Tort and Insurance Law Yearbook

Helmut Koziol
Barbara C. Steininger (eds.)

European Tort Law 2008

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Edited by the
European Centre of Tort
and Insurance Law

together with the

Institute for European Tort Law
of the Austrian Academy of Sciences

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Preface

A harmonisation of European law presupposes sound mutual knowledge of the jurisdictions involved in the harmonisation process. However, partly due to language problems it is not always easy to obtain information about all these jurisdictions, especially as far as new developments are concerned. Against this background, the European Centre of Tort and Insurance Law and the Institute for European Tort Law decided to publish a Yearbook on European Tort Law containing reports on the most interesting new developments in the field of tort law in different European countries.

The eighth Yearbook on European Tort Law includes reports on most EU Member States, including the new Member States Bulgaria and Romania. Contributions from Switzerland and Norway as well as an overview of the developments in the field of EC law are also included. Furthermore, the Yearbook includes a comparative overview and several essays on key issues of tort law, most of which focus on questions of burden of proof. These essays, as well as the most important results of the country reports and the comparative overview, were presented and discussed at the 8th Annual Conference on European Tort Law in Vienna from 16 to 18 April 2009. The 9th Annual Conference on European Tort Law will again take place in Vienna from 8 to 10 April 2010.

In publishing the Yearbook we pursue the idea of providing a comprehensive overview of the latest developments in the law of torts of many European countries thereby enabling scholars as well as practitioners from different national backgrounds to keep abreast of questions concerning tort law. Furthermore, we hope that the Yearbook will enhance and promote a greater understanding of the respective national legal and judicial systems which is essential for a successful harmonisation of European tort law.

At this point, we would like to express our gratitude for the support of this project by the Austrian Ministry of Science and Research, the Austrian Ministry of Justice, the European Commission, Freshfields Bruckhaus Deringer, the Kulturabteilung der Stadt Wien, Wissenschafts- und Forschungsförderung and Munich Re. Without their support this project could never have been realised. Moreover, we would like to thank the staff of the Institute for European Tort Law and the European Centre of Tort and Insurance Law. Special thanks go to Mag. Lisa Zeiler for making the Conference such a success, Donna Stockenhuber M.A. for once again taking on the most delicate and time-consuming task of proof-reading the entire manuscript and Dr. Nora Wallner for attending to the project and managing the publication process. Moreover, we would like to

thank Thomas Thiede LL.B., LL.M. for technical support, JUDr. Petra Pipková for preparing the Index and Mag. Kathrin Karner-Strobach for unifying the style of the footnotes.

Helmut Koziol and Barbara C. Steininger
Vienna, July 2009

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Opening Lecture

What went wrong? Tort law, personal responsibility, expectations of proper care and compensation

Michele Graziadei*

A. What Went Wrong?

1 The question "what went wrong?" is a simple, common sense question. Confronted with adverse events, human beings show a deeply engrained tendency to ask what, if anything, *did* go wrong? Time and again this powerful question resonates as a critical reaction to an adverse set of facts, for which someone may have to account. Grappling with harm suffered, an individual, or an entire community, will look for a source of disorder. In a sense, this is what makes us human.[1] The old intuition is that disaster follows once the "natural" order of society is undone by a human violation of an ethical or metaphysical principle of order. In many cultures, failing to obey divine precepts, or to observe the rituals and customs, is wrongdoing and a recipe for misfortune. Man's fall from heaven – if you like – is a case in point here.

2 The modern evolution of tortious liability shows a long term tendency to distance tort law from the stance that moral or religious wrongdoing is, by itself, enough to establish civil liability. The bad Samaritan, who fails to aid a person in peril or need, is usually featured in law books to teach students that the law does not generally require citizens to live up to high moral ideals. There has been indeed a long standing effort to build the legal domain as an autonomous domain – autonomous from other normative systems, such as those implicated in moral judgment.[2] This was required to make the law of the State the cement of society. In this respect, at least, the word "tort" (and its cognates, such

* To prepare this piece I have relied on the help and learning of several colleagues and friends. I am grateful to Peter Barber, Michel Cannarsa, Gerhard Dannemann, Lara Khoury, Richard Lewis, Elise Polliot, Ken Oliphant, Geneviève Saumier, Marc Stauch, Pierre Widmer and Richard W. Wright (who provided several helpful comments). The usual disclaimer applies. I am indebted to Prof. Helmut Koziol for the invitation to deliver the lecture, which was held in Vienna, on 16 April 2009.

[1] *M. Tomasello*, The Cultural Origins of Human Cognition (1999).

[2] For a classic statement see *H. Kelsen*, Pure Theory of Law (Knight trans. 1967) 59–69.

as "tortious liability") can be applied to refer generally to the field of extra-contractual liability in the various legal systems of Europe, as the *Principles of European Tort Law* do, and as I will do in the following pages.[3]

The argument of this contribution is, first, to briefly assess what the effort made in this direction – towards the evolution of autonomous patterns of legal liability for civil wrongs – has achieved so far in the field of tortious liability. To a great extent, tort law seems to turn its back on the rules that govern the ascription of moral responsibility and blame in society. Such a general statement needs to be qualified in many ways, of course. To begin with, it may be truer for academic writing than for tort law as applied by judges. This would confirm once more the necessity to distinguish between different formants of the law in discussing any legal topic.[4] Whether tort law can be defended from the indictment of working in the shadow of luck or not, just to pick an academic debate which turns on the distinction between law and morality,[5] it is least clear that the law is dispensed according to formal, established procedures. At least in this first crucial, albeit limited sense, the law strives to dispense a form of justice that is different from morality, assisted as it is by those formal guarantees that safeguard procedural fairness, while blame and moral responsibility are often attributed without such safeguards.[6] Moving past this first observation, tort law today has a certain utilitarian slant that encourages arguments in support of the distinction between legal reasoning and other forms of reasoning. In the first part of this lecture I will briefly touch upon this aspect of tort law from a historical perspective. This will provide an introduction to the second part of the lecture. In the second part of the lecture I will examine how a less reductive approach to human agency may cast light on tort law and its evolution. I will argue that what we know about human agency requires fresh thinking about the meaning and structure of tort law and the role that personal responsibility has in its making.[7]

3

[3] Following the example set by *J. Bell*, The Development of Tort Law, European Tort Law 2007, 2. The use of English as a lingua franca in Europe poses certain problems, nonetheless. They are brilliantly analysed by *O. Moréteau*, L'anglais pourrait-il devenir la langue juridique commune en Europe? in: R. Sacco/L. Castellani (eds.), Les multiples langues du droit européen uniforme (1999) 143 ff.

[4] For this fundamental methodological advice: *R. Sacco*, Legal Formants: a Dynamic Approach to Comparative Law, 39 American Journal of Comparative Law (Am.J.Comp.L.) 1–34; 343–401.

[5] See, e.g., the contributions to the symposium on moral and legal luck in Theoretical Inquiries in Law 2008, vol. 9, no. 1 and *J.C.P. Goldberg/B.C. Zipursky*, Tort Law and Moral Luck, 92 Cornell L. Rev. 2007, 1123; *P. Cane*, Responsibility in Law and Morality (2002) 66 ff., 84 f., 110 f., 135 ff.; *J. Waldron*, Moments of Carelessness and Massive Loss, in: D.G. Owen (ed.), Philosophical Foundations of Tort Law (1995) 387 ff. The debate about objective versus subjective standards of care is, perhaps, the locus classicus for similar reflections, see below, fn. 34.

[6] Note, however, that under a Kantian account of law, moral responsibility can be considered objective and different than moral blame, which is subjective. On the basis of this distinction it can be argued that tort law is concerned with such objective moral responsibility but not with moral blame, unless punitive damages are at issue. See, e.g., *R.W. Wright*, Right, Justice, and Tort Law, in: D.G. Owen (ed.), Philosophical Foundations of Tort Law (1995) 163 ff., 174 ff.; *id.*, The Standards of Care in Negligence Law, in: D.G. Owen (ed.), Philosophical Foundations of Tort Law (1995) 249 ff., 254 ff.

[7] Such as that advocated by *T. Honoré*, The Morality of Tort Law – Questions and Answers, in: D.G. Owen (ed.), Philosophical Foundations of Tort Law (1995) 73 ff.

4 I should add that this is not a plea for a new kind of approach to the law or to legal method. It is rather a personal homage to a time honoured scholarly tradition. It is sometimes remarked that law is the oldest social science. Compared to other normative systems, such as religion and moral reasoning, the law has a certain inclination to take (wo)man as (s)he is, which is probably why that remark has some truth. We should live up to this intellectual tradition by renewing it. To anticipate my conclusions, with reference to the future development of European law in the field of tort, what follows is essentially a warning about the temptation of adopting a purely instrumental approach to tort law. If conceptualism in the law is a thing of the past, it is yet to be seen whether full blown instrumentalism about the law will be our future.

B. The Evolution of a Functional View of Tort Law

5 One of the clearest signs of the tendency of the law to provide its own answer to the question of what wrongdoing is lies in the notion of fault. Since the law regulates human behaviour through the imposition of external standards of conduct – this is how Kant put the distinction between law and ethics – fault for tort law purposes is to be established according to an external measure. The yardstick is the mythical always reasonable or prudent person, or its civilian counterpart, the bonus pater familias, the family man.

6 Behind this predicament there is already an extended history. In Europe, one does not have to wait until the age of Enlightenment to discover a cleavage between law and morals. A wall was gradually erected between transgressions that affect only the conscience of the agent and wrongs that generate claims adjudicated by civil courts. Modern political discourse supported this distinction by insisting on the need to build a civic community which can accommodate certain differences, including, of course, religious differences.[8] The utilitarian view of the law which emerged by the beginning of the modern age became explicit and dominant by the middle of the nineteenth century. By the last quarter of the nineteenth century – but there are forerunners here as well[9] – a functional and interests driven approach to tort law was on the ascendancy. Eventually, it gained the centre of the stage and became the hallmark of a modern law of tort. This did not, of course, erase many differences between national systems of tort law. I will just mention in this respect the different structure of the notion

[8] It would be wrong to think that this movement affected the development of tort law only, since contract law was at the centre of it as well. For shifts in political theory related to this story see the classic contribution by *A.O. Hirschman*, The Passions and the Interests: Political Arguments For Capitalism Before Its Triumph (1977).

[9] Cf. *T. Baums*, Die Einführung der Gefährdungshaftung durch F.C. von Savigny, Savigny-Zeitschrift (Germ. Abt.) vol. 104 (1987) 277–282, on the role played by Savigny as a member of the Prussian State Council in the introduction of a strict liability regime in Prussia for all harms to persons or property caused by carriage on the railway (Gesetz über die Eisenbahn-Unternehmungen vom 3. November 1838, § 25).

of fault. To pick a well known example, in England fault is linked to the violation of a duty of care owed to the claimant in negligence; in France, instead, fault is generally considered to be not relational, but rather free standing.[10] Furthermore, accidents in different countries are litigated before different courts – civil, administrative, and criminal – under different procedural rules, and this also contributes to the formation of distinct national tort cultures, which now in Europe co-exist under the common roof provided by the European Convention on Human Rights and the law of the European Union.

Nonetheless, certain overall patterns can still be discerned. In the late nineteenth century and in the early part of the twentieth century, the establishment of workmen's compensation schemes across the industrialised world and the spreading of insurance further showed that tort law could be considered merely as one of several devices available to cater for certain needs. Other techniques – as was eventually conceded – could deliver redress more widely and faster than tort litigation, though they were also often criticised for giving less than what tort law would provide, if tort liability could be established in favour of the individual claimant. By and large, the rehabilitation of forms of strict liability in a number of domains came of age in the same intellectual atmosphere and produced fundamental changes of the law, most notably in France.[11] Tort lawyers everywhere became fully familiar with the approach that invited exploration of the different functions of tort law rules. In the United States this approach gained momentum with the flourishing of the idea that tort law could be a powerful instrument of "social engineering". By the middle of the twentieth century, the functional view of tort law backing up this type of analysis presided over the birth of the modern law and economics movement in the United States,[12] which obtained spectacular academic success and became influential with academics elsewhere as well.[13] 7

Although it is daring to try to encapsulate a vast movement of ideas in a single line, one could say that this trend of thought, favouring an instrumentalist approach to tort law, culminated in the idea that tort law is the means whereby individual rights are priced through the assessment of their value carried out by the judiciary. To put it as Guido Calabresi did in an enlightening recent contribution: 8

> Torts and other related rules permit the involuntary transfer or destruction of entitlements so long as a collectively determined price is assessed as a result of that transfer or destruction.[14]

[10] *S. Whittaker*, Liability for Products: English Law, French Law, and European Harmonization (2005) 40 ff.

[11] With specific regard to France, *J-L. Halpérin*, Histoire du droit privé français depuis 1804 (1996) 190 ff. For a general view of the law of several European countries: *F. Werro/V.V. Palmer* (eds.), The Boundaries of Strict Liability in European Tort Law (2004).

[12] For a lucid analysis of the different perspectives on tort law of the legal realists and of leading law and economics scholars see *A.J. Sebok*, The Fall and Rise of Blame in American Tort Law, 68 Brooklyn L. Rev. 2003, 1032; cf. *G.E. White*, Tort Law in America (2003) 244 ff.

[13] Whether it did have the same success with the courts or not is, of course, an altogether different question.

[14] *G. Calabresi*, Toward A Unified Theory of Torts, Journal of Tort Law 2007, vol. 1, iss. 3, art. 1.

9 This statement shows to what extent a functional understanding of the subject informs tort law thinking after homo oeconomicus entered the scene. The influence of theoretical models advanced by this approach has been so great that alternative theories of torts – based essentially on the notion of corrective justice – are usually discussed and assessed against this template.[15] Such a broad instrumental outlook on torts assumes that individuals (both injurers and victims) are rational actors who strive to satisfy their self interest and to maximise their utility. They will relate to tort rules by factoring them into their individual judgments. This approach – it is claimed – would correspond to a realistic view of what moves agents in a market society. But, of course, in legal argument, the same methodological outlook can generate normative conclusions as well. To get the flavour of the normative argument one can, for example, check the American Law Institute's *Reporters' Study on Enterprise Responsibility for Personal Injury* about the significance of product warnings. According to this study the purpose of product warnings is:

> [T]o provide users with information about risk levels so that users can harmonize their use preferences with their safety preferences in an informed way, to provide users with information about safe and dangerous use so that they can choose optimal risk reduction strategies, or to provide both types of information.[16]

10 This is the same philosophy that in the different field of securities regulation assigned a pivotal role to disclosure requirements. I do not have to press the point further here, because there are obvious differences between these two fields of law, though one can see some similarities as well, I think. It is well known that this type of analysis is currently applied in many fields of the law. Its impact is enhanced by the claim that it provides tools to design rules with minimum interference with individual choice. The implication is that this theoretical approach squares easily with the fundamental values of a free society, while more paternalistic approaches would require instead to be justified in detail. A cynical consumer viewpoint would nonetheless hold that these warnings are purely self-protection on the part of the seller/manufacturer – like the "sell-by" date (by which time cheeses such as Camembert are not even ripe). This is why good arguments have been developed to the effect that product warnings do not shield producers from liability except

[15] Hence the claim that they are actually a foil to one another: *K.W. Simons*, Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy, 41 Loyola of Los Angeles Law Review (Loy.L.A.L.Rev.) 2008, 1171. Professor Jules L. Coleman and Professor Ernest J. Weinrib are among those routinely cited as leading expositors and defenders of a corrective justice approach to tort law: *J.L. Coleman*, Risks and Wrongs (1992); *E.J. Weinrib*, The Idea of Private Law (1995); *J.L. Coleman* The Practice of Principle (2001); *id.*, Doing Away with Tort Law, 41 Loy.L.A.L.Rev. 2008, 1149. For a fuller discussion of this approach: *J. Gordley*, The Aristotelian Tradition, in: D.G. Owen (ed.), Philosophical Foundations of Tort Law (1995) 131 ff.; *R.W. Wright*, Substantive Corrective Justice, 77 Iowa L. Rev. 1992, 625.

[16] American Law Institute (ALI) Reporters' Study: Enterprise Responsibility for Personal Injury Approaches to Legal and Institutional Change (1991) 66. The Reporters' Study, prepared by non-tort lawyers, was so controversial that it did not gain approval by the ALI and was shelved. It had no impact on the subsequent Restatement Third of Torts. However, there is similar language about product warnings in the Restatement Third of Torts on products liability.

when product hazards cannot be avoided by taking reasonable steps to design those hazards away.[17]

A view of the law of tort from the trenches is not quite the same view one gets from the high ground of legal theory, however. Tort disputes involve the experience of losses that may be ascribed to human agency, to misfortune, or to both, according to the determination of the court. From the personal point of view, they are made of hot stuff, even when the stakes involved seem to be trivial to outsiders. In other words, the human factor is still there. I am sure that most tort scholars steeped in the economic analysis of law would not want to contest this down-to earth remark. Some of them have indeed done much to cast light on it, like Guido Calabresi did in his *Ideals, Attitudes, Beliefs and the Law*.[18] 11

My point is that the instrumental approach to tort law discussed so far deserves a strict scrutiny. A critical examination of how norms work, what features human agency exhibits, and how patterns of behaviour develop in specific contexts, shows the profound weakness of instrumentalism in the law. The philosophical difficulty with an instrumental approach to the law has always been there, of course. Over three hundred years ago, David Hume, one of the founding fathers of British empiricism, warned: "[…] though men be much governed by interest; yet even interest itself, and all human affairs, are entirely governed by *opinion*."[19] Though Hume has a place among the forefathers of utilitarism in the law, he was very much alert to the dangers of taking a too simple view of the human mind. The subjective element that he considers is difficult to eradicate from the law. Hume was obviously right: the pursuit of self-interest as an ideology[20] is – to say the least – deeply ambiguous. To think that it provides a solid foundation for legal regulation requires a willing suspension of disbelief. 12

Before turning to the second part of this article, I wish to make clear that, despite my plea to reconsider how tort law rules relate to human agency, I am not claiming that policy making has no part to play in tort law, or that tort law rules have no distributional effects, or that a functional view of the subject strikes no chord at all. What I am arguing is that the theory under discussion accounts for far less than is commonly thought. It misses the mark in a wide range of cases, and it does so even when, according to its predictions, it should work without trouble. Let us see how and why. 13

[17] See, e.g., *D.G. Owen*, The Puzzle of Comment J, 55 Hastings L.J. 2003–2004, 1377; *id.*, Information Shields in Tort Law, in: S. Madden (ed.), Exploring Tort Law (2005) 295.

[18] *G. Calabresi*, Ideals, Attitudes, Beliefs and the Law: Private Law Perspectives on a Public Law Problem (1985); *id.*, The Complexity of Torts: The Case of Punitive Damages, in: S. Madden (ed.), Exploring Tort Law (2005) 333 ff.

[19] *D. Hume*, Whether the British Government Inclines More to Absolute Monarchy, or to a Republic, in: D. Hume, Essays, Moral, Political, and Literary (1742/repr. 1987) I.VII.5 (emphasis in the original).

[20] *D.T. Miller*, The Norm of Self-Interest, American Psychologist 1999, vol. 54, no. 12, 1053–1060.

C. How Do Norms Work? Of Norms and Incentives

14 At an elementary level, the argument that norms backed up by sanctions are like prices put on human activities has some appeal. There are judicial opinions to the effect that "[…] the law of tort is the general law, out of which the parties can, if they wish contract".[21] Contracts of this kind are incorporated in the law of torts through product warnings and exemption clauses. These have a price, even if it is not stated. But to contract out of the law of torts altogether is not permissible, though after a tort is committed there is room for negotiations and settlement. Yet, the very fact that, unlike prices, tort damages arise out of non-consensual transactions, casts a long shadow on the inference that prices and sanctions for the violations of norms are just different names for the same thing. Even law and economics scholars have reservations about this assimilation for a variety of good reasons.[22]

15 The attempt to reduce norms to prices is just the tip of the wider reductionist program inspired by methodological individualism and supported by the assumption that incentives in the form of rewards or penalties are the most powerful means to induce a desired action. According to this approach, negligence determinations would simply turn on judicial policy analysis of the costs and benefits of different liability rules and the different incentives they generate. Despite the spectacular academic success of this approach – you will have guessed what I am about to argue – the utilitarian model based on these premises works only under some very heavy constraints. These constraints flow from the normative framework that both social and legal norms create, as well as from certain characteristics of human psychology. To put it rather bluntly, while the legal economist would argue that the economy of legal rules wags the dog of tort, I am arguing that the law and the surrounding social norms, as well as human psychology, set the boundaries of the economic approach to tort liability. Economic analysis of law in its classical versions shares the ideology of legal centralism that holds government to be the only source of order and law the only set of enforced rules. To incorporate informal norms into the picture – what many tort lawyers call for want of a better term "morality" – would substantially alter both the positive and the normative analysis for legal economists too.[23]

16 Let me briefly present as a test case for this type of criticism the fate of the conceptualisation of how fault is to be determined in negligence cases advanced by Learned Hand J. in the famous *Carrol Towing* decision.[24] According to Judge

[21] *Henderson v. Merrett Syndicates Ltd* [1995] 2 Appeal Cases (AC) 145, 193, per Lord Goff. On this point, in a critical vein, *T. Weir*, An Introduction to Tort Law (2nd ed. 2006) 5 f.

[22] *R. Cooter*, Prices and Sanctions, 84 Columbia Law Review (Col.L.Rev.) 1984, 1523.

[23] *R.H. McAdams/E.B. Rasmusen*, Norms and the Law, in: A.M. Polinsky/S. Shavell (eds.), Handbook of Law and Economics II (2007) 1573 ff. Interestingly, this chapter falls under the heading "other topics", which is an odd way to label such a core subject.

[24] *United States v. Carroll Towing Co*., 159 Federal Reporter, Second Series (F.2d) 169 (2d. Cir. 1947).

Hand, the standard of care is a function of three variables: the probability of an accident, the magnitude of the resulting harm, and the costs of adequate precautions. If the costs of preventing the accident are less than the magnitude of the potential loss, discounted by its probability, the formula would justify a finding of fault. In one version or another, this formula has become familiar to the generality of tort theorists since it was popularised over thirty years ago by one of the rising stars of law and economics, Professor (now Judge) Richard Posner.[25] If there is a part of economic analysis of law that seems to be eminently sensible, this is it. The American Law Institute's Restatement of Torts, Second, § 291 seems to adopt it:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.[26]

Comment j to § 291 of the Restatement suggests that the question to ask is 17
simply whether "the game is worth the candle". Yet, research conducted by Professor Richard W. Wright on American cases up to 2003 shows that the so-called Hand formula has very little take in practice; it is seldom mentioned and even more rarely applied by American courts.[27] To sum up, the law on the standard of the reasonable person in the United States as applied by the courts has not fallen under the influence of the approach endorsed by the supporters of the Hand formula, despite its apparent acceptance by the Restatement of the Law.[28] To be sure, the *Principles of European Tort Law* – the most important effort to date to restate tort principles at the European level – do not adopt the utilitarian cost-benefit approach to negligence that is commonly associated to the Hand formula, and for good reasons.

The first layer of problems raised by a utilitarian approach to negligence li- 18
ability is that individuals hold definite beliefs about what actions are appropriate and what are not. These beliefs are not framed in instrumental terms (and may indeed not always be appropriate to the modern conditions of life which

[25] *R.A. Posner*, A Theory of Negligence, 1 Journal of Legal Studies (J.Leg.Stud.) 1972, 29; in retrospective: *B.C. Zipursky*, Sleight of Hand, 48 William and Mary Law Review (Wm. & Mary L. Rev.) 2007, 1999.

[26] Note, however, the important but often overlooked qualification introduced in § 291 above by the words "what the law regards". The actual intent of the drafters of this language in the Restatement is discussed in part II of *R.W. Wright*, Justice and Reasonable Care in Tort Law, 47 American Journal of Jurisprudence (Am.J.Juris.) 143 (2002) 146 ff. Unfortunately, the comments (but not the black letter) in the Restatement Third are much more explicitly cost-benefit reductionist, despite widespread criticism.

[27] *R.W. Wright*, Hand, Posner, and the Myth of the "Hand Formula", Theoretical Inquiries in Law 2003, vol. 4, no. 1, art. 4. This path-breaking article marks a turning point in the debate over the role of the Hand formula in the law of negligence. *P.J. Kelley/L.A. Wendt*, What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions, 77 Chicago-Kent Law Review (Chi.-Kent L.Rev.) 2002, 587 rightly note that standard jury instructions in negligence cases do not make reference to the elements that make up the Hand formula.

[28] The Draft Restatement of Torts, Third, supports as well an application of the same test. For a critical appraisal of this choice, see *R. Perry*, Re-Torts, 59 Alabama Law Review (Ala.L.Rev.) 2008, 987; *White* (fn. 12) 325 f.

prevail in society). The question of legitimacy cannot thus be easily turned into a question of rational pursuit of self-interest. Legitimacy is not so flexible or malleable. It has its own dimension.[29] There is therefore ample room to hold that "the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied".[30] Probing further into this matter, social psychology unveils experimental evidence about how people actually react to incentives. A salient finding is that tangible rewards for activities that are considered to be intrinsically enjoyable or socially desirable undermine motivation to engage in them. Rather surprisingly, material incentives which should foster an activity may change its meaning in the eyes of agents and decrease their willingness to engage in it, rather than increasing it.[31]

19 The second layer of problems concerning the approach targeted here is that it unduly assumes complete control of the agents over the relevant situation. Yet some losses are due to lapses, slips, or awkwardness in the execution of tasks that a competent person was definitely set to carry out. Losses caused by inadvertence, or by momentary lapses of attention, are in most cases still considered to be a manifestation of lack of ordinary care, even when they are not examples of unreasonable risk-taking. The concept of unreasonable risk-taking involves the notion of foresight, but only in some cases is faulty behaviour the outcome of short-sighted planning.[32] A discerning analysis of human errors carefully distinguishes these different types of failures.[33] The effort to lump them into the single notion of lack of adequate precautions is counterproductive insofar as it does not really help to understand human behaviour. It may just reflect the old idealistic tendency to explain every aspect of human conduct in terms of will and intention. This is hardly a realistic approach to human agency,[34] but it would not be the first time that an idealistic view of human

[29] One explanation of this lies in the fact that moral intuitions are the outcome of a specialised process, which operates below the level of conscious control. Though we can think about situations as consequentialists, our brains are set to provide strong emotional responses to actions themselves, quite independently of their consequences. Cf. *J.D. Greene*, The Secret Joke of Kant's Soul, in: W. Sinnott-Armstrong (ed.), Moral Psychology, vol. 3: The Neuroscience of Morality: Emotion, Brain Disorders, and Development (2008) 35 ff. Perhaps this explains why juries penalise corporate defendants who do not proceed to implement a safety improvement which is unwarranted in terms of risk analysis, contrary to what economic analysis would suggest: *W. Kip Viscusi*, Corporate Risk Analysis: A Reckless Act? 52 Stanford Law Review (Stan.L.Rev.) 2000, 547.

[30] *X (Minors) v. Bedfordshire County Council* [1995] 3 All England Law Reports (All ER) 353, 380, per Lord Browne-Wilkinson.

[31] There are abundant findings that confirm this. For a study which shows their relevance with respect to environmental regulation see *B.S. Frey/A. Stutzer*, Environmental morale and motivation, in: A. Lewis (ed.), The Cambridge Handbook of Psychology and Economic Behaviour (2008) 406 ff.

[32] The point is forcefully made by *Zipursky*, 48 Wm. & Mary L. Rev. 2007, 1999.

[33] *J.T. Reason*, Human Error (1990); *id.*, The Human Contribution: Unsafe Acts, Accidents and Heroic Recoveries (2008); *C. Vincent*, Patient Safety (2006).

[34] For a realistic approach see *A. Merry/A. McCall Smith*, Errors, Medicine and the Law (2001) 172 ff. (a very helpful book); *M.M. Mello/D.M. Studdert*, Deconstructing negligence: the role of individual and system factors in causing medical injuries, 96 Georgetown L.J 2008, 599; see also *P. Cane* (ed.), Atiyah's Accidents, Compensation and the Law (7th ed. 2006) 48 ff., 188 f. On the perennial, related question whether the standard of care should be subjective or objective see

capabilities lurks behind a piece of legal or economic analysis. The time is ripe to react to this limited understanding of faulty human behaviour.[35]

In the light of these remarks, it is easier to appreciate why the *Principles of European Tort Law* have not followed the American Restatement in the elaboration of the requirement of fault along the lines of the so-called Learned Hand formula of negligence. The *Principles of European Tort Law* are the fruit of a less reductive approach to the issue of fault, which is closer to a common sense analysis of the concept, thanks to a sustained effort to identify all the elements that are called into play to determine fault.[36] 20

D. Formal norms, informal norms and expectations: the duty to disclose medical errors to patients

I now wish to illustrate my points by taking up an emerging subject. The topic is the duty of health care institutions and professionals to disclose medical errors to patients. I am using the familiar expression "medical errors" to speak of cases in which, during any kind of medical treatment, something went wrong. The patient was injured or harmed or, more controversially, unduly exposed to a risk. The terminology to refer to such mishaps has evolved over the last decade in conjunction with growing concerns about patients' safety, which have been unveiled by the pioneering study *To Err is Human* published almost ten years ago.[37] Medical errors are now more often labelled as adverse events or incidents which affect the physical or psychological health of patients. They may or may not import liability for negligence. Unfortunately, the classification of medical errors and the terminology relating to this field of research has not yet been completely standardised and is still evolving, despite the efforts made by the World Health Organization's World Alliance for Patient Safety to provide the appropriate terminology that is needed to provide a general framework to systematically cover the topic.[38] Hence, I will still speak of "medical 21

R.W. Wright, Introduction to the Symposium on Negligence in the Courts: The Actual Practice, 77 Chi.-Kent L.Rev. 2002, 425, 466 ff.; *A. Bernstein*, The Communities That Make Standards of Care Possible, 77 Chi.-Kent L.Rev. 2002, 735; *H. Koziol*, Liability based on Fault: Subjective or Objective Yardstick? Maastricht Journal 1998, 111; *M. Bussani*, La colpa soggettiva (1991).

[35] See now *R.D. Cooter/A. Porat*, Liability for Lapses: "First Order" or "Second Order" Negligence? (2008) University of Chicago Law & Economics, Olin Working Paper No. 435.

[36] *European Group on Tort Law* (ed.), Principles of European Tort Law: Text and Commentary (2005) art. 4:012. See the Introduction to chap. 4 of the Principles by *Pierre Widmer*, 64 ff. for an enlightening presentation of the approach of the Group to the issue of liability for negligence.

[37] *L.T. Kohn/J.M. Corrigan/M.S. Donaldson* (eds.), To Err is Human, Building a Safety Health System (2000) initiated by the National Institute of Medicine. The long-debated Patient Safety and Quality Improvement Act adopted in the US in 2005 is a follow up to this first study at the federal level. Reports of adverse events under this system remain confidential, and cannot be used in liability cases.

[38] The World Alliance for Patient Safety launched the Project to Develop an International Classification for Patient Safety (ICPS) in 2005. The Report on it and other materials are now

errors", to refer generally to the idea that an adverse event affecting a patient's health occurred during medical care of any kind, without pretending to be able to offer here a detailed analysis of this whole field.

22 Steps to improve patients' safety and to reform medical liability are now being made in Europe and elsewhere.[39] Disclosure of medical errors may seem to be a minor point in the reform effort, given the general issues that the reform of this field of the law involves. Nonetheless, the practice of disclosing medical errors, accounting for them, accepting responsibility for them, and eventually providing an apology for them, alters the overall context of medical malpractice law, whether legal liability for medical errors is based on negligence in one of its many manifestations or not.[40]

23 I have chosen this topic to illustrate my points because it connects with the subject of the ECTIL tort law conference of this year on the burden of proof in tort law. My choice of the topic is inspired by a different reason too, however. In due time, systematic efforts to meet, at least in part, patients' expectations concerning the redress of medical errors will be discussed in the light of abundant new empirical evidence. This evidence will help to assess how liability rules work under a regime that claims to better respond to patients' expectations of honesty, trust and respect in the provision of medical treatment, whether that liability is considered part of tort law or of contract law, or of a regime which does not distinguish between the two. A full examination of the topic goes beyond the scope of this paper, however; I will therefore limit my remarks to a few essential points only, instead of considering the full range of questions raised by this topic.[41]

available on the WHO web site: <http://www.who.int/patientsafety/taxonomy/en/>. Cf. *L. Donaldson*, An International Language for Patient Safety, 21 International Journal for Quality in Health Care (Int. J. Qual. Health Care) 2009, 1; *W. Runciman/P. Hibbert/R. Thomson/T. Van Der Schaaf/H. Sherman/P. Lewalle*, Towards an International Classification for Patient Safety, 21 Int. J. Qual. Health Care 2009, 18–26.

[39] Cf. the Council of Europe Recommendation Rec. (2006) 7 of the Committee of Ministers to member states on management of patient safety and prevention of adverse events in health care and the Communication of the European Commission on patient safety, including the prevention and control of healthcare-associated infections, Com(2008) 836 final. European developments have been presented at the Conference sponsored by the Council of Europe on "The Ever-Growing Challenge of Medical Liability: National and European Responses", held in Strasbourg, 2–3 June 2008. The Programme of Community Action in the field of Public Health (2003–2008) funded by the European Commission established the SIMPATIE project which aimed at developing EU-wide commonality and transparency in methodology on patient safety in health care institutions. For an instructive comparative study that covers the UK, the USA, Australia, New Zealand and Canada: *J.M. Gilmour*, Patient Safety, Medical Error and Tort Law: An International Comparison (2006).

[40] The evolution of health care liability systems in this regard is mapped in the contributions collected by *J. Dute/M. Faure/H. Koziol* (eds.), No-Fault Compensation in the Health Care Sector (2004); *P. Hubinois*, Législations et indemnisations de la complication médicale en France et en Europe (2006). For a lucid, concise treatment: *R. Pardolesi*, E' vera la crisi? Note in margine al sottosistema della responsabilità medica, in: Liber Amicorum per Francesco D. Busnelli, II (2008) 415 ff.

[41] For a brilliant analysis of the larger picture one should consult: *Merry/McCall Smith* (fn. 34). In the following pages I will not comment on Italian law, which is a candidate for reform proposals. See *G. Comandé*, Le "regioni" della responsabilità sanitaria e il governo del risarcimen-

There is a wide gulf between the attitude of the medical profession towards the disclosure of medical errors and the expectations of patients affected by them. Traditionally, physicians' informal professional norms do not require disclosure, but favour secrecy. Though some studies show that physicians in principle agree that medical errors should be disclosed to patients, at least when there are clear-cut mistakes that cause significant harm, they are still very reluctant to do so, whether the matter is disclosed to patients, to patients' families, or to colleagues. Various factors hinder the disclosure of medical errors. Some of them are internal to the health care system, but others are external to it.[42] 24

Physicians who are considering whether to disclose a medical error may be concerned about the long-term repercussions of revealing it. These consequences may include loss of position, loss of reputation, or loss of respect of one's peers or of the most respected members of the profession. It can be psychologically difficult to face the complaint of a patient who has suffered harm or been put at risk. This patient may be angry or express total loss of trust in the physician. To disclose an error that is the fruit of a systemic failure is to expose oneself to blame for conduct that may have provided only a minimal contribution to the production of the event. In other words, fear of becoming a scapegoat can be a deterrent to disclosure. Furthermore, disclosure of errors may be resisted on the ground that such a communication does not actually help the affected patient or patients generally. There are also external pressures contributing to the physician's decision not to disclose an error – particularly the possibility of being sued or having to face disciplinary action. In 2004, a well-known English textbook on medical law commented that, though there were dicta in the cases advancing the notion of a duty of candour owed by physicians to patients in case of errors, lawyers advising doctors would rather consider disclosure of such errors an "act of folly".[43] A related preoccupation is, of course, the risk of losing professional indemnity insurance coverage, as a consequence of breaching the contractual clause stipulating a duty to cooperate with the insurer, which may be interpreted as barring admissions of liability.[44] 25

It is not clear, however, whether the law has had a primary role in building the atmosphere of secrecy that traditionally shrouds medical errors. Informal professional norms are probably the primary factors in this respect. This ob- 26

to, in: Liber Amicorum per Francesco D. Busnelli, I (2008) 529 ff.; *G. Comandé/G. Turchetti* (eds.), La responsabilità sanitaria: valutazione del rischio e assicurazione (2004).

[42] *L.C. Kaldjian*, Disclosing medical errors to patients: attitudes and practices of physicians and trainees, 22 Journal of General Internal Medicine (J. Gen. Intern. Med.) 2007, 988–996. I will not consider here the burdens that physicians bear as a consequence of medical errors and of the difficulty of coping with them, but this is part of the same general picture too: see, e.g., *D.L.B. Schwappach/T.A. Boluarte*, The emotional impact of medical error involvement on physicians: a call for leadership and organisational accountability, 138 (1–2) Swiss Med Weekly 2008, 9–15.

[43] *A. Grubb* (ed.), Principles of Medical Law (2nd ed. 2004) 192.

[44] *J.D. Banja*, Does Medical Error Disclosure Violate the Medical Malpractice Insurance Cooperation Clause? in: K. Henriksen/J.B. Battles/E.S. Marks/D.I. Lewin (eds.), Advances in patient safety: from research to implementation, vol. 3, Concepts and methodology (AHRQ Publication No. 05-0021-3), available online at <http://www.ncbi.nlm.nih.gov>.

servation can be validated by comparing the situation in the United States and in Canada. Physicians in the two countries share the same attitudes about the disclosure of medical errors, though the law of tort in the two countries is not the same.[45] Furthermore, even in countries like Japan where apology is a common feature of social life, the medical profession has a different record.[46]

27 Measurements of physicians' efforts to communicate medical errors everywhere show a low reporting rate. They also show more than a trace of lack of candour in the words chosen to convey the message. Sometimes communication is given, if at all, only after the patient had pressed the physician for an explanation, that is, too late to restore trust between the parties.

28 According to various surveys, patients, on the other hand, have strong expectations about receiving a clear statement that an error has occurred. A survey conducted in England by the Department of Health among 8000 citizens who were asked what they would want if they had been harmed during treatment by a National Health Service institution showed that, within this group, 34% wanted an apology or an explanation; 23% wanted an inquiry into the causes of harm; 17% wanted support to cope with the consequences; 11% wanted financial compensation; 6% wanted disciplinary action.[47]

29 The gap between patients' expectations about the disclosure of errors and the performance of the health system on this point could invite many comments. I will mention three aspects only. From an ethical point of view, withholding knowledge about errors from patients involves a lack of respect for them as persons. Lack of honesty may also undermine the therapeutic relationship with the patient. Furthermore, non-disclosure of errors may undermine efforts to improve the safety of medical practice from a systemic point of view.

30 This troublesome picture began to change in the last decades of the twentieth century. By that time, some health care institutions in the United States had turned to a policy of disclosure of medical errors to patients. The Veterans Affairs Hospital in Lexington, Kentucky in 1999 reported about its new policy of full disclosure of harmful errors to patients, with early offers of compensation, and about the impact of this on its malpractice claims experience.[48] The policy was adopted in 1987, after the hospital had lost two malpractice cases, costing more than $ 1.5 million awarded to injured patients. After nineteen years of experience with the new approach, the liability costs of the hospital were below those of comparable

[45] *T.H. Gallagher et al.*, US and Canadian Physicians' Attitudes and Experiences Regarding Disclosing Errors to Patients, 166 Archives of Internal Med. 2006, 1605.

[46] *A. Leflar*, Medical Error as Reportable Event; as Tort; as Crime: A Transpacific Comparison, 12 Widener L. Rev. 2005, 189–225; *id.*, "Unnatural Deaths", Criminal Sanctions, and Medical Quality Improvement in Japan, 9 Yale J. Health Policy, Law & Ethics 2009, 1–51. These fine contributions may help one to understand how the law works in jurisdictions such as Italy and France in which criminal prosecutors often play a role in the story.

[47] Department of Health, Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS (2003) 75.

[48] *S.S. Kraman/G. Hamm*, Risk Management: Extreme Honesty May Be the Best Policy, Annals of Internal Medicine (Ann. Intern. Med.) 1999, 131:1212, 963–967.

VA hospitals. The health system of the University of Michigan adopted a similar robust policy of disclosure and early offers in the same period with comparable results.[49] In 1993, the National College of Physicians amended its Code of Ethics to include a statement on the duty to disclose errors to patients. In 2001, the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), the body responsible for accrediting hospitals and healthcare organizations in the United States, added disclosure of errors to patients to its list of safe practices. The requirement – phrased in the simplest terms – was that "patients and when appropriate their families be informed about all outcomes of care, including unanticipated outcomes."[50] In 2006, Harvard University hospitals and other health care institutions based in Massachusetts published the consensus statement *When things go wrong: responding to adverse events*. This articulated the policy favouring disclosure in detail.[51] In the same year, the National Quality Forum, an organisation promoting consensus standards for high quality healthcare, included disclosure of serious unanticipated outcomes to its list of thirty "safe practices." A flurry of legislation was enacted at the State level to protect statements that could be used in court as admissions of liability.[52] Thirty-six U.S. states have "apology" statutes in force now. Their common denominator is that they all protect "an expression of regret" from being used in court as an admission. Six states also protect "an explanation" of the event. Four states provide protection for full disclosure and apology, including an admission of liability. At the federal level, three years ago, Senators Clinton and Obama presented the *National Medical Error Disclosure and Compensation Bill*.[53] This proposal aimed at providing federal grant support and technical assistance for doctors, hospitals, and health systems that would endorse a policy of disclosure of medical errors coupled with an early offer of fair compensation for injuries or harm occurring as consequences of a medical procedure. Commentators are now paying increasing attention to the various implications of the policy change that goes against the "deny and defend" response to patients' complaints.[54]

Meanwhile, the policy of favouring disclosure of medical errors began to gain 31
support in Canada as well. Just to mention the present situation in Quebec, the user of medical services of the health care system is now:

[49] Medical justice: making the system work better for patients and doctors. Hearings before the U.S. Senate Committee on Health, Education, Labor and Pensions – Testimony of Richard C. Boothman, Chief Risk Officer, University of Michigan Health System. Accessible at <help.senate.gov/Hearings/2006_06_22/boothman.pdf> (hearing held on Thursday, 22 June 2006).

[50] JCAHO, Patient safety standards, effective July 2001.

[51] When Things Go Wrong: Responding to Adverse Events. A Consensus Statement of the Harvard Hospitals (2006) 6 ff.

[52] For a concise presentation and discussion of these laws see *W.M. McDonnell/E. Guenther*, Narrative Review: Do State Laws Make It Easier to Say "I'm Sorry?", 149 Ann. Intern. Med. 2008, 811–815. The authors note that most of these laws became effective after 2000, and that twenty-four States enacted legislation only in 2005, or afterwards. They report that many doctors are still not familiar with the relevant legislation of the State where they practice.

[53] For their presentation of the bill to the scientific community: *H.R. Clinton/B. Obama*, Making Patient Safety the Centerpiece of Medical Liability Reform, 354 (21) New England Journal of Medicine (NEJM) 2006 (25 May) 2205–8.

[54] See, e.g., *R.W. Bourne*, Medical Malpractice: Should Courts Force Doctors to Confess their Own Negligence to their Patients? 61 Arkansas Law Review (Ark.L.Rev.) 2009, 621.

> […] entitled to be informed, as soon as possible, of any accident having occurred during the provision of services that has actual or potential consequences for the user's state of health or welfare and of the measures taken to correct the consequences suffered, if any, or to prevent such an accident from recurring.[55]

Other Canadian provinces have adopted legislation which, however, does not always go this far. Furthermore, the Code of Ethics of the Canadian Medical Association in 2004 was amended to affirm a duty of disclosure. Art. 14 of this code now provides: "Take all reasonable steps to prevent harm to patients; should harm occur, disclose it to the patient.".[56] In 2008, the Canadian Patient Safety Institute released the *Canadian Disclosure Guidelines*, which implement the same policy. Several Canadian provinces have also enacted apology laws, which may help to address such issues without having to address immediate concerns about liability.[57]

32 The movement in favour of this policy is not a purely US-Canadian story, however.[58] Australia was an early mover as well, with the adoption of an *Open Disclosure Standard* in 2003, which has been the subject of an assessment completed in the previous year with positive results.[59] Even more remarkable is the fact that New Zealand, with its no-fault compensation scheme for accidental personal injuries,[60] has only recently turned to a policy of disclosure for medical errors.[61] As predicted by a famous study published in 1994 on why patients sue doctors, this is a clear sign that:

> A no-fault compensation system, however well intended, would not address all patients' concerns. If litigation is viewed solely as a legal and financial problem, many fundamental issues will not be addressed or resolved.[62]

[55] An Act Respecting Health Services And Social Services, R.S.Q., chap. S-4.2, s. 8(2). The disclosure of events that have potential (as opposed to actual) adverse effects is not always without consequences: *R. Chafe/W. Levinson/T. Sullivan*, Disclosing errors that affect multiple patients, 180 (11) Canadian Medical Association Journal (CMAJ) 1125 (class action against Ottawa hospital launched by patients who received a wrong radiation therapy for cancer).

[56] *W. Lewinson/T.H. Gallagher*, Disclosing medical errors to patients: a status report in 2007, 177 CMAJ 2007, 265–267.

[57] British Columbia and Saskatchewan were the first two provinces to enact such legislation, followed in 2008 by Alberta, Manitoba, and Ontario. Cf. *N. MacDonald/A. Attaran*, Medical errors, apologies and apology laws, 180 (1) CMAJ 2009, 11.

[58] *T.H. Gallagher*, Disclosing Unanticipated Outcomes to Patients: International Trends and Norms, in: Proceedings of the Commission of Inquiry on Hormone Receptor Testing II (2009), available at: <http://www.cihrt.nl.ca/partIIoftheinquiry.html>.

[59] Australian Council for Safety and Quality in Health Care, Open disclosure standard: a national standard for open communication in public and private hospitals, following an adverse event in health care (2003). Cf. *R.A.M. Iedema et al.*, The National Open Disclosure Pilot: evaluation of a policy implementation initiative, 188 (7) Medical Journal of Australia (MJA) 2008, 397–400.

[60] *K. Oliphant*, Accident Compensation in New Zealand: An Overview, in: G. Schamps, Evolution des droits du patient, indemnisation sans faute des dommages liés aux soins de santé: le droit médical en mouvement (2008) 451 ff.

[61] New Zealand Medical Council, Good medical practice – Disclosure of harm (2008), available on the web site of the Council: <http://www.mcnz.org.nz/>.

[62] *C. Vincent/M. Young/A. Phillips*, Why do people sue doctors? A study of patients and relatives taking legal action, Lancet 1994 (25 June) 343 (8913):1609–13.

Turning to Europe, the subject was addressed in France in 2002 with the introduction of a comprehensive system of redress for medical accidents by the so-called loi Kouchner of 2002, on the rights of patients and on the quality of the health care system.[63] The reform enacted comprehensive provisions on information duties to patients.[64] It also established the right of patients to know the causes and circumstances of a "dommage médical", which is now part of the health code of France: 33

> Toute personne victime ou s'estimant victime d'un dommage imputable à une activité de prévention, de diagnostic ou de soins ou ses ayants droit, si la personne est décédée, ou, le cas échéant, son représentant légal, doit être informée par le professionnel, l'établissement de santé, les services de santé ou l'organisme concerné sur les circonstances et les causes de ce dommage.[65]

The same Code introduces also a duty of information concerning new risks that could not be identified at the time when medical care of any kind was provided: 34

> Lorsque, postérieurement à l'exécution des investigations, traitements ou actions de prévention, des risques nouveaux sont identifiés, la personne concernée doit en être informée, sauf en cas d'impossibilité de la retrouver.[66]

Under the French Health Code, harm consequent on medical treatment is to be redressed whether or not it is brought about by negligence. In the case of a medical accident that does not involve negligence, patients are entitled to redress on a no-fault basis by the *Office National d'Indemnisation des Accidents Médicaux* (ONIAM) established for this purpose, in fulfilment of the principle of "national solidarity", which is affirmed by this legislative enactment. To be sure, the no-fault scheme provides a right of reparation of substantial injuries only. As mentioned above, within this new framework, all patients who have been victim of a "dommage médical" (as well as those who step into their shoes in case of death or incapacity) have a right to information about the 35

[63] Loi no. 2002-303 of 4 March 2002, Journal Officiel (JORF) 5 March 2002. This law introduces a special regime for nosocomial infections, which have a special regime compared to other causes of medical accidents. For a brilliant comparative treatment of the resulting regime: *L. Khoury*, L'indemnisation de l'infection nosocomiale au Québec: Les leçons du droit français, 45 Cahiers de Droit 2004, 619; for a general introduction and a commentary see: *A. Laude/B. Mathieu/D. Tabuteau*, Droit de la santé (2007); see also *Ph. Hubinois*, Législations et indemnisations de la complication médicale en France et en Europe (2006). No-fault medical liability in France was first advocated by A. Tunc in 1966: *G. Viney*, Avant-propos, in: G. Viney (ed.), L'indemnisation des accidents médicaux – Actes du colloque du 24 avril 1997 (1997).

[64] The rules enacted by the original law are now contained in the French Code de la santé publique, art. L. 1111-2, L. 1111-4, L. 1111-7.

[65] Code de la santé publique, art. L. 1142-4.

[66] Code de la santé publique, art. L. 1111-2. See also the power established by art. L. 1413-13 of the same Code, concerning actions to be taken by the public administration. On this obligation: *D. Tabuteau*, L'information *a posteriori* en droit de la santé, in: C. Kouchner/A. Laude/D. Tabuteau (eds.), Rapport sur les droits des malades 2007–2008 (2009) 93 ff.

circumstances and the causes of the event. The information must be given by the professional involved in the accident or by the health care institution that provided treatment, no later than fifteen days after the discovery of the errors or after an express request for information by the patient.[67] The information is given during a meeting with the victim, who may attend the meeting with the assistance of a doctor or by a trusted person of his or her choice. In formal terms, the duty to disclose belongs to the section of the law setting up a voluntary complaints and redress handling procedure administered by independent regional commissions operating under the law. One can therefore argue that such a duty is only a device to ensure that the redress procedure set up under the Act can proceed smoothly.[68] Nonetheless, some commentators read into this new legal provision the enactment of a full-blown duty of candour towards patients.[69] Contrary to other laws, the French law does not contemplate a report to patients on actions taken to prevent the occurrence of similar events, nor does it say anything about an apology. In the press, there are statements to the effect that the duty to inform patients is apparently not yet adding to a full scale systematic effort to prevent medical errors.[70] Lastly, the ethical code of the French medical profession has not been amended to incorporate an express reference to the duty to communicate to patients what went wrong during medical treatment. Although one could argue that the current version of the ethical code already covers this type of communication, the official commentary on the code is silent on this point.

36 One can compare the French approach to this issue with the English approach.[71] One year after the enactment of the loi Kouchner, in 2003, the consultation paper "Making amends" – setting out proposals for reforming the approach to clinical negligence in the NHS report – was issued by the Chief medical officer for the British National Health Service.[72] This paper advanced the proposal to introduce a duty of candour requiring clinicians and health service managers to inform patients about actions which have resulted in harm. In 2005, the National Patient Safety Agency, the authority of the National Health Service that monitors patient safety incidents in the NHS, took a proactive stance on this issue with the adoption of its "being open policy". This policy:

> advises healthcare staff to apologise to patients, their families or carers if a mistake or error is made that leads to moderate or severe harm or death,

[67] Article L. 1142-4.

[68] Cf. *Laude/Mathieu/Tabuteau* (fn. 63) 511 f.

[69] *P. Chevalier*, La gestion de l'accident médical en établissement de santé, Revue de droit sanitaire et social 2007, 780. The author notes that: "Cette obligation d'information, qui n'est pas assortie de sanction, peine à s'appliquer dans les services médicaux."

[70] See the interview to Prof. Philippe Juvin, Journal de dimanche, 10 January 2009. Prof. Juvin is a politician as well as a surgeon.

[71] Belgium as well has taken steps to reform its system of health care. See the contributions on this subject in *G. Schamps*, Evolution des droits du patient, indemnisation sans faute des dommages liés aux soins de santé: le droit médical en mouvement (2008) and the Belgian report in this Yearbook. For the sake of brevity, I will not discuss this reform in comparison with the other reforms mentioned in the text.

[72] See above fn. 47.

> explain clearly what went wrong and what will be done to stop the problem happening again.[73]

37 The "Good medical practice" ethical code supported by the Department of Health endorses as well a duty of candour in this respect:

> If a patient under your care has suffered harm or distress, you must act immediately to put matters right, if that is possible. You should offer an apology and explain fully and promptly to the patient what has happened, and the likely short-term and long-term effects.
>
> Patients who complain about the care or treatment they have received have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology. You must not allow a patient's complaint to affect adversely the care or treatment you provide or arrange.[74]

38 On the other hand, the National Health Service Redress Act 2006, which will most likely enter into force in 2010 as a sequel to the reform effort carried out to remedy the heavy toll of unsafe medical practice, is much more circumspect on this point.[75] The Act establishes a redress scheme for injuries suffered in connection with services provided as part of the National Health Service. The scheme – which attracted some academic criticism[76] – preserves fault as the general basis of liability. The redress package offered under the Act to victims of medical negligence will ordinarily consist of an offer of compensation for injuries with an upper limit of GBP 20,000, an explanation of what had happened, an apology and a report of action taken to prevent similar occurrences. Care or treatment may be included in the package as well. By accepting the redress package, the patient waives the right to sue.

39 The National Health Service Redress Act 2006 does not introduce a duty of candour towards patients who have suffered injury or harm as a consequence of medical treatment. The statutory redress package will be offered only if negligence by the hospital has already been established by the health care institution. Furthermore, since the scheme does not allow offers above the threshold of GBP 20,000, injuries that are of the most severe kind will not be covered by the scheme. The conclusion is that, outside the ambit of the new redress proce-

[73] This statement is on the web page of the National Patient Safety Agency: <http://www.npsa.nhs.uk>, with the materials prepared to implement this policy.

[74] *General Medical Council*, Good Medical Practice (2006) s. 30 f. This duty was introduced in 1998, after the case *Powell v. Boldaz* [1998] Court of Appeal, Civil Devision (EWCA Civ) 2002, Lloyd's Law Reports Medical (Lloyd's Rep Med) 116; [1998] 39 Butterworth's Medico-Legal Reports (BMLR) 35. For the sequel to this case: *William and Anita Powell v. the UK*, Application no. 45305/99, 4 May 2000, ECHR (dec.); *Powell v. Paul Boldaz* [2003] England & Wales High Court (EWHC) 2160 (Queen's Bench, QB).

[75] The background to this enactment and its context is presented and discussed by *O. Quick*, Outing Medical Errors: Questions of Trust and Responsibility, 14 Medical L. Rev. 2006, 22. This piece also offers a brilliant analysis of the general problems raised by unsafe medical practice.

[76] *A. Farrel/S. Devaney*, Making amends or making things worse? Clinical negligence reform and patient redress in England, Oxford Journal of Legal Studies (OJLS) 2007, 630.

dure, the law has not been changed. Judicial dicta in the law reports about the existence of a duty of candour concerning medical errors[77] are considered to be exhortatory, rather than mandatory, unless the duty of care owed to patients can be extended to include such a duty to inform. They are supported by the previously mentioned initiative of the National Patient Safety Authority and by the Code of Ethics of the medical profession, but from the legal point of view they receive no support as a free-standing duty.[78] In the light of the limitations of the new legislation, the Department of Health:

> considers it is currently more important to embed the general principles of wider redress across the National Health Service – those of apologies and explanations, a spirit of openness, a culture of learning from mistakes and robust investigation – rather than focusing on financial redress only for those cases: which are of low monetary value (currently envisaged to be under £ 20,000); which satisfy set principles in tort law; and where financial compensation would be appropriate.[79]

40 Considering all these developments, a number of questions arise. The first is, how is it possible that the adoption of "consent" as an essential step to secure that medical treatment is legitimate could so often go hand-in-hand with silence when things have gone wrong? A properly executed consent procedure makes clear what risks are associated with medical treatment. But does the duty to inform the patient stop there? And if the answer is no, then how should the current practice of countries where the law and the ethical code that govern the profession do not impose disclosure of medical errors be evaluated? Does this practice square with the requirements of consent to treatment under the law? Under the ethical code?

41 Second, how does disclosure affect the litigation rates concerning medical accidents? Interestingly, despite the enormous amount of intellectual resources devoted to the investigation of tort law the effects of these reforms do not seem to have attracted much attention among tort lawyers. Apparently, the new policy, where adopted, does not seem to produce a growth of malpractice claims, but rather to have no effect or a negative effect on them, producing a decrease in claims or in expectations of compensation. A note of caution is appropriate here, since this assessment may be rather optimistic, being based on a limited historical series of occurrences.

42 There is evidence that patients' positive response to disclosure decreases in the presence of more serious injuries, as one could expect. There are also studies that argue that disclosure is an unlikely method of reducing exposure to litigation and that honesty about errors may bring in more claims, since most medical errors so far have been hidden from patients. One thing is sure, however.

[77] *Naylor v. Preston Area Health Authority* [1987] 1 Weekly Law Reports (W.L.R.) 958, 967, per Donaldson M.R.

[78] *Powell v. Boldaz* [1997] EWCA Civ 2002, [1997] 39 BMLR 35; [1998] Lloyds Rep Med 116.

[79] See the statement by the Parliamentary Under-Secretary of State, Department of Health (Lord Darzi of Denham), in: Hansard, Lords, text for 18 March 2009, Column WA49–WA50.

The implementation of the policy in favour of disclosure is not a light task. It requires the training of personnel and the adoption of effective organisational measures designed to abate errors and to repair trust whenever trust is lost as a consequence of adverse events, if the choice for candour supported by this policy is not to become an empty gesture. It also involves walking a fine line. Expressing regret, or offering a full apology, should not by itself invite the conclusion that substandard care was provided, or that there was negligence according to the law. Under English law, the Compensation Act 2006, s. 2, now generalises this solution with express reference to all cases of negligence or breach of statutory duty:

> "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."

Despite worries about the economic impact of these reforms, there is more at 43
stake here than their distributional impact both on the defendant's side and on the claimant's side. It is something that concerns in a profound sense what we owe to each other, at least in this context. This is what brings us back to the question of what features human agency exhibits and how they are displayed in specific contexts, such as those under scrutiny in tort cases. Is there anything we can learn in this respect?

E. What we owe to each other

What do we owe each other? The classic answer is: mutual respect for the 44
rights recognised under the law. Yet, despite its beauty, this answer leaves much to desire today, though powerful restatements of it have not lost their appeal.[80] We live under the constant pressure of change. The epoch in which the law was considered immutable is past, if indeed it ever existed. Under these circumstances, what we owe each other is, first of all, the recognition that legal subjects and legal rights are constituted, transformed and denied through social action carried out by individuals and groups driven by the desire and the necessity to act in a way that can be justified to others.[81] Individuals and groups approach the law as a form of social interaction and exchange, even in the presence of an institutional practice in which the State claims to have a stake. They mostly strive to establish what is legitimate, rather than what is lawful. All sorts of "higher law" – constitutional law, fundamental rights law, natural law – have been invented to bring the law in line with this basic attitude. Whatever side one wishes to take in the jurisprudential debates over positivism and its alternatives, we should avoid being blind to what is before our eyes. Human beings have a strong inclination to understand legal norms within the wider framework of social life, which is by and large governed by

[80] *N. Jansen*, Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability, 24 OJLS 2004, 443; *R. Stevens*, Torts and Rights (2007).

