibility was adversely affected (or entirely frustrated) by the defendant's unlawful conduct (the harmful event).

According to the legal opinion of both the court of first instance and the Court of Appeal, it is unacceptable that patients who have suffered personal injuries should be burdened with a 100% onus of proof. According to the Court of Appeal, the doctrine of loss of a chance appears to be fair because it is consistent with the principle of proportionality, which also sufficiently protects the injured party.

The fact that both the substantive and procedural legislation in question does not normatively define the concept, the search for answers to these questions is primarily a task of the application of the law manifested in the decision-making activity of the public authorities.

When it comes to explaining the concept of loss of a chance, court rulings do not provide entirely clear positions. In the judgment of the Constitutional Court of the Czech Republic of 2008 as well as in the judgment of the Constitutional Court of the Slovak Republic of 2021, reference is made in their arguments to the case of *Gregg v Scott*,[19] but without detailed explanation.

The judgment of the Regional Court of Trnava of 2022 states that the most characteristic feature of the theory of loss of a chance is that the plaintiff does not have to prove a 100% causal link between the defendant's conduct and the damage: they must, however, show that, but for the defendant's conduct, they would have had a better chance of a more favourable outcome. In other words, the plaintiff must show both that there was a possibility of a better outcome and that this possibility was adversely affected (or entirely frustrated) by the defendant's unlawful conduct (the harmful event). The damage occurs through a reduction in the hope of achieving a better result, and the requirement of proving a causal link is significantly weakened and must be excluded when the loss of a chance itself is not hypothetical (negligible) but the chance of a better result was real. According to the theory of loss of a chance, it is sufficient to prove that the defendant's actions deprived the plaintiff of a certain opportunity to prevent the damage from occurring or to reduce the severity of the harm suffered. It is therefore not necessary to prove that the tortfeasor is fully liable for the entire harm. However, if the relationship between cause and effect is too hypothetical, the plaintiff will not succeed with their claim even if this theory is applied.

The judgment of the Regional Court in Trnava and a later decision of the Prešov District Court[20] offer solutions in certain specific (medical malpractice) cases. Such acceptance of the loss of a chance theory represents a huge leap in the reasoning of Slovak courts willing to change their assessment of the situation of the injured party, who very often finds themselves in a situation where they lack evidence, through no fault of their own. The cause is not only the poorer availability of evidence (eg medical records), less knowledge of the environment, but also objective obstacles – the impossibility of proving causation where it cannot be objectively determined by any means.

[19] [2002] Court of Appeal (Civil Division) (EWCA Civ) 1471 per Latham LJ at [39]; confirmed by *Gregg v Scott* [2005] United Kingdom House of Lords (UKHL) 2; [2005] 2 Weekly Law Reports (WLR) 268).

[20] Judgment of the Regional (Appeal) Court in Prešov of 10 December 2024, Case No 5 Co/29/2024.

4. Judgment of the Regional Court Nitra, 2 October 2013, File no 9 Co/330/2012[21]

The court's decision from 2013 is significant not only because of the highest amount of compensation ever awarded for personal injury in Slovakia. Perhaps greater attention should be paid to the reasons why the court ruled this way.[22]

Claimant 1 had undergone a simple nasal septum surgery. During the operation and subsequent post-operative care, the hospital (its employees) committed a serious breach of several of their obligations, which resulted in claimant 1's irreversible and permanent brain damage, termed as permanent vegetative state (pseudo coma) or 'social death'.

Claimant 1, claimants 2 and 3 (parents of claimant 1) and claimants 4 and 5 (siblings of claimant 1) demanded the payment of compensation for injury. With minor modification, the county court, as a court of appeal decided in favour of the claimants. The court ordered the defendant to pay to claimant 1 € 17,942 as compensation for pain, the amount of € 181,667 as compensation for reduced capacity for social life and the amount of € 200,000 as compensation for immaterial injury due to the infringement of his right to health. Furthermore, it ordered the defendant to pay to claimant 2 the amount of € 90,000; claimant 3 the amount of € 90,000; and claimants 4 and 5 € 10,000 each as compensation for the immaterial injury suffered due to the infringement of their right to privacy.

The court ruling is noteworthy for several reasons. Firstly, the court accepted the idea that compensation claims for damage to health are specific claims in relation to general claims accrued in the regime of personality rights.

Furthermore, when examining the preconditions for liability for the damage caused, the court did not focus solely on the unlawfulness of the defendant's conduct. The court argued that the defendant's position in society could not be ignored. According to the court, when examining the possibility of preventing damage to another person's health, a higher degree of responsibility must be imposed on doctors as professionals than that imposed on laypersons, ie non-professionals.

The court, when considering the basis for awarding damages under sec 11 of the Civil Code, was also concerned with the function of this legal institute. According to the court, the decisive goal should not only

[21] ECLI:SK:KSNR:2013:4109209960.5.

[22] Case reported by *A Dulak*, Slovakia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 589, nos 5–23.

be satisfaction, but also prevention and deterrence, thus damages should become a tool to achieve the aim of prevention, both special and general. Therefore, the court expressly states that this judgment serves as a warning to all doctors that the obligation to proceed *lege artis* is a fundamental duty of the physician in the exercise of his profession.

In its reasoning, the court paid particular attention to the question of the degree of culpability of the tortfeasor – when assessing culpability, it is necessary to evaluate the degree of gross negligence or even a series of grossly negligent acts of the tortfeasor. Subsequently, the seriousness of the infringement should be reflected in the amount of monetary satisfaction awarded. The court therefore took particular account of the fact that serious complications arose solely as a result of the negligence of the defendant's doctors. According to the court, 'this was a case of incredible contempt for life and health in a place where people paradoxically entrust themselves to the hands of doctors and expect them to fight for their health and lives using all their abilities.' The court explained the appropriateness of the compensation because 'such an unprofessional and negligent approach by the defendant cannot be justified.' The court also took into consideration the circumstances under which the health damage had occurred. It held that claimant 1 had undergone a simple operation; it was not therefore a risky type of surgery where the chances of its success were minimal.

In determining the amount of compensation awarded, the court applied established criteria. The amount of compensation for claimant 1 was justified on the ground that he '...was young, very gifted... from which it is obvious that he approached the preparation for life in order to further himself as best he could in life.' When determining compensation for claimants 2 and 3, the court argued that the amount determined by the court of first instance was deduced from the unimaginable pain and despair which they must endure as a result of the injury to claimant 1's health, whereby this effect is even worse because they have to witness this pain on a daily basis without any hope that this condition will improve in the future. The consequences of the damage to health also have repercussions for claimants 4 and 5, who cannot receive the care and attention that they need due to the daily care of claimant 1, who needs parental care at all times, 24 hours a day.

Proving their very close relationship with claimant 1 was important in determining the amount of compensation for the siblings. On the other hand, the court reduced the compensation which was originally sought on the grounds that claimants 4 and 5 were young, could continue their education and were likely to start families themselves and would be able to live a full life, which could not be said of their parents.

The cited court decision certainly deserves attention for several reasons. First and foremost, it deals precisely with all the prerequisites for liability for damage. It does not only note that the defendant breached his duty but further emphasises that the defendant is a physician who, given his position in society, is expected to demonstrate a high level of professionalism. The court describes the physician's conduct as gross negligence, even though the Civil Code does not explicitly use this term. On this basis, the court decided on a high compensation award, which is not only intended to constitute satisfaction, but also a certain form of warning. Finally, when determining the amount of compensation, the court takes into account the nature of the damage – in terms of the effects of the damage ie, the pseudo comatose state of claimant 1, which could be argued to be worse than death.

5. Judgment of the Regional Court Žilina, 28 September 2022, Case No 7 Co/122/2022[23]

The analysed court decision is the first judgment in which a court passed a decision on compensation for damage caused by a protected animal.[24]

On the basis of the results of an investigation, it was established that the death was caused by an animal, namely a brown bear (Ursus arctos). The deceased's wife (plaintiff 1) and her two daughters (plaintiff 2 and plaintiff 3) sought compensation for the loss suffered as a result of the death of their husband and father. The plaintiffs asserted their claim against the District Office Ružomberok, Department of Environmental Care (defendant 1) and the Ministry of the Environment of the Slovak Republic (defendant 2). In its judgment, the District Court ordered defendant 2 to pay non-pecuniary damages in the amount of € 30,000 to plaintiff 1, and € 15,000 each to plaintiffs 2 and 3, a decision which was upheld by the Court of Appeal.

The decision in this case required the resolution of several legal issues. Firstly, the current Civil Code (Act No 40/1964 Coll) has no express provision on liability for damage caused by an animal (domestic or wild). The liability of defendant 2 was established pursuant to sec 97 ff of Act No 543/2002 Coll on nature and landscape protection, since it is the Ministry of the Environment which issues the decree establishing the list of animals[25] for which the State is liable.

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[23] ECLI:SK:KSZA:2022:5921202017.1.

[24] Case reported by *Dulak*, ETL 2022 (fn 18) nos 2–13.

[25] The brown bear (Ursus arctos) is listed in Annex 39.

Secondly, it was necessary to decide whether the provisions on State liability for damage caused by protected animals concerns only compensation for pecuniary damage and not rights of a non-pecuniary nature as was argued by defendant 2. The Court of Appeal did not accept this argument and referred to the case law on compensation for emotional harm suffered by secondary victims in traffic accident cases.[26]

Thirdly, the defendant disagreed with the reasoning of the court of first instance that it had failed to properly fulfil its obligations in implementing measures to regulate the number of brown bears, or that it had failed to provide a natural environment in which there would be no encounters with bears. In its submissions, it pointed out that deaths caused by brown bears are *vis maior* and that there is no connection between the regulation of brown bears and the number of attacks or deaths caused by dangerous encounters between brown bears and humans. It is not possible to conclude with certainty that there will be fewer dangerous encounters between brown bears and humans if 'the necessary regulatory measures' are taken. The Court of Appeal did not accept this objection, arguing that the State's liability arises from the special liability regulation, which is objective in nature. The State is therefore liable irrespective of whether it properly fulfilled its obligations to regulate the number of brown bears or whether there is an overpopulation of brown bears.

Determining the amount of compensation also proved problematic, since similar claims have not yet been decided by the Slovak courts. The court stated that the amount of compensation was established in the range of € 10,000 to € 30,000 for one victim (depending in particular on the intensity and quality of the relationship with the primary victim), or possibly less. However, higher amounts are not entirely exceptional.

The case has become the subject of controversy. Among other things, the media commented extensively on the amount of compensation awarded for the loss of a loved one in relation to the social value of the bear, which is € 5,000 and the amount to be paid for a permit to shoot a bear is approximately the same.[27] The court's decision prompted a promise to amend the relevant laws, which has not yet been fulfilled. However, the cited decision from 2022 influenced further judicial practice. The judgment of the Regional Court in Banská Bystrica of 15 January 2024, Case

[26] An example is the liability of the operator of a means of transport under sec 427 of the Civil Code.

[27] According to Decree No 170/2021. Source: <https://zasahovytim.sopsr.sk/medved-hnedy/>.

No 14 Co/59/2024[28] is one such example. In this case, the court awarded compensation for damage to personal rights to a plaintiff injured by a brown bear, together with compensation for pain and suffering and social hardship. The Court of Appeal considered the amount of € 15,000 awarded as non-pecuniary compensation to be appropriate, as this amount represents half of the amount awarded to secondary victims who lost a close family member as a result of an encounter with a protected animal (brown bear).

Against the defendant's objections regarding the extent of his obligation to pay damages, the court considered it necessary to emphasise that '...the reason for adopting the 2002 act on nature and landscape protection is, on the one hand, the prevailing social interest in protecting and preserving endangered animal species, but at the same time, it is the acceptance of legitimate demands by those who are affected by the damage caused. The State should ensure compensation for the damage incurred, mainly because of the society-wide interest in protecting these species.'

[28] ECLI:SK:KSBB:2024:6623203320.1.

XXVII. Slovenia

Barbara Novak and Gregor Dugar

1. Judgment of the Supreme Court II Ips 360/2001, 21 February 2002

The first case deals with liability for a dog bite. The defendant's dog, kept for the purpose of guarding property, had a naturally vigilant and stern disposition, though it remained within the normal behavioural limits of the shepherd breed. The dog was chained[1] in the backyard behind the defendant's house, where the defendant and her neighbour – the plaintiff's grandmother – were engaged in conversation. They stood in close proximity to the dog, with the defendant herself even within its reach. At the time of the incident, the plaintiff, then ten years old and familiar with the conditions on the defendant's property, saw his grandmother from the street. He entered through the wide-open front gate of the yard and proceeded past the house toward the backyard. When the defendant and the grandmother noticed him at a distance of about nine metres, the grandmother warned him to be careful of the dog. Despite this warning, the plaintiff continued forward and stepped into the area within the dog's reach. At that point, the dog attacked from behind, biting his left leg and causing injuries for which the plaintiff sought compensation. The court of first instance granted the claim only in part, finding the defendant liable for 40% of the damage, while attributing 60% contributory negligence to the plaintiff. On appeal, however, the court adjusted the apportionment of liability, holding the defendant responsible for 50%.[2]

The Supreme Court granted the plaintiff's request for revision of the appellate court's decision. In its view, both the trial court and the appellate court erred in apportioning liability between the parties. The Court

[1] The tethering of dogs is now prohibited under art 15 of the Animal Protection Act (Zakon o zaščiti živali) – Uradni list RS Nos 38/2013 – official consolidated text, 21/2018, 92/2020, 159/2021, 109/2023, 12/2025, 60/2025.

[2] About these questions see also *G Dugar*, Slovenia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2021 (2022) 571, nos 1–2 and *B Novak*, Slovenia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 585, nos 19–22.

https://doi.org/10.1553/978OEAW51463-Slovenia

ultimately held that the defendant's share of responsibility amounted to 70%. It stressed that the appellate court had failed to accord sufficient weight to the circumstances established on the defendant's side of the case. The lower courts had correctly identified but insufficiently considered several key factors: the defendant did not adequately secure access along the side of the house where the incident occurred; the event could have been prevented had she locked the wider entrance gate; she could reasonably have foreseen that the plaintiff would join his grandmother and the defendant in the backyard; the dog was sometimes kept on a longer chain and at other times on a shorter one, creating uncertainty about the extent of its reach; and in the specific situation, the defendant failed to take any action. The Supreme Court further emphasised that the issue extended beyond the defendant's failure to secure entry to the backyard and prevent visitors from coming within the chained dog's reach. Crucially, the incident occurred in the defendant's immediate presence: she herself was standing within the dog's reach, she observed the plaintiff approaching, yet she failed to intervene. The Supreme Court reiterated that an owner has a duty to maintain control over their dog. Having seen the plaintiff approach, the defendant could have anticipated the risk and prevented the attack by issuing a command or restraining the chain. In this context, the plaintiff's familiarity with the backyard and his disregard of his grandmother's warning could not be regarded as a contribution to the damage equivalent to that of the defendant. The Court further observed that ignoring the grandmother's warning was likely the product of a child's misjudgement, and that a ten-year-old cannot reasonably be held to the same standard of judgement as an adult. Accordingly, the Supreme Court allowed the plaintiff's revision in this respect and determined that the defendant's share of liability was 70%, with the plaintiff bearing responsibility for the remaining 30%.

The judgment under discussion is grounded in the principle that where an animal causes injury, its keeper is liable unless they can demonstrate that they exercised due care in safeguarding or supervising the animal (para 2 art 158 of the Code of Obligations;[3] previously applied *mutatis mutandis* under § 1320 of the Austrian Civil Code of 1812, including its subsequent amendments[4]). Relying on this rule, and reinforced by the

[3] Obligacijski zakonik, Uradni list RS Nos 97/2007, 64/2016, 20/2018.

[4] Following the 1946 federal Yugoslav law, which annulled all pre-war regulations dating from before 6 April 1941 together with those enacted under occupation, Slovenia has been without a civil code – Act on the Annulment of Regulations Enacted before 6 April 1941 and during Enemy Occupation [Zakon o razveljavitvi predpisov, izdanih

judgment in question, the courts have gradually developed a consistent line of jurisprudence which has both refined the scope of dog owners' liability and concretized the otherwise open-textured legal standard of 'supervision of a dog'. The function of supervision is to ensure, in an effective manner, that the animal does not inflict harm. The extent and form of such supervision must be tailored to the specific circumstances that the owner could, or ought to, have anticipated. Consequently, liability arises, for instance, where a dog causes damage after breaking free from its chain, when it has been allowed to roam unrestrained, or even where it was kept on a chain but no visible warning sign alerted others to its presence. A central element in adapting supervision to a given situation is the dog owner's duty to be aware of the specific characteristics of the animal. Where a dog poses a danger, the owner must adjust the measures of care and control accordingly and anticipate potentially hazardous situations. This duty is particularly pressing in circumstances indicated by prior experience or earlier incidents. It is especially relevant where the dog has repeatedly exhibited aggression, has previously attacked or injured people, or has done so under comparable circumstances. The greater the danger the animal presents, the more rigorous and stringent the supervision required. Supervision must therefore be tailored to the dog's potentially dangerous traits. Appropriate measures may include shortening the chain, enclosing the yard with a sufficiently high fence, or placing the dog in a space where it cannot come into direct contact with passers-by. The use of a muzzle can also prevent harm, or at the very least mitigate its extent.[5]

Case law has also contributed to defining the legal term 'keeper of a dog'. According to judicial practice, the term 'keeper', who bears liability for damage caused by a dog to third parties, is broader than the term 'owner.' A keeper is any person to whom the dog has been entrusted for care and supervision, even if that person is not the owner. In such cases, liability for the damage attaches to the keeper,[6] and not necessarily, or even at all, to the owner. An owner who entrusts their dog to another person is, under case law, not liable if they exercised sufficient care in selecting the person to whom the dog was entrusted for safekeeping and

pred 6. aprilom 1941 in med sovražno okupacijo], Uradni list Federativne ljudske republike Jugoslavije no 86/1946. Following the annulment, the provisions of the Civil Code continued to be applied insofar as they were not otherwise regulated or were not inconsistent with the new legal order. The provisions on liability for animals, in particular, continued to be applied in this manner until the adoption of the Code of Obligations in 2007, which expressly regulated this matter in art 158.

5 Judgment of the Supreme Court II Ips 111/2021, 12 January 2022.

6 Judgment of the Supreme Court II Ips 485/2007, 26 February 2009.

supervision.[7] Such care is absent, for example, where a Rottweiler was entrusted to the owner's mother, who was unable to control the dog and clearly unfit for the task,[8] or where the dog was entrusted to a child. The keeper may also be liable to the owner if the owner suffers harm caused by a dog that is no longer under their direct care and supervision (for instance, where a daughter, as the owner, permanently entrusted the dog to her parents for safekeeping and supervision).[9] The status of keeper may also be shared by several individuals. This typically arises where the dog forms part of the community property of spouses and, therefore, their joint ownership, without its care and supervision being entrusted to one spouse alone. In such circumstances, the spouses' liability for damages is joint and several.[10] Finally, the liability of a dog's keeper may be partly excluded where the injured party contributed to the occurrence of the damage by provoking an otherwise uncontrolled dog, teasing it, or neglecting to protect themself against it.[11]

Case law generally assesses the liability of a dog's keeper according to the principles of fault-based liability (para 2 art 158 of the Code of Obligations). In exceptional circumstances, a dog may satisfy the statutory criteria for classification as a dangerous animal, in which case the keeper's liability is assessed under the rules of strict liability. Pursuant to the Animal Protection Act,[12] a dangerous dog is one that endangers its surroundings due to uncontrollability, exhibits aggressive behaviour toward humans, or has bitten a person or another animal. The Act, however, explicitly excludes certain situations from this definition. A dog is not considered dangerous, for example, where a bite results from unlawful entry into a building or fenced property clearly marked with a warning sign; where the bite occurs during handling in the course of a veterinary procedure; or where the dog, being under six months of age, bites once, provided its date of birth was entered in the central register of companion animals prior to the incident. In such cases, it is the official veterinarian who, in inspection proceedings, issues the decision designating the dog as dangerous and records this status in the central register (art 11.a of the

[7] Judgment of the Supreme Court II Ips 267/2011, 20 February 2014.

