XXIII. Portugal

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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.