[81] Cf. *T.M. Scanlon*, What we Owe to Each Other (1999); *id.*, Moral Dimensions: Permissibility, Meaning, Blame (2008).

its own rules. Legal rules are appreciated for the place they occupy in the wider context of social life and are understood in that context.[82]

45 If you are sceptical about this claim, think twice. Think of the thick layers of social norms in which, e.g., company law, labour law, family law, and the law of succession are embedded. Think of the vast field of relationships governed by self-regulation, which is an explicit recognition of the organisational power of social norms. Coming closer to tort law, let's listen to the legislature, when it explicitly acknowledges the normative function of social practice. The Compensation Act 2006 enacted by the UK Parliament did so, by recognising that desirable social activities that involve risk taking may need to be shielded from the full application of the laws of negligence and of breach of statutory duty. Indeed, social practices permeate the law of negligence. Reference to them is unavoidable in order to understand what negligence is, even when the law upholds one practice instead of another.

46 Within this wider context, a deeply engrained tendency is at work even in highly complex contexts such as those concerning the provision of medical care in a hospital. This is the tendency to attribute human actions to an agent's character, that is to look for personality-based explanations of a certain outcome, or constellation of events, rather than to the influence of the wider context in which agents operate. Social psychologists have coined the expression "attribution error" to refer to this psychological tendency, which produces attribution biases, such as the belief that bad outcomes are generally attributable to people with bad dispositions (the "bad apple" response to error). On the contrary, it is often the case that the best people make the worst errors, precisely because they are the ones who are invited to take risks. Similar errors lead to a systematic underrating of the power of the situation. The simplest way to focus on the power of the situation is to reflect on how easy it is to make a perfectly able person look like a clumsy clown or incompetent by changing the usual features of objects that are part of the familiar scene of everyday life.[83]

47 This charge – the charge that the power of the situation is all too often ignored – concerns tort law.[84] Tort law responds to all violations and errors that result in damage done. However, unsafe conduct per se is not generally targeted by tort law. Even a near miss is by and large irrelevant in this respect. The necessary implication is that tort law systematically discounts latent sources of violations and errors. Under tort law, sentinel events of all kinds – precursors of disaster – are ignored until damage occurs. Tort law, in other words, takes into account latent sources of errors, if at all, only when they combine with other factors

[82] Cf., e.g., *N. Zeegers/W. Witteveen/B. van Klink* (eds.), Social and Symbolic Effects of Legislation Under the Rule of Law (2005); *R.A. Macdonald*, Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity, in: M. Graziadei/M. Bussani (eds.), Human Diversity and the Law – La diversité humaine et le droit (2005) 43 ff.

[83] Cf. *D. Norman*, The Psychology of Everyday Things (1988).

[84] *A. Benforado/J. Hanson*, The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy, 57 Emory Law Journal 2008, 311; *J. Hanson/M. McCann*, Situationist Torts, 41 Loy.L.A.L.Rev. 2008, 1345.

to produce harm. But the focus is then on the segment of the specific causal sequence that the agent activates, rather than on the concomitant situation and on the latent sources of errors that mark the path leading to disaster. Only when the magnitude of the disaster is great – sometimes huge – is there willingness to investigate the manifold factors involved in the causing of the accident and to remedy them.[85] In other cases, when the undesired outcome materialises, it is ascribed to "bad luck", or to the seemingly occasional failure of the operator who was on duty that day, that minute, when the window of opportunity for the accident to occur opened and risk materialised as harm. Mine is not a plea for diminished responsibility, but rather for greater awareness of how lawyers usually approach this scenario. It is undeniable that tort law is imbued with assumptions about free will, and the ability to act on it. Yet the study of the various environments in which agents operate and of how human psychology works should help us to understand to what extent these assumptions serve us, and to what extent they instead trick us into thinking about things that are simply not there. To draw your attention to this point is simply to draw your attention to the limitations of tort law as a means to remedy injustice.

F. Conclusions

48 Personal responsibility remains a key concept in the discourse over the structure of tort law. The advent of vicarious liability, strict liability, and the diffusion of no-fault, collective compensation schemes, just like the widespread recourse to insurance to socialise losses, have surely cast doubts on the meaning of this notion. Most often, today, an employer or an insurer, a fund, if not the State, is the provider of the resources employed to deliver compensation, even when a tort action is brought by or against an individual. The extraordinary importance of these alternative routes to compensation cannot be ignored or underestimated. The argument that the spreading of costs is the dominant function of tort law today rests on these solid foundations.

49 Does this state of affairs also invite the conclusion that the notion of personal responsibility has little to do with tort law nowadays? This conclusion is, in my opinion, by and large unwarranted. The evolution of tort law over time occurred in a more convoluted way than was anticipated by the advocates of risk pooling and cost spreading, as evidenced by the widespread move toward recognition of a duty of disclosure, apology and other redress for medical errors. All in all, the measures adopted to tackle the problem of providing compensation to the victims of accidents in the industrial society have not effaced the idea that civil justice provides a forum to deliberate over rights and wrongs, according to a frame of thought that includes the notion of personal responsibility. When the matter is that of delivering compensation to the victims of accidents, tort law must be considered a luxury, because it surely is a costly item,

[85] Tort doctrines and tort theories are contingent upon events and contexts as well: *J.H. Shugerman*, A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century, Journal of Tort Law 2008, vol. 2, iss. 1, art. 2.

as many have pointed out. And yet, the tort system still signals what expectations of care members of society have and how corresponding responsibilities can be shaped through a civic discourse based on rights and duties. In Europe, the human rights jurisprudence flowing from the Strasbourg Court highlights this dimension of tort law for all the Member States of the Council of Europe.

50 I have argued that each accident is a node in a vast network of relationships, an eminently social fact. As such, it is embedded in the network of relationships surrounding it and attributing sense to it. This is why a purely instrumental view of tort law is to be rejected. On the other hand, if this general remark is considered to be true, there is hope to avoid legalistic excess, which is both painful and costly.

51 In the twenty-first century, the language of personal responsibility can therefore still be meaningfully employed by the law of tort, if it is joined with an essential qualification. Wrongful conduct calls for an assumption of responsibility, but it often also calls for reform through the legal system, or otherwise. To affirm personal responsibility and to advocate reform: these should be considered as complementary rather than alternative moves. Proper expectations of care and compensation will be betrayed if one is traded for the other, or confounded with the other. This is a modest reminder: let it also be a source of critical inspiration in the development of a common law for Europe.

Essays

I. Tort Law and Burden of Proof – Comparative Aspects. A Special Case for Enterprise Liability?

Vibe Ulfbeck and Marie-Louise Holle

A. Introduction

1 It has often been pointed out that decision making in law, rather than being concerned with complicated legal issues, is concerned with fact finding. As a supreme court judge once put it: "Deciding a legal case is about three things: facts, facts and facts". Precisely for this reason are rules on burden of proof of enormous practical importance. Thus, rules on burden of proof come into play when there is uncertainty as to the facts of the case.

2 It is often discussed whether rules on burden of proof should be categorized as substantive or procedural law. Quite clearly, the rules belong in both categories. They are procedural rules in the sense that they give directions to the judge as to who should do what during a trial. At the same time, however, they are substantive law rules in the sense that they determine who should win the case in the event of uncertainty.

3 The fact that the rules belong in both categories imply that they may be motivated by different types of reasoning. Broadly speaking, it can be said that rules on burden of proof are based on three different considerations: policy, practical/procedural considerations in combination with fairness and finally, probability.[1]

4 In some areas of the law it is desirable to lend support to the plaintiff for instance because of the type of damage suffered. For instance, in personal injury cases, it may be thought that as a matter of *policy* it should not be too difficult for the plaintiff to obtain relief. Thus, rules on the burden of proof are sometimes used as a means of achieving a substantive law purpose. In some instances, applying a reversed burden of proof can in reality come close to imposing strict liability.

[1] *J.G. Fleming*, The Law of Torts (9th ed. 1998) 350.

It is sometimes said that rules on burden of proof also come into play when it is hard for the plaintiff to satisfy the burden of proof. Clearly, it cannot be the case that whenever it is hard to satisfy the burden of proof then it is reversed or in other ways lowered. Some cases the plaintiff is in fact supposed to lose due to the fact that he cannot prove his case. However, in some instances it can be *unreasonably* burdensome for the plaintiff to be required to satisfy the burden of proof. For instance, if evidence is in control of one party, it could be argued that he should also bear the burden of proof. Likewise if the tortfeasor by his conduct has made it difficult for the plaintiff to satisfy the burden or if the injury occurred in the tortfeasor's sphere of risk, it may seem the proper solution that the tortfeasor bears the burden of proof. The shifting or lessening of the burden of proof in such cases can be viewed as being based on a combination of *practical/procedural* reasons and considerations of *fairness*. 5

Sometimes rules on burden of proof may simply be based on *probability*. Thus, sometimes – at the outset – one fact may seem more likely than another and this may lead to a specific allocation of the burden of proof. The application of the principle of probability serves the function of minimising the number of incorrect decisions. 6

The question of burden of proof contains two questions: 1) the question of the standard of proof, and 2) the question of the allocation of the burden of proof. The question of the standard of proof concerns the intensity with which something must be proved. Is it enough for something to be considered proved if the fact in question seems more likely than not, or does the law require a higher degree of certainty? The question of the burden of proof concerns the question who must prove what. Is it the plaintiff who must prove his case or the defendant who must prove his innocence? Of course, these two problems are interrelated. At the very general level it can be observed that the higher the standard of proof, the greater the effect of rules allocating the burden of proof from one person to another. Likewise, the lower the standard of proof, the less may be the need for proof allocating rules in favour of the person bearing the burden of proof. 7

Questions of burden of proof occur in all areas of tort law. This article focuses on the requirement of negligence, the requirement of causation and the requirement that there must be a loss if the plaintiff is to be able to achieve compensation. In addition the article explores questions of burden of proof specifically in relation to "enterprise liability". The reason for this is the novel rule introduced in the Principles of European Tort Law (PETL) Art. 4.202, reversing the burden of proof in case of enterprise liability. The article explores this rule seen in the light of the general rules on burden of proof. 8

The overall approach is comparative. The aim is to examine to what extent common threads in relation to rules on burden of proof and their background can be identified in European law. However, mainly the German, French, English and Scandinavian legal systems are included. 9

B. The standard of proof

10 The standard of proof turns on the intensity of the proof. The question is how great a likelihood is required for something to be considered proved. This varies considerably in the different legal systems. In some legal systems proof of something requires 100% proof. In other legal systems it is sufficient to prove something on "a balance of probabilities", meaning "more likely than not". Yet other systems take a middle position as the starting point. In any legal system, the burden of proof can be lowered by lowering the standard of proof.

11 Under German law the general rule on proof is expressed in (Zivilprozessordnung) ZPO § 286, which reads:

> "Das Gericht hat unter Berücksichtigung des gesamten Inhalts der Verhandlungen und des Ergebnisses einer etwaigen Beweisaufnahme nach freier Überzeugung zu entscheiden, ob eine tatsächliche Behauptung für wahr oder für nicht wahr zu erachten sei. In dem Urteil sind die Gründe anzugeben, welche für die richterliche Überzeugung leitend gewesen sind.
>
> An gesetzliche Beweisregeln ist das Gericht nur in den durch dieses Gesetz bezeichneten Fällen gebunden."

12 The rule establishes the principle of "freie Beweiswürdigung". This means that it is up to the court to decide how much weight should be given to the evidence presented to it. Furthermore, the rule is interpreted to mean that in order for something to be proved, it must be proved to the full conviction of the court.[2] What this in fact means is not entirely clear. The rule, of course, does not require "mathematical proof" of the fact in question. The court can be fully convinced in other ways. Sometimes it is said that it is sufficient with "an eine Gewissheit grenzenden Wahrscheinlichkeit" or that it is sufficient with such a degree of likelihood "dass ein vernünftiger, die Lebensverhältnisse klar überschauender Mensch nicht an der Wahrheit zweifelt" or that the judge "zu einem für das praktische Leben brauchbaren Grad von Gewissheit gelangt, der dem Zweifel schweigen gebietet, ohne ihn völlig auszuschliessen".[3] The essence is said to be that, as a starting point, it is not sufficient to prove something on the balance of probabilities.[4] The bar is set higher than this.[5] In some instances, however, the standard of proof is lowered. An example of this is the rule in ZPO § 287 concerning the quantification of loss (see further below under VII).

13 Also French law and Belgian law proceed from the starting point that in order for something to be proved it must be proved "with certainty".

[2] *R. Geigel*, Der Haftpflichtprozess (20th ed. 1990) 1246.
[3] Ibid., 1246.
[4] BGH Neue Juristische Wochenschrift (NJW) 83, 1740; OLG München Versicherungsrecht (VersR) 85.295.
[5] *Geigel* (fn. 2) 1246, *W. van Gerven*, Tort Law (2000) 428/17.

Other legal systems have a different approach. Under English law, the standard is the "balance of probabilities." This means that the fact which one is attempting to prove must seem more likely than not. In other words, if there is more than a 50% likelihood that something happened or happened in a particular way, then this is regarded proved.[6] 14

In Scandinavian law, too, the starting point is the "balance of probabilities" test. In Norwegian law, the court cannot impose liability if the court finds that the probability of the fact which is disputed is 50% or less. The fact must seem more likely than not to the court. If it seems to the court that it is a 50/50 situation, the alleged tortfeasor must be acquitted.[7] In Swedish law, as a starting point, "clear probability" is required in case law.[8] Also under Danish law, the standard of proof is generally higher than a balance of probabilities.[9] However, the applicable standard of proof may vary from one area of tort law to another. 15

Thus, as regards the general starting point, it seems that German, French and Belgian law are the legal systems that set the bar the highest in relation to the standard of proof. This, however, does not answer the question whether as a general rule it is harder for the plaintiff to win a tort law case under German and French law than in other legal systems. Firstly, it is hard to evaluate what is the reality behind the different percentage figures. Secondly, the rules on the standard of proof must be seen in the light of the rules on the allocation of the burden of proof. 16

C. The allocation of the burden of proof

The question of the allocation of the burden of proof concerns the question: "Who must prove what?" 17

In all of the examined legal systems, it is the general starting point that *the plaintiff must prove* his case. In other words, in a tort law case, the plaintiff must prove that all the conditions for imposing liability are fulfilled (i.e. in short: that there is a basis of liability, causation and loss).[10] This allocation of the burden of proof is the most burdensome for the plaintiff. The following other types of allocations lessen the burden of the plaintiff. 18

Sometimes the plaintiff is helped in satisfying the burden of proof by *presumptions* or *prima facie evidence*.[11] Often these concepts are distinguished from the "reversal of the burden of proof". If there is a presumption or prima facie evidence of something, then the plaintiff is in a stronger position than in the absence of such a presumption. Thus, if the defendant does nothing to rebut the presump- 19

[6] *Fleming* (fn. 1) 352 – critical.
[7] *P. Lødrup*, Lærebok i erstatningsrett (4th ed. 1999) 319.
[8] *J. Hellner/M. Radetzki*, Skadeståndsrätt (7th ed. 2006) 200 ff. (in relation to causation).
[9] *B. von Eyben/H. Isager*, Lærebog i erstatningsret (7th ed. 2007) 257 (in relation to causation).
[10] Not all legal systems proceed from this starting point. For instance, in some Eastern European countries the starting point is a presumption of negligence.
[11] See below about the German "Anscheinsbeweis" and the English rules on presumptions.

tion, then the plaintiff wins the case even though he has not proved his case with certainty. However, the presumption can be rebutted, and in this respect it is sufficient for the defendant to show that there is no basis for the presumption, for instance because the course of events was not typical. In other words, there is no requirement that the defendant must present counter-evidence (for instance, prove that he did not act negligently if negligence is the theme in the case).

20 In some situations, the burden of proof is *reversed*. This means that there is a presumption in favour of the plaintiff's case and that if the defendant does nothing to rebut the presumption, then the plaintiff wins the case although he has not proved his case with certainty. Furthermore, the presumption is so strong that it can only be rebutted if the defendant presents counter-evidence. If the burden of proof is reversed, it is for instance not sufficient for the defendant to show that there *could be* explanations for the injury other than that which leads to liability of the defendant. The defendant must show that this was in fact the case. The reversal of the burden of proof places a heavy burden on the defendant.

21 In yet other types of cases, it is not even sufficient for the defendant to present counter-evidence. For instance, if there is uncertainty as to whether the defendant acted negligently, then in some cases negligence is assumed and the defendant can only exculpate himself by proving that the loss was caused by *force majeure* events. It is not enough for the defendant to show that he did not act negligently. This type of proof rule is even more burdensome on the defendant than the reversed burden of proof.[12]

22 Under German law, it is the general rule that the injured party must prove that all the conditions for claiming damages are fulfilled. However, German law basically knows two ways of modifying this principle. The prima facie proof ("Anscheinsbeweis") and the reversed burden of proof ("Beweislastumkehr").

23 If the injured party has provided *prima facie proof* that an injury was negligently caused by the tortfeasor, this means that there is a presumption that the injury occurred in this way. The prima facie proof can only be made if the presumption can be said to be based on "life experience". In other words, the course of events must be typical. If prima facie proof is shown, it is up to the tortfeasor to rebut the presumption. As long as the proof is only prima facie proof, the presumption can be rebutted merely by convincing the court that the course of events could have been untypical.[13]

[12] The most burdensome type of allocation rule is the rule according to which there is a *non-rebuttable presumption* of something. An example of this could perhaps be said to be the case of liability of masters for their employees, under art. 1384, par. 5 of the French Civil Code according to which the plaintiff does not need to prove that the employee acted negligently. *P. Delebecque/F.-J. Pansier*, Droit des obligations, 2. Responsabilité civile, délit et quasi-délit (4th ed. 2008) no. 214.

[13] Thus, in NJW 1954, 111, a person who was not able to swim drowned in a swimming pool that was not secured, in an area where the water was deep. The court held there was prima facie evidence that the drowning could be related to the fact that the water was deep, *V. Wahrendorf*, Die Prinzipien der Beweislast im Haftungsrecht (1976) 31, 36.

In contrast, the *reversal of the burden of proof* is harder on the tortfeasor. If the burden of proof is reversed, the tortfeasor is also presumed liable. However, to escape liability he must show either that he did not act negligently or that his act did not cause the loss (or that one of the other requirements was not fulfilled).[14] As a practical matter, it is not always easy to distinguish between prima facie evidence and a reversed burden of proof and in German legal theory it is debated whether there is in fact a difference between the two.[15] 24

In English law it is also the starting point that the plaintiff must prove his case. However, also under English law this starting point is modified. In particular, the operation of (permissible) presumptions/prima facie evidence is known in relation to the doctrine of res ipsa loquitur (see infra no. 32). In addition, English law recognizes the reversal of the burden of proof in some instances. 25

In Scandinavian law, as a starting point the burden of proof is on the plaintiff. However, in some instances the burden of proof is reversed. Scandinavian law does not know the German "Anscheinsbeweis" as a concept. This, however, does not mean that a presumption always has the legal effect of reversing the burden of proof. Some presumptions are stronger than others.[16] In general, it is up to the court to decide what it takes to rebut a presumption.[17] Sometimes a presumption is so strong that it has the effect of reversing the burden of proof. 26

In French law the starting point seems to be the same. As a general rule the burden of proof is on the plaintiff. There does not seem to be a concept equivalent to the German "Anscheinsbeweis" but presumptions may be stronger or weaker and ultimately have the effect of reversing the burden of proof. 27

D. The interplay between the standard of proof and the allocation of the burden of proof

Of course, the rules on standard of proof and the allocation of the burden of proof interact. A legal system which proceeds from the requirement of certainty sets the bar high in relation to the standard of proof. Such a legal system may find it necessary to look for ways of lowering the burden of proof for instance through the operation of presumptions and a reversal of the burden of proof. In a legal system in which the standard of proof is certainty, presumptions greatly ease the burden of proof on the plaintiff. Thus, if there is a presumption in favour of the plaintiff's case and the defendant does nothing to rebut it, the plaintiff wins the case although the case has not been proved with certainty but only 28

[14] *Wahrendorf* (fn. 13) 37.
[15] Ibid., 38 with reference (ref.) to Diederichsen.
[16] See for instance below about protective provisions and negligence, *von Eyben/Isager* (fn. 9) 73 and incidences of gross negligence and causation, ibid., 259.
[17] See for instance *von Eyben/Isager* (fn. 9) 257.

to some degree of probability (in some instances on a balance of probabilities). In other words, in these systems presumptions lower the standard of proof.

29 A legal system which sets a lower bar in relation to the standard of proof may not have the same need to operate rules on presumptions and the reversal of the burden of proof.

30 A legal system which proceeds from the balance of probabilities test sets the bar very low in relation to the standard of proof. In order for something to be proved, the fact in question must simply seem more likely than not. In principle, the operation of presumptions and the reversal of the burden of proof in conjunction with the balance of probabilities test might seem a contradiction. Thus, if there is a presumption as to something, it must mean that the fact is – at least – regarded more likely than not. In that case, however, the fact is proved on a balance of probabilities and there should be no opportunity to rebut the presumption. If something is already proved according to the applicable standard of proof, then it cannot – as a matter of logic – be disproved. However, as will be shown below, this is not how the legal systems work. In a legal system that proceeds from the balance of probabilities test, presumptions do not lower the standard of proof but nevertheless make it easier for the plaintiff to prove his case by changing the "proof theme" (see below on res ipsa loquitur and the "loss of a chance" cases).

E. Negligence

1. The General Rule

31 All the legal systems proceed from the same starting point; this is the rule that the plaintiff must prove his case. In other words, he must prove that the defendant acted negligently. However, the standard of proof may vary in the different legal systems. In addition, the general rule is modified by several exceptions.

2. Res Ipsa Loquitur

32 "Res ipsa loquitur" means the event speaks for itself. The main point here is that sometimes negligence can be inferred from the fact of the case. In other words, although negligence cannot be proved, negligence seems to be the only explanation for the cause of events. In such cases it may – under the maxim[18] of res ipsa loquitur – be inferred that the defendant has acted negligently. The maxim is known in all of the examined legal systems.[19]

[18] There is dispute as to whether res ipsa loquitur qualifies as a maxim at all or merely should be seen as an application of common sense, see for instance *W. Rogers/P. Winfield/J. Jolowicz*, Winfield and Jolowicz on Tort (17th ed. 2006) 260 f. See further below.

[19] Scandinavian law: *von Eyben/Isager* (fn. 9) 97, note 47; *Lødrup* (fn. 7) 166; *Hellner/Radetzki* (fn. 8) 148: "The mere fact that injury has occurred is often an indication that there has been negligence" [unofficial translation], English law: e.g. *B.S. Markesinis/S.F. Deakin*, Tort Law (4th ed. 1999) 171; German law: *C. van Dam*, European Tort Law (2006) 282; French law: *P. Le Tourneau*, Droit de la responsabilité et des contrats (7th ed. 2008) no. 2364.

However, it is treated in depth in English legal literature where a classic statement of the principle is the following: 33

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such, as in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."[20]

The main condition for the maxim to apply is that something must have happened which would not ordinarily have happened if proper care had been taken. Classical examples are: a barrel does not just drop from an open window, a crane does not just collapse, stones are not normally embedded in a bun, a dead mouse is not normally found in a sealed container, etc. In cases like these it seems obvious that only a negligent act can be the explanation for the cause of events. 34

In the definition given above it is a condition that "the accident is such, as in the ordinary course of things, does not happen". In other words, if it is a matter of *common experience* that the event would normally not have occurred, the situation falls within the scope of the rule.[21] This requirement resembles the requirement under the German "Anscheinsbeweis" just described. 35

However, there is a second requirement that must be fulfilled. Thus, as a starting point "the means" with which the accident was caused must be in "the sole control" of the defendant. The requirement presupposes "a means" thereby narrowing the applicability of the doctrine as compared to the German "Anscheinsbeweis". However, today this requirement has been relaxed.[22] Finally, there must be an absence of explanation. The facts must be unknown to the court. If the facts of the case are known to the court, then the doctrine does not apply and no inferences can be drawn. In this case, the court must simply 36

[20] Erle CJ in *Scott v. London and St. Katherine Docks Co.* (1865) 3 Hurlstone & Coltman's Exchequer Reports (H. & C.) 596, 601; *Markesinis/Deakin* (fn. 19) 172; *H. Street*, The Law of Torts (12th ed. 2007) 127 f.

[21] The question has been raised whether this means that it must be a matter of common experience so that the experience of the expert is irrelevant, *Street* (fn. 20) 129. With the advance of technology this is of some importance. The more common modern view seems to be that an inference can be drawn also on the basis of expert knowledge.

[22] Thus, previously, the requirement caused problems in traffic accident cases. In traffic accidents it is not really possible to argue that only the driver of the car which was in the accident was in control. In traffic every driver must adapt his conduct to that of the others. Accordingly, the application of the doctrine was severely limited. Today we find a more lenient approach. The requirement of the "sole control" does not apply. For instance, if the instrument that (may have) caused the damage was in control of several employees and it is not possible to point to the particular employee who was in control at the time of the accident, then the doctrine still applies, *Street* (fn. 20) 130.

decide according to normal principles whether the act of the defendant must be regarded as negligent.[23]

37 The requirement that the accident would not *ordinarily* have happened must mean that it must be regarded as more likely than not that the act was caused by a negligent act (negligence on a balance of probabilities). This in turn means that in legal systems which as a general rule operate a standard of proof test of "certainty", the maxim of res ipsa loquitur has the effect of lowering the standard of proof in the event the defendant does not seek to rebut the presumption. It could be argued that, seen in this light, res ipsa loquitur should rightly be seen as a maxim. In contrast, it is less clear what the effect of the "maxim" is in legal systems that adhere to the balance of probabilities test as a general rule. Not surprisingly, therefore, the effects of the maxim have been intensely discussed in English law. The focus of the discussion seems to have been whether the effect of the maxim should be the establishing of prima facie evidence or a reversal of the burden of proof. Theoretically, it could be argued that neither of the above should be the effect. Thus, as explained above, if there is a presumption as to negligence, this must mean that it is considered more likely than not that the defendant acted negligently. In this case, negligence has been proved on a balance of probabilities and it should not be possible to raise the issue of rebuttal or presentation of counter-evidence. However, this is not the way the maxim is understood. Today it is assumed that the effect of res ipsa loquitur is that there is prima facie evidence of negligence.[24] This means that if the defendant does nothing to rebut the presumption, he loses the case.[25] If, on the other hand, the defendant does establish evidence, then in general, the effect of the doctrine is that if the defendant can give an explanation of the accident equally consistent with negligence or absence of negligence on his part, the scales are tilted back in his favour.[26] According to some parts of case law, it seems that prima facie evidence can only be rebutted by the defendant proving that the accident resulted from a specific cause which does not constitute negligence on his part but on the contrary, points to the absence of negligence as more probable.[27] Thus, whether the effect of the doctrine is prima facie evidence or reversal of the burden of proof, the idea seems to be that "at the end of

[23] The classical case here is *Barckway v. Southwales Transport* Co Ltd. (1950) 1 All England Law Reports (All ER) 392. In this case a car crashed because of a blown tyre. The plaintiff sued the manufacturer. The question was whether an inference could be drawn as to negligence on the part of the defendant. Since all the facts were known, the House of Lords held that the doctrine of res ipsa loquitur was inapplicable. However, the facts were found to constitute negligence (also without application of the test).

[24] This was established in *Ng Chun Pui v. Lee Chuen Tat* (1988) Road Traffic Reports (RTR) 298; see *Markesinis/Deakin* (fn. 19) 172; *P.J. Cooke/D.W. Oughton*, The Common Law of Obligations (2nd ed. 1993) 182; *J. Salmond*, The Law of Torts (14th ed. 1965) 192.

[25] *Rogers/Winfield/Jolowicz* (fn. 18) 263 and cf. *Salmond* (fn. 24) 822: "Hence, if the defendant gives no evidence a verdict for the plaintiff will stand". Cf. *Street* (fn. 20) 132: "…it may now be that certain facts are so clear that the inference of negligence is sufficiently cogent that the judge must rule in favour of the claimant. On the other hand, this will by no means always be the case".

[26] *Cooke/Oughton* (fn. 24) 182, *Street* (fn. 20) 133, *Salmond* (fn. 24) 822.

[27] *Street* (fn. 20) 133.

the day, the court must ask itself whether, taking the evidence as a whole, it is more likely than not that the accident is attributable to the defendant's fault".[28]

3. Breach of Statutory Provisions

38 Under German law, when it comes to infringements of legal regulations covered by § 823 II, the general starting point is often modified. Thus, if it is proved that a protective provision has been infringed, there is often some sort of presumption that this has been done negligently.[29] However, there is no clear line in case law as to the character of the presumption.[30] There are also different interpretations in legal literature.[31] In some cases there is a reversal of the burden of proof when the injured party has proved that a protective provision has been infringed. This means that the tortfeasor must prove that he did not act negligently.[32] In other cases the proof by the injured party that a protective provision has been infringed merely creates prima facie proof ("Anscheinsbeweis") that the tortfeasor acted negligently.[33] This presumption can be rebutted by the tortfeasor if he can show that the presumption in the circumstances of the case is not well founded. The tortfeasor need not necessarily show that he did not act negligently. In practice, however, the difference between a reversed burden of proof and the application of the presumption rule may be slim.[34]

39 Under French law, as a starting point, an infringement of a written legal rule constitutes a "faute" under art. 1382 Code Civil (CC). This means that the defendant is considered liable unless he can prove a justification for his act.[35] In other words, under French law, an infringement of a statutory provision has the effect of reversing the burden of proof.[36]

40 In Scandinavian law, infringements of protective provisions can have similar effects, although it is not quite clear to what extent an infringement of a protective provision establishes a presumption of negligence. The infringement of a

[28] *Rogers/Winfield/Jolowicz* (fn. 18) 264.
[29] *Geigel* (fn. 2) 433, *van Dam* (fn. 19) 245.
[30] *P. Ulmer* (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (MünchKomm) (2004) 1672; *G. Baumgärtel*, Handbuch der Beweislast im Privatrecht, vol. 1 (4th ed. 1981) 641 f. mentioning that legal literature speaks of a "Grenzvermischung zwischen Anscheinsbeweis und Beweislastumkehr in der Rechtsprechung".
[31] *Baumgärtel* (fn. 30) 642.
[32] Examples include Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 145,107,116; Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 51,91,103 f. = NJW 1969, 269, 274; BGH NJW 1985, 1774 f. = Juristenzeitung (JZ) 1975, 540; MünchKomm/*Ulmer* (fn. 30) 1672, note 1501.
[33] Examples include RGZ 113, 293,294; BGH VersR 1984, 270, 271, MünchKomm/*Ulmer* (fn. 30) 1672, note 1500.
[34] *Baumgärtel* (fn. 30) 643, *C. von Bar*, Verkehrspflichten: Richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht (1980) 291 f. concluding that in the majority of cases a presumption which is founded on an "Anscheinsbeweis" in reality amounts to a reversal of the burden of proof.
[35] *Van Dam* (fn. 19) 245.
[36] Notably, under French law, in principle it is not a requirement that the provision aims to protect the victim from the harm as long as there is a causal link between the infringement and the harm, *van Dam* (fn. 19) 245 f.

protective provision will often lead to the finding that the defendant acted negligently. The more detailed a protective provision is, the easier it is to reach this conclusion.[37] Conversely, if the defendant has complied with existing protective provisions, there is a presumption that he did *not* act negligently.[38] Under Danish law, if the plaintiff can prove that a detailed protective provision has been infringed, then as a starting point this is considered sufficient for imposing liability. Normally, the plaintiff is not required to prove "subjective fault" in addition. As a general rule, the defendant can only avoid liability if he can prove that the infringed provision did not have the purpose of protecting the economic interests of the plaintiff,[39] that the defendant acted in self-defence or that there was no causal link between the infringement of the provision and the injury.[40] However, both Norwegian and Swedish law know examples of defendants being acquitted because of lack of subjective fault.[41] It is unclear who bears the burden of proof in this relation.

41 Under English law the question of the legal effect of a breach of a statutory duty is complicated by the fact that such a breach constitutes a separate course of action (different from a course of action based on the tort of negligence). It is a special feature of the tort of breach of a statutory duty that there is a requirement that the legislator intended to create a private right of action by the statutory provision.[42] Whether such an intention was present must be determined by interpretation of the statutory provision. There is no clear line in case law as to how the different statutory provisions should be interpreted.[43] On the other hand, if it is held that it was the intention to create a private right of action, then, as a starting point, liability is strict.[44] However, under certain circumstances it may be possible for the defendant to escape liability if he can prove that the breach of the statute was not due to negligence on his part.[45]

4. The Creation of a Risk/Dangerous Situation

42 Several specific rules in the various legal systems reflect the thought that there should be a reversed burden of proof in situations where the tortfeasor has created a specific and increased risk (or this risk is in his sphere of control).

43 Examples include liability for things, including animals. For instance, under English law, liability under the Animals Act from 1971 is strict when it comes to liability for dangerous animals. The keeper of the animal can only escape liability by proving risk acceptance or contributory negligence.[46] Under German law, liability also varies according to the type of animal. For animals that do

[37] *Von Eyben/Isager* (fn. 9) 68; *Hellner/Radetzki* (fn. 8) 130.
[38] *Von Eyben/Isager* (fn. 9) 73, *Lødrup* (fn. 7) 133.
[39] *Von Eyben/Isager* (fn. 9) 70.
[40] Ibid., 71.
[41] *Hellner/Radetzki* (fn. 8) 130, *Lødrup* (fn. 7) 132.
[42] *Van Dam* (fn. 19) 239.
[43] Ibid., 239 f., *Fleming* (fn. 1) 208.
[44] *Van Dam* (fn. 19) 243.
[45] *Markesinis/Deakin* (fn. 19) 339.
[46] *Van Dam* (fn. 19) 356.

not serve economic purposes, there is liability for negligence with a reversed burden of proof. Under French law the owner or the possessor of the animal is strictly liable for an animal under art. 1385 or 1384, sec. 1. This means that there is liability unless the defendant can prove force majeure. Also rules on the liability for defective products are of course illustrative. The special rules on product liability under the Product Liability Directive establishing strict liability for the manufacturer of a defective product illustrate the fact that dangerous activities are submitted to strict rules. Outside the scope of the Product Liability Directive it is not uncommon to find rules in the national legal systems, reversing the burden of proof. Another example is the liability for collapsing buildings. Under French law, art. 1386 CC establishes liability of the owner for the collapse of a building. Only proving force majeure can exonerate the defendant.[47] The same line of thought is reflected in German law. Here, according to the Bürgerliches Gesetzbuch (BGB) § 836, there is liability for collapsing buildings with a reversed burden of poof. Finally, liability for the acts of children is illustrative. Under French law, the liability of parents for harm caused by their child under art. 1384, sec. 2, rests on a presumption of liability. Therefore, the plaintiff need not prove negligence. Furthermore, the parent can only escape liability by proving either force majeure, contributory negligence of the victim or an act committed by a third person.[48] Under German law, a similar rule is found in BGB § 832. According to this rule, the parent ("the supervisor") is liable for the wrongful acts of his child, unless he can prove that he supervised and educated the child in a proper way.

PETL Art. 4:201 generalizes these rules and sets out a general rule on the creation of a dangerous situation. The rule reads as follows: 44

> Reversal of the burden of proving fault in general
>
> 1. The burden of proof may be reversed in light of the gravity of the danger presented by the activity.
> 2. The gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

The rule is thought to be applied to situations falling between extremely dangerous activities – such as running a nuclear power station – and "not dangerous" types of enterprises.[49] 45

[47] *Delebecque/Pansier* (fn. 12) no. 182.

[48] *Le Tourneau* (fn. 19) no. 2364. The liability of parents was extended by the court in the case *Bertrand*, Cass. 2nd Civ., 19 February 1997, so that the parent cannot escape liability by proving that the damage was not caused by a supervision failure or by an education failure.

[49] *European Group on Tort Law* (ed.), Principles of European Tort Law, Text and Commentary (2005) 91.

F. Causation

1. General

46 Causation is one of the areas of tort law which gives rise to many questions related to the burden of proof. The reason for this is that causation is not just a matter of historical fact in the same way as how fast a defendant was driving, for instance. It includes the inquiry into what would have happened if the defendant had not committed the wrong. However, in many legal systems, causation problems are treated in the same way as other legal problems in relation to the question of burden of proof. Thus, as a general rule the plaintiff must prove that the negligent act caused the harm. He must do this according to the applicable standard of proof in the national system. If the plaintiff can prove causation according to this standard, he wins, otherwise he loses. In other words, these legal systems adhere to the "all or nothing" approach, albeit with some modifications (see infra no. 47–50 on the impact of intention/gross negligence). Other legal systems adopt a different approach and allow for proportionate compensation when there is uncertainty as to questions of causation (see infra no. 58–67 on the "loss of a chance" cases).

2. Intention/Gross Negligence

47 In some legal systems, it is recognized that the degree of negligence can play a role when assessing whether the requirement of causation has been satisfied. This can be illustrated by a Danish case from 2002.1469H.

48 In this case, the plaintiff had been knocked down. He hit his head and suffered a blood clot in his brain shortly afterwards. Later, brain damage occurred. The legal question was whether the brain damage could be considered to have been caused by the defendant who had knocked down the plaintiff. Medical experts found that there was only a low degree of probability, perhaps 52%, that there was a link between the defendant's acts and the brain damage. Nevertheless, the Court found that causation was proved. It was however emphasized by the Court that this was a special case. The special feature was that the defendant had acted wilfully.

49 The same rule would have applied had the defendant acted grossly negligently. The same tendency to reverse the burden of proof in case of gross negligence can be observed in Norwegian law.[50]

50 Also under German law, a reversal of the burden of proof can be a tool to handle uncertainty in relation to causation issues. However, as a starting point such a reversal only comes into play under special circumstances and in special areas of the law. As a general rule, a reversal of the burden of proof in relation to causation is only applied if the conduct of the tortfeasor rendered the evidence unclear. Examples can be found within the area of liability of physi-

[50] *Lødrup* (fn. 7) 328.

cians or comparable professionals. However, it is an additional requirement that there is gross negligence on the part of the professional person.[51]

3. Protective Provisions

As in relation to the requirement of negligence, protective provisions can play a role in relation to the assessment whether the requirement of causation is fulfilled. In German law, if a protective provision under § 823 II of the BGB has been infringed, this is prima facie proof ("Anscheinsbeweis") that there was a causal connection between the infringement of the regulation and the occurrence of damage[52] provided the injury, according to "common knowledge and experience", is a typical consequence of the conduct for which the liability of the defendant is sought.[53] 51

Under Danish law, if a protective provision has been infringed, this may lead to a lowering of the burden of proof in a number of different ways.[54] Sometimes the standard of proof is lowered so that it is enough for the plaintiff to show that the injury might not have happened had the protective provision not been infringed. In other cases the burden of proof has been reversed (U 1997.648 Ø).[55] 52

Under English law, the ordinary rules on causation apply in the event of breach of a statutory provision.[56] Again, this may have to do with the fact that under English law, the standard of proof is a balance of probabilities, reducing the need for softening rules.[57] 53

4. The Creation of a Risk (Alternative Causes/Tortfeasors)

As in relation to the question of proof of negligence, the creation of a dangerous situation/a risk can in some legal systems be a criterion which plays a role when the courts are to place the burden of proof or asses the appropriate standard of proof. 54

Under English law, the most prominent example of this is the *Fairchild* decision[58] in which the House of Lords held that an employee who had been exposed to asbestos dust in the course of his employment under different employers was entitled to damages although he could not prove on a balance of probabilities which particular employer was responsible for the disease he had 55

[51] *Van Gerven* (fn. 5) 428.
[52] *Wahrendorf* (fn. 13) 74.
[53] BGH, 4.10.1983, 432 offers an example of the application of the rule.
[54] *Von Eyben/Isager* (fn. 9) 73.
[55] Examples of cases in which the burden of proof was lowered include: FED 2001.2386 H (Højesteret, Supreme Court), FED 2003.402 Ø, Ugeskrift for Retsvæsen (U) 2003.208 V. In contrast, U 1997.648 Ø is an example of a case in which the burden of proof was reversed.
[56] *Markesinis/Deakin* (fn. 19) 350.
[57] Cf. on the other hand Norwegian law, which applies the balance of probabilities test but which nevertheless also assumes that there is a presumption of causation in case of gross negligence.
[58] *Fairchild v. Glenhaven Funeral Services Ltd* [2002] United Kingdom House of Lords (UKHL) 22; [2003] 1 Appeal Cases (AC) 32.

developed. It was sufficient that the plaintiff could prove that the defendant's breach of duty had materially contributed to the *risk* of contracting the disease. In reaching this decision, the House of Lords applied the doctrine in *McGhee*[59] in which it was also sufficient for the plaintiff to prove that the failure by the employer to provide washing facilities had materially increased the risk of the plaintiff contracting dermatitis.[60]

56 The thought that the creation of a risk can have an impact on the proof requirements in relation to causation has also been developed under German law in relation to BGB § 830 I, sec. 2. According to BGB § 830 I, sec. 1, where several individuals have jointly caused a loss, they are all jointly liable. According to sec. 2, this rule is also applied if it is not possible to prove which of the participants caused the loss. In a case from 1976, the BGH clarifies the conditions for the rule to apply: "Two or more persons must have created, in a way that is legally attributable to them, a risk which might have caused the loss. The loss must have been caused by either the one or the other person; or while it is certain that the actions of each of the two persons alone could have caused the loss, the extent to which it was caused by each of them can no longer be established. And finally, it has to be impossible to determine which person actually caused the loss. Each of the potential tortfeasors would then be in a position to exonerate himself by referring to the other potential tortfeasor. The injured person thus faces a specific difficulty of proof, and it is in this situation that § 830 (1) 2 BGB grants him an additional claim."[61]

57 Also under French law, the burden of proof is relaxed if someone acts negligently and thereby creates a dangerous situation. If, then, someone is injured in a way which appears to be the normal and foreseeable consequence of the risk, then the plaintiff can succeed with a claim although it is not possible to prove with certainty that there was a causal link between the fault and the injury. It is sufficient that the injury was objectively probable or foreseeable.[62] Examples include cases concerning car accidents, dangerous objects left with third parties and persons left under the supervision of another.

5. The "Loss of a Chance" Cases

58 The loss of a chance cases are another example of situations in which the requirement of proof of causation can sometimes be relaxed. The "loss of a chance" cases present the problem that it is not possible to prove that the negligent act or omission has caused a loss but sometimes it is possible to prove the causation of the loss of the chance. One example is legal malpractice cases

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

[60] The reasoning in *McGhee* was challenged in the later decision *Wilsher v. Essex Area Health Authority* [1988] AC 1074, but this decision must be regarded as repudiated by the *Fairchild* decision.

[61] *B. Winiger et al.* (eds.), Digest of European Tort Law, vol. 1: Essential Cases on Natural Causation (2007) 355.

[62] *Van Gerven* (fn. 5) 428/20 with ref. to *G. Viney/P. Jourdain*, Traité de droit civil – Les conditions de la responsabilité, sous la direction de J. Ghestin (2nd ed. 1998).

in which the lawyer overlooks a time limit. It is uncertain whether the client would have won the case in any event, but it is certain that he has lost the chance of winning the case. Other examples include medical malpractice cases. If a disease is diagnosed too late, it will very often be uncertain whether the patient could have been saved in the event of an earlier diagnosis. However often it is quite clear that the patient would have at least had the chance of recovering had his disease been diagnosed earlier. If the concept of the "loss of chance" is accepted as such, the question is how to asses the economic value of the lost chance. The approach to these cases differs tremendously in the different European legal systems.[63]

59 Under French law, the doctrine has been applied by the Supreme Court (Cour de cassation) since the late 1960s[64] in many areas of the law. Examples are lost chances in medical liability cases, the loss of a chance to sit a university exam or an entrance exam, to have a paid job, or the possibility of obtaining a pharmacist license, a professional promotion, taking a job with a higher salary or pursuing a scientific career.[65] A final example is the loss of a chance to obtain market shares due to an act of unfair competition.[66]

60 It is for the court to decide whether there was an actual chance. Courts have stated that the chance lost must be *réelle et sérieuse* as opposed to being hypothetical.[67] From a general point of view, in order for the plaintiff to meet the burden of proof for the chance lost, he must establish that he had either started to take the chance or was just about to take the chance. The courts are quite severe when it comes to proving the imminent and real character of the lost chance. In particular, this has been so in cases where the plaintiff has filed a claim on the basis of his chances of finding a job, being promoted at work or starting his own company.[68]

61 When it has been established that a chance had been lost, this loss can be compensated. Only the loss of a chance is a certain loss, as opposed to the advantage which might have been obtained if the chance had been fulfilled.[69] As a rule, compensation for the loss of a chance is lower than the advantage the plaintiff could count on getting, had the chance been realised. The Supreme Court has stated firstly that compensation must *not* be calculated according to a fixed rate, and secondly that compensation must correspond to a fraction of the various heads of damage. It is then for the court to assess the various heads of damage,

[63] See in general *Winiger et al.* (fn. 61) chap. 10.
[64] *Le Tourneau* (fn. 19) no. 143; *Viney/Jourdain*, sous la direction de J. Ghestin (3rd ed. 2006) no. 280.
[65] For instance Cour d'appel de Lyon, 17 November 1958; Cour d'appel de Limoges, 19 October 1995; Cass. 2nd Civ., 28 April 1966; Tribunal de grande instance Corbeil-Essonnes, 22 April 1963; *Viney/Jourdain* (fn. 64) no. 280.
[66] Cour d'appel de Versailles, 21 April 1988; *Viney/Jourdain* (fn. 64) no. 280.
[67] *Viney/Jourdain* (fn. 64) no. 283.
[68] Ibid., no. 283, for instance Cass. Crim., 19 March 1997; Cass. 2nd Civ., 19 July 1966; Cass. Crim., 11 March 1986.
[69] Cass. 1st Civ., 9 April 2002; *Le Tourneau* (fn. 19) no. 1419.

and to assess how big a fraction should be compensated.[70] This starting point was applied in case of liability of a solicitor[71] and in case of liability of a surveillance company.[72] Full compensation has sometimes been granted in cases where there was a breach of the obligation to inform in connection with surgery.[73]

62 Recently, it has been clarified that also Belgian law accepts the loss of a chance approach. Thus, in a recent case, the proportionate solution was adopted and the plaintiff was allowed to recover 80% of the full loss, being the equivalent of the lost chance percentage.[74]

63 German law, on the other hand, rejects the loss of a chance approach.[75]

64 Under English law recovery under the loss of a chance theory has in general been rejected. The prime example of this is Hotson.[76]

65 This case concerned a teenage boy who fell from a tree in the school playground. The hospital failed to correctly diagnose the plaintiff's condition. Afterwards he developed a serious disability of the hip joint. There was a 25% chance that this would have been avoided had he been properly diagnosed. The lower courts awarded damages amounting to 25% of the loss. In other words, the courts applied the proportional solution. The House of Lords, however, simply stated that the plaintiff had not proved that negligence on a balance of probabilities had caused the disability. This had only been proved by a 25% certainty, not a 51% certainty. Accordingly, the defendant was acquitted.

66 It could be asked whether the *Hotson* decision can be upheld after *Fairchild*.[77] However, the approach in *Hotson* was recently affirmed in *Greg v. Scot*[78] a case which also concerned medical malpractice. Also in this decision, the House of Lords rejected the proportionate liability solution.[79]

67 There seems to be no clear line in European law as to how cases of loss of a chance should be treated. Some legal systems reject the loss of chance concept altogether (German law and English law). Other legal systems embrace it (French law and Belgian law). Under French law, the value of the chance is assessed at the discretion of the court. In Belgian law the solution seems to be proportionate liability. When looking at the problem from the burden of proof angle it is quite clear that the effect of the adoption of the loss of a chance

[70] Cass. 1st Civ., 18 July 2000; *Le Tourneau* (fn. 19) no. 1420.
[71] Cass. 1st Civ., 16 July 1998; *Le Tourneau* (fn. 19) no. 1419.
[72] Cass. 1st Civ., 16 May 2000; *Le Tourneau* (fn. 19) no. 1419.
[73] *Viney/Jourdain* (fn. 64) no. 369-1.
[74] Case of 5 June 2008 (Cour de Cassation).
[75] *Winiger et al.* (fn. 61) 548 ff.
[76] *Hotson v. East Berkshire Area Health Authority* (1989) AC 750.
[77] For a discussion of this see, *Winiger et al.* (fn. 61) 571 ff.
[78] *Greg v. Scot* (2002) England & Wales High Court (EWHC) Civ 1471.
[79] In contrast, the case *Allied Maples Group Ltd v. Simmons & Simmons* (1995) 1 WLR 1002, concerned a case of purely economic loss. Here the loss of a chance approach and the proportionate liability was accepted. See *Winiger et al.* (fn. 61) 572 ff.

approach in combination with the proportionate approach in a legal system depends very much on the applicable standard of proof in that particular legal system. Thus, if a legal system sets the bar high in relation to the standard of proof (requires "certainty"), then the effect of awarding proportionate damages in loss of a chance cases will almost always be beneficial to the plaintiff – for the plaintiff, the alternative to proportionate liability is no compensation at all. In contrast, if a legal system adopts the balance of probabilities test, then the effect of accepting proportionate liability in loss of a chance cases is beneficial to the plaintiff only in cases in which it is not possible to prove causation with a likelihood of more than 50%. If the plaintiff manages to prove causation with a likelihood of more than 50%, then he has satisfied the burden of proof and recovers in full. Accordingly, the demand for a proportionate solution is probably less acute under English law and other jurisdictions adhering to the balance of probabilities test than under other jurisdictions which require a high degree of proof.

G. Loss

All of the examined legal systems proceed from the starting point that the plaintiff must prove the existence of a loss. This is also the rule under PETL Art. 2:105, reading: "Damage must be proved according to normal procedural standards". The standard of proof may vary in the different legal systems. 68

Interestingly, when it comes to establishing the extent of the loss, all of the examined legal systems depart from the rule that the plaintiff must prove his case. As with causation issues, calculating the extent of the loss may well involve speculations as to what will happen in the future or what would have happened had it not been for the harmful act. For instance, in a personal injury case, the calculation of a loss may involve considerations of the possible future income for the plaintiff. Here however, "the balance of probabilities is irrelevant" as *Jolowicz* has put it in relation to English law[80] and he goes on to cite *Mallot v. Mc Monagle* per Lord Diplock:[81] "The court must make an estimate as to what are the chances that a particular thing will or would not have happened and reflect these chances, whether they are more or less than even, in the amount of damages which it awards."[82] 69

A similar approach is found in German law where the ZPO § 287 has the following wording: 70

> "Ist unter den Parteien streitig, ob ein Schaden entstanden sei und wie hoch sich der Schaden oder ein zu ersetzendes Interesse belaufe, so entscheidet hierüber das Gericht unter Würdigung aller Umstände nach freier Überzeugung. Ob und inwieweit eine beantragte Beweisaufnahme

[80] *Rogers/Winfield/Jolowicz* (fn. 18) 284.
[81] *Mallot v. Mc Monagle* (1970) AC 166 at 176 per Lord Diplock.
[82] *Rogers/Winfield/Jolowicz* (fn. 18) 284.

> oder von Amts wegen die Begutachtung durch Sachverständige anzuordnen sei, bleibt dem Ermessen des Gerichts überlassen. Das Gericht kann den Beweisführer über den Schaden oder das Interesse vernehmen; die Vorschriften des § 452, Abs. 1 Satz 1, Abs. 2 bis 4 gelten entsprechend."

71 The effect of the rule is that in the absence of proof of the exact size of the loss, the court may estimate this. The provision does not change the rules on the allocation of the burden of proof. It merely slackens the standard of proof.[83]

72 A rule corresponding to the German ZPO § 287 used to be found in the Danish Procedural Act (Retsplejeloven). However, this rule was repealed 30 years ago being considered superfluous.[84] Today, the plaintiff must prove that there is a loss. As a starting point, the plaintiff must also prove the extent of the loss (cf. U 1967.273 H). However, in many cases this is unreasonably difficult for the plaintiff. For instance, this is often the situation in cases concerning purely economic loss. In such situations the court estimates the loss if it must be regarded as certain or proved on a balance of probabilities, that a particular consequence which has caused a loss has occurred.[85]

73 Also the second part of PETL Art. 2:105 contains a special rule relating to the quantification of damages. The rule reads: "The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly". The rule seems to correspond with the law in all of the examined legal systems.

H. Enterprise Liability

74 Many of the above described rules lowering the burden of proof on the part of the plaintiff are particularly relevant in the area of the law which could be called enterprise liability. Hereby is meant liability for an enterprise for harm caused to third parties and employees in the course of the activities which the enterprise pursues. Thus, protective provisions often regulate the behaviour of enterprises. An obvious example is provisions the aim of which is to prevent industrial injuries. Similarly, whereas dangerous activities can be carried out by individuals, more often they will be carried out by enterprises. The "loss of a chance cases" include numerous examples of medical malpractice and legal malpractice cases. Finally, the problem of quantifying the amount of damages which can be claimed is very often relevant in relation to enterprise liability where an increasing number of cases concern professional liability for purely economic loss. Consequently, one could ask whether it would be possible to formulate a more general rule on the burden of proof in relation to enterprise liability. PETL Art. 4:202 takes a step in this direction. It reads:

[83] *Baumgärtel* (fn. 30) 607.
[84] *T. Iversen*, Erstatningsberegning i kontraktsforhold (2000) 168 f.
[85] *B. Gomard/M. Kistrup*, Civilprocessen (6th ed. 2007) 584.

Enterprise liability

(1) A person pursuing a lasting enterprise for economic or professional purposes who uses auxiliaries or technical equipment is liable for any harm caused by a defect of such enterprise or of its output unless he proves that he has conformed to the required standard of conduct.
(2) "Defect" is any deviation from standards that are reasonably to be expected from the enterprise.

The rule only concerns the burden of proof in relation to the basis of liability (negligence). The idea behind the rule is that of "the lengthened arm". In other words, by using auxiliaries or technical equipment, the entrepreneur extends his sphere of influence and risk. The corollary of this, it could be argued, should be an extension of liability, for instance achieved by a reversal of the burden of proof. As explained in the commentary; "The major motivation underlying Art. 4:202 is the concern that victims may not be able to identify the proper cause of their losses although it can be traced to an enterprise that takes advantage both of human auxiliaries and/or technical equipment".[86] 75

The new principle must be understood in the light of the traditional rules establishing liability for other persons, more specifically, the rules according to which an enterprise is liable if it can be proved that an employee has acted negligently (PETL Art. 6:102). Equivalents of this rule are found in most European systems. In addition, the national legal systems may often contain rules that impose a fairly strict liability on the owner or operator of defective technical equipment ("liability for things"). However, as explained in the commentary, sometimes it may be (unreasonably?) difficult for the plaintiff to prove whether an injury was the result of human behaviour – for example the infringement of protective provisions or the creation of a dangerous situation – or alternatively of a defect in technical equipment. All that can be concluded is that something has gone wrong. The rule seeks to solve this problem by relieving the plaintiff of the obligation to prove whether the error was human or technical. According to the commentary, it is sufficient to show "that the cause lies within the sphere of the enterprise by showing that it was a defect of such enterprise or of its output"[87] (that caused the injury). In cases in which it is not possible to prove whether the injury was caused by human behaviour or by technical equipment, the rule will only be of practical importance if it is not possible to achieve a reversal of the burden of proof by application of the doctrine of res ipsa loquitur. However, by applying the general formulation, the rule in Art. 4:202 goes beyond the reasons motivating it. Thus, the rule applies in all cases of enterprise liability, i.e. also in cases where it is quite clear whether the cause of the accident was human or technical. In this way it might seem that the rule enhances liability quite markedly. However, to the extent it is known that the injury is caused by an auxiliary, and the auxiliary has infringed protective provisions, the burden of proof will often be reversed anyway. The same 76

[86] *European Group on Tort Law* (fn. 49) 94.
[87] Ibid.

may be true to the extent it can be argued that the pursuer of the enterprise has created a dangerous situation by using defective machinery resources. The rule also covers situations in which there has been no negligence on the part of employees and no technical defects, but the injury is caused by poor organization of the enterprise. One such example is the surgeon who suffers a heart attack while operating. There is no negligence on the part of the surgeon but if the reason for the heart attack is bad organization in the sense that the surgeon has been overburdened, the rule establishes a reversed burden of proof. It cannot be ruled out that this would also be the result in many European legal systems today. Possibly it could be argued that the poor organization creates a dangerous situation and that consequently, the burden of proof must shift.

77 Thus, seen against the background of the existing rules, reversing the burden of proof in a number of cases, the rule in Art. 4:202 PETL may not be as far reaching as it may seem at first sight. This also seems to be the view in the commentary: "The novelty aforementioned is only one within the framework of these Principles and therefore necessary to complement them; it is by no means new to most of the legal systems covered by the Group's research".[88] In some respects however, the rule may be seen as a real novelty. The rule establishes a reversed burden of proof also in case of defects of its output. The term "output" covers, of course, products. Consequently, the rule establishes a reversed burden of proof in product liability cases not covered by the strict liability regime of the EU Directive. This may very well be in accordance with the national product liability rules in many European legal systems. However, the rule goes beyond this. It also establishes a reversed burden of proof in case the enterprise has rendered defective services.[89] A similar rule was suggested several years ago in a proposal for an EU directive.[90] However, the proposal was met with severe objections precisely because it implied fundamental changes of the law in many European legal systems. Consequently, the directive never came into being. In this respect, therefore, the rule suggested in Art. 4:202 PETL seems far reaching and a daring "old" novelty.

I. Conclusion

78 As will be clear from the above, the rules on burden of proof play an important role in tort law. However, the topic is flimsy. Even within the national systems it seems difficult to establish firm rules on the burden of proof. Even more difficult – it would seem – would be the task of formulating common European rules on the topic. For instance, the standards of proof vary considerably in the different European jurisdictions. The same is true in relation to the question of the allocation of the burden of proof. This is hardly surprising since, as a starting point, one would expect the rules on allocation of the burden of proof

[88] Ibid., 96.
[89] Ibid., 99.
[90] Proposal for a Council Directive on the Liability of Suppliers of Services, COM (1990) 482 final – SYN 308, Official Journal (OJ) C 12, 18.1.1991, 8.

to correlate to the rules on standard of proof. This is also the case to some extent. For instance, English law operates a very low standard of proof and consequently has no need for and has not developed specific concepts on the allocation of the burden of proof the purpose of which are to relax the burden of proof. In contrast, under German law, the high standard of proof is to some extent compensated – it would seem – by well developed concepts and rules on the allocation of the burden of proof that relax the burden of proof. However, looking at other legal systems, there seems to be no clear pattern. Thus, like German law, French law also operates a high standard of proof but here, apart from the "loss of a chance" concept, proof relaxing concepts are not found to the same extent. The same is true of Danish law and Swedish law which generally operate a higher standard of proof than the balance of probabilities test.