[8] Judgment and decision of the Supreme Court II Ips 267/2011, 20 February 2014.

[9] Judgment of the Supreme Court II Ips 267/2011, 20 February 2014. See also *B Novak*/*G Dugar*, Slovenia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 566, nos 16–19.

[10] Cf judgment and decision of the Supreme Court II Ips 504/2004, 16 June 2005.

[11] Judgment and decision of the Supreme Court II Ips 98/2006, 8 May 2008.

[12] Uradni list RS Nos 38/2013 – official consolidated text, 21/2018, 92/2020, 159/2021, 109/2023, 12/2025, 60/2025.

Animal Protection Act). The Act further requires both animal keepers and transporters to ensure the physical restraint of dangerous animals. Specifically, dangerous dogs must be secured either on a leash and with a muzzle, confined within a kennel or enclosed structure, or kept in a fenced area with a fence at least 1.8 metres high, marked at the entrance with a warning sign (art 12 of the Animal Protection Act). If injury is caused by a dangerous dog, the keeper's liability is strict. This means that liability attaches irrespective of the precautions taken, such as confining the dog in a kennel, keeping it leashed, or fitting it with a muzzle.

2. Decision of the Supreme Court II Ips 21/2024, 3 December 2024

This case concerns depression as a consequence of the failure to properly maintain a stormwater manhole. The municipality failed to remedy a defect in the infrastructure situated on its property, namely an inadequately constructed wastewater drainage system. The inspection chamber J1 on the municipal road was undersized and improperly built, while the gradient of the stormwater sewer was excessively steep. Consequently, between 1991 and August 2016, stormwater repeatedly overflowed onto the plaintiff's land, causing recurrent flooding. From 1991 onwards, the plaintiff persistently sought rectification of the problem, initially from the municipality's legal predecessors and later from the municipality itself. In August 2016, after decades without resolution, he undertook remedial works at his own expense by constructing a grit chamber (inspection chamber J2) on his property, which successfully prevented further flooding. He claimed that the municipality's prolonged inaction over a period of 25 years caused him severe stress. The stress caused the plaintiff to fall ill. He was classified as a Category III invalid and experienced headaches, memory impairment, delusions, insomnia, depression, cognitive decline, and related difficulties. Because the municipality failed to remedy the defect in its infrastructure, the plaintiff sought compensation for non-pecuniary damage, claiming mental suffering resulting from the reduction of his life activities, which in his case stemmed from depression. Relying on expert opinion, the court of first instance concluded that the plaintiff's depression had developed directly as a consequence of the stress generated by the municipality's inaction. It therefore upheld the claim in principle and awarded € 11,000 in damages, while dismissing the remainder of the claim (€ 9,000). The appellate court altered the first instance judgment and dismissed the claim in full, holding that no causal link existed between the municipality's passivity and the plaintiff's de-

pression. It reasoned that the municipality's inaction, in the absence of any enforceable order requiring corrective measures, would not, in the ordinary course of events, give rise to depression. Such a consequence was considered neither typical nor reasonably foreseeable as a legally relevant causal connection. The plaintiff's medical condition was described as exceptional. Because the consequence was not adequate in law, it was deemed legally irrelevant, and the municipality was found not liable. The Supreme Court admitted revision on the issue of whether the plaintiff's mental suffering was in a legally relevant causal connection with the municipality's conduct. It allowed the revision, annulled the appellate judgment insofar as reviewed, and remitted the case to the appellate court for further consideration.

The Supreme Court first examined whether the 'egg shell skull' theory, invoked by the appellate court, was applicable to the assessment of causation in the present case. Under this doctrine, a tortfeasor is liable even for unforeseeable or barely foreseeable consequences of their conduct, where such consequences arise from the victim's particular characteristics or vulnerable conditions. The Court therefore considered whether the plaintiff in this case displayed such particular characteristics, which might have manifested themselves in additional harm, in a different form of harm, or in an aggravated extent of harm. The key issue was whether the plaintiff's depression resulted from hypersensitivity, fragility, weakness, or pre-existing vulnerability, or whether it constituted a probable, and thus foreseeable, reaction to more than two decades of fruitless efforts to resolve the situation. The Supreme Court concluded that the 'egg shell skull' theory was not applicable. Expert evidence established that although the plaintiff, by reason of his character and personality traits, was predisposed to depression, the illness did not arise from those traits. Rather, it developed as a consequence of chronic stress caused by the repeated outflow of water onto his land and by the frustration stemming from the futility of his long-standing attempts to rectify the situation. The Court therefore held that the proper framework for analysis was the theory of adequate causation.

In contrast to the appellate court, the Supreme Court held that the plaintiff's damage did not constitute an exceptional, extraordinary, or entirely unusual causal consequence. Depression cannot be regarded as a consequence wholly beyond what life experience would consider a possible outcome of the omission in question. Life experience and logic confirm that a person is not a machine devoid of emotions, capable of enduring indefinitely, and without mental consequences, the municipality's persistent inaction in relation to a situation it had itself created by con-

structing a drainage system that caused flooding. The plaintiff's hope for remediation of the cause of the damage gradually diminished, while his stress steadily increased, eventually developing into chronic stress that triggered depression. Although depression may not be the most common consequence of prolonged and fruitless attempts to resolve an improper condition, the municipality's longstanding failure to address the harmful situation cannot be treated as a normal or ordinary circumstance, contrary to the appellate court's suggestion that disputes between municipalities and residents are not uncommon. The appellate court also failed to give due consideration to the special features of the case, namely the municipality's prior active conduct that led to flooding of the plaintiff's property, followed by its prolonged and persistent inaction. If the circumstances themselves were not ordinary, it logically follows that depression, as their consequence, cannot be considered ordinary either. Even if depression is not the most typical consequence, in the abnormal circumstances in which the plaintiff found himself, it represented a probable and therefore foreseeable reaction. The rarity or isolated nature of such omissions of duty cannot alone justify the exclusion of municipal liability. What is decisive is that the consequence was not wholly implausible. Even if unlikely, it remained foreseeable. Foreseeability, as a legal standard, encompasses more than ordinariness.

The present decision is significant as it marks the first instance in judicial practice where the important question of whether depression may arise from a failure to act where action was legally required was addressed. Its importance also lies in the fact that the Supreme Court offered substantive guidance on the application of various theories of causation. The decision is expected to exert considerable influence on the future development of case law concerning the assessment of causation and on the practical responsiveness of public authorities.

3. Judgment of the Supreme Court II Ips 50/2021, 20 April 2022

This case concerns an assessment of the plaintiff's contribution to the occurrence of damage as a result of travelling with an intoxicated driver. The plaintiff and driver Z drove to Y in the early afternoon. While driving, they bought several cans of beer and consumed them. At the border crossing, driver Z underwent an alcohol test, his licence was revoked due to excessive intoxication, and both were returned to Slovenia. Because Z no longer had a valid licence, the plaintiff – who was also intoxicated – began driving from the border crossing. After two or three kilometres,

however, he allowed Z to resume driving, despite knowing that Z was intoxicated. A traffic accident followed, in which the plaintiff was seriously injured and Z was killed. The plaintiff sought compensation from Z's insurer. The court of first instance held that the claim was justified to the extent of 35%, and that the plaintiff was responsible for the remaining 65% of the damage, which was also confirmed by the court of second instance.

In Slovenian court practice, there is no doubt that a car constitutes a dangerous thing and that the driver is strictly liable for injuries caused to a passenger (para 2 art 131 of the Code of Obligations). However, the driver may be fully released from strict liability (paras 1 and 2, art 153 of the Code of Obligations), or only partially released, if the injured party contributed to the occurrence of the injury (para 3 art 153 of the Code of Obligations).[13]

According to the established case law of the Supreme Court at the relevant time, an injured party who willingly rides with an intoxicated driver is deemed to have contributed to the occurrence of the damage to the extent of 20%.[14] The same degree of contribution was assessed irrespective of the fact that the driver and the injured party had previously been drinking together.[15]

The Supreme Court admitted the revision and modified the lower courts' judgments by awarding the plaintiff 50% of the claimed amount, holding him responsible for the remaining 50% of the damage. Beyond the fact that the plaintiff knowingly rode with an intoxicated driver, the Supreme Court emphasised that the plaintiff and the driver had been drinking together prior to the accident. This conduct, in the Supreme Court's view, justified assigning 50% of contribution of the occurrence of damage to the plaintiff. One of the main arguments of the Supreme Court was that the current practice was too unambiguous and did not distinguish between different situations. According to the Supreme Court, there is a difference between an injured party sitting next to a driver whom he suspects is mildly intoxicated and an injured party who drinks excessively with the driver and then gets into their car. Since similar cases must

[13] *Novak*/*Dugar*, ETL 2014 (fn 9) no 22.

[14] See eg, judgment of the Supreme Court II Ips 105/2002, 7 November 2002; decision of the Supreme Court II Ips 1249/2008, 12 March 2009; judgment of the Supreme Court II Ips 666/2001, 29 August 2002; judgment of the Supreme Court II Ips 334/2009, 19 December 2012; judgment of the Supreme Court II Ips 244/2011, 28 August 2014.

[15] See eg, judgment of the Supreme Court II Ips 467/2002, 27 November 2003; judgment of the Supreme Court II Ips 619/2005, 7 February 2008; judgment of the Supreme Court II Ips 74/2008, 10 March 2011.

be treated similarly, and different ones must be treated differently, it is necessary to distinguish between cases when the injured party agrees to drive with an intoxicated driver from cases when the injured party and the driver had been drinking together beforehand.

The present case is significant for the development of the assessment of injured parties' contribution to the occurrence of damage, not only in cases involving travelling with an intoxicated driver, but also in any other case of strict liability. The decision of the Supreme Court highlights that, when assessing the injured party's contribution, it is necessary to distinguish between different situations and to determine the extent of such injured party's contribution accordingly. In determining injured parties' contribution, therefore, we do not seek, nor can we seek, a contribution based on natural causation. Since the very reason for attribution in this context is normative rather than physical, it is likewise impossible to measure forces in a natural-scientific manner and then mathematically delimit the causes. The respective contribution must therefore convey a certain evaluative message. Thus, a contribution may express mere symbolic significance (eg 10%), it may indicate that the cause is of lesser evaluative importance than the primary cause (eg 25% or 30%), it may further reflect that both causes can be weighed as equivalent (50%), or that the injured party's contribution is even decisive (eg 70%).[16]

4. Judgment of the Supreme Court II Ips 22/2024, 4 September 2024

In criminal proceedings, the plaintiff's mother (the defendant) was convicted of neglect of a minor and cruel treatment for the period from 19 October 2015 to 11 April 2017, during which she gravely failed in her parental duties toward the plaintiff, then aged 11.[17] As a result of her conduct, the plaintiff suffered serious harm to his physical and psychological integrity, manifested in physical pain, fear, and a decrease in life activities. The defendant repeatedly left the plaintiff without supervision, failed to provide adequate nutrition, clothing, and basic living conditions, and allowed him to reside in an apartment without electricity, heating, or hot water. She also neglected his education by failing to ensure regular school attendance, thereby undermining his academic performance and healthy psychosocial development. The plaintiff lived in constant

[16] Judgment of the Supreme Court II Ips 50/2021, 20 April 2022.

[17] On this case see *B Novak*, Slovenia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2024 (2025) 661, nos 37–39.

fear of the continuation of these conditions, which was exacerbated by the defendant's dismissive and harsh responses to his expressions of distress. Expert psychological evidence established that the prolonged neglect and emotional deprivation prevented the plaintiff from attaining age-appropriate emotional, social, and personal maturity. He developed post-traumatic stress disorder, accompanied by persistent anxiety, sleep disturbances, and psychosomatic symptoms, including headaches and nausea. The plaintiff exhibits profound deficits in self-esteem and social functioning, experiences severe insecurity in interpersonal relationships, and remains burdened by a pervasive fear of rejection. These impairments are long-term in nature, require extensive psychotherapeutic intervention, and, in part, constitute irreparable damage to his mental health. The plaintiff demanded from the defendant compensation in the total amount of € 291,500, namely € 55,000 for physical pain, € 200,000 for mental pain due to reduced life activities and € 36,500 for fear. The first instance court granted the plaintiff's claim in the total amount of € 90,000, which was increased to the total amount of € 130,000 by the second instance court.

When calculating pecuniary compensation for non-pecuniary damage, Slovenian court practice uses two basic principles, namely the individualisation of the level of compensation and objective conditionality of the level of compensation.[18] The first principle requires determination of fair pecuniary compensation based upon the intensity and duration of physical pain, mental suffering and fear and upon all the specific circumstances in relation to the injured party. The second requires taking into account the importance of the affected good and the purpose of the compensation as well as the fact that the compensation may not support aspirations that are incompatible with their nature and purpose. In calculating non-pecuniary loss, therefore, the court thus takes into account the objective material possibilities of society and court practice in similar cases of non-pecuniary loss.[19]

The decision in the case under consideration is significant for the development of court practice concerning the calculation of pecuniary compensation for non-pecuniary damage in cases involving catastrophic harm, especially where different forms of non-pecuniary loss are intertwined. Prior to the case under consideration, Slovenian court practice

[18] *G Dugar*, Slovenia, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2023 (2024) 607, no 34.

[19] See *Novak*/*Dugar*, ETL 2014 (fn 9) no 60 ff; judgment of the Supreme Court II Ips 62/2011, 16 January 2014; judgment of the Supreme Court II Ips 117/2012, 20 March 2014; judgment of the Supreme Court II Ips 280/2013, 22 May 2014.

had not yet encountered a case involving consequences of this nature. According to art 179 of the Code of Obligations, a court awards compensation for non-pecuniary damage for physical pain suffered, for mental pain suffered due to reduced life activity, disfigurement, defamation of good name and honour or impairment of freedom or personal rights or the death of a loved one and for fear if the circumstances of the case, in particular the degree of pain and fear of the injured party and their duration, justify this. In cases such as the one under consideration, the types of damage referred to in art 179 of the Code of Obligations constitute merely individual aspects of a single, unified experience of harm. The Supreme Court therefore held that the circumstances of the case under consideration required the assessment of a uniform compensation amount, rather than its calculation according to the individual statutory categories set out in art 179 of the Code of Obligations. In the case under consideration, all the consequences affecting the claimant occurred in a closely interwoven and mutually conditioning manner across different spheres of his psychophysical integrity – namely, psychosomatic physical pain and fear, which even developed into a component of diminished life activities in the form of post-traumatic stress disorder, and mental suffering due to the reduction of life activities, which is itself partly a consequence of the severe fear endured. Separating these multi-layered and concurrent serious impairments would be inappropriate and artificial, thereby justifying the award of compensation in the form of a uniform compensation amount.[20]

In assessing the appropriateness of the uniform pecuniary compensation for non-pecuniary damage, the Supreme Court compared the harmful consequences in the case under consideration with those in other cases involving damage of comparable severity. In determining the lower threshold of uniform compensation, the Supreme Court compared the present case with cases concerning the consequences of sexual abuse. Thus, for example, in a case in which the injured party was severely emotionally affected and in which feelings of humiliation, shame, fear, and insecurity had not abated even several years after the harmful event, the Supreme Court upheld a uniform compensation award in the amount of 70 average monthly net salaries.[21] In another case, over a period of four years, a father committed numerous sexual acts and acts of sexual violence against the claimant, who was a minor at the time. As a result, the claimant developed low self-esteem, a sense of stigmatization, recurrent re-experiencing of traumatic events, pronounced distrust and insecurity in forming

[20] Judgment of the Supreme Court II Ips 22/2024, 4 September 2024.

[21] Judgment of the Supreme Court II Ips 8/96, 28 May 1997.

interpersonal relationships, and poor adaptation to new environments. The Supreme Court held that, in view of these consequences, an award of compensation in the amount of 77 average monthly net salaries was appropriate.[22] In identifying the upper threshold of the unified compensation amount in the case under consideration, the Supreme Court relied on cases involving compensation awarded for injuries sustained in traffic accidents with predominantly catastrophic consequences affecting both the physical and mental spheres. This included, for example, an award of uniform compensation in the amount of 155 average monthly net salaries for injuries to a minor claimant whose intellectual abilities were permanently diminished as a result of the injury, who became excessively anxious, emotionally hypersensitive, irritable, and aggressive, and who will not attain maturity even in adulthood.[23] According to the mentioned lower and upper limits of uniform compensation amounts in comparable cases, the Supreme Court concluded that, in the case under consideration, a uniform compensation award in the amount of 100 average monthly net salaries constitutes appropriate pecuniary compensation for non-pecuniary damage.[24]

5. Judgment of the Supreme Court II Ips 284/2016, 30 August 2018

This case deals with the tortious liability of the operators of a sports park for mountain biking. On 21 September 2012, the plaintiff suffered a permanent spinal cord injury resulting in paraplegia while riding a bicycle in the bike park. He was using the easiest (blue) trail, which was properly maintained, clearly marked, and separated from the surrounding terrain. The plaintiff did not leave the trail due to perceived danger and was not riding at high speed. Nevertheless, he deviated approximately four metres from the trail, entered an unmarked drainage ditch, and fell. The bend he cut was not technically demanding, and the drainage ditch did not constitute an obstacle for riders who remained on the trail. The park's rules, which prohibited leaving marked trails, were publicly displayed at the ticket counter.

The plaintiff demanded compensation from the operators of the bike park and the insurance company, with which one of the defendants had its liability insured. The first and second instance courts dismissed the plain-

[22] Judgment of the Supreme Court II Ips 366/2011, 19 December 2013.
[23] Judgment of the Supreme Court II Ips 32/2001, 6 September 2001.
[24] Judgment of the Supreme Court II Ips 22/2024, 4 September 2024.

tiff's claim for compensation with the argument that the injury occurred due to the plaintiff's negligent conduct. The Supreme Court partially granted the plaintiff's revision, holding that the plaintiff's substantive claim was well founded to the extent of 50%, because the operators of the bike park should have expected cyclists to cut the corner and because the drainage channels should have been marked or, at least, the grass around them should have been mown in order to make them visible. Consequently, the Supreme Court returned the case to the court of first instance for a determination of the amount of compensation and the costs of the proceedings.

The decision in the case under consideration is important for the development of court practice concerning the delineation between strict and culpable tortious liability. The Supreme Court emphasised that, under the rules of the Code of Obligations governing strict liability for damage arising from a dangerous activity (art 149 ff), liability is borne by the person engaged in such activity, irrespective of whether that person acts with due care. Liability is imposed by reason of the inherent risk itself. This form of tort liability was developed because technological and scientific progress has led to the emergence of new forms of energy and machinery which, even when all safety regulations are observed, pose such a significant risk of injury that it would be unjust for the injured party to bear the consequences of an accident solely because it did not result from fault.[25] For this reason, the rule was established that the risk should be borne by the person who carries out the dangerous activity and derives a benefit from it.

The Supreme Court emphasised that, in certain sports, injuries are both frequent and severe (such as boxing, car or motorcycle racing, and climbing). Downhill mountain biking on steep terrain also falls within this category. However, an individual who voluntarily participates in a sporting activity consents to the risks inherently associated with that sport. In many cases, the sport is chosen precisely because of the excitement generated by those risks. For this reason, the application of the rules on strict liability is excluded in such cases. The organiser of a sporting activity may still incur liability in damages, but only for damage resulting from a lack of due care, and not for damage arising from risks inherent in the sport itself. From the perspective of the preventive function of tort law, the application of fault-based liability rules encourages organisers to ensure professional standards and safety, while at the same time prompt-

[25] *S Cigoj*, Komentar obligacijskih razmerij [Commentary of law of obligations], vol I, Časopisni zavod Uradni list SRS, Ljubljana 1984, at 644.

ing participants to make more considered decisions about engaging in dangerous sports and to be aware of the importance of personal responsibility for their own safety.

