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

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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).

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

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).