However, there do seem to be certain general criteria which are applied to relax the burden of proof in tort law cases in a number of the examined European systems. 79

Res ipsa loquitur is known in all of the examined legal systems. Because of the nature of the doctrine it is not possible to identify specific areas of the law to which it applies. It is a broad principle applicable in all areas of the law.[91] As starting point the doctrine must be seen as being based not on policy reasons but on probability. However supporting policy reasons could be said to be to avoid the injustice that would result if a plaintiff were obliged to prove the precise cause of the accident and the defendant's responsibility for it even where the facts are unknown to him at the outset, but typically known to the defendant (in his sphere of risk). 80

As to *protective provisions*, they often seem to play a role in relation to the question of proving negligence. The same is true in relation to the issue of causation. Thus, the infringement of a protective provision will often mean that there is a presumption as to negligence and/or causation. This rule, which is very broad in scope, must be based on probability. 81

Also the *creation of a dangerous situation/a risk* seems to be a criterion which is applied in several jurisdictions in relation to the question of the burden of proof. It is applied in relation to the negligence requirement as well as to causation. This criterion is founded on considerations of policy. It seems fair that the person who has created a risk of a dangerous situation should as a starting point also bear the expenses in this relation. 82

Gross negligence on the part of the tortfeasor can to some extent be regarded a relevant criterion when establishing causation. This criterion is clearly based on policy reasons. 83

[91] *Markesinis/Deakin* (fn. 19) 173 notes that the principle has been widely used in such areas as industrial injuries and traffic accidents.

84 Finally, all of the legal systems allow for an *estimation* of the extent of the loss suffered once it has been proved that there is in fact a loss. This criterion is derived from practical/procedural reasons.

85 Enterprise liability cuts across many of the described areas and many of the criteria are particularly relevant to enterprise liability. The rule in PETL, establishing a reversal of the burden of proof, is based both on policy reasons and on practical/procedural reasons. Many of the existing criteria might well lead to the same result and can in this sense be said to support the rule. Against this background it will be interesting to see whether enterprise liability will emerge as an independent area of the law where the general rule is a reversed burden of proof. On the basis of the existing rules, it could even be argued that it should be explored to what extent such a rule should be concerned not only with the basis of liability but also with the issue of causation.

II. The Burden of Proof and other Procedural Devices in Tort Law

Ivo Giesen

A. Introduction

This contribution deals with the (importance of the) burden of proof, especially in tort cases, and its relationship with procedural law in general, i.e. other devices within procedural law, most notably evidence law. To be more precise: I will analyse the burden of proof in European tort law systems against the background of the use of other procedural devices that might be of importance for the substantive law outcome of specific (liability) cases. Meant are of course such devices as presumptions (be it in the form of "Anscheinsbeweis", "res ipsa loquitur" or otherwise) or the standard of proof ("Beweismaß"), but also procedural duties to supply information, and the like. To phrase my topic in more general terms: what is to be analysed here is the relationship between all these various (procedural) devices, including the burden of proof, when it comes to tort cases. 1

The way in which I propose to conduct this analysis is as follows. I will first describe, in general terms, what is generally meant in European legal systems with the burden of proof, and the possibility of a reversal of that burden. I will provide the reader with a description of this instrument, note its aim and function and focus on its place in tort law, especially with regard to the possibility of accepting a reversal of that burden. Next, I will follow the same path for three other devices that are rooted mostly in the law of civil procedure but do have great practical impact on substantive tort law solutions. These devices are the standard of proof, the use of factual presumptions and the use of duties to provide information to the opposing party. What is meant by those rather general notions will be explained hereafter. Having analysed these four instruments as such, I will focus on the relationship between them, mainly by analyzing their specific aims and functions within procedural (and possibly substantive) law. The German-Austrian-Dutch concept of what I will call, for now, procedural duties to inform will be specifically promoted as a means to equal procedural chances without opening Pandora's box of additional tort claims (see below section F.). 2

It would be next to impossible to provide an in-depth account of all the European civil procedure and tort law systems on all these four instruments and 3

the questions arising in that respect. Instead of embarking thus on a route to foreseeable failure, I have chosen to limit myself to the most important basic features and to select my sources, information and inspiration from several countries in a rather eclectical fashion, using Dutch, German, Austrian, French, Belgian and English legislation, case law and doctrinal works in various different combinations throughout the following sections of this contribution.[1]

B. The Burden of Proof and its Reversal

1. An Ancient Concept Used Worldwide

4 The (division of the) burden of proof is a legal institution or instrument that is usually embedded in the law of evidence, if dealt with explicitly at all in legislation. Usually it is captured in one single, rather general rule. That rule decides, basically, who is obliged to prove one or more factual elements ("facts in issue") of a certain type of claim.[2] For example, who should prove the existence of wrongfulness in a tort claim? Or who should prove the existence of a contract? And so on. The general, worldwide accepted rule regarding the (division of the) burden of the proof is that each party to civil proceedings (both the claimant and the defendant) is required to prove those facts that form the minimally required factual content of the legal rule upon which the claim or defence is based. What requirements are in fact necessary depends then on the substantive private law rules invoked. If one does not succeed in proving these facts, and a so-called *non liquet situation* (i.e. a situation in which the facts that needed to be proven could not be proved) arises, the law will assume that, and proceed as if, the fact in question has *not* occurred.[3] This general rule is leading everywhere and is considered self-evident.[4]

5 In France, a rule of this kind has been laid down in art. 1315 Code Civil (Cc) and in art. 9 Code de Procedure Civil (CPC), just as is the case in Belgium.[5]

[1] Instead of trying to incorporate all or even most of the vast and well documented doctrinal works (especially from the Germanic legal systems) on the topic of burden of proof and evidence, I have drawn extensively from my own comparative work in this regard, most notably from *I. Giesen*, Bewijs en aansprakelijkheid (2001), which contains references to the most important literature in Germany, France and England until 2000. Recent developments have been studied from more recent sources, of course. As a practical guide to several systems, see *S. Leitner et al.*, Beweise und Beweisführungsgrundsätze im Zivilrecht (2008).

[2] See *P. Murphy*, Murphy on Evidence (2007) 71.

[3] See below at no. 10, and *Giesen* (fn. 1) 12 specifically on the non liquet situation.

[4] Cf. *Giesen* (fn. 1) 75 ff.; *Chr. Heinrich*, Zur Funktion der Beweislastnormen, in: Chr. Heinrich (ed.), Festschrift für Hans-Joachim Musielak (2004) 231 ff.; *E. Schmidt*, Die Beweislast in Zivilsachen – Funktionen und Verteilungsregeln, Juristische Schulung (JuS) 2003, 1008, speaks in this respect of a "Verlegenheitslösung" because "in real life" things might have happened completely differently instead. See also *I. Giesen/T.F.E. Tjong Tjin Tai*, Proportionele tendensen in het verbintenissenrecht (2008) 106 f.

[5] Cf. *H. Geens*, De verdeling van de bewijslast over de partijen in het verzekeringsrecht en het gemeen verbintenissenrecht, in: B. Allemeersch/P. Londers/S. Sroka (eds.), Bewijsrecht (2007) 161, dealing with Belgian law as laid down in art. 1315 Burgerlijk Wetboek (BW) and art. 870 Gerechtelijk Wetboek (GW).

Under Dutch law, the Code of Civil Procedure contains a differently worded, but similar rule in art. 150 Wetboek van Burgerlijke rechtsvordering (Rv). English lawyers are not fond of deciding cases on the basis of the burden of proof.[6] They know of no specific statutory provision in point, but do start the sometimes necessary judgments on the burden of proof from the same premise.[7] In Germany, inclusion of a rule of this kind in § 193–198 of the first draft of the Bürgerliches Gesetzbuch (BGB) was later deemed unnecessary (because it was considered self-evident),[8] but the leading theory on burden of proof starts here as well.[9] Austrian law does the same.[10] The rule itself actually dates from Roman times, as evidenced in the classic saying "actori incumbit probatio, reus excipiendo fit actor"[11] and is also accepted in the modern ALI/Unidroit Principles of Transnational Civil Procedure (in Principle 21.1).[12]

2. Exceptions are Possible when Justified

This general rule is not without exceptions. It is generally acknowledged everywhere that it is possible to come to a so-called reversal of the burden of proof under certain (strict or less strict) circumstances. Basically, this means that a party other than the party carrying the burden according to the normal rule explained above is indeed entrusted with the task of proving a certain element[13] of a claim. That other party then also bears the consequences and risks of a possible failure to do so. 6

Without going too much into the details regarding such possible reversals of the burden of proof in several systems,[14] it is important to analyse at least to some extent the possible reasons (better: justifications) for accepting such a shift. A valid reason for doing so needs to be present because the implications 7

[6] Cf. Peter Pain J., in *Clark v. MacLennan* [1983] 1 All England Law Reports (All ER) 416, at 425: "It may seem that to base one's judgment on the burden of proof is the last resort of a judge who cannot make up his mind.".

[7] E.g. *Rhesa Shipping Co SA v. Edmunds (the Popi M)* [1985] 2 All ER 712, at 718. See also *Murphy* (fn. 2) 75.

[8] *Heinrich* (fn. 4) 235; *Schmidt*, JuS 2003, 1009.

[9] I am referring of course to the "Normentheorie" by *L. Rosenberg*, Die Beweislast auf der Grundlage des Bürgerlichen Gesetzbuchs und der Zivilprozessordnung (1965) as modified into the "modifizierte Normentheorie" by later theoretical accounts (cf. *Heinrich* (fn. 4) 231).

[10] *W. Rechberger* (ed.), Kommentar zur ZPO (2006) Vor § 266, no. 11.

[11] On that Roman foundation, see *K.-H. Schwab*, Zur Abkehr moderner Beweislastlehren von der Normentheorie, in: W. Frisch (ed.), Festschrift für H.-J. Bruns (1978) 516 ff.

[12] It reads: "Ordinarily, each party has the burden to prove all the material facts that are the basis of that party's case". On (an older version of) that Principle, see *A. Kemelmajer de Carlucci*, La charge de la preuve dans les Principes et Règles ALI/Unidroit relatifs à la procédure civile transnationale, Uniform Law Review (Unif. L. Rev.) 2001, 915 ff.

[13] To be sure, a reversal could be accepted for instance for the element wrongfulness or the causation requirement, and so on. It is important to note each time which condition for tortious liability is at stake. Examples are offered by *C. van Dam*, European Tort Law (2006) 281 ff.

[14] An example: the French art. 102 of Law no. 2002-203 of 4 March 2002 (Loi Kouchner) states, in short, that the defendant must prove that the Hepatitis C infection was not due to a blood transfusion. On that article, see Cass. Civ. 1re, 14 June 2007, Juris-Classeur Periodique (JCP) éd. G. 2007, IV, 2481, and *A. Vignon-Barrault/Ph. Casson*, Chronique de responsabilité civile, Petites Affiches 2008, 13 ff.

of a shift in the burden of proof are quite serious and not to be taken lightly. Reversing the burden indeed equals the shift of the risks of not being able to prove a certain fact onto someone else. The consequence could be that the other party in fact loses the case whereas he would not have lost if the normal division had been retained. Or, in opposite terms: shifting the burden of proof may result in winning a case that would otherwise have been lost due to evidential difficulties.

8 The rationale put forward to justify a reversal of the burden of proof usually consists of one or more of several arguments. One is that it is meant to improve the protection and the position of the victim of a certain act (the plaintiff). It does so in particular if the application of the general rule regarding the apportionment of the burden of proof would put that victim in unreasonable difficulties due to, for instance, the technical or organizational complexity of the defendant's activities and, as a result, making the facts difficult to prove. Other reasons used are the idea that he who benefits from a certain activity should also bear the extra burdens related to that activity (profit theory), the idea of channelling liability in a certain direction, the idea of promoting the preventive effects of (a harsher form of) liability, the need to protect fundamental rights at stake, the wish to decrease the dependence of one party, the need to decrease the imbalance in information between the litigants, the existence of insurance coverage, or to serve the goal of being able to invoke a substantive rule despite evidential difficulties.[15] That last argument was put to the forefront forcefully by Lord Hope of Craighead when he stated in *Chester v. Afshar*:

> "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content."[16]

9 In general, even if not made explicit, for a reversal of the burden of proof legal policy and normative considerations (and not just factual arguments, which vary depending on the case[17]) are decisive. As far as I am concerned, this is indeed how it should be; normative points of view, and not mere factual particulars, should govern the apportionment of the burden of proof and thus also the reversal of the burden of proof, if indeed accepted. My reason for following this line of reasoning is that the reversal of the burden of proof leads to a much tighter or stricter tort (liability) law regime and such a tightening must be justified on normative grounds, just as would be needed for a change in substantive tort law.

[15] More generally on the possible reasons for a reversal, *Giesen* (fn. 1) 409–421 and 447 ff.

[16] See *Chester v. Afshar* [2004] 4 All ER 587; [2005] 1 Appeal Cases (A.C.) 134, 162 f. In that case, his Lordship used this reasoning to reach a "narrow modification" of traditional causation principles. The same principle is put forward in *Van Dam* (fn. 13) 286, and as the leading argument for a reversal of the burden of proof in *Giesen* (fn. 1) 449–451.

[17] *Giesen* (fn. 1) 443 f., and 410 ff. for an overview of the normative arguments. In the same vein *N. Jansen*, Principles of European Tort Law? Rabels Zeitschrift (RabelsZ) 70 (2006) 767. For criteria see also *Schmidt*, JuS 2003, 1010.

3. Aim and Function

Since facts cannot always be ascertained with the required amount of certainty (see also section C.) each and every legal system needs a rule that decides what happens if that situation (a non liquet) in fact arises. Such a rule is a rule on the burden (and risk) of proof. Its aim and function is thus to actually decide a case in instances of persisting factual uncertainty, in case of indecisiveness. It does so by providing the answer to the question: who runs the risk of losing if uncertainty remains?[18] The answer is, as stated before, that if no or too little evidence was delivered, the judge will decide as if the fact in question is non-existent. 10

4. Its Place in Tort Law

Tort law as part of private law occupies as such no special place in this regard. What has been said before basically applies equally to tort law as to contract law, family law, and commercial law and so on. The one exception to this might be that tort law (or somewhat broader: liability law) seems to provide us with a fair (and maybe even large) share of exceptions to the fundamental rule. This is not that strange if one considers that (potentially) wrongful acts are being litigated on rather often, while many tortious acts depend on proof which is hard to come by. The litigants were usually strangers to each other before the possible tort was committed. There were thus no prior dealings, no previous contracts, files, etc., to fall back on. Tortious acts are usually also "split second wrongdoings" in the sense of events happening all of a sudden and within a very limited period of time, with no person paying explicit attention to what is or rather was happening, making useful witness statements rare or not really reliable. Thus, many tort claims are packed with evidential difficulties, and in many cases these difficulties are of a structural character, i.e. they come up in each tort case of the same kind. All tort law systems are thus confronted on a regular basis with cases in which plaintiffs seem to be in need of some "evidential" assistance. If indeed the system (be it the legislator or the court) decides to provide that aid, a reversal of the burden of proof is a serious candidate. Indeed, it would be an obvious one. Be that as it may, it is certainly not the only one. 11

C. The Standard of Proof

1. Definition of a Well-Known Concept[19]

The standard of proof refers to the extent or degree of certainty or probability that the evidence delivered by the litigants must generate in the mind of the judge when deciding an issue of fact.[20] If the so required degree is reached, the court can say it is convinced of the "truth" (whatever that may be in a more philosophical sense) of a certain factual proposition and decide the case ac- 12

[18] Cf. *Murphy* (fn. 2) 71 f.; *Schmidt*, JuS 2003, 1008, and *Heinrich* (fn. 4) 233 and 241. For Austria, see *Rechberger* (fn. 10) Vor § 266, no. 8.

[19] See also *M. Brinkmann*, Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht (2005).

[20] Cf. *Murphy* (fn. 2) 101.

cordingly. Included in the foregoing description is the notion that in principal, but with exceptions, the courts in Europe are free to attach their own weight to different pieces of evidence. Whether they believe an eyewitness or not, to give one example, is at their discretion. Related to that notion is the starting point that the standard of proof is decided according to the weight that the judge in question decides to give the evidence; it is thus in principal a subjective judgement, one which is objectified however by the obligation for a judge to motivate his decision.[21]

13 As to the degree or extent of evidence required to pass the standard of proof hurdle, it would seem that common law and civil law countries are divided.[22] In England[23] proof "on the balance of probabilities" (is it more likely than not?) would suffice, while elsewhere the measure to reach is put (somewhat) higher, for instance at "a reasonable degree of certainty" in the Netherlands or "at a practical degree of probability or certainty that silences doubt without totally excluding it" as it is specified in Germany, which is an even higher standard, laid down in § 286 Zivilprozessordnung (ZPO) and usually described as "sehr hohe Wahrscheinlichkeit".[24] In Austria the required degree is that of "die hohe Wahrscheinlichkeit". This is based on § 272 österreichische Zivilprozessordnung (öZPO) and case law.[25]

14 Noteworthy is also that in most systems the standard of proof can vary according to the type of case that is being dealt with. Most prominently is of course the difference made in England between the standard of proof in civil cases as opposed to criminal cases.[26] In Germany, for instance, the degree of certainty can and sometimes is lowered in certain (private law) cases when "Glaubhaftmachung", i.e. "überwiegende Wahrscheinlichkeit", seems to suffice.[27] In line with that, Dutch courts lower the standard in so-called "kort geding" procedures (very fast proceedings, issued at short notice, before a single judge, based mainly on oral arguments) to "aannemelijkheid" or: is it probable?[28]

[21] For details, see *Giesen* (fn. 1) 49 f., 53–55.

[22] See for instance *E.L. Sherwin/K.M.A. Clermont*, Comparative View of Standards of Proof, American Journal of Comparative Law (AJCL) 2002, 243 ff. The ALI/Unidroit Principles of Transnational Civil Procedure try to bridge the gap by stating in Principle 21.2: "Facts are considered proven when the court is *reasonably convinced* of their truth." (emphasis added, *IG*). See further on this "divide" and on this Principle: *M. Brinkmann*, The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/Unidroit Principles of Transnational Civil Procedure, Unif. L. Rev. 2004, 875 ff.

[23] *Murphy* (fn. 2) 107. See also (in German) *Chr. Schröder*, Das Beweisrecht im englischen Zivilverfahren (2007) 222 ff.

[24] See *Giesen* (fn. 1) 50 and 55; *H.-J. Musielak*, Grundkurs ZPO (2007) 281, and BGH 17 February 1970, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 53, 245, 256 (Anastasia-Urteil). For Belgium, a degree of "redelijke zekerheid" suffices, see *B. Allemeersch*, Taakverdeling in het burgerlijk proces (2007) 466.

[25] See the discussion (and further references) in *C. Bumberger*, Zum Kausalitätsbeweis im Haftpflichtrecht (2003) 45 ff., 49 and 182, and OGH 9 July 2002, Juristische Blätter (JBl) 2003, 249 f.; OGH 17 November 2004, JBl 2005, 464.

[26] See *Murphy* (fn. 2) 101.

[27] *Musielak* (fn. 24) 283.

[28] Cf. *Giesen* (fn. 1) 56 f.

2. Aim and Function

15 The principle aim of the standard of proof is to have a certain measure, to be applied equally to all litigants in the same sorts of cases, to decide whether the burden of proof has been discharged. In order to perform that function, the degree of evidence required can as such vary without much trouble. To do so would be feasible if in a given situation demanding more evidence to be supplied would be unjustified. For possible reasons why demanding more might be unjustified, one can fall back on the justification for having a reversal of the burden of proof as exemplified earlier.[29]

16 The standard of proof, however determined and set will be of influence on the burden of proof. If a court is convinced of the existence of a certain fact, the required evidence apparently has been brought forward, allowing the judge to decide the matter accordingly. The risks associated with the burden of proof are then no longer at stake since a non liquet situation will not arise. From this it follows that if the required standard were to be lowered, the degree of evidence needed to reach the standard would also be lower, making it less likely that the burden of proof will be decisive for that case at hand. Lowering the standard is thus equal to less cases being decided on the burden of proof.[30]

3. Its Place in Tort Law

17 When it comes to the standard of proof, a tort case will in principal not be treated differently from any other private law case. The standard of proof is set at a certain level in each legal system and for some cases a lower standard is accepted, as explained above. The most important deviation from this, however, is that in Germany the lowering of the standard of proof that is laid down in § 287 ZPO is especially relevant for and functional in liability cases. That article provides that both the existence of damage and the amount thereof can be assessed and determined (or even estimated) by using (only) an "erhebliche Wahrscheinlichkeit". Equally important is that the question of remoteness of damage, the so-called "haftungsausfüllende Kausalität" in German terminology, is supposed to be dealt with according to this (lowered) standard of proof. Its purpose is to (try and) avoid a non liquet.[31] A similar possibility to estimate the amount of damage suffered is provided for in the Dutch Civil Code, in art. 6:97 Burgerlijk Wetboek (BW).

[29] See above at no. 8, and *Giesen* (fn. 1) 475 and 477 f.

[30] Cf. *Bumberger* (fn. 25) 42.

[31] On all this, see for instance *G. Baumgärtel*, Beweislastpraxis im Privatrecht (1996) no. 377 ff., and recently BGH 20 March 2008, Monatsschrift für Deutsches Recht (MDR) 2008, 799 on the use of § 287 ZPO. The same deviation from the regular standard applies, according to § 252 BGB, for the determination of lost profits.

D. Presumptions of Fact

1. General Thoughts on Presumptions

18 Once again it will not be possible to cover the topic of (factual) presumptions in all its finesses and richness in this contribution. The theme is just too diverse and broad for that. What is possible however is to sketch a few general lines of thought, thought to be common to most legal systems. The first is that a presumption is in essence a mode of reasoning which leads to certain inferences being drawn, i.e. to the acceptance of certain facts or legal consequences from other, proven facts.[32] To do so, use is made of rules of thumb and facts that are common knowledge. A presumption thus provides the judge with the opportunity to base the existence of a certain factual element on the presence of another fact which has been proven. So, in essence, the object of proof (the fact that needs to be proven) is changed.

19 It is important to note, secondly, that accepting such a presumption does not change the burden of proof. It only denotes that for the time being that burden has been discharged. It is then for the opposite side to come forward with evidence to rebut that provisional judgment. In order to do so, the presumption must be countered to such an extent that the judge remains in doubt again as to the existence of the fact in question; going further and actually providing proof to the contrary is not needed. So, in essence, only the "evidential" burden of proof shifts when a presumption is accepted, but not the "legal" burden.[33]

20 A third aspect to mention is that both in England on the one hand as well as in Germany and Austria on the other hand, separate doctrines regarding the use of presumptions of fact have emerged. In England the notion of "res ipsa loquitur" (i.e. the case speaks for itself) and in Germany and Austria the doctrine of "Anscheinsbeweis" have arisen and (at least in Germany) gained enormous practical importance.[34] Since both are (almost) confined to liability cases, I will deal with them below (section D.3).[35]

2. Aim and Function

21 As stated, a presumption does not alter the division of the burden of proof. It just makes it easier to come up with the proof needed because an additional way of "gathering" evidence is used, next to the usual modes of providing evidence. The function a presumption thus fulfils is that it might alleviate the evidential needs one may encounter (it is a "Beweiserleichterung") and that it provides for the possibility to use probabilities when deciding a case. Taking it one step further, one can also say that a presumption prevents the non liquet

[32] Cf. *Giesen* (fn. 1) 65; See also on presumptions *W.D.H. Asser*, Bewijslastverdeling (2004) 87 ff.
[33] *Giesen* (fn. 1) 65 f.
[34] Cf. especially *Baumgärtel* (fn. 31) no. 227.
[35] I will not deal with the doctrine of "Indizienbeweis" since doing so would not add a lot to the line of argument developed in this contribution. For more information, see *Baumgärtel* (fn. 31) no. 272 ff.; *Rechberger* (fn. 10) Vor § 266, no. 21.

situation from arising in certain instances; a presumption thus also prevents the (legal) burden of proof from becoming decisive.[36]

3. Presumptions in Tort Law: Res Ipsa Loquitur and Anscheinsbeweis

22 At the risk of sounding repetitious, it must be stressed once again that on a principal level the use of presumptions is not confined to or treated in any special way within tort law. Factual presumptions can and may be used also in contract cases, labour law, family disputes, etc. Be that as it may, (again) it does seem noteworthy that presumptions are in fact used relatively often in liability cases, although I have no empirical evidence at my disposal to back that proposition up with hard figures. The proposition does seem valid however given the extensive use that is made of, for instance, "Anscheinsbeweis" in Germany in liability cases (see below). The large numbers of cases that are decided in the Netherlands on the basis of the so-called "omkeringsregel" (a presumption of fact as to the existence of the condicio sine qua non requirement, which in fact started out as a genuine reversal of the burden of proof[37]) strengthen that educated guess on my part.

23 As mentioned, in England the notion of "res ipsa loquitur" and in Germany and Austria the doctrine of "Anscheinsbeweis" have become important, especially for tort cases. Without it being necessary to deal with these procedural instruments extensively, it should be noted that the English doctrine of res ipsa loquitur basically stands for the notion that sometimes the judge may infer negligence from the circumstances of the event that led to the injury because the injury is of the type that would not have occurred without negligence on someone's part. Usually pedestrians do not get struck by falling barrels of flour plummeting from a second floor storage facility.[38] Of course this places res ipsa loquitur right within the law of negligence; it is designed, so to speak, for tort cases, allowing a court to draw an inference of a breach of a duty of care and thus allowing presumptions to flourish in that part of the law. The use of

[36] *Giesen* (fn. 1) 65.

[37] As regards causation, this specific rule gained momentum in the Netherlands a few years ago. The rule basically states that whenever a wrongful act creates or increases a certain risk of damage and that specific risk actually materializes, the causal link has been established, unless the wrongdoer can prove that taking preventive measures would not have prevented the damage from occurring. This so-called "omkeringsregel" was first used in the mid 1970s in cases of traffic accidents and accidents at workplaces, and was widened in its scope of application in the *Dicky Trading II*-case of Hoge Raad (HR) 26 January 1996, Nederlandse Jurisprudentie (NJ) 1996, 607. See also *W.H. van Boom/I. Giesen*, The Netherlands, in: B. Winiger et al. (eds.), Digest of European Tort Law. Vol. 1. Essential Cases on Natural Causation (2007) 102–11, 215 f. and 408 f. By now, it is widely held that the ambit of this rule is reduced so considerably that it will apply only (again) if traffic rules or specific safety rules are breached, cf. *I. Giesen*, De aantrekkingskracht van Lorelei, in: T. Hartlief/S.D. Lindenbergh, Tien pennenstreken over personenschade (2009) 69 ff.

[38] I am referring here of course to the famous case of *Byrne v. Boadle* 159 English Reports (Eng. Rep.) 299 (Exch. 1863). For more information on this principle or rule or maxim, see recently *G. Gregg Webb*, The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur, Stanford Law Review (Stan. L. Rev.) 59 (2007) 1065 ff.; *Giesen* (fn. 1) 69 ff. (also dealing with French law in this respect).

res ipsa loquitur has also been questioned, and forcefully at that, however, due to its difficulties in determining its application.[39]

24 In Germany and Austria the doctrine of "Anscheinsbeweis" fulfils a similar, yet in practice more important function. It supplies liability law with a detailed (albeit complex) possibility of using presumptions to decide cases that present factual difficulties. "Anscheinsbeweis" relates to the fact that if a certain injury has occurred, at first glance ("am ersten Anschein") a certain cause is likely to be present as well and responsible for the event. This inference is based on general rules of experience.[40] Again I will not dwell on the preconditions for its use nor its consequences, let alone all the legal questions that still remain as regards this doctrine. Here it suffices to mention that "Anscheinsbeweis" does not lead to a reversal of the burden of proof, that rebutting the presumption suffices, without having to provide proof to the contrary and that it is typically used to prove either causation and/or negligence.[41] Of course, that specific area of application also denotes its special importance for liability questions.

E. The Duty to provide information (Sekundäre Behauptungslast)

1. Several Forms of Information Duties

25 Under modern rules of civil procedure litigants are increasingly obliged to provide information to their opponents and/or the judge, even if they are unwilling to do so. There are an increasing number of instruments available that stimulate the fact-finding process. The importance of such – in general terms – "duties to provide information" is that the more information comes out in the open, the more facts can be ascertained or at least be subject to discussion in the litigation process.[42] Such a duty to provide information is achieved through the use of several types of rules pertaining to the transfer of knowledge.

26 Even though this paper is not the appropriate forum to provide a more or less exhaustive overview of rules in several legal systems in Europe in this regard, a few instances can be mentioned.[43] Such an instance is the French general

[39] See for example *Chr. Witting*, Res Ipsa Loquitur: Some Last Words? Law Quarterly Review (LQR) 117 (2001) 392 ff.

[40] To give one fairly recent example: breaking of a piece of a tooth when biting a piece of meat is not considered, according to rules of experience, to be typically due to the presence of some foreign object hidden in the dish, which means that "Anscheinsbeweis" cannot be invoked. See BGH 5 April 2006, Neue Juristische Wochenschrift (NJW) 2006, 2262.

[41] From the vast amount of literature on this topic I will only mention *J. Metz*, Der Anscheinsbeweis im Straßenverkehrsrecht, NJW 2008, 2806 ff.; *C. Jungmann*, Der „Anscheinsbeweis ohne ersten Anschein", Zeitschrift für Zivilprozess (ZZP) 120 (2007) 459 ff.; *Baumgärtel* (fn. 31) no. 227 ff.; *Rechberger* (fn. 10) Vor § 266, no. 22; *Bumberger* (fn. 25) 51 ff., all with further references.

[42] *Giesen* (fn. 1) 18 f.

[43] For more information on the following, see *Giesen* (fn. 1) 18–38, with further references.

duty to contribute to finding the truth (art. 10 CPC) and the more specific duty to introduce certain pieces of evidence into the proceedings if ordered to do so (art. 11 sec. 2 CPC). Similar in vein are the Dutch duty to provide relevant facts completely and truthfully (art. 21 Rv) and the power given to a judge to demand further elaboration on or about certain pleadings (art. 22 Rv). Mention can also be made of the duty to substantiate factual elements by having to name the expected defences the opposing party will invoke and by having to name what type of evidence is available (art. 111 sec. 3 and 128 sec. 5 Rv). The English Civil Procedure Rules (CPR) have vested the judge with the power to order parties to supply him with information (Rule 18.1 CPR), coupled with a statement of truth as regards the information so provided (Rule 22.1 (1) CPR). The rules on disclosure also contribute to the presence of information (Rule 31 CPR). According to German procedural law, information can be obtained by using the duty contained in § 138 ZPO, which states that parties need to make sure that their declarations are truthful and complete. Under § 139 the judge is obliged to make sure that the parties elaborate on the facts of the case, and name their means of evidence.[44]

A general duty to supply the opponent spontaneously with all the relevant facts of a case is in principal not accepted in the European systems of civil procedure,[45] but specific duties to provide the judge and/or the opposing party with information are accepted, and rightly so. The ALI/Unidroit Principles of Transnational Civil Procedure further exemplify this.[46] These duties need sanctioning of course, for instance by using, as in Germany, the "Präklusion", (§ 296 sec. II ZPO) but that is another (difficult, and usually not easy to achieve) topic altogether. 27

2. One Specific Example Highlighted: Sekundäre Behauptungslast

One specific example of an information duty that deserves more of our attention is the (in German) "sekundäre Behauptungslast" or (in Dutch) "aanvullende stelplicht" or "gemotiveerde betwisting", which could also be named (even though it is non-existent in English law) the "the duty to provide an extra motivated pleading". This instrument is part of the law of evidence and warrants our attention because of its relevance for tort cases and its potential to solve the evidential needs of (usually) plaintiffs. What we are dealing with here is the obligation of one litigant, usually the defendant, to not only deny the plaintiff's statement of claim and the facts asserted therein, but to go one step further and to extra underpin and motivate that denial by bringing in factual details and relevant sources. It comes down to this: the defendant is charged by the case law with a duty to *substantiate his defence or claim* that he has not 28

[44] For German law in this respect, see also *I. Saenger*, Grundfragen und aktuelle Probleme des Beweisrechts aus deutscher Sicht, ZZP 121 (2008) 142–144.

[45] For German law for instance *Baumgärtel* (fn. 31) no. 305 ff.

[46] Principle 21.3 states: "When it appears that a party has possession or control of relevant evidence that it declines without justification to produce, the court may draw adverse inferences with respect to the issue for which the evidence is probative." It is based on the notion of good faith (Principle 11.1).

acted wrongfully, for instance. He has to do so by supplying information on all the factual aspects of the claim. What is thus needed is that the defendant takes an extra step when denying the asserted facts by supplying a certain degree of extra information (which is typically not available to the plaintiff).[47] Think of a doctor who is obliged to hand over his medical file, with his notes, to the patient claiming damages. Since a breach of the medical standard of care is usually hard to prove for a patient, the courts tend to "lower" the burden of proof a bit, give it a different content, when duties of care are supposedly breached.

29 By using this instrument the substantiation of a claim is thus put partly upon the defendant. This is done however without reversing the (legal) burden of proof, which is of course important.[48] Only the (evidential) burden of producing (pieces of) evidence is shifted.[49] If the defendant complies with this duty, the plaintiff is still obliged to prove, using the extra information provided, his claim. What happens if in fact the duty is not complied with, is that the existence of the fact at stake is considered to be given (on the basis of § 138 Abs. III ZPO in Germany and art. 149 Rv in the Netherlands).[50] In Austria, the foregoing is dealt with somewhat differently however. Here it seems to depend on the type of case whether a reversal of the burden of proof is accepted as the sanctioning mechanism or not.[51] Its legal basis can be found in § 184 öZPO.[52]

30 In Germany this legal notion, based on the notion of "Treu und Glauben", can be invoked if three conditions have been met. First, the party which carries the burden of invoking and stating facts to support its claim has no further knowledge concerning the determining facts because that party has been outside of the realm in which the facts in question occurred, while second, the opposing litigant knows or is supposed to know these facts, and, thirdly, it can be attributed to that opposing party to be obliged to introduce those facts into the dispute at hand.[53] In Austria the same conditions generally apply.[54] In the Netherlands case law has not come up with a specific (similar) list of conditions to be met, but in essence the same principles do seem to apply there as well.[55]

[47] See *Giesen* (fn. 1) 39 ff.; *Baumgärtel* (fn. 31) no. 307 f., 347 ff., as well as the following footnotes.

[48] See *D. Magnus*, Beweislast und Kausalität bei ärztlichen Behandlungsfehlern, ZZP 120 (2007) 353.

[49] On these two notions, see *Baumgärtel* (fn. 31) no. 9, 14; *Murphy* (fn. 2) 71 f.; *Giesen* (fn. 1) 12 f., with ref. in fn. 60.

[50] Cf. *Saenger*, ZZP 121 (2008) 145; *Giesen* (fn. 1) 41 and 43–47, although the range of possible sanctions is, wrongly as far as I am concerned, considered to be somewhat wider in the Netherlands, see HR 15 December 2006, NJ 2007, 203 (NoordNederlands Effektenkantoor/Mourik).

[51] *J. Rassi*, Die Aufklärungs- und Mitwirkungspflichten der nicht beweisbelasteten Partei im Zivilprozess aus österreichischer Sicht, ZZP 121 (2008) 176–178, who claims that a reversal of the burden of proof should not be used (ibid., at 199).

[52] *Rassi*, ZZP 121 (2008) 187 ff.

[53] See, for example BGH 18 May 1999, NJW 1999, 2887 f.; *Saenger*, ZZP 121 (2008) 144; *Magnus*, ZZP 120 (2007) 353; *Giesen* (fn. 1) 41. Cf. also *Baumgärtel* (fn. 31) no. 307.

[54] See *Rassi*, ZZP 121 (2008) 176.

[55] *Giesen* (fn. 1) 42.

Examples of the use of this "sekundäre Behauptungslast" can be found in German law in the area of labour law, in maintenance law, in company law and in competition law (i.e. misleading advertising, which is closely connected to tort law). The German Bundesgerichtshof (BGH) has used the concept in medical negligence cases recently as well.[56] It has done the same in relation to a lawyer who is being sued for a failure to warn his client and in respect of tax advisors.[57] In Austria the instrument is currently being used in (parts of) competition law, transportation law and bankruptcy law.[58] In the Netherlands liability claims against medical practitioners, notaries, and presumably also lawyers, can be dealt with along these lines, just as several labour law issues, while it has also been used in intellectual property law in the past.[59] 31

3. Aim and Function of the Sekundäre Behauptungslast

This "sekundäre Behauptungslast" is meant and used as an instrument to alleviate the plaintiff's burden of proof in cases in which it is obvious that such burden cannot be met without some external help being offered. The burden of proof is not shifted onto the defendant but lessened in the sense that one is given certain factual information that is needed to build one's claim and which was not available before. An important question is of course why someone would be obliged to help out his opponent this way. Isn't litigation like a battle or even worse still, a "war"? 32

Basically this duty is accepted, as far as I am concerned, because without the duty to supply information the burden of proof would become too burdensome. Since it would be an illusion to think that the plaintiff could provide the evidence needed without this duty bestowed on the opponent, the protection substantive law aims to offer a party would become illusionary as well.[60] And that is something we do not wish to accept. In the end, it is thus the desire to safeguard the protection offered by substantive law that ignites this procedural protective measure. Of course that is a course of action taken more often, due to the close ties that exist between the law of evidence and substantive law in terms of achieving certain aims or outcomes.[61] 33

[56] See BGH 14 June 2005, NJW 2005, 2614; *Saenger*, ZZP 121 (2008) 144, and *Magnus*, ZZP 120 (2007) 353 and fn. 28, with references and critical comments as regards the use in medical negligence cases.

[57] BGH 26 June 2008, Der Betrieb (DB) 2008, 1738, 1740 and BGH 4 June 1996, DB 1996, 1869 f.

[58] *Rassi*, ZZP 121 (2008) 176 f.

[59] *Giesen* (fn. 1) 39 f. Especially in medical liability cases, this is standing case law since HR 20 November 1987, NJ 1988, 500 (Timmer/Deutman). See also HR 18 February 1994, NJ 1994, 368 (Schepers/De Bruijn); HR 13 January 1997, NJ 1997, 175 (De Heel/Korver); HR 7 September 2001, NJ 2001, 615 (Anesthesie); HR 23 November 2001, NJ 2002, 386 (Ingenhut) and HR 15 December 2006, NJ 2007, 203 (NoordNederlands Effektenkantoor/Mourik).

[60] See the advice to the Supreme Court by *Asser* in the case of HR 10 January 1997, NJ 1999, 286 (Notaris W.), at no. 2.9, and *Giesen* (fn. 1) 42.

[61] Cf. *Giesen* (fn. 1) 43 and 465–467 in more general terms.

4. Information Duties and Tort Law

34 The above mentioned information duties can be accepted, basically, for any type of judicial dispute, and are thus not confined to issues of tort law. Neither are tort disputes excluded from these basic duties. In essence, these rules thus can govern "our" tort cases just as they could cover a contract case or a dispute over the ownership of a piece of land. Tort law is, yet again, not special in this regard, but there are certain types of tort claims that benefit greatly from the existence of this concept.

35 In principle, the same goes for the specific case of the "sekundäre Behauptungslast". Its use and applicability is not confined, in principle, to certain cases, although its use has not yet become "universal". Of course the conditions that need to be met in order to be able to use the instrument do in fact shape the extent to which it can be invoked in practice. This duty has however already proven to be useful in liability cases, most notably, at least in the Netherlands, in cases of medical negligence and other forms of professional negligence.[62] The information deficit a patient usually encounters when suing a medical practitioner can be balanced by imposing on the doctor the duty to come forward with certain information at his disposal, thus levelling the "playing field" between both parties to some extent. Cases of misleading advertising also come to mind as types of cases in which the concept can be useful. To my mind the usefulness of this concept has however not been fully grasped everywhere[63] and where it has, the extent of its potential use has not been fully appreciated, or so it would seem.

F. Further Analysis: The Relationship between the Procedural Devices

1. Similar Aims and Functions

36 What we have seen so far is that in most legal systems, in one way or another, legal tools or instruments are being developed to escape the regular outcomes and consequences of rules of evidence, such as the fundamental rule designed to divide the burden of proof between the litigants. Deviating from the regular application of one or more of the above mentioned instruments of the law of evidence is usually accepted when it serves a specific purpose, i.e. most notably, arranging for a reduction in evidential burdens of whatever sort, sometimes also called a "Beweiserleichterung bis hin zur Beweislastumkehr"[64] for

[62] To be sure, in the Netherlands such cases are either rooted in contract law or in tort law, without this distinction being relevant for the duty of care.

[63] Belgian law does not seem to accept this way of reasoning, at least not without further qualifications, see *M.E. Storme*, Algemene beginselen van bewijs in het vermogensrecht, in: B. Allemeersch/P. Londers/S. Sroka (eds.), Bewijsrecht (2007) 11. However, *Allemeersch* (fn. 24) 126 f., does seem to accept a similar duty (with reference to Dutch case law in this regard).

[64] On that concept and the possible confusion it entails, see *W. Laumen*, Die „Beweiserleichterung bis hin zur Beweislastumkehr" – Ein beweisrechtliches Phänomen, NJW 2002, 3739 ff.

the plaintiff. This deviation from normal standards is deemed justified because the plaintiff can invoke one or more valid (substantive and normative) arguments for a change in his unfavourable position, for instance because profit theory or the dependence of the plaintiff in his relationship with the defendant dictates so.[65]

37 Each instrument (be it a reversal of the burden of proof, a lowering of the standard of proof, and so on) functions as a legal route that can be used in order to achieve a desired result. This desire is fuelled, usually, by the fact that we are trying to cope the best we can with a situation of what I would call *structural evidential difficulties*, i.e. we are dealing with types of cases that (almost) always run into the same or similar difficulties as regards the possibilities of proving certain elements of the case. To give only one example: requiring proof that a patient would have chosen an alternative treatment or no treatment at all if he had known and been informed in time about the medical risks of the treatment actually provided is bound to lead to a causation requirement that is as good as impossible to prove in any case of that type.[66]

38 The concept of informational duties as explained above is, to use that as an example, suited, at least in principle, to tackle the problem at hand if that problem is indeed one of "evidential needs".[67] This is true for problems of proof as regards the unlawfulness but also when dealing with condicio sine qua non issues.[68] Building a case to actually be allowed by a judge to use this form of "evidential alleviation" is manageable in practice since it is considered possible to use the same arguments one would use for defending a reversal of the burden of proof.[69] Another option might of course be to lower the demands usually imposed on a litigant to reach the required standard of proof. One can be more or less strict in what is required.[70] Instead of asking for a reasonable degree of certainty (for instance a "redelijke mate van zekerheid") a judge might be satisfied if the proof delivered reaches the standard of more probable than not (i.e. the usual standard in England) or something similar ("aannemelijkheid" for instance).

39 Both these examples lead to a situation in which the evidential difficulties for a plaintiff are lessened, at least to a certain extent. That is not to say however, that the defendant will thus automatically lose his case. This depends on the instrument used and the consequences attached to that specific devise. These consequences need not be all too harsh (considering the defendant's position) in all cases, it depends on the instrument chosen.

[65] On these and several other arguments (in essence these arguments are usually of a normative character), see *Giesen* (fn. 1) 409 ff. and no. 8 f. above.
[66] More on this in *Giesen* (fn. 1) 455–458.
[67] *Giesen* (fn. 1) 39 ff.; *Asser* (fn. 32) 115 ff.
[68] Cf. HR 23 November 2001, NJ 2002, 386 (Ingenhut).
[69] *Giesen* (fn. 1) 475.
[70] Cf. for Belgium for instance *I. Boone*, Het "verlies van een kans" bij onzeker causaal verband, Rechtskundig Weekblad (R.W.) 2004, 96.

2. But Different Consequences

40 Of course, not all of the analysed instruments to alleviate or change the position of the plaintiff have the same or similar legal consequences. This means that the choice for one of them instead of another is not without significance. For example, using the "sekundäre Behauptungslast" and concluding that this obligation has not been lived up to leads in principle to the conclusion that the fact in dispute must be considered to be true, thus excluding the need for any further evidence. On the other hand, a reversal of the burden of proof relocates that burden to the other litigant, allowing evidence to be delivered while a presumption presupposes that the proof has been delivered, for the time being at least, but allowing counter-evidence to be handed down.

3. Caveat: Substantive Law Could also Be Used

41 So far I have dealt with several procedural instruments designed or at least used to circumvent unwanted substantive outcomes. It is important to note that one does not have to fall back on these procedural devices in order to achieve a desired result. Substantive law can also provide a "remedy" for forms of structural evidential difficulties. For instance, if a legislator (or, exceptionally a court) introduces or accepts a form of strict(er) liability instead of the regular rules on fault liability, this is usually done by excluding the elements (or: conditions for acceptance of liability) of wrongfulness and/or (subjective) fault. Excluding such an element of course means that proof in that regard is no longer needed.[71]

42 If and when proof of the condicio sine qua non connection between the act complained of and the damage suffered is hard or impossible to prove, a solution might be to change the way one interprets that (causal) element of the claim. By extending the interpretation given to a certain condition for liability it may become easier to prove the existence thereof. What used to be a problem of proof may then have disappeared.[72] This method seems to have been used in England not that long ago.[73] This method of course has the advantage that the non liquet situation will be avoided completely, which in turns means that the division of the burden of proof will not be decisive.[74] A rather paramount disadvantage would of course be that the liability system as such is "invaded" or impaired in the sense that one of the major conditions for liability is downplayed to a large extent or re-formulated.

43 The same disadvantage can be mentioned as one of the key factors when another substantive law solution is brought to the floor: *proportional liability*, or,

[71] As a method to circumvent evidentiary difficulties strict liability is a much used instrument, cf. *Giesen* (fn. 1) 473, with further references.

[72] *Giesen* (fn. 1) 473 f., with further references.

[73] In *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32, a case that dealt with using a more "flexible" test for causation when dealing with an asbestos claim and more possible defendants. On that case, for instance, *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2002 (2003) 144 ff.; *J. Stapleton*, Lords a'leaping evidentiary gaps, Torts Law Journal 10 (2002) 276 ff.

[74] *Giesen* (fn. 1) 475. Cf. also *Bumberger* (fn. 25) 92 ff.

phrased in general terms, liability in conformity with and to the extent of the likelihood that a certain causal factor for which the defendant is responsible was indeed the cause of the damage suffered by the claimant. However, this solution has many advantages as well. Since this contribution cannot deal with this highly debated issue extensively,[75] I will not dwell on this any further but only mention it as an alternative to a re-definition of the burden of proof as regards causation.[76]

The fact that both substantive and procedural solutions are indeed available 44
to litigants begs the question as to the relationship between these two possible solutions to the same problem. Are these routes to choose from mutually exclusive, for instance? As the principal starting point I would say that if and when more than one instrument is (possibly) applicable, the claimant should be given the freedom to set his own course and decide for himself which variation to choose and use. The more instruments that are available, the better it is for a claimant since he can then choose the instrument that suits his needs best. Excluding some of the options if others are or can be of use would not sit well with the notion of private autonomy in private law matters, especially if the possible reasons and justifications for the concurring options are related or even the same.

4. Concluding Remarks: Proportionality should be Leading when Choosing a Solution

All these procedural and substantive options then raise one final question: how 45
to choose from the options that are available? Does the claimant enjoy total freedom in this respect? If not, what guides the choice to be made and to what extent? In this respect it is of the utmost importance to remember that, at least as far as I am concerned, in civil procedure law – just as in substantive (contract) law – the opposing parties are bound, at least to a certain extent, by the notion of and rules deriving from (English) "good faith and fair dealing", (German) "Treu und Glauben", (Dutch) "redelijkheid en billijkheid", or any other terminology used for the same idea.[77] To some extent,[78] according to this notion, one must take account of the interest of the opposite side, even when you are involved in litigation with that other person. Suing someone does not

[75] Which of course has been accepted in the Principles of European Tort Law, see Principles art. 3:103, 3:105 and 3:106, and the comments by *J. Spier* (ed.), Unification of Tort Law: Causation (Chapter 3), in: European Group on Tort Law, Principles of European Tort Law (2005) 46 f., 48 and 57.

[76] See in greater detail: *Giesen/Tjong Tjin Tai* (fn. 4) 100 ff., and especially 106 f. On (different variations of) proportional liability, see also *G. Wagner*, Gutachten zum 66. Deutschen Juristentag (2006) 59–61; *Boone*, R.W. 2004, 92; *Th. Kadner Graziano*, Loss of a Chance in European Private law, European Review of Private Law (ERPL) 2008, 1022.

[77] See most notably *J.B.M. Vranken*, Rechtsvergelijkende gezichtspunten bij de herziening van het civiele procesrecht in eerste aanleg, in: W.D.H. Asser/J.B.M. Vranken, Verantwoordelijk procederen (1999) 78–82, especially 80. In the ALI/Unidroit Principles of Transnational Civil Procedure, Principle 11.1 ("The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.") accepts this notion as well.

[78] The question as to what extent would open up a whole new discussion, of course. Given the time and space limitations, I have decided not to try to answer that question here.

lead to a declaration of a mutual state of war and/or lawlessness. Even when in battle, certain rules need to be upheld and good faith decides on what (social) norms are indeed valid even when involved in litigation.

46 Given that starting point, the determination as to what instrument should or can be used to alleviate one party's evidential burden cannot be left totally to the freedom of the party able to initiate the course of action to take. Some control (by the courts) is needed and can be exercised. So, when deciding on what instrument to invoke to achieve a better position, any alleviation of the plaintiff's burden must be one that also takes into account the opposing side's interests, as far as reasonably possible. Hence, the choice to be made is for the solution that is *proportionate to the goal* aimed at.[79]

47 Such a proportional fashion of dealing with the evidential difficulties certain tort cases lead to and which need a solution that deviates from what the regular rules on burden of proof provide for[80] could be the (more extensive) use of the aforementioned procedural duties to inform (see section E. above), specifically the "sekundäre Behauptungslast". These duties might – and do, as far as I can tell – provide an efficient means to level, if not equal, the procedural chances between the litigants in the proceedings without at the same time opening Pandora's box in the sense of allowing a vast amount of added, new and/or frivolous tort claims to pop up.

48 If this duty were to be accepted on a more general scale in European (tort law) systems, this would mean that one party, usually the defendant, would be obliged to provide certain information, thereby allowing the opposing party (usually the plaintiff) to use that information to strengthen its own case or at least to make it easier to provide the proof demanded for. It would do so without going so far as to completely reverse the chances of both parties as the typical reversal of the burden of proof would entail. Hence, the possible fear for opening floodgates to frivolous claims can be put to rest.

49 The foregoing is especially the case if the party obliged to provide information actually supplies this when asked to, because in that case the burden of proof will not be altered or even touched upon. The defendant supplies information, and helps out the plaintiff who would then still bear the risks associated with a non liquet situation. Only if the defendant would refuse or not be able, although obliged, to supply extra information or would not be able to completely fulfil the obligation to supply that extra information, would a sanction follow. This sanction could either be a reversal of the burden of proof or alternatively the acceptance of the fact in question as undisputed (and thus no longer needed as proof). Such a sanction might be relatively harsh, since it would lead to los-

[79] A certain level of proportionality is becoming more and more accepted in substantive liability law, for instance through the use of the loss of a chance theory. On that, see *Giesen/Tjong Tjin Tai* (fn. 4), and *Kadner Graziano*, ERPL 2008, 1009 ff.

[80] Whether such a deviation from the standard way of dividing the burden of proof is needed and justified is a different question altogether, and one which I will not try to answer here. For some thoughts on that, see section B.2, no. 6 ff. above.

ing on the merits of the case or a reversal of the risks associated with the non liquet situation. But this sanction is then justifiable given the defendant's non-fulfilment of the procedural duty in question.

50 Given the different results that will ensue if either the information duty was met or was not met, the foregoing can and will only function properly (and proportionally) if and when the courts can find the proper way to decide on *how much additional information* they can and should ask from litigants. This aspect is of the utmost importance and the highest courts in Europe should keep lower courts' decisions under rather close scrutiny in this respect.[81] If the amount of information the courts require becomes too high, the proportionality of the use of this instrument will soon be lost. Such a delicate balancing task corresponds however exactly with what we ask our courts to do on a daily basis in several other types of cases. We may therefore safely assume that our courts are up for this task.

[81] In the Dutch system, the decision on how much information should be supplied is one which rests with the lower court but the Dutch Supreme Court can and will rule on the soundness of the motivation given by the lower court, see *Giesen* (fn. 1) 40, with ref. in fn. 163.

III. The Function of the Burden of Proof in Tort Law

Ernst Karner

A. Foundations

1 Questions of burden of proof do not always lie in the focus of interest and are at times neglected when the substantive legal position is investigated. However, experienced lawyers in particular know that a case frequently fails not because of highly complicated legal problems but instead because a party cannot convince the judge of those facts that support their case.[1] The question as to what conclusion the judge will draw is, of course, firstly a question of free consideration of evidence. Properly, this also includes *prima facie* evidence (*Anscheinsbeweis*),[2] which is premised on how certain sequences of events are typical on the basis of experience; such justifies for instance the association made between the carelessly discarded banana skin and the fall as a result of slipping.[3] Suchlike *prima facie* evidence is also well-known to the common law (*res ipsa loquitur*), indeed the common law was probably the model for the German law in this respect.[4] *Byrne v. Boadle* is an example of a leading case: the claimant was injured by a barrel of flour which fell from the window of the defendant's house onto the street. The court held that this spoke for the defendant's fault, observing succinctly: "*Barrels do not usually fall out of windows unless there has been want of care*".[5] In such cases then, his life experience helps the judge with his task.[6] Only when the means of free consideration of

[1] Cf. *J. Kokott*, The Burden of Proof in Comparative and International Human Rights Law (1998) 1.

[2] See *H. Koziol*, Österreichisches Haftpflichtrecht I (3rd ed. 1997) no. 16/2 f. with further references (ref.).

[3] Cf. Oberlandesgericht (OLG) Schleswig 5 U 194/90 = Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR) 1992, 796: lettuce leaf in food market; OLG Innsbruck 4 R 153/95 = Zeitschrift für Verkehrsrecht (ZVR) 1996/39: slippery, wet stairs at an indoor swimming pool.

[4] See *H. Weitnauer*, Wahrscheinlichkeit und Tatsachenfeststellung, in: Karlsruher Forum 1966: Beweisfragen im Schadenersatzrecht (1966) 13.

[5] *Byrne v. Boadle* [1863] 2 Hurlstone & Coltman's Exchequer Reports (H. & C.) 722, 159 Eng. Rep. 299.

[6] *U. Diederichsen*, Zur Rechtsnatur und systematischen Stellung von Beweislast und Anscheinsbeweis, Versicherungsrecht (VersR) 1966, 213.

the evidence have been exhausted, in other words when there is lack of proof, does the question of burden of proof arise. *Rosenberg* expressed this very picturesquely: the place where the kingdom of consideration of evidence ends is the beginning of the dominion of burden of proof; if the judge has crossed over this without being able to find a judgment, then the burden of proof will supply him with what free consideration of evidence has failed to give him.[7] And this brings us to the real subject of our discussion.

2 When examining the burden of proof in tort law, we must firstly note that there are two kinds of burden of proof: Firstly, the "burden of production", that is the burden of going forward with the evidence (*Beweisführungslast; subjektive Beweislast; charge de la preuve*); secondly the "burden of persuasion" (*objektive Beweislast; risque de la preuve*), which deals with the question of who must bear the risk of failing to prove a fact. Hence, an objective burden of proof rule is necessary even on a procedural basis because the judge must reach a decision: in contrast to the situation in ancient Rome, where the judge could decline judgment and withdraw from the process with the help of the oath *sibi non liquere* when he could not clarify the requisite factual basis,[8] the impossibility of clarifying the decisive facts with the means admissible under the law of evidence does not relieve the modern judge of having to reach a decision. The burden of proof rules, therefore, provide a mechanism to overcome a non-liquet situation, in other words the failure of proof, and constitute a special normative basis for the decision on the merits. Burden of proof standards are norms for decision-making that indicate who must bear the risk of not being able to establish the facts relevant to the decision. If a party is allocated this risk and fails to prove, he will lose the proceedings.

3 *Rosenberg* formulated the general burden of proof rule for the German legal system; this is obviously also authoritative in tort cases: each party must prove the facts which support his case,[9] or in the less abridged form: the claimant carries the burden of proof for the elements of the facts which are the basis of his claim, the defendant for the facts which estop, destroy or obstruct the claim.[10] This means that basically in tort law the victim must prove damage, causation and the facts decisive for the establishment of unlawfulness and fault. The tortfeasor, on the other hand, must prove everything which exonerates him, in particular the victim's attainment of any benefits which mitigated the damage suffered, the existence of grounds of justification, exculpatory grounds, or the defence of lawful alternative behaviour. Obviously, this only applies insofar as no special rules reverse the burden of proof. As an example we may refer to the German case-law on reversal of burden of proof regarding causation in the

[7] *L. Rosenberg*, Die Beweislast (5th ed. 1965) 62 f.

[8] Cf. *H. Prütting*, Gegenwartsprobleme der Beweislast (1983) 124; *Th. Klicka*, Die Beweislastverteilung im Zivilverfahrensrecht (1995) 36 fn. 2 with further ref.

[9] *Rosenberg* (fn. 7) 98 f.; *L. Rosenberg/K.H. Schwab/P. Gottwald*, Zivilprozessrecht (16th ed. 2004) § 114 no. 10.

[10] *Rosenberg* (fn. 7) 100 f., 108.

case of serious medical error[11] or the general reversal of burden of proof for fault also in the field of delicts in the countries of Eastern Europe.[12]

4 The general burden of proof rule so aptly formulated by *Rosenberg* originates of course not in fact from him but is of much older date and stakes a claim to, one might say, ubiquitous validity. It even provided the basis for the fundamental principles of Roman formulary procedure and thus found expression even in Roman law and *ius commune* quotes:[13] *actori incumbit probatio* or *reus in excipiendo fit actor*. In many cases, the European states have codified these principles in their civil codes, for example, France in Art. 1315 Code civil,[14] Italy in Art. 2697 Codice civile and Switzerland in Art. 8 ZGB. The first draft of the German BGB also contains a corresponding rule in § 193 f., but this was deemed so self-evident that it was not ultimately codified. In England, the above-described principle is after all a feature of established case-law.[15]

5 Such a distribution of the burden of proof – according to which the claimant as attacker must obtain and prove the required factual material – is in line with fundamental fairness considerations:[16] the enforcement of a claim by means of court action aims at a change of the *status quo*. The principles of protection of property and the preservation of peace under the law speak in favour of the *status quo*. These principles allow the *status quo* an assumption of legitimacy and act as a barrier against a permanent obligation to justify. Hence, it is up to the claimant to justify his attack. The *status quo* rule is, therefore, fundamental to the doctrine of burden of proof. He who invokes a change in the existing legal position must prove such change[17] or as *Rudolf von Jhering* so aptly put it: the burden of proof is the price for which rights may be obtained in the proceedings ("*Der Beweis ist der Preis, um den die Rechte prozessualisch zu haben sind*.").[18]

6 Having clarified the key terms of "burden of production" on the one hand and "burden of persuasion" on the other, it must nonetheless be pointed out that

[11] On this *A. Hausch*, Der grobe Behandlungsfehler in der gerichtlichen Praxis (2007).