XXVIII. Spain

Albert Ruda

This paper offers a concise analysis of five landmark judgments in Spanish case law from the last 25 years. While the selection is inevitably subjective and many relevant decisions have necessarily been left aside, the judgments examined here provide insight into some of the most significant developments in Spanish tort law over the past quarter of a century. These include: the jurisprudential shift concerning the burden of proof of fault (Judgment no 1); the denial of compensation for damage caused by Thalidomide (Judgment no 2); one of the most severe cases of environmental pollution in Spanish history (Judgment no 3); claims brought by a child for having been deprived of the opportunity not to have been born, commonly referred to as 'wrongful life' claims (Judgment no 4), and the compensation of personal injury arising from motor vehicle accidents and other forms of transport (Judgment no 5). Taken together, the selected cases seek to provide a kaleidoscopic view of the operation of the core elements of civil liability in Spanish law. The cases illustrate, in particular, how damage (Judgment no 4), causation (Judgment no 3), and fault (Judgment no 1) are articulated in judicial practice, while also addressing related issues such as the assessment of damages (Judgment no 5) and the application of prescription periods where damage is continuing or appears late (Judgment no 2). Although in most of the selected cases compensation is ultimately not awarded – and the picture presented here is therefore, so to speak, a photographic negative – the main areas of this field of law (product liability, environmental liability, medical liability, etc) are nevertheless covered.

1. Sentencia del Tribunal Supremo (Supreme Court Decision, STS) (Civil Chamber) 831/2007, 17 July 2007[1]

The first decision should be read in the context of the truly seismic shift that took place in the tort law doctrine of the Spanish Supreme Court (Civil Chamber) in the early 2000s. Such evolution cannot be understood

[1] ECLI:ES:TS:2007:5043. The decision is commented upon by *J Ribot/A Ruda,* Spain, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2007 (2008) 541, no 27.

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as the result of a gradual doctrinal refinement alone. Rather, it reflects a profound transformation produced by the convergence of several structural factors: a radical procedural reform, a change in institutional leadership, and a substantial renewal of the Court's composition. Together, these elements altered not merely the outcomes of cases, but the very function and self-understanding of the Spanish Supreme Court (*Tribunal Supremo*) as a court of cassation.

The first decisive trigger of change was the Civil Procedure Act 2000 (*Ley de Enjuiciamiento Civil* [LEC]),[2] which deeply reconfigured the system of extraordinary appeals. This long-overdue reform (the previous statute was from 1881) redefined the admissibility criteria for cassation (*casación*); reoriented the Supreme Court toward a normative and doctrinal role rather than one focused on correcting individual wrongs; and introduced a more selective model of access to the Court, functionally closer to a 'court of precedents'. As a result, the Civil Chamber was compelled to clarify its 'nomofilactic' function (the creation and unification of legal doctrine), develop more systematic and abstract reasoning, and establish clearer, more stable doctrinal lines capable of guiding lower courts.[3]

To the foregoing, one must add a second element, namely, a change in the composition of the Court. Too little attention is usually paid to who the members of judicial bodies actually are and to how changes in court composition may prove determinative,[4] as the Spanish case clearly shows. In 2003, at a moment when the Chamber was still digesting the impact

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Except indicated otherwise, all the STS cited in this paper are from the First Chamber (Civil Chamber) of the Spanish Supreme Court.

[2] Act (Ley) 1/2000, of 7 January, *de Enjuiciamiento Civil* (Spanish Official Gazette, Boletín Oficial del Estado [BOE] 7, 8.1.2000).

[3] On the new statutory framework generally, see *M Morón Palomino*, La nueva casación civil (2001); *J Nieva Fenoll*, El recurso de casación civil (2003) and *J Montero Aroca/J Flors Matíes*, El recurso de casación civil (3rd edn 2018) with further references. On case law as a source of law generally, see *R Casas Vallès/V Ferreres Comella/E Roca Trias* (eds), La jurisprudencia como fuente del Derecho: interpretación creadora y arbitrio judicial (2006) and *F Clemente de Diego/JL Monereo Pérez*, La jurisprudencia como fuente del derecho (2016).

[4] Sociological studies on Spanish judiciary usually pay attention to criminal courts only. See *LM Lozano Martín*, Sus señorías: una aportación sociológica al estudio de la judicatura española (Tesis doctoral) (2024) <https://docta.ucm.es/rest/api/core/bitstreams/33781920-1320-4489-8ee9-f20d09e99207/content> and *E Blay Gil/I González Sánchez*, Los jueces penales: una introducción al estudio de la profesión (2020), besides the seminal (but rather outdated) studies by *JJ Toharia*, El juez español: un análisis sociológico (1975) and El juez y su imagen en la sociedad: pasado, presente y futuro (2000).

of the LEC, Ignacio Sierra Gil de la Cuesta was appointed President of the Civil Chamber. While presidents do not formally dictate substantive outcomes, their role may be crucial in moments of institutional transition. In a context marked by procedural uncertainty following the LEC reform, a sharp increase in technically complex litigation, and rising pressure to ensure doctrinal coherence, Sierra's presidency exercised influence through internal coordination, case management, and the promotion of a more coherent deliberative culture.[5] This leadership shift coincided with – and facilitated – the consolidation of the Court's new role under the post-2000 procedural architecture. But Sierra had already been President in the past,[6] so this factor alone cannot explain the change.

In fact, between 2000 and 2005, the Civil Chamber experienced one of the most significant waves of judicial renewal in its modern history. Notable appointments include Francisco Marín Castán (2000) – the grandson of a former President of the Spanish Supreme Court – with a strong background in the Supreme Court's Technical Office, bringing a highly structured, doctrinally systematic approach, and Clemente Auger Liñán (2003/2004). In addition, there was a decisive cluster of appointments in 2005, including José Antonio Seijas Quintana,[7] Vicente Luis Montés Penadés (then a full professor at the University of Valencia), and Encarnación Roca Trías (then a full professor at the University of Barcelona). Juan Antonio Xiol Ríos – a former Judge at the Administrative Chamber of the same court – succeeded Marín Castán as President of the Civil Chamber from 2005 until 2013 and was, without a doubt, one of the most influential figures in that Chamber's case law in the 2000s, significantly shaping its doctrinal trajectory before his later appointment to the Constitutional Court in 2013.[8] This renewal was not merely quantitative,

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[5] A personal profile of Sierra can be found under *E López Causapé*/*B Muñoz Yangüela*, Vitorinos: Ignacio Sierra, Asociación Judicial Francisco de Vitoria (2020) <https://www.ajfv.es/vitorinos-ignacio-sierra>.

[6] See *JM Lázaro,* Ignacio Sierra, nuevo presidente de la Sala Civil del Supremo, El País 28.6.1990 <https://elpais.com/diario/1990/06/28/espana/646524011_850215.html>.

[7] See *Jose Antonio Seijas Quintana*, «In personam». José Antonio Seijas Quintana (entrevistado), La Ley Probática 10 (2022) <https://www.aranzadilaley.es/tienda/legalteca> and *P Fernández-Rivera González*, Entrevista a D. José Antonio Seijas Quintana, Diálogos jurídicos. Anuario de la Facultad de Derecho de la Universidad de Oviedo 8 (2023) 345–352.

[8] Xiol, currently working as a lawyer after his retirement from the judiciary, was a resolute judge, renowned for adhering to his original views despite frequently finding himself in the minority of the court's chamber (especially when he was a Constitutional Court judge). His genius transformed the Civil Chamber of the Spanish Supreme Court and succeeded in dramatically reducing the vast backlog of pending

but it introduced judges with strong technical and theoretical sensitivity (both Montés and Roca were prestigious private law academics and Roca in particular was a co-author of one of the leading tort law textbooks);[9] greater attention to doctrinal coherence and line-building across cases, and a judicial culture more attuned to European influences – references to European soft law texts suddenly went on the rise – mass litigation, and evolving private law paradigms.

This transformation qualifies as seismic for several reasons: (i) it altered the Court's institutional function, since the Supreme Court moved decisively from a model of corrective justice to one of doctrinal governance of private law; (ii) it changed how case law was produced: reasoning became more abstract and systematic, and old dogmas were revisited and abandoned; and (iii) it redefined the relationship between the Supreme Court and lower courts, which became executors of the Supreme Court doctrine rather than autonomous interpreters awaiting correction.

A decision that illustrates this turning point from a tort law perspective is the one referred to above.[10] The case at stake involved a bad fall in an

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cases before the same. He has been rightfully described as 'one of the most prestigious members of the Spanish bench, and is well known for his illustrative flare in presenting arguments and rulings' (*JM Lázaro,* The judge with an institutional mountain to climb, El País 25.7.2012 <https://english.elpais.com/elpais/2012/06/25/inenglish/1340624012_836695.html>). Under his baton, the Civil Chamber decisions adopted a new style and structure which, among many other novelties, incorporated a list of abbreviations. In a way, it may be suggested that Xiol's public law training forced him (and the Chamber he presided over) to look at the preceding doctrine of the court from a new angle. On his approach, see *Hispacolex,* Juan Antonio Xiol Ríos. Presidente de la Sala 1ª del Tribunal Supremo de Justicia (2010) <www.hispacolex.com/biblioteca/entrevistas/juan-antonio-xiol-rios-presidente-de-la-sala-1a-del-tribunal-supremo-de-justicia/>.

[9] See *E Roca Trias/M Navarro Michel,* Derecho de Daños. Textos y materiales (8th edn 2020). Vicente Montés' outstanding legal production is commented upon by *FP Blasco Gascó et al* (eds), Estudios jurídicos en homenaje a Vicente L. Montés Penadés (2011); on his persona also see *F Blasco*, Discurso del doctorado Honoris causa a Vicente Luis Montés, Almaig, estudis i documents 26 (2010) 14–21. Legal scholars from Montés' *alma mater* (University of Valencia) joined efforts with some other tort experts to give continuity to an unfinished scholarly work of his in an impressive two volume set by *ME Clemente Meoro/ME Cobas Cobiella* (eds), Derecho de Daños (2021).

[10] The reporter judge in this case was Marín Castán. While the judgment is a collective act of the court, the reported judge (magistrado ponente) acts as an intellectual and organisational pivot of the decision, coordinating deliberation and translating the majority's position into a coherent text. A judge in the minority may file a disssenting opinion.

apartment. The claimant suffered injuries after tripping over a toy left on the floor inside his friends' private home and sought compensation on the basis of tort liability under art 1902 of the Spanish Civil Code (CC).[11] The Supreme Court dismissed the claim. It held that liability in tort requires proof of fault or negligence (*culpa*), as well as a causal link between the defendant's conduct and the damage suffered. The Court rejected any automatic or objective attribution of liability on the basis of a mere risk-creation, stressing that not every accident gives rise to compensation. In particular, the Court considered that the presence of a toy on the floor of a home constituted a foreseeable and ordinary risk inherent in everyday life, especially in a domestic environment. The accident was therefore classified as a mere fortuitous event (*caso fortuito*), for which no liability could be imposed in the absence of negligent conduct.[12]

The judgment is often cited as a leading authority for reaffirming a fault-based model of tort liability in Spanish law and for rejecting an expansive interpretation of objective liability beyond situations involving abnormal or extraordinary risk. This is of paramount importance, since for decades Spanish case law had interpreted art 1902 CC flexibly, effectively shifting the burden of proof to defendants and raising the standard of care to the point that liability approached strict liability, despite the formal or apparent retention of fault as a principle.[13] Recent Supreme Court decisions, however, mark a corrective turn and reverse the judicial tide: they reject any reversal of the burden of proof, refuse to ground liability on the mere creation of risk, and adopt a more restrictive approach that limits defendants' liability, as illustrated both in the present case and in subsequent decisions. A previous decision that paved the way for such a development was another decision on a bad fall, STS 149/2007, 22 February 2007.[14]

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[11] Royal Decree (Real Decreto, RD) of 24 July 1889, *por el que se publica el Código Civil* (Official Gazette [Gaceta de Madrid] no 206, 25.7.1889). A translation of the tort law provisions can be found at *A Ruda*, Spain, in: E Karner/K Oliphant/BC Steininger (eds), European Tort Law. Basic Texts (2nd edn 2018) 345.

[12] On liability for bad falls generally, see *A Ruda*, Comentario a la Sentencia de 6 de junio de 2002: Responsabilidad civil extracontractual. Caída en portal de edificio. Prueba del nexo causal. Responsabilidad por culpa de la comunidad de propietarios. Tendencia objetivadora: creación de riesgo para terceros. Actividad no peligrosa. Predisposición y "culpa" de la víctima. Valoración de la prueba: informe pericial, Cuadernos Civitas de jurisprudencia civil (CCJC) 60 (2002) 1067–1080 and *ML Kubica*, La responsabilidad civil por caídas en establecimientos abiertos al público (2017).

[13] Such stance was described in the seminal monograph by *S Cavanillas Mugica*, La transformación de la responsabilidad civil en la jurisprudencia (1987).

[14] ECLI:ES:TS:2007:1032. The decision's reporter judge was Xiol.

In light of the foregoing, it must be concluded that, within contemporary Spanish case law, the use of risk as a criterion of attribution does not constitute the general rule, unlike what happened *de facto* under the previous case law. Admittedly, however, there may be a number of situations in which such attribution is deemed to arise, mostly involving intrinsically dangerous activities.[15] At any rate, the decision under comment is illustrative of the criterion generally adopted under Spanish law, according to which in cases involving falls, the injured party ordinarily bears the consequences of the damage, insofar as such incidents are typically attributed to a lack of due care on the part of the victim.[16]

2. STS 544/2015, 20.10.2015[17]

The following decision recounts a particularly painful tragedy. As may be recalled,[18] a number of Thalidomide victims, grouped under an association known as AVITE, sought compensation for damage allegedly suffered as a result of in utero exposure to the drug. They claimed that they had not received any compensation for the harm suffered, including long-term sequelae that had manifested only many years after the initial exposure. The court of first instance awarded compensation notwithstanding the significant lapse of time between the exposure and the filing of the claim, which clearly exceeded the one-year limitation period established by the Spanish Civil Code (art 1968.2). However, the Court of Appeal overturned that decision and ruled in favour of the defendant pharmaceutical company (Grünenthal Pharma SA, a subsidiary of the

[15] On which, see *E Roca Trías*, El riesgo como criterio de imputación subjetiva del daño en la jurisprudencia del Tribunal Supremo español, InDret 4 (2009) 1, 10 <www.indret.com>. More extensively, see also *ML Kubica*, Fundamentos y técnicas de desarrollo de la responsabilidad objetiva (2017). On strict liability under Spanish law, see *X Basozabal Arrue*, Responsabilidad extracontractual objetiva. Parte general (2015).

[16] From a critical perspective in recent legal scholarship, see *M Yaben Peral*, La responsabilidad patrimonial objetiva por caídas en la vía pública (certeza de la incerteza) (2025); *A Yáñez de Andrés*, Caídas de viandantes y servicios públicos deficientes, Diario La Ley 10584 (2024) <https://diariolaley.laleynext.es/>; *A Quintana Afonso*, Accidente sufrido en una iglesia católica, Diario La Ley 10351 (2023) <https://diariolaley.laleynext.es/>; *idem*, Responsabilidad extracontractual derivada de accidente dentro de una iglesia católica (2023); also see *L Morate Martín*, Responsabilidad patrimonial del municipio: criterios de exoneración administrativa en las caídas en la vía pública, in: E Ortega Burgos/F Pastor Ruiz (eds), Derecho administrativo 2023 (2023) 721–734.

[17] ECLI:ES:TS:2015:4149.

[18] See *A Ruda*, Spain, in: E Karner/BC Steininger (eds), ETL 2015 (2016) 581, no 39.

German company Chemie Grünenthal GmbH) on the ground that the claimants had failed to prove the existence of a causal link between the defendant's conduct and the damage alleged. Although the claimants submitted an expert report linking the type of damage for which compensation was sought to exposure to the defective drug, the court found that the link was merely statistical or general. Consequently, the specific harm suffered by the individual claimants before the court was not shown to be causally attributable to the defendant's conduct.

The Spanish Supreme Court (*Tribunal Supremo*) upheld the Court of Appeal's judgment. It held that the drug had been marketed in the 1950s and 1960s and that liability for damage resulting from such exposure, which had been known for several decades, was clearly time-barred. In particular, the Supreme Court rejected the argument that the harm constituted continuous damage (*daños continuados*) and accordingly dismissed the claimants' contention that the limitation period had been suspended on the basis that the damage was allegedly ongoing. The Court also dismissed the argument that the limitation period had been interrupted or suspended by the adoption of a government regulation that provided relief to victims. With regard to causation, the Court acknowledged that there was no doubt that damage had been caused by in utero exposure to the drug. The judgment therefore recognised that the victims could bring a separate claim for damage that could not be considered at the time and might materialise in the future.

The claim brought by Thalidomide victims attracted considerable attention in Spain, as the Supreme Court's decision ultimately left them without compensation. This outcome may be partly explained by shortcomings in the legal strategy adopted, in particular the failure to clearly distinguish between initial damage, which was known from the outset and time-barred, and so-called late damage (*daños tardíos*). Some late-manifesting injuries were already known years before and are likely time-barred, whereas other unforeseeable forms of damage (such as arthrosis) might still give rise to claims, albeit with significant difficulties in proving the manufacturer's fault, if one bears in mind that damage was foreseeable when the drug was marketed.

Although Grünenthal's resistance to compensation may be criticised in light of its continued marketing of the drug despite known risks, the judgment did leave open the possibility of a new claim limited to late damage. In practice, however, the length of judicial proceedings and the difficulty of distinguishing new from old damage cast doubt on the effectiveness of tort law as a solution. This points instead to the need for mechanisms based on social solidarity, such as compensation schemes.

While the German Contergan Foundation provides some relief, Spanish victims largely do not benefit due to strict evidentiary requirements.

This case constitutes a paradigmatic example for the analysis of limitation periods in cases of long-term or latent damage, the distinction between permanent, continuous, and late-manifesting damage,[19] and the structural limits of tort liability in large-scale, historically rooted mass litigation. Although some authors have suggested that the procedural strategy adopted by the claimants may not have been the most appropriate, as it failed to clearly differentiate between damage that was already known and therefore time-barred, and genuinely late-manifesting or unforeseeable damage that might have justified a distinct legal approach,[20] the Spanish Supreme Court did not reverse or substantially modify its position in subsequent Thalidomide-specific litigation, and the decision has been confirmed and indirectly developed through subsequent case law on latent damage, prescription, and mass harm, which helps contextualise and consolidate its reasoning.[21]

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[19] On which, see *M Yzquierdo Tolsada*, Prescrita la acción contra los fabricantes de la Talidomida (comentario de la sentencia del Tribunal Supremo de 20 de octubre de 2015), Revista de la Asociación Española de Abogados Especializados en Responsabilidad Civil y Seguro (RAEAERCS) 57 (2016) 57–77; *E Llamas Pombo*, Daño continuado y talidomida, 129 Práctica derecho daños: Revista de Responsabilidad Civil y Seguros 2016, 1 and *J Avilés García*, Más allá de la prescripción: problemas interpretativos sobre el alcance de la Responsabilidad Civil en el caso de la talidomida, Revista de responsabilidad civil, circulación y seguro (RRCCS) 1 (2017) 6–25; *idem*, Tipología de daños, causalidad y prescripción: (A propósito del caso de la talidomida en España), Diario La Ley 8784 (2016) <https://diariolaley.laleynext.es/>. Also see *I Barreda*, El caso de la talidomida en España: entre la prescripción legal y el daño continuado, Actualidad del derecho sanitario 208 (2013) 810–815.

[20] See *E Moure González*, Las sentencias de la Talidomida. Recreación acrítica de lo que pudo haber sido y no fue, Diario La Ley 8718 (2016) <https://diariolaley.laleynext.es/> and *MD Ortiz Vidal*, Las dos claves olvidadas en el asunto de la "Talidomida": prescripción y un buen asesoramiento jurídico, in: B García Romero et al (eds), Cuestiones actuales de la prestación farmacéutica y los medicamentos (2017) 253–277.

