II. Belgium

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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

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[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.