[12] See, for example, sec. 420 § 3 Czech civil code; on this *L. Tichy*, Fault under Czech Law, in: P. Widmer (ed.), Unification of Tort Law: Fault (2005) 61; in detail *M.R. Will/V.V. Vodinelić*, Generelle Verschuldensvermutung – das unbekannte Wesen. Osteuropäische Angebote zum Gemeineuropäischen Deliktsrecht? in: U. Magnus/J. Spier (eds.), European Tort Law. Liber amicorum for Helmut Koziol (2000) 307 ff.

[13] On this and the following see *R. Stürner*, Beweislastverteilung und Beweisführungslast in einem harmonisierten europäischen Zivilprozeß, in: Festschrift für Hans Stoll (2001) 692 f.

[14] More general and no longer solely directed at extra-contractual obligations since 1981 Art. 9 New Code of Civil Procedure; cf. *D. Adloff*, Vorlagepflichten und Beweisvereitelung im deutschen und französischen Zivilprozess (2007) 119 ff.

[15] Fundamental *Wakelin v. L. and S.W. Ry* [1886] 12 Appeal Cases (AC.) 41, 45 (House of Lords); *Joseph Constantine S.S. Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154, 174 (House of Lords).

[16] See on this and the following *H.-J. Ahrens*, Die Verteilung der Beweislast, in: E. Lorenz (ed.), Karlsruher Forum 2008: Beweislast (2009) 30, 51; *Prütting* (fn. 8) 250 ff., 277 f.

[17] *U. Huber* in: E. Lorenz (ed.), Karlsruher Forum 2008: Beweislast (2009) 122.

[18] *R. von Jhering*, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung (5th ed. 1906) III/1, 206.

the meanings of said terms naturally depend on the overall procedural environment. This is true for both burden of production and burden of persuasion:

7 As far as the burden of production is concerned, it may be assumed that this must be borne in principle by the same party as also carries the risk of lack of proof. This is a virtually unalterable rule of logic: the threat of failure in the proceedings is the greatest motivation for activity.[19] The burdens of production and persuasion thus mainly run in parallel. Seen from a comparative law perspective, however, there are substantial differences in terms of the opposing party's duty to cooperate.[20] In particular, it must be noted that a "fishing expedition" (*Ausforschungsbeweis*), i.e. a motion to take evidence with the object of acquiring the necessary evidence is treated very restrictively in Austrian[21] and German law.[22] This is in marked contrast to the discovery procedure in US civil procedure, which can also force the opponent to reveal any and all information.[23] The significance of the burden of production fades into the background in such a proceeding along with the importance of the burden of proof rules. The famous judge *Lord Diplock* put it concisely: "*There is no burden of proof, once all evidence is out*."

8 A second substantial difference, this time with reference to the burden of persuasion, consists in the applicable standard of proof. This becomes apparent when one recalls to mind that the question of burden of persuasion only arises when the free consideration of evidence has failed to lead to a conclusion.[24] As *Rosenberg* put it succinctly: burden of proof and free consideration of evidence lie right beside each other but are separated by fixed boundaries.[25] The actual placing of this boundary depends obviously on the standard of proof applied. In the Anglo-American and Scandinavian systems, the preponderance of probabilities is basically sufficient (*Überwiegensprinzip; balance of probabilities test*).[26] The claimant wins, therefore, even with a probability of 51% to 49%. Thus, when the preponderance of probabilities is the applicable standard, burden of proof rules will hardly come into play since the significance of the burden of proof is reduced to those rare cases in which the truth of a fact is exactly as probable as its falsehood.[27] Conversely, the burden of proof rule has far greater significance when, as in Austria, the law requires "a probability bor-

[19] In this sense aptly *Stürner* (fn. 13) 695.
[20] On this *Stürner* (fn. 13) 699 ff.
[21] *W.H. Rechberger* in: H.W. Fasching/A. Konecny (eds.), Kommentar zu den Zivilprozeßgesetzen, vol. III (2nd ed. 2004) Vor § 266 ZPO, no. 81 f.
[22] *G. Baumgärtel*, Beweislastpraxis im Privatrecht (1996) no. 315 ff.; *Rosenberg/Schwab/Gottwald* (fn. 9) § 115 no. 15 ff.; *Adloff* (fn. 14) 242 ff.
[23] See on this *A. Junker*, Discovery im deutsch-amerikanischen Rechtsverkehr (1987); *A. Stadler*, Der Schutz der Unternehmensgeheimnisse im deutschen und US-amerikanischen Zivilprozeß und im Rechtshilfeverfahren (1989) 66 ff.
[24] On this *Klicka* (fn. 8) 21 ff.
[25] *Rosenberg* (fn. 7) 62.
[26] On this *Prütting* (fn. 8) 73 ff.
[27] See *G. Kegel*, Der Individualanscheinsbeweis und die Verteilung der Beweislast nach überwiegender Wahrscheinlichkeit, in: Festschrift für Heinrich Kronstein (1967) 335 f.; *Klicka* (fn. 8) 32.

dering on certainty" (the judge must be convinced beyond reasonable doubt)[28] or when at least (very) high probability is required as a basis, in line with the predominant German[29] and Austrian[30] teaching.

9 Naturally, the significance of any reversal of the burden of proof rises with the significance of the burden of proof rules. In tort law, such a reversal of the burden of proof – especially in countries with a very high general standard of proof – leads to a considerable tightening of liability, indeed to put it bluntly having the burden of proof imposed means the proceedings are "half lost".[31] In the year 1976, *Hans Stoll* already wrote vividly of a "*shift in liability by means of the law on evidence*".[32] However, such a shift in liability always requires sound grounds of substantive law, in other words it can only be justified by evaluative considerations that have to be deduced from the overall tort law system. This is also evidenced by the fact that a reversal of the burden of proof with respect to causation leads to liability for merely assumed causation, a reversal of the burden of proof regarding the fault of the tortfeasor leads to liability for merely assumed fault. If liability is triggered even by the mere presumption of one ground for liability however, then the weakening of such basis for liability must generally be balanced by another basis for liability being present in extra force (for example, increased endangerment) or additional grounds for liability (such as economic capacity).

10 Purely procedural grounds can only have supplementary character in this connection. This applies ultimately also to evaluative considerations like the access to factual material and the proof proximity (*Beweisnähe*). Such factors play a major role in the case of distribution of the burden of proof according to spheres of influence (*Sphärentheorie*) or according to the principle of the origin of risks (*Gefahrenbereichslehre)* sometimes favoured by German tort law.[33] According to *Prölss*, one of the main proponents of this doctrine, an appropriate distribution of the burden of proof is dictated above all by the following criteria: avoidance of situations where there is a lack of proof (*Beweisnotstand*), fostering of the efforts at clarification, imputation of the unreasonableness of the sphere of danger.[34] Such considerations mainly play a role in the procedural function of the burden of proof and thus in terms of the burden of production. As *Gerhard Wagner* rightly points out,[35] the burden of production should fall to that party which has the better access to the facts decisive for the decision and to whom is available the necessary evidence for

[28] See *W.H. Fasching*, Lehrbuch des österreichischen Zivilprozeßrechts (2nd ed. 1990) no. 815 with further ref.
[29] *H.-J. Musielak*, Die Grundlagen der Beweislast im Zivilprozeß (1975) 116; *Baumgärtel* (fn. 22) no. 70 ff.; *Prütting* (fn. 8) 86; *Rosenberg/Schwab/Gottwald* (fn. 9) § 112 no. 13 f.
[30] *Klicka* (fn. 8) 33; *W.H. Rechberger/D.-A. Simotta*, Grundriss des österreichischen Zivilprozessrechts (7th ed. 2009) no. 755; *Rechberger* (fn. 21) Vor § 266 ZPO, no. 11.
[31] Cf. the ref. in *Rosenberg* (fn. 7) 61 fn. 1.
[32] *H. Stoll*, Haftungsverlagerung durch beweisrechtliche Mittel, Archiv für die civilistische Praxis (AcP) 176 (1976) 145 ff.
[33] On this *J. Prölss*, Beweiserleichterungen im Schadenersatzprozeß (1966) 65 ff.
[34] *J. Prölss*, Die Beweislastverteilung nach Gefahrenbereichen, VersR 1964, 901 ff.
[35] *G. Wagner* in: E. Lorenz (ed.), Karlsruher Forum 2008: Beweislast (2009) 132 f.

their proof. This amounts, however, to a sort of theory of spheres, because each party typically has unproblematic recourse to the documents and evidence lying within their own sphere. In the context of the burden of production, sphere considerations would thus be very significant. Such cases of a modification of the burden of production must of course be conceptually separated from the tightening of liability by means of a reversal of burden of proof which is the main issue here.[36] For such modifications do not concern a burden of proof decision as such, but rather are a question of consideration of evidence and the existence of duties to cooperate.[37] In my opinion, the cases of violation of documentation duties are also to be seen in this light, in the manner in which they have increased in significance particularly in relation to the liability of doctors: under Austrian law doctors have the duty to document treatment and diagnosis (§ 10 Law on Hospitals and Sanatoria, KAKuG; § 51 Law on Doctors, ÄrzteG). If this duty is violated, then the law assumes that any measures which were not documented were also not taken.[38] The same is advocated for German law.

There is ultimately broad consensus nowadays that the distribution of the burden of proof facilitates or hinders the enforcement of a right in cases of doubt, and thus must be seen as substantive law, meaning that in international private law the *lex delicti commissi* or *lex damni* is authoritative.[39] Thus, there is a close link between the rights assigned by the substantive law and the burden of proof, as was pointed out long ago by *James B. Thayer* in the year 1890: "*The subject of the burden of proof … covers the topic of argument, of legal reasoning; and equally of reasoning about law and about fact…*".[40] In the following, several examples are submitted to illustrate more clearly this substantive-law significance of the distribution of the burden of proof. 11

B. Tightening of Liability by Reversal of Burden of Proof

1. Joint Offenders and Alternative Causation

Alleviations of the burden of proof or a reversal of the burden of proof are often used to improve the legal position of the victim with regard to the path of causation. In this sense it has already been mentioned that German law presumes causation for the patient's injury in the case of serious medical errors.[41] 12

[36] In this sense *Wagner* (fn. 35) 132.
[37] *Klicka* (fn. 8) 68 f.
[38] Oberster Gerichtshof (OGH) 3 Ob 2121/96z = Recht der Medizin (RdM) 1998/7; 1 Ob 139/04d = Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen (SZ) 2004/122; in more detail *Th. Juen*, Arzthaftungsrecht (2nd ed. 2005) 229 ff.
[39] See *Stürner* (fn. 13) 693. English law on the other hand apparently holds the *lexi fori* to be authoritative; on this *H.J. Hartwig* in: E. Lorenz (ed.), Karlsruher Forum 2008: Beweislast (2009) 177 f.
[40] *J.B. Thayer*, The Burden of Proof, Harvard Law Review (Harv. L. Rev.) 4 (1890) 69 f.
[41] See *Hausch* (fn. 11).

In the same manner, no strict proof of the causal link is required in Austria when there is a violation of protective laws in the sense of § 1311 ABGB, which prohibit conduct for its abstract dangerousness alone.[42]

13 However, overcoming doubts as to causation is also an important issue when it comes to the liability of several perpetrators. This was at issue for example in a case from the year 1931 before the Austrian Supreme Court:[43] several men decided to trip up a drunken person with a rope "for fun"; the drunken person was seriously injured as a result. Under Austrian law joint offenders, i.e. tortfeasors who acted in concert and with intent, are liable jointly and severally (§ 1301 ABGB) regardless of whether it is possible to establish which of them actually held the rope. Such joint and several liability of joint offenders is very widespread from a comparative law point of view. Corresponding rules can be found for example in the laws of Germany (§ 830 (1) line 1 and (2) BGB), Switzerland (Art. 50 OR), Greece (Art. 926 ZGB), Italy (Art. 2055 Codice Civile), Portugal (Art. 490 Código civil) and the Netherlands (Art. 6:166 BW).[44] The reason for imposing joint and several liability is probably often the notion that joint offenders are guilty of particularly objectionable conduct and that their individual causation is in any case established on the basis of their deliberate involvement. Precisely this causation by each individual joint offender must not of course be proven by the victim. Rather – as *Franz Bydlinski* has already forcefully pointed out[45] – the mere suspicion of psychological causation is sufficient for liability. Thus, it is quite realistically assumed that none of the joint offenders would have formed the intention to inflict the loss on their own or at least would not have committed the act on their own. Furthermore it is the tortfeasors who have created this situation with their concerted action and this is why the uncertainty should fall to their disadvantage.[46] Therefore, in the case of liability for merely assumed causation, the question arises as to whether deliberate collaboration should lead to the liability of each person involved even when some can prove that they did not contribute either psychologically or physically to the damage incurred.[47] The large majority of legal systems probably affirm the liability of all involved even in such constellations.[48] Naturally, if one bears in mind that cases of joint offenders too are based on liability for merely assumed causation and thus on a reversal of the burden of proof, then rebutting evidence must also be admissible. Accordingly, a joint offender too would be freed from liability if he could prove beyond doubt that his conduct was in no way causally linked to the damage.[49] Liability in spite of established

[42] See *E. Karner* in: H. Koziol/P. Bydlinski/R. Bollenberger (eds.), Kurzkommentar zum ABGB (KBB) (2nd ed. 2007) § 1311 no. 6 with further ref.

[43] OGH 2 Ob 922/31 = SZ 13/193.

[44] See on this *Ch. von Bar*, Gemeineuropäisches Deliktsrecht I (1996) no. 54 ff.

[45] *F. Bydlinski*, Mittäterschaft im Schadensrecht, AcP 158 (1959/1960) 410 ff.

[46] Cf. *K. Larenz/C.-W. Canaris*, Lehrbuch des Schuldrechts II/2 (13th ed. 1994) § 82 I 1 (564 f.).

[47] Fundamentally on this *F. Bydlinski*, AcP 158 (1959/1960) 418 ff.

[48] See *von Bar* (fn. 44) no. 55; cf. for example for Germany *G. Wagner* in: Münchener Kommentar, BGB (5th ed. 2009) § 830 no. 4 f. with further ref.

[49] See *F. Bydlinski*, AcP 158 (1959/1960) 418 ff., 430; following this line *Larenz/Canaris* (fn. 46) § 82 I 1 (564 f.); *Karner* (fn. 42) § 1301 no. 5.

non-causation would in fact be in conflict with fundamental principles of imputation in tort law and could only be affirmed if one was putting the case for punitive damages on the basis of mere misconduct as such.

14 However, the cases of alternative causation also involve liability for merely assumed causation: several perpetrators act unlawfully and culpably, but it cannot be established which of them actually caused the damage. The leading case in numerous legal systems is probably that of the two hunters who carelessly shoot at game and hit a beater. Many systems also affirm joint and several liability in such case for the tortfeasors; that is true for example for Germany, Austria, France and the Netherlands.[50] Such liability can be justified by the argument that it is better that the tortfeasor who acted unlawfully and culpably bears the risk arising from the impossibility of clarifying the precise causal path rather than the victim who is not at fault. Hence, the alternative perpetrators are liable on the basis of merely potential, i.e. merely assumed, causation. If this is also understood as a reversal of the burden of proof, then it is absolutely clear that a possible perpetrator is not liable if he can prove with certainty that he did not in fact cause the damage.[51] Otherwise, a schematic application of the rules on the burden of proof would lead to an evidently wrong result: it would be absurd for instance if a rule on burden of proof set out an assumption that all the tortfeasors have caused the damage even though it has been established with certainty that only one of them really caused the damage.[52] This too shows that a modification of the burden of proof must always be adjusted to substantive law evaluations. If one examines the decisive evaluative considerations however, then even the prevalent solution, i.e. joint and several liability for alternatively causal perpetrators, is called into doubt:[53] while the victim should indeed be relieved of the risk arising from the impossibility of clarifying the causal path, there is still no reason for the victim to be put in a better position than he would have been in if he had known who the real perpetrator was. However, joint and several liability leads to just that. While the victim who knows the identity of the perpetrator must bear the risk of such perpetrator's insolvency in its entirety, cases with two alternative perpetrators mean there is a doubling of the liability funds. Moreover, it must be considered that alternative causation involves liability in the absence of proven causation; however, weaker conditions for imputation must correspond to weaker consequences of liability. Thus, the arguments on both the side of the victim and of the tortfeasor speak against joint and several liability. Instead, partial liability (proportional liability) seems appropriate; in such case each tortfeasor would only be liable in proportion to the probability that he caused the damage. Such a partial liability has hitherto been advocated for Switzerland by *Emil W. Stark*;[54] for the

[50] See *J. Spier/O.A. Haazen*, Comparative Conclusions on Causation in: J. Spier (ed.), Unification of Tort Law: Causation (2000) 154.

[51] In this manner for Austrian law: OGH 1 Ob 662/88 = SZ 61/234; 7 Ob 57/01k = ZVR 2002/37.

[52] Cf. *F. Bydlinski*, Aktuelle Streitfragen um die alternative Kausalität, Festschrift für Günther Beitzke (1979) 8.

[53] See on the following *H. Koziol*, Schaden, Verursachung und Verschulden im Entwurf eines neuen österreichischen Schadenersatzrechts, Juristische Blätter (JBl) 2006, 773.

[54] *K. Oftinger/E.W. Stark*, Schweizerisches Haftpflichtrecht I (5th ed. 1995) 148.

reasons given it is now also foreseen by the Principles of European Tort Law (Art. 3:103 (1) PETL)[55] and the Austrian reform proposal (§ 1294 (2) Draft).[56]

15 This brings me to my next and last topic, namely the significance of the reversal of the burden of proof in the interim area between fault-based and strict liability.

2. Strict Liability, Fault-Based Liability and the Area in Between

16 With reference to *Josef Esser* one often hears of the two lanes of liability law (*Zweispurigkeit des Haftungsrechts*):[57] on the one hand there is fault-based liability, in which the tortfeasor's wrongful behaviour forms the decisive ground for imputation; on the other hand there is strict liability, where the legal system allows the keeper to use a particularly dangerous thing or engage in a particularly dangerous activity but in return requires him to bear the associated risks. In the case of fault-based liability then, there is only liability when fault is proven, whereas in the case of strict liability the presence or absence of fault in the defendant's conduct is not relevant. Thus, fault-based and strict liability appear to be a classical pair of opposites. In fact, however, there is a broad grey area between the two – as has been explained in particular by *Helmut Koziol*.[58] In this interim field, both faulty conduct on the one hand, and the dangerousness of the thing or activity on the other, play a role. *Barbara Steininger* elaborated the details thereof in her doctoral thesis.[59]

17 Hence, fault-based and strict liability are not two separate categories of liability but rather, in their pure form, the two extremes in a chain of grounds for imputation, all of which are joined together unbroken.[60] Therefore, depending on the degree of the danger posed, there are many different steps in liability: in the purest form of strict liability there is no exculpatory ground at all; this applies for instance to the Austrian, German and Swiss liability for nuclear power plants or for aircraft. The next step of strict liability does allow the defence of *vis major* (*act of God; force majeure*); an example of this would be the Austrian *Reichshaftpflichtgesetz*, which regulates liability for energy and gas or the German liability for motor vehicles under the Road Traffic Act (*Straßenverkehrsgesetz*, StVG). At a further level, the exercise of all conceivable care is accepted as a defence; an example of this would be the Austrian liability for railways and motor vehicles (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG). At the next level, exercise of the care normally to be

[55] On this *J. Spier* in: European Group on Tort Law (ed.), Principles of European Tort Law (2005) Art. 3:103 no. 1 ff.

[56] On this *F. Bydlinski*, Die Verursachung im Entwurf eines neuen Schadenersatzrechts, in: I. Griss/G. Kathrein/H. Koziol (eds.), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 42 ff.; *Koziol*, JBl 2006, 773 f.

[57] *J. Esser*, Die Zweispurigkeit unseres Haftpflichtrechts, Juristenzeitung (JZ) 1953, 129 ff.

[58] *H. Koziol*, Bewegliches System und Gefährdungshaftung, in: F. Bydlinski/H. Krejci/B. Schilcher/V. Steininger (eds.), Das Bewegliche System im geltenden und künftigen Recht (1986) 51 ff.

[59] *B.C. Steininger*, Verschärfung der Verschuldenshaftung (2007).

[60] Cf. *Koziol* (fn. 58) 51 f.

expected in the professional or usual technical context or the exercise of the care normally required is sufficient; regarding the latter the standard applied is usually that of the *bonus pater familias*. The majority of legal systems proceed from this objective standard in relation to establishing fault.[61] At the last level, the absence of subjective fault is a sufficient defence. Thus, the issue is the personal blameworthiness of the faulty conduct; this constitutes fault-based liability in its purest form. Such a subjective notion of fault, which is endowed with particular legal-ethical weight as it involves an evaluation of the person of the defendant, is only used in a few legal systems nowadays, for example in Austrian law.

18 We shall see that in the interim field in which the dangerousness posed is not sufficient to justify strict liability, liability is often tightened in that the burden of proving the exercise of objective care or the presence of fault is reversed. An example of this would be the liability of the owner of a structure under German and Austrian law: such is liable for the damage which results from a collapse of the building if he cannot prove that he exercised all the care required to avert such danger (§ 836 BGB; § 1319 ABGB). The same is the case in Germany for farm animals (§ 833 (2) 2 BGB) and in Austria and Switzerland for animals in general (§ 1320 ABGB; Art. 56 OR): the owner of an animal is liable for damage caused by the animal if he cannot prove that he provided for the necessary safe-keeping and supervision. As has already been mentioned, such a reversal of the burden of proof for the care exercised or in respect of fault leads to a distinct tightening of liability, because the tortfeasor is liable for merely assumed negligence in non liquet-situations.[62] This weakening of one basis for liability is justified because the increased dangerousness of a defective building or an animal constitutes an additional ground for liability. The increased dangerousness is not grave enough however in this instance to justify strict liability in its pure form. It is enough though to justify a moderate tightening of liability by reversal of the burden of proof.

19 Naturally, the idea that increased dangerousness justifies a tightening of liability by reversal of the burden of proof is not limited to defective buildings and animals, in fact it is capable of generalisation. Accordingly, the Principles of European Tort Law provide a blanket clause in Art. 4:201 (1): "*The burden of proving fault may be reversed in light of the gravity of the danger presented by the activity*". In the view of the authors of the Principles the danger required for a reversal of the burden of proof is one of intermediate intensity, between the "normal" risk which is inherent to any human activity and the extraordinary or "abnormally" high risk which triggers strict liability.[63] As *Pierre Widmer*[64] pointed out, the purpose of Art. 4:201 PETL is to build a bridge between traditional liability in tort on the one side and the more recent

[61] See *P. Widmer*, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation, in: P. Widmer (ed.), Unification of Tort Law: Fault (2005) 348 f.
[62] See *Koziol* (fn. 58) 54.
[63] See *P. Widmer* in: European Group on Tort Law (ed.), Principles of European Tort Law (2005) Art. 4:201 no. 3.
[64] Ibid., Art. 4:201 no. 7.

category of strict liability on the other. Thus, the provision is a clear expression of the "unbroken chain" between both extremes of subjective and objective liability and thus of the steps of liability described already above.

20 Suchlike rules on the burden of proof can, moreover, also be found in modern reform proposals regarding the current law. Worthy of mention is, as a first example, the draft of an Israeli civil code from the year 2007, in which under the heading "*Injury caused by a dangerous thing*" Art. 486 (a) provides: "*Where injury was caused by a thing that is dangerous by its nature* [or due to the escape of a thing likely to cause injury by its escape, and the defendant had control over the dangerous thing, or over the thing that escaped immediately prior to its escape] *the defendant has the burden of proof to show that he was not negligent in failing to prevent the injury*; [for this purpose it makes no difference if the grounds of the action against the defendant is a tort of negligence or another tort]". According to Art. 486 (b) of the Israeli draft, dangerous things include in particular "*poisonous substances, water, explosive substances, flammable substances, harmful radiation, electricity, fire, wild animals or an animal known to be dangerous*". It must of course be noted that some of the things listed do not merely pose an increased danger but indeed a high degree of danger. According to the above-described steps of liability then, strict liability rather than only fault-based liability with reversal of the burden of proof would certainly be justified in cases involving poisonous substances, explosive substances or harmful radiation.

21 Finally, reference can also be made to the Austrian tort law reform proposal. This contains a blanket clause for strict liability in cases of a particularly high degree of danger (§ 1304 of the draft proposal) and a reversal of the burden of proof on the other hand in the case of merely increased danger (§ 1302 of the draft proposal).[65] Only the reversal of burden of proof is of interest in the present context. Under § 1302 para. 1 of the draft proposal, someone who creates or maintains a source of particular danger is liable for the damage incurred thereby if he does not prove that the care necessary to avert the damage was exercised. Particular danger can be posed according to § 1302 para. 2 of the draft proposal in particular by animals, construction works, certain motor vehicles or activities like cycling or skiing at high speeds.[66]

22 If all of these rules are viewed together, then there is certainly hope that the notion that increased danger, while not justifying strict liability, does indeed suffice to justify a moderate tightening of liability by reversal of the burden of proof, might become even more widely accepted than is now the case. This is indeed desirable.

[65] See Diskussionsentwurf der beim Bundesministerium für Justiz eingerichteten Arbeitsgruppe für ein neues österreichisches Schadenersatzrecht. Vorläufige Endfassung (Ende Juni 2007), JBl 2008, 365 ff. = ZVR 2008, 168 ff.

[66] See *Griss*, Gefährdungshaftung, Unternehmerhaftung, Eingriffshaftung, in: I. Griss/G. Kathrein/H. Koziol (eds.), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 61 f.

IV. Proving Facts: Belief versus Probability

Richard W. Wright

A. Proving Facts in the Common Law and the Civil Law: Radically Different Standards of Persuasion?

Although it comes as a great surprise to most American lawyers and legal scholars, it is commonly assumed by those familiar with civil (non-criminal) trial procedures in both common law and civil law jurisdictions that there is a radical difference between the standards of proof in the two types of jurisdictions.[1] Yet, despite the assumed difference and the great practical as well as theoretical significance of the topic, not much is said about the burden of proof in monographs on comparative tort law, and what little is said tends to focus on the allocation of the burden rather than on its content.[2] 1

The general rule in both types of jurisdictions is that the plaintiff bears the burden of proving the prima facie case against the defendant (the defendant's tortious causation of the harm allegedly suffered by the plaintiff), while the defendant bears the burden of proving any affirmative defenses.[3] However, the burden is sometimes shifted to the defendant on one or more elements of the prima facie case. This occurs much more often in civil law jurisdictions, through presumptions or explicit reversals of the burden of proof, than in common law jurisdictions.[4] 2

[1] E.g., *K.M. Clermont/E. Sherwin*, A Comparative View of Standards of Proof, American Journal of Comparative Law (AJCL) 50 (2002) 243 ff.; *C. Engel*, Preponderance of the Evidence versus *Intime Conviction*: A Behavioral Perspective on a Conflict Between American and Continental European Law, Vermont Law Review (Vermont L Rev) 33 (2009) 435 ff.; *J. Kokott*, The Burden of Proof in Comparative and International Human Rights Law (1998) 18.

[2] E.g., *C. van Dam*, European Tort Law (2006) 281 ff.; *W. van Gerven/J. Lever/P. Larouche*, Case, Materials and Text on National, Supranational and International Tort Law (2000) sec. 4.2.3 (available at http://www.casebooks.eu/tort/chapter4.php) accessed on 16 July 2009.

[3] *Clermont/Sherwin*, AJCL 50 (2002) 248; *M. Kazazi*, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (1995) 57 ff.

[4] *P.L. Murray/R. Stürner*, German Civil Justice (2004) 267 ff.; *van Dam* (fn. 2) 281 ff.; *van Gerven/Lever/Larouche* (fn. 2) sec. 4.2.3; European Commission, European Judicial Network in Civil and Commercial Matters, Taking of evidence and mode of proof (available at http://ec.europa.eu/civiljustice/evidence/evidence_gen_en.htm) accessed 30 June 2009; short form: EC EJN Evidence and Proof.

Among the various possible explanations for this difference, two are based on real or assumed differences between the two types of jurisdictions with respect to the two aspects of the burden of proof.

3 The first aspect is the burden of producing evidence. It is generally much more difficult for plaintiffs in civil law jurisdictions to obtain relevant evidence, which often is in the hands of or more readily available to the defendant. The parties in civil law jurisdictions do not have the extensive (perhaps too extensive) "discovery" procedures available in common law jurisdictions – especially in the United States – to compel production of evidence, nor do judges in civil law jurisdictions generally have such power, except in France, where the power is seldom used.[5]

4 The second aspect is the burden of persuasion, including the standard of persuasion, which is the focus of this essay. In common law jurisdictions, there is a clear and explicit distinction between the standard of persuasion in criminal and civil proceedings. In criminal proceedings, the standard is very high: the prosecutor must prove the defendant's guilt "beyond a reasonable doubt". In civil proceedings, however, the plaintiff generally only needs to prove his case by the much lower standard of a "preponderance of the evidence" (the usual formulation in the United States) or a "balance of probability" (the usual formulation in the United Kingdom, the British Commonwealth and Scandinavia). Both the preponderance standard, which is often rephrased or interpreted as a "more likely than not" standard, and the "balance of probabilities" standard are commonly interpreted as merely requiring a 50+ percent probability.[6]

5 In most civil law jurisdictions, on the other hand, there is a common, but not universal, assumption that the standard of persuasion is the same for civil and criminal proceedings. The plaintiff in a civil case, as well as the prosecutor in a criminal case, must provide sufficient proof to convince the trier of fact of the truth of the facts at issue on the particular occasion. This is phrased in France and elsewhere as a requirement that the trier of fact have an "intime conviction," an inner, personal, subjective conviction or belief in the truth of the facts at issue. It is often stated that the required conviction can only be established by proof beyond a reasonable doubt, or proof that "silences doubts without completely excluding them." Although it is recognized that absolute certainty is impossible to achieve, the required degree of belief is often expressed in terms of a virtual certainty, or at least a very high probability. However, a mere

[5] *Clermont/Sherwin*, AJCL 50 (2002) 248, 265 f.; *M. Taruffo*, Rethinking the Standards of Proof, AJCL 51 (2003) 659 ff., 675.

[6] *Clermont/Sherwin*, AJCL 50 (2002) 243, 251 f. and fn. 39, 257, 261 fn. 86; *Kokott* (fn. 1) 18 f. Sometimes an intermediate standard is used, according to which the plaintiff must prove her case by "clear and convincing evidence." *Clermont/Sherwin*, AJCL 50 (2002) 251; *Kokott* (fn. 1) 19 f. The interpretation of the preponderance of the evidence standard as a mere 50+ percent probability standard is literally implemented by Kokott, who refers to the preponderance standard as a "preponderance of probabilities." *Kokott* (fn. 1) 20.

probability, no matter how high, will not suffice in the absence of the required conviction or belief in the truth of the facts at issue.[7]

Shifting the burden of proof to the defendant, explicitly or through rebuttable presumptions, compensates for the lack of discovery procedures and the assumed very high standard of persuasion in civil law jurisdictions. However, given the assumed very high standard of persuasion that is thereby placed on the defendant, the shift of the burden of proof overcompensates and, perhaps intentionally, effectively converts civil code provisions basing liability on fault into strict liability regimes. 6

Common law lawyers find it hard to understand why the very high standard of persuasion required for a criminal conviction should also apply in a civil liability action.[8] Some of them also believe that the civil law's rejection of proof by statistical probabilities and its insistence that the trier of fact instead be convinced of the truth of the facts at issue is naïve, irrational, "strange" and "very odd," especially when such conviction is interpreted as requiring virtual certainty. They note that nothing is certain, that all evidence merely gives rise to probabilities regarding the facts at issue, and that the 50+ percent probability standard best serves the assumed goal of minimizing errors.[9] They also question the focus on conviction, belief, and truth in civil law jurisdictions given the very limited means for acquiring relevant evidence in those jurisdictions.[10] 7

Conversely, many civil law lawyers believe that it is naïve to believe that mere statistical probabilities can establish what actually happened in a particular case, and they find it hard to understand why a defendant should be held civilly liable based merely on such aggregate class-based probabilities, in the absence of evidence sufficient to convince the trier of fact of what actually happened in the particular case. Believing that the common law's "preponderance of the evidence" and "balance of probability" standards allow such proof, they reject both standards, at least as so interpreted.[11] 8

I argue in this essay that the supposed radical difference between the standard of persuasion in civil cases in common law and civil law jurisdictions is greatly overstated. In both types of jurisdiction, the plaintiff generally must provide evidence sufficient to convince the trier of fact of the truth of the facts at issue in the particular situation; a mere statistical probability, no matter how high, is insufficient. On the other hand, in both types of jurisdictions the required degree of conviction by the trier of fact is far below a virtual certainty. 9

[7] *Clermont/Sherwin*, AJCL 50 (2002) 243 ff., 254 ff.; EC EJN Evidence and Proof (fn. 4); *Kokott* (fn. 1) 18 f.; *F.H.S. Bridge*, The Council of Europe French-English Legal Dictionary (2002) 173 (defining "intime conviction" as "reasonable conviction; reasonable certainty; state of being satisfied beyond reasonable doubt (personally convinced); personal conviction of the court (after considering all the evidence)").

[8] E.g. *Clermont/Sherwin*, AJCL 50 (2002) 243 ff.; *Engel*, Vermont L Rev (2009) 345 ff.

[9] E.g. *Clermont/Sherwin*, AJCL 50 (2002) 243 f., 251 f., 258 f., 267, 271, 273 f.

[10] Id. 249 f.

[11] E.g. *Taruffo*, AJCL 51 (2003) 659, 663 f., 667 ff.

10 The seeming conflict between the civil law's focus on conviction or belief and the common law's focus on likelihood or probability is based on a failure of those on each side of the conflict to appreciate that, while it is true that all proof involves probabilities, there are different types of probabilities, only one of which – which is not statistical in nature – is sufficient to justify a belief about what actually happened on a particular occasion. The failure to appreciate this fact has prevented academics and courts in both types of jurisdictions from clearly perceiving the relevant issues and has led to troublesome doctrines with paradoxical implications in an increasing number of situations.

11 In Parts B and C of this essay, I discuss, respectively, the standards of persuasion in civil law jurisdictions and the standards of persuasion in common law jurisdictions. In Part D I discuss the various types of probabilities and their relevance in proving the facts at issue in a particular case. In Part E I discuss some doctrinal problems and paradoxes that are created by the statistical probability interpretation of the standard of persuasion.

B. The Standards of Persuasion in the Civil Law

12 Michele Taruffo argues persuasively that the common conception of the standard of persuasion in civil law jurisdictions is incorrect.[12] As he states, "no rule, in any civil law system, requires the courts to apply in civil cases the same standard of proof that is applied in criminal cases."[13]

13 One might argue for such an equation based on the similarity of the relevant provisions in the German codes of criminal and civil procedure. Sec. 261 of the Code of Criminal Procedure states:

> The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.[14]

14 Subsec. 1 of sec. 286 of the Code of Civil Procedure states:

> The court shall decide at its free discretion, by taking into account the whole substance of the proceedings and the results of any evidence taking, whether a factual allegation should be regarded as true or untrue. The grounds which prompted the court's conviction shall be stated in the judgment.[15]

[12] Id. 659 ff.
[13] Id. 665.
[14] *C.J.M. Safferling*, Terror and Law – Is the German Legal System able to deal with Terrorism? – The *Bundesgerichtshof* (Federal Court of Justice) decision in the case against *El Motassadeq,* German Law Journal 5 (2004) 515, 520.
[15] *S.L. Goren*, The Code of Civil Procedure Rules of the Federal Republic of Germany of January 30, 1877 and the Introductory Act for the Code of Civil Procedure Rules of January 30, 1877 (1990) at 73.

However, while both provisions state the need for the judge to be convinced regarding the truth of the fact(s) at issue, neither provides any standard for reaching that conviction or requires that whatever standard is employed be the same in criminal and civil proceedings. To the contrary, each emphasizes the judge's discretion in reaching that conviction based on his or her "free evaluation" of all the available evidence, unconstrained by rigid rules of legal proof, such as the hearsay rules in the common law and the weighting of different types of evidence and mathematical calculation of "full proof" that existed under the French regime of "preuve légale" prior to the adoption of the civil codes.[16] 15

The same point holds for the "intime conviction" standard that is commonly said to apply in French criminal and civil proceedings. There is no mention of this standard (or any other standard) in the French Civil Code or the Code of Civil Procedure.[17] It is mentioned in the French Code of Criminal Procedure. Art. 304 requires each juror of the Assize Court to swear "to remember that the accused is presumed innocent and that he has the benefit of the doubt; to decide according to the charges and defence arguments following your conscience and your innermost conviction,"[18] and art. 353 requires the following instruction to be read to the jury and "put up in large type in the most visible part of the deliberation chamber" before the jury retires for deliberation: 16

> The law does not ask the judges [jurors] to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?[19]

Although phrased in a more explicit subjective manner (but consider the reference to the judge's "free discretion" in sec. 286 of the German Code of Civil Procedure), the "intime conviction" standard had the same genesis and aim as the relevant provisions in the German codes: a replacement of the prior rigid rules of legal proof with the "free evaluation" of all the relevant evidence by the judge, who is to decide cases according to her own inner, personal, subjective, "intimate" conviction.[20] As Taruffo states, 17

[16] *Taruffo*, AJCL 51 (2003) 666 f.; see *Clermont/Sherwin*, AJCL 50 (2002) 244 f. The judge's "free evaluation" is not completely unconstrained. In addition to the substantial limitations on the power of the parties or the judge to obtaining access to relevant evidence, some legal proof rules continue to exist, especially in France. See *Clermont/Sherwin* AJCL 50 (2002) 249; *R. Vouin*, The Exclusionary Rule: France, Journal of Criminal Law, Criminology, and Police Science (JCLCPS) 52 (1961) 275 ff. But cf. *Taruffo*, AJCL 51 (2003) 661, 674 f.

[17] *Clermont/Sherwin*, AJCL 50 (2002) 254; *Taruffo*, AJCL 51 (2003) 667.

[18] Code of Criminal Procedure art. 304 (available in English at http://Legifrance.gouv.fr/) accessed on 15 July 2009.

[19] Id. art. 353.

[20] *M. Foucault*, Abnormal: Lectures at the Collège de France 1974–1975, at 6–8 (F. Ewald & A. Fontana eds., G. Burchell transl. 2003); *Taruffo*, AJCL 51 (2003) 666 f.

> The principle of the *intime conviction* and all the similar (but not identical) principles concerning the free evaluation of proofs do not by themselves entail the adoption of any specific standard of proof, let alone the standard of proof beyond reasonable doubt. The history of these principles, as well as their systematic role in modern systems, show that they have a *negative* rather than a *positive* meaning. Their negative meaning is that to the extent they are applied (which is in many cases a matter of degree) they exclude the application of rules of *legal proof* (i.e., rules determining in general and binding terms the probative force of specific items of evidence), vesting the court with the power to determine the weight of proofs on the basis of a discretionary evaluation. In a word: these principles exclude the application of *legal* standards of proof but do not prescribe by themselves any positive standard of proof.[21]

18 I would amend Taruffo's statement in one significant respect. I believe the references to the judge's "conviction" in the French "intime conviction" standard and the German criminal and civil code provisions quoted above do provide a *minimum* standard of persuasion: the judge is required to have a *conviction* or belief regarding the truth of the fact at issue. This is the core of the civil law approach to proof, which is thought to be absent in the common law's preponderance and balance of probability standards. Taruffo himself subsequently emphasizes that "not only is truth the main goal stated by the already mentioned § 286 of the *Zivilprozessordnung*, the search for truth is the main reference point of the German legal theory concerning the problems of proof …."[22]

19 However, I agree with the basic point that Taruffo makes: the "intime conviction" standard by itself does not specify what *degree* of conviction is required. Its conjunction with the presumption of innocence and, more specifically, the benefit of the doubt that a juror in the Assize Court is required to grant to the defendant in art. 304 of the French Code of Criminal Procedure provides support to those who restate the criminal standard as a "deep-seated" or "profound" conviction,[23] perhaps comparable to the "beyond a reasonable doubt" standard but perhaps only requiring something like the "clear and convincing evidence" standard. However, there is no support in the French codes for requiring any particular degree of "inner conviction" in civil actions.

20 Kevin Clermont and Emily Sherwin argue that the strong preference that civil plaintiffs have in France for joining their civil action to a related criminal action (as allowed in France and some other civil law jurisdictions) proves that the standard of persuasion in the civil action is at least as high as (the assumed) very high standard in the criminal action; otherwise civil plaintiffs would prefer to pursue their action in the civil courts rather than the criminal courts even though they, rather than the public prosecutor, would bear the costs of litigation.[24]

[21] *Taruffo*, AJCL 51 (2003) 666.
[22] Id. 675.
[23] E.g, *Foucault* (fn. 20) 7 ff. ("profound"); *Vouin*, JCLCPS 52 (1961) 275 ff. ("deep-seated").
[24] *Clermont/Sherwin*, AJCL 50 (2002) 264.

There are a number of problems with this argument. First, even if the standards were the same, the standard could be low rather than high. Taruffo makes this point with particular reference to the situation in Italy, where plaintiffs also have a strong preference for joining their civil action with the related criminal action. He notes that a recent overview of the Italian case law "shows that Italian courts in deciding civil cases adopt very flexible standards of proof, based essentially upon the discretion of the judge, without any reference to the standard of proof beyond reasonable doubt,"[25] and that the late Federico Stella, a leading Italian scholar and prominent practitioner of criminal law, strongly criticized the Italian courts for applying in criminal actions "the much lower standard, that is typical of civil cases, of the prevailing probability" rather than the "beyond a reasonable doubt" standard.[26] Stella's criticism actually was even stronger: he faulted the Italian courts for applying a stricter standard of persuasion in civil cases than in criminal cases, and he forcefully argued for the adoption of the "beyond a reasonable doubt" standard in criminal actions and the "preponderance of the evidence" standard in civil actions in place of the amorphous and manipulable "inner persuasion" standard.[27] 21

Second, Clermont and Sherwin's argument ignores the very high costs of litigating in the civil courts, especially given the "loser pays" rule under which the loser of the civil case has to pay the litigation costs of the other party, which often would make pursuing one's civil action in the criminal proceeding the only financially feasible option, or at least so much cheaper as to outweigh the advantage of a lower standard of persuasion in the civil court. 22

Third, Clermont and Sherwin's argument assumes the point supposedly being proven, that the criminal courts apply the same standard of persuasion in the joined civil action as in the criminal action. 23

If the civil standard of persuasion were (at least) as high as the criminal standard of persuasion, the acquittal of the defendant in a criminal action should have conclusive effect in any non-final civil action involving the same facts. The fact that this at one time was the case in France, despite the absence of any code provision mandating that result, has been put forth by Clermont and Sherwin as evidence of the identity of the criminal and civil standards in civil law jurisdictions, even though they state that the same rule does not apply in most of France's neighboring countries.[28] However, recent changes to the 24

[25] *Taruffo*, AJCL 51 (2003) 665 fn. 26, citing *F. Carpi/M. Taruffo* (eds.), Commentario breve al codice di procedura civile. Complemento giurisprudenziale (3rd ed. 2002) 477. Examples of the widely varying standards that have been employed by the Italian courts with respect to the causation issue in medical malpractice cases are provided in a forthcoming paper by Claudia DiMarzo: Trib. Florence 2222 [1999] ("reasonable certainty"); Cass. Civ. 11522 [1997] ("concrete, actual and not hypothetical possibility of a favorable outcome"); Cass. Civ. 4725 [1993] ("reasonable certainty about the existence of a not insignificant probability"); Cass. Civ. 4044 [1994] ("moral certainty"); Cass. Civ. 1286 [1998] ("reliable and significant possibility of a favorable outcome").

[26] *Taruffo*, AJCL 51 (2003) 665, citing *F. Stella*, Giustizia e modernità (2nd ed. 2002) 147, 328.

[27] *Stella* (fn. 26); *F. Stella*, Causation in Products Liability and Exposure to Toxic Substances: A European View, in: M.S. Madden (ed.), Exploring Tort Law (2005) 403 ff.

[28] *Clermont/Sherwin*, AJCL 50 (2002) 263 f.

French Code of Criminal Procedure, beginning in 1983, explicitly state that the civil action can proceed, in the criminal court or the civil court as appropriate, despite the acquittal of the defendant in the criminal action.[29] This makes little sense unless, as in common law jurisdictions, the civil standard is lower than the criminal standard.

25 Speculation about the identity or divergence of the criminal and civil standards of persuasion is no longer necessary with respect to the situation in Italy. The Italian Supreme Court of Cassation has explicitly adopted the "beyond a reasonable doubt" standard for criminal actions and the "preponderance of the evidence" standard for civil actions, while emphasizing that satisfaction of the preponderance standard requires evidence specific to the particular case rather than a mere statistical probability:

> As this Court has previously stated, the main difference [between the penal and civil processes] is in the standards of proof that each system requires (Cass. Pen., S.U., 11.09.2002, n. 30328).
>
> The Penal Code requires proof "beyond a reasonable doubt" while the Civil Code merely requires a "preponderance of the evidence." The different standards correspond to the different values at stake in each system (Cass. 16.10.2007, n. 21619; Cass. 18.04.2007, n. 9238; Cass. 05.09.2006, n. 19047; Cass. 04.03.2004, n. 4400; Cass. 21.01.2000, n. 632).
>
> The Court of Justice CE has recently stated that causation cannot be based on probabilities (CGCE 13.07.2006, n. 295; CGCE 15.02.2005, n. 12).
>
> The concept of "probabilistic certainty" is a standard that is necessary in all civil cases. The mere statistical likelihood that one act or omission caused certain harm is not enough to impose liability. Probabilistic certainty also requires evidence from the specific case to support that statistical likelihood.[30]

26 In civil law jurisdictions other than Italy, there is little empirical information regarding the standards of persuasion actually applied by the courts, and sometimes very little guidance in judicial opinions, especially in France, where appellate judges do not review facts and write extremely short, conclusive opinions with minimal if any elaboration of standards or rationales.[31] However, anecdotal evidence indicates that, as in Italy,[32] the standard of persuasion in France, even in criminal proceedings,[33] varies depending on the discretion of the judge. This is also said to be the case in Germany.[34] Even Clermont and Sherwin conclude that

[29] E.g., Code of Criminal Procedure art. 4-1, 371 f., 470–1.

[30] Cass. Civ. Sez. Un. 581 [2008] § 3.9 (translated by Claudia DiMarzo, University of Palermo). The concept of "probabilistic certainty" is discussed in Part D below.

[31] See *Clermont/Sherwin*, AJCL 50 (2002) 254, 257.

[32] See supra no. 21.

[33] E.g., *Foucault* (fn. 20) 8–11.

[34] *Murray/Stürner* (fn. 4) 310 ff.; *P. Gottwald*, "Fact Finding: A German Perspective," in: D.L.C. Miller/P. R. Beaumont (eds.), The Option of Litigating in Europe (1993) 67, 77 (stating that German courts apply a preponderance standard "with regard to prima facie cases, to causation, to negligence and to assessment of damages").

the supposed identity of the (very high) criminal and civil standards of persuasion in civil law jurisdictions is a myth, which they argue is purposely maintained by the courts to shore up their legitimacy.[35] They state that "civil-law judges likely apply a haphazardly variable civil standard of proof,"[36] and they cite scholars who believe that the civil standard is closer to the preponderance standard than the "beyond a reasonable doubt" standard.[37] However, contrary to Clermont and Sherwin's identification of the civil standard of persuasion with mere statistical probability,[38] civil-law judges and lawyers generally seem to agree with the Italian court's rejection of that identification and its insistence that evidence specific to the particular case is necessary in order to form the required conviction regarding what actually happened in that case.[39]

C. The Standards of Persuasion in the Common Law

As I have previously noted, many academics in both common law and civil law jurisdictions assume that the "preponderance of the evidence" standard of persuasion, at least as employed in the United States, merely requires a 50+ percent statistical probability. The same assumption applies, through literal interpretation, to the "balance of probability" standard that is employed in common-law jurisdictions outside the United States. For both standards, as so interpreted, it would be better to employ the term "standard of proof" rather than "standard of persuasion," since the latter implies an element of conviction or belief that is lacking when all that is involved is a class-based statistical probability. Happily, however, the term "standard of persuasion" can be retained without awkwardness or misdescription, since the statistical probability interpretation of these standards, as they are usually understood and applied, is incorrect. The evidence that I provide in support of this statement is limited to the preponderance standard, due to limitations of space and personal knowledge. However, I believe that similar evidence could easily be adduced for the "balance of probability" standard by someone knowledgeable about the practice in a jurisdiction that employs that standard. Additional arguments applicable to both standards are provided in Part E below. 27

Contrary to the common assumption among academics, the preponderance standard in the United States has traditionally been understood by judges and presented to juries as a standard of conviction or belief regarding the truth of the fact(s) at issue rather than as a matter of mere mathematical or statistical probability. A widely employed pattern jury instruction states: 28

[35] *Clermont/Sherwin*, AJCL 50 (2002) 258 f., 269 ff.
[36] Id. 273.
[37] Id. 261, citing, among other sources, ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure P-18A, R-31E (Discussion Draft No. 3, 2002). See also *Murray/Stürner* (fn. 4) 310 ff.
[38] *Clermont/Sherwin*, AJCL 50 (2002) 265.
[39] *Taruffo*, AJCL 51 (2003) 659, 663 f., 667–71; EC EJN Evidence and Proof (fn. 4).

> To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more *convincing* force, and produces in your minds *belief* that what is sought to be proved is more likely *true* than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.[40]

29 The core of this instruction is essentially identical to the standards of persuasion enunciated in the German codes of criminal and civil procedure. While the American instruction does not include the "free evaluation of the evidence" principle that is stressed in the German provisions, it has the same focus on the required formation of a conviction or belief in the truth of the facts at issue. In addition, unlike the German provisions, it specifies the required degree of that belief. The required degree of belief is by a bare preponderance of the evidence, barely sufficient for the formation of a belief in the truth of the facts at issue: the slightest degree of belief,[41] rather than the much stronger degrees of belief required under the "clear and convincing evidence" or "beyond a reasonable doubt" standards, which are more literally worded belief (rather than mere probability) standards.

30 As in the quoted instruction, jury instructions in the Unites States generally refer to proof that the disputed fact is "more probably true than not true," rather than simply "more likely than not" as a matter of abstract class-based statistics.[42] When "more likely than not" or some similar phrase is employed, it is usually clear from the surrounding language that the phrase is not being used to refer to a mere 50+ percent statistical probability, but rather to refer to the truth of what actually happened on the particular occasion.

31 Few American judges, jurors, or laypersons interpret the "preponderance of the evidence" standard or even the "more probable than not" standard as merely requiring a 50+ percent statistical probability. In the well-known *Cipillone* case, the U.S. Court of Appeals for the Third Circuit questioned attempts by some courts and commentators to use mere statistics to define and prove "but for" causation:

[40] *E.H. Devitt et al.*, Federal Jury Practice and Instructions (Civil) (4th ed. 1987) vol. 3 § 72.01, at 32 (emphasis added); see *R.W. Wright*, Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, Iowa Law Review (Iowa L Rev) 73 (1988) 1001, 1065 and fns. 337–339 (citing numerous sources).

[41] See *Livanovitch v. Livanovitch*, 131 A. 799, 800 (Vt. 1926) ("If … you are more inclined to believe from the evidence that he did so deliver the bonds to the defendant, even though your belief is only *the slightest degree* greater than that he did not, your verdict should be for the plaintiff." (quoting the trial court's jury instructions)).

[42] E.g., *Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases*, Illinois Pattern Jury Instructions: Civil (2006) § 21.01 ("more probably true than not true"); short form: Illinois Pattern Jury Instructions; *L. Sand et al.*, Modern Federal Jury Instructions (2007) vol. 4, § 73.01, Instruction 73–2 (stating that "by a preponderance of the evidence" means "more likely true than not true," considering the "weight" and "quality and persuasiveness" of the evidence).

> We are not convinced that when a jury determines that "but for" a defendant's conduct, the injury would not have occurred, it is determining that the chances of that injury being the result of defendant's conduct are 50% or greater. Traditionally, jury instructions have been in words, not numbers.[43]

When asked to do so by researchers, many judges similarly object to interpreting standards of persuasion in terms of quantitative probabilities.[44] In one survey, 80 out of 255 judges refused to specify a probability sufficient for a "preponderance of the evidence" finding.[45] Of the judges who were willing to do so, only about three-fifths chose a probability of 50 to 55 percent; about two-fifths chose a probability of 60 percent or greater, almost one-fifth a probability of 70 percent or greater, one-tenth a probability of 80 percent or greater, and one-twentieth a probability of 90 to 100 percent.[46] The distribution of probabilities was about the same for the "more probable than not" standard.[47] Laypersons – jurors and students – were even less willing to interpret the preponderance standard as a mere 50+ percent probability. About four-fifths of the laypersons chose a probability of 70 percent or greater, half a probability of 80 percent or greater, and more than one-tenth a probability of 95 to 100 percent.[48] Over 90 percent of the judges and about two-thirds of the laypersons were opposed to having jurors simply make a probability finding, which the judge would then use to determine liability.[49] Trial consultants advise American plaintiffs' lawyers that "[m]any jurors will not agree to decide on the basis of 80 percent or 70 percent or 60 percent certainty," but rather "expect you to prove your case beyond a reasonable doubt, and you won't change their minds by explaining preponderance." Instead, the trial consultants advise, repeatedly get witnesses to testify that something is "more likely right than wrong" and, "beyond that," that they are "certain" of the truth of the fact at issue.[50] 32

American courts also usually agree with the civil law jurisdictions that, to prove what actually happened in a particular case – to establish what the facts actually were in that case – the party with the burden of persuasion regarding 33

[43] *Cipollone v. Liggett Group, Inc*., 893 Federal Reporter, Second Series (F.2d) 541, 561 fn. 17 (3rd Cir. 1990).

[44] *C.M.A. McCauliff*, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, Vanderbilt Law Review (Vand L Rev) 35 (1982) 1293, 1332; *R.J. Simon/L. Mahan*, Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom, Law and Society Review (L Soc Rev) 5 (1971) 319, 329 (quoting judges as stating that "[p]ercentages or probabilities simply cannot encompass all the factors, tangible and intangible, in determining guilt – evidence cannot be evaluated in such terms").

[45] *McCauliff*, Vand L Rev 35 (1982) 1325 fn. 184, 1330.

[46] Id. 1331; *Simon/Mahan*, L Soc Rev 5 (1971) 324 f., 327 table 7.

[47] *McCauliff*, Vand L Rev 35 (1982) 1331.

[48] *Simon/Mahan*, L Soc Rev 5 (1971) 327 table 7; see also *D.K. Kagehiro/W.C. Stanton*, Legal vs. Quantified Definitions of Standards of Proof, Law and Human Behavior 9 (1985) 159, 164, 169 (discussing an empirical study demonstrating a divergence between subjects' findings under the preponderance standard and a quantified 51 percent standard, with results closer to those obtained under the preponderance standard even when the two standards were combined in the same instruction).

[49] *Simon/Mahan*, L Soc Rev 5 (1971) 329, 330 fn. 8.

[50] *D. Ball*, Making Preponderance Work, Trial (Mar. 2008) 38 ff.

those facts must employ evidence specific to that particular case, rather than mere statistical probabilities. In an often quoted statement, the Supreme Court of Massachusetts stated:

> It has been held not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.[51]

34 Jury instructions often refer to the "weight" of the evidence.[52] Abstract class-based statistics do not have weight. Only concrete "particularistic" evidence specific to the particular case has weight.

35 In sum, contrary to a widespread perception, there is strong agreement between civil law and common law jurisdictions regarding the standards of persuasion. True persuasion requires the formation of a conviction or belief regarding the truth of the facts at issue, and such belief cannot rationally be based on mere class-based statistics, but rather must be based on evidence specific to the particular instance. Furthermore, the required degree of belief varies in criminal actions and civil actions, given the different interests at stake in each action. For criminal actions, a very high degree of belief is required: no reasonable doubt can remain. For most issues in civil actions, however, the standard of persuasion is much lower: all that is required is the formation of a bare, minimal personal belief ("intime conviction") by the trier of fact in the truth of the facts at issue, as required by the usual understanding in practice (rather than in academia) of the preponderance of the evidence standard.

36 However, a critical objection or question remains. How is such a conviction or belief formed? Nothing is certain. All evidence, including particularistic evidence specific to the particular occasion – for example, fingerprint evidence and (especially) eyewitness testimony – merely gives rise to a probability regarding the facts at issue.[53] Does it then make any sense to distinguish between

[51] *Sargent v. Mass. Accident Co*., 29 North Eastern Reporter, Second Series (N.E.2d) 825, 827 (Mass. 1940) (citations omitted).

[52] E.g., *Sand* (fn. 42) § 73.01, Instruction 73–2 (stating that "by a preponderance of the evidence" means "more likely true than not true," considering the "weight" and "quality and persuasiveness" of the evidence).

[53] The difficulties of attributing a specific piece of evidence to a particular source are examined in *National Research Council*, Strengthening Forensic Science in the United States: A Path Forward (2009).

probability and belief? Even Taruffo apparently does not think that it does. Although he is critical of statistical probability interpretations of the standards of persuasion, he is also critical of standards that take seriously the concepts of conviction, belief, or truth.[54]

D. Probabilities and Belief[55]

The proponents of the 50+ percent statistical probability interpretation rely on the truth that all evidence, including the particularistic evidence that is generally insisted upon by courts in both civil law and common law jurisdictions, is ultimately probabilistic. However, they fail to recognize that there are different types of probabilities, and that these different types of probabilities have differing relevance depending on the type of inquiry at issue. 37

In litigation and ordinary life, we are usually interested in determining what has actually happened in the past or predicting what is likely to or may happen in the future. Both types of inquiry rely on causal generalizations, which are incompletely specified causal laws. A causal law is a law of nature; it describes an invariable, nonprobabilistic connection between some fully specified set of antecedent conditions and some consequent condition, such that whenever all the listed antecedent conditions are instantiated on a particular occasion, that complete instantiation necessarily will produce the instantiation of the consequent condition.[56] The antecedent conditions and the consequent condition are described as abstract types, which cannot in themselves cause anything. An actual singular instance of causation consists of the complete instantiation of a causal law on a particular occasion. 38

Our knowledge of the content of causal laws is based on experience and empirical investigation. The existence of such a law is usually inferred from observation of a constant or frequent conjunction between occurrences of some set of antecedent conditions and the subsequent (or simultaneous) occurrence of some other condition. However, the mere existence of a frequent, or even a constant, conjunction is not sufficient to establish a causal relation.[57] Scientists engage in carefully designed experiments to determine whether there is an actual causal relation or, instead, the correlation is spurious, and, if there does seem to be a causal relation, to determine the direction of causation and, to the extent possible, all of the antecedent conditions in the causal law. 39

[54] *Taruffo*, AJCL 51 (2003) 669–71.

[55] Some of the text in this Part and the prior Part is excerpted from *Wright*, Iowa L Rev 73 (1988) and *R. Wright*, Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof, Loyola of Los Angeles Law Review (Loy LA L Rev) 41 (2008) 1295.

[56] I have made no attempt to avoid circular use of causal terminology, since the exposition here is not intended to be an analysis of the meaning of causation but rather an explanation of the relationships among causation, probability and belief.

[57] *A.B. Hill*, The Environment and Disease: Association or Causation?, Proceedings of the Royal Society of Medicine 58 (1965) 295; *A. Scales*, Legal Feminism: Activism, Lawyering, and Legal Theory (2006) 171 f.