[21] See *A Ruda*, Spain, in: E Karner/BC Steininger (eds), ETL 2013 (2014) 627, no 35. Also see *P Caballero Portero/C Fernández Moriano*, El regreso de la talidomida, Panorama actual del medicamento 460 (2023) 35-3; *A Piga Rivero/MT Alfonso Galán*, Talidomida, de nuevo ante los Tribunales, Actualidad del derecho sanitario 208 (2013) 805–809; *S Pintado Vázquez,* La catástrofe de la talidomida en el cincuentenario de su comercialización, Jano: Medicina y humanidades 1726 (2009) 34; *ML Martínez Frías*, Talidomida: 50 años después, Medicina clínica 139(1) (2012) 25–32; Daños por talidomida: prescripción de la acción: STS 21/7/2023, RRCCS 10 (2023) 43–45; *P Salvador Coderch et al*, Daños tardíos: Avite c. Grünenthal. Comentario a la SJPI nº 90 Madrid, 19.11.2013, sobre los daños causados por la talidomida, Indret: Revista para el Análisis del Derecho 1 (2014) 1–30 <www.indret.com>; *S Ramos González*, Talidomida II y los esfuerzos de AVITE por posponer el inicio del

Although it would generally be possible to hold the public authorities liable for damage caused by a drug whose marketing authorisation was granted negligently, or where the administration fails to order its withdrawal once it is discovered to cause harm, this possibility remains today more theoretical than real, since, in practice, the administration has not, to date, been found liable in any such cases.[22]

3. STS (Criminal Chamber) 865/2015, 14 January 2016[23]

The third decision highlighted here dealt with the *Prestige* case, widely regarded as the most serious environmental pollution disaster in Spanish history.[24] The *Prestige* oil tanker sank off the Galician coast in 2002 after suffering structural damage during a storm, causing a massive oil spill that affected Spain and neighbouring countries. Rather than towing the damaged vessel to a safe harbour, Spanish authorities ordered it to be taken further out to sea. After several days adrift, the ship broke in two and sank, worsening the environmental disaster.[25]

The vessel was – as is usually the case in this type of incident – an ageing tanker sailing under a flag of convenience and owned by a single-asset company, which complicated potential civil claims. Spanish authorities

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plazo de prescripción de la acción con base en el conocimiento tardío de las patentes de la Talidomida y otros documentos inscritos en registros públicos (Arts. 1968.2 y 1969 CC), CCJC 124 (2024) 279–296; *I Arana de la Fuente/E Blanco Martínez*, Responsabilidad civil por daños causados por la talidomida: cómputo del plazo de prescripción: Sentencia del Tribunal Supremo de 21 de julio de 2023, Anuario de derecho civil (ADC) 77(2) (2024) 929–972. An appeal before the Constitutional Court also failed, see *MJ Vaquero Pinto*, Historia del caso de la talidomida. Dies a quo del plazo de prescripción de la acción de responsabilidad civil: prescripción y amparo constitucional, Derecho Privado y Constitución 31 (2017) 275–316 and *A Moya Jiménez*, Jurisprudencia reciente: la talidomida y el Tribunal Constitucional, RRCCS 10 (2016) 60 f.

[22] See *MÁ Parra Lucán*, La responsabilidad civil por medicamentos y productos sanitarios a la luz del caso de la talidomida, Revista CESCO de Derecho de Consumo 8 (2013) 130–146, at 146 <https://dialnet.unirioja.es/descarga/articulo/4524508.pdf>.

[23] ECLI:ES:TS:2016:11. Commented upon by *A Ruda*, Spain, in: E Karner/BC Steininger (eds), ETL 2016 (2017) 582, nos 17–24.

[24] Among others, see *E Sierra Noguero/D Callejon Muzelle*, Los casos 'Prestige' y 'Aznalcóllar' y la responsabilidad civil medioambiental en el Estado español, Economist & Jurist 31(272) (2023) 80–91.

[25] On damage derived from the spill, see *A Ruda*, La tipología de los daños causados por el "Prestige", in: S Álvarez González/MP García Rubio (eds), La responsabilidad por los daños causados por el hundimiento del Prestige (2007) 37–112; on compensation of damage to the environment as such, *idem*, El daño ecológico puro (2017).

chose not to pursue uncertain litigation against foreign actors (such as the shipyard in China that had recently repaired the hull) and instead focused on criminal proceedings against the ship's captain. The Court of Appeal of A Coruña had held that the precise cause of the sinking could not be established. The captain was convicted only of disobedience to authorities and acquitted of environmental crimes, a decision that sparked widespread public criticism. The case was subsequently appealed to the Spanish Supreme Court. According to the latter, the *Prestige*'s captain knowingly commanded a ship that was unfit for navigation and repeatedly disobeyed orders from the maritime authorities. His conduct was found to be especially serious because it not only involved disobedience but also created a risk of catastrophic and irreversible environmental damage, constituting an environmental crime under art 326.e of the Spanish Criminal Code (CP).[26]

The Court was particularly critical of the captain's decision to flood the ship's tanks to stabilise it, a manoeuvre that weakened the vessel's structure and ultimately contributed to its sinking.[27] Overall, the captain was found to have increased the permissible risk of his activity and to have breached his objective duty of care. In tort liability terms, the Supreme Court departed from the lower court's ruling and held the captain liable under Spanish law. Although the 1992 Civil Liability Convention[28] – applicable to the case – normally channels liability to the shipowner, the Court applied the Convention's exception for intentional or reckless conduct, finding the captain grossly negligent. The Spanish state had advanced the compensation payouts, which affected individuals could claim from either those responsible for the accident or the International Oil Pollution Compensation (IOPC) Fund.[29] The shipowner was held subsidiarily liable due to its knowledge of the ship's poor condition. The insurer (London P&I Club) was found directly liable up to the policy limit of USD 1 billion, and the IOPC Fund was also held liable, with compensation to be determined later under the principle of full reparation. The IOPC Fund was eventually required to pay up to the limit set in its governing convention. At the time of the incident, that limit was 135 million SDRs (Special Drawing Rights) (approximately

[26] Organic Act 10/1995, of 23 November, *del Código Penal* (BOE no 281, 24.11.1995).

[27] From an engineering perspective, see *G Polo*, De nuevo el Prestige, Ingeniería naval 1030 (2024) 75 f.

[28] Instrument of Spain's accession to the 1992 Protocol amending the International Convention on Civil Liability for Oil Pollution Damage, 1969. Done in London on 27 November 1992 (BOE no 225, 20.9.1995).

[29] See *M Asensio Ruiz,* Environmental liability: the sinking of the vessel "Prestige", ConsorSeguros Revista Digital 10 (2019) <https://www.consorsegurosdigital.com/en/numero-10/content/reviews/environmental-liability-the-sinking-of-the-vessel-prestige>.

€ 147.9 million at the time) – the maximum amount the Fund could be held liable to pay under the 1992 Fund Convention before any supplementary mechanisms applied.[30]

This judgment brought an end to the domestic litigation concerning one of the most significant cases of marine pollution to have occurred off the Spanish coast. The case profoundly shaped Spanish public opinion and left a lasting mark on the country's collective imagination.[31] One particular legal feature of the case is that it addresses not only criminal liability but also civil liability, in accordance with the general rule in Spanish law (art 109 ff CP).[32] The approach adopted is, however, striking. First, it is remarkable that the captain – widely portrayed as having acted heroically during the incident – is ultimately cast as the story's sole villain. In order to reach this conclusion, the Court engages in a complex and arguably questionable line of reasoning that allows it to circumvent the application of the Civil Liability Convention, despite the Convention's clear rules on channelling of liability and liability caps. It is difficult to understand why the Court disregards the protection afforded to the captain under the Convention and instead gives precedence to domestic law. Moreover, with the benefit of hindsight, the Court portrays the captain as having a comprehensive awareness of the potential consequences of an oil spill – an assumption that appears unrealistic and effectively equates his conduct with that of someone knowingly courting disaster.

The Supreme Court's decision was also controversial because it assigned liability to the captain despite the lower court's finding that

[30] See IOPC, Twenty years since the Prestige incident (2022) <https://iopcfunds.org/news/twenty-years-since-the-prestige-incident/>. According to the same source, the London Club paid € 22.8 million.

[31] For instance, see *U Fellone Pérez/A Pajón Fernández*, "El mar escupía un lamento". Respuestas musicales ante desastres ecológicos en la España contemporánea: los casos del Prestige y el Mar Menor, Cuadernos de música iberoamericana 38 (2025) 19–48 <https://revistas.ucm.es/index.php/CMIB/article/view/98873/4564456574264>; *MA Rodríguez González*, Arte, activismo y educación: una cadena humana escolar ante la marea negra del Prestige, Arte, individuo y sociedad 4 (2025) 713–724 <https://revistas.ucm.es/index.php/ARIS/article/view/101453/4564456574189>; *JM Estévez-Saá/J Cañero Serrano*, Del Prestige al Toconao: una tragedia repetida, sufrida y narrada transculturalmente a ambos lados del Atlántico, in: E Cerdá Redondo (ed), Climate Change and Trans-Atlantic Transformations (2024) 171–184 and *D Vilavedra Fernández*, Una Galicia otra. Posibilidades disidentes en la narrativa post-Prestige, in: C Claesson (ed), Novela postcrisis en la España plurilingüe (2024) 310–336.

[32] More generally on this rule, see *L Bachmaier Winter/C Gómez-Jara Díez/A Ruda,* Blurred borders in Spanish tort and crime, in: M Dyson (ed), Comparing Tort and Crime (2015) 223–270.

causation could not be established. This approach suggests that the Court may have been unwilling to accept that the accident resulted from unknown factors or chance. This reveals a certain predisposition in Spanish case law to dispense with causation in difficult cases, as well as a will to shield the Spanish authorities from responsibility. The question of whether victims of the *Prestige* disaster actually received compensation is complex and unresolved, as the large compensation ordered against the insurer has not yet been collected, due to UK arbitration and enforcement issues that block execution of the Spanish judgment.[33] The subsequent litigation – even reaching the ECJ[34] – has aptly been described as an odyssey.[35] In practice, the polluter-pays principle is significantly diluted.

4. STS 581/2002, 7 January 2002[36]

Unlike some common law jurisdictions and a limited number of continental legal systems, Spanish tort law has consistently rejected wrongful

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[33] See *M Alba Fernández*, Nuevo hito en el caso Prestige: Nota sobre la sentencia de la High Court of Justice (Commercial Court) de 6 de ocubre de 2023 en el litigio entre el London Steam-Ship Owners' Mutual Insurance Association Limited y el reino de España, Cuadernos de derecho transnacional (CDT) 16(1) (2024) 656-670 <https://e-revistas.uc3m.es/index.php/CDT/es/article/view/8440>; *A Yáñez de Andrés*, El caso "Prestige" sucintas reflexiones actuales, Diario La Ley 10429 (2024) <https://diariolaley.laleynext.es/>; *A Gilabert Gascón*, El caso "Prestige" en el año de su vigésimo aniversario. Problemas pasados, presentes y futuros, Revista de Derecho del Sistema Financiero: mercados, operadores y contratos 4 (2022) 241–272 and *G Caballero/D Soto-Oñate*, Environmental crime and judicial rectification of the Prestige oil spill: The polluter pays, Marine Policy 84 (2017) 213–219.

[34] See *MC Urcelay Lecue*, El TJUE considera que prevalece la sentencia española que condena a la aseguradora del Prestige sobre el arbitraje británico que la exonera: Sentencia TJUE 20 junio 2022 (TJCE 2022, 140). Asunto C-700/20: London Steam-Ship Owners' Mutual Insurance Association Limited (London P&I Club) contra Reino de España (Gran Sala), Revista Aranzadi Doctrinal (RAD) 1 (2023) <https://www.aranzadilaley.es/tienda/legalteca> and *E Sierra Noguero*, Estudio de Derecho español, inglés y comunitario sobre la extensión al tercero perjudicado del convenio arbitral y de ley aplicable del seguro marítimo de responsabilidad civil, CDT 15(2) (2023) 942-961 <https://e-revistas.uc3m.es/index.php/CDT/es/article/view/8085>.

[35] See *O Gómez Fasanella/E de España Valenzuela*, La odisea judicial entre London Steam-Ship Owners-Mutual Insurance Association Limited y el Reino de España: Una aventura legal que está lejos de concluir, CDT 16(1) (2024) 798–805 <https://e-revistas.uc3m.es/index.php/CDT/es/article/view/8447>.

[36] ECLI:ES:TS:2002:4137. The decision is commented upon by *MP García Rubio/J Lete*, Spain, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 380, nos 2–7.

life claims.[37] In fact, the Spanish Supreme Court has never upheld an action in which a child seeks compensation on the basis that, due to medical negligence, they were born with a disability and that non-existence would have been preferable to life with impairment. Consequently, it is not possible to identify a 'first judgment' of the Spanish Supreme Court recognising wrongful life; rather, one must refer to the first one in which the Court expressly addressed and rejected such claims. That foundational ruling is the one mentioned above.

In the case at stake, the Court was confronted with a claim brought, directly or indirectly, in the name of a child born with serious disabilities, alleging that negligent prenatal diagnosis had deprived the mother of the possibility of terminating the pregnancy. The claim sought to characterise the child's very existence, under conditions of disability, as compensable damage. The Court categorically rejected this construction. Legal scholarship has noted that, under Spanish law, such claims are usually dismissed, yet the Supreme Court does not engage in – or place particular emphasis on – the legal reasoning required to justify that outcome. In the case under comment, the decision laconically concludes that the baby's handicap was not caused by the physician. Nevertheless, in recent years, one can observe a certain increase in the Court's attention to legal reasoning, including arguments like: (i) life cannot constitute legally compensable damage within the meaning of tort liability law; (ii) the counterfactual comparison required by wrongful life is legally impossible, as non-existence lacks juridical and ontological content capable of evaluation; and (iii) the proper subject of legal protection is parental autonomy, not the child's existence. As a result, harm 'belongs' to the parents, not to the child.[38] In sum, the Supreme Court excluded the possibility of recognising wrongful life as a valid cause of action under Spanish law.

The position adopted in the 2002 judgment has been consistently reaffirmed in later decisions of the Civil Chamber. At the same time, the Supreme Court has progressively refined and consolidated the admissibility of claims commonly labelled as wrongful birth. These actions are framed as compensation for the loss of the parents' opportunity to decide freely and responsibly about reproduction, due to deficient medical information

[37] See *A Ruda*, I didn't ask to be born: wrongful life from a comparative perspective (2010) 1 Journal of European Tort Law (JETL) 204–241 <https://www.degruyterbrill.com/document/doi/10.1515/jetl.2010.204/html>, with further references.

[38] See *A Macía Morillo*, El tratamiento de las acciones de wrongful birth y wrongful life a la luz de la nueva ley sobre interrupción voluntaria del embarazo, Revista jurídica Universidad Autónoma de Madrid 23 (2011) 83–98 <http://hdl.handle.net/10486/13725>, 96.

or negligent prenatal diagnosis. The compensable harm is thus conceptualised as a violation of parental autonomy.[39]

5. STS 1513/2019, of 17 May 2019[40]

One of the most distinctive features of Spanish tort law is the central role of the compensation schedule, or tariffication system (commonly referred to as the *baremo*), laid down as an annex to the Road Traf-

[39] In legal scholarship, see *A Paz Garibo*, El derecho a la vida cuando ésta es frágil como una exigencia de justicia: la perspectiva que ofrecen las acciones de "wrongful birth" y "wrongful life" sobre las personas con discapacidad, Persona y derecho: Revista de fundamentación de las Instituciones Jurídicas y de Derechos Humanos 81 (2019) 323–348; *P Gutiérrez Santiago*, Responsabilidad médico-sanitaria por daños vinculados a la concepción, gestación y nacimiento de una persona, Revista Boliviana de Derecho 26 (2018) 18–57 <https://dialnet.unirioja.es/descarga/articulo/6510512.pdf>; *AM Romero Coloma*, Las acciones de *wrongful life* y su problemática jurídica, RRCCS 11 (2016) 28–37; *Á Luna Yerga*, Responsabilidad civil médico-sanitaria por anticoncepciones fallidas ("Wrongful conception") y por error de diagnóstico prenatal ("Wrongful birth y wrongful life"), in: A Ortí Vallejo/MC García Garnica/RP Rojo Álvarez de Manzaneda (eds), La responsabilidad civil por daños causados por servicios defectuosos: Estudio de la responsabilidad civil por servicios susceptibles de provocar daños a la salud y seguridad de las personas (2015) 501–526; *AI Berrocal Lanzarot*, La responsabilidad por daños relacionados con la procreación, La Ley Derecho de Familia: Revista jurídica sobre familia y menores 8 (2015) <https://www.aranzadilaley.es/tienda/legalteca>; *A Paños Pérez*, Responsabilidad civil médica por wrongful birth y wrongful life, Diario La Ley 8396 (2014) <https://diariolaley.laleynext.es/>; *E Toral Lara*, Las acciones Wrongful birth y wrongful life en el ordenamiento español, in: E Llamas Pombo (ed), Estudios sobre la responsabilidad sanitaria: un análisis interdisciplinar (2014) 251–289; *JL Tomillo Urbina*, Responsabilidad por daños al inicio de la vida: las acciones Wrongful Birth y Wrongful Life, in: D Larios Risco et al (eds), Tratado de derecho sanitario (2013) 253–272; *E Mazzilli*, La acción de Wrongful Life en la reciente jurisprudencia del Tribunal Supremo: dudas y cuestiones abiertas, Aranzadi civil-mercantil. Revista doctrinal 10 (2012) 79–111; *MN Pacheco Jiménez*, Responsabilidad médica derivada de negligencia en el diagnóstico prenatal: acciones "wrongful birth" y "wrongful life". Repercusión de la proyectada ley de protección de la vida del concebido, Parlamento y Constitución. Anuario 15 (2012-2013) 287–308 <https://dialnet.unirioja.es/descarga/articulo/5082725.pdf>; *idem*, El abogado y las reclamaciones de responsabilidad por diagnóstico prenatal: acciones "wrongful birth y wrongful life", in: M Gisbert Pomata et al (eds), Retos de la abogacía ante la sociedad global (2012) 1801–1811; *A Macía Morillo*, La responsabilidad médica por los diagnósticos preconceptivos y prenatales: Las llamadas acciones de wrongful birth y wrongful life (2005) 183 ff and many others.

[40] ECLI:ES:TS:2019:1513. Commented upon by *A Ruda,* Spain, in: E Karner/BC Steininger (eds), ETL 2019 (2020) 613, no 45.

fic Act.[41] Originally designed for road traffic accidents, it provides standardised criteria and tables for assessing bodily harm, death, and economic loss. Over time, it has acquired broader relevance and is frequently applied by courts as a guiding reference beyond traffic accidents, while remaining subject to the principle of full compensation.

One case which provides an excellent example of that concerns the application of the *baremo* to an air crash, namely, the judgment arising from the Spanair JK5022 accident (Madrid-Barajas, 2008). In this judgment, the Spanish Supreme Court addressed whether the statutory compensation schedule in question could be used to quantify damages arising from an aviation disaster, an area governed neither by the Road Traffic Act nor by its underlying risk rationale. The Court held that the traffic accident compensation schedule may be applied as a guiding criterion (*criterio orientador*) in the context of an air crash, despite the fact that such accidents fall outside the material scope of road traffic liability law. The justification for this approach lies in considerations of legal certainty, equality of treatment, and methodological coherence in assessing personal injury damages.