40 Our knowledge of causal laws is almost always incomplete, and even when it is complete we rarely refer to completely specified causal laws. We rather employ causal generalizations, which are incompletely specified causal laws that have only as much specificity as is possible and needed to resolve the causal issue in the particular situation. Since the causal generalization is not a complete specification of the causal law, instantiation of all of the antecedent conditions in the causal generalization does not guarantee the instantiation of the consequent condition. Instead, there is only a probability that the consequent condition will be instantiated. This probability is what I have called an ex ante causal probability. It is an aggregate, class-based probability associated with a particular causal generalization that describes the frequency of instantiation of the consequent condition given the complete instantiation of the antecedent conditions.

41 Ex ante causal probabilities are useful, indeed necessary, for causal prediction – predicting what is likely to or may happen in the future. However, they have only limited, redundant utility in causal explanation – explaining what actually happened on a particular occasion. As noted above, significant statistical correlations, such as are provided by epidemiological evidence, can be used – and often are used – to infer a general causal relation, what is often referred to in the law as "causal capacity" or "general causation." By themselves they are never sufficient (or necessary) for inferring a causal relation. However, if the causal relation is confirmed, the statistical frequency becomes an ex ante causal probability, which can be used for causal prediction.

42 Reference to an ex ante causal probability does not assist in establishing what is often referred to as "specific causation": the actual instantiation of the relevant causal generalization and its underlying causal law on a particular occasion. Reference to the statistical frequency that has been confirmed as an ex ante causal probability merely redundantly confirms and quantifies the "causal capacity" of the conditions in the antecedent of the causal generalization when they are instantiated. It does not provide any information about the actual instantiation of those conditions on a particular occasion.

43 An abstract ex ante causal probability associated with some possibly applicable causal generalization is not evidence of what actually happened on any particular occasion because it provides no information on whether the abstract elements in the causal generalization and the underlying causal law actually were instantiated on that occasion. It merely states that X percent of the time that the known abstract elements in the causal generalization are instantiated, the unknown abstract elements required to complete the causal law are also instantiated. It does not help us determine whether this particular occasion is one of the X percent in which the causal law was fully instantiated, or instead is one of the 100 – X percent in which the causal law was not fully instantiated. It can be used to place a bet on what most likely happened, but it cannot be used to resolve the bet. If a horse wins 90 percent of its races or the odds are 90 percent that a spin of a roulette wheel will not result in the ball's landing on a certain number, no one who placed a bet either way

in either situation will consider themselves to have won or lost the bet in the absence of specific evidence of the actual outcome of the particular race or spin of the wheel.

44 A judgment on what actually happened on a particular occasion is a judgment on which causal generalization and its underlying causal law was fully instantiated on the particular occasion. An item of particularistic evidence is a concrete feature of a particular occasion that instantiates, or negates the instantiation of, one of the abstract elements in a possibly applicable causal generalization. Particularistic evidence connects a possibly applicable causal generalization to the particular occasion by instantiating the abstract elements in the causal generalization, thereby converting the abstract generalization into an instantiated generalization. Without such particularistic evidence, there is no basis for applying the causal generalization to the particular occasion.

45 To determine whether a specific causal law was fully instantiated, we use particularistic evidence to assess, non-quantitatively, the ex post probability that each of the abstract elements in the relevant causal law was instantiated – what I have called an ex post causal probability. This ex post causal probability of complete instantiation is distinct and independent from the ex ante causal probability associated with the relevant causal generalization. The ex post probability for complete instantiation of the causal law is equal to the lowest ex post probability for instantiation of any constituent element. The ex post probability for instantiation of the known abstract elements listed in the causal generalization is either based on direct particularistic evidence of such instantiation or, as with the unknown abstract elements required to complete the causal law, is circumstantially inferred from particularistic evidence of the network of causal relationships that encompasses the particular occasion. The final judgment on what actually happened depends on whether, in the mind of the trier of fact, the unquantified ex post probability associated with a possibly applicable causal generalization – the ex post probability, based on all the particularistic evidence, that the causal law underlying the causal generalization was fully instantiated – is sufficient, in comparison with the unquantified ex post probability associated with competing causal generalizations, to produce in the trier of fact the required degree of belief in the truth of the fact that the first causal generalization and its underlying law were the ones that were fully instantiated on the particular occasion.

46 A "naked statistic" is an accidental (non-causally related) distribution or frequency of occurrence – for example, the fact that most of the taxis in a town are operated by a particular company or that most of the bolts used by a particular manufacturer were supplied by a particular supplier. If the "preponderance of the evidence" and "balance of probability" standards of persuasion merely require proof of a 50+ percent statistical probability, a 50+ percent "naked statistic" should suffice to prove the fact at issue. Yet, when such naked statistics are presented to courts, in the United States or elsewhere, as alleged proof of the fact that it was the defendant's instrumentality (e.g., taxi or defective bolt)

that tortiously caused the plaintiff's injury, they are almost always properly rejected as being irrelevant.[58]

47 Ex ante causal probabilities are relevant and necessary for causal prediction; they are irrelevant for causal explanation. Conversely, ex post causal probabilities are relevant and necessary for causal explanation; they are irrelevant for causal prediction. Naked statistics are irrelevant for both causal explanation and causal prediction, although they can be used to place a bet on the fact at issue.

48 The distinction between causal prediction and causal explanation underlies and supports the different standards of persuasion in sec. 286 and 287 of the German Code of Civil Procedure. Sec. 287, which deals with the determination of the damages resulting from a legal wrong, does not have sec. 286's reference to the necessary "conviction" of the trier of fact:

> If it is controversial between the parties whether any damage was caused or the extent of the damage or of a compensable interest, it shall be decided by the court at its free discretion by taking into consideration all the circumstances.[59]

49 As the drafters of sec. 287 must have understood, no belief can be formed, but rather only predictions can be made, about the amount of future damages. Thus, sec. 287 omits the requirement that the trier of fact form a belief regarding such damages. The actual occurrence of the legal wrong is an issue of past fact or causal explanation, which is governed by sec. 286, which properly requires the trier of fact to be convinced of the actual occurrence of the legal wrong. The determination of past damages is also an issue of past fact for which ex ante causal probabilities are irrelevant. However, on this issue most jurisdictions are willing, as the drafters of sec. 287 were,[60] to let the plaintiff recover damages even if there is insufficient proof for the trier of fact to form a belief regarding the precise amount, as long as there is sufficient evidence to support a reasonable estimation.

50 The failure to perceive the distinctions among the different types of probabilities and their disparate relevance to the different types of inquiries that arise in litigation exists in both common law and civil law jurisdictions. However, contrary to Clermont and Sherwin's claim that the judges, lawyers and academics in civil law jurisdictions are far behind those in the common law jurisdictions (especially the United States) in their understanding of the relationship between probability and proof and related liability issues,[61] I agree with

[58] *E.g.*, *Howard v. Wal-Mart Stores, Inc.,* 160 F.3d 358, 359–60 (7th Cir. 1998); *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 755 (Mass. 1945); *Wright*, Iowa L Rev 73 (1988) 1050 fn. 271. In the *Howard* case and again in *United States v. Veysey*, 334 F.3d 600, 605 (7th Cir. 2003), Judge Posner repeats the mathematical probabilists' "missing evidence" argument to try to explain the courts' rejection of such naked statistics. The flaws in that argument are discussed in *Wright*, Iowa L Rev 73 (1988) 1055 f.

[59] *Goren* (fn. 15) 73.

[60] *Murray/Stürner* (fn. 4) 312 f.; *van Dam* (fn. 2) 281 f.; *van Gerven/Lever/Larouche* (fn. 2) sec. 4.2.3, 428/17.

[61] *Clermont/Sherwin*, AJCL 50 (2002) 252–58, 273 f.

Taruffo that it is those in the civil law jurisdictions that generally have a better understanding.[62] Although, for the most part, their understanding has been intuitive rather than explained, they have understood more clearly, consistently and explicitly that neither ex ante causal probabilities nor naked statistics are relevant on the issue of what actually happened in a particular case, which must instead be proven through particularistic evidence that is specific to the particular situation, which alone is capable of supporting the necessary belief in what actually happened.

Jurisprudence in Italy has advanced further, particularly through the work of the late Federico Stella, who developed an analysis of proof based on complete instantiation of causal laws that is similar to but significantly different from the analysis in this Part. Stella distinguished a concept of "logical probability" from mere statistical probability. However, Stella's concept of logical probability was what I have called an ex ante causal probability (the frequency of occurrence of the consequent of a causal generalization given instantiation of the antecedent conditions).[63] To establish actual causation in a particular instance, he insisted, the causal generalization being used must be an (almost) fully specified causal law, with a "logical probability" close to one, and there must be sufficient particularistic evidence specific to the particular case to enable the trier of fact to conclude that it was completely instantiated.[64] This obviously is an extremely high standard of persuasion, as Stella as a criminal defense lawyer certainly intended it to be, in order to put a halt to Italian criminal convictions based merely on statistical probability and increased risk, which sometimes occurred even with statistical probabilities of less than 50 percent, and in order to have the standard of persuasion in criminal cases effectively raised to the level of "beyond a reasonable doubt."[65] 51

Stella's goals seemed to be achieved in the landmark Franzese opinion of the Full Bench of the Criminal Division of the Supreme Court of Cassation in 2002.[66] The court, employing Stella's "logical probability" terminology, held that findings of 52

[62] See *Taruffo*, AJCL 51 (2003) 662 ff.

[63] *F. Stella*, The Vitality of the Covering Law Model: Considerations on Wright and Mackie (available at http://works.bepress.com/richard_wright/34/) accessed on 16 July 2009, at 5 (translation by F. Stella of La vitalità del modello della sussunzione sotto leggi. A confronto il pensiero di Wright e Mackie, in: *F. Stella*, I Saperi del Giudice. La Causalità e Il Ragionevole Dubbio (2004) 1–70).

[64] Ibid.; *F. Stella*, Criminal omissions, causality, probability, counterfactuals: Medical-surgical activity (available at http://works.bepress.com/richard_wright/35/) accessed on 16 July 2009, at 14–18, 23 f. (translation by F. Stella of Causalità omissiva, probabilità, giudizi controfattuali: l'attività medico-chirurgica, in: *F. Stella*, Il Giudice Corpuscolariano. La Cultura delle Prove (2005) 201–43. Taruffo also refers to a concept of "logical probability" that is distinct from mere statistical probability, which however he attributes "mainly" to Jonathan Cohen. *Taruffo*, AJCL 51 (2003) 664 and fn. 20 (citing *L.J. Cohen*, The Probable and the Provable (1977)); see id. 659, 669. The distinction that I make between causal prediction and causal explanation and the related distinction between ex ante causal probability and ex post causal probability is loosely based on Jonathan Cohen's distinction between "Pascalian" frequentist probability and "Baconian" inductive probability. See *Wright*, Iowa L Rev 73 (1988) 1044 ff. Cohen himself seems not to have fully grasped – or to have lost sight of – these distinctions. See *Wright* 1063 fn. 329.

[65] See *Stella* (fn. 64) 1–2 (English translation).

[66] Cass. Crim. Sez. Un. 30328/02, *Franzese* [2002].

causation and criminal liability cannot be based merely on increased risk or even a high statistical probability of causation, but rather require resort to a rationally credible "covering law" and proof beyond a reasonable doubt, through particularistic evidence specific to the occasion, of the "real conditioning efficacy of [the conduct at issue] in the causal web."[67] However, the precise nature of the "logical probability" standard established in Franzese apparently was not too clear and results in subsequent cases have been mixed.[68] In the recent opinion of the Full Bench of the Civil Division of the Supreme Court of Cassation, which is quoted in Part B above, the same restrictions and requirements are stated and labeled "probabilistic certainty," with however proof by a "preponderance of the evidence" being substituted for proof "beyond a reasonable doubt" in civil actions.[69]

53 When Stella became aware of the analysis that is briefly described in this Part, which I previously have extensively elaborated and defended,[70] he treated it as being essentially identical to his analysis by submerging the significant difference between his concept of logical probability and my concept of ex post causal probability,[71] which however he described as "complet[ing] and defin[ing] my point of view on the application of the covering law model."[72] I greatly regret that his untimely death prevented us from embarking on a planned comparison and refinement of our respective views.

E. Proof by Statistical Probability: Problems and Paradoxes[73]

1. Indeterminate Defendants: The Alternative Causation Doctrine and Proportional Market Share Liability

54 In both common law and civil law jurisdictions, an alternative causation doctrine is commonly applied in situations like the typical hunting accident situation, in which two (or more) defendants each fire in the direction of the plaintiff, who was hit by only one pellet, and it is impossible for the plaintiff to prove which defendant fired the pellet that injured him. In order to achieve a second-best just result in situations like this, when each defendant behaved tortiously and may have thereby caused the plaintiff's injury but it is impossible for the plaintiff to prove which defendant actually caused her injury, the courts shift the burden to each defendant to prove that she did not injure the plaintiff and hold each defendant who is unable to do so jointly and severally liable for the plaintiff's injury.[74]

[67] See *Stella* (fn. 64) 5–6 (English translation).
[68] Id. at 2–3, 23 ff.; *V. Grembi*, Trends and Duration of Medical Malpractice Cases: Some Evidence From the Italian Court of Cassation Decisions (1970–2005) (available at http://papers.ssrn.com/abstract=983039) accessed on 16 July 2009, at 11.
[69] See supra no. 25.
[70] *Wright*, Iowa L Rev 73 (1988) 1044 ff.
[71] See *Stella* (fn. 64) 4 f., 12–16; *Stella* (fn. 63) 2 f., 7–10 (English translation).
[72] *Stella* (fn. 63) 10 (English translation).
[73] Much of this Part is excerpted from *Wright*, Loy LA L Rev 41 (2008) 1295.
[74] Id. 1299 ff.; *van Dam* (fn. 2) 287 ff.; *van Gerven/Lever/Larouche* (fn. 2) sec. 4.4.3.

However, if there are more than two defendants and the standard of persuasion is satisfied by a mere 50+ percent statistical probability, the statistical probabilities by themselves ordinarily would enable each defendant to prove that she was not the cause of the injury, even though it is certain that one of the defendants caused the injury. For example, if there were three defendants, each equally likely to have been the cause of the plaintiff's injury, each defendant can "prove" that she was not the cause, since there is a 67 percent probability that she was not the cause, which leads to the paradoxical result that it can be "proven" that none of the defendants was the cause, even though we know that one of them must have been the cause. 55

Conversely, using what Mark Geistfeld calls "evidential grouping,"[75] the statistical probability interpretation of the standard of persuasion can be employed iteratively to achieve the opposite paradoxical result: "proof" that all but one of the initial multiple defendants, each approximately equally likely (or unlikely) to have been the actual cause, was the actual cause. At each step in the iteration, a smaller group consisting of most of the defendants in the prior group can be carved out of the prior group, and the statistical probability interpretation of the standard of persuasion can be used to "prove" that this smaller group contains the defendant who actually caused the plaintiff's injury, until we are down to only two defendants, one of whom can be "proved" to have been the actual cause if there is even a "scintilla" of evidence, statistical or otherwise, to tip the probability one way or the other – for example, if the shotgun cartridge fired by one of the hunters contained one more pellet than the cartridge fired by the other hunter.[76] 56

The courts avoid each of these contrary paradoxical results by refusing to allow such naked statistics as proof or disproof of actual causation.[77] As the reporters for the American Law Institute's *Restatement (Third) of Torts* state (despite their acceptance elsewhere of the statistical probability interpretation of the preponderance standard[78]), 57

> Defendants would be able to satisfy their burden of production [under the alternative causation doctrine] when three or more defendants are subject to alternative liability [sic] in one of two ways: a defendant might show *why* it was not the cause of plaintiff's injury or it might show *which one* of the other defendants was the cause.[79]

To show *why* she was not the cause or *which one* of the other defendants was the cause, the defendant must produce evidence of the actual causal effect of another defendant's shot or the lack of causal effect of her own shot. To do this, 58

[75] *M.A. Geistfeld*, The Doctrinal Unity of Alternative Liability and Market Share Liability, University of Pennsylvania Law Review (U Pa L Rev) 155 (2006) 447, 464 f., 466, 469.

[76] See *Wright*, Loy LA L Rev 41 (2008) 1312 n. 64, 1330, 1332 f.

[77] *American Law Institute*, Restatement (Third) of Torts: Liability for Physical Harm (Restatement Third) (Proposed Final Draft No. 1, 2005) § 28(b) and cmts. d(1) & e, reporters' notes; *American Law Institute*, Restatement (Second) of Torts (1965) §§ 433B(2)–(3).

[78] *American Law Institute*, Restatement Third (Proposed Final Draft No. 1, 2005) §§ 26 cmt. l & illus. 5, n. 28 cmt. a, reporters' note.

[79] Id. § 28 cmt. j, reporters' note at 565 (emphasis added).

she must provide concrete particularistic evidence specific to the particular occasion, rather than mere abstract ex ante causal probabilities or noncausal naked statistics, neither of which provide any information about what actually happened on the particular occasion.

59 When the preponderance standard is properly understood as requiring the formation of a minimal belief in the truth of a disputed fact, based on particularistic evidence specific to the particular occasion, the logical inconsistency that results from using the statistical probability interpretation of the preponderance standard in the alternative causation cases disappears. As Geistfeld states:

> [T]he plaintiff has provided particularistic evidence showing that each defendant belongs to the group of [possible] tortfeasors that caused the harm, whereas each defendant [using the statistical probability argument] only relies upon "quantitative probability" or "the greater chance" that the other defendants caused the injury. That evidence, however, is not probative of what actually happened on this particular occasion …. To avoid liability, a defendant must instead provide [particularistic] evidence rebutting the plaintiff's particularized proof ….[80]

60 A further paradox would be produced by the statistical probability interpretation of the standard of persuasion when the same defendants are repetitively implicated as having possibly caused a particular type of injury. The Supreme Court of Oregon confronted such a situation in a case involving an injurious DPT vaccine that was supplied by one of two defendants, one of which had a 73 percent share of the market for the DPT vaccine. Literally applying the statistical probability interpretation of the preponderance standard would paradoxically result in its being "proven" that the defendant with the 73 percent market share, who was thus presumably only responsible for approximately 73 percent of the DPT-related vaccine injuries, caused 100 percent of those injuries. Although apparently accepting the statistical probability interpretation of the preponderance standard, the court, referring to articles discussing the "naked statistics" issue, did not allow either of the two defendants to be held liable, even under the alternative causation doctrine.[81]

61 The courts in the American DES cases may have faced a similar situation. It has been stated that one company, Eli Lilly, may well have supplied, directly or indirectly, more than half of the marketed DES.[82] It thus is worth noting how carefully the Supreme Court of California, in the leading American case, phrased its statements on proof of causation of the plaintiff's injury. The court observed that an inference of causation (based on statistical probability) would fail "*if* we measure the chance that any one of the defendants supplied the injury-causing drug by the *number* of possible tortfeasors"[83] (rather than by

[80] *Geistfeld*, U Pa L Rev 155 (2006) 468.
[81] *Senn v. Merrell-Dow Pharmaceuticals, Inc.*, 751 Pacific Reporters, Second Series (P.2d) 215, 216 n.1, 222 (Or. 1988)
[82] See *A.M. Levine*, "Gilding the Lilly": A DES Update, Trial 20 (Dec. 1984) 18, 19 f.
[83] *Sindell v. Abbott Labs.*, 607 P.2d 924, 931 (Cal. 1980) (emphasis added); see id. at 936 f.

relative market share). Like the Oregon court, the California court also was unwilling to apply the alternative causation doctrine in this type of situation, since doing so would result in each defendant – even those with a minor share of the market – being held fully liable for all of the many DES-related injuries, even though the portion of the injuries that each defendant actually caused presumably approximated its share of the DES market.[84]

62 However, unlike the Oregon court, the California court devised a new second-best liability doctrine in an attempt to have each defendant be liable, approximately, for the share of the total DES-related damages that it presumably actually caused, by holding each defendant proportionately liable in each case for a share of the damages in that case equal to its share of the DES market.[85] Some courts, in both common law and civil law jurisdictions, have imposed more extensive liability in the DES cases, but they have done so as a matter of normative policy while recognizing that it is impossible to prove who actually caused the plaintiff's injury in each case.[86]

2. Toxic Exposures: The Doubling of the Risk Doctrine

63 Although phrases such as "more likely than not" or "balance of probabilities" have long been part of the legal language regarding the standard of persuasion in tort law and other areas of civil law, it is only in fairly recent years that they have come to be understood as mere statistical probability statements. A major locus of this shift in understanding is the toxic tort cases, in which proof often depends on, and often consists solely of, statistical epidemiological evidence. As I discussed in Part D above,[87] such evidence is very useful, although neither necessary nor sufficient, in establishing that a toxic substance is capable of causing a particular kind of injury – the causal capacity or "general causation" issue – and, if such causal capacity has been sufficiently established, in predicting possible results ex ante or comparing possible causes ex post for purposes of remedial treatment. However, such evidence has also incorrectly come to be viewed by many courts as being sufficient to prove the actual occurrence of the relevant causal process on a particular occasion – "specific causation" – if exposures to the substance more than double, in the aggregate, the frequency of occurrence of that kind of injury, so that it can be said, whenever that kind of injury occurs following exposure to the substance, that the injury was (statistically) "more likely than not" caused by the exposure to the substance.[88]

64 As in the indeterminate defendant cases, the statistical probability interpretation of the burden of persuasion produces odd results in the toxic exposure

[84] Id. 1325.
[85] Id. 1325 f.
[86] *B. v. Bayer Nederland BV*, Hoge Raad 9 October 1992, [1994] Nederlandse Jurisprudentie (NJ) 535 (C.J.H.B.); *Collins v. Eli Lilly Co.*, 34 North Western Reporter (N.W.2d) 37 (Wis. 1984); *Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984).
[87] See supra no. 39.
[88] E.g., *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1313–14, 1318–22 (9th Cir. 1995); *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1092 (D. Md. 1986), *aff'd*, 814 F.2d 655 (4th Cir. 1987); *American Law Institute* (fn. 78) § 28 cmt. c(4).

cases. When exposure to a substance more than doubles the risk, the "doubling+" doctrine will result in defendants being held liable for every instance of the injury that occurs following exposure to the substance, even if there is no evidence that the substance actually caused the injury on any particular occasion, and even though exposure to the substance could only have caused a portion of the injuries. For example, if exposure to the substance barely doubles the frequency of occurrence of the injury, so that just over half of the injuries that occur following exposure to the substance are caused by that exposure, defendants nevertheless will be held liable in every case, for all of the injuries. Conversely, when, as is usually the case, exposure to the substance does not more than double the frequency of occurrence of the injury, no defendant will be liable for any of the injuries that occur following exposure to the substance, no matter how many may actually have been caused by such exposure, even though as many as half of the injuries may be due to exposure to the substance. It is remarkable that such a miniscule difference in statistical probability should be thought to result in such a dramatic difference in the supposed proof of causation and resultant liability.[89]

65 Some American courts recognize this. As one such court stated, "numerous jurisdictions have rejected medical experts' conclusions based upon a 'probability,' a 'likelihood,' and an opinion that something is 'more likely than not' as insufficient medical proof," and instead have required that the expert express a "reasonable medical certainty" about the fact at issue.[90] Unfortunately, "reasonable certainty" standards are not employed and have no meaning in the medical and scientific communities, so the plaintiff's attorney can and often does fill the semantic void, and the plaintiff's expert then employs the required terminology.[91]

66 Doctors and scientists understand that a mere statistical probability, while useful for diagnosis and prediction, is insufficient to establish what actually happened in a particular case. Thus, if an expert's opinion regarding actual causation, whether couched in terms of "reasonable certainty", "more likely than not", or "preponderance of the evidence", is based only on a statistical probability (as is usually true in the toxic exposure cases), a good defense attorney will ask the expert, "Can you say whether the plaintiff's exposure to the [relevant substance] actually caused the [relevant specific harm] in this case?" The expert – if honest – will reply, "No", and be chagrined for having been made to appear to have contradicted her earlier testimony.

[89] Clermont and Sherwin dismiss this objection as an "appealing but unsound lay intuition" that conflicts with the supposed basic goal of minimizing erroneous judgments. *Clermont/Sherwin*, AJCL 50 (2002) 252; see id. 258.

[90] *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200–01 (6th Cir. 1988); see *American Law Institute* (fn. 78) § 28 cmt. a.

[91] *American Law Institute* (fn. 78) § 28 cmt. a and cmt. a reporters' note.

3. Professional Malpractice: Lost Chances

67 An identical situation exists in many common law and some civil law jurisdictions in the medical malpractice context. In these jurisdictions, the courts, applying the statistical probability interpretation of the standard of persuasion, erroneously assume that, if the doctor's negligence in diagnosing or treating an ill patient deprived the patient of a 50+ percent statistical probability of avoiding the injury that subsequently occurred (generally, death), then the doctor's negligent causation of the injury is easily – indeed, certainly – proven; however, if the patient was deprived of a less than a 50+ percent statistical probability of avoiding the injury, the defendant's negligent causation of the injury is not deemed to be proven (indeed, theoretically it is disproven) and the defendant is not liable.[92] The same result is reached in German law, through a rule shifting the burden of proof of lack of causation to the defendant doctor in cases of gross medical negligence that deprived the plaintiff of a 50+ percent probability of avoiding the injury.[93] Under either approach, proof of actual causation (or its lack) and all-or-nothing liability arbitrarily turns on a trivial difference in statistical probability.

68 Some courts, in both common law and civil law jurisdictions, while supposedly adhering to the usual requirement that the plaintiff prove the defendant's tortious causation of the plaintiff's injury, but influenced by the statistical probability interpretation of the standard of persuasion and perhaps by the arbitrary distinction under that standard between trivial differences in statistical probability, have been willing to treat any significant increase in risk (or its converse, loss of any significant chance of avoiding the injury) as proof of, or equivalent to, actual causation of the injury and thus as supporting holding the defendant fully liable for the injury.[94]

69 Other courts, including many American courts, while treating the defendant's depriving the plaintiff of a 50+ percent chance of avoiding the injury as proof of actual causation and consequent full liability, acknowledge that causation is not proven when the plaintiff had less than a 50+ percent chance of survival, but (supposedly) hold the defendant liable for having caused a newly recognized legal injury, the plaintiff's "lost chance" of avoiding the tangible injury that actually occurred, with liability being imposed for a portion of the tangible injury equal to the lost chance.[95] The same theory is followed in France whether the probability is greater or less than 50 percent.[96] This approach (except in France) continues to base significant, albeit reduced, substantive differences in liability on mere trivial differences in statistical probability. Moreover, even

[92] See, e.g., *Kramer v. Lewisville Mem'l. Hosp.*, 858 S.W.2d 397, 399–400 (Tex. 1993); *American Law Institute* (fn. 78) § 26 cmt. n (assuming proof of causation, and thus full liability, if "the probability of a better outcome was in excess of 50 percent"); *van Dam* (fn. 2) 295 ff.

[93] *van Dam* (fn. 2) 296.

[94] *Stella* (fn. 64) 1 f. (English translation); *Wright*, Iowa L Rev 73 (1988) 1067 ff.; supra fn. 25 (Italian cases).

[95] *Wright*, Iowa L Rev 73 (1988) 1067–72.

[96] *van Dam* (fn. 2) 293 f. The lost chance theory is applied widely in France. Id. In many other jurisdictions – especially in the United States – it is applied only in medical malpractice cases.

in France, it erroneously equates aggregate statistical probabilities of avoiding the tangible injury with the particular plaintiff's probability of avoiding that injury in the particular situation, which will vary depending on his particular genetic makeup and other relevant conditions, and, while claiming to impose liability for having caused the (particular) lost chance, it actually imposes liability not for the lost chance – the mere imposition of unrealized risk – but rather for the plaintiff's actual tangible injury, in the acknowledged absence of proof of causation of that tangible injury. No liability is imposed for the lost chance in the absence of the physical injury, and the liability that is imposed when there is a physical injury (which may or may not have been affected or caused by the lost chance) is not for the (statistical) value of the lost chance, but rather for the damages resulting from the physical injury, reduced in proportion to the statistical lost chance.

70 Oddly, in the United Kingdom, the lost chance doctrine is applied with respect to financial losses in contractual relationships, including the attorney-client relationship, but not in medical malpractice cases.[97] The English position is even odder when one considers that the usual justification for employing the lost chance doctrine or some other second-best liability rule is the inherent impossibility of proving causation.[98] In legal malpractice cases, the trial that did not occur or that was botched can be re-litigated – "a trial within a trial," as occurs in the United States – to determine whether the plaintiff would have won or lost; there is no need for a lost chance doctrine. The same is not true in medical malpractice cases.

71 The British House of Lords' decision in the Hotson medical malpractice case[99] is an especially dramatic example of the perverse results that often are caused by the statistical probability interpretation of the standard of persuasion. The plaintiff fell from a tree and ruptured some of the blood vessels in his left femoral epiphysis. The defendant's negligent delay in diagnosing and treating his injury caused a swelling of the epiphysis that compressed the remaining intact blood vessels and thus shut off the supply of blood from those blood vessels. As a result of the combined loss of blood from the initial fall and ruptures and the subsequent compression of the remaining blood vessels, the epiphysis became distorted and deformed, resulting in permanent injury to the boy's left hip and leg. However, the trial court determined that there was a 75 percent chance that the permanent injury would have happened anyway even if the defendant had not been negligent, due to the loss of blood from the ruptured blood vessels. Focusing on this finding, the House of Lords held that the defendant was not liable due to lack of causation, which as a past fact is determined by the "balance of probabilities" – the British version of the preponderance of the evidence standard of persuasion.[100] Adding insult to injury, the court further held that there could be no recovery for any lost chance: "In

[97] Id. 294 f.
[98] See *Wright*, Loy LA L Rev 41 (2008) 1295 ff.
[99] *Hotson v. East Berkshire Area Health Authority*, [1987] 1 Appeal Cases (A.C.) 750.
[100] See *Wright*, Loy LA L Rev 41 (2008) 1322 f.

determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain."[101] After using a statistical probability argument to find a lack of causation, the court makes the plaintiff's 25 percent chance of avoiding the injury disappear through judicial ipse dixit!

However, that is not the worst part of the court's decision. The worst part is the court's denial of actual causation, as a result of combining the statistical probability interpretation of the standard of persuasion with the but-for test of causation. Although the plaintiff most likely would have suffered the permanent injury anyway, the defendant's negligence, by causing the loss of the blood supply from the intact blood vessels, contributed to the aggregate loss of blood that caused the permanent injury (and likely was a but-for cause of this happening earlier than it otherwise would have), just as stabbing a person who more likely than not already has been stabbed sufficient times to bleed to death, but who still has a significant amount of blood left and several hours to live, contributes to that person's bleeding to death (and likely is a but-for cause of the death happening earlier than it otherwise would have).[102] 72

4. Res Ipsa Loquitur and "Prima Facie" Presumptions

The last doctrine to be discussed is the res ipsa loquitur doctrine, which seems to exist in every jurisdiction even though it sometimes is known by a different name (e.g., as the "prima facie" evidence doctrine in Germany).[103] 73

The res ipsa loquitur doctrine, as usually stated, allows an inference of negligent causation of the plaintiff's injury by the defendant if (a) in the type of situation that existed the injury *ordinarily* does not occur unless there is negligence and (b) other possible responsible causes are sufficiently eliminated by the evidence.[104] Although condition (b) may put some limitations on the scope of the doctrine, depending on how it is interpreted,[105] it constitutes a departure from the ordinary substantive liability rules and proof rules of a magnitude that is not commonly appreciated. The doctrine allows an inference of negligent conduct by the defendant, and a further inference that the inferred negligence caused the plaintiff's injury, based on a mere ex ante statistical frequency. If, in the aggregate, most (50+ percent) occurrences of this type of event are caused by negligence, then negligent causation by the defendant can be inferred without any specific evidence of negligence or causation by the defendant or anyone else on the particular occasion. 74

[101] *Hotson* (fn. 99) 785 (Lord MacKay) (quoting *Mallett v. McMonagle*, [1970] A.C. 166, 176 (Lord Diplock)); accord, *Hotson*, 1 [1987] A.C. at 792 (Lord Ackner).

[102] See *R. Wright*, Acts and Omissions as Positive and Negative Causes, in J.W. Neyers/E. Chamberlain/S.G.A. Pitel (eds.), Emerging Issues in Tort Law (2007) 287, 295–97, 299.

[103] *Murray/Stürner* (fn. 4) 312 f.; *van Dam* (fn. 2) 1107; *van Gerven/Lever/Larouche* (fn. 2) sec. 4.2.3 at 428/15 ff.

[104] E.g., *American Law Institute*, Restatement (Second) of Torts (1965) § 328D(1).

[105] See *Wright*, Loy LA L Rev 41 (2008) 1338 ff.

75 Thus, contrary to what is commonly stated,[106] it is not true that res ipsa loquitur is merely a fancy Latin name, employed in the particular context of proving the defendant's causal negligence, for the ordinary use of circumstantial evidence to make a straightforward factual inference. Circumstantial evidence is concrete evidence specific to the particular occasion about the network of instantiated causal relationships leading to and flowing from the particular factual issue being litigated. For example, a person's running away from the scene of a murder immediately after it happened with blood on her that matches the victim's blood and holding a knife, the blade of which matches the victim's stab wound, is strong circumstantial evidence that she stabbed the victim. The inference of negligence allowed by the res ipsa loquitur doctrine as stated by many courts, interpreted literally, does not require any such case-specific evidence of what actually happened on the particular occasion, but rather only abstract statistical data (or assumptions) on what usually (50+ percent of the time) has happened in such situations. The difference in the validity of the inference depending on whether or not the word "ordinarily" is included parallels the distinction between the admissibility of habit evidence (allowed) and character evidence (generally not allowed) to prove what a person did on a particular occasion.[107]

76 The common failure to appreciate the extraordinary nature of the res ipsa loquitur doctrine is probably attributable to an assumption that the word "ordinarily" in the first condition is simply an incorporation of the preponderance of the evidence standard, interpreted as merely requiring a 50+ percent statistical probability. Once again, however, taking this interpretation seriously immediately raises a logical contradiction. Why, if the first condition is satisfied, is the inference that someone was negligent only a permissive one, rather than being required? Why, in the absence of any contrary evidence by the defendant, allow the trier of fact not to draw the inference once the conditions for drawing the inference have been established, especially since this permits inconsistent verdicts by different juries in similar situations, which is a denial of formal justice?

77 The reason, I suspect, is a discomfort with the broad formulation of the doctrine, especially when there is a conscious realization that it permits an inference of negligence by the defendant based merely on aggregate statistical frequency. Allowing the trier of fact not to draw the inference may be an implicit concession that she should be able to draw the inference or not depending on whether she actually *believes* the defendant was causally negligent in the particular situation. But if the existence of such an actual belief is the concern, the broad formulation should be abandoned in favor of the narrow one (with

[106] E.g., *W.L. Prosser/W.P. Keeton/D.B. Dobbs/R.E. Keeton/D.G. Owen*, Prosser and Keeton on Torts (5th ed. 1984) § 39, at 243 f. & fn. 20; *American Law Institute* (fn. 104) § 328D cmt. a. But see *D.B. Dobbs*, The Law of Torts (2000) § 154, at 372 (noting, correctly, that res ipsa loquitur cases differ "overwhelmingly" from ordinary circumstantial evidence cases by allowing an inference of negligence [and causation] without any particularistic evidence of negligence [or causation] on the particular occasion).

[107] E.g., *K.S. Broun et al.* (eds.), McCormick on Evidence (6th ed. 2006) vol. 1 §§ 186, 188, 195.

the word "ordinarily" omitted), or at least the trier of fact should be instructed that an inference of negligent causation should be drawn only if evidence specific to the particular case combines with the "ordinarily would not happen" statistical frequency to raise a minimal belief that the defendant actually was negligent in the particular situation and that such negligence contributed to the plaintiff's injury. On the other hand, if the broad formulation is meant to provide a second-best (or third-best) resolution of the factual uncertainty regarding negligent causation, it seems that decision should be consistently implemented through a rebuttable presumption.

Reports

I. Austria

Barbara C. Steininger*

A. Legislation

1. Tort Law Reform – Alternative Draft

1 As reported in previous Yearbooks, the question of tort law reform has been intensely discussed in Austria since an unofficial draft for a new Austrian tort law was published in 2005.[1] This draft had been prepared by a working group called together by the Austrian Ministry of Justice and has, at least partly, been met with fierce criticism. On the basis of the discussion process brought about in Austrian legal literature by this draft, the working group prepared a revised version of the draft which was finalized in 2007.[2]

2 Already after publication of the draft in 2005 some of the most fierce critics had decided to set up their own working team to elaborate an alternative draft.[3] This alternative draft was finally published in a commented version in early 2008.[4] As was the case for the draft and its revised version, it is clearly not possible to cover the whole alternative draft in detail in the framework of the current report, let alone to give a detailed analysis or evaluation of the draft. Nor is it feasible to make a detailed comparison of this alternative draft with the draft elaborated by the working group called together by the Ministry. I will therefore only highlight the most important points of the alternative draft and can only occasionally comment on the reform proposals or compare the solutions found in the alternative draft to those of the original draft.

* I would like to thank Donna Stockenhuber for proof-reading the text.

1 For a description of the draft and an English translation see *B.C. Steininger*, Austria, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 118 ff., 142 ff.; cf. also *I. Griss/G. Kathrein/H. Koziol* (eds.), Entwurf eines neuen österreichischen Schadenersatzrechts (2006).

2 For a description of the revised version of the draft and an English translation see *B.C. Steininger*, Austria, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 134 ff., 158 ff.

3 As mentioned in the preface of the book presenting the alternative draft (infra fn. 4), this working team consists of seven law professors and one Supreme Court judge.

4 *R. Reischauer/K. Spielbüchler/R. Welser* (eds.), Reform des Schadenersatzrechts III: Vorschläge eines Arbeitskreises (2008). An English translation of this alternative draft is available as an annex to the present report.

To avoid confusion, I have decided to refer to the working team's alternative draft as alternative draft or "AD", whereas the draft elaborated by the working group set up by the Ministry will be referred to as original draft or "OD"[5]. 3

a) General Character of the Alternative Draft

While the OD aimed at a total reform of Austrian tort law, the alternative draft deliberately opts for partial reform, as a total reform would, in the view of the AD working team, lead to decades of legal uncertainty.[6] The AD therefore aims at providing only selective revisions for questions which have for some time been identified as being in need of reform in legal science and practice.[7] Thereby, the AD tries to retain the current numbering of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) as far as possible, in order to facilitate locating the individual rules.[8] Moreover, the AD is supposed to work as some kind of add-on system, which means that the different reform proposals included in the AD could be implemented quite independently from each other.[9] Furthermore, the AD, in accordance with both, the current rules and the OD, covers not only delictual but also contractual liability. 4

b) Damage

§ 1293 ABGB provides a definition of damage. The same is true for § 1293 AD, according to which damage is any harm that has been inflicted on someone to his patrimony or his person. According to § 1293 AD sentence 2, damage also includes loss of the earnings which someone is entitled to expect in the normal course of events. The first sentence remains close to the ABGB's original text,[10] sentence 2, on the other hand, is intended to change the current situation: While, according to the ABGB, loss of earnings will only be compensated in case of gross negligence or intent, § 1293 AD foresees compensation of the entire damage (i.e. both actual loss – *positiver Schaden* – and lost profits)[11] even in case of slight negligence.[12] The same result is reached by § 1315 OD. However, the difference to present tort law is not as substantial as it may appear as the notion of *positiver Schaden* has been interpreted rather widely in Austrian court practice.[13] 5

[5] In its revised version if not expressly stated differently.

[6] *Reischauer/Spielbüchler/Welser* (fn. 4) 15; cf. Also *R. Reischauer*, Reform des Schadenersatzrechts – Allgemeine Gedanken, Versicherungsrundschau (VR) 2008, 25 f. Against this argument see *H. Koziol*, Schadenersatzreform: Der Gegenentwurf eines Arbeitskreises, Juristische Blätter (JBl) 2008, 349 ff., 353 f.

[7] *Reischauer/Spielbüchler/Welser* (fn. 4) 15.

[8] Ibid.

[9] Ibid. See also *Reischauer*, VR 2008, 26.

[10] Only the ABGB's reference to harm inflicted to someone's rights is no longer present in the AD, but this is not intended to lead to any change in the merits, as, according to the drafters, "rights" will always refer either to the person or the patrimony, *Reischauer/Spielbüchler/Welser* (fn. 4) 29. Critical *Koziol*, JBl 2008, 354.

[11] For an overview of *positiver Schaden* and lost profits see *H. Koziol*, Österreichisches Haftpflichtrecht I (3rd ed. 1997) no. 2/34 ff.

[12] *Reischauer/Spielbüchler/Welser* (fn. 4) 29.

[13] Cf. *P. Apathy*, Begrenzung der Haftung, Art und Umfang des Ersatzes, in: I. Griss/G. Kathrein/H. Koziol (eds.), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) no. 14 with further references.

c) Amendments to the General Clause of § 1295 ABGB

6 According to § 1295 AD, everyone is entitled to claim compensation from the tortfeasor for the damage which was culpably inflicted on him by such; the damage may have been caused by the breach of a contractual duty or in a manner unrelated to any contract. While the first sentence of § 1295 AD is, therefore, still phrased like a general clause for liability, the new second sentence of § 1295 para. 1 AD adds that it has to be assessed on the basis of one of the five newly added following paragraphs whether damage gives rise to a right to compensation or not. The drafters argue that general clauses are often too open and therefore impair legal certainty. For this reason, they decided to add the additional limiting paragraphs which are, amongst others, geared to § 823 of the German BGB.[14] While para. 2 aims at violations of contracts or other pre-existing duties, para. 3 holds that a person who unlawfully injures the life, the health, the liberty or the property of another or other absolute right, is responsible to the injured party for the damage arising therefrom and therefore contains a rule on absolute rights similar to that of § 823 para. 1 of the German BGB.[15] Para. 4 then states that apart from the cases mentioned in para. 2 and 3, the tortfeasor is only obliged to compensate if he has breached a protective law (*Schutzgesetz*) that was intended to prevent such damage or when a law specifically provides so. According to the drafter's commentary, this clause refers to pure economic loss in case of violation of protective laws.[16] § 1295 para. 5 AD comes close to the current para. 2 of § 1295 ABGB and provides for liability in case of harm inflicted intentionally in a manner *contra bonos mores*. Finally, § 1295 para. 6 AD holds that, in the absence of fault, there is no liability unless this is prescribed by law.[17]

7 Due to the constriction of the general clause of § 1295 para. 1 sentence 1 AD by the following paragraphs 2 to 4 and 6, the concept of a "general clause" is in fact given up. In comparison with § 1295 ABGB, the proposed § 1295 AD therefore loses the most important advantage, namely its flexibility. Moreover, these additional paragraphs lead to further unclarities.[18] § 1295 para. 3 AD, for example, uses the term *widerrechtlich* (unlawfully), but the AD does not clarify its concept of wrongfulness; the drafters even expressly write in their commentary that they did not want to solve the question whether the concept of *Verhaltensunrecht* or that of *Erfolgsunrecht* should apply.[19] Another problematic point can, e.g. be found in para. 4[20] which refers to the protective purpose of the norm ("… a protective law that was intended to prevent such damage …"). This reference seems to be confined to cases of protective statutes, whereas the concept is – according to current law – generally applicable.[21]

[14] See *Reischauer/Spielbüchler/Welser* (fn. 4) 30.
[15] Cf. ibid., 31.
[16] Ibid., 32.
[17] On this provision see infra at fn. 31.
[18] For a critical evaluation of § 1295 AD see *M. Schauer*, Zu den Vorschlägen des Arbeitskreises zur Reform des Schadenersatzrechts: Die Perspektive von außen, VR 2008, 44 ff.
[19] I.e. whether a wrongful conduct or a wrongful result are decisive. See *Reischauer/Spielbüchler/Welser* (fn. 4) 31. Cf. the criticism on this point by *Koziol*, JBl 2008, 357 and *Schauer*, VR 2008, 45 f.
[20] On § 1295 para. 6 see infra at fn. 31.
[21] Cf. *Schauer*, VR 2008, 46.

d) Causation

The notion of causation is not defined in the AD but it can be assumed that the *conditio sine qua non* formula will be the basis for causation just like under present law as well as according to § 1294 OD (where this is, however, expressly mentioned in the text). The AD does, however, include express rules on questions of potential causation. § 1302 AD provides for solidary liability in case of cumulative causation and for cases of superseding causation it rules that only the first cause be taken into account, whereas the second hypothetical cause be disregarded.[22] Both solutions are in accordance with the current applicable regime.[23] Regarding alternative causation, the AD, in accordance with the solution under present law, opts for solidary liability. However, § 1302 AD also explicitly states that the victim has to bear his or her own loss alone in case of alternative causation between a culpable act of a third person on the one hand, and chance on the other hand. Contrary to this, court practice currently regularly settles for partial liability in such cases.[24] 8

e) Contributory Conduct

§ 1304 AD deals with contributory conduct. The current rule of § 1304 is on the one hand amended by an explicit comment that it is also applicable if liability is not based on fault. On the other hand, § 1304 AD adds a second paragraph according to which the victim, if he fails in a blameworthy manner to avert accrual of the damage incurred, shall bear the consequential harm himself. Thereby the AD clearly deviates from the current applicable regime as, like under present law, such cases would be dealt with like other cases of contributory conduct which means that damage would be split between tortfeasor and victim.[25] 9

f) Liability for Auxiliaries

Liability for auxiliaries is, in the view of the drafters of the AD, one of the main fields where reform is imperative,[26] especially as far as liability of the principal outside of pre-existing obligations is concerned. For the latter group of cases, the current § 1315 ABGB only provides for liability of the principal if the auxiliary was inept or if the principal knew that the auxiliary was dangerous.[27] 10

[22] § 1294 OD on the other hand, provides for solidary liability in case of superseding causation.

[23] For an overview of the current situation concerning questions of potential causation see *Koziol* (fn. 11) no. 3/24 ff.; cf. also *H. Koziol/R. Welser*, Bürgerliches Recht II (13th ed. 2007) 334 ff.; *E. Karner* in: H. Koziol/P. Bydlinski/R. Bollenberger (eds.), Kurzkommentar zum ABGB (2nd ed. 2007) § 1302 no. 3 ff.; *R. Reischauer* in: P. Rummel (ed.), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II/2a (3rd ed. 2007) § 1302 no. 12 ff.

[24] See *Karner* (fn. 23) with further references. § 1294 para. 2 OD also opts for splitting the damage between tortfeasor and victim in such cases.

[25] That this change is problematic, as there is no reason justifying a differentiation between these two cases of contributory conduct, is stressed by *Koziol*, JBl 2008, 355.

[26] *Reischauer/Spielbüchler/Welser* (fn. 4) 16 ff., 45; *Reischauer*, VR 2008, 26.

[27] For a description of the current applicable regime see *Karner* (fn. 23) § 1315; *R. Reischauer* in: P. Rummel (ed.), Kommentar zum Allgemeinen bürgerlichen Gesetzbuch II/2b (3rd ed. 2004) § 1315.

11 The AD only slightly modifies contractual liability for auxiliaries, while the main change concerns extra-contractual liability: § 1315 AD provides that a person who uses another for the arrangement of his own affairs is liable for the damage which this other as auxiliary causes to a third party, whereby he is held accountable for the same standard of care as he would have had to exercise personally. With this provision, the AD substantially widens liability and this widening is not limited to entrepreneurs but covers all cases of liability for auxiliaries outside of pre-existing obligations.[28] However, in the commentary on this provision the drafters stress that there should only be liability if there is a substantial connection between the auxiliary function and the conduct causing damage, not however, if a mere risk of life materializes.[29] Unfortunately, the extent of this limitation, which is only mentioned in the materials and not in the text itself, is not very clear.[30]

g) Strict Liability

12 The AD does not include a general clause for strict liability. Its § 1295 para. 6 even stresses that there will be no liability in the absence of fault unless there are special rules foreseeing such liability. The wording of the provision implies that an application of existing strict liability statutes to other cases by analogy – as accepted under present law – should be excluded, but the commentary clarifies that such exclusion was not intended.[31] Court practice would therefore still be able to apply existing strict liability rules by analogy. Such existing rules are currently to be found mainly in special statutes. In the view of the drafters, such existing strict liability statutes should not be integrated into the ABGB, as legal practice is accustomed to these special statutes and because different cases of strict liability require different rules.[32] While the AD therefore does – in my view unfortunately[33] – not provide a general solution for questions of strict liability, it does include a few special strict liability rules, e.g. the liability for animals (§ 1320 para. 2 AD) or the liability for nuisance (§ 1318a AD).[34] Moreover, it includes a strict liability for environmental harm.[35]

[28] § 1302 OD, in contrast, only provides for tightened liability for auxiliaries outside of pre-existing obligations if the principal is an entrepreneur. Cf. *H. Koziol*, Die außervertragliche Unternehmerhaftung im Diskussionsentwurf eines neuen österreichischen Schadenersatzrechts, JBl 2006, 18. The drafters of the AD do, however, also provide an alternative solution according to which liability for auxiliaries is limited to cases in which the principal was negligent when selecting the auxiliary if the principal is a consumer (*Reischauer/Spielbüchler/Welser* [fn. 4] 46).

[29] *Reischauer/Spielbüchler/Welser* (fn. 4) 46.

[30] The drafters mention the example of an auxiliary causing a traffic accident as a pedestrian, and argue that this should not be covered by the principal's liability, whereas the opposite should apply in case of an auxiliary rendering delivery services by bicycle in a pedestrian precinct (*Reischauer/Spielbüchler/Welser* [fn. 4] 46). Critical on this point – though from different angles *Koziol*, JBl 2008, 351 and *Schauer*, VR 2008, 50 f.

[31] *Reischauer/Spielbüchler/Welser* (fn. 4) 32; *C. Fischer-Czermak*, Vorschläge zur Reform der Gefährdungshaftung, VR 2008, 38. This is also criticised by *Koziol*, JBl 2008, 351; *Schauer*, VR 2008, 48.

[32] *Reischauer/Spielbüchler/Welser* (fn. 4) 19; *Fischer-Czermak*, VR 2008, 35.

[33] Cf. *B.C. Steininger*, Verschärfung der Verschuldenshaftung (2007) 297 f., 316 f.

[34] On these strict liabilities see *Reischauer/Spielbüchler/Welser* (fn. 4) 51 f., 59 f.; *Fischer-Czermak*, VR 2008, 36 ff.

[35] Cf. infra no. 13.

h) Environmental Liability

§§ 1322a ff. AD include detailed rules on environmental liability.[36] If a business activity affects the environment because of its special dangerousness and if a person is thereby killed, sustains bodily or health injury, or property is damaged, then the operators of such activity are declared strictly liable by § 1322a AD[37] unless there is *force majeure*. The following articles define what activities are to be qualified as dangerous in the sense of § 1322a AD, provide for a presumption of causation under certain circumstances and foresee rules for cases of potential causation of harm by more than one operator. 13

i) Non-Pecuniary Loss

According to § 1324 AD, compensation for a mere personal infringement is only due if explicitly so provided by the law or if such has been specifically agreed upon. With this provision the drafters of the AD express their reservation towards compensation of non-pecuniary loss.[38] Only if explicitly provided for, should non-pecuniary loss be compensable. As mentioned in the commentary, this reluctance of the drafters also relates to compensation for "mere" bereavement of close relatives (without the close relative suffering a mental shock or injury to health); in the view of the drafters there should be no compensation in such cases.[39] Nevertheless, § 1327 para. 2 AD provides a rule on compensation for bereavement in case the legislator desires such. According to this provision, the parents, children and spouse as well as persons in a similar relationship of proximity to the deceased, who lived together with the deceased in one household, are entitled to compensation for serious emotional distress.[40] Likewise § 1325 para. 2 AD rules that § 1327 para. 2 AD is applicable *mutatis mutandis* for bodily injury in the case of particularly serious long-term consequences. 14

j) Remarks

As mentioned above, a detailed analysis or evaluation of the draft is not possible in the framework of the current Yearbook report. I have therefore mainly limited myself to a description of the most important points of this draft and limited my comments. In conclusion, I would, nevertheless, like to give a very brief general comment on the AD. 15

First of all, it is certainly enriching for the discussion process on tort law reform to now have an alternative basis for debate. However, it is in my view deplorable that the AD only opts for partial reform of Austrian tort law, which, after all, to a 16

[36] See on these rules also *F. Kerschner*, Umwelthaftung, VR 2008, 30.

[37] This means that, even in case of death or bodily injury, there will be no liability according to this provision if the environment was not affected. Liability would in such cases presuppose that there is another special strict liability statute that could be applied at least in analogy (with all the problems related to applications in analogy). Cf. *Koziol*, JBl 2008, 352.

[38] *Reischauer/Spielbüchler/Welser* (fn. 4) 70.

[39] Ibid., 70, 76 f.

[40] The burden of proof for the existence of serious mental distress lies with the person claiming compensation. Therefore, as stressed by the drafters, compensation has to be denied in case of doubt (*Reischauer/Spielbüchler/Welser* [fn. 4] 77).

large extent dates back to the 19th and early 20th century. Although partial reform can bring about improvements, such a fragmented approach is always at great risk of leading to additional inconsistencies and a result that lacks a uniform basic concept, which can only be detrimental to legal certainty. The latter, however, seems to have been one of the main reasons for setting up a working team elaborating an alternative draft. The members of the AD working team feared that the OD, which chose the method of a flexible system[41], would leave too much discretion for judges and might thereby lead to legal uncertainty. However, when looking at the AD, the question of legal certainty does not seem to be better off. Instead of the OD's flexible system approach disclosing the factors to be taken into account, the AD uses abstract legal concepts, but these are, in reality, not apt to provide additional certainty, as is very clearly exemplified by the unclarities related to § 1295 AD and its method of dealing with the question of wrongfulness.[42]

17 Therefore it seems that, even after publication of the AD, further debate will be needed before the last word on the subject can be spoken. However, discussion on tort law reform somewhat stagnated in the course of the year. It seems that the legal community awaits an official Ministry draft before further ink is spilled on the topic.

2. Interbankmarktstärkungsgesetz – IBSG und Finanzmarktstabilitätsgesetz – FinStaG sowie Änderung des ÖIAG-Gesetzes 2000, des Bankwesengesetzes, des Börsegesetzes, des Finanzmarktaufsichtsbehördengesetzes sowie des Bundesfinanzgesetzes 2008[43]

18 In the course of the current Act, which was passed in relation with the global financial crisis in autumn 2008, the Austrian legislator changed *inter alia* § 3 Finanzmarktaufsichtsbehördengesetz (Act on the Financial Market Authority, FMAG). § 3 FMAG provides for liability of the Austrian federal state for damage caused by organs or employees of the *Finanzmarktaufsichtsbehörde* (Austria's Financial Market Authority, FMA) in the course of its duties and excludes direct liability of the FMA, its organs and employees towards the person harmed. This provision has now been changed by adding a sentence according to which only damage suffered by the legal entities to be supervised by the FMA will be considered as "damage" in the sense of this provision.[44]

[41] *W. Wilburg*, Die Elemente des Schadenersatzrechts (1941); *id.*, Entwicklung eines beweglichen Systems im bürgerlichen Recht (1950). See also *F. Bydlinski*, Juristische Methodenlehre und Rechtsbegriff (2nd ed. 1991) 529 ff. For an overview of this flexible system approach in English see *B.A. Koch*, Wilburg's flexible system in a nutshell, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2001 (2002) 545 ff. The same method was chosen by the European Group on Tort Law for drafting the Principles of European Tort Law. See *J. Spier*, Drafting European Tort Law, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2002 (2003) 543.

[42] See supra at no. 7.

[43] Bundesgesetzblatt (Federal Law Gazette, BGBl) I 136/2008, 26 October 2008. Available at <http://ris.bka.gv.at/Bgbl-Auth>. Austrian legislation is available at <http://www.ris.bka.gv.at/Bundesrecht>.

[44] "Schäden im Sinne dieser Bestimmung sind solche, die Rechtsträgern unmittelbar zugefügt wurden, die der Aufsicht nach diesem Bundesgesetz unterliegen."

Therefore, liability of the Austrian Federation on the one hand as well as of the FMA, its organs and employees on the other hand, towards other persons is now excluded. According to the preparatory materials to the present Act, this provision aims at excluding liability occurring only as a consequence of the supervisory conduct in the property of third persons.[45] This means particularly that there will be no public liability for damage suffered by investors.

Such an exclusion of public liability is problematic as there seems to be no substantial reasons for this exclusion other than the state's fear of extensive liability. As is stressed by *Kathrein*[46], it is somewhat strange that, based on the current Act, the state on the one hand assumes liability of up to € 100 billion for banks and insurance companies, while at the same time excluding liability for its own misconduct. Moreover, the current change has been met with criticism also from the point of view of Constitutional law and EC law.[47] 19

B. Cases

1. Oberster Gerichtshof (Austrian Supreme Court, OGH)[48] 29 January 2008, 1 Ob 138/07m[49]: Medical Liability; Burden of Proof for Causation

a) Brief Summary of the Facts

The plaintiff suffered a tendon tear in his arm in the course of lumbering work. On 22 January the plaintiff was treated in the defendant's hospital, where the attending physician did not recognize the tendon tear and only told the plaintiff to return for a further examination in two or three days if things got worse. While such a tendon injury can normally only be diagnosed after one to two weeks, the attending physician should have suspected such an injury, should have made a new appointment with the plaintiff for further examination and, moreover, should have informed him about the need for an operation in case of a torn tendon. 20

After a few days the plaintiff's pain increased. He did, however, not return to the defendant's hospital. Only on 4 February was the torn tendon diagnosed in another hospital where an appointment was made for surgery on 6 February. The plaintiff could not keep this appointment as he contracted influenza. After he recovered on 16 February he made a new appointment for surgery on 26 February. While an operation on 6 February would still have enabled a direct 21

[45] Erläuterungen zur Regierungsvorlage (annotations to the government bill, ErläutRV), 682 Beilagen zu den stenographischen Protokollen des Nationalrates (BlgNR) 23. Gesetzgebungsperiode (legislative period, GP) 6.

[46] *G. Kathrein*, Vertrauen ist gut …: Das Finanzmarktstabilitätsgesetz, Österreichische Juristen-Zeitung (ÖJZ) 2008/87.

[47] See *H. Kunst/U. Salburg*, FMA: Amtshaftungsausschluss statt effizienter Aufsicht! ecolex 2008, 1092.

[48] Cases are available at <http://www.ris.bka.gv.at/jus>.

[49] Zivilrecht aktuell (Zak) 2008/244.

suture of the tendon, this was no longer possible on 26 February. The tendon therefore had to be attached to the muscle of an adjacent tendon which led to reduced mobility of the affected arm.

22 The lower courts denied the plaintiff's claim, arguing that the defendant's behaviour was not causal for the plaintiff's harm as the plaintiff had seen a specialist and had arranged an appointment for surgery in time.

b) Judgment of the Court

23 The OGH states that the lower courts had correctly assumed a treatment error as the attending physician had not made a new appointment for further examination and had violated his disclosure duties concerning the urgency of surgical treatment.

24 The OGH then holds that, if a treatment error is established and there is no doubt that the probability of the occurrence of damage was not only insignificantly increased by this treatment error, the defendant physician or hospital will have to prove that its negligence was with utmost probability not causal for the patient's harm. Therefore, according to the OGH, the burden of proof for causation is reversed in such cases.