Crucially, however, the Court introduced an important qualification to this application. It stressed that, in cases such as large-scale aviation accidents, the *baremo* does not operate as a closed or binding system: its internal limitations, ceilings, and corrective factors cannot be mechanically transposed, and its use must remain flexible and non-restrictive, in accordance with the overarching principle of full compensation of damage (*restitutio in integrum*). The Supreme Court expressly rejected the idea that the compensation schedule could function as a *de facto* cap on damages in contexts structurally different from road traffic accidents. The exceptional nature of aviation disasters – characterised by catastrophic harm, mass casualties, and a risk profile distinct from that of ordinary traffic – requires an adapted and corrective application of the schedule. In short, the *baremo* may serve as a reference framework, but not as a normative ceiling.[42]

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[41] Act 35/2015, of 22 September, *de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación* (BOE no 228, 23.9. 2015).

[42] In legal scholarship, see *G Iturmendi Morales*, La valoración del daño personal en el caso Spanair, RRCCS 9 (2019) 3; *A Vicente Sempere Navarro*, Indemnización por el accidente de Spanair (vertientes civilista y laboralista), Revista española de derecho del trabajo 228 (2020) 13–25; *E Farnós Amorós*, La aplicación orientativa del baremo de tráfico y sus límites: de nuevo sobre el "caso Spanair", CCJC 120 (2022) 75–94; *P Jarne Muñoz*, De nuevo sobre la problemática valoración del daño en las catástrofes

This decision is widely regarded as a landmark in the Supreme Court's evolving approach to the transversal use of the traffic compensation schedule beyond its original statutory domain.[43] Together with later case law on asbestos-related diseases and other mass-harm scenarios, it supports the view that the *baremo* has become a general tool for the rationalisation of damages, while remaining subordinated to the principle of full compensation. The decision under comment may be seen as a paradigmatic example of how the Supreme Court reconciles standardisation and flexibility in quantifying personal injury damages outside the field of motor vehicle liability. Such an expansionist interpretation of the *baremo* is not always well received[44] and it has been suggested that there should probably be a separate *baremo* for medical malpractice cases.[45]

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aéreas: a propósito de los primeros pronunciamientos del tribunal supremo en relación con el accidente de Spanair de 20 de agosto de 2008, Revista de Derecho del Sistema Financiero: mercados, operadores y contratos (2020) 309–324. On other aspects of the case, also see *C Llorente Gómez de Segura*, "Forum non conveniens" revisited. El caso Spanair, CDT 3(2) (2011) 267–281 <https://e-revistas.uc3m.es/index.php/CDT/es/article/view/1336/557>; *M Herranz Ballesteros*, Conflicto de jurisdicciones y declinación de la competencia: los asuntos Honeywell y Spanair, CDT 5(2) (2013) 592–609 <https://e-revistas.uc3m.es/index.php/CDT/es/article/view/1826/865>; *I Lorente Martínez*, Litigación internacional, forum non conveniens y daños punitivos: el caso del accidente aéreo de Spanair, in: JR Robles Reyes (ed), Aportaciones de juristas noveles a la ciencia jurídica (2015) 115-128; *ID González Barrios*, Accidente de "Spanair". Interpretación del convenio de Montreal: cómputo del plazo de caducidad e imposición de los intereses del art. 20 LCS: Sentencia del Tribunal Supremo de 22.07.21, RRCCS 9 (2021) 37 f.

[43] Also see *A Ruda,* Spain, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 633, no 70, with further references. Also see *J Solé Feliu*, Responsabilidad civil y accidente de navegación aérea. Un compendio de la jurisprudencia sobre el caso "Spanair": comentario a la STS 963/2023, de 14 de junio, CCJC 124 (2024) 177–204. This other decision extends that indicative (guidance-only) character of the *baremo* to the determination of who qualifies as an injured party (*perjudicados*). See *E Monterroso Casado*, La reparación ad integrum por daño moral en la responsabilidad civil de accidentes, Cuadernos de Derecho Privado 9 (2024) 99–139 <https://doi.org/10.62158/cdp.63>, 124.

[44] Among others, see *F Vasques-Terreiro Vega*, Únete a la rebelión contra el baremo de tráfico (Rogue one), Diario La Ley 8853 (2016).

[45] Among others, see *JA Badillo Arias*, ¿Es necesario un baremo para daños médicos?, RRCCS 9 (2014) 3; *E Llamas Pombo*, Negligencia médica, daño moral y baremo, Práctica derecho daños: Revista de Responsabilidad Civil y Seguros 103 (2012) 4 f.

XXIX. Sweden

Vera Bolmgren

1. Supreme Court (Högsta domstolen) 9 June 2005, Nytt Juridiskt Arkiv (NJA) 2005, 462

A person was suspected of crimes in relation to his business. The investigation was carried out over a period of seven years before the suspect was ultimately acquitted. The prolonged investigation was in part a result of the complexity of the case, in part due to periods of inactivity by the prosecutors. The main question in the Supreme Court was whether there had been a violation of the right to a fair trial in due time according to art 6.1 of the European Convention on Human Rights (ECHR) and, if a violation was found, if the plaintiff was to be compensated for the non-pecuniary damage suffered. The Supreme Court found that there had been a violation of art 6.1 of the Convention and the compensation sum was set at € 10,000.

NJA 2005, 462 is the first case in which a direct application of the European Convention on Human Rights resulted in the establishment of tortious liability. Previously, it was generally assumed by the Swedish courts that only the European Court of Human Rights (ECtHR) could award damages for violations of the Convention. The Supreme Court deviated from this stance based on an interpretation of the right to an effective remedy according to art 13 of the ECHR as requiring the existence of remedies at the national level.

The judgment is often referred to as the starting point for the development of tort law as a remedy for violations of the ECHR in Sweden. In the years following NJA 2005, 462, the Supreme Court delivered several judgments on compensation in a Convention context. It was established that violations of articles other than art 6.1 ECHR could result in an award of compensation.[1] The basic principles of the assessment of compensation were also developed (NJA 2012, 211 I). Since 2018, tort liability and compensation for violations of the ECHR have been regulated in the Tort Liability Act (*Svensk forfattningssamling*, [SFS] 1972:207) ch 3 sec 4 and ch 5 sec 8.

[1] NJA 2007, 295; NJA 2007, 584.

https://doi.org/10.1553/978OEAW51463-Sweden

2. Supreme Court (Högsta domstolen) 5 April 2006, NJA 2006, 181

A fight broke out between two individuals outside of a discotheque. One of the individuals suffered a significant blow to the head by the other. The injury left the victim unconscious for two weeks. During this time, it was uncertain whether he would survive. The question posed to the Supreme Court was whether the victim's mother and brother were entitled to compensation for the psychological distress that the incident had caused them, even though the victim had not been killed. The Supreme Court ruled that the mother, but not the brother, be compensated with a sum of € 1,000.

NJA 2006, 181 brings to light the interplay between the legislator and the Supreme Court in Swedish tort law. The right to compensation for psychological distress when a close relative is killed was first established by the Supreme Court in NJA 1993, 41 I–II. In the judgment from 1993, the Supreme Court discussed whether close relatives could be entitled to compensation in cases where the victim had not been killed but severely injured. The Supreme Court found that such an expansion of the right to compensation should be decided by the legislator. However, the Supreme Court went on to expand the right to compensation in other ways, by establishing that not only intentional but also grossly negligent killing – though not negligent killing – could result in compensation (grossly negligent, negligent killing[2]).

The right to compensation when a close relative is killed was introduced into ch 5 sec 2 of the Tort Liability Act (SFS 1972:207) in 2002. In the preparatory works, it was stated that the intention was not to exclude compensation in cases where the victim is not killed but severely injured. However, the legislator found it difficult to construct a generally applicable rule for these cases. Therefore, the task of deciding on compensation in cases when the victim is not killed was left to the courts. NJA 2006, 181 is the first time that the Supreme Court decided to compensate close relatives of a victim who had been severely injured but not killed. The judgment was preceded by NJA 2003, 508, in which the possibility of compensation for a non-fatal incident was entertained but a restrictive approach upheld.

NJA 2006, 181 represents the culmination of a long-standing dialogue between the Supreme Court and the legislator. The legal development surrounding ch 5 sec 2 of the Tort Liability Act thereafter continued with

[2] Cf NJA 1996, 377; NJA 1999, 632.

regards to the compensation sum and the closeness of the relationship required between the victim and the plaintiff.[3] In 2022, a rule was also introduced in ch 2 sec 3a of the Tort Liability Act, aimed at compensating close relatives for the specific emotional shock, anger and despair typically caused by the loss of a relative through an intentional or grossly negligent act of a criminal nature.

3. Supreme Court (Högsta domstolen) 1 October 2008, NJA 2008, 915

Four individuals of foreign origin were discriminated against by being denied entry to a restaurant, while individuals with a typical Swedish appearance were allowed to enter. The individuals who were denied access had no interest in visiting the restaurant. Rather, the attempt to gain access was part of an investigation regarding the prevalence of discrimination in the restaurant industry. The pivotal question addressed by the Supreme Court was whether the fact that the discrimination had occurred in the context of an investigation aimed at discovering said discrimination should affect the compensation sum. The Supreme Court reasoned that the plaintiffs' lack of interest in visiting the restaurant was irrelevant for the compensation sum. However, the Supreme Court considered the risk of contributing to public perception that the discrimination legislation could be used for systematic enrichment. The Supreme Court therefore ruled that the compensation sum be reduced from € 1,500 to € 500 per plaintiff.

NJA 2008, 915 raises principled questions about the function of non-pecuniary damages, in particular as regards compensation in the case of discrimination and the relationship between tort law, public perception and society at large. The Supreme Court did not only take the prerequisites for compensation in the case of discrimination, the deterring purpose of compensation levels and the case law on compensation sums into account when deciding on the compensation amount. Rather, these factors were weighed against the effect that a compensation sum in accordance with the case law could have on the public perception of, and confidence in, discrimination legislation.

The judgment showcases how the legal justification of non-pecuniary damages is dependent on how the societal function is framed. The higher compensation sum of € 1,500 per plaintiff would have better served the deterring purpose of discrimination compensation, but the Supreme Court also took the broader societal context into account. In the same

[3] NJA 2006, 738; NJA 2017, 1208; NJA 2021, 46.

vein, the Supreme Court has emphasised the interconnected relationship between ever-changing societal norms and values and the compensation levels for certain types of non-pecuniary damage.[4] Turning to the continued development of discrimination case law, the deterring effect has had a prominent impact on how compensation sums are calculated and on the levels of compensation.[5]

4. Supreme Court (Högsta domstolen) 23 April 2014, NJA 2014, 323

A young man was stripped of his Swedish citizenship when it was uncovered that his father, who was a Swedish citizen, was in fact not his biological father. His mother was a British citizen. Four and a half years later, it was determined that the decision to strip the young man of his Swedish citizenship was unlawful. The decision was therefore overturned. The question before the Supreme Court was whether the plaintiff was to be compensated for the non-pecuniary damage suffered as a result of the violation of his right to citizenship according to the Swedish Constitution (*Regeringsformen* [RF] ch 2 sec 7). The Supreme Court emphasised the fundamental nature of the right to citizenship and the consequences that being stripped of it has for participation in society. For those reasons, and because the plaintiff had been stripped of his citizenship for a significant amount of time, the compensation sum was set at € 10,000.

NJA 2014, 323 was the first time that compensation was based on the Swedish Constitution. In the judgment, it was established that although the Swedish Constitution 'is primarily addressed to the legislature and government', tortious liability could arise from the infringement of a right as fundamental as the right to citizenship. The judgment thereby introduced the idea that the Swedish Constitution could be a potential basis for tort claims. An exception was also made from the fundamental principle in Swedish tort law that non-pecuniary damages require explicit support in the legislature.

The outcome in NJA 2014, 323 was confirmed in NJA 2018, 103, where a violation of the right to citizenship according to the Swedish Constitution ch 2 sec 7 once again resulted in compensation. Since 2022, tort liability and compensation for violations of the Swedish Constitution ch 2 are regulated in the Tort Liability Act.[6]

[4] NJA 2017, 938.

[5] NJA 2014, 499 I–II.

[6] SFS 1972:207, ch 3 sec 4 and ch 5 sec 8.

5. Supreme Court (Högsta domstolen) 5 December 2023, NJA 2023, 916

Elevated levels of Per- and polyfluoroalkyl substances (PFAS, commonly referred to as 'forever chemicals') were measured in the bodies of a large number of residents in a Swedish municipality. The cause was contaminated drinking water. The question that the Supreme Court addressed was whether the plaintiffs had suffered personal injury. The Supreme Court's conclusion was that the risk for future harm that the elevated levels of PFAS in the plaintiffs' bodies gave rise to did not constitute personal injury. However, the elevated levels of PFAS in the plaintiffs' bodies were considered to be bodily defects – a form of bodily deterioration. The Supreme Court therefore established that the plaintiffs had suffered personal injury.

NJA 2023, 916 brings to the forefront the effect of new potential harm sources on tort law theory. In Swedish tort law, the definition of personal injury requires the presence of a significant bodily defect. PFAS, once present in an environment, can linger and cause harm over a long period of time. This makes harm caused by PFAS difficult to merge with the framework and definitions of tort law. These difficulties are made no less apparent by the fact that NJA 2023, 916 was preceded by ten years of investigation and court proceedings, including a Supreme Court judgment[7] on the applicability of the relevant tort legislation.

The distinction made by the Supreme Court between personal injury defined as a risk for future harm from elevated PFAS levels and the elevated PFAS levels themselves will likely contribute to the Swedish academic discourse on the concept of harm within tort law. Without doubt, the judgment will hold significance for potential future tort claims based on PFAS exposure.

[7] NJA 2018, 475.

XXX. Switzerland

Peter Loser

Selecting five key landmark decisions from the last 25 years cannot, of course, be done with scientific precision. Any assessment of these decisions will always involve some degree of evaluation. There are other decisions that could have been included in this list of landmark decisions. With my selection, I would like to highlight two characteristics of the Swiss Federal Supreme Court: on the one hand, its willingness to innovate and develop the law, as shown in the first three decisions (on 'normative' household damage, proof of fault in product liability and the development of 'liability based on reliance'); on the other hand, as shown in the third and the last two decisions, the preserving respect for the overall value system of the legal order (in limiting liability based on reliance to avoid contradictions in values), for the legislative powers (in the reluctant recognition of the unlawfulness of 'pure economic losses' and by setting the limitation period for 'long latency damage') and for the reasonable citizen's own maturity and responsibility (in emphasising the contributory negligence of injured parties in traffic).

1. BGE 127 (2001) III 403[1]

The Swiss Federal Supreme Court Decision BGE 127 (2001) III 403 is an important judgment on the so-called 'normative concept of damage' issue. This concerns the question of whether pecuniary damage can be determined and compensated even if the injured party has not suffered any specific financial loss.

The decision is essentially based on the following facts. In 1992, the plaintiff was injured in a car accident with no fault of her own and was subsequently unable to work to varying degrees. She was no longer able to run the family household and could no longer help her husband in his

[1] Federal Supreme Court Decision (Bundesgerichtsentscheid, BGE) 127 III 403 of 21 June 2001: at <http://www.bger.ch/jurisdiction-recht>. Cf *H Hausheer*/*M Jaun*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2001 (2002) 456, nos 5–22.

https://doi.org/10.1553/978OEAW51463-Switzerland

business. Although the injured party did not hire external domestic help and therefore did not incur any costs, she claimed damages based on the costs that she would have incurred if she had hired domestic help.

According to the traditional concept of Swiss liability law, the damage consists of the difference between the financial situation of the injured party as a result of the damaging event and the hypothetical financial situation if the event had not occurred. The bodily injury itself does not constitute damage in the legal sense; rather, it is only the economic disadvantages resulting from the injury for the injured party that are to be compensated. The deprivation of personal opportunities for production (or enjoyment) alone may, under certain circumstances, be considered as immaterial damage; but it is not considered as financial loss.[2]

However, the Federal Supreme Court deviates from these principles in cases where the injured person is no longer able to run the household as before as a result of the bodily injury. The damage resulting from limited or lost ability to work in the household is not merely compensated if specific costs are incurred for domestic helpers who are hired because of the loss of the person running the household: rather, compensation must be paid for the economic loss incurred as a result of the impairment of the ability to work in the household, regardless of whether this loss leads to the employment of a replacement, increased expenditure on the part of the partially disabled person, additional strain on relatives or a reduction in quality of life. The damage must be determined 'normatively', ie the damage must be measured by law without proof of the specific financial loss resulting from the injury, based on what a paid replacement hypothetically would have cost.

In the present case, the Federal Supreme Court has consolidated and deepened its practice on this issue. The reason for the abstract assessment of damages, which is to be carried out independently of the specific additional costs, is that the involvement of an outside person for work in the private sphere of a household does not always appear reasonable and the impairment is usually compensated for by additional unpaid work, either by the injured person themselves or by other members of the family or household. This is because household work is traditionally performed free of charge – by the (married) woman – which is why there is no market for typical household work as such, even though the overall work can be divided into individual tasks that are comparable to activities performed by professionals in return for payment.

[2] For the concept of damage cf *F Werro*, La responsabilité civile (3rd edn 2017) no 46 ff; and *H Rey/I Wildhaber*, Ausservertragliches Haftpflichtrecht (6th edn 2024) no 162 ff.

The present case has also brought about a limitation on abstract calculations, because if the injured spouse was not only active in the household but also worked in the marital business, then a portion must be deducted when determining the abstract household damage. The damage consisting in the lost cooperation in a business, on the other hand, must be calculated and proven according to the traditional concept of damage as a (temporary) loss of income. This is because it is always reasonable to hire an outside third party for commercial activities, and their services are usually remunerated.

The decision is important because it has clearly established and concretised the concept of so-called 'normative damage'. The Federal Supreme Court does not exclude a 'normative' determination of damage in other cases either. For example, an injured person may also be compensated for the (hypothetical) costs of external care, even though the care is provided free of charge by relatives. Such voluntary services should not benefit the injuring party, but the injured person.

Compensation in such cases is largely approved by legal scholars, as the rejection of damages would hardly be compatible with today's social norms. However, as some legal scholars point out, the concept of 'normative damage' proves to be an empty shell, as it encompasses any deviation from the traditional concept of damage without any material criteria. The vague concept of 'normative damage' also makes it difficult to predict the future development of case law on special cases of compensable damage. Decisions would be more predictable and methodologically honest if the courts transparently disclosed the underlying legal assessments for the deviations from the traditional concept of damages.[3]

2. BGE 133 (2007) III 81[4]

The Swiss Federal Supreme Court Decision BGE 133 (2007) III 81 is an important judgment in the field of product liability, as it makes it easier for the claimant to prove that a product is defective and makes the manufacturer's position more difficult in several respects.

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[3] Cf *W Fellmann/A Kottmann/A Rothenberger*, Schweizerisches Haftpflichtrecht, vol I (2nd edn 2026) § 2 no 96 ff for an overview of 'normative damage' cases, and § 2 no 111 ff for critics to the concept.

[4] BGE 133 III 81 of 19 December 2006 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2007 (2008) 586, nos 5–19.

The decision is based on the following facts. In March 2000, X purchased a filter coffee machine in a shop in Geneva, which was manufactured in Hong Kong and imported in large numbers by company Y to Switzerland for resale to retailers. The instruction manual contained the following 'safety instructions and important information': 'Avoid dropping the machine or exposing it to impact. Never place the glass container on a cold or wet surface while it is still hot, as the glass could shatter.' The model successfully passed a quality control check prior to export. On 8 June 2001, X wanted to make coffee for her guests. According to her statement in the proceedings, she placed the glass container with the prepared coffee on the kitchen counter and put the lid on it. The jug then exploded and X injured her hand. After returning from the hospital, she discovered that her guests had cleaned the kitchen and thrown the broken glass into the rubbish bin.