25 The OGH further holds that, although the plaintiff got an appointment for a timely operation, the defendant's negligence might still be causal for the plaintiff's harm if the surgery had been performed before the plaintiff's influenza had a new appointment been made and had he been informed of the urgency of surgery. According to the OGH, the burden of proof in this respect falls on the defendant according to the arguments set out above. For lack of fact finding on this question the OGH referred the case back to the court of first instance.

c) Commentary

26 Decisive for the case at hand is the question whether the negligence on the part of the defendant caused the plaintiff's loss of mobility in his arm. While the OGH's reasoning, according to which the behaviour of the defendant's physician might have been causal is convincing, the reversal of the burden of proof as applied in the OGH's court practice seems problematic. The OGH does not give detailed reasons for this reversal of the burden of proof. Sometimes it refers to the difficulties of proof (*Beweisnot*) of the plaintiff and sometimes it mentions prima facie evidence (*Anscheinsbeweis*). However, the difficulties of proof alone cannot be a reason for reversing the burden of proof as the defendant will regularly be confronted with the same difficulties. Prima facie evidence on the other hand, is only possible if experience suggests a typical course of events. If this is not the case, prima facie evidence is of no use in such cases.

27 What could be put forward in favour of a reversal of the burden of proof in the present case is the fact that the treatment error was deduced from omissions of the attending physician. In case of omissions, however, the question of the causality of the breach of duty coincides with the question of alternative law-

ful behaviour (*rechtmäßiges Alternativverhalten*, i.e. the question whether the damage would also have occurred had the defendant acted as required). While normally the plaintiff has to prove causation, the burden of proof for alternative lawful behaviour lies with the defendant. As, in case of omissions, the two cannot be separated, the burden of proof will normally lie with the plaintiff. However, it has been argued in literature that there should be a reversal of the burden of proof in case of concretely dangerous and unlawful behaviour of the defendant. The latter would then have to prove that the increase in risk he brought about did not materialize.[50] This concept would, however, lead to a general reversal of the burden of proof in case of omissions and would thereby lead to a tightening of liability for omissions which does not seem justified in such a general way as the legal order is otherwise more restrictive in accepting liability in case of omissions than it is in case of positive acts. Therefore, even in case of omissions, the reversal of the burden of proof does not seem justified, which means the burden of proof for causation should remain with the plaintiff.

In the present case, the fact finding was insufficient to decide on the question of causation. However, if even the continued proceedings cannot ascertain whether the surgery would have taken place before the plaintiff contracted influenza had a new appointment been made and had he correctly been informed about the urgency of a surgical treatment, the burden of proof should in my view – and against the OGH's practice – remain with the plaintiff. In this case, the plaintiff would only be able to prove hypothetical causation of the negligent conduct which is normally not sufficient for establishing liability. 28

However, in the present case, the negligent behaviour in the sphere of the defendant concurs with the plaintiff's illness as a second potential cause for the belated surgery. One could therefore consider to split damage between plaintiff and defendant in accordance with a theory developed by *Bydlinski*: On the basis of his generally accepted theory of joint and several liability in case of alternative causation of two faulty acts,[51] he suggests that, in cases of alternative causation of faulty behaviour on the one hand and a risk in the sphere of the plaintiff on the other hand, damage should be divided between plaintiff and defendant in the light of the Austrian Civil Code's provision on contributory negligence (§ 1304 ABGB)[52]. 29

[50] *Karner* (fn. 23) § 1295 no. 14; *M. Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 393; *Koziol* (fn. 11) no. 8/67, 16/12, 16/37; differentiating however *id.*, Der Beweis des natürlichen Kausalzusammenhanges, in: A. Koller, Haftpflicht- und Versicherungsrechtstagung 1999 (1999) 86 ff., 90 f., based on the argument outlined in the following sentence.

[51] *F. Bydlinski*, JBl 1959, 8 ff.; *Koziol* (fn. 11) no. 3/29 ff. For an overview in English see *H. Koziol*, Problems of alternative causation in Tort Law, in: H. Hausmaninger et al. (eds.), Developments in Austrian and Israeli Private Law (1999) 178 ff.; *B.A. Koch*, Austria, in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann, Digests of European Tort Law I (2006) 6a/3, no. 6–8.

[52] *F. Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 86 ff.; *id.*, Aktuelle Streitfragen um die alternative Kausalität, in: Festschrift Beitzke (1979) 30 ff.; *id.*, Haftungsgrund und Zufall als alternativ mögliche Schadensursachen, in: Festschrift Frotz (1993) 3. See also *Koziol* (fn. 11) no. 3/36 ff. For an overview in English see *H. Koziol*, Problems of alternative causation in Tort Law, in: H. Hausmaninger et al. (eds.), Developments in Austrian and Israeli Private Law (1999) 180 ff; *B.A. Koch*, Austria, in: B.Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds.), Digests of European Tort Law I (2006) 6b/3, no. 6–9.

30 This solution would avoid an all or nothing approach as would e.g. apply in case of a reversal of the burden of proof. While the OGH has already followed this theory repeatedly,[53] it requires a grave treatment error for the application of this theory, but has already accepted a violation of disclosure duties as being equivalent to such a grave treatment error.[54] In my view it is decisive whether the defendant's behaviour was concretely dangerous, i.e. highly adequate for the occurrence of the damage.[55] While this will regularly be the case for a grave treatment error, it might also apply to normal treatment errors and violations of disclosure duties.

2. OGH 29 May 2008, 2 Ob 176/07g[56]: New for Old, *Vorteilsausgleich* (Adjustment of Damages due to Benefits Received)

a) Brief Summary of the Facts

31 The defendant negligently handled bangers and thereby caused a fire which destroyed a house that had been unoccupied for several years. As a consequence of the demolition of the remains of the house after the fire, the value of the real property was increased by the amount of the fictitious demolition costs. The plaintiff in the current case is the insurance company which reimbursed the owners of the house on the basis of a fire insurance contract for the time value of the house and the clean-up costs. It now claims compensation of the payments made to the owners from the defendant, based on § 67 VersVG (Versicherungsvertragsgesetz, Insurance Contract Act) which provides for a subrogation by law (*cessio legis*) in favour of the insurer, as far as the insurer compensates the damage of the insurant.

32 While the lower courts awarded the plaintiff compensation, the defendant argued that there was actually no damage, as the building he destroyed had lowered the market value of the real property.

b) Judgment of the Court

33 The OGH first refers to § 67 VersVG and holds that the subrogation by law presupposes the actual existence of a compensation claim of the person harmed against the defendant and states that subrogation will only be possible to the extent to which the person harmed was entitled to claim compensation. It then examines whether the plaintiff suffered compensable damage:

34 The OGH holds that, if a thing has been destroyed completely by slight negligence of the tortfeasor (as in the case at hand), the general value (*gemeiner*

[53] OGH 4.6.1993, 8 Ob 608/92, Evidenzblatt der Rechtsmittelentscheidungen (EvBl) in ÖJZ 1994/13; 7.11.1995, 4 Ob 554/95, SZ 68/207 = JBl 1996, 181 = Recht der Medizin (RdM) 1996, 54; 15.3.2001, 6 Ob 36/01i. In contrast, an all or nothing approach was chosen in OGH 10.10.1993, 6 Ob 604/91, JBl 1992, 522 = EvBl 1993/32; 8.7.1993, 2 Ob 590/92, JBl 1994, 540 with cmt. by *R. Bollenberger*.

[54] OGH 26.7.2006, 3 Ob 106/06v. See *B.C. Steininger*, Austria, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) no. 39 ff., 45, 49.

[55] *Koziol* (fn. 11) no. 3/38.

[56] ecolex 2008, 809 = Zak 2008/511 = Zeitschrift für Verkehrsrecht (ZVR) 2008/241 with cmt. by *Ch. Huber* = JBl 2009, 37.

Wert) of the thing will have to be compensated according to § 1332 ABGB. In the view of the OGH, a building falls under the wide notion of "thing" of § 285 ABGB and does therefore represent an own asset notwithstanding the fact that property law attributes it to the land it is built on. This asset was destroyed by the defendant's negligence. However, as there is no market value for a building without the land it is built on, computation of damage could only be based on construction costs.

As always in case of destruction of a used good which cannot be replaced by an equivalent second hand good, the OGH stresses, one is faced with the problem of *Neu für Alt* – new for old. The pecuniary advantage arising from the construction of a new building would lead to an enrichment of the person harmed which would be in conflict with the idea of compensation. Therefore, the OGH holds, a "new for old" discount will have to be made if the plaintiff can use the newly constructed building longer than he would have been able to use the destroyed building. 35

Moreover, the OGH stresses, the idea of compensation also requires that an increase in value of the real property be taken into account on the basis of an adjustment of damages due to benefits received (*Vorteilsausgleich*). While the lower courts had argued that a *Vorteilsausgleich* does not apply as damage will, *in casu*, have to be calculated in an objective-abstract way, the OGH holds that, even in case of an objective-abstract calculation of damage, advantages of the damaged good itself will have to be taken into account. It further holds that not only the building but also the real property have to be qualified as damaged goods, which means that an increase in value of the real property will have to be taken into account even in case of an objective-abstract calculation of damage. 36

Therefore, the OGH concludes that the amounts paid on the basis of the insurance contract have no final significance for the amount of compensation to be paid by the defendant and refers the case back to the court of first instance for further fact finding. 37

c) Commentary

The result reached by the OGH in its current decision, namely that a "new for old" deduction will have to be made on the one hand and that, on the other hand, the increase in value of the real property will have to be taken into account, can be approved of. Both aspects have to be taken into account to avoid an enrichment of the person harmed. 38

As far as the question of *Vorteilsausgleich*, i.e. the computation of damage in consideration of the increase in value of the real property, is concerned, the line of argument that, even in case of an objective-abstract calculation of damage, advantages of the damaged good itself are to be taken into account, is convincing.[57] 39

[57] Cf. *W. Thiele*, Gedanken zum Vorteilsausgleich, Archiv für die civilistische Praxis (AcP) 167 (1967) 207 f.; *Koziol* (fn. 11) no. 10/22; *Karner* (fn. 23) § 1295 no. 18. Different *Reischauer* (fn. 23) § 1312 no. 7.

But it is not so clear why the OGH first stresses that a building is an asset on its own notwithstanding its attribution to the land it is built on, while it then bases its decision on the fact that the real property as such is a damaged good. The result, however, is both straightforward and conclusive.

3. OGH 10 June 2008, 4 Ob 75/08w[58]: Multiple Causes

a) Brief Summary of the Facts

40 The plaintiff in this case was born with a disability. Her mother suffered from renal insufficiency which, in the course of the pregnancy, led to a retardation of the plaintiff's development. Although this was to be expected given the mother's illness, the defendant gynaecologist did not make appointments for examinations often enough and only opted for a delivery by caesarean section in the 37th week of the pregnancy, which was too late. In case of a delivery in the 34th week of the pregnancy (or even earlier in case of an indication to do so) the strong fetal retardation would with high probability have been less severe. However, in case of a delivery before the 37th week of pregnancy, the birth of a healthy child is very unlikely.

b) Judgment of the Court

41 The OGH argues that the harm suffered by the plaintiff can be attributed to the interaction of two causes, namely the treatment error of the defendant on the one hand and the plaintiff's pre-existing intrauterine illness on the other hand. Therefore, the OGH qualifies this case as a case of accumulated impact (*summierte Einwirkungen*) as none of the causes would in itself have led to the precise damage of the plaintiff.

42 The OGH comes to the conclusion that, in cases in which both a pre-existing damage of the plaintiff and a subsequent treatment error cause a certain total damage, which can only have been caused by the interaction of both causes and not by one of them alone, the defendant physician will not be liable for the pre-existing damage but only for the additional damage caused by his treatment error as long as the contribution to the total damage brought about by the different causes can be defined. If such a definition of different parts of damage is not possible, both, the physician and the person harmed will have to bear the loss in equal shares in analogy to § 1304 ABGB. Thereby, the OGH applies the theory developed for alternative causation of faulty behaviour on the one hand and a risk in the sphere of the plaintiff on the other hand, i.e. a case of only potential causation on the part of the tortfeasor, to the present case.[59] The OGH argues that this theory must *a fortiori* apply here as it is clear that both causes contributed to the total loss while only the respective share remains uncertain.

[58] ecolex 2008, 819 = Zak 2008/541 with cmt. by *A. Kletečka* = Interdisziplinäre Zeitschrift für Familienrecht (FamZ) 2008, 251.

[59] On this theory see no. 29 above with further references.

c) Commentary

While the result reached by the OGH in the present case merits approval, the reasoning of the current decision is slightly misleading. The facts concerning the question of causation are not entirely clear from the decision but it seems that, even in case of proper treatment by the defendant, the plaintiff would have been born with a disability though this disability would have been less severe. Although, therefore, both, the plaintiff's intrauterine illness as well as the defendant's treatment error contributed to the harm suffered by the plaintiff, the defendant's treatment error was only causal for the aggravation of the plaintiff's disability, not however for the basic harm (i.e. the disability as such). It is therefore somewhat misleading when the OGH stresses that the damage only emerged due to the contribution of the two causes as this might induce one to think of cases in which both factors were a *conditio sine qua non* for the whole damage which is not the case in the present decision.[60] However, the solution reached by the OGH is convincing: Partial liability of the defendant, i.e. liability only for the aggravation of damage caused by him if the aggravation – i.e. the share of the damage caused by him – can be defined is a solution consistent with § 1302 sentence 1 ABGB (although this article refers to several tortfeasors while here a treatment error occurred in addition to a risk in the sphere of the person harmed). Opting for an allocation of harm in equal proportions if the shares attributable to the two causes cannot be defined is also conclusive. Thereby the theory developed for alternative causation of faulty behaviour and a risk in the sphere of the person harmed is convincingly transferred to the case of multiple though indefinable contributions to the harm as regulated in § 1302 sentence 2 ABGB. 43

4. OGH 26 June 2008, 2 Ob 158/07k[61]: Compensation for Property Damage Concerning Motor Vehicles; Fictitious Costs of Repair

a) Brief Summary of the Facts

The plaintiff's leased car was damaged in a traffic accident caused by a driver insured by the defendant insurance company. Before the accident the car was worth € 32,500 as opposed to € 5,500 after the accident. Repair costs would have amounted to € 21,000 and the loss in value upon resale after repair (*merkantiler Minderwert*) would have been € 2,700. The car was not repaired but sold at a price of € 5,500. The plaintiff claimed compensation for the car's objective loss in value arguing that the lessor had subrogated the compensation claim to him; alternatively, he claims compensation for the fictitious costs of repair and the fictitious loss in value upon resale. 44

b) Judgment of the Court

The OGH examines the claims of the lessor which were subrogated to the plaintiff and thereby first refers to its practice on compensation for property 45

[60] Cf. *A. Kletečka* (in his cmt. on the present decision, Zak 2008, 315), who stresses that this is not a case in which only the co-action of both events leads to the damage.

[61] ecolex 2008, 1012 = Zak 2008/580 = ZVR 2008/227 with cmt. by *Ch. Huber* = JBl 2009, 39.

damage concerning cars: According to the OGH's consistent practice, the person harmed is entitled to claim compensation for fictitious costs of repair, i.e. the costs necessary for repairing the car – irrespective of the question whether the car is in fact repaired or not. If the car is indeed repaired, the person harmed is entitled to compensation of the factual cost of repair, even if these costs slightly exceed the value of the car. However, according to recent practice of the OGH, compensation of fictitious repair costs is limited by the objective loss in value of the car. Therefore, the costs of repair will normally be the basis of compensation claims if it is economically sensible and technically possible to repair the vehicle. If the fictitious costs of repair are lower than the objective loss in value, the person harmed will only be entitled to compensation for the costs of repair due to the primacy of restoration in kind on the one hand and the duty to mitigate the loss on the other hand.

46 The OGH stresses, however, that even under these circumstances a computation of damages on the basis of fictitious costs of repair presupposes that a technically impeccable repair is possible and not inappropriate. The OGH then refers to a recent case in which it had decided that notwithstanding the economic efficiency of a repair of a damaged new car, a repair is not appropriate if the car was badly damaged, especially if the damage concerns parts of the car which are relevant for its safety.[62] The OGH holds that the arguments underlying this decision also apply if the car was not new. In the case at hand a considerable risk of latent defects of relevance for the car's safety would have remained even after professional repair of the car. Therefore, the OGH argues, the person harmed, who expresses his reasonable mistrust in the restoration of the safety of the car by selling it unrepaired, should be entitled to compensation on the basis of the objective loss in value instead of the fictitious costs of repair. Furthermore, the OGH stresses that claiming compensation for the (higher) objective loss in value does under such circumstances not violate the duty to mitigate the loss as the plaintiff did not fail to take measures to mitigate the loss which can be expected from a sensible average person. Consequently, the OGH awarded the plaintiff compensation for the objective loss in value of his car.

c) Commentary

47 Reparation costs plus the loss in value upon resale after repair will regularly be higher than the objective loss in value of the damaged car. In that respect, the facts leading to the present case are extraordinary as here the objective loss in value of the used car is higher than the combined amount of fictitious reparation costs and the fictitious loss in value upon resale.[63] The solution reached by the OGH for this case in its present decision is convincing. § 1323 ABGB provides that reparation has to be in kind if this is possible and appropriate. Only if this is not the case does the said provision foresee monetary com-

[62] OGH 23.3.2007, 2 Ob 162/06x, EvBl 2007/108 = ecolex 2007, 515 = Zak 2007/354 = ZVR 2008/45 with cmt. by *Ch. Huber* ZVR 2008/29.

[63] Cf. *Ch. Huber*, ZVR 2008, 469, who, in his cmt. on the present decision, therefore assumes that there has been an estimation error on the part of the motor vehicle assessor.

pensation.[64] As a result of the present decision, restoration in kind is not only qualified as inappropriate if a repair is economically inefficient but can also be considered inappropriate for the person harmed if the car's safety remains impaired notwithstanding professional repair. Therefore, the person harmed will in such cases be entitled to monetary compensation for the objective loss in value of the car.

5. OGH 10 July 2008, 8 Ob 51/08w[65]: Liability of an Expert towards Third Persons

a) Brief Summary of the Facts

A car damaged in a car accident was repaired in the plaintiff's garage at the expense of an insurance company. Before repair a motor vehicle expert of the insurance company determined the expected costs of repair to be € 1,900 and thereby assumed that the right front door would have to be replaced. After repair the insurance company initiated an examination of the plaintiff's repair bill by the defendant motor vehicle expert. 48

The defendant came to the – incorrect – conclusion that the right front door had not been replaced but only repaired. He reached this conclusion without having conducted a coating thickness measurement which would have been state of the art. Had the defendant measured the coating thickness, it would have been clear that the door had been replaced. 49

On the basis of the defendant's expert opinion, the insurance company brought a charge at the office of public prosecution, which led to a criminal trial against the plaintiff who was accused of severe fraud. However, an expert opinion obtained in the course of a civil law trial brought by the owner of the damaged car against the insurance company made clear that the door had in fact been replaced. After presentation of this expert opinion in the criminal trial, the plaintiff of the present case was acquitted. The plaintiff claims € 5,500 as compensation for lawyer's fees incurred in the course of the criminal trial. 50

b) Judgment of the Court

While both lower courts had awarded the plaintiff compensation, the OGH rejects the plaintiff's claim. It sets out that tortious liability of experts towards third persons for pure economic loss as suffered in the present case will only 51

[64] Therefore, calculating compensation of property damage concerning cars on the basis of fictitious costs of repair seems not entirely correct from a dogmatic point of view as repair costs can only be paid as refund of the expenses for restoration in kind (*Koziol* [fn. 11] no. 9/11). However, as, according to the OGH's recent practice compensation of fictitious costs of repair is limited by the objective loss in value, this dogmatic inprecision is ultimately unproblematic (see on this question *P. Apathy*, Aufwendungen zur Schadensbeseitigung [1979] 74 ff.; *id.*, Fragen des Ersatzes von Reparaturkosten, ZVR 1981, 261 ff.; *Koziol* [fn. 11] no. 9/11, 10/19).

[65] ecolex 2008, 1018 = RdW 2008, 776 = Zak 2008/647 with cmt. by *U. Schrammel*, Zak 2008, 367 = EvBl 2009/3 with cmt. by *S. Hohensinn* = Österreichische Richterzeitung (RZ) 2009, 116 = JBl 2009, 174 = ZVR 2009/30 with cmt. by *Ch. Huber*.

be admitted under limited conditions.[66] Apart from cases in which there was at least *dolus eventualis* on the part of the expert (which was not claimed in the present case), court practice and prevailing opinion have, as the OGH points out, accepted liability towards third persons if the person ordering the expert opinion discernibly also pursued interests of the third person. Moreover, the OGH holds that objective legal duties of care will be extended to a third person if the expert has to expect that his expert opinion will become known to third persons and serve them as a basis for their decisions, i.e. if a basis for reliance (*Vertrauenstatbestand*) was created.

52 The OGH holds that, on the basis of this practice, the defendant will not be liable towards the plaintiff. The OGH stresses that the interests of the insurance company ordering the expert opinion and those of the plaintiff oppose each other. Liability is, therefore, only possible if the expert opinion created a basis for reliance on which the plaintiff relied. However, this is not applicable in the case at hand: The expert opinion was supposed to enable the insurance company to control the correctness of the repair costs and therefore only served the insurance company's own financial interests. A basis for reliance should precisely not be created. Extending liability of the expert towards third persons to such cases would, according to the OGH, lead to liability of the expert for any incorrectness of the expert opinion leading to pure economic loss of the third person and would thereby blur the distinction between contractual and tortious liability.

53 The situation is, according to the OGH, different if someone is suspected of having committed a crime because of an incorrect expert opinion in a criminal trial. In such cases, the expert opinion serves the purpose of solving a criminal case and, therefore, the expert has to anticipate that persons other than the person accused will also be prosecuted on the basis of his expert opinion. The mere fact that the defendant in the case at hand could have expected that the reproach that the door was not replaced might lead to a criminal prosecution does, in the view of the OGH, not suffice to justify liability. The OGH motivates this with the fact that the expert opinion of the defendant was not aimed at confirming or rebutting a suspicion of the commission of a crime in a criminal trial that serves the ascertainment of truth. Moreover, the OGH stresses, even a person who directly files charges against someone else will only be liable if he did so against better judgement.

c) Commentary

54 The OGH applies its practice on tortious liability of experts towards third persons for pure economic loss to the present case. However, it seems doubtful whether the case at hand really concerns pure economic loss. After all, the defendant's honour (and reputation) is at stake which is qualified as an absolutely

[66] It argues that tortious liability of the experts towards third persons for pure economic loss as suffered in the present case will regularly presuppose at least *dolus eventualis* on the part of the expert, which was not claimed in the present case.

protected personality right.[67] Therefore, the resulting pecuniary loss suffered by the plaintiff is not purely economic. This means that liability will have to be assessed according to general rules.[68] The defendant will accordingly be liable for the plaintiff's loss if he acted wrongfully and if he was at fault, whereby negligence on the part of the defendant suffices.[69] The defendant could have expected that the reproach that the door was not replaced might lead to a criminal prosecution. His behaviour was therefore highly dangerous for the damage suffered by the plaintiff and will, in my view, have to be qualified as wrongful. The counter-argument of the OGH, according to which even a person who directly files charges against someone else will only be liable if he did so against better judgement can, in my view, not change this result. The latter situation is based on the primacy of a functioning of the judicial system but this reason is not applicable to the defendant, who did not file charges but was simply negligent when drafting his expert opinion.[70]

6. OGH 7 August 2008, 6 Ob 148/08w[71]: Compensation of Maintenance for an Unplanned Child

a) Brief Summary of the Facts

The plaintiffs are the parents of healthy triplets. In order to get pregnant three embryos fertilized in vitro with the sperm of the first plaintiff were implanted in the second plaintiff's uterus in the defendant's fertility clinic. However, to reduce the probability of a multiple pregnancy, the plaintiffs had expressly agreed with the attending physician that only two embryos be implanted. Had in fact only two embryos been implanted, the second plaintiff would have given birth to twins instead of triplets. The plaintiffs claim compensation for one third of the maintenance costs for their triplets. 55

b) Judgment of the Court

The sixth panel of the OGH denies the plaintiffs' claim and holds that the OGH has already decided several times that the birth of a healthy child cannot be qualified as damage. It refers to the fact that the fifth panel has qualified the entire maintenance costs for a handicapped child as compensable damage in two different wrongful birth cases, but then the sixth panel argues that the birth of a healthy child and the birth of a disabled child are different and incomparable facts ac- 56

[67] Cf. *H. Koziol*, Haftpflichtrecht II (2nd ed. 1984) 6 with further references; *B.A. Koch* in: H. Koziol/P. Bydlinski/R. Bollenberger (eds.), Kurzkommentar zum ABGB (2nd ed. 2007) § 16 no. 9; *Karner* (fn. 23) § 1330 no. 2.

[68] *R. Welser*, Die Haftung für Rat, Auskunft und Gutachten (1983) 17 ff.; *Karner* (fn. 23) § 1300 no. 4; cf. also OGH in Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (SZ) 37/105.

[69] *Koziol* (fn. 67) 189; *Karner* (fn. 23) § 1300 no. 4.

[70] See *S. Hohensinn* in her cmt. on the present decision, ÖJZ 2008, 30.

[71] ecolex 2008, 1117 with cmt. by *H. Friedl* = Zak 2008/578 with cmt. by *A. Kletečka* = JBl 2009, 108 = RdM 2009, 20 with cmt. by *A. Leischner* = Österreichisches Anwaltsblatt (AnwBl) 2009, 100. Cf. also *R. Fucik*, Wieder Neues zu „wrongful birth", ÖJZ 2008/67; *E. Karner*, Unerwünschte Zeugung und ungeplante Geburt – (k)eine Rechtsprechungsdivergenz? Zeitschrift für Ehe- und Familienrecht (EF-Z) 2009, 91.

cording to consistent OGH practice. Moreover, the OGH states that, as the case at hand deals with healthy children, it cannot give its opinion on the question whether the reasons behind a denial of maintenance compensation for a healthy child should also be applied to the basic maintenance for a disabled child.

57 Furthermore, the OGH stresses that it does not have to deal with the question whether very limited means of the parents can be a reason to qualify maintenance costs for a healthy child as compensable damage as the question was not raised in the proceedings before the OGH[72].

58 Finally, the OGH argues that whoever calls for a decision of an amplified panel of the OGH on questions of maintenance compensation for unplanned children mistakes the prerequisites for an amplification of the court's panel: An amplified panel presupposes a divergence in the OGH's practice but, in the view of the sixth panel, there is no such divergence as the birth of healthy and disabled children are incomparable facts.

c) Commentary

59 As reported on in previous Yearbooks, Austrian law has in the past few years seen several heavily discussed but unfortunately contradictory decisions on questions of maintenance compensation for unplanned children[73]:

60 On the one hand the fifth panel has in two cases[74] awarded parents of disabled children compensation for their children's entire maintenance costs: It argued that a comparison between the maintenance obligation after the birth of the disabled child on the one hand and the situation after an abortion on the other hand leaves no doubt that the entire maintenance costs for the disabled child constitute compensable damage in the sense of § 1293 ABGB.

61 If one applies this line of argument to cases of unplanned children born healthy, their maintenance costs would also have to be compensable.

62 Decisions by other OGH panels, on the other hand, doubt whether maintenance for an unplanned child can be qualified as compensable damage[75]. According to these decisions, compensation is only possible exceptionally if the maintenance obligation places an extraordinary burden on parents, be it because of the limited means of the parents or the special needs of the child[76]. One could

[72] The court of first instance had qualified the means of the parents as sufficient to cover maintenance for the triplets.

[73] OGH 25.5.1999, 1 Ob 91/99k (for a summary of this decision see *Steininger* [fn. 54] no. 13 f.); 7.3.2006, 5 Ob 165/05h (see *Steininger* [fn. 54] no. 5 ff. with further references); OGH 14.9.2006, 6 Ob 101/06f (see *Steininger* [fn. 54] no. 18 ff.); 30.11.2006, 2 Ob 172/06t; 11.12.2007, 5 Ob 148/07m (see *Steininger* [fn. 2] no. 61 ff.).

[74] OGH 1 Ob 91/99k; 6 Ob 101/06f; 2 Ob 172/06t. Cf. the references in fn. 73 above.

[75] OGH 6 Ob 101/06f; 2 Ob 172/06t in this direction already 1 Ob 91/99k. Cf. the references in fn. 73 above.

[76] The underlying argument as put forward by some scholars being that the tortfeasor's conduct does not merely cause maintenance costs but leads to a comprehensive family relationship

therefore argue that the existence of a financial emergency is qualified as a prerequisite for compensation. If one follows this second line of argument, it is not clear why, in case of a disability of the child, this child's entire maintenance costs should always be compensable.

With its current decision, the OGH not only maintains these contradictory lines of court practice but does in my view even worsen the situation as the sixth panel now expressly refers to a consistent line of court practice according to which the birth of healthy and disabled children are different and incomparable cases. In its previous practice, however, the OGH did not distinguish between healthy and disabled children but between wrongful birth and wrongful conception cases. The latter groups of cases differ in so far as conception should have been avoided in wrongful conception cases while the negligent act occurred after conception in wrongful birth cases. Although in the decisions issued by the OGH so far all wrongful birth cases concerned disabled children and all wrongful conception cases healthy children, it is not decisive for this distinction whether the child is disabled or not. This is ignored by the OGH in the current decision. 63

Both distinctions – between healthy and disabled children on the one hand and wrongful birth and wrongful conception cases on the other hand – are detrimental for a solution of the basic question whether and if so to what extent maintenance costs for an unplanned child are compensable. Moreover, these distinctions conceal the fact that the OGH's practice has up to now not managed to find a consistent solution to this basic question: While the fifth panel qualifies the entire maintenance costs as compensable, this will only exceptionally be the case according to the other OGH decisions. 64

As there are hardly any clues in the law as to how this group of cases should be solved, it is understandable that different panels of the OGH reach different conclusions. While in my view both lines of court practice are justifiable this is definitely not the case for contradictory Supreme Court practice. It is therefore regrettable that the OGH, by denying the existence of a contradiction in its practice, refuses to decide the case in an amplified panel. Again the OGH conceals the contradiction between its decisions by referring to factual differences which are not decisive for the basic legal questions. A decision of the legislator on this topic would therefore be most useful. However, it is to be feared that the legislator will not come up with a solution in the near future. 65

including different pecuniary and non-pecuniary aspects, which will in total usually not be considered as pecuniary loss and can therefore only be considered as being detrimental if it places an extraordinary burden on parents. Cf. *Steininger* (fn. 54) no. 13 and the references ibid. in fn. 18.

7. OGH 14 October 2008, 4 Ob 155/08k[77]: Medical Liability; Burden of Proof

a) Brief Summary of the Facts

66 The plaintiff underwent abdominal surgery in the defendant hospital. The surgery was performed *lege artis* but, as a typical complication of this surgery, he developed an adhesion. However, the risk of such an adhesion had not been disclosed to the plaintiff before the surgery. The plaintiff claims compensation for pain and suffering (which was no longer disputed in the trial before the OGH) as well as a declaratory judgment asserting the defendant's liability for any future harm resulting from the surgery.

67 The court of first instance issued the declaratory judgment holding that it could not be ruled out that the plaintiff would not have opted for the surgery had the complications been adequately disclosed to him. The court of appeal on the other hand denied the claim for a declaratory judgment arguing that the plaintiff had not even tried to substantiate why he would have rejected the treatment had he known about the risk of adhesions and that, therefore, his consent had to be assumed.

b) Judgment of the Court

68 The OGH first states that a patient has to consent to medical treatment and that a valid consent requires adequate disclosure. It then refers to its consistent practice according to which a physician or hospital will be liable for the negative consequences of a medical treatment even though it was performed *lege artis* if the patient would not have given his consent to the treatment had he been adequately informed. Moreover, the OGH holds that the burden of proof for the question whether the patient would, in case of adequate disclosure, have consented to the treatment or not, lies with the defendant as this concerns the question of alternative lawful behaviour (*rechtmäßiges Alternativverhalten*, i.e. the question whether the damage would also have occurred had the defendant acted as required). After all, the OGH argues, it is the defendant's violation of his disclosure duties that caused the uncertainty concerning the course of events, i.e. the fact that the patient's decision-making is actually not repeatable.

69 The defendant had, by reference to the practice of the German BGH, advocated a reversal of the burden of proof to the detriment of the plaintiff if he violates his duty to substantiate his hypothetical decision. According to this view, it is not sufficient for the plaintiff to merely hold that he would have decided against the treatment but he would instead have to make his hypothetical decision against the treatment plausible. The OGH, however, rejects the idea of such a reversal of the burden of proof in reference to its consistent practice.

[77] ecolex 2009, 229.

The OGH, therefore, comes to the conclusion that the plaintiff's claim for a declaratory judgment is justified as the defendant did not prove that the plaintiff would have given his consent to the treatment had the risks been adequately disclosed to him. 70

c) Commentary

The current case is based on a dilemma which is typical for violations of disclosure duties, namely the necessity to prove a hypothetical decision in the past. As such proof is obviously hard to provide, it is of great importance who has to bear the burden of proof. As the present case deals with a medical intervention which will, according to consistent practice of the Austrian OGH, be considered as personal injury unless it is justified by the informed consent of the patient, we are confronted with damage caused by active conduct.[78] This means the plaintiff will have to prove that the treatment caused the damage, while the defendant who argues that the plaintiff would have decided for the treatment even in case of adequate disclosure invokes alternative lawful behaviour and will have to bear the burden of proof for this. 71

As mentioned before, such proof is hard to provide and this is not only true for the patient but also for the defendant physician or hospital. *Anscheinsbeweis* (prima facie evidence) which is often of help in case of difficulties of proof cannot be reverted to: Disclosure should enable the patient to reach an independent decision on several equivalent options of conduct, which means that experience, on which the *Anscheinsbeweis* is based, does not suggest a certain course of events.[79] The burden of proof falling on the defendant, the latter will in such cases regularly be liable for the damage, notwithstanding the existence of a *non liquet* concerning the patient's hypothetical decision and this is also the result reached by the OGH in the current case. 72

The approach rejected by the OGH advocates a duty of the plaintiff to substantiate his hypothetical rejection of the treatment and a reversal of the burden of proof in case of violation of this duty.[80] A duty to substantiate the plaintiff's hypothetical decision aims at avoiding an abuse of disclosure rights for tort law purposes.[81] Although the OGH rejects a reversal of the burden of proof without further elaboration on the reasons for this rejection, it seems that the 4th panel only objects to the reversal of the burden of proof and not to the duty 73

[78] In contrast to most other cases of violated disclosure duties, as these will normally concern damage caused by omissions. In case of omissions, however, the question whether the damage would also have occurred had the defendant acted as required (i.e. alternative lawful behaviour), cannot be separated from the question of causation. On this question and the consequences for the burden of proof cf. supra no. 27.

[79] Cf. *B. Grunewald*, Die Beweislastverteilung bei der Verletzung von Aufklärungspflichten, Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (ZIP) 1994, 1165; *B.C. Steininger*, cmt. on OGH 20.10.2004, 7 Ob 220/04k, Österreichisches Bank-Archiv (ÖBA) 2006, 62. On the prerequisites for the application of an *Anscheinsbeweis* cf. *C. Bumberger*, Zum Kausalitätsbeweis im Haftpflichtrecht (2003) 51 ff. with further references.

[80] Cf. *T. Juen*, Arzthaftungsrecht (2nd ed. 2005) 139 f.

[81] OLG Linz, RZ 1994, 65.

to substantiate as such, as the OGH has referred to this duty several times in its past practice.[82]

74 In my view, the OGH's decision to reject a reversal of the burden of proof is correct. A reversal of the burden of proof leads to serious consequences on the level of substantial law. Therefore, it can, in my view, only be justified if there are grounds in the field of substantive law to do so. While the aim to avoid an abuse of the right to disclosure could be put forward in favour of a reversal of the burden of proof, the idea that the patient's disclosure rights may not be undermined and the fact that it is the one who violated the disclosure duty who caused the difficulties of proof speak against such a reversal. In all there are, in my view, no sufficient grounds for reversing the burden of proof. However, I think that such a reversal of the burden of proof will, in most cases, not be necessary as a violation of the duty to substantiate can easily be taken into account in the course of the consideration of evidence (*Beweiswürdigung*), i.e. before a *non liquet* situation arises: If the plaintiff cannot even make plausible why he would not have opted for the treatment because of the risk that was not disclosed to him, while he did accept more serious risks, a judge will not have to revert to stating that it cannot be verified whether the plaintiff would have opted for the treatment or not in his fact finding, which means that the question of the burden of proof will not arise.

8. OGH 21 October 2008, 1 Ob 103/08s[83]: Fictitious Costs of Repair; Restoration in Kind

a) Brief Summary of the Facts

75 The plaintiff in this case had asphalting work conducted for the defendant by a subcontractor in a workshop shed on the premises of the defendant. The asphalting work led to radiant heat. Due to insufficient ventilation this brought about a heat accumulation which heated the sheets of the panels of the roof construction so that the sheets were deformed. Although the deformation is irreparable, it does not affect the bearing capacity or the functional capability of the panels but only causes an optical encroachment of one third of the interior view of the roof's surface. The shed was two months old at the time of the asphalting work and was a most simple workshop shed, without any significant aesthetical or architectural value, used for cleaning and repairing cars. Replacing the panels would cost € 5,500. The court of first instance quantified the optical encroachment at € 180. The plaintiff claimed the payment for the asphalting work amounting to € 8,300.

b) Judgment of the Court

76 The OGH argues that, according to § 1323 ABGB, damage will have to be compensated primarily by restoration in kind. The person harmed will be entitled to compensation even for fictitious costs of repair, i.e. the costs nec-

[82] Cf. e.g. OGH 26.9.2003, 3 Ob 131/03s, RdM 2004, 58.
[83] ecolex 2009, 132 with cmt. by *H. Friedl*.

essary and adequate for the repair, irrespective of the question whether the damaged thing is in fact repaired. However, claims for fictitious costs of repair are limited by the amount of the objective loss in value as otherwise the person harmed would receive more than his loss. Such enrichment on the side of the person harmed would be in conflict with the principle of compensation.

77 As in case of premises and buildings it is not possible to compensate the person harmed fully by replacing the damaged good, reparation in kind will in principle even be due if it is more expensive than monetary compensation. It will have to be examined whether a sensible person would, in the position of the person harmed, bear these expenses.

78 According to the OGH, it is clear that a sensible person would not spend € 5,500 to repair panels of a roof construction which are functioning perfectly well only because there is an optical encroachment in case of a shed without aesthetical pretence. Therefore compensation is limited by the loss of value due to the optical encroachment which was quantified by the court of first instance at € 180.

c) Commentary

79 Although this is a contract law case, the OGH deals with questions which are of general interest for compensation. Again the OGH stresses that the person harmed is entitled to claim fictitious costs of repair which will, however, be limited by the objective loss in value.[84] Its conclusion that restoration in kind is limited by what a sensible person would be prepared to pay is convincing. Anything else would be in violation of the duty to mitigate the loss.

9. Overview of Important Personal Injury Decisions

a) Quantum of Damages for Non-Pecuniary Loss

80 Concerning quantum, the OGH in 2 Ob 55/08i, 26.6.08[85], confirmed the award of € 15,000 for each of the two siblings of a 19-year-old woman who was so severely injured in a car accident that she died 10 days after the accident. At the same time the amount awarded to her parents was increased to € 20,000 each. The OGH also had to decide whether the fact that the direct victim spent several days in an intensive care unit before she died influences the amount to be awarded. It comes to the conclusion that this can only be decided on a case by case basis and depends on the question whether this situation increased the secondary victims' suffering (the OGH's judicature thereby qualifies the close emotional relationship between the primary and the secondary victim as decisive factor for the award). In another 2008 case, 2 Ob 238/07z, 14.2.08[86], the OGH qualified the amount of € 85,000 to a woman who suffered severe

[84] See on this topic above no. 45 ff.
[85] ecolex 2008, 907 = Zak 2008/579.
[86] Zak 2008/339 = RdW 2008, 454 = ZVR 2008/239. See also *Ch. Huber*, Auslandsunfall eines deutschen Ehepaars in Österreich, ZVR 2008, 484.

craniocerebral injury including lasting neurological malfunctioning and severe mental impairment as adequate.

b) Loss of Earnings

81 2008 brought a few cases on loss of earnings. Amongst others, the OGH in 2 Ob 226/07k, 14.8.08[87], had to decide on the question of reduction of damages due to benefits received (*Vorteilsausgleich*) concerning the claim for loss of earnings. Due to a car accident, the victim had to change her job which also meant that she no longer had to drive 150 to 180 km every day (this took her about 3 hours per day). According to the OGH, the saved commuting expenses will have to be taken into account, while the additional free time gained is to be disregarded. The OGH argues that the latter advantage is non-pecuniary while the concept of *Vorteilsausgleich*, in the view of the OGH, only focuses on pecuniary loss.[88] According to 2 Ob 238/07z[89], an injured partner of a business partnership can claim compensation for the costs of a fictitious substitute if a loss of income of the business partnership was only avoided by unpaid increased efforts of a third party (other partners or relatives) to the benefit of the injured partner. In 6 Ob 75/08k, 7.7.2008[90], the OGH awarded a retired carpenter compensation for the costs of completion of the interior of the house he lived in with his wife[91], which he had intended to do himself but could no longer do so due to his injury. According to the OGH, the loss of his ability to work on his house constitutes loss of earnings. In another 2008 case, 2 Ob 100/07f, 10.4.08[92], the OGH decided that the loss of the sense of smell and taste of a housewife through an accident does not justify compensation for the cost of a home help. Finally, the OGH in 2 Ob 210/07g, 27.3.2008[93], dealt with questions of compensability of the tax burden concerning damages for loss of earnings and for loss of maintenance and with the prescription of such claims.[94]

c) Further decisions

82 In 2 Ob 58/07d, 24.1.2008[95], the OGH first outlined that damage can, in case of a multi-vehicle accident, not only be imputed to the person/vehicle causing the initial crash but also to the person/vehicle causing one of the follow-up accidents. In this case the OGH stressed that the defendant, who caused one of the follow-up accidents, is (solidarily)[96] liable for the shock suffered by minor

[87] ecolex 2008, 1016 = Zak 2008/653.
[88] Cf. also OGH 13.11.2008, 2 Ob 227/08h, where the OGH declined a *Vorteilsausgleich* concerning gained free time in relation to an award of compensation for housekeeping costs.
[89] See the references supra fn. 86.
[90] ecolex 2008, 1014 = Zak 2008/614 = ZVR 2009/40.
[91] The owner of the house was his wife.
[92] Zak 2008/403 = ZVR 2008/228 with cmt. by *Ch. Huber*.
[93] ecolex 2008/226 with cmt. by *G. Wilhelm* = JBl 2008, 719 = ZVR 2008/155 with cmt. by *Ch. Huber*.
[94] Cf. also OGH 13.11.2008, 2 Ob 228/08f, ecolex 2009, 407 = Zak 2009/144.
[95] Zak 2008/340 = Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht (ZfRV) 2008, 80 with cmt. by *H. Ofner* = ZVR 2008/225 with cmt. by *G. Kathrein*.
[96] § 8 para. 1 together with § 8 para. 2 EKHG provide for solidary liability of all the parties involved in the accident (unless their liability is excluded according to the rules applicable to

passengers witnessing a further follow-up accident in which their father was severely injured (the children were awarded € 7,500 and € 9,600 respectively as compensation for the post-traumatic stress disorder suffered).

C. Literature

1. *A. Kletečka*, Punitive damages – Der vergessene Reformpunkt? ÖJZ 2008, 785

The title of this article poses the question whether punitive damages are a neglected item in the current debate of tort law reform. After a reference to the image of a "bogey of American circumstances" in tort law, which is often used in discussion of the topic in Europe, the author provides a definition of punitive damages and deals with the aims of such damages. In the view of *Kletečka*, their main purpose is not retaliation but prevention. The author notes that, based on the argument that tort law aims at compensation, the current proposals for Austrian tort law reform reject the idea of punitive damages. *Kletečka* then continues with a detailed analysis of cases in which current law acknowledges prevention as a legitimate aim: In his view, it has to be recognized that damage is not an empirical value, but that the law decides what is to be considered as compensable damage. On the basis of this insight, the author holds, a notion of damage dependent on fault is no longer excluded. *Kletečka* then identifies situations in which current law, based on the argument of prevention, does not limit itself to compensatory damages and thereby he stresses the arbitrariness of the delimitation between compensatory and over-compensatory damages. After a reference to the arguments brought forward in favour of punitive damages by the economic analysis of law, he concludes with a reform proposal, according to which damages for non-pecuniary loss should be amplified if damage is caused intentionally or deliberately negligently with the intention to realize profits. Such could especially be done in the field of enterprise liability. *Kletečka* suggests a doubling of damages and argues that this should be seen as a statutory replication of a contract penalty. 83

2. *H. Koziol/B.C. Steininger*, Schadenersatz bei ungeplanter Geburt eines Kindes, RZ 2008, 138

In this article, the authors examine the question of compensation of maintenance costs for an unplanned child (irrespective of the questions whether the negligence leading to liability occurred before or after conception or whether the child is disabled or not). The authors first provide an overview of the current situation in Austria and thereby present the contradictory court practice of the OGH as well as the three main positions to be found in doctrine on this topic. Subsequently, the authors give an overview of solutions found concerning this topic in other European countries, especially in German, Swiss, Dutch, 84

their liability) towards victims who are, as the plaintiffs in the case at hand, themselves not such liable parties to the accident. Cf. *M. Schauer* in: M. Schwimann, Praxiskommentar zum ABGB VII (3rd ed. 2005) § 8 EKHG no. 1 ff.

English and French law. After this, the authors deal with the (third) intermediary approach to be found in Austrian law,[97] according to which maintenance costs can normally not be compensated as the tortfeasor's conduct does not merely cause maintenance costs but leads to a comprehensive family relationship including different pecuniary and non-pecuniary aspects, which will in total usually not be considered as pecuniary loss. However, according to this intermediary view, such a relationship of family law can be considered as being detrimental if it places an extraordinary burden on parents, which means that the total of the relationship can no longer be qualified as equalised. The authors expound that this approach can, as set out by *Bydlinski*, be justified by a weighing of the colliding legal principles involved, namely the dignity of the person on the one hand and liability and grounds of imputation on the other hand, but they stress that a justification can also be found within tort law itself by taking non-pecuniary advantages into account when assessing pecuniary harm. Such a *Vorteilsausgleich* (adjustment of damages due to benefits received) between non-pecuniary advantages and pecuniary loss is generally rejected with the argument that this would lead to only partial compensation. However, the authors argue that this is not a compelling argument as the question precisely is whether the compensatory function of tort law refers to the patrimonial sphere and the immaterial sphere separately; i.e. it is also possible that the compensatory function only refers to the totality of pecuniary and non-pecuniary factors. Although the authors stress that it would be problematic to always take non-pecuniary advantages into account as the legal order does not always consider non-pecuniary impairments as compensable damage, they argue that the case of the unplanned birth of a child is such a special case that non-pecuniary advantages can be taken into account. Subsequently, the authors examine the condition of an extraordinary burden and suggest assuming such a burden as soon as there is a clear deterioration of the family's living standard compared to the hitherto existing situation, though with the corrective of the usual need as the minimum and the so-called luxury limit known in maintenance law as the upper limit. Finally, the authors advocate a compensation award for the non-pecuniary loss of parents caused by the fact that their family planning was thwarted and call for a solution to the questions related to the unplanned birth of a child by the legislator.

3. *R. Pletzer*, „Recht auf kein Kind?" – Überlegungen anlässlich der jüngsten Entscheidung des OGH zu „wrongful birth", JBl 2008, 490

85 Under the striking title of "right to no child" the author deals with the topic of wrongful birth. Starting from a recent decision of the OGH on this topic,[98] she first presents the most important points of this decision and then examines

[97] The other two approaches being the mere family law approach and the tort law approach. According to the first, the personal and pecuniary consequences of the birth of a child are exclusively regulated in family law, which means that the question of compensation in case of the unplanned birth of a child does not arise. The tort law approach on the other hand arrives at the conclusion that the maintenance costs are compensable as the maintenance obligation placed on the parents clearly reduces their patrimony.

[98] For an overview of this decision and further references see *Steininger* (fn. 2) no. 61 ff.

whether maintenance costs are compensable in cases in which the parents were negligently not informed about the disability of their child during pregnancy and therefore could not opt for an abortion which they would otherwise have done. She rejects the approach according to which compensation of maintenance costs is only possible if these costs place an extraordinary burden on parents. This approach takes the non-pecuniary advantages derived by the parents from the birth of their child into account and such a *Vorteilsausgleich* between non-pecuniary advantages and pecuniary loss would, according to *Pletzer*, presuppose quantifying the immaterial advantage in monetary terms, which would, in her view, lead to a commercialisation of such non-pecuniary advantages and bring about the danger of undercompensation if this non-pecuniary advantage is overestimated. Such advantages should, in her view, be opposed to the non-pecuniary loss of parents caused by the fact that their family planning was thwarted. The author then examines whether compensation should encompass the entire maintenance costs or only the additional costs which are due to the child's disability. *Pletzer* argues that the provision relating to abortions in case of a severe disability of the unborn child (§ 97 para. 1 lit. 2 second case) is a justification in the view of prevailing opinion and holds that the purpose of this norm does not exclude pecuniary interests of the parents. However, in her view, this is of secondary importance as the purpose of the contract on prenatal diagnosis is not limited by the purpose of this norm and can therefore at any rate include the parents' pecuniary interests. *Pletzer* then criticizes the fact that the OGH's decision is not clear on this question of the protective purpose: Although the OGH awards compensation for the child's entire maintenance costs, one could, according to *Pletzer*, argue on the basis of the decision that the protective purpose is limited to the additional maintenance costs due to the disability. Notwithstanding this critique she agrees with the OGH's conclusion to award compensation for the child's entire maintenance costs. However, she subsequently also heavily criticises the fact that the current decision of the OGH is in contradiction with other OGH decisions denying compensation in case of the birth of a healthy child and she stresses that a differentiation according to the question whether the child is disabled or not is not justified. In conclusion the author stresses that awarding compensation for maintenance costs in such cases neither relates to a right of parents to have a healthy child nor denies disabled persons their right to life; according to *Pletzer* it is the right of parents to decide first, whether they want to have a child at all and second, whether they are prepared to raise a disabled child, and therefore "the right to have no (healthy or disabled) child" which is at stake.

4. Further Selected Literature

Competition Law: *W. Obwexer*, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts, ecolex 2008, 878; *A. Reidlinger/H. Steinbach*, Schadenersatz wegen Kartellrechtsverstößen – Das Weißbuch der Kommission und die Rechtslage in Österreich, Medien und Recht (MR) 2008, 205. 86

Employers' Liability: *T. Rauch*, Arbeitgeberhaftung bei Arbeitsunfällen durch ein Verkehrsmittel, Arbeits- und Sozialrechtskartei (ASoK) 2008, 140. 87

88 **Environmental Liability**: *M. Köhler*, Der „Stand der Technik" in der Umwelthaftung, Recht der Umwelt (RdU) 2008, 50.

89 **Liability in General**: *K.-H. Danzl*, Bemerkenswerte schadenersatzrechtliche Entscheidungen des OGH aus dem Jahr 2007, ZVR 2008, 128.

90 **Liability Insurance**: *D. Rubin*, Direktklage des Geschädigten; Haftung des säumigen Haftpflichtversicherers, ZVR 2008, 538.

91 **Medical Liability**: *M. Nademleinsky*, Die Rechtsprechung zur Arzthaftung 2007, in: M. Kierein/P. Lanske/S. Wenda (eds.), Jahrbuch Gesundheitsrecht 2008 (Neuer Wissenschaftlicher Verlag, Vienna 2008).

92 **Non-Pecuniary Loss**: *G. Christandl*/*D. Hinghofer-Szalkay*, Beeinträchtigungen der Entfaltungsmöglichkeiten der Person als ersatzfähiger immaterieller Schaden, ZfRV 2008, 82; *K.-H. Danzl/K. Gutiérrez-Lobos/O.F. Müller*, Das Schmerzengeld in medizinischer und juristischer Sicht (9th ed., Manz, Vienna 2008); *D. Hinghofer-Szalkay*, Schwerste Verletzung eines Angehörigen: Fortentwicklung des „Trauerschmerzengeldes"? ZVR 2008, 444; *Ch. Huber*, Globalbemessung, Teilbemessung und Teilglobalbemessung bei zukünftigen Schmerzen, ÖJZ 2008, 83; *E. Karner*, Trauerschmerz und Schockschäden in der aktuellen Judikatur, ZVR 2008, 44; *W. Reisinger*, Die Bedeutung des Schmerzengeldes für die Versicherungswirtschaft, ZVR 2008, 49; *A. Stiegler*, Schmerzengeld für Schock- und Trauerschäden: Rechtsvergleichende Analyse des Angehörigenbegriffes und der Mitverschuldensanrechnung (Böhlau, Vienna 2008).

93 **Personality Rights**: *M. Handler*, Der Schutz von Persönlichkeitsrechten (Verlag Österreich, Vienna 2008).

94 **Prescription**: *D. Kolonovits/A. Vonkilch*, Schadenersatzrechtliche Sonderverjährung und Gleichheitssatz, Österreichische Zeitschrift für Wirtschaftsrecht (ÖZW) 2008, 12; *M. Nademleinsky*, Wann beginnt die Verjährungsfrist in den Fällen des § 1310 ABGB? EF-Z 2008, 52.

95 **Private International Law**: *D. Beig/C. Graf-Schimek/A. Grubinger/J. Schacherreiter*, Rom II – VO: Neues Kollisionsrecht für außervertragliche Schuldverhältnisse (Manz, Vienna 2008); *D. Hinghofer-Szalkay/C. Hirsch*, Die kollisionsrechtliche Anknüpfung außervertraglicher Schuldverhältnisse – neu. Ein didaktischer Beitrag zu Rom II, Juristische Ausbildung und Praxisvorbereitung (JAP) 2008/2009, 179; *H. Ofner*, Die Rom II-Verordnung – Neues Internationales Privatrecht für außervertragliche Schuldverhältnisse in der Europäischen Union, ZfRV 2008, 13.

96 **Professional Liability**: *P. Bydlinski*, Haftung für fehlerhafte Anlageberatung: Schaden und Schadenersatz, ÖBA 2008, 159; *B. Jud*, Rechtsberatung durch Wirtschaftstreuhänder und mögliche Haftungsfolgen, AnwBl 2008, 433; *F. Parapatits*, Die Haftung des Sachwalters für nicht beantragte Sozialleistungen,

FamZ 2008, 180; *C. Schilling*, Haftung für Unternehmsberatung, RdW 2008, 327; *A. Schönhofer-Hammerl*, Die Haftung des Immobilienverwalters (Manz, Vienna 2008); *U. Schrammel*, Wieder einmal erfolglos! Zur Haftung des Sachverständigen gegenüber Dritten, Zak 2008, 367; *E. Völkl/W. Völkl*, Die Haftung der rechtsberatenden Berufe im Spiegel der Rechtsprechung 2005–2007, ÖJZ 2008, 383.

Property Damage: *Ch. Huber*, Abrechnung auf Neuwagenbasis, ZVR 2008, 92. 97

Public Liability: *L. Held*, Auskunftserteilung, Baubewilligung, Flächenwidmungsplan: Haftung der Gemeinde als Behörde. Wo lauert die Amtshaftung für die Gemeinde und deren Organe? Rechts- und Finanzierungspraxis der Gemeinden (RFG) 2008, 96; *F. Kerschner*, Amtshaftung der Gemeinden bei Baugenehmigung in hochwassergefährdeten Gebieten, RFG 2008, 85; *W. Kleewein*, Amtshaftung in der Raumplanung, Baurechtliche Blätter (bbl) 2008, 1; *H. Kunst/U. Salburg*, FMA: Amtshaftungsausschluss statt effizienter Aufsicht! ecolex 2008, 1092; *E. Standeker/G. Streit/M. Pressinger-Buchsbaum*, Schadenersatzanspruch Studierender gegen die Universität wegen unzureichenden Lehrveranstaltungsangebots? Zeitschrift für Hochschulrecht, Hochschulmanagement und Hochschulpolitik (zfhr) 2008, 21. 98

Road Traffic: *A. Gschöpf*, Ist ein stehendes Kraftfahrzeug im Betrieb? ZVR 2008, 372; *Ch. Huber*, Auslandsunfall eines deutschen Ehepaars in Österreich, ZVR 2008, 484; *id.*, Die Kfz-Schadensregulierung in Österreich und Deutschland, ZVR 2008, 532; *W. Kath*, Die Schwarzfahrt als Haftungs- und Deckungsproblem, ZVR 2008, 546; *C. Rudolf*, Internationaler Verkehrsunfall. Das Haager Straßenverkehrsübereinkommen und die Rom II VO, ZVR 2008, 528; *A. Wittwer*, Auswirkungen des EuGH-Urteils Odenbreit auf die Internationale Schadensregulierung, ZVR 2008, 524. 99

Sports: *H. Häckel*, Schadenersatz bei Verletzungen infolge Foulspiels beim Fußball, Zak 2008, 183; *D. Kocholl*, Variantenfahren – Haftung bei Lawinen, ZVR 2008, 10; *R. Rexeis*, Haftung randalierender Fans gegenüber dem Fußballverein für ÖFB-Strafen, Zak 2008, 206. 100

Tort Law Reform: *C. Fischer-Czermak*, Vorschläge zur Reform der Gefährdungshaftung, VR 2008, 34; *R. Fucik*, Vor einer Reform des Schadenersatzrechts? ÖJZ 2008/23; *R. Koppler*, Vorschläge zur Reform des Schadenersatzrechts. Auswirkungen auf Unternehmen und Versicherungsnehmer, VR 2008, 24; *F. Kerschner*, Umwelthaftung, VR 2008, 30; *H. Koziol*, Schadenersatzreform: Der Gegenentwurf eines Arbeitskreises, JBl 2008, 348; *R. Reischauer/K. Spielbüchler/R. Welser* (eds.), Reform des Schadenersatzrechts III: Vorschläge eines Arbeitskreises (Manz, Vienna 2008); *R. Reischauer*, Reform des Schadenersatzrechts – Allgemeine Gedanken, VR 2008, 25; *M. Schauer*, Zu den Vorschlägen des Arbeitskreises zur Reform des Schadenersatzrechts: Die Perspektive von außen, VR 2008, 40; *G. Wagner*, Reform des Schadensersatzrechts, JBl 2008, 2. 101

102 **Wrongful Birth:** *R. Fucik*, Wieder Neues zu „wrongful birth", ÖJZ 2008/67; *K. Grüblinger*, „Wrongful birth" – A never ending story? Zak 2008, 143; *D. Hinghofer-Szalkay/C. Hirsch*, Wrongful Birth – Wrongful Conception: Die Diskussion geht in die Verlängerung, FamZ 2008, 120; *D. Hinghofer-Szalkay/C. Hirsch*, Die Ersatzfähigkeit immaterieller Schäden bei Geburt eines unvorhergesehen behinderten Kindes, RdM 2008, 136; *B.C. Steininger*, Wrongful birth revisited: Judikatur zum Ersatz des Unterhaltsaufwands nach wie vor uneinheitlich, ÖJZ 2008, 436.

103 **Other**: *P. Bydlinski*, Zivilrechtsfragen des „kleinen" Automatenglücksspiels, ÖJZ 2008, 697; *G. Haybäck*, Risikohaftung bei missbräuchlichen Bankomatbehebungen. Ein österreichisch-deutscher Rechtsvergleich (Neuer Wissenschaftlicher Verlag, Vienna/Graz 2008); *M. Klamert/N. Kraft*, Schadenersatzanspruch nach § 394 EO und Gemeinschaftsrecht, wirtschaftsrechtliche blätter (wbl) 2008, 261; *C. Limberg*, Ersatz des durch Schadensbegrenzung(-sversuche) verursachten Folgeschadens, Zak 2008, 428; *U. Schrammel*, Zur Bindung des Zivilrichters an strafgerichtliche Verurteilungen, Zak 2008, 47; *G. Wilhelm/A. Tschugguel*, Zur Schadenshaftung im Gefolge von Massenveranstaltungen (EURO-Fan-Meile), ecolex 2008, 515.

Appendix: Alternative Draft[99]

Section 30

Of the law of compensation and satisfaction

Damage

§ 1293. (1) Damage is any harm that has been inflicted on someone to his patrimony or his person. Damage also includes loss of the earnings, which someone is entitled to expect in the normal course of events.

§ 1294. *unchanged*

Of the obligation to compensate:

1. Of the damage caused by fault

§ 1295. (1) Everyone is entitled to claim compensation from the tortfeasor for the damage which was culpably inflicted on him by such; the damage may have been caused by the breach of a contractual duty or in a manner unrelated to any contract. Whether damage gives rise to a right to compensation shall be assessed on the basis of the following paragraphs.

(2) A person who violates an existing contractual duty or a duty arising from the law or on the basis of a transaction to the benefit of a particular person is liable for the damage resulting from the violation of such duty.

[99] Cf. supra fn. 4. Translation by Fiona Salter-Townshend LL.B., LL.M.

(3) A person who unlawfully injures the life, the health, the liberty or the property of another or other absolute right, is responsible to the injured party for the damage arising therefrom.

(4) If someone suffers damage that is caused neither by a violation of another's duty towards him (para. 2) nor as a result of injury incurred by him to one of the rights listed in para. 3, then the tortfeasor is only obliged to compensate if he has breached a protective law that was intended to prevent such damage (§1311) or when a law specifically provides so.

(5) A person who inflicts damage intentionally in a manner *contra bonos mores* is obliged to compensate in any case; however, when this occurs within the exercise of a right then only insofar as the purpose of injuring the other party was clearly predominant.

(6) In the absence of fault there is no liability unless this is prescribed by law.

§ 1296. – § 1297. *unchanged*

§ 1298. (1) A person who has not fulfilled an obligation is liable if the result owing did not ensue and he does not prove that he has complied with the required duty of care or that he is not at fault in the breach of such. If no result is owed to the creditor but only the compliance with the duty of care, then the tortfeasor is not liable in spite of established breach of duty of care if he proves that such breach is not his fault.

(2) The debtor also has to compensate the damage caused by his non-fulfilment of the obligation insofar as he does not prove that he neither recognised nor would have had to recognise an obstacle which already existed at the time the contract was concluded or which should have been taken into consideration.

§ 1299. – § 1301. *unchanged*

or b) multiple participants;

§ 1302. (1) In such a case, if the injury is founded in a mistake and the proportions can be determined, each is liable only for that damage caused by his mistake. However, if the damage is caused deliberately; or if the proportions caused by the individuals cannot be determined; then all are liable solidarily. There is also liability if someone is responsible for the damage although he is not at fault and the proportions cannot be determined.

(2) A person who has engaged in conduct that would have caused the damage by itself is liable jointly and severally with any other person of whom the same is true. If another person had already inflicted the damage, then only this other person is liable. Multiple possible tortfeasors are liable together if it is certain that at least one of them did cause the damage. If it is unclear whether culpable behaviour or mere chance caused the damage, then the injured party alone must bear the damage. All of this applies *mutatis mutandis* if a law provides for liability independent of fault.

(3) A person who is jointly and severally liable and has compensated the damage retains right of recourse (§ 896).

§ 1303. *unchanged*

§ 1304. (1) If in the event of injury there is also fault on the side of the victim, then such shall bear the damage himself on a *pro rata* basis; insofar as one party is responsible for the damage in the absence of fault, his proportion is determined according to the extent of the danger created. If the proportions cannot be determined then both parties bear the damage to an equal extent.

(2) If the victim fails in a blameworthy manner to avert accrual of the damage which was incurred, then he shall bear the consequential harm himself.

§ 1305. – § 1311. *unchanged*

4. by coincidence;

§ 1312. A person who has done someone a service in an emergency will not be held accountable for the damage which he failed to prevent; unless he culpably prevented another who would have done more to help from so doing. If he is to blame for an injury, then the extent of the compensation shall be determined according to the Employee Liability Law (*Dienstnehmerhaftpflichtgesetz*). In any case, he can balance up the benefit undoubtedly rendered against the damage caused.

§ 1313. *unchanged*

5. through actions of third parties;

§ 1313a. (1) A person who uses another in the performance of his obligations is liable for this other person's behaviour as for his own.

(2) The legal representative of a debtor is equivalent to a performance agent (*Erfüllungsgehilfe*).

§ 1314. Duties can only be delegated to another party insofar as this is permitted by law or by the contract on which such duties are based. Subject to application by a party at risk or an injured party, the delegator must disclose the delegatee without delay. The delegatee is liable in the same manner as the delegator.

§ 1315. (1) A person who uses another for the arrangement of his own affairs is liable for the damage which this other as auxiliary causes to a third party. He shall be held accountable for the same standard of care as he would have had to exercise personally.

(2) A person who arranges the affair independently in his own responsibility is not an auxiliary.

§ 1316. – § 1317. *unchanged*

§ 1318. If someone is injured by the falling of an object or the throwing out, pouring out or flowing out of something from a flat, then the person from whose flat such thing was thrown or poured, flowed or fell is liable insofar as he does not prove that he exercised the care objectively required to avert the danger.

§ 1318a. If a facility, a machine or the performance of an activity causes illegal emissions, the precautionary hindrance of which is factually made more difficult by an official permit, approval or authorisation based on their presumed harmlessness, then the person who derives benefit therefrom is liable to the neighbour for damage arising thereby within the meaning of § 364a.

6. by a building;

§ 1319. If someone is injured by collapse or detachment of parts of the building or another works constructed on the plot or a tree, then the keeper of the building, works or tree is obliged to compensate if the event is the result of the inadequate state of the thing and he does not prove that he exercised the care objectively required to avert the danger. The same applies when ice or snow slips and falls from a building.

6a. by a road;

§ 1319a. (1) If through the inadequate state of the road, a person is killed, or should sustain injury to his body or health or if someone's property is damaged, then the person who is responsible for the state of the road as keeper of such is liable for the damage insofar as he is at fault for the inadequate state through gross negligence or intention. If the damage was sustained during an illicit use of the road, especially if such is contrary to the designated purpose of the road, and if it was discernible to the user either from the type of road or because of pertinent prohibitory signs, fencing off or other barrier on the road, that the use was illicit, then the victim cannot base a claim on the inadequate state of the road.

(2) A road in the sense of para. 1 is an area of ground which can be used by everyone under the same conditions for traffic of every sort or for certain types of traffic, even if it is reserved for the use of a restricted circle of users; a road also includes the constructions along its passage which serve the traffic, for instance in particular bridges, supporting walls, revetments, culverts, ditches and plantations.

Whether the state of a road is inadequate depends on what is reasonable and feasible for its construction and maintenance considering the type of road, especially its designated purpose.

(3) Delegating the duties is permitted (§ 1314).

(4) Insofar as auxiliaries of third parties are liable on the basis of their own fault, they shall be held accountable only in the case of gross negligence or intent.

7. by an animal;

§ 1320. (1) If someone is injured by an animal, then the person who incited or aggravated it to cause the damage or who failed to hold it in safe-keeping is liable. The person who keeps the animal is accountable if he does not prove that he provided for the objectively necessary safe-keeping or supervision.

(2) This proof is excluded if the danger typical for this animal has been realised, unless the victim assumed the risk or the damage was caused in the meadow by an animal that is not ordinarily held in a special way.

§ 1321. – § 1322. *unchanged*

8. through an environmentally dangerous activity

§ 1322a. (1) If a business activity affects the environment because of its special dangerousness and if a person is thereby killed, sustains bodily or health injury, or property is damaged, then the operators of such activity are liable for the compensation of the damage without regard to fault. In the case of *force majeure* there is no liability.

(2) Dangerous business activities in the sense of para. 1 include such as are listed in line 1 to line 13 Appendix 1 of the Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz BGBI I...*) and in the federal state laws … ….

§ 1322b. (1) If in the light of the details in the particular case, a dangerous activity (§1322a para. 2) would have been apt to cause the damage which was in fact sustained, then it is assumed that the damage was caused by this business activity.

(2) Said assumption is rebutted if the operator shows it probable that the damage was not caused by the business activity.

§ 1322c. If in the light of the type of damage sustained, several business activities come into question in terms of causation and if it is likely that they combined to cause it, then each party responsible (§ 1322a) is liable for a share, which is determined by the extent and dangerousness of his activity for the injured legal interest (§ 273 ZPO), alternatively liability is divided equally among the parties.

§ 1322d. If someone shows probable cause that he has incurred damage due to a dangerous business activity according to § 1322a, then the operator of the activity is obliged to hand over to him within a reasonable length of time upon founded written request a breakdown of all the dangerous substances used for the business activity, above all that were stored, processed, manufactured and emitted in or from a facility at the time the damage was incurred, which come into question as the cause of the damage.

Types of damage compensation

§ 1323. (1) The victim can seek the restoration of the previous state or the necessary monies to be expended for this purpose or compensation for the loss of value. If the restoration of the previous state is inappropriate then compensation of the loss in value is due. The compensation extends not only to the damage sustained (in fact indemnification) but also to the loss of earnings (§ 1293). The same applies when the injuring party is liable in the absence of fault and the law does not stipulate any other type of compensation.

(2) If a physical thing is damaged or destroyed, then the victim is entitled to seek the loss in value as damages, or if it is destroyed the market value, which it had at the time the damage was sustained insofar as another amount of damage is not proven.

§ 1324. Compensation for a mere personal infringement is only due if explicitly so provided by the law or if such has been specifically agreed upon.

In particular

1. in the case of bodily injuries;

§ 1325. (1) A person who inflicts bodily injury on another must compensate the costs of the treatment and the increased needs as well as the loss of earnings or any other losses of the utilisation of the power to work and shall pay appropriate damages for pain and suffering. If the impairment makes the victim's work-related activity or other equivalent activity more difficult, then the victim is entitled to damages for increased strain.

(2) In the case of particularly serious long-term consequences § 1327 para. 2 is applicable *mutatis mutandis*.

(3) The compensation for loss of earnings and for increased strain shall be in the form of an annuity. For cause the victim can seek an equivalent indemnity in capital in lieu of the annuity, insofar as this is not an unreasonable economic burden on the party obliged to pay the compensation.

§ 1326. If the injured person is left disfigured then this circumstance must be taken into consideration, insofar as his better advancement can thus be impeded.

§ 1327. (1) If the injury leads to death, then the costs occasioned by the death shall be compensated. Surviving dependants who were legally entitled to be supported by the deceased or who would in the case of need have been entitled to such support, shall be compensated the support they have lost.

(2) The parents, children and spouse as well as persons in a similar relationship of proximity to the deceased, who lived together with the deceased in one household, are entitled to compensation for serious emotional distress.

§ 1327a. (1) If a third party compensates the damage which must be compensated under the above provisions, then the victim's claims against the tortfea-

sor pass on to such party. This does not apply if the payment of such was intended to release the tortfeasor or to particularly benefit the victim.

(2) Such passing on of claims cannot be invoked to the disadvantage of the victim.

§ 1328. – § 1328a. *unchanged*[100]

2. to personal liberty;

§ 1329. A person who deprives another of his liberty by violent abduction, private imprisonment, or intentionally by unlawful arrest is obliged to restore the victim to his previous liberty and to indemnify for the injury suffered and to compensate the personal infringement. If he can no longer make liberty available to him then, as in the case of killing, he must compensate the surviving dependants.

3. to someone's honour;

§ 1330. (1) If damage (§ 1293 line 2) is caused to someone through defamation, then he is entitled to seek compensation.

(2) This also applies if someone spreads facts that endanger the credit, earnings or advancement of another person and which he knew to be untrue or ought to have known to be untrue. In such case the victim can seek retraction of the statements and the publication of such retraction. Statements that have not been presented publicly and which the person disclosing it does not know to be untrue shall not give rise to liability if the discloser or the recipient of the information had a legitimate interest in the information.

4. to someone's patrimony

§ 1331. If someone is culpably injured in his patrimony and if compensation is due therefor under §§ 1295 or 1311 then he is entitled to compensation under § 1323. If, however, the damage is inflicted by an action prohibited by criminal law or motivated by wantonness and malicious pleasure then he is additionally entitled to the value of special affection.

§ 1332. *deleted*

§ 1332a. *unchanged*

[100] Except for the deletion of the words "und den entgangenen Gewinn" (and the lost profit) in § 1328.

II. Belgium

Isabelle C. Durant[*]

A. Legislation[1]

1. Ordonnance de la Région de Bruxelles-Capitale du 13 novembre 2008 relative à la responsabilité environnementale en ce qui concerne la prévention et la réparation des dommages environnementaux/ Ordonnantie van het Brussels hoofdstedelijk Gewest van 13 november 2008 betreffende milieuaansprakelijkheid met betrekking tot het voorkomen en herstellen van milieuschade (Ordinance of the Brussels Region of 13 November 2008 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage)[2]

The Brussels Ordinance of 13 November 2008, which entered into force on 14 November 2008,[3] aims to implement, quite faithfully,[4] the European Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, by making use of some latitude left open by the European Act.[5] As observed in the previous Yearbook, environmental matters are the responsibility of different authorities in Belgium and the Directive had to be implemented in the different regions of the country.[6] 1

* With many thanks to Donna Stockenhuber for her invaluable help.

1 Belgian Acts, published in the Belgian official journal (Moniteur belge/Belgisch Staatsblad), are nowadays only available on the website of the Belgian Ministry of Justice: http://www.ejustice.just.fgov.be/cgi/welcome.pl.

2 Belgian official journal of 14 November 2008 (3rd ed.) 61024 (Moniteur belge/Belgisch Staatsblad).

3 Art. 19 of the Ordinance.

4 On some points, the Ordinance enlarges the scope of the Directive, e.g. with regard to the notion of damage that includes damage to soil.

5 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal (OJ) L 143, 30.4.2004, 56–75. Recently published on this Directive and its implementation under Belgian law: *H. Bocken* (ed.), Omzetting en uitvoering van de richtlijn milieuschade (2008) 232 pp.; *Centre d'Etude du Droit de l'Environnement (CEDRE) des Facultés universitaires Saint-Louis*, La responsabilité environnementale. Transposition de la directive 2004/35 et implications en droit interne (2009) 324 pp.

6 *I.C. Durant*, Belgium, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 177 f. (fn. 28). Cf. also more recently *Fr. Tulkens*, La confrontation de la directive à la répartition

Implementation in the Walloon and in the Flemish legislation was operated respectively by a Walloon Decree of 22 November 2007 and by a Flemish Decree of 21 December 2007. As regards the Brussels Region, the Directive was implemented by the commented Ordinance[7] and by its implementing order of 19 March 2009.[8]

2 The Directive founds the framework of environmental liability on the "polluter-pays" principle.[9] As a result of this principle, "the operator shall bear the costs for the preventive and remedial actions".[10] Should the competent authority take actions under the new environmental legislation, it would be entitled to recover the costs it has incurred from the operator.[11]

3 The Directive provides for two specific cases in which the operator shall not be required to bear the costs of the taken actions. These two specific cases are reproduced in the new Brussels legislation: the operator shall not bear the costs when he can prove that the environmental damage (or imminent threat of such damage): "(a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an instruction consequent upon an emission or incident caused by the operator's own activities".[12]

4 Apart from these two compulsory defences, the Directive allowed the Member States to provide for two other situations in which the competent authority would not be authorised to recover the costs of its actions, as far as these actions are remedial actions. The Brussels Region took the decision to introduce in its legislation these two other defences. The first one, sometimes called "the permit defence", concerns cases in which the environmental damage was caused by an emission or event expressly authorised, provided that the operator were not at fault or negligent.[13] The second defence, called "the state of the art defence", concerns cases in which the environmental damage was caused by an emission or activity or any manner of using a product in the course of an activity, where the potential for damage could not have been known according to the state of scientific and technical knowledge when the event or the emission took place and provided that the operator were not at fault or negligent.[14]

des compétences en droit belge, in: CEDRE des Facultés universitaires Saint-Louis, La responsabilité environnementale (2009) 65 ff.

7 *B. Jadot*, L'Ordonnance bruxelloise du 13 novembre 2008 transposant la directive 2004/35/CE: quelques points particuliers, in: CEDRE des Facultés universitaires Saint-Louis, La responsabilité environnementale (2009) 281 ff.

8 Belgian official journal of 16 April 2009 30602 (Moniteur belge/Belgisch Staatsblad).

9 Art. 1 of the Dir. 2004/35/EC.

10 Art. 8 of the Dir. 2004/35/EC.

11 In the Brussels Region, this authority is designated by the Brussels Government (art. 7 § 6 of the Ordinance). Cf. art. 2 of the implementing order of 19 March 2009 (nomination of the Directeur général/Directeur-generaal).

12 Art. 8 (3) of the Dir. 2004/35/EC and art. 13 § 1 of the Brussels Ordinance.

13 Art. 8 (4) (a) of the Dir. 2004/35/EC and art. 13 § 2 of the Brussels Ordinance.

14 Art. 8 (4) (b) of the Dir. 2004/35/EC and art. 13 § 2 of the Brussels Ordinance.

2. Art. 97 de la Loi du 22 décembre 2008 portant des dispositions diverses (I)/Art. 97 van de Wet van 22 december 2008 houdende diverse bepalingen (I) (Art. 97 of the Act of 22 December 2008 Containing Various Provisions (I))[15]

On 15 May 2007, an Act was adopted in Belgium aiming at compensating the damage sustained by patients and their beneficiaries and caused in Belgium by a care provider (either a medical practitioner or a hospital). The general idea on which it is based was to organize a totally new system of compensation of accidents in the course of medical treatment, regardless of whether they resulted from a faulty conduct of the provider or not. It is sometimes presented as being a no-fault system. This new system was commented upon in the previous Yearbook.[16] 5

Initially, the new system should have entered into force on 1 January 2008. However, in the absence of the Royal Decrees which would have had to be adopted to ensure the application of the system (in particular, it was expected that exemptions and/or maximal amounts for the compensation would be set with the aim of ensuring the financial equilibrium of the system), this entry into force was postponed a first time to 1 January 2009. As a result of an Act of 22 December 2008, it is henceforth postponed sine die. 6

In reality, from the time it was published, the Act was criticized. Among the problematic aspects, one may point out the fact that under the new system, the victim was deprived of the possibility to sue the tortfeasor on the basis of tort law although the principle of full compensation was not guaranteed by the new system. 7

As a consequence of the dissatisfaction generated by the Act of 15 May 2007, the council of ministers decided in October 2008 that this Act should be modified quite substantially: an ad hoc fund would be created to indemnify the victim whatever the cause of the damage (however the victim should present a minimal threshold of permanent incapacity). Should the victim not be satisfied with the gained compensation, he/she could sue the care provider (or his/her insurer) before the judicial courts to obtain full compensation. In this case, he/she would have to prove the faulty conduct of the care provider.[17] The future will tell us whether these new ideas, clearly inspired from the French legislation, will become reality in Belgium. 8

[15] Belgian official journal of 29 December 2008 (4th ed.) 61024 (Moniteur belge/Belgisch Staatsblad).

[16] *Durant* (fn. 6) 182. On this Act, recently: *H. Bocken* (ed.), Nieuwe wettelijke regelingen voor vergoeding van gezondheidsschade. De wet van 15 mei 2007 betreffende de vergoeding van schade als gevolg van gezondheidszorgen (2008) 193 pp.; *Th. Vansweevelt*, Een no fault-systeem voor medische ongevallen in België: quo vadis? in: Liber Amicorum Jean-Luc Fagnart (2008) 347 ff.

[17] *E. Langenaken*, La réforme de l'indemnisation du dommage issu des soins de santé, in: B. Kohl, Droit de la responsabilité (2009) 284 and 296. This author refers especially to *P. Staquet*, Responsabilité sans faute en droit médical: avis de décès? Droitbelge.net 31 October 2008 (http://www.droitbelge.be/news_detail.asp?id=497). Cf. also the latest declarations of the Health Minister.

B. Cases[18]

1. Cour de cassation/Hof van Cassatie (Supreme Court), 19 December 2007, P.07.1314.F; JT 2008, 160: But-For Test and Lawful Alternative Behaviour

a) Brief Summary of the Facts

9 While he was reversing his car, a drunken driver crashed into a vehicle regularly parked on the right hand side of the road. The owner of this vehicle sued the driver who invoked the contributory negligence of the owner. Indeed, this latter had parked his car on a public road although he had failed to take out liability insurance (although it is forbidden to put a car into circulation without liability insurance). However, the trial judges considered that the damage would have occurred in the same way if the owner of the parked vehicle had been insured. Therefore, only the driver was declared liable.

10 On the contrary, according to the driver, the accident would not have occurred in the same way without the faulty conduct of the owner: without the faulty conduct, the car would not have been placed on the public road (considering that the owner was not insured). Therefore, he appealed before the Supreme Court.

b) Judgment of the Court

11 The Supreme Court did not quash the decision of the trial judges. According to the Court, by replacing the faulty conduct with a correct conduct (if the owner of the parked car had been insured, the accident would have occurred in the same way) the trial judges decided regularly (because it did not modify the circumstances of the case) that there was no causal link between the absence of insurance and the collision.

c) Commentary

12 See the commentary under the next decision.

2. Cour de cassation/Hof van Cassatie (Supreme Court), 28 May 2008, P.08.0226.F; CRA/VAV 2008, 411; Forum de l'Assurance 2008, 132, cmt. *J.-L. Fagnart*; NjW 2009, 80, cmt. *I. Boone*: But-For Test and Lawful Alternative Behaviour

a) Brief Summary of the Facts

13 The driver of a car, who was drunk, was not covered by liability insurance and whose vehicle was not registered, collided with many other vehicles. The question arose whether the faulty conduct of the driver was causally linked to the damage. The trial judges applied the but-for test as follows: without the faulty conduct of the driver, that is to say if the driver had not put his vehicle on the

[18] The commented decisions are to be found not only in the mentioned legal reviews, but also on the official website of the Belgian judicial power: www.juridat.be.

public road considering he was drunk, not insured and his car not registered, no collision would have occurred. According to this test, causation was considered to be proven.

According to the driver, another way of applying the but-for test was conceivable: to ask whether the accident would also have occurred if the driver had been insured, registered and sober. However, the trial judges refused to apply the but-for test in such a manner. According to them, this second way was not admissible because it would have implied a misreading of the concrete circumstances of the case. The driver did not agree and appealed to the Supreme Court. 14

b) Judgment of the Court

When he applies the but-for test, the trial judge may not modify the circumstances in which damage occurred with the exception being that he leaves out the faulty conduct itself. In so doing, the trial judge is free to replace the faulty facet of putting the vehicle into circulation with a vehicle which is correctly put into circulation and to deduce from this reconstruction whether the faulty conduct was or was not causally linked to the damage, depending on whether the damage would not or would have occurred in the absence of the faulty conduct. 15

Taking into account these principles, the trial judges were not allowed to refuse to consider, in the framework of the but-for test, whether the accident would also have occurred if the driver had been sober, insured and his car registered. Therefore, their decision was quashed. 16

c) Commentary

Under Belgian tort law, causation is deemed to be established when one can say that without the faulty conduct the damage would not have occurred as it occurred concretely: Belgian tort law applies the but-for test.[19] As recently once again recalled by the Supreme Court, liability may not be engaged when uncertainty exists as regards causation[20]: certainty is thus required.[21] As a rule, to apply the but-for test means to imagine what would have occurred in the absence of the faulty conduct: one reconstructs the events by removing the faulty conduct while maintaining all the other circumstances of the case. 17

[19] *B. Winiger/H. Koziol/B.A. Koch/R. Zimmerman* (eds.), Digest of European Tort Law. Vol. I: Essential Cases on Natural Causation (2007) 16. During this last year, cf. Cass., 29 October 2008, P.08.0901.F.

[20] Cass., 31 January 2008, Nieuw Juridisch Weekblad (NjW) 2008, 441, cmt. *I.B.*; De Juristenkrant 12 November 2008, 2, cmt. *F. Korkmazer*. In this case, a couple claimed damages from the Belgian authority responsible for controlling the energy prices (electricity and gas). According to the couple, the authority had not executed the control correctly with the consequence that they paid too much during the period 1997–2001. Considering that the increase in energy prices might also be the consequence of other factors (such as the availability of raw materials), the trial judge reduced the sought damages. Nevertheless, the Supreme Court quashed the decision because this revealed that causation was uncertain.

[21] During the last year, cf. Cass., 23 October 2008, C.07.0481.F.

18 However, when the problematic conduct is not entirely faulty, but presents only a faulty facet, one sometimes has recourse to the argument generally called the legitimate alternative (alternative légitime/rechtmatig alternatief). In this case, when one reconstructs the events, the faulty facet of the problematic conduct is not only removed but also replaced with its correct execution.[22] In this way, causation would be determined in a more accurate manner.

19 Several years ago the Supreme Court stated that it accepted this way of applying the but-for test[23] and one can easily imagine why it could be interesting to proceed on such a manner: if the judge is of a mind that the damage would also have occurred once the faulty facet of the problematic conduct is replaced by its correct execution, the conclusion that must be drawn is that there is no causation between the fault and the damage. For instance, if the driver had been driving very slowly at the moment of the accident with a moped, the engine of which he had manipulated in order to increase its power, the judge who reconstructs the events by asking himself what would have happened if the driver had been driving a "regular" moped will very probably conclude that the accident would also have occurred in the presence of a regular conduct considering the driver was driving very slowly at the moment of the accident. Consequently, the irregular conduct will not be considered as causally linked to the damage.[24]

20 The limit of the use of the argument of the legitimate alternative comes from the fact that the concrete circumstances of the accident may not be modified at the moment of the reconstruction of the story and, as observed by Prof. Dr. Marc Van Quickenborne, the difference between a correct application of the legitimate alternative and an incorrect application of the but-for test founded on suppositions is "very subtle".[25]

21 In the first commented decision (19 December 2007), the criticized judgment was not quashed because the argument of the legitimate alternative had been considered by the Supreme Court as having been correctly applied by the appeal judges. On the contrary, in the second commented case (28 May 2008), the Supreme Court censured the trial judges because they were of the opinion that were not authorized to address the issue of whether the accident would also have occurred had the driver been sober, insured and his car registered, while, according to the Court, they could have adopted this way of reasoning that did not imply a modification of the concrete circumstances of the accident.

[22] *J. du Jardin*, Audiences plénières et unité d'interprétation du droit, Journal des Tribunaux (JT) 2001, 646; *M. Van Quickenborne*, De oorzakelijkheid in het recht van de burgerlijke aansprakelijkheid (1972) 85; *id.*, Oorzakelijk verband tussen onrechtmatige daad en schade (2007) 46; *Winiger/Koziol/Koch/Zimmerman* (fn. 19) 30.

[23] Cass., 25 March 1997, Bulletin des Arrêts de la Cour de Cassation (Bull arr) 1997, 405.

[24] Cass., 13 October 1987, Droit de la circulation Jurisprudence/Verkeersrecht Jurisprudentie (DCJ/VKJ) 1988, 260. Cf. also court of appeal of Brussels, 21 November 2000, DCJ/VKJ 2001, 148. In this case, the lorry involved in the accident was not equipped with the legal accessories and its side rear lights were not functioning at the moment of the accident.

[25] *Van Quickenborne*, Oorzakelijk verband tussen onrechtmatige daad (fn. 22) 47.

This last decision in particular shows that the Supreme Court controls effectively the reasoning developed by the trial judges as regards causation.[26] These judges had considered that the reconstruction of the story by imagining a sober, insured and registered driver would have implied a modification of the real circumstances of the case. The Supreme Court did not agree with this point of view.[27] The application of the but-for test is anything but simple! 22

A commentator of the decision of 28 May 2008 considered that it must be approved. According to him, the argument of the legitimate alternative would perfectly be in accordance with the but-for test doctrine; its purpose would be to identify as accurately as possible ("with surgical preciseness") the faulty conduct.[28] 23

The danger that looms for one who uses the argument of the legitimate alternative may be to lose sight of the real fault committed by the defendant. In the first case, for instance, it is not the fact of not being insured that constituted the faulty conduct (one may have a car without being insured); it is more exactly the fact of having put a vehicle on a public road without being insured. One can thus wonder whether the judge who imagines what would have happened if the owner of the vehicle had been insured correctly replaces the faulty conduct by its correct execution. 24

3. Cour de cassation/Hof van Cassatie (Supreme Court), 5 June 2008, C.07.00073.N; NjW 2008, 881, cmt. *I. Boone*; JLMB 2009, 52, cmt. *D. Philippe*: State's Liability Due to the Faulty Conduct of a Magistrate

a) Brief Summary of the Facts

The firm Vulex was declared bankrupt by the bankruptcy court of Tongeren in 1983, but at the end of various proceedings, the bankruptcy was withdrawn on 11 January 1989. On 26 January 1989, the firm sued the Belgian State for faulty conduct of the judges who had pronounced the bankruptcy. However, the claim was rejected for reason of prescription. The firm did not agree with the decision. According to it, the prescription period began to run in 1989 at the moment of the withdrawal of the contested decision of the bankruptcy court and not in 1983 when this decision was delivered. Therefore, the damages claim was not time-barred according to the firm, which appealed to the Supreme Court. 25

b) Judgment of the Court

The faulty conduct of a judge may lead to the liability of the State, being understood that one may speak about faulty conduct in two kinds of situations: when the judge did not act as a reasonable and cautious judge placed 26

[26] *J.-L. Fagnart*, La notion de causalité et le contrôle de la Cour de cassation, Forum de l'Assurance 2008, 133.

[27] A similar decision was delivered on 26 November 2008 by the Supreme Court (P.08.1009.F). In this case, the driver of a moped carried a passenger, although he was not authorized to do so.

[28] *Fagnart* (fn. 26) 135.

in the same circumstances or when the judge violated a national or international norm imposing on him a duty either to refrain from acting or to act in a well-defined manner, except, in the latter case, in the presence of a cause of justification.

27 In addition, when the contested conduct of the judge constitutes the direct object of the jurisdictional function (when it takes the shape of a judgment), the State's liability may only be incurred as a rule if the criticized judgment has been withdrawn, reformed, cancelled or retracted by another definitive judgment. As far as the contested decision has not been withdrawn (or reformed, cancelled, or retracted), there is no compensable damage. In the present case, it was therefore not admissible to claim that the damage occurred in 1983 (and consequently that the prescription period began to run at that time).

c) Commentary

28 For about twenty years, it has been clearly admitted by the Supreme Court that the State's liability may be engaged due to the faulty conduct of a judge.[29] This faulty conduct can arise when the judge exercises the office to judge and delivers judgments (jurisdictional function), but the faulty conduct may also occur on the occasion of exercising a non-jurisdictional function (for instance, during criminal investigations or a house-search). In both cases, the fault will consist either in the violation of a national or an international norm imposing a well-defined conduct (for instance, not to give a ruling ultra petita or to keep a secret) or in a conduct that would not have been adopted in the same circumstances by a reasonable and cautious magistrate.[30]

29 As regards the faulty act which occurred on the occasion of jurisdictional function, the Supreme Court links the admissibility of the claim to one specific additional condition: considering a legal presumption of truth is attached to the judicial decisions, the conduct of the judge will not be considered as a fault as far as the contested decision still exists. On the contrary, from the moment this decision has lost its judicial power,[31] the State's liability may be engaged if there is still damage notwithstanding the withdrawal of the decision. From this perspective, the judicial means offered by the Civil Procedure Code are the first means to be used by the individual who complains of a judicial decision. As ruled by the Supreme Court in the commented decision, there is no damage deemed to be compensated on the basis of tort law as far as the contested decision still exists. However, the Sate's liability does not automatically result from the reform of the contested decision: in addition to this

[29] Cass., 19 December 1991, Pasicrisie (Pas) 1991, I, 316; Revue régionale de droit 1991, 412, cmt. *Chr. Jassogne*; JT 1992, 142; Revue générale de droit civil belge/Tijdschrift voor Belgisch Burgerlijk Recht (RGDC/TBBR) 1992, 62, cmt. *A. Van Oevelen*; Revue de Jurisprudence de Liège, Mons et Bruxelles (JLMB) 1992, 42, cmt. *Fr. Piedbœuf*; Rechtskundig Weekblad (RW) 1992–1993, 377, cmt. *A. Van Oevelen*; Revue Critique de Jurisprudence Belge (RCJB) 1993, 285, cmt. *Fr. Rigaux/J. Van Compernolle*.

[30] Cass., 8 December 1994, Pas 1994, I, 1063; JLMB 1995, 387, cmt. *D. Philippe*; JT 1995, 497, cmt. *R.O. Dalcq*; RW 1995–1996, 180, cmt. *A. Van Oevelen*.

[31] Cf. also Cass., 27 June 2008, C.07.0384.F; JLMB 2009, 58, cmt. *D. Philippe*.

condition, the three traditional requirements are to be proven (fault, damage and causation).[32]

To be complete, it has to be added that in another decision of 5 June 2008, the Supreme Court ruled a refinement to this principle.[33] According to the Court, the situation in which the victim has no interest in obtaining the withdrawal of the decision has to be assimilated to the situation of withdrawal. In this particular case, in the framework of a criminal investigation about cigarette smuggling, the head of the service "offence prevention" was suspected of passive corruption and arrested by order of a judge. Two days later, the court chambers "chambre du conseil/raadkamer" (instruction court) considered that the arrest order was justified at the time it had been delivered but that keeping the individual in custody was no longer justified. The director was released and due to this reason had no interest in appealing the decision of the "chambre du conseil/raadkamer". He sued the Belgian State to obtain compensation of the damage he suffered due to being kept in custody, although the decision of the court chambers had not been withdrawn. On this occasion, the Supreme Court ruled that the judicial means to contest judicial decisions, offered by the Criminal Code or the Code of Civil Procedure, have only to be used against a contested decision if the victim has an interest in using it. In other words, the criminal or judiciary recourse means have to be used only if these means may actually lead to a kind of restoration of the damage caused by the contested decision.[34] 30

4. Cour de cassation/Hof van Cassatie (Supreme Court), 5 June 2008, C.07.0199.N; Bulletin des assurances/De Verzekering 2008, 418, cmt. *H. Bocken*; De Juristenkrant 15 October 2008, 3, cmt. *K. Beirnaert*; Rechtskundig Weekblad 2008–2009, 795, cmt. *S. Lierman*; Revue de droit de la santé/Tijdschrift Gezondheidsrecht 2008–2009, 210, cmt. *S. Lierman*; Circulation, Responsabilité, Assurances/Verkeer, Aansprakelijkheid, Verzekering 2008, 526; Nieuw juridisch weekblad 2009, 31, cmt. *H. Bocken* and *I. Boone*; Journal des Tribunaux 2009, 28, cmt. *A. Pütz*: Loss of a Chance

a) Brief Summary of the Facts

The horse Prizrak died of gastric rupture as a consequence of which his owner (or more precisely his heirs) sued the vet M., who was considered by the court of appeal as having acted in a faulty manner in the framework of his contractu- 31

[32] Cass., 26 June 1998, Bull 1998, 812; JLMB 1998, 1166, cmt. *D. Philippe*; JT 1998, 677; Revue Générale des Assurances et des Responsabilités (RGAR) 1999, 13095, cmt. *R.O. Dalcq*; RCJB 2001, 21, cmt. *B. Dubuisson*; *B. Dubuisson*, La responsabilité civile du pouvoir judiciaire: l'application de la loi par le juge, obligation de moyens ou de résultat? in: La responsabilité professionnelle des magistrats (2007) 44; *B. Dubuisson*, La responsabilité civile du pouvoir judiciaire: l'expérience belge, in: M. Fabre-Magnan/J. Ghestin/P. Jourdain (eds.), Etudes offertes à Geneviève Viney (2008) 360.

[33] Cass., 5 June 2008, C.06.0366.N; RW 2008–2009, 800, cmt. *A. Van Oevelen*.

[34] *A. Van Oevelen*, De overheidsaansprakelijkheid voor het optreden van de rechterlijke macht (1987) 814 f., no. 793 f.; *id.*, De aansprakelijkheid van de Staat voor foutieve jurisdictionele beslissingen verfijnd, RW 2008–2009, 803.

al relation with the owner of the animal. Indeed, considering the information at his disposal about the health of the animal when he examined it, the vet should have carried out a stomach catheterization. If such an examination had been done, it would have been possible to initiate the appropriate therapy and the horse would probably not have died. The court of appeal of Antwerp assessed that the horse would have had an 80% survival chance in case of accurate therapy and allocated to the owner 80% of € 198,186.22 (i.e. € 158,548.97). The vet objected to this decision. According to him, causation between his faulty conduct and the death of the animal was uncertain and his (contractual) liability was consequently not established. Therefore, he appealed before the Supreme Court.

b) Judgment of the Court

32 Firstly, the Supreme Court recalled that the one who claims damages must prove that causation exists between the faulty conduct and the damage and that causation supposes that, without the faulty conduct, the damage would not have occurred as it did. Afterwards, it ruled that the loss of a real recovery or survival chance is deemed to be compensable if a conditio sine qua non link exists between the faulty conduct and the loss of such a chance. When such a loss is caused by a fault, it must be compensated by the tortfeasor. In view of the fact that the court of appeal had considered that the horse had a real chance of survival if it had been correctly treated, its decision was not disapproved by the Supreme Court.

c) Commentary

33 One shall remember that a lot of ink has been spilled over the loss of a chance theory for about five years in Belgium. Indeed, in 2004, the Supreme Court delivered a decision interpreted by many authors as having very probably sounded the death knell of this theory.[35] This apparent death was deplored by some people[36] while others were delighted with this apparent reversal of the case law,[37] actually unexpected considering the theory had been admitted and applied for many years and had been accepted by the Supreme Court especially in 1984.[38]

34 In the case giving rise to the leading case dated of 1984, JJR tumbled with the consequence that he suffered multiple fractures to a leg and a foot. Although the injuries should not have led to serious after-effects, JJR's leg had to be amputated as a result of the emergence of gangrene. JJR claimed that the doctor on duty had not anticipated this and, consequently, failed to take appropriate

[35] Details on this case are to be found in: *I.C. Durant*, Belgium, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 178; *Winiger/Koziol/Koch/Zimmerman* (fn. 19) 558.

[36] *B. Dubuisson*, La théorie de la perte d'une chance en question: le droit contre l'aléa? JT 2007, 491.

[37] *J.-L. Fagnart*, La perte d'une chance ou la valeur de l'incertain, in: R. Capart/D. de Callataÿ/J.-L. Fagnart et al., La réparation du dommage. Questions particulières (2006) 90.

[38] Cass., 19 January 1984, Pas 1984, I, 548; RGAR 1986, 11084, cmt. *Th. Vansweevelt*. Also Cass., 31 March 1969, Pas 1969, I, 676.

measures, despite the presence of a brown blotch on the plaster on the patient's leg, a swelling of the patient's toes and the patient's complaining about pain and suffering. Under these circumstances, the trial judges, basing their decision especially on the scientific literature,[39] decided that the faulty conduct of the doctor was causally linked to the loss of the patient's chance not to have his leg amputated (or for the leg not to have been amputated to such an extent). The doctor had to repair 80% of the (actually occurred) damage. The Supreme Court did not receive favourably the appeal coming from the doctor, as a consequence of which one could say that the loss of a chance theory was admitted in Belgian tort law.

On the contrary, in 2004, the Supreme Court quashed a judgment of the court of appeal of Brussels having considered that it was certain that the victim of an acid attack would have had a chance to escape from her aggressor if protective measures had been taken by the police and by the public prosecutor aware of the potential danger. The court of appeal of Brussels had evaluated the lost chance to 80% (meaning that, according to the court, if safety measures had been taken, in eight cases out of ten, the damage would not have occurred).[40] 35

When the decision of 2004 was delivered, the question of its correct interpretation (or meaning) arose. Taking into account the pleas of the public prosecutor and considering the care with which the court of appeal of Brussels had written its decision, there were reasons to believe that the intention of the Supreme Court had been to condemn the use of the theory of the loss of a chance in case of causal uncertainty.[41] However, it is also true that one word used by the Supreme Court in its decision could perhaps cast a doubt on this condemnation. According to the Court, it was not proven that, without the faulty omissions, the invoked damage would have occurred. Considering that the Supreme Court noted that the claim aimed at the repair of damage resulting from the aggression, it is not absolutely certain that the decision of the Supreme Court would have been the same if the claim had been otherwise expressed, aiming expressly to repair the lost chance.[42] A new decision of the Supreme Court was therefore eagerly awaited. This came in 2008, within a contractual context but this should not constitute a difficulty considering that causation is regarded as a rule in the same way within contractual and non-contractual contexts.[43] In the 36

[39] According to which gangrene is either the consequence of therapeutic negligence or the consequence of an excessively long period of treatment.

[40] Court of appeal of Brussels, 4 January 2001, Journal des Procès (no. 410) 2001, 22, cmt. *J. Fermon*.

[41] In this sense, cf. also *N. Estienne*, L'arrêt de la Cour de cassation du 1er avril 2004: une chance perdue pour les victimes de fautes médicales, JT 2005, 359; *R. Marchetti/E. Montero/A. Pütz*, La naissance handicapée par suite d'une erreur de diagnostic: un préjudice réparable? La perte d'une chance de ne pas naître? RGDC/TBBR 2006, 130; *A. Van Oevelen/G. Jocqué/Chr. Persyn/B. de Temmerman*, Overzicht van rechtspraak. Onrechtmatige daad: schade en schadeloosstelling (1993–2006), Tijdschrift voor privaatrecht (TPR) 2007, 967.

[42] Cf. our comments in *H. Koziol/B.C. Steininger* (eds.), European Tort Law 2004 (2005) 181; *Winiger/Koziol/Koch/Zimmerman* (fn. 19) 560. Cf. also *Van Quickenborne*, Oorzakelijk verband tussen onrechtmatige daad (fn. 22) 75.

[43] *H. Bocken*, Verlies van een kans, NjW 2009, 6.

commented case, the Supreme Court ruled without any doubt that the loss of a real recovery or survival chance is deemed to be compensable if a conditio sine qua non link exists between the faulty conduct and the loss of such a chance.

37 The commentators have favourably received the new decision, which expresses clearly that the loss of a real recovery or survival chance is compensable. The majority now write that the Supreme Court has dispelled the ambiguity[44] while those who had considered that the judgment of 2004 was comprehensive, considering that in the "acid attack" case the victim would not have claimed the compensation of a lost chance but only the compensation of the real occurred damage, explain that the case law of the Supreme Court does not show a lack of consistency.[45]

38 As regards the habits of the trial judges, the decision of 5 June 2008 should not imply great modifications. Indeed, most of these judges continued to make use of the theory of the loss of a chance even after 2004.[46] Nevertheless, some judges had advocated the idea that the doctrine of the loss of a chance could not be used in case of causal uncertainty. A decision of the court of appeal of Mons of 10 April 2008 is worthy of particular mention.[47] In this decision, the judges recalled the pleas of the public prosecutor in the "acid attack" case: the concept of the loss of a chance could not be used for masking causal uncertainty.

39 Should the decision of 5 June 2008 be compatible with the decision of 1 April 2004 and should the decision of 1 April 2004 be understood as having rejected the use by the judge of the lost chance doctrine while the victim seeks compensation for the real occurred damage, the advice should be given to the victim (or his/her lawyer) to expressly claim compensation of the loss of a chance, if need be only in addition to the main claim.[48]

[44] *I. Boone*, Vergoeding voor verlies van een genezings- of overlevingskans liet langer onzeker, NjW 2009, 33; *A. Pütz*, La perte d'une chance d'éviter la réalisation d'un risque: un préjudice indemnisable! JT 2009, 30. P. Van Ommeslaghe speaks about a reorientation ("infléchissement") of the case law and considered that the decisions of 1 April 2004 and 5 June 2008 seem to be contradictory. Therefore, he hoped that a third decision would be delivered by the Supreme Court in plenary session (*P. Van Ommeslaghe*, Lien de causalité et dommage réparable: dérives et corrections, in: J.-P. Beauthier/K. Bernauw et al., Liber Amicorum Jean-Luc Fagnart (2008) 702 and 708).

[45] *Bocken*, NjW 2009, 3 ff.

[46] E.g. Court of appeal of Liège, 13 May 2004, JLMB 2005, 289; RGAR 2004, 14025; court of appeal of Antwerp, 7 June 2004, NjW 2005, 205; Revue de droit de la santé/Tijdschrift voor gezondheidsrecht (Rev Dr Santé/T Gez) 2005–2006, 138; court of appeal of Brussels, 15 September 2004, Intellectuele Rechten Droits intellectuels (IR DI) 2004, 387; Civ Ghent, 1 December 2004, NjW 2005, 172; Civ Dinant, 27 June 2005, RGDC/TBBR 2005, 491.

[47] Court of appeal of Mons, 10 April 2008, Bulletin des assurances/De Verzekering (Bull Ass/De Verz) 2008, 430, cmt. *A. Schollen*; cf. also court of appeal of Antwerp, 19 October 2005, NjW 2006, 895, cmt. *I. Boone.*

[48] *K. Beirnaert*, "Verlies van een kans"-theorie terug van weggeweest? De Juristenkrant 15 October 2008, 3; *S. Lierman*, Het verlies van genezings- en overlevingskansen blijft vergoedbaar, Rev Dr Santé/T Gez 2008–2009, 214.

5. Cour de cassation/Hof van Cassatie (Supreme Court), 6 June 2008, C.06.0640.F: Lawful Interest Required at the Moment of Damaging Event

a) Brief Summary of the Facts

In the course of autumn 1995 and spring 1996, the claimant planted Christmas trees without a permit, although this was required by the Walloon legislation. In 1998, this legislation was modified with the consequence that the planting of Christmas trees no longer requires any administrative authorization. In April 1999, the claimant's Christmas trees were damaged by game coming from the defendant's shoot. Considering this damage, the claimant sued the defendant in order to obtain damages. 40

According to the trial judge, the claimant did not have any lawful ground to seek compensation, considering that the damaged trees had been planted irregularly. When he did not agree with this decision, the claimant appealed before the Supreme Court. 41

b) Judgment of the Court

Having recalled that, as regard to tort law, the violation of an interest may only give rise to a claim for damages as far as the violated interest is a lawful interest, the Supreme Court ruled that the lawfulness of the interest must be determined at the moment the damaging event occurred. Therefore, the decision of the trial judge, having appreciated the lawfulness of the situation as regards a moment prior to the incidence of the damage, was quashed. 42

c) Commentary

As recalled in the commented decision, under Belgian tort law, the violation of an interest may only give rise to a claim for damages in so far as the interest is lawful.[49] This principle is not contested, but it is obviously necessary to agree on the notion of lawful interest. Two kinds of situations may occur. 43

Firstly, an individual whose claim aims only to *maintain a situation contrary to law and order* does not pursue a lawful interest. Consequently, the trial judges have to examine the goal of the claim. If they dismiss the claim under the pretext of unlawfulness without having examined its goal, their decision is illegal. For this reason the Supreme Court decided to quash a decision of the court of appeal of Antwerp delivered in the following circumstances.[50] 44

[49] Cass., 3 October 1997, C.96.0334.F; Pas 1997, I, 965; Arr Cass 1997, 921; Amén 1998, 172; RW 1998–1999, 1349; Cass., 2 April 1998, C.940438.N; Pas 1998, I, 431; Arr Cass 1998, 407; Revue de droit judiciaire et de la preuve/Tijdschrift voor Procesrecht en Bewijsrecht (RDJP) 1998, 129; RW 1998–1999, 502; RGDC/TBBR 1999, 251, cmt. *D. Simoens*; T Not 2003, 460; Cass., 14 May 2003, P.02.1204.F; Pas 2003, I, 982; RGAR 2003, 13767; Bull Ass/De Verz 2003, 818, cmt. *P. Graulus*; RCJB 2004, 135, cmt. *J. Kirkpatrick*; RW 2005–2006, 743.

[50] Cass., 2 April 1998, C.94.0438.N; Pas 1998, I, 431; Arr Cass 1998, 407; RDJP 1998, 129; RW 1998–1999, 502; RGDC/TBBR 1999, 251, cmt. *D. Simoens*; T Not 2003, 460.

45 The owner of a caravan placed it in a leisure area without a permit. A tree crashed down on the caravan. The owner's insurer, who had compensated him, sued the guardian of the tree. The court of appeal dismissed the insurer's claim, considering that the conduct of the owner of the caravan had been unlawful (the caravan had been placed without a permit). The insurer did not agree with this decision: it was of the opinion that the claim aimed at obtaining compensation for the lost property (the caravan) and that this property was not unlawful per se (only its location was unlawful). On appeal of the insurer, the Supreme Court quashed the judgment of the court of appeal considering that this latter had not checked whether the insurer's claim only aims at the maintenance of a situation contrary to law and order or not.[51]

46 In similar cases, some decisions indicate clearly the aim of the claim. For instance, the court of appeal of Mons was of the opinion that the claim aiming to obtain compensation for the damage resulting from the deterioration of car wrecks illegally stored in a garden was lawful. In this case, three children vandalised wrecks which had been stored without a permit.[52] This decision consolidates the opinion of many authors and judges according to which the claim to compensate property is not to be considered as being unlawful even if the loss occurs within an illegal context and the same would apply to bodily damage (for instance, when a thief is injured while trying to escape).[53]

47 Secondly, the claimant's interest is also unlawful when the claim concerns the *loss of an unlawful advantage or the lack of unlawful profits*. The deprivation of an unlawful advantage, that is to say an advantage that is contrary to law and order or to morality, is not deemed to be compensable. Law and order relate to essentials interests of the State or community on which the economic and social order of society rests.[54] The morality relates to the moral values perceived by the collective consciousness at the present time.[55]

48 Pursuant to this principle, the Supreme Court ruled that the receipt of income resulting from moonlighting constitutes an unlawful advantage the deprivation of

[51] The court of appeal of Brussels, having taken cognizance of the case after the decision of the court of appeal of Antwerp had been quashed, dismissed also the insurer's claim considering that the claim did actually aim at the maintaining of an illegal situation because before the accident the owner of the caravan had asserted that he would never move it. Court of appeal of Brussels, 19 May 2003, RW 2006–2007, 478. In the same way but making a difference between the damage caused to the caravan (unlawful damage) and the damage caused to the movables contained in it (lawful damage), cf. court of appeal of Antwerp, 5 April 2006, Bull Ass/De Verz 2006, 440. In this case, the victim had used the indemnity received from its insurer to repair its bungalow.

[52] Court of appeal of Mons, 21 February 2008, Bull Ass/De Verz 2008, 428.

[53] *E. Dirix*, Het begrip schade (1984) 70; *L. Schuermans/A. Van Oevelen/C. Persyn/Ph. Ernst/J.L. Schuermans*, Overzicht van rechtspraak. Onrechtmatige daad. Schade en schadeloosstelling (1983–1992), TPR 1994, 921; *D. Simoens*, Een illegaal opgestelde caravan moogt u niet beschadigen, RGDC/TBBR 1998, 255.

[54] Cass., 15 March 1968, Pas 1968, I, 885; Cass., 10 November 1978, Pas 1979, I, 309; Cass., 28 September 1979, Pas 1980, I, 131.

[55] For a definition, cf. Civ Brussels, 21 April 2004, Rev Dr Santé/T Gez 2004–2005, 384.

which may not give rise to compensation.[56] In this case, a foreman working in a bakery was the victim of a traffic accident. He was totally disabled for five years. He claimed damages evaluated on the basis of his real lost income (i.e. regular wages and also income resulting from the moonlighting). However, the trial judges did not allow any compensation for the loss of illegally gained income.[57]

6. Cour de cassation/Hof van Cassatie (Supreme Court), 25 September 2008, C.07.0207.F: Damage Caused to Vehicles and Value Added Tax

a) Brief Summary of the Facts

The claimant bought a second hand car. On this occasion, he paid to the salesman not only the sales price but also the value added tax (VAT). Considering that the sold good was a second hand car, the VAT (21%) was not calculated on the total sales price but only on 15% of it (i.e. on the presumed profit margin of the seller). 49

After it was bought by the claimant, the car was totally destroyed in a traffic accident caused by a tram; the claimant sought compensation from the tortfeasor (the tramway company). According to traditional Belgian case law, when a car is totally destroyed, its owner may obtain from the tortfeasor the reconstitution of his patrimony. More precisely, he may obtain an amount necessary to acquire a thing similar to the destroyed thing, *including* the VAT, *when* the victim is not subjected to this tax. One speaks about the replacement value of the destroyed thing (valeur de remplacement/vervangingswaarde). 50

In the present case, the trial judge calculated the VAT due by the tortfeasor (21%) on the whole replacement value, but the tramway company did not agree with this manner of assessing the damage. According to it, the VAT should have been calculated at 15% of the replacement value and not on the whole replacement value because the destroyed car (to be replaced) was a second hand car and because the VAT paid by the victim was therefore a reduced VAT. Consequently, he appealed before the Supreme Court. 51

b) Judgment of the Court

The Supreme Court did not quash the decision of the trial judge. According to the Court, the VAT due by the tortfeasor must be calculated at the rate imposed by law in case of acquisition of a new car, even when the destroyed car had been bought as a second hand car by the victim with a VAT rate calculated on the profit margin of the salesman and not on the total sales price. 52

c) Commentary

The right for the victim to obtain full compensation of his damage implies that he/she may claim the restoration of his damaged patrimony and so would be put, as far as possible, in the same situation as that existing before the accident. 53

[56] Cass., 14 May 2003, P.02.1204.F; Pas 2003, I, 982; RGAR 2003, 13767; Bull Ass/De Verz 2003, 818, cmt. *P. Graulus*; RCJB 2004, 135, cmt. *J. Kirkpatrick*; RW 2005–2006, 743.

[57] The income resulting from the moonlighting was considered to have been gained illegally considering that the extra-hours were in violation of the social legislation.

The damage does not consist in the loss of the price of the damaged thing but in the loss of the thing itself.[58] Restoration occurs either by the repairing of the damaged thing or by the granting of an amount necessary to buy a thing similar to the damaged thing as existing just before the accident.[59]

54 Should the victim not be subject to VAT, the indemnity must include the tax on the additional value.[60] This can be explained by the fact that the victim must be placed in a position to buy a replacement thing. The fact that the victim would finally decide not to replace the damaged thing (for instance the victim decides to live without a car) does not modify this principle.[61]

55 The principle of full compensation must be combined with this other principle, according to which the amount of the damages may not vary in function of the use that will be made by the victim of these damages (the acquisition of a new car, the acquisition of a second hand car).[62] The reason for this second rule lies in the fact that the victim is free to use (or not to use) the damages as he/she wants. According to the Supreme Court, the consequence of this "combination" is that the VAT due by the tortfeasor is the VAT due on the acquisition of a new car at the rate in force at the moment of this acquisition, that is to say practically at the date of the judicial decision.[63]

7. Cour de cassation/Hof van Cassatie (Supreme Court), 18 December 2008, C.07.0018.F: But-for Test and Hypothetical Situations

a) Brief Summary of the Facts

56 On 15 June 1998, the Walloon Region delivered to the city of Charleroi two building permits relating to the extension of the football stadium and to the area of the city around it. The works were undertaken to prepare for the Euro 2000 Football Championship. In a decision of 18 September 2003, the Council of State (Conseil d'Etat/Raad van Staat) cancelled both permits because they were not delivered in accordance with the town-planning statute in force at the time of the facts, although a dispensation could have been delivered by the Walloon Region justified by grounds of public interest.

57 The court of appeal of Liège deduced from the cancellation of the permits that the Walloon Region, which had issued them, committed a fault. However, it did not favourably receive the claim of the residents for obtaining compensation of the damage apparently resulting from the works. Indeed, according to

[58] Cass., 28 September 1994, Pas 1994, I, 774.

[59] Cass., 13 April 1988, Pas 1988, I, 936; Cass., 28 May 1996, Pas 1996, I, 533; Cass., 12 November 1996, Pas 1996, I, 1111; Cass., 13 May 1997, Pas 1997, I, 564; Cass., 11 May 2000, DCJ/VKJ 2000, 339.

[60] Cass., 13 April 1988, Pas 1988, I, 936; Cass., 28 September 1994, Pas 1994, I, 774; Cass., 28 May 1996, Pas 1996, I, 533; Cass., 12 November 1996, Pas 1996, I, 1111; Cass., 13 May 1997, Pas 1997, I, 564.

[61] Cass., 12 November 1996, Pas 1996, I, 1111; Cass., 13 May 1997, Pas 1997, I, 564.

[62] Cass, 11 May 2000, DCJ/VKJ 2000, 339.

[63] Cass., 13 May 1997, Pas 1997, I, 564. Cf. *Van Oevelen/Jocqué/Persyn/de Temmerman*, TPR 2007, 1509.

the court of appeal, the residents did not prove that the works could not have been executed on the basis of permits issued in compliance with the statute in force at the time of their execution. Besides, a new building permit had actually been issued in October 2004. The residents did not agree with this decision and appealed before the Supreme Court.

b) Judgment of the Court

The Supreme Court quashed the decision. According to the Court, it was not admissible for a trial judge to exclude causation between the faulty conduct of the Walloon Region and the damage invoked by the residents, by comparing the concrete situation (permits not delivered in compliance with the town-planning statute) and a hypothetical situation (permits delivered in compliance with the town planning statute should a dispensation have been delivered by the Walloon Region). 58

c) Commentary

When applying the but-for test with the aim of verifying whether there is a causal link between the damaging event and the damage, one essential rule to be respected by the judge is, as a rule, to base his judgment on known facts, without taking into account facts that present only a hypothetical feature. One understands therefore that the Supreme Court quashed the decision in which the trial judge had compared the concrete situation with a hypothetical situation. 59

8. Recent Developments concerning Personal Injury

a) The fifth version of the Indicative Table (Tableau Indicatif/Indicatieve Tabel)

In 1995, two National Unions of first instance judges (Union nationale des magistrats de première instance/Nationaal Verbond van de Magistraten van Eerste Aanleg and the Union royale des juges de paix et des juges de police/Koninklijk Verbond van Vrede- en Politierechters) took the decision to publish, in a legal newspaper,[64] what they have called an indicative table, with the aim of helping first instance judges to assess the damage resulting from traffic accidents by proposing lump sums valuations and a detailed model of appraisal by order of the court.[65] The table, that may also be used as a goad to those who have to negotiate the valuation of damage, has become, in a certain way, a work tool and a unification tool. 60

This table was drawn up at the time when the rules on civil jurisdiction in case of traffic accidents were changed, having as a consequence the increase of first instance courts in charge of this matter.[66] Until 1995, the tribunaux de première instance/rechtbanken van eerste aanleg were in charge of litigations relating to 61

[64] Journal des juges de paix et de police/Tijdschrift van de vrede- en politierechters.