Non-contractual liability for product defects in Switzerland is based on two principles. On the one hand, in the mid-1980s, the Federal Supreme Court tightened ordinary tort liability by making it largely impossible for manufacturers, as employers, to absolve themselves of liability for their employees. The traditional proof of sufficient care in the selection, instruction and supervision of auxiliary persons was no longer sufficient to exempt the employer from liability.[5] The Federal Supreme Court thus tightened liability at the same time as the European Product Liability Directive came into force. On the other hand, in 1994, the Swiss legislator voluntarily (ie 'autonomously') implemented the European Directive by means of the Swiss Product Liability Act. This Law was applied in the present case.

However, the injured party was unable to prove a defect in the design or production, as is usually required. The Federal Supreme Court made an important clarification: the individual categories of defects listed in the law are merely indications or causes of product defects; based on the wording of the law, a defect exists if the product does not offer the safety that can reasonably be expected under all circumstances. According to the Federal Supreme Court, the injured party does not therefore have to prove the cause of the defect, but only has to show that the product did not meet the reasonable safety expectations of the average consumer.

The reasonable safety expectations are specified taking into account the presentation and use that can reasonably be expected. This raises the question of whether the injured party used the coffee machine correctly,

[5] BGE 110 (1984) II 456; cf *H Honsell/B Isenring/M Kessler*, Schweizerisches Haftpflichtrecht (5th edn 2013) § 21 no 18 ff; *Fellmann/Kottmann/Rothenberger* (fn 3) no 872 ff.

especially whether they observed the manufacturer's safety precautions. If this is the case and damage still occurred (in this case: the explosion of the glass), then the defect is established.

Put simply, the fact of damage 'proves' a defect and results in liability, provided that the product was used correctly. This alone constitutes an increase in liability. The Federal Supreme Court also made two further clarifications that weaken the position of manufacturers.

On the one hand, the injured party does not have to prove that the product was used correctly, but only that it is highly probable that this was the case.

On the other hand, the manufacturer must not 'complicate' the correct operation by imposing excessive safety requirements. The information and warnings in the instructions for use do not constitute an alternative to the manufacturer's obligation to design and manufacture safe products. In the case of products for everyday use, for which the public expects a certain minimum level of safety, the manufacturer may not effectively exempt itself from liability in advance by means of a safety notice. This is because the manufacturer's liability is compulsory and cannot be excluded according to the Swiss Product Liability Act. Unexpected safety precautions on the part of the manufacturer would therefore be unacceptable and legally inadmissible limitations to the manufacturer's liability.

With this decision, the Federal Supreme Court has significantly developed product liability in favour of the injured party. It is not yet clear whether this tightening of the law will be permanent, in particular whether in future it will be possible to infer a product defect from the damage without further ado. This would effectively remove the requirement of defect and introduce strict liability for product damage.

The decision is also noteworthy from a methodological point of view. In interpreting Swiss law, the Federal Supreme Court closely followed the considerations of the above-mentioned European Product Liability Directive, which the Swiss legislature implemented 'autonomously'. In this way, it facilitates the single market, which is the underlying motive of the Directive.

3. BGE 133 (2007) 449[6]

The Swiss Federal Supreme Court Decision BGE 133 (2007) III 499 is an important judgment in the field of 'liability based on reliance', a

[6] BGE 133 III 449 of 12 June 2007 (at <http://www.bger.ch/jurisdiction-recht>). Cf *Loser* (fn 4) nos 20–25.

non-contractual and non-regulated liability concept developed by court practice. In this judgment, the Federal Supreme Court sets limits to the liability and restricts the often-criticised openness of the concept.

The decision is essentially based on the following facts. Renovation work had to be carried out in the Gotthard road tunnel, which connects southern and northern Switzerland in the Alps. Company Y, which was commissioned to carry out the work, engaged Company X as a subcontractor. Later on, a dispute arose over the compensation to be paid to Company X by Company Y. Company X threatened to stop the renovation work if it did not receive higher compensation. In a crisis meeting with the owner of the tunnel and the two companies Y and X, the owner informally promised higher compensation to Company X. But no contractual agreement (in the sense of a contract between the owner and Company Y with a direct claim in favour of Company X) was concluded. Company X claims, however, that the owner had inspired trust and reliance that he would ensure that Company X would receive higher compensation either from Company Y or directly from the owner.

As already mentioned, Company X had no contractual claim to higher compensation. However, it asserts a non-contractual claim against the owner, as the latter acted in bad faith by failing to fulfil the trust he had inspired to provide higher compensation, thereby causing damage to Company X in breach of his duty. As a result, Company X is claiming pure economic loss.

According to the Swiss concept of liability, damage is compensated if it is the result of a violation of absolute legal interests, such as physical integrity, personality rights or property. Other damage, ie pure economic losses, are only compensated if the injuring party has violated a legal duty that serves to protect against such damage.[7] The legal duty must in principle be enacted by the formal legislator, but in exceptional cases it can also be created by the court, which – in its recognised subsidiary legislative function – fills gaps in the law.[8]

In contrast, some legal scholars argue that the court could go beyond this exceptional legislative function and create non-contractual duties in

[7] Cf *Fellmann/Kottmann/Rothenberger* (fn 3) no 362 ff.

[8] Article 1 of the Swiss Civil Code states: (1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision. (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. (3) In doing so, the court shall follow established doctrine and case law. At <https://www.fedlex.admin.ch/en/cc/internal-law/21>.

general to compensate pure economic loss.[9] The Federal Supreme Court has not followed this newer approach. In particular, it would undermine the concept of the separation of powers in the creation of (elementary) legal duties between citizens of a society and, especially in Switzerland, would also increasingly conflict with the principle of democracy.

Instead, in the mid-1990s, the Federal Supreme Court, within the scope of its recognised subsidiary legislative function, further developed pre-contractual liability (liability based on *culpa in contrahendo*) and generalised it to 'liability based on reliance'. Landmark decisions were BGE 120 (1994) 331 regarding the liability of a parent company towards creditors of its subsidiary and BGE 130 (2004) III 345[10] regarding the liability of an expert towards third parties – outside of the expertise contract – relying on the written expert opinion (this decision cannot be discussed in detail here due to the limited number of cases for this report). Pre-contractual liability is regulated in Swiss law for isolated special constellations: there is no general liability, but this was recognised by the Federal Supreme Court decades ago. The further developed new concept of liability seemed vague ('based on reliance') and without recognisable limits, which is why it was often criticised at first.

However, the Federal Supreme Court has set limits in several decisions, thereby legitimising liability with regard to its content on the one hand and making it predictable on the other. Liability based on reliance expresses the principle of increased responsibility in special relationships in the field of legal transactions. If a party involved in a legal transaction causes a situation of risk for the other party by inspiring trust and reliance, it has to take legal responsibility for it. The problem of uncertainty in contractual relationships, however, has an importance beyond this individual scope: an efficient and effective legal regulation of contracts requires the parties involved not to eliminate their information gaps exclusively by procuring and securing the missing information themselves, but to compensate the gaps with the alternative strategy of reliance instead. Liability based on reliance may thus contribute to optimising the institution of legal and contractual transactions as a core element of the economy and society.[11] This legitimation explains the limited number of special rela-

[9] For a (critical) overview to this approach, see *M Kessler* in: C Widmer Lüchinger/D Oser (eds), Basler Kommentar, Obligationenrecht I (8th edn 2026) OR 41 no 32a ff; cf also *Fellmann/Kottmann/Rothenberger* (fn 3) § 2 no 344 ff.

[10] See *P Loser*, Switzerland, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2004 (2005) 583, nos 26–33.

[11] Cf *P Loser*, Vertrauenshaftung (2006) no 166 ff (with an English summary at no 1340 f).

tionships that merit protection and may thus give rise to liability based on reliance.

In the present BGE 133 (2007) III 499, the Federal Supreme Court in principle excluded liability if one party relies on the other party to perform a task without a contractual obligation. In such cases, the relying party knows that there is no legally enforceable obligation to perform. They rely on 'voluntary' future behaviour. However, reliance may only be protected if the protection does not result in a breach of the value system of private law. The private law system provides the contract (as a legal institution) to protect expectations of performance. In general, it is reasonable for the parties to secure their expectations of performance by concluding a corresponding contract. The recognition of liability based on reliance must not lead to the legal institution of the contract being undermined. Trust in the voluntary performance of a task can therefore only be protected in very exceptional cases, namely when the conclusion of a contract is de facto impossible due to the existing power relations between the parties or the dependence of the relying party and, at the same time, the relying party cannot reasonably be expected to refrain from the transaction or business relationship. In such special circumstances, the requirements of private autonomy are not met and there is therefore no risk of the contract as a private autonomous legal institution being undermined.

In the present case, Company X continued the renovation work because it relied on the information that it would receive the promised higher compensation payments. The conclusion of a corresponding guarantee agreement with the defendant would have been possible due to the existing balance of power, as the defendant had no realistic alternative. Company X was therefore in a strong negotiating position vis-à-vis the defendant. Under these circumstances, its reliance cannot – from a legal perspective – be considered worthy of protection.

This correct conclusion of the Federal Supreme Court essentially excludes liability for situations in which 'guarantees' are relied upon without a guarantee agreement being in place. This applies, for example, to 'letters of comfort', which are common in the commercial sector.

Other constellations of trust respectively other areas of liability based on reliance, on the other hand, are worthy of further protection. This applies, for example, to: (1) reliance on a correct and complete set of information upon which to base a contractual decision, which has been inspired by executive bodies of a company, by persons making statements in a financial market prospectus or by experts;[12] (2) the reliance that a

[12] Cf BGE 130 (2004) III 345, mentioned above at fn 10.

contractual promise is binding when the party inspires such reliance by its behaviour or the reliance that contractual negotiations are conducted in a serious way; and (3) the reliance that the integrity of one's own legal sphere (ensuring physical safety on the sales premises or maintaining confidentiality of information given during negotiations) is maintained when entering contractual negotiations.

With this decision, the Federal Supreme Court has reinforced the importance of interpreting the law in a consistent ('system-compliant') manner.

4. BGE 146 (2020) III 25[13]

The Swiss Federal Supreme Court Decision 146 (2020) III 25 is a judgment on the issue of long latency damage. It adheres to the concept newly confirmed by the Swiss legislator that liability claims for physical injury may, in exceptional cases, become time-barred even though the damage has not yet manifested itself. The decision lies between two judgments of the European Court of Human Rights (ECtHR), which have condemned Switzerland for this legal situation. This makes the decision significant, even if it is unclear whether the practice will be changed as a result of the second ECtHR judgment.

The decision is essentially based on the following facts. The injured party, Mr J, born in 1953, lived as a child between the ages of eight and 19 in the immediate vicinity of a factory belonging to Company E, which manufactured materials containing asbestos. He stated that he had been regularly exposed to asbestos emissions. Mr J died in 2006 from pleural cancer, allegedly from exposure to asbestos in his childhood. In 2009, his widow and son, as heirs of Mr J, brought an action against the (successor of) Company E. The first two court instances rejected the claims because they held that the limitation period had expired.

Swiss limitation rules are governed by the system of double time limits. A first short and so-called relative period (of three years) runs from the time the injured party becomes aware of the damage. The second longer and so-called absolute period (of ten years; or 20 years in the case of physical injury) runs from the time of the damaging act or the violation of legal duties. Whether the injured party is already aware of the damage at this time is not relevant.

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[13] BGE 146 III 25 of 6 November 2019 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: E Karner/BC Steininger (eds) European Tort Law (ETL) 2019 (2020) 659, no 61 ff and *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2023 (2024) 689, no 130 ff.

The shortcomings of this system in the case of long latency damage were criticised in 2014 in an initial ruling by the ECtHR (*Howald Moor v Switzerland*).[14] In that case, the ECtHR found that there had been a violation of the right to a fair trial under art 6 of the European Convention on Human Rights (ECHR):[15] it acknowledged that the systematic application of the rule to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprived those persons of the chance to assert their rights before the courts.

In 2018, Switzerland revised its statute of limitations rules. As part of the revision, the time limits for the absolute period in the case of physical injury were extended from ten years to 20 years, as mentioned above. However, the concept of double time limits was retained and a special provision for asbestos damage was waived. The 2014 ECtHR ruling was not the reason for the revision, but was discussed by parliament.

The legal proceedings brought by Mr J's heirs were suspended during the revision of the law. The Federal Supreme Court subsequently dismissed the action on the grounds of limitation, denying that there had been a violation of art 6 of the ECHR.

The case was subsequently referred to the ECtHR, which affirmed a violation of art 6 ECHR (*Jann-Zwicker and Jann v Switzerland*):[16] when it is scientifically proven that it is impossible for a person to know that they suffer from a certain illness, such a circumstance should be taken into account in setting the limitation period. The earlier *Howald Moor* judgment of 2014 was, by some legal scholars, understood to mean that it does not prohibit the setting of absolute limitation periods. Rather, the entire national regulation of damages must be considered. The new *Jann-Zwicker* judgment of 2024 obviously takes a more restrictive view.

Despite this, Federal Court Decision BGE 146 (2022) III 25 remains important.

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[14] ECtHR *Howald Moor and Others v Switzerland,* 11.3.2014, nos 52067/10 and 41072/11 (at <https://hudoc.echr.coe.int/eng>). Cf Swiss Report in the Yearbook 2013: *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 673, nos 21–38.

[15] Article 6 ECHR states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[16] ECtHR *Jann-Zwicker and Jann v Switzerland*, 13.2.2024, no 4976/20 (at <https://hudoc.echr.coe.int/eng>). Cf *C Widmer Lüchinger*, Comparative Remarks, in: E Karner/BC Steininger (eds), ETL 2023 (2024) 779, no 39; and the Swiss Report in the ETL Yearbook: *Loser* (fn 13) no 130 ff and *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2024 (2025) 749, no 132 ff.

On the one hand, the conclusion remains that even the revised law provides for an absolute limitation period for long latency damage. In doctrine, an approach is discussed whereby although the limitation period begins to run from the damaging act, it is suspended during the period of uncertainty about the damage. The Federal Supreme Court explicitly rejected this approach because it would result in the introduction of a concept in which the second period begins from the time of knowledge of the damage – a concept that the legislator had deliberately rejected. It remains to be seen whether this is the final court opinion. This is because the question of whether the missing knowledge of the injury is an *objective* uncertainty – as required by law for suspending the limitation period – or a *subjective* uncertainty is still disputed in doctrine.[17]

On the other hand, the Federal Supreme Court is of the opinion that art 6 ECHR is not applicable to this issue at all. This is because the statute of limitations is not a procedural rule, but a substantive issue of liability law, and the ECtHR is not competent to address substantive regulations on liability law. Article 6 ECHR grants everyone the right to assert their civil rights in court, but does not itself establish these rights and claims. The prerequisite for the applicability of art 6 ECHR is therefore the existence of a substantive claim under national law. The Grand Chamber of the ECtHR has confirmed this view in recent judgments.[18] The case of Mr J – like the earlier *Howald Moor* judgment – was not handed down by the Grand Chamber, but by Section III. Therefore, there is still an open question of exceeding competences.

5. BGE 148 (2022) III 343[19]

The Swiss Federal Supreme Court Decision 148 (2022) III 343 is an important judgment in the field of contributory negligence. It concerns the question of whether negligence on the part of the injured party excludes strict liability.

The decision is essentially based on the following facts. On 20 February 2019, B was standing at a tram stop in the city of Zurich with his back to an oncoming tram operated by the municipal transport company.

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[17] Cf *U Babusiaux/A Dedual/R Fein*, Verjährung von Latenzschäden, Zur Umsetzung der EGMR-Rechtsprechung im schweizerischen Verjährungsrecht, Zeitschrift für Schweizerisches Recht (ZSR) I (2025) 433 ff.

[18] See consideration no 8.1.1 of BGE 146 (2020) III 25.

[19] BGE 148 III 343 of 20 May 2022 (at <http://www.bger.ch/jurisdiction-recht>). Cf *P Loser*, Switzerland, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2022 (2023) 673, nos 55–75.

He was looking at his mobile phone when he suddenly stepped onto the tracks without looking to his left. He was hit by the tram and seriously injured.

In principle, there is strict liability for the operators of a tram or other motorised means of transport. However, according to the statutory provisions, this liability does not apply if a circumstance that cannot be attributed to such operators has contributed to the occurrence of the damage to such an extent that it must be regarded as its main cause. Such circumstances are in particular: (1) force majeure; or (2) gross negligence on the part of the injured party or a third person. In contrast to the two lower courts, the Federal Supreme Court assumed gross negligence on the part of the injured party and denied liability.

In legal doctrine, it is sometimes argued that the complex conditions in urban road traffic should be taken into account:[20] gross contributory negligence is assumed only in cases of completely careless and 'blind' walking on tracks; even when gross contributory negligence is confirmed, the operational risk of the tram is only in exceptional cases completely excluded as the cause of the accident. The Federal Supreme Court is more strict and obviously does not want to limit the required care by the fact that looking at one's mobile phone is increasingly common nowadays: 'the degree of care required is not reduced by negligence and bad habits that have developed in traffic'.

The Federal Supreme Court thus expresses a view that also underpins many other judgments: it upholds the maturity and personal responsibility of the reasonable citizen. This is to be welcomed. Personal responsibility should not be seen merely as a burden, but also as freedom. At first glance, the increasing delegation of concern for personal safety and for personal well-being to the State or large companies may appear to be a relief and a social achievement. Ultimately, however, there is a risk of an increasing disempowerment of the citizens.

[20] See consideration no 4.3.6 of BGE 148 (2022) III 343.

XXXI. European Union

Bernhard A Koch and Thomas Thiede

The five selected decisions of the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice (ECJ), between 2001 and 2025 illustrate the profound and, at times, intrusive influence of EC and EU law on the tort regimes of the Member States. Together, these judgments (ranked chronologically below) redefine fundamental tort concepts through the prism of the Union's legal principles, that are effectiveness, functional equivalence, and the protection of fundamental rights.

1. *Veedfald*[1]

In the very first ruling on the substance of the 1985 Product Liability Directive (PLD),[2] the ECJ immediately shattered several expectations with regard to the PLD that had developed until then.

The plaintiff was in need of a kidney transplant, and his brother had agreed to donate one of his. After the healthy kidney had been removed, it was placed into a perfusion fluid while on its way to the operating theatre where the recipient awaited the transplant. The liquid had been concocted by a laboratory belonging to the same hospital operator specifically for this particular surgery. Since it turned out to be defective, the donor kidney could no longer be used. The intended recipient now sued the hospital operator for compensation, and when the case reached the Danish Supreme Court, the latter asked the ECJ for a preliminary ruling on several aspects of the case.

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[1] ECJ 10.5.2001, C-203/99, *Henning Veedfald v Århus Amtskommune*, ECLI:EU:C:2001:258. See *BA Koch*, European Union in: H Koziol/BC Steininger (eds), European Tort Law 2001 (2002) 473, no 31 ff.

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

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One question concerned the type of harm. After all, art 9 PLD only recognises bodily (including fatal) injuries as well as certain property damage as compensable losses. At first sight, it was unclear under which category the damage at stake fell – it could have been a property damage (but whose – of the donor or of the recipient?) or personal injury instead (but again whose – of the donor who had lost a healthy kidney, or of the frustrated recipient who was still missing one, even though that condition per se was pre-existing?). The ECJ failed to reply to this crucial question by arguing evasively that it must have been at least one (no matter which) kind of harm covered by the PLD, leaving it to the national court to ultimately decide.

Another important question referred to the fact that the liquid in question had never actually been put onto any market, since it was produced internally by the hospital's own infrastructure exclusively for the very operation they were called to perform. However, putting the product into circulation is the key moment of the 1985 PLD, and in this case, it never actually happened. Again, the ECJ circumvented this problem by claiming that the liquid was effectively used, so it must have been circulated somehow somewhere by someone. The Court thereby opened Pandora's box. After all, what was at the centre of the case was actually a (failed) service rendered to the claimant that went wrong and not a product that was merely a by-product of said service. In subsequent case law, the ECJ tried to navigate back at least partially in this regard.[3]

Also, since the liquid was produced for this very occasion alone, it was not one item of a line of mass production, which was the original primary scenario underlying the discussions leading to the introduction of the PLD. In fact, for Advocate General Ruiz-Jarabo Colomer, that difference led him to conclude that the PLD would not apply at all in the instant case.[4] However, the ECJ did not follow his opinion.

2. *Köbler*[5]

Köbler is a landmark judgment that consolidated the constitutional principle of State liability within EU law. It secured a remedy for individuals harmed by judicial acts of last resort and thus significantly strength-

[3] CJEU 21.12.2011, C-495/10, *Centre hospitalier universitaire de Besançon v Thomas Dutrueux, Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869.

[4] ECLI:EU:C:2000:697, no 14 ff.

[5] ECJ 30.9.2003, C-224/01, *Gerhard Köbler v Republik Österreich*, ECLI:EU:C:2003:513. See *BA Koch*, European Union, in: H Koziol/BC Steininger (eds), European Tort Law 2003 (2004) 435, nos 41–52.

ened the protection of rights derived from EU law. At the same time, it imposed on national supreme courts an enhanced duty of diligence in the correct application of Union law.

The claimant, a university professor, alleged indirect discrimination after being refused a special length-of-service increment in Austria on the ground that his previous service in Germany had not been counted into the duration of employment required to qualify for such a loyalty payment. When the competent authorities denied the claim, he appealed to the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH). The VwGH initially referred a question to the ECJ but later withdrew the reference and dismissed the claim. The claimant then brought a civil action against the Republic of Austria, seeking damages for the lost increment on the basis that the VwGH's judgment infringed directly applicable provisions of EU law. The referring first-instance court in civil matters asked the ECJ inter alia whether the principle of State liability extends to decisions of a court adjudicating at last instance.

The ECJ, relying on its earlier case law,[6] confirmed that the standards of State liability apply to any breach of EU law by a Member State, irrespective of the branch of government responsible. Because the State constitutes a single entity, liability arises 'irrespective of whether the breach … is attributable to the legislature, the judiciary or the executive'. Therefore, for the first time, the Court confirmed in principle that State liability also extends to cases where the alleged infringement of EU law stems from a last-instance court decision in a Member State. Denying compensation where such a court causes the harm would undermine the full effectiveness of EU law. Liability attaches to the State, not to individual judges, thereby promoting the quality of justice by ensuring redress for harm resulting from judicial error. However, in the case at hand, the ECJ deemed the breach of EU law complained of not to reach the required degree of seriousness, hence insufficient to trigger liability.

3. *Manfredi*[7]

Manfredi constitutes the cornerstone of modern European competition damages litigation. It transformed private enforcement of competition

[6] ECJ 19.11.1991, Joined Cases C-6/90 and C-9/90, *Andrea Francovich v Italian Republic, Danila Bonifaci and Others v Italian Republic*, ECLI:EU:C:1991:428; CJEU 5.3.1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Germany and Factortame Ltd v UK*, ECLI:EU:C:1996:79.

[7] ECJ 13.7.2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04)*

law from a theoretical possibility into a mandatory tort claim grounded directly in primary EU law. The judgment became the principal catalyst for Directive 2014/104/EU (Damages Directive),[8] which codified and harmonised substantive and procedural rules on antitrust damages across the Union, thereby reshaping national civil litigation practice.

The CJEU in *Manfredi* recognised that the right to claim compensation for a loss caused by infringements of (now) arts 101 and 102 Treaty on the Functioning of the European Union (TFEU) stems directly from EU law and forms an essential element of the effectiveness of the competition rules. The case addressed the diversity of national tort laws that had long obstructed effective enforcement, for instance, by imposing stringent fault requirements, short limitation periods or excluding certain heads of loss. The claimants, consumers overcharged by a cartel, faced prescription barriers under domestic law when seeking compensation years later.

The Court held that national procedural frameworks govern the exercise of the EU-based right to damages, but they must comply with the twin principles of effectiveness and equivalence. The principle of effectiveness requires that national rules must not render the exercise of the right virtually impossible or excessively difficult. The principle of equivalence demands that those rules must not be less favourable than those governing similar domestic actions. By constitutionalising these standards, *Manfredi* elevated private enforcement of competition law to a fundamental element of the EU legal order.

4. *Vnuk*[9]

Vnuk radically extended the territorial and functional scope of compulsory third-party motor liability insurance within the EU.

Mr Vnuk was standing on a ladder in the courtyard of a farm, when a tractor with a trailer struck the ladder while reversing. Vnuk was injured in the subsequent fall. His claim against the insurer of the tractor failed in

and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, ECLI:EU:C:2006:461.

[8] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1. See *BA Koch/T Thiede*, European Union, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 660, no 1 ff.

[9] CJEU 4.9.2014, C-162/13, *Damijan Vnuk v Zavarovalnica Triglav d.d.*, ECLI:EU:C:2014:2146. On this case, see *Koch/Thiede* (fn 8) no 45.

the Slovenian courts, which inter alia held that compulsory cover applied only to accidents occurring in public traffic. The Slovenian Supreme Court referred to the CJEU the question whether such use of a tractor nevertheless fell within the notion of 'the use of a vehicle' in art 3 para 1 of the First Motor Insurance Directive (MID).[10]

The Court first confirmed that the tractor qualified as a 'vehicle' within the meaning of the Directive, noting that the definition is 'unconnected with the use which is made or may be made of the vehicle'. Because language versions diverged – some referring to 'use', others to 'circulation' or merely to 'liability in respect of vehicles' – the Court interpreted the provision in light of its context and objectives. It identified a dual objective: protecting victims of motor vehicle accidents and facilitating free movement. On that basis, the CJEU held that the concept of 'use of a vehicle' covers any use consistent with its normal function. Manoeuvring a tractor to position a trailer falls within that normal function, subject to the national court's verification. The fact that this happened in the courtyard of a farm rather than on some public road was not decisive, as the alternative view would violate the primary purpose of the motor insurance system to protect all victims of accidents caused by vehicles.

The judgment provoked considerable concern in the insurance sector. With its broad test of any use 'consistent with the normal function of a vehicle', the Court effectively brought within the Directive's scope *all* motor vehicles intended for travel on land, regardless of registration or location. Hence, any accident arising from the normal operation of such a vehicle must be covered under compulsory insurance.

In light of *Vnuk*, the MID was subsequently amended to reflect this extended view also in its black-letter text.[11]

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[10] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L 103/1.

[11] Art 1 para 1a of the consolidated MID: Directive 2009/103/EC 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 insure against such liability [2009] OJ L 263/11, as amended by Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 amending Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2021] OJ L 430/1. This provision therefore now defines 'use of a vehicle' as meaning 'any use of a vehicle that is consistent with the vehicle's function as a means of transport at the time of the accident, irrespective of the vehicle's characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion'.

5. *Österreichische Post*[12]

Österreichische Post is a major landmark as it fundamentally redefines the concept of compensable non-material damage in the novel context of digital rights, paving the way for a potential increase in mass claims across the EU.

The facts concerned *Österreichische Post*, a company that inter alia collected data on the political affinities of the Austrian population and used this (also) to compile 'target group addresses' subsequently sold to third parties, enabling them to target advertising. The claimant, who had not consented to any such processing of information concerning his persona, felt 'great upset, a loss of confidence, and a feeling of exposure', but no further harm beyond such adverse emotions, after *Österreichische Post* had statistically inferred his affinity with a certain political party, which he found offensive. The Austrian courts denied compensability of such (purely) immaterial harm for lack of seriousness, leading the Supreme Court to ultimately refer several questions to the CJEU, in particular whether the award of compensation for non-material damage under art 82 GDPR[13] required the existence of harm that goes beyond the mere upset caused by the infringement, effectively asking for a threshold of seriousness.

The CJEU held that art 82(1) GDPR cannot be interpreted as meaning that the mere infringement of the GDPR's provisions is sufficient to confer a right to compensation, as the wording speaks of 'damage' and 'infringement' separately. However, regarding any form or degree of 'seriousness' of non-material damage, the Court pointed to the lack of any such reference in art 82(1) GDPR and to recital 146 GDPR, which states that 'the concept of damage should be broadly interpreted'. The CJEU emphasised that limiting this notion solely to damage of a certain degree of seriousness would be contrary to the broad notion favoured by the EU legislator. Moreover, any threshold of seriousness would risk undermining the coherence of the rules established by the GDPR, as the gradation of such a threshold would fluctuate according to the assessment of the courts seized.

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[12] CJEU 4.5.2023, C-300/21, *Österreichische Post AG v Verein für Konsumenteninformation*, ECLI:EU:C:2023:370. See *BA Koch/T Thiede*, European Union, in: E Karner/BC Steininger (eds), European Tort Law 2023 (2024) 721, no 1 ff.

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

The CJEU conceded that the GDPR is silent on how to specifically compensate such losses, leaving it to the Member States to prescribe the detailed rules governing the criteria for determining the extent of the compensation payable. This freedom allows Member States some leeway on quantification, but the ruling fundamentally establishes that the infringement of the right to data privacy need not necessarily lead to a certain minimum degree of harm.

XXXII. Israel

Ronen Perry

To identify the five most important Israeli tort law decisions from 2001 to 2025, I employed several criteria: novelty (of the espoused rule or the reasoning), legal complexity, breadth of applicability, demonstrable impact within the Israeli legal system, potential global appeal, and technical features of the decision (such as length, number of references, size of panel, the presence of concurring and dissenting opinions, and non-party intervention). I consulted colleagues from the other Israeli university-affiliated law schools (Ronen Avraham, Israel Gilead, and Benjamin Shmueli), yet the ultimate decisions and the ensuing responsibility for any controversial inclusion or exclusion are mine. As an academic commentary, four out of the five cases presented here (as well as a prior Supreme Court judgment on the fifth matter) involved Deputy Chief Justice Eliezer Rivlin, who served on the Supreme Court between 2000 and 2012. Rivlin's dominance in the area of tort law was preceded by the Aharon Barak era (indeed, one of the short-listed decisions was Barak's ruling on the constitutionality of tort law legislation which was eventually deemed too far-off from core tort jurisprudence to be included[1]) and followed by the rise of Yitzhak Amit (whose innovative opinions have not yet gained sufficient traction or impact[2]).

1. *Re Estate of Ettinger*[3]

In re *Estate of Ettinger*, the Supreme Court overturned a time-honoured precedent concerning the availability of damages for loss of earning capacity in the 'lost years.' Michael Ettinger, a twelve-year-old child, was playing with a friend at a playground near his house in the Jewish Quarter of the Old City of Jerusalem. He fell into an unfenced archeolog-

[1] High Court of Justice (HCJ) 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel v Minister of Defense*, 62(1) Piskei Din (PD) 1 (2006).

[2] See eg, Civ App 4486/11 *John Doe v Clalit Health Services*, 66(2) PD 682 (2013).

[3] Civ App 140/00 *Estate of Ettinger v The Company for the Reconstruction and Development of the Jewish Quarter in the Old City of Jerusalem Ltd*, 58(4) PD 486 (2004).

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ical pit with a concrete flooring and died from his injuries the following day. His estate, parents, and sister brought an action against the Company for the Reconstruction and Development of the Jewish Quarter, which was responsible for the maintenance of the area, and against other parties. The main question was whether a person whose life (and employment) expectancy were reduced by wrongful conduct, or their estate in cases of death, could recover damages for the loss of earning capacity in the 'lost years.' In *Estate of Gavriel*, famously decided in 1982, the Supreme Court held by a 3:2 majority that they could not.[4] The District Court in *Estate of Ettinger* followed this precedent and denied recovery for loss of earning capacity in the lost years. The estate and the family members appealed to the Supreme Court.

Justice Rivlin wrote the decision, and the other four judges (Barak, Dorner, Matza, and Or) concurred. The Court held, first, that a surviving victim whose life was shortened should be allowed to recover for the loss of earning capacity in the lost years. This is consistent with the principle of *restitutio in integrum*, because its application entails a comparison between the pre-tort and the post-tort conditions, and the former includes the plaintiff's ability to work throughout their natural pre-tort lifespan. In this respect, there is no real difference between causing serious injury that totally prevents the plaintiff from working for several years and shortening their working life expectancy by the same number of years. Allowing an injured person to recover damages for the loss of earning capacity in the lost years also promotes efficiency. Efficient deterrence requires internalisation of the social cost of the wrongful conduct, and this includes any harm to earning capacity, whether caused by an injury that prevents work or by a reduction in life expectancy.

The fact that the victim cannot enjoy damages for the loss of earning capacity in the lost years is immaterial. First, the wrongful conduct caused the inability to enjoy earnings along with the loss of earning capacity. Second, an ability to enjoy damages is not a precondition for their award, as damages for the non-pecuniary element of loss of life expectancy and damages for the loss of earning capacity of comatose victims demonstrate. Third, a surviving victim whose life expectancy has been shortened can often use the damages to fulfill their personal priorities even after their death. Fourth, damages for the loss of earning capacity in lost years can be enjoyed after the victim's death by their legal heirs just like any other asset of the deceased.

[4] Civ App 295/81 *Estate of Gavriel v Gavriel*, 36(4) PD 533 (1982).

Recovery for the loss of earning capacity in lost years also ensures that the victim's dependants do not lose their source of income after the victim's death. In cases of wrongful death, the victim's dependants have a derivative statutory cause of action that hinges on the existence of the deceased's cause of action at the time of death. If the deceased has already litigated or settled their claim, they no longer have a cause of action at the time of death so neither do the dependants. If the victim brings an action before death (thereby blocking the dependants' derivative cause of action) but cannot recover for the loss of earning capacity in the lost years, the dependants will be left with no source of support for these years.

The Court then held that the victim's living expenses, saved by the early death, should be deducted from the damages for loss of earning capacity in the lost years. The saved costs will be assessed by dividing the total family income, including the victim's lost income, by the number of family members plus two (the additional two shares representing general household expenses and family savings). If the family status of the victim in the lost years cannot be reasonably predicted, courts can use statistical data about family size.

Finally, the Court held that even in the case of a fatal injury, when damages for loss of earning capacity in the lost years are not necessary to ensure the dependants' redress, the estate can recover damages for such loss. According to sec 19 of the Civil Wrongs Ordinance, the victim's cause of action fully survives their death. Consequently, any damages that the victim could have obtained but for their death may be awarded to their estate in a survival action. If the heirs are not also the victim's dependants, the court should deduct the amount that the victim would have allocated to support the dependants from the estate's award.

Estate of Ettinger was decided *per curiam* (despite the clear controversy in *Estate of Gavriel*) by a large five-judge panel. The sole opinion, written by Justice Rivlin, is almost 90 pages long in the official reporter, referencing over 160 cases (half of which foreign) and almost 30 books and articles (two-thirds foreign). The Court discussed fundamental questions concerning the assessment of damages for serious and fatal injuries that have occupied courts and legislatures across the world. It overruled a two-decade-old frequently applied precedent and, as the motion for rehearing was denied in late 2004,[5] solidified the law for years to come. The decision has had a tremendous impact on legal practice because it dramatically increased pecuniary damages in most cases of severe or fatal

[5] Civ Rehearing 4011/04 *Municipality of Jerusalem v Estate of Ettinger* (Supreme Court, 7.12.2004).

injury, where life expectancy is shortened. It has been cited in almost 400 subsequent cases and in approximately 150 legal publications.

2. *Migdal Insurance Co v Abu Hanna*[6]

Migdal Insurance Co v Abu Hanna laid down a groundbreaking rule concerning the assessment of damages for minors' loss of earning capacity. The respondent, Reem Abu Hanna, a five-month-old girl from an Arab village in one of the lowest socio-economic clusters, was injured in a road accident. The main question was whether damages for the respondent's loss of earning capacity, probably the most important remedial component in personal injury cases, should be assessed in accordance with the national average wage or in accordance with the average wage of Arab women in the respondent's village (and within her family), which was considerably lower.

The Supreme Court held that in assessing damages for minors' loss of earning capacity, courts must presume, in the absence of concrete evidence to the contrary, that, but for their injuries, children would have been able to earn the national average wage. This presumption applies to every child, so courts should not take into consideration the victim's gender, race, religion, ethnicity, or socio-economic background. Calculating damages based on one of these characteristics constitutes discrimination. The presumption is rebuttable only by clear evidence about the actual prospects of the particular plaintiff.

The Court found support for this proposition in considerations of corrective justice, distributive justice, and efficiency. As for corrective justice, an assessment of earning capacity based on the national average wage represents the broad spectrum of opportunities available to a minor child. As regards distributive justice, assessing earning capacity based on the victim's gender, race, etc, perpetuates social inequality. A uniform gauge respects equality. As for efficiency, assessing earning capacity based on individual affiliations might incentivise potential injurers to exercise lesser care towards underprivileged children.

The respondent was injured when she was only five months old. At such an age, it is impossible to make any assumptions about her future occupation or about the impact of her socio-economic background on her prospects. Therefore, the scope of damages for loss of earning capacity

[6] Civ App 10064/02 *Migdal Ins Co Ltd v Abu Hanna*, 60(3) PD 13 (2005), previously reported in *R Perry*, Israel, in: K Oliphant /BC Steininger (eds), European Tort Law (ETL) 2011 (2012) 715, nos 81–85.

could not be influenced by the facts that most Arab women do not work or work only until marriage, that the average income in the Arab sector is lower than the national average, and that it is even lower in the respondent's village.

The Court opined that differential damages based on disaggregated statistical data perpetuate the present, rather than reflecting the expected – brighter – future. The ruling implicitly assumed that the gap between the national average wage and the average wage in the relatively deprived rural Arab sector, particularly among women, would gradually close. However, while closing socio-economic gaps may be warranted, cumulative data show that the gap has persisted, or even widened, before and after the decision. This fact highlights the novelty of the rule and its underpinnings: awarding damages regardless of group-based statistics constitutes an exception to the fundamental and time-honoured principle of *restitutio in integrum*, and the exception to this rectificatory principle extraordinarily rests on policy concerns involving distributive and social justice.

The breadth of applicability of the *Abu Hanna* rule is notable, as it applies to most cases of personal injury to minors. In fact, the Supreme Court extended the ruling in *Abu Hanna* to the assessment of damages for loss of earning capacity of some adult victims. In *Karnit v Abdalluli*,[7] the Court held that damages for loss of earning capacity of an adult Druze victim should be based, in the absence of concrete evidence about his earning capacity prior to the accident, on the national average wage, rather than the average wage in Druze villages. The domestic impact of *Abu Hanna* on legal practice and scholarship is manifested in more than 1,000 citations in subsequent cases and about 150 in the academic and professional literature. The universal nature of the *restitutio in integrum* principle also makes the ruling and its reasoning interesting and important on a global scale.

3. *Carmel Hospital Haifa v Malul*[8]

In *Carmel Hospital Haifa v Malul,* the Supreme Court conclusively rejected the notion of proportional liability. The respondent, Eden Malul, was born completely paralyzed and mentally retarded. There were two possible causes for her condition: her preterm birth and its complications,

[7] Civ App 8380/03 *Karnit – Road Accidents Victims' Compensation Fund v Abdalluli* (Supreme Court, 8.12.2005).

[8] Civ Rehearing 4693/05 *Carmel Hospital Haifa v Malul*, 64(1) PD 533 (2010), previously reported in ETL 2011 by *Perry* (fn 6) nos 73–80.

which was a natural cause, and her mother's bleeding following placental abruption, which was caused by a negligent delay in performing a caesarean section. The respondent could not prove by a preponderance of the evidence that the negligence, rather than the natural circumstances, caused her harm. The question was whether it is possible to impose proportional liability in the case of uncertainty about the causal link between the negligence and the harm. The Supreme Court initially answered this question in the affirmative,[9] but upon rehearing, overruled its earlier decision by a slim 5:4 majority.

The decision is highly complex because the nine judges (an exceptionally large panel) expressed six different views, labelled *v*1–*v*6 below. All nine agreed that it is generally necessary to prove all elements of a cause of action by a preponderance of the evidence. The controversy revolved around the willingness to recognise an exception for cases of uncertain causality and the boundaries of this exception.

The four dissenting judges were prepared to impose proportional liability in cases of uncertain causality, based on the probability that the negligent conduct caused the harm, as established through statistical evidence or intuitive appraisal. Justice Naor opined that proportional liability can be allowed if three conditions are met: (1) negligence and physical injury can be proved by a preponderance of the evidence; (2) an 'inherent uncertainty' exists with respect to factual causation, preventing any proof of the causal chain (ie, existing knowledge and scientific research do not enable the court to determine whether the harm was caused by negligence or by a natural cause); and (3) the defendant's negligence was a significant source of risk (there is a significant probability that the negligence caused the harm) (*v*1). Justices Arbel and Rubinstein fully endorsed Justice Naor's proposition. Justice Joubran agreed in principle but opined that the term 'inherent uncertainty' was obscure and that the uncertainty must be scientific (*v*2).

The five-member majority split into two groups. Justices Grunis and Procaccia expressed strict refusal to impose liability for negligence if causation cannot be established by a preponderance of the evidence. Despite this shared view, two nuances can be discerned. Justice Grunis opined that imposing proportional liability in cases like the one at bar would be unwarranted (*v*3). Justice Procaccia argued that even if imposing liability were justified, it would entail statutory reform given its revolutionary nature (*v*4).

[9] Civ App 7375/02 *Carmel Hospital Haifa v Malul*, 60(1) PD 11 (2005).

Justice Rivlin (with whom Justices Beinisch and Levi concurred) held an intermediate position. Conceding that proportional liability based on the probability of causation in cases of uncertainty should not be generally allowed, he advocated a limited exception (which was inapplicable to the case in hand). The exception allows proportional liability in cases of a *recurrent bias*, namely where an injurer exposed a group of victims to a recurrent and common risk, and the application of the preponderance of the evidence standard creates a systematic bias in favour of one of the parties. For example, if the defendant's conduct exposed many plaintiffs to a similar risk, but the probability that the conduct caused harm to any specific plaintiff is consistently lower than 50%, then, under the preponderance of the evidence standard, all plaintiffs will lose, even though that conduct clearly caused harm to some of them. The traditional standard of proof systematically favours the defendant. By allowing proportional liability, the proposed exception overcomes this problem.

A few comments on the recurrent bias doctrine are due. First, this doctrine is much narrower than the dissent's proposal in the sense that the former only allows proportional liability in the relatively rare cases of recurring risk, whereas the latter also allows proportional liability in the vast majority of tort cases in which the risk to the plaintiff was distinct. Second, the recurrent bias doctrine, as opposed to the dissent's formulation, does not have a threshold probability of causation ('significant source of risk'). Third, the doctrine may apply when the preponderance of the evidence standard generates a systematic bias either in favour of the defendant or against them. Unlike the dissent's proposal, it can benefit defendants, not only plaintiffs. Fourth, Justice Rivlin explained that the market share liability doctrine should be recognised because it is a special case of the recurrent bias doctrine. Fifth, Justice Rivlin argued that the loss of a chance doctrine, which did not fit the recurrent bias framework, should be abolished (*v*5). Justice Levi concurred with Justice Rivlin completely, whereas Chief Justice Beinisch endorsed the recurrent bias doctrine but refused to abolish the loss of a chance doctrine (*v*6). Sixth, the recurrent bias doctrine was adopted by only three of the five majority judges (Beinisch, Levi, and Rivlin), and briefly by one of the dissenting judges (Rubinstein). Justices Grunis, Joubran, and Naor did not make a conclusive decision on this matter, while Justices Arbel and Procaccia did not discuss it at all.

Malul is the longest tort decision in Israeli legal history (nearly 300 pages in the official reporter, referencing 150 cases and almost 150 books and articles), and probably the most complex one given the unusual nine-judge panel with nine separate and nuanced opinions. It lacks a clear *ratio*

decidendi apart from the rejection, by a slim and fractured majority, of Justice Naor's generous acceptance of proportional liability in cases of uncertain causation. This leaves Israel with only one limited exception to the rule of no proportional liability: the loss of a chance doctrine (often described as proportional liability in disguise because it recognises a new type of compensable harm rather than allowing partial recovery for traditional harm). The recurrent bias doctrine was adopted by only three of the five majority judges (and one of the dissenting judges), and in subsequent cases, the Supreme Court has repeatedly left the question of its recognition undecided.[10] In rejecting a general principle of proportional liability, *Malul* essentially applies to all cases of uncertain causation. Even though this rejection has drastically curtailed litigation, *Malul* has been cited in almost 500 subsequent cases. Because of its importance, it has also been cited about 170 times in domestic legal literature.

4. *Hammer v Amit*[11]

In *Hammer v Amit*, the Supreme Court revisited *Zeitsov v Katz*,[12] its landmark decision on wrongful life and wrongful birth. In *Zeitsov*, the court held four-to-one that a severely disabled child may claim damages from the person whose negligence resulted in that child's birth, although that negligence did not cause the disability itself. The majority disagreed as to the availability of the new cause of action in cases of less severe disability and as to the assessment of damages. Justice Ben-Porat, with whom Justice Dov Levin concurred, held that only in rare cases of extremely severe disability can a court determine that a person was harmed by being born and has a cause of action. In such cases, damages cannot restore the plaintiff to the status quo ante (non-existence). Therefore, in assessing damages, the court should aim to minimise the consequences of the disability and help the child exhaust their existing potential. Justice Barak, with whom Justice Shlomo Levin concurred, held that the doctor must exercise reasonable care so that the minor's life will be unimpaired and that the minor's legally protected interest is not in non-existence but in life without impairment. Thus, the harm for which the defendant is re-

[10] See eg, Civ App 6102/13 *Atzmon v Haifa Chemicals Ltd* (Supreme Court, 24.9.2015); Civ App 7547/99 *Maccabi Health Services v Dubek Ltd*, 65(1) PD 144, 228 f (2011).

[11] Civ App 1326/07 *Hammer v Amit*, 65(2) PD 797 (2012), previously reported in *R Perry*, Israel, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 745, nos 19–33.

[12] Civ App 512/81 *Zeitsov v Katz*, 40(2) PD 85 (1986).

sponsible does not lie in causing life or in preventing non-existence, but in causing life with impairment. In assessing damages, the court should compare impaired life and unimpaired life. Justice Goldberg dissented, holding that recognising the child's cause of action entails statutory reform.

The controversies over the limits of the cause of action and over the assessment of damages, which originated in *Zeitsov*, remained unresolved for more than 25 years and led to inconsistencies in lower courts' decisions. *Hammer* consolidated six different wrongful life/wrongful birth cases from three districts, aiming to address the general questions of liability for wrongful life and wrongful birth and the scope of damages.

The Court in *Hammer* first abolished the child's cause of action for wrongful life, overruling *Zeitsov*. Justice Rivlin, writing for the Court, held that Justice Ben-Porat's position in *Zeitsov* cannot stand, because the possibility of being harmed by birth is a metaphysical question that is institutionally and normatively unfit for judicial decision. Put differently, courts cannot compare life with disability to non-existence and should not engage in the social and moral debate on the question of whether life may be inferior to non-life. Justice Rivlin also rejected Justice Barak's position in *Zeitsov*, holding that the defendant in wrongful life cases is not causally responsible for the disability, and therefore cannot be liable for it.

Next, Justice Rivlin confirmed (and extended) the parents' cause of action for wrongful birth. He emphasised that the parents' action is not based on a judicial determination that the child's life is inferior to non-existence but on vindication of the parents' choice concerning procreation. With respect to causation, Justice Rivlin explained that the parents must prove that: (1) a Termination of Pregnancy Committee would have authorised an abortion; and (2) the parents would have decided to undergo an abortion. The second requirement raises several difficulties. Parents who already know and love their children will be indisposed to argue that they would have avoided bringing them into the world. Moreover, this requirement discriminates against more altruistic parents who are willing to bear the burden of raising disabled children, a discrimination that might have a sectorial dimension. To overcome these problems, Justice Rivlin introduced a rebuttable presumption that the Termination of Pregnancy Committee's expected decision also reflects the parents' position regarding abortion. Put differently, had the Committee authorised an abortion, the parents would have decided to undergo an abortion, and vice versa.[13]

[13] This presumption is not useful in cases of preconception negligence.

Justice Rivlin then counteracted the financial consequences of abolishing the wrongful life action by extending the scope of damages recoverable by the parents in a wrongful birth action, in line with the recommendations of the Matza committee (see below). He held that, for the duration of the child's minority, the parents are entitled to damages for special expenses entailed by the child's disability (stating that the ordinary child-rearing expenses are offset by the joy of having a child). For the time after the child reaches adulthood, the parents are entitled to damages covering the child's normal cost of living, in addition to disability-related costs, and the cost of living is assumed to be equivalent to the average wage. The parents are also entitled to damages for non-pecuniary harm and for infringement of autonomy.

The Court held that its decision would not apply retroactively to pending cases in which a claim had been brought by the child but not by the parents. According to the statute of limitations, a civil action must be brought within seven years after the cause of action accrues. Wrongful birth claims typically expire seven years after birth. However, a minor's claim is barred only seven years after they reach majority. Prior to *Hammer*, a wrongful life claim could be brought when the corresponding wrongful birth cause of action had already expired. If an action was brought only by the child based on *Zeitsov*, or not brought at all, and seven years elapsed from the child's birth, abolishing wrongful life claims could leave the family without any redress. To avoid injustice, the court held that the abolition of wrongful life claims would not apply to cases in which a claim was brought by the child but not by the parents. Yet, this does not provide a solution to the rare cases in which no action was brought at all prior to *Hammer*.

The case resolved critical legal uncertainties that have troubled practitioners and courts for over 25 years, regarding the availability of a cause of action for wrongful life and the scope of damages therefor. Its importance is emphasised by the fact that it was decided by an exceptional seven-judge panel, and that both the Israeli Medical Association and the Israel Bar Association participated as *amici curiae*; the former endorsed Justice Ben-Porat's narrow approach in *Zeitsov*, whereas the latter endorsed Justice Barak's more inclusive approach. The Attorney General also joined the proceeding and asked the Minister of Justice to form a professional committee to provide recommendations on the subject. This committee was chaired by former Deputy Chief Justice of the Supreme Court, Eliyahu Matza, and although the Attorney General ultimately decided not to express an opinion, the Court heavily relied on the committee's report. Finally, even though the subject matter seems relatively

constrained, *Hammer* gained more than 300 citations in subsequent cases and more than 100 in the legal literature.

Lastly, Justice Rivlin employed a new type of reasoning of universal relevance: he relied on the 'global consensus' against wrongful life in support of the decision to abolish this cause of action. Notably, the Court assigned independent weight to the global consensus, adding to any other justification provided in other jurisdictions for the disinclination to recognise wrongful life claims. The willingness to comply with global consensus must be context-specific, not only because the court must weigh the advantages and disadvantages of the specific globally endorsed rule, but also because the general advantages and disadvantages of compliance with global consensus (those that are unrelated to the merits of the specific rule) are not equally relevant in all contexts. This is indeed a complicated jurisprudential issue.

5. *John Doe v Dayan-Orbach*[14]

John Doe v Dayan-Orbach is a landmark decision on journalists' liability for defamation, in which the Supreme Court recognised the responsible journalism defence. The petitioner, 'Captain R,' was a company commander in a military post near the Gaza Strip. The area was subject to terrorist activities. On the relevant day, the soldiers in the military post identified a suspicious person carrying a bag and approaching the gate. The soldiers, who expected a terrorist attack against the post, shot at and injured the person, while a siren and an intruder alert were sounded. Captain R shot the suspect from a shorter distance, reporting afterwards that it was a teenage girl who may have had an explosive belt, and may have been sent to examine the soldiers' alertness or as bait. It transpired that the suspect was a thirteen-year-old girl on her way to school. Captain R was indicted in a military court for illegal use of his weapon, perverting the course of justice, overreaching authority by ordering subordinates to deviate from the rules of engagement, and conduct unbecoming of an officer. Captain R was ultimately acquitted of all charges; the criminal court found the allegations against him unconvincing. On the day of the indictment, the respondent contended in her investigative television show that the officer repeatedly shot the girl, even after becoming aware of her age and after she had already died, to verify her death.

[14] Civ Rehearing 2121/12 *John Doe v Dayan-Orbach*, 67(1) PD 667 (2014), previously reported in *R Perry*, Israel, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2014 (2015) 688, nos 28–42.

The District Court held that the television show presented a story in which the soldiers kept shooting even after they realised that the suspect was a young girl, demonstrating indifference and disrespect for human life, and that Captain R shot her repeatedly from a short distance to verify her death, telling his soldiers that 'anyone moving in this area must be killed.' The District Court concluded that the television show defamed Captain R by presenting him as cruel and vicious, as being responsible for an indifferent shooting by the soldiers, and as a commander who urged his soldiers to lie for him in the operational inquiry. The District Court held that neither the truth nor the good faith defences applied.

Both parties appealed to the Supreme Court.[15] This Court held in 2012 that the television show indeed defamed Captain R. However, all judges concluded that at least one of the statutory defences applied. The truth defence (Defamation Act § 14) precludes liability if two conditions are met: (1) the statement published was true, and (2) there was public interest in its publication. Under a time-honoured interpretation, known as the provisional truth rule, truthfulness is tested at the time of publication, so the defence holds even if subsequent changes and developments render the initial publication inaccurate or incomplete. Justice Rivlin, with whom Justice Amit concurred, extended this rule to a case in which the representation was consistent with the truth *known* to the defendant at the time of publication, and it later transpired that it was not objectively true at that time. In his view, although Captain R was ultimately acquitted, the reality reflected in the documentary was not substantially different from 'the truth, which was known at the time, in accordance with the fact-finding capacity of a reasonable journalist.' At the time of publication, there was sufficient basis for an indictment, and this is the truth that was available to the respondent. Consequently, the truth defence applied. Justice Vogelman opined that the truth defence may be said to apply to statements that were wholly true at the time of publication and rendered partially true at a later stage following a change in reality, not to statements that were perceived as wholly true at the time of publication but were actually inaccurate at that time.

The good faith defence (Defamation Act § 15) precludes liability if two conditions are met: (1) the defendant published the statement in good faith, and (2) one of the special circumstances enumerated in this section existed. Justice Rivlin held that the respondent did not intend to harm the petitioner and took the necessary precautions to verify the truthfulness of the publication. Thus, she acted in good faith. One of the circumstances

[15] Civ App 751/10 *John Doe v Dayan-Orbach*, 65(3) PD 369 (2012).

enumerated in sec 15 is the existence of a legal, moral, or social duty to publish (sec 15(2)). The Court recognised 'a journalistic duty to publish,' arising not only with respect to potential danger to life, health, or property, but also when there is a need for public debate on highly important matters. Justice Vogelman, with whom Justices Rivlin and Amit concurred, elaborated on the defence of good faith publication under a journalistic duty to publish.

A motion for rehearing by the Supreme Court was granted in October 2012, and a nine-judge panel convened to reexamine the initial ruling with respect to the viability of the truth defence and the journalistic duty to publish defence. The decision was released in September 2014.

Chief Justice Grunis delivered the leading majority opinion. Grunis agreed that the television show defamed Captain R, and that the question was whether one or more of the statutory defences applied. As regards the truth defence, he opined that there is only one objective legal truth, determined on the basis of the totality of the evidence available to the court at the time of its decision, even if some of the evidence surfaced after the publication. It is insufficient for the purposes of sec 14 to show that the statement appeared to be truthful at the time of the publication; rather, a defendant must establish that the statement reflected the actual truth at that time. The respondent's publication did not meet this condition. Note that Justice Rivlin, who delivered the leading opinion in the Supreme Court's 2012 decision, had already retired, and his extension of the provisional truth rule was wholly rejected by the nine-judge panel in the 2014 rehearing.

Next, Chief Justice Grunis affirmed the 'responsible journalism defence'. He held that while the truth defence is inapplicable to false factual statements, the good faith defence may be relevant. One of the circumstances enumerated in sec 15 is the existence of a legal, moral, or social duty to publish. A journalist has a duty to publish items which serve *a significant public interest*. Such interest exists if the publication facilitates the realisation of a public goal, helps people form opinions on public matters, or enables them to improve their lives. The duty is carried out 'in good faith' only if the journalist acted without malice, in accordance with the standards of responsible, prudent, and fair journalism. These standards concern: (1) the quality of the journalistic investigation, as determined by the reliability and the weight of the sources, the precautions taken to verify the facts, and the publisher's belief in the truthfulness of the factual statements; (2) the nature of the publication itself – refraining from conclusive language in cases of uncertainty, presenting a fair and balanced version of the events, avoiding defamatory statements not

serving the public interest, and publishing the victim's response. In the present case, the publication served a significant public interest, so a duty to publish existed. The respondent reasonably believed in the truthfulness of the statements when they were made, and the publication reflected responsible though imperfect journalism.

Finally, Chief Justice Grunis refused to recognise publishers' general duty to issue a correction when their factual statements subsequently transpire to be flawed. Section 17 of the Defamation Act provides that a good faith defence cannot stand if the victim demanded publication of a correction or a denial, and the publisher did not comply within a reasonable time and in a way comparable to that used in making the defamatory statements. But there should be no general duty to correct or deny in the absence of the victim's demand.

Deputy Chief Justice Naor, and Justices Amit, Arbel, Danziger, Hendel, Joubran, and Vogelman concurred, although each offered some comments or reservations. Justice Vogelman restated his previously expressed opinion that compliance with the standards of responsible journalism was necessary for the establishment of a duty to publish (the second condition of the defence) and should not be tested under the rubric of 'good faith' (the first condition) as suggested by the Chief Justice. Justice Danziger observed (correctly, in my view) that the controversy need not be decided because its practical significance is negligible.

Most judges considered the publisher's duty to issue a correction when the statement transpires to be false. Chief Justice Grunis was unwilling to recognise such a general duty. Justices Arbel and Hendel opined that the publisher may be obliged to publish a correction even without the victim's demand under the good faith requirement. Justice Danziger opined that a duty to report substantial developments derives from the standards of responsible journalism which underlie the 'duty to publish'. Justice Joubran thought it was unnecessary to decide this question, because, in the present case, the public became fully aware of the inaccuracies, making any formal correction redundant. Justice Amit implied that a court cannot order the publisher to publish a correction or a denial of a false defamatory statement if the victim's action is ultimately dismissed, but did not make a conclusive decision on this matter.

Justice Rubinstein dissented, endorsing Chief Justice Grunis's analysis of the truth defence while rejecting the responsible journalism defence altogether. In his view, sec 15(2), which deals with good faith publication under a duty to publish, does not apply to journalistic publications. Justice Rubinstein believed that recognising a broad journalistic duty to publish potentially false statements would constitute an unwarranted

encroachment on reputation, hence on the constitutional right to human dignity. Thus, the original claim should be allowed, the petitioner should be awarded damages, and the respondent should inform the viewers of the petitioner's acquittal.

The importance of the case lies in the groundbreaking recognition of the responsible journalism defence, which revolutionised defamation law. The new defence covers false factual journalistic statements, which were not previously protected – because the truth defence applies only to truthful statements of fact and the good faith defence was perceived as covering opinions rather than factual statements. In addition, the Court rejected the proposed extension of the truth defence to publications that the publisher reasonably believed to be true but turned out to be false following subsequent revelation. *Dayan-Orbach* is one of the most extensive decisions in the history of Israeli tort law, spanning more than 200 pages in the official reporter with over 250 referenced legal sources. The case involved an unusual nine-judge panel, of whom eight (one in dissent) offered independent and differing opinions. The case's impact is manifested in almost 600 citations in subsequent cases and more than 100 in legal literature.

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In this book, experts from more than 30 jurisdictions present their selection of the five most important tort cases issued in their system between 2001 and 2025. The reporters outline the decisions and place them in the context of their respective tort law regime. Together, these reports create a bird's eye view of the evolution of tort law in Europe in the first quarter of the 21st century.

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