[65] We may here recall that as far as faulty conduct and damage are established, the judge has to assess the damage even if the claimed amount does not result directly or immediately from the supporting documents (Cass., 13 October 1993, P.93.0491.F; JLMB 1994, 52; JT 1994, 232; Cass., 15 January 2008, P.07.1247.N).

[66] *M. Van den Bossche*, De indicatieve table. Een situering, NjW 2004, 616.

traffic accidents, on first hearing, while today, the more numerous tribunaux de police/politierechtbanken are in charge of traffic accidents on first hearing (and the tribunaux de première instance/rechtbanken van eerste aanleg on appeal).[67] Some judges were afraid of the possible development of dissimilar case law and decided, through both above mentioned Unions, to elaborate guidelines with the aim of maintaining and encouraging unity in the case law by identifying as precisely as possible the common denominator of case law and literature concerning the compensation of material and bodily damage.[68] Unity would ensure equality among victims.

62 The table, quite severely criticized at the beginning,[69] has been modified four times: in 1998, 2002, 2004 and 2008.[70] Indeed, from the beginning of the project, the authors were of the opinion that the table should be adapted periodically to the development of case law. Besides, the various versions were used as an occasion to address (some of) the criticism, that is nowadays less venomous but still exists.[71] The latest version, even if it was written only by judges, was elaborated in close cooperation with an association gathering parents of children involved in accidents, lawyers, insurers and judges (first instance and appeal judges).[72]

63 In a certain way, the table has thus stood the test of time. As observed by some authors, the indicative table is within reach of every legal practitioner dealing with accidents involving bodily damage (not only traffic accidents as in 1998, but from now on all kinds of accidents)[73] and, quite frequently, the judges refer expressly (or not)[74] to it in their decision.[75]

[67] Art. 601bis of the Belgian Code of Civil Procedure.

[68] *J.-L. Desmecht*, Préface, in: W. Peeters/M. Van den Bossche, De behandeling van lichamelijke schadedossiers en tien jaar Indicatieve Tabel/Le traitement de sinistres avec dommage corporel et dix ans de Tableau indicatif (2004) V.

[69] *D. de Callataÿ*, Sombre tableau, noir dessein. Examen critique du tableau indicatif des dommages et intérêts forfaitaires, RGAR 1996, 12641; Le nouveau tableau indicatif des dommages et intérêts forfaitaires: second ou deuxième? JT 1998, 854.

[70] The last version (2008) is available at:
http://www.cmro-cmoj.be/FR/info/professionels/tarifs/tableau.htm.
It is also published in: Journal des Juges de police/Tijdschrift van de politierechters (JJPol/T Pol) 2008, 122; NjW 2008, 710; Circulation, Responsabilité, Assurances/Verkeer, Aansprakelijkheid, Verzekering (CRA/VAV) 2008, 381.

[71] *D. de Callataÿ*, L'évaluation judiciaire des indemnités: tableau indicatif, in: J.-L. Fagnart, Responsabilité civile. Traité théorique et pratique (2002) Dossier 54, 11; *id.*, L'utilisation pratique de la quatrième édition du tableau indicatif, in: W. Peeters/M. Van den Bossche (fn. 68) 51 ff. For critical observations relating to the new version of the table, cf. *Th. Papart*, Le Tableau indicatif 2008: vers une évaluation plus précise et une indemnisation plus juste? in: C. Engels/P. Lecocq, Chronique de droit à l'usage des juges de paix et de police 2009 (2009) 363 ff.; *L. Soetemans*, De nieuwe indicatieve tabel est arrivé, CRA/VAV 2008, 475 ff.

[72] Cf. the foreword of the last version.

[73] *De Callataÿ* (fn. 71) Dossier 54, 11; *Th. Papart*, Tableaux indicatifs, in: Evaluation du préjudice corporel. Commentaire au regard de la jurisprudence (2007) 1.2.11.-1; *Van den Bossche*, NjW 2004, 615.

[74] *J.-B. Petitat*, De behandeling van dossiers lichamelijke schade vanuit de praktijk van de advocaat, in: W. Peeters/M. Van den Bossche (fn. 68) 79.

[75] Cf. for instance: Ghent, 25 April 2000, Bull Ass/De Verz 2002, 247, cmt. *E. Van den Haut*; Anvers, 7 December 2005, Bull Ass/De Verz 2006, 447; Civ Brussels, 1 March 2007, Bull Ass/De Verz 2008, 95.

The more fundamental criticism against the table was that its use would be in contradiction with one persistent principle of tort law, that is to say that the damage must be assessed concretely, taking into account the particularities of the case and thus of the victim.[76] The judge has to assess the damage not in an automatic way but taking into account the victim's real life and experience. 64

Actually, it must be stressed that the proposed table does not exclude the taking into account of the particular situation of each victim. Being *indicative*, the proposed amounts may be adapted by the judge to each specific situation. That is the reason why amount ranges are sometimes proposed by the table which must be used with a critical view according to its foreword. 65

Therefore, it is important to recall the specific features of the table that show its limits. Resulting from a non-legislative initiative, the table is first of all not compulsory (it is rejected as a rule by some judges using their own table;[77] other judges agree with the principle of the table but explain why they decide to depart from it in some cases).[78] Secondly, the table proposes indications as regards the assessment of the damage that can only be valuated by way of lump sums; the actual version deals with five categories: I. Costs and expenses – loss of use of a vehicle (bicycle, moped, motorcycling, trailer, car, mobile home, taxi, van, truck, lorry, tractor, ambulance, bus, etc.), administrative costs (phone calls, post, etc.), loss of clothes and luggage; II. Work incapacity and temporary disability; III. Work incapacity and permanent disability; IV. Death; V. Interests and deposits. The table is frequently accompanied by some comments and on certain points is closer to a reminder of the compensation rules or an instruction guide than a "tariff". Thirdly, the table concerns only the assessment of the damage which must previously have been proven by the victim.[79] In final considerations, the authors of the table rule that the damage results from the difference between two situations: the situation in which the victim is following the fault and the situation in which the victim would have been in the absence of the fault.[80] Fourthly, the table is only to be used if the damage may not be assessed precisely; it plays a subsidiary role.[81] 66

Concerning the new version of the table, attention may be drawn to five kinds of modifications.[82] 67

[76] About this principle, cf. *P.-H. Delvaux*, Quelques réflexions théoriques sur un tableau pratique, in: W. Peeters/M. Van den Bossche (fn. 68).

[77] At least until recently: *Th. Papart*, Le traitement des dossiers d'intérêts civils du point de vue du juge de police, in: W. Peeters/M. Van den Bossche (fn. 68) 145; *Papart* (fn. 71) 369.

[78] For instance: pol Dinant, 14 September 2004, CRA/VAV 2005, 17 (in this case the victim became tetraplegic; in view of the gravity of the damage, the judge considered that the proposed valuation was underestimated); pol Dinant, 24 May 2005, EPC 2007, III.4.Dinant,1 (in this case a widow lost her only child; considering that she could never have a grandchild, the judge considered that the proposed assessment of the moral damage was underestimated).

[79] *Papart* (fn. 71) 1.2.11.-3; *Papart* (fn. 71) 367; *Soetemans*, CRA/VAV 2008, 475.

[80] Table, no. 60.

[81] *Papart* (fn. 71) 1.2.11.-3; *Petitat* (fn. 74) 74.

[82] On the new version, see *Papart* (fn. 71), 363 ff.; *Soetemans*, CRA/VAV 2008, 475 ff.; *I. Verbaeys*, Nieuwe indicatieve table in een overtreffende trap, Bull Ass/De Verz 2008, 478 ff.

68 First of all, the authors have brought some modifications in the *structure* of some parts of the table. The most remarkable of them consists in the new hierarchy of the compensation *methods* of material damage in case of permanent work incapacity. As in the past, three methods are described: the granting of index-linked annuity; the method of capitalization (of the annuity presumed to be paid) and the granting of lump sums depending on the percentage of incapacity. By mentioning in the first place the method of index-linked annuity (and no longer the method of capitalization), the authors of the table indicate very probably that they prefer this method: according to them, this method is the most comprehensive and the most accurate to compensate the loss of periodical income. On the contrary, the capitalization method never exactly corresponds with reality, considering that it is based on probabilistic data.[83]

69 Secondly, the authors have *refined some guidelines*. For instance, they proposed a valuation scale of aesthetic damage finer than in the past: the suggested amounts depend on the gravity of the damage (seven categories) and on the victim's age (nine categories).[84] They also modified the indications about the pretium doloris, attempting apparently to put together the diverging case law of the north and of the south of the country.[85]

70 Thirdly, the authors *adapted some amounts*. For instance, they propose to assess moral damage in case of death of a partner or a child at € 12,500 and to assess material damage resulting from the loss of an academic year at € 2,000 or at € 4,200 depending on whether the injured student was living at home or in a student room.[86]

71 Fourthly, *the model of appraisal by order of the court* is nowadays very more detailed. This shows that the judges are conscious of the very great importance of the role of experts in the description of the consequences and after-effects of an accident. Opting for a definition of the damage seemingly simple, the authors of the table stress that this results from the comparison

[83] Table, no. 19.

[84] Table, no. 37. Compensation conditions of aesthetic damage:

Age	1/7 minor	2/7 very light	3/7 light	4/7 intermediate	5/7 serious	6/7 very serious	7/7 repugnant
0–10	€ 540	€ 2,150	€ 4,850	€ 8,625	at least	at least	at least
11–20	€ 520	€ 2,075	€ 4,700	€ 8,300	€ 10,000	€ 15,000	€ 25,000
21–30	€ 490	€ 2,000	€ 4,400	€ 7,850			
31–40	€ 450	€ 1,800	€ 4,100	€ 7,250			
41–50	€ 400	€ 1,600	€ 3,600	€ 6,500			
51–60	€ 350	€ 1,400	€ 3,100	€ 5,550			
61–70	€ 275	€ 1,100	€ 2,600	€ 4,400			
71–80	€ 200	€ 800	€ 1,750	€ 3,100			
> 80	€ 115	€ 450	€ 1,050	€ 1,850			

[85] *Papart* (fn. 71) 381 f.

[86] Table, no. 16.

of two situations: that existing before and that existing after the occurrence of the accident.[87]

Fifthly, the authors brought more *formal adaptations* to the table (the wording of some titles of the table or of some kind of damage). 72

C. Literature

1. *J.-L. Fagnart* (ed.), Responsabilités. Traité théorique et pratique (Brussels, Kluwer)

During the year 2008, the treatise on torts edited by J.-L. Fagnart became richer by various manuals, including that by E. Montero and Qu. Van Enis on liability for animals. Their contribution is devoted to the liability mechanisms that may be applied in case of damage caused by an animal. The first chapter of the volume concerns specifically the damage caused by an animal in somebody's custody. In this case, two legal mechanisms may be used: on the one hand, art. 1385 of the Civil Code rules that the owner of an animal or the one who controls it is liable for the damage caused by the animal; on the other hand, the doctrine of nuisance may also be used when the occupier of a real estate is excessively troubled by an "activity" implying animals and occurring on another real estate (trouble caused by noise, smell, etc.). The second chapter of the volume concerns the damage caused by animals which are not in somebody's custody. The authors deal mainly with the damage caused (or likely to be caused) by game and for which the owner of the shoot may be declared liable. Finally, in the third chapter, the authors devote their attention to situations in which damage is caused by ill or infectious animals. Inevitably, they glide in the field of alimentary safety. 73

The four other volumes to be mentioned are by J.-L. Fagnart himself and are devoted to causation. These volumes are not only published in Responsabilités. Traité théorique et pratique, but were also collected in a publication on causation.[88] In the first volume, the author approaches the notion of causation: before examining the various theories on causation, he first wonders himself whether it is possible and useful to give a legal definition of causation. In the second volume, the proof of causation is thoroughly studied. The author distinguishes the rules related to the onus of proof (who has to prove causation?), the rules related to the manner of proving causation (how causation must be proven) and the rules related to the certainty with which causation must be proven (in this part, the author addresses especially the situations in which a duty to inform is violated and those in which a chance has been lost). The third volume concerns two kinds of events and the impact of their occurrence on causation: firstly, fortuitous events (including force majeure) and secondly intentional fault. Finally, in the fourth volume, J.-L. Fagnart considers the cases 74

[87] Table, no. 60.
[88] *J.-L. Fagnart*, La causalité (2009) 366 pp.

in which a third party or the victim himself/herself would have committed a fault at the same time as the defendant or not. In the first case, the question will nearly always arise how to divide the liability between the tortfeasors. In the second case, some particular questions are classical: Did the victim present predispositions? Did the victim have an obligation to limit the damage? Is the one who paid some amounts in favour of the victim after the accident occurs, a victim?

2. *V. Vervliet*, Burgerrechtelijke aansprakelijkheid voor arbeidsongevallen en beroepsziekten (Ghent, Larcier 2008) 114 pp.

75 This book is the occasion for the author to explain in detail how civil liability mechanisms operate in a firm. Principles of this particular liability are to be founded in the Act on Industrial Accidents and in the legislation on professional diseases. Considering that the employer has to bear the professional risks, the legislator adopted the following mechanism: the employer is liable when an employee is the victim of an industrial accident even in the absence of fault (no-fault system) but in return the injured employee has to accept as a rule (exceptions are more numerous than in 1903, the year when the system came into force) that the compensation should not be in full. Besides, the employer is prevented from being sued by the employee with the aim of obtaining full compensation. On the contrary, he (or more precisely its insurer) may sue the third party who is liable for the damage.

3. *D. de Callataÿ/Th. Papart/N. Simar*, Actualités en droit de la responsabilité (Louvain-la-Neuve, Anthemis 2008) 120 pp.

76 This little book contains three contributions on specific topics of tort law written by three practitioners. D. de Callataÿ, who is an uncontested specialist of the compensation of damage, examines some specific questions related to the assessment of material damage resulting from injuries or death. Th. Papart focuses on an examination of the task of the legal expert in charge of the assessment of bodily damage. And finally, N. Simar concentrates on the possible recourse of the public employer, who compensates the damage suffered by one of his employees, against the third party liable for this damage.

4. Liber Amicorum Jean-Luc Fagnart (Bruxelles/Louvain-la-Neuve, Bruylant/Anthemis 2008) 1014 pp.

77 Prof. J.-L. Fagnart taught especially tort law and insurance law for several decades at the Université libre de Bruxelles. He became emeritus in 2008 and on this occasion his colleagues and friends published a collection of studies in particular devoted to tort law and insurance. Of particular interest, as regards tort law, are the contributions on loss of a chance in the European case law (J.-M. Binon), on a European approach to tort law (H. Cousy), on the compensation of damage resulting from railway accidents (N. Estienne), on the criterion of sharing of liability in case of multiple tortfeasors (P.-A. Foriers), on the intervention of the State in the compensation of certain damage (J.-Fr. Leclercq and D. De Roy) and on damage and causation (P. Van Ommeslaghe).

5. *H. Bocken*, Buitencontractuele aansprakelijkheid voor gebrekkige producten, in: E. Dirix/A. Van Oevelen (eds.), Bijzondere overeenkomsten (Mechelen/Kluwer 2008) 335 ff.

78 In a book devoted to contracts, H. Bocken devoted a contribution to non-contractual liability for defective products. The author does not only pay attention to the legislation having implemented in 1991 the European Product Liability Directive (85/374/EEC), but also to the other legislation co-existing with the Act of 25 February 1991 (in particular, art. 1384 of the Civil Code concerning the liability of the guardian of a defective thing and the general tort law provision).

6. *E. de Kezel*, Schadevergoeding bij asbestschade, Nieuw juridisch Weekblad (NjW) 2008, 282 ff.

79 E. de Kezel is probably the Belgian legal author who is the most competent as regards the asbestos problem. Her present study is devoted to the compensation of damage resulting from asbestos. Considering that tort law is one possible way for obtaining compensation (when the victim does not contract the disease in the framework of his/her professional occupation), she applies the traditional requirements of tort law (fault, damage and causation) to the asbestos issue in the first part of her contribution, while in a second part, she explains the working of the Belgian asbestos fund from a comparative perspective (The Netherlands, France and the United Kingdom).

7. *E. de Kezel*, Blootstelling aan asbest. Civiele vorderingsmogelijkheden van milieuslachtoffers, Tijdschrift voor Milieurecht (TMR) 2008, 584 ff.

80 As a complement to the above mentioned contribution, allow me to quote another work by E. de Kezel this time specifically devoted to victims of asbestos who suffer damage although they were not working in a company using the grievous fibre. She speaks about "environmental victims". In her work, she examines which legal means are at the disposal of victims (asbestos fund and tort law), including the possible recourse of the victims against the public authorities and the possible recourse of the public authorities which would have to take environmental measures against the polluting company.

8. *B. Dubuisson*, L'indemnisation des dommages causés par des actes de terrorisme en Belgique: la loi du 1er avril 2007, Bulletin des assurances/De Verzekering (Bull Ass/De Verz) 2008, 348 ff.[89]

81 This contribution consists in an in-depth analysis of the Belgian Act of 1 April 2007 on insurance against damage caused by terrorism.[90] This Act entered into force on 1 May 2008. Because the terrorism risk cannot be easily assessed –

[89] This contribution is also published in: Liber Amicorum Jean-Luc Fagnart (2008) 465 ff. On this topic, cf. also *Cl. Devoet*, L'assurance des dommages causés par le terrorisme, Forum de l'Assurance 2008, 101 ff.

[90] Belgian official journal of 15 May 2007 26350 (Moniteur belge/Belgisch Staatsblad).

there is much uncertainty regarding the frequency of its occurrence as well as to the gravity of its consequences – the new legal insurance system, inspired by the Dutch regime, is unavoidably complex. Considering that the traditional insurance methods were not suitable for the situation, the intervention of public authorities was considered to be necessary: the new system rests therefore on a partnership between the private sector (insurers and re-insurers) and the Belgian State. It is planned that the State will intervene only after the private insurers and insofar as the intervention of the latter would not have been sufficient to indemnify the victims. This will be the case in the presence of disasters implying very consequential damage.

82 Subject to some exclusions, the Act of 1 April 2007 applies to all insurance branches as far as the insurance contract stipulates that the terrorism risk is covered ("terrorism condition"). However, in some cases, the "terrorism condition" is compulsory (industrial accident risk, automobile civil liability risk, etc.).

83 The Act of 2007 provided for a maximum available amount of € 1 billion (index-linked) per year. Within this limit, in the presence of a disaster (loss), the first to intervene will be the insurers, followed by the re-insurers and, finally, the Belgian State (according to an annual agreement).[91] In case of occurrence of a terrorist event, the Terrorism Reinsurance and Insurance Pool (TRIP), which is a legal person gathering especially the insurers and re-insurers that will participate in the risk pool system,[92] will manage the consequences of the loss. When it is in possession of the useful data relating to the global financial cost of the loss, it will share this cost among its members (the insurers and re-insurers) in proportion to their market share. Should the € 1 billion sum mentioned above not be sufficient to compensate the damage in full, the TRIP should decide which damage has priority in accordance with the hierarchy established by law (first, bodily damage, then damage to things and pure economic loss and, finally, moral damage). Each member will indemnify its own insured (or beneficiaries). As a consequence of this system, non-insured victims will not receive any compensation.

9. *I. Lutte/S. Laureys*, La conscience de la victime: une nouvelle condition de la réparation du dommage? Revue générale des assurances et des responsabilités (RGAR) 2008, no. 14422

84 The first part of this contribution, written by a neurologist and by a lawyer who is also a doctor (in medicine), is devoted to the notions of consciousness and alertness. In the second part of the study the authors examine whether the state of consciousness constitutes one of the conditions to allocate compensation to the victim.

[91] Each year, negotiations will occur with the aim of determining the contribution of each "sector" (it is spoken about € 300 million from insurers, € 400 million from re-insurers and € 300 million from the Belgian State). The Belgian State will intervene if the first two slices are not sufficient and the re-insurers will intervene if the first slice is not sufficient.

[92] The statutes of TRIP are available on: http://www.tripasbl.be/fr/home/about.asp or http://www.tripasbl.be/nl/home/about.asp.

10. *M. Matagne/M. Vanderweckene/J. Perin*, Le travail ménager et sa valeur économique *in concreto*, Revue générale des assurances et des responsabilités (RGAR) 2008, no. 14408

85 After having denounced the archaism and the deficiencies of the methods used to assess damage resulting from harm to the economic capacity and domestic ability of the victim, the authors of the contribution (two lawyers and one doctor) present a new compensation approach based on scientific data. They are of the opinion that each situation must be analyzed more specifically than it is today.

11. *O. Mignolet*, La responsabilité civile de l'expert judiciaire, Ius & Actores 2008, 51 ff.

86 This contribution is specifically devoted to the civil liability of legal experts. Considering that the legal expert designated by a judge is not contractually bound to parties in lawsuit, his liability could be based on tort law, and more precisely on art. 1382 of the Civil Code, which is the statutory rule of liability based on fault.

12. *A. Van Oevelen/G. Jocqué/Chr. Persyn/B. De Temmerman*, Overzicht van rechtspraak. Onrechtmatige daad: schade en schadeloosstelling (1993–2006), Tijdschrift voor Privaatrecht (TPR) 2007, 933 ff.

87 This impressive contribution is practically a book devoted to the review of Belgian case law concerning damage and damages. The studied period covers 13 years (from 1993 until 2006). The master work is divided into four main chapters: I. General principles; II. Damage caused to persons (in case of death, temporary or permanent incapacity); III. The relations between tort law and social legislation (in case of industrial accident) and IV. Damage to things. A priceless resource to know the state of Belgian case law.

13. *A. Van Oevelen/M. Wissink/R. Meijer*, Staatsaansprakelijkheid wegens schending van het Europese gemeenschapsrecht in België en Nederland, Tijdschrift voor Privaatrecht (TPR) 2008, 77 ff.

88 The starting point of this contribution is the famous Francovich judgment delivered by the European Court of Justice in 1991, according to which a Member State may be held liable for loss and damage caused to individuals by breaches of Community law. Having in mind this judgment, the authors examine under which conditions Belgium and The Netherlands may be held liable in case of violation of the European law and whether these conditions diverge from the European case law.

III. Bulgaria

Viktor Tokushev

A. Legislation

1 In the year 2008 there were neither major amendments to Bulgarian legislation made nor were new legal regulations concerning the subject of tort passed.

2 From 1 March 2008 a new Civil Procedure Code (CPC)[1] has been in force which substantially affects the development of civil procedures in tort cases.

1. Civil Procedure Code

3 The new CPC amended the essence of the cassation appeal, transforming it from mandatory stage to a stage of the civil procedure which depends on the court's discretion. A separate procedure through which the court rules upon the admission of the cassation appeal, which is different from the procedure for ruling on the cassation appeal itself, has been established.

4 Subject to cassation appeal shall only be such decisions of lower courts on substantial material legal or procedural legal matters, which: (1) are decided in contradiction to the practice of the Supreme Court of Cassation (SCC), (2) have not been decided by the courts in a unanimous manner, (3) are of importance for the precise application of the law as well as for the development of the law (Art. 280 CPC). Claims with material interest under Bulgarian Leva (BGN) 1,000 (€ 500) shall not be subject to cassation appeal – Art. 280, para. 2 from the CPC.

5 The amendment to the right to cassation appeal should thus lead to a significant reduction and consolidation of the SCC practice over tort cases. On the other hand, the study of the practice of the SCC in regard to the admission of civil actions, related to tort cases, would clarify what the Supreme Court considers established in its practice and in what direction the interpretation of inconsistency of lower courts' practice shall be.

[1] The Official Gazette, issue 59/2007, last amendment in the Official Gazette issue 69/2008.

The new CPC does not amend the provisions concerning the matter of distribution of the burden of proof (Art. 153 and 155 from the CPC which are identical to Art. 127, para. 1 and Art. 128, para. 1 from the repealed CPC)[2], as well as the particular provisions that cancel the prohibition of sequestration for receivables from tort (Art. 445, para. 2 from the repealed CPC). 6

B. Cases

In the year of 2008 no substantial changes in the Bulgarian judicial practice over tort matters were observed. 7

The report for 2008 is based on particular cases, which are grouped around separate issues and are indicative of the court practice. The SCC practice, as well as the practice of the Courts of Appeal, as far as it was subject to cassation appeal, has come under review. Special attention is given to the SCC practice concerning the admission of cassation appeals on tort matters. 8

1. Ruling No. 107/25 November 2008, civil case No. 2672/2008, 2nd civil division of the Supreme Court of Cassation[3]: Admission of Cassation Appeal

a) Brief Summary of the Facts

The claimant was not satisfied with the decision of the Court of Appeal on the tort action he filed, considering that the court incorrectly interpreted and applied the material law, thereby creating grounds for a cassation appeal. Inasmuch the case is important for the precise application of the law. 9

b) Judgment of the Court

The Supreme Court of Cassation dismissed the cassation appeal as inadmissible, pointing out that, in order for cassation appeal grounds to exist in relation to the precise application of the law and the development of the law, not only a breach of a material legal norm should be present, (a breach of material law is a ground for cassation appeal), but the existence of a necessity for the Supreme Court to rule on a substantial material legal or procedural legal issue, on which no previous judicial practice exists, or reconsideration of an already established judicial practice should be made. Only in this case shall the precise application of the law be essential to the development of the law, as required by Art. 280, para. 1, sec. 3 CPC. 10

c) Commentary

The ruling in question provides a clear idea of the practice, endorsed by the SCC in regard to the admissibility of cassation appeals, hearing on these more 11

[2] The Official Gazette, issue 12/1952, repealed through the Official Gazette, issue 59/2007.

[3] Hereinafter the Decisions and the Rulings are referred to as follows: d. (decision)/r. (ruling), p.c. (penal case)/c.c. (civil case)/t.c. (trade case), (case number) p.d./c.d./t.d. (penal, civil, trade division) of the SCC/Sofia CC (Supreme Court of Cassation/Sofia City Court).

as an exception, rather than as a natural development of the judicial process. On the basis of this ruling and of SCC's similar practice, the conclusion may be drawn that the Court clearly and consistently distinguishes the grounds for cassation appeal from those for admissibility of the cassation appeal. In particular, the complaint for incorrect application of the material law by the lower court is not accepted as a sufficient ground for the admissibility of the cassation appeal, which is a practice that cannot be supported.

2. Ruling No. 207/18 December 2008, t.c. No. 511/2008, 1st t.d. SCC: Admission of Cassation Appeal

a) Brief Summary of the Facts

12 The claimant was not satisfied by the decision of the Court of Appeal because the Court did not accept that a tort existed in the case under review and that there was a ground for seeking tort liability. The importance of the case for the precise application of the law and for the development of the law is cited as a ground for the admissibility of the appeal.

b) Judgment of the Court

13 The Supreme Court of Cassation finds that there are no grounds to admit the cassation appeal, pointing out that according to the new CPC, in order for the cassation claim to be considered, the cumulative existence of two prerequisites should be present – imprecise application of the material law in the decision on the dispute and the precise application to be necessary for the development of the law. In the Court's view, the consideration of these circumstances demands a study of whether the disputed matter is significant, e.g. that it is important to a degree which exceeds the frames of the specific case, and also, that in similar cases there is no existing judicial practice, or if such exists, it has lost its relevance in the meantime, and therefore has to be abandoned, or the question of filling a gap in the regulatory base is being raised. As far as the issue of tort is clarified in detail and without any contradictions in the interpretative practice of the SCC and the Court of Appeal has not deviated from the latter, the claim is therefore dismissed as inadmissible.

c) Commentary

14 On the basis of the rulings considered, a substantiated conclusion can be drawn that the SCC practice is directed to a significant restriction of the number of cases reviewed by the Court of Cassation, especially on tort matters. In a number of rulings it has been explicitly specified that, in matters of tort, the SCC has a rich practice, which is sufficient and needs no alteration, which should mean that cassation practice should be developed only on issues which, as of this moment in time (1) have not been considered in the SCC practice (2) are based on torts, envisaged in new laws.

3. Ruling No. 122/01 December 2008, t.c. No. 505/2008, 2nd t.d. SCC: Admission of Cassation Appeal

a) Brief Summary of the Facts

The claimant, representing a limited liability company which sought damages from its manager, is not satisfied by the ruling of the Court of Appeal, which dismissed its claim for compensation. The existence of a significant material interest in the amount of BGN 86,000 (€ 43,000), comparable to the company's capital stock, is pointed out as a ground for the admissibility of the claim. 15

b) Judgment of the Court

The SCC does not allow the cassation appeal on this case and points out that the general requirement of the CPC in regard to the three criteria for admitting a cassation appeal is related neither to the amount of the claim made nor to the value and significance of the right claimed by the claimant, but pertains to a significant material or procedural legal issue on which the court has made a ruling. 16

c) Commentary

The court's interpretation delivered in this ruling is perfectly correct. Indeed, after the amendment of the CPC, the amount of the material interest involved in the case, in particular, the amount of the compensation claim in a tort case is not a criterion for the admissibility of the cassation appeal, except if it is lower than BGN 1,000 (€ 500) – see supra no. 4. A reasonable assumption can be made that the amount of the compensation claimed cannot be used as a ground in regard to the third criterion for the admissibility of the cassation appeal, as an argument for an issue "which is important to the development of the law" inasmuch as the law is concerned not with the amount of the compensation being sought and its significance to the parties, but with the accurate and equitable application of the law. 17

4. Ruling No. 147/11 December 2008, t.c. No. 536/2008, 2nd t.d. SCC: Admission of Cassation Appeal

a) Brief Summary of the Facts

The claimant sought compensation for damage sustained in a road accident and was not satisfied with the ruling of the Court of Appeal which dismissed his claim. A contradiction of the appealed ruling of the Court of Appellation with the practice of the Supreme Administrative Court on administrative disputes was specified as a ground for admissibility of the cassation appeal. 18

b) Judgment of the Court

The SCC does not allow the cassation appeal on this case, arguing that the ground for the appeal's admissibility provided by the CPC is the contradiction of the ruling with the SCC practice on civil and trade disputes. 19

c) Commentary

20 This ruling is, again, an expression of the SCC's practice of restricting the hearing of cassation claims and strict interpretation of the grounds for admissibility, provided by the new CPC. Also, this ruling may lead to the conclusion that the SCC would be rather conservative when using rulings on criminal cases as well, considering the admissibility of cassation appeals in tort cases.

5. Ruling No. 222/11 December 2008, c.c. No. 4760/2008, 5th c.d. SCC: Admission of Cassation Appeal

a) Brief Summary of the Facts

21 The claimants, a plaintiff and a defendant who had claimed non-material damages due to a road accident, were not satisfied with the amount of the compensation awarded in a ruling by the Court of Appeal. The plaintiff demanded an increase in the amount of compensation while the defendant, who was not satisfied with the ruling of the Court of Appeal dismissing his claim, its decrease. Both parties considered the cassation appeal admissible due to the contradiction of the compensation amount awarded with the practice of the SCC of awarding compensation for non-material damage in tort cases.

b) Judgment of the Court

22 The SCC does not allow the cassation appeal. In the Court's view, the amount of the compensation as a specific sum does not represent evidence of contradiction between court rulings, provided that, with respect to the specific cases, upon studying the circumstances having relevance to this, the respective circumstances have been considered, i.e. the character and degree of the pain and suffering endured, their intensity, lasting or temporary nature of the injuries, etc. In case there is neither an application of the same statute or legal norm which is contradictory in principle, nor any deviation from the criteria for applying the material law set forth in principle in the interpretative practice of the Supreme Court of the Republic of Bulgaria, the arguments for admissibility of the cassation claim cannot be allowed. In conclusion, the SCC points out that the different amounts of compensation awarded in different cases are not in themselves a sufficient ground for the existence of a hypothesis for admissibility of the cassation appeal.

c) Commentary

23 This ruling is probably the most significant in the matter of admissibility of tort disputes. From it, criteria may be defined as to when the amount of compensation shall contradict the practice of the SCC, namely (1) if the criteria for determining compensation, set forth in the SCC practice are not adhered to, or (2) if the case involves determining compensation in two cases having similar factual backgrounds, on one of which the SCC has already made a ruling. In practice this shall mean that in the future, the SCC shall give up the control over the compensation amount to be determined for non-material damage in cases outside the hypotheses specified above. With regard to this, the trends

regarding the determination of compensation for non-material damage from a tort shall have to be followed mainly in the practice of the lower-instance courts.

6. Decision No. 399/27 October 2008, p.c. No. 371/2008, 1st p.d. SCC and d. No. 166 from 30 December 2008 on p.c. 232/2008 Burgas Court of Appeal: Indemnity in Case of Death

a) Brief Summary of the Facts

After a car accident in the summer of 2007 a 23-year old man died and his 19-year old fiancée fell into a coma. The driver who caused the accident was driving his Hummer at a speed double the speed limit and the alcohol content registered in his blood was 1.29‰ while the limit permitted by law is 0.5‰. The driver who caused the crash was Maxim Staviski, a world-famous figure skating athlete. In 2005 and 2006 he and his partner Svetlana Denkova won the World Figure Skating Championship. In April 2007 they were awarded Bulgaria's highest state distinction, the order of "Stara Planina", and several weeks before the accident Staviski became the official person in a media campaign against drunk driving. 24

b) Judgment of the Court

The SCC repealed the 2.5-year prison sentence, passed by the Burgas Court of Appeal, suspended it for a 5-year probation period, and overturned the compensation awarded in the amount of BGN 90,000 (€ 45,000) to each parent for causing the death of a youth, aged 23, in a road accident, and in the amount of BGN 80,000 (€ 40,000) for the comatose girl, and returned the case to the lower court. The reason for this decision, among others, was mainly the actions of the perpetrator, who demonstrated a lack of respect not only for the established rules of the road, but also for the instructions of the control authorities – a few minutes before the crash Staviski had been stopped and warned by road policemen to drive carefully. It should be noted that the ruling cited was signed with a reservation by the chairperson of the court who also reported on the case and who stated that increasing the compensation to the parents of the deceased would lead to groundless enrichment. 25

In a new ruling the Burgas Court of Appeal replaced the suspended sentence with a 2.5 years effective prison term, while significantly increasing the compensation amounts. This second ruling awarded BGN 120,000 (€ 60,000) to each of the parents, and the amount of BGN 150,000 (€ 75,000) to the comatose girl. The court's ruling, again, was signed with a reservation by the chairperson of the court. 26

c) Commentary

The Staviski case is indicative of the development of judicial practice regarding compensation awarded for non-material damage. Generally, it may be pointed out that in criminal cases in particular, one can note a significant increase in the amounts of compensation awarded. It may be expected that this 27

fact, as well as the significantly reduced possibility for cassation appeal in a civil procedure, shall certainly lead to an increase in the number of civil claims for tort compensation in criminal cases. Second, the ruling of the Burgas Court of Appeal is also indicative of its, for the practice in Bulgaria, unprecedented award for causing bodily injuries in an amount greater than that for causing death, which is a court ruling that is difficult to endorse. Inasmuch as a new pronouncement of the SCC on this case is expected, it is still too early to judge whether the court has set an enduring trend or whether this is just a precedent, considering the increased media attention to the case.

7. Decision No. 642/06 October 2008, t.c. No. 303/2008, 2nd t.d. SCC: Indemnity in Case of Death

a) Brief Summary of the Facts

28 A 31-year-old man died in a road accident. His father, who is also his only surviving relative, filed a cassation claim since he was not satisfied with the compensation he was awarded for non-material damages from the death of his son in the amount of BGN 50,000 (€ 25,000).

b) Judgment of the Court

29 The SCC repealed the ruling of the Court of Appeal in its part regarding the compensation and increases the awarded amount to BGN 80,000 (€ 40,000). As a main ground for its ruling the court points out the close relations between father and son and the fact that the two had lived together. The son had been taking care of his father, which determined the scale of the loss sustained.

c) Commentary

30 This case is further evidence of the trend to increase the compensation amounts for non-material damage for causing death, even in cases which have not been at the centre of public attention. Moreover, when determining compensation "by equity", the court should be encouraged to consider all specific circumstances of the case.

8. Decision No. 56/19 February 2008, c.c. No. 43/2008 Varna Court of Appeal: Indemnity in Case of Death

a) Brief Summary of the Facts

31 The father of a juvenile child died in a road accident.

b) Judgment of the Court

32 The Varna Court of Appeal awarded compensation for non-material damages in the amount of BGN 60,000 (€ 30,000) to the child. The court's main arguments, as in the aforementioned case, are the close family relations between father and son, as well as the lack of a fatherly figure in the general upbringing of the child, which determined the amount of the compensation.

c) Commentary

Here, as in the previous case, one could support the approach of the court to thoroughly examine the personality of the deceased, as well as that of the person seeking compensation, the relationship between them and the exact appraisal of the loss of this relationship. Attention should also be paid to the argument about the period in which the child should cope with the absence of a father, namely its whole life. 33

9. Decision 04 April 2008, t.c. No. 13/2008 Varna Court of Appeal: Indemnity in Case of Death

a) Brief Summary of the Facts

In a road accident a 36-year-old woman was killed. It was established in the hearings that she was a selfless mother and wife. 34

b) Judgment of the Court

The Varna Court of Appeal confirmed the decision of the court of first instance in regard to the compensation awarded: in the amount of BGN 35,000 (€ 17,500) for her husband and BGN 40,000 (€ 20,000) for her juvenile child. 35

c) Commentary

This decision demonstrates that, despite the trend to increase compensation amounts described above, one still cannot point to a clear-cut and uniform practice, even within the same court. Inasmuch as non-material damage is compensated by equity, each jury remains free to assess the facts of a particular case and to determine the compensation amount using their own judgment. 36

10. Decision No. 1443/02 December 2008, c.c. No. 6337/2007, 5th c.d. Sofia CC: Indemnity for Bodily Injury

a) Brief Summary of the Facts

After an attempt on his life the victim sustained a bodily injury, expressed in numerous head wounds, injuries to his left hand, paralysis of his left leg and amputation of his right hand, which in combination led to a 100% disability. 37

b) Judgment of the Court

The Sofia City Court determined compensation in the amount of BGN 8,000 (€ 4,000), with the main argument being that the tort occurred in 1992 and the amount of the compensation is determined in consistency with the time of perpetration of the tort. 38

c) Commentary

This decision provides a clear idea that, despite the trend towards increasing compensation amounts in cases of causing death, the situation with bodily injuries remains unchanged, with the amounts remaining small. One cannot sup- 39

port the court's argument for adjusting the amount of compensation with the amounts awarded more than 15 years ago, since the very delay in compensation for this period should have been a reason for an additional compensation.

11. Decision No. 719/27 October 2008, t.c. No. 403/2008, 2nd t.d. Sofia CC: Indemnity for Bodily Injury

a) Brief Summary of the Facts

40 As a result of a road accident a woman sustained three bodily injuries, which caused mobility difficulties for a period of 7–8 months.

b) Judgment of the Court

41 The Sofia City Court awarded a compensation for non-material damages in the amount of BGN 6,000 (€ 3,000).

c) Commentary

42 The ruling under consideration is an example for the fact that, even in case of timely compensation of non-material damage for a bodily injury, the amount of the compensation awarded remains too low. It can be compared neither to the compensation for non-material damage for causing death in a road accident, nor with the non-material damages awarded with the second ruling in the Staviski case.

12. Decision No. 1015/21 October 2008, c.c. No. 48/2008, 3rd c.d. SCC: Liability of the State

a) Brief Summary of the Facts

43 The plaintiff had been charged with a crime, committed while he was in office. The plaintiff was subsequently acquitted. It was established that, as a result of this incident, the plaintiff suffered damage, expressed in the negative experiences of the plaintiff, which were directly and immediately causally linked with the charges brought by the representative of the prosecution.

b) Judgment of the Court

44 The SCC awarded compensation in the amount of BGN 9,000 (€ 4,500). When determining the amount of the compensation, the court took into consideration the following underlying facts: (1) as a result of the charges brought, the woman voluntarily resigned from her job; (2) her relationship with her father, a long-term employee at the Ministry of the Interior, deteriorated; and (3) her case gained publicity after press coverage.

c) Commentary

45 The amount of the compensation awarded seems well-founded in the light of the facts of the case. However, it is also incomparable to the compensation amounts awarded for pain and suffering sustained in the cases of bodily injury. Besides, one cannot make a substantiated conclusion about the court's

approach in rulings on such cases, inasmuch as sufficient judicial practice does not exist.

13. Ruling No. 84/14 November 2008, c.c. No. 3169/2008, 2nd c.d. SCC: Tort Excess

a) Brief Summary of the Facts

The claimant was not satisfied with a ruling of the Court of Appeal which awarded the victim of a 1998 road accident compensation for non-material damage due to a traumatic injury, which was established by an expert medical committee in 2004 and which led to 76% work disability. 46

b) Judgment of the Court

The SCC decrees that this ruling is not subject to cassation appeal inasmuch as it is consistent with the established practice on the matter under consideration. The grounds for this are as follows: (1) the traumatic injury should be compensated for when it is a direct and immediate consequence of the injury and if it could not have been foreseen during the initial awarding of compensation; and (2) the prescription on the claim for this additional compensation begins from the moment of establishing the deterioration of the victim's condition. 47

c) Commentary

The ruling under consideration is of interest not from the viewpoint of the inadmissibility of the cassation appeal, but in regard to a practice deliberated and confirmed by the SCC on the matter of tort excess. Essential to this case is the issue whether, given the period of time that has elapsed between the bodily injury initially sustained and the subsequent compensation, the deterioration of the victim's condition is not due to the natural aging process. A positive answer to this question would have prevented the claimant from seeking compensation. 48

C. Literature

In the year 2008 no monographs or articles were published in the area of tort law. 49

IV. Czech Republic

Jiří Hrádek

A. Legislation

1. Regulation No. 447/2008 Coll., on Compensation for Loss of Earnings[1], Regulation No. 448/2008 Coll., on the Regulation concerning Compensation for Loss of Earnings of Soldiers[2] and No. 466/2008[3] and No. 347/2008[4], on the Regulation concerning Compensation for Loss of Earnings of Members of Security Forces or their Survivors

1 Under regulation No. 447/2008 Coll., which alters the current level of compensation for loss of earnings arising in connection with both the Labour Code and Civil Code, the compensation to be granted due to inability to work or disability shall be changed by increasing the average earnings by 4.4%. The average earnings are the deciding factor for the calculation of compensation (possibly changed by earlier regulations). This change shall apply only to cases of compensation that arose at the latest by 31 December 2008.

2 The compensation based on the provisions of sec. 445 and 447 of Act No. 40/1964 Coll., the Civil Code ("Civil Code")[5] as well as sec. 193, 195, 197, 199 of Act

[1] Nařízení vlády č. 447/2008 Sb., ze dne 16. prosince 2008 o úpravě náhrady za ztrátu na výdělku po skončení pracovní neschopnosti vzniklé pracovním úrazem nebo nemocí z povolání, o úpravě náhrady za ztrátu na výdělku po skončení pracovní neschopnosti nebo při invaliditě a o úpravě náhrady nákladů na výživu pozůstalých (úprava náhrady).

[2] Nařízení vlády č. 448/2008 Sb., ze dne 16. prosince 2008 o úpravě náhrady za ztrátu na výdělku po skončení pracovní neschopnosti nebo při invaliditě vzniklé služebním úrazem nebo nemocí z povolání vojáků při výkonu vojenské základní nebo náhradní služby a výkonu vojenských cvičení a o úpravě náhrady za ztrátu na platu po skončení neschopnosti výkonu služby nebo při invaliditě vzniklé služebním úrazem nebo nemocí z povolání vojáků z povolání (úprava náhrady za ztrátu na výdělku vojáků).

[3] Nařízení vlády č. 466/2008 Sb., ze dne 16. prosince 2008 o úpravě náhrady za ztrátu na služebním příjmu po skončení neschopnosti k službě vzniklé služebním úrazem nebo nemocí z povolání a o úpravě náhrady nákladů na výživu pozůstalých.

[4] Nařízení vlády č. 347/2008 Sb., ze dne 20. srpna 2008 o úpravě náhrady nákladů na výživu pozůstalých po příslušnících bezpečnostních sborů.

[5] Zákon č. 40/1964 Sb., občanský zákoník.

No. 65/1965 Coll., the Labour Code ("former Labour Code")[6] and sec. 369, 371, 375 and 377 of Act No. 262/2006 Coll., the Labour Code ("Labour Code")[7] is always provided in the form of a pecuniary pension. The aim of this provision is that if damage to health occurred in causality with the activity of the wrongdoer, this person shall consequently compensate the difference between the wage of the injured party before and after the damage. The authorization of the government based on sec. 447 (4) of the Civil Code and sec. 390 (2) of the Labour Code should ensure that the standard of living of the injured party remains the same, despite the influence of inflation or the general improvement of standards of living.

The regulation concerning soldiers has the same purpose. In this case, the compensation for loss of earnings shall be increased by 4.4% as well. The authorization of the government is based on sec. 71 (3) of Act No. 220/1999 Coll. and sec. 127 (3) of Act No. 221/1999 Coll., both Acts regulating the service relationships of soldiers in the Czech army. 3

In the case of members of security forces, the compensation for loss of earnings shall be increased by 4.4%. The authorization of the government is based on sec. 103 (8) of Act No. 361/2003 Coll. regulating the service relationships of members of security forces.[8] Pursuant to regulation No. 347/2008, the compensation for costs of maintenance of the surviving dependants of the members of security forces shall be increased by 3%. 4

2. Zákon o Policii České republiky (Act on the Police of the Czech Republic)[9]

A very important piece of legislation approved in 2008 was Act No. 273/2008 Coll., on the Police of the Czech Republic (hereinafter the "Act"), which shall substitute Act No. 283/1991 Coll., on the Police of the Czech Republic, as well as several decrees and regulations regulating the conditions for the provision of security services and the particular conditions as well as duties imposed on other security forces which shall become subject to the new legislation. 5

The Act regulates in a comprehensive manner not only the organisational structure of the forces and their competence but also sets forth general conditions for providing protection to rights and property within the territory of the Czech Republic. In addition to these matters, the Act includes legislation concerning the liability of the police. 6

The liability of the members of security forces for damage caused to the service and the liability of the security service for the damage suffered by its 7

[6] Zákon č. 65/1965 Sb., zákoník práce (abolished by Act No. 262/2006 Coll., as from 1 January 2007).
[7] Zákon č. 262/2006 Sb., zákoník práce.
[8] *J. Hrádek* in: H. Koziol/B.C. Steinninger (eds.), European Tort Law 2003 (2004) 85.
[9] Zákon č. 273/2008 Sb., o Policii České republiky.

members are subject to specific laws of the Act on Service in the Security Forces No. 361/2003 Coll.

8 In sec. 95–96 the Act regulates liability of the police for damage suffered by a third party when providing assistance, either personally or by providing an item.

9 As a general rule the state shall be held liable for damage caused by the police in connection with the fulfilment of its tasks. This does not apply if a person who invoked the police's action by its unlawful action suffered damage. The state shall be liable for damage a) caused to a person who provided assistance to the police or to a policeman upon its request or with its knowledge (the state may exempt itself from the liability if the damage was caused intentionally), b) which was caused by the person in connection with assistance provided to the police or a policeman. The compensation shall be provided by the Ministry of the Interior.

10 If the person who provided assistance suffered damage to health or died, the scope of damage and the amount of compensation shall be provided pursuant to the respective provisions of the Civil Code. If the case merits special consideration, extraordinary lump sum compensation may be provided in addition to the above compensation.

11 If the person who provided assistance suffered pecuniary damage, the state shall compensate the actual damage by restitution in kind or if this is not possible or expedient by compensation in money. Costs connected with the acquisition of a new thing may also become subject to compensation.

12 If the assistance consisted of providing an item, the compensation shall correspond to the common compensation for use of a similar thing under similar conditions.

3. Zákon o předcházení ekologické újmě a o její nápravě (Act on Prevention of Ecological Harm and its Remedying)[10]

13 In 2008, the Czech Parliament approved Act No. 167/2008 Coll., on Prevention of Ecological Harm and its Remedying ("Act on Prevention") which implements into Czech legislation Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, 56–75.

14 The basic rule consists in the principle of prevention of damage. Thus, if there is an imminent threat of damage occurring, the operator shall, without delay, take the necessary preventive measures and an operator who caused damage shall take necessary remedying action. The operator shall bear the costs for the

[10] Zákon č. 167/2008 Sb., o předcházení ekologické újmě a o její nápravě a o změně některých zákonů.

preventive and remedial actions taken pursuant to or in connection with the Act on Prevention.

Under the law, there are many competent public authorities which can require both preventive and remedial actions. The competent authority shall require that the measures are taken by the operator. If the operator fails to comply with the obligations, cannot be identified or is not required to bear the costs, the competent authority may take these measures itself. An operator shall not be required to bear the cost of preventive or remedial measures taken pursuant to the Act on Prevention when he can prove that the environmental damage or imminent threat of such damage: (a) was caused by a third party and occurred despite the fact that appropriate safety measures were in place; or (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities. 15

This Act on Prevention does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damage. 16

The Act on Prevention sets forth that an operator which carries out an operative activity specified in Annex 1 to the Act on Prevention is obliged to ensure that it has arranged for the necessary financial instruments to cover his responsibilities under this Act on Prevention. These instruments shall not be provided by an operator whose operative activity cannot cause ecological harm with the costs of compensation higher than CZK 20 million or if the ecological harm with the costs of compensation are higher than CZK 20 million the operator must be registered in the EMAS-Programme or he has received the certificate under the ČSN EN ISO 14000 norm. 17

In this regard, the Czech Republic has not yet developed any programme of financial security instruments, but the Act on Prevention stipulates in sec. 14 (5) that the Government shall closely specify the manners of risk assessment, criteria for assessing adequate financial security for operators as well as conditions for implementing financial security for the preventive and corrective measures. This provision shall become effective as of April 2011 and the duty to arrange for financial instruments shall become effective from 2013. 18

Conditions for public law liability for ecological harm are also stipulated in the Act on the Environment (Act No. 17/1992 Coll.).[11] This Act is uncertain as regards ecological harm and it can therefore happen that it may be applicable to a certain extent in addition to the new law. In sec. 10 the Act on the Environment sets forth another definition of ecological harm. Pursuant to this provision, ecological harm is a loss or impairment of the natural function of ecosystems, caused by damaging their components or disturbing their internal relations and processes as a result of human activity. 19

[11] Zákon č. 17/1992 Sb., o životním prostředí.

20 Pursuant to sec. 27 of the Act on the Environment, everybody who by damaging the environment or by another criminal activity causes ecological harm shall restore the natural functions of the damaged ecosystem or of its parts. If this is not possible or if it is not for a justified reason desirable, he shall compensate the ecological harm in a different manner. If this is not possible, he shall compensate the damage in money. A public authority shall decide on the imposition of the obligation.

4. Zákon č. 137/2008 Sb., kterým se mění zákon o pojištění odpovědnosti z provozu vozidla *(*Act amending the Act on Liability Insurance against Damage Caused by the Operation of Motor Vehicles)[12]

21 The Act amends Act No. 168/1999 Coll., the Motor Vehicle Liability Insurance Act (hereinafter the "Motor Vehicle Liability Insurance Act") and shall approximate the area of liability insurance against damage caused by the operation of motor vehicles, especially with the relevant provisions of the EC law,[13] in order for Czech insurance legislation to reach full compatibility.

22 The Act sets forth limits of the insurance premium to be provided by the insurer. Through these provisions the Czech Republic implements the requirements of Art. 2 (3) of Directive 2005/14/EC and Art. 1 of Directive 1976/580/EEC. These changes are set in the new section 3a of the Motor Vehicle Liability Insurance Act.

23 Based on this, the limit of the insurance premium shall present the highest level of the insurer's performance in case of a single damaging event. The limits of the insurance premium shall be stipulated separately in each insurance policy and in a way which corresponds with the limits specified in the Motor Vehicle Liability Insurance Act. In particular, the limit of the insurance premium shall correspond to:

a) in case of damage to health or fatal injury (sec. 6 (2) lett. a) of the Act) at least CZK 35 million for each injured or killed party including reimbursement of costs expended for health care recoverable from public health insurance or redress claim pursuant to sec. 6 (2) of the Act,
b) in case of damage which arises due to damage, destruction or loss of a thing, as well as damage caused by theft if the person injured lost disposition of it, at least CZK 35 million regardless of the number of injured parties. If the aggregation of claims asserted by more injured parties exceeds the limit of the insurance premium stipulated in the insurance policy, the particular performance shall in each case be limited in the ratio of the limit of the insurance premium and the claims of all injured parties.

[12] Zákon č. 137/2008 Sb., kterým se mění zákon č. 168/1999 Sb., o pojištění odpovědnosti za škodu způsobenou provozem vozidla a o změně některých souvisejících zákonů (zákon o pojištění odpovědnosti z provozu vozidla), ve znění pozdějších předpisů.

[13] Directives 72/166/EEC, 84/5/EEC, 87/344/EEC, 90/232/EEC, 2000/26/EC, 2005/14/EC.

Under sec. 6 (2) of the Motor Vehicle Liability Insurance Act, the insured shall be newly entitled to ask for payment on his behalf to the injured party in the scope and amount stipulated under sec. 442 ff. of the Civil Code as follows: 24

a) damage to health or fatal injury,
b) damage which arises due to damage, destruction or loss of an item, as well as damage caused by theft if a person lost disposition of it,
c) lost profit,
d) reasonably expended costs connected with legal representation in asserting claims under lett. a) – c). However, in case of lett. b) or c) the insured party shall be entitled only in case of useless expiration of term under sec. 9 (3) or illegal refusal or illegal restriction of the performance by the insurer, provided that the injured party asserted and proved the claim and the damaging event occurred at the time when the insurance policy was valid and effective.

The Motor Vehicle Liability Insurance Act also closely specifies the particular claims of the insured party and makes the terminology regarding the claim more coherent with the current terminology of the Civil Code. In particular, under sec. 6 (3) of the Act, damage pursuant to sec. 6 (2) lett. a) – c) shall be compensated in money, however, maximally to the limit of the insurance premium set in the insurance policy. 25

Furthermore, the Motor Vehicle Liability Insurance Act explicitly establishes claims of the public health insurance company or social security authority as to the redress claims against the liable party and his insurer. 26

The insured shall be entitled to have the insurer compensate an asserted and proved claim of an health insurance company for compensation of costs expended for health care recoverable from the public health insurance[14] if the insurance company incurred these costs for health care provided to the injured party and if the damage for which the insured party shall be held liable occurred at the time when the insurance policy was valid and effective. The same applies to the redress claim to be reimbursed by the insured party under the Act on sick pay insurance.[15] 27

The Motor Vehicle Liability Insurance Act also newly establishes conditions for claim representatives pursuant to Directive 2000/26/EC. The experience showed that it is necessary to determine between a claim representative appointed by an insurer with a licence in the Czech Republic, an insurer which provides services in the Czech Republic temporarily and an insurer which does not provide motor insurance in the Czech Republic. This determination is set forth in sec. 9a–9d of the Act and provides for specific duties with regard to the claim representative. 28

[14] Sec. 55 of Act No. 48/1997 Coll., on Public Health Insurance.
[15] Sec. 126 of Act No. 187/2006 Coll., on Sick Pay Insurance.

B. Cases

1. Ústavní soud České republiky (Constitutional Court of the Czech Republic) 16 October 2007, Pl. ÚS 50/05, Collection of Laws No. 2/2008 Coll.: Abolition of the Current System of Compensating Damage to Health

a) Brief Summary of the Facts

29 Pursuant to art. 95(2) of the Czech Constitution, the District Court of Prague 1 submitted to the Constitutional Court a proposal for the abolition of sec. 444(2) of the Civil Code.

30 In the case the plaintiff claimed compensation from the insurer for aggravation of her social position pursuant to sec. 9 of Act No. 168/1999 Coll., the Motor Vehicle Liability Insurance Act. For this purpose she had two expert opinions prepared, under which the aggregate amount of the compensation for the aggravation of social position amounts to CZK 486,000. The insurer reimbursed this amount of insurance. However, the plaintiff claimed that with respect to the permanent consequences of the accident, i.e. a permanent limitation in her family, social, cultural, sport and sexual life, the court shall award under sec. 7 (3) of the Decree 440/2001 Coll. in connection with the provision of sec. 444(2) of the Civil Code, compensation for the aggravation of social position three times higher than the amount calculated, because her case merits special consideration. Thus, the insurer should pay an amount of CZK 1,458,000 (€ 58,320).

31 As regards the constitutional complaint, the District Court held that the whole system of compensation for pain suffered and the aggravation of social position which is based on multiplication of the value determined by the Ministry of Health and calculated by an expert, is undignified and thus contrary to the principles which shall be granted by a democratic society protecting the human dignity, honour, health and life of its citizens. If the law sets forth a framework for the compensation for damage to health, which authorizes the Ministry of Health to evaluate the amount of compensation for pain suffered and aggravation of social position on a point scale, such a norm presents a disrespect to human rights. Such a system of compensation is especially undignified because it enables the court to increase the compensation pursuant to the Act in connection with the decree only in special cases which merit special consideration.

b) Judgment of the Constitutional Court

32 After considering all evidence the Constitutional Court concluded that the complaint is unfounded.

33 Under art. 95 (2) of the Constitution, if a court concludes that a statute to be applied in deciding a case contravenes the constitutional order, it shall submit the issue to the Constitutional Court. Thus, the legitimisation to file a complaint shall derive from the subject of the case and legal qualification. In other words,

the court may submit only such a proposal for abolition of a law which shall become subject to application.

Thus, in the given case only sec. 444 (2) of the Civil Code and not sec. 7 of the Decree may become subject to constitutional complaint pursuant to art. 95 (2) of the Constitution. However, since sec. 444 (2) only authorises the Ministry of Heath to issue a decree providing particular conditions for compensation for pain suffered and aggravation of social position this cannot be qualified as unconstitutional. 34

As pursuant to art. 95 (1) of the Constitution judges are bound when making their decisions by statutes and treaties which form a part of the legal order, they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such treaties. If the judge considers that the provisions of the Decree are contrary to the statutes, he shall not apply these provisions but instead use general principles. 35

In the given case, the District Court may also choose another possibility stipulated under sec. 7 (2) of Decree No. 440/2001 Coll. This provision enables the court to award higher damages than calculated in accordance with the point-scale valuation and to take into account extraordinary circumstances. It may be true that the case law of general courts tends to adopt a restrictive interpretation of this provision; however, its conclusions do not exclude the possibility to seek the particular conditions for the increase in the compensation in the given case. 36

The Constitutional Court also formed some principles regarding the increase in the compensation, namely in finding III. ÚS 350/03 published in the Collection of Laws. In its opinion, the following criteria should be taken into account when considering the increase in compensation: 37

a) the seriousness of the damage caused, i.e. whether organs of vital importance were harmed or injured;
b) the probability of curing or eliminating the harm caused, i.e. whether the injured party is limited in his way of life as a result of the harm or if the injured party is forced to attend regular check-ups or to undergo further surgical treatments or if he has become dependent on technical equipment as a consequence of the damage to health;
c) the scope of fault of the physician, i.e. how much he deviated from the standards of a typical and ordinary operation.

For deciding on extraordinary cases, the general courts have a certain discretionary power, which allows for multiplication of the basic amount. However, from the point of view of the protection of constitutionality, it must be taken into account that the adjudicated amount must be based on objective and justified reasons and that the adjudicated amount (monetary sum) and the damage caused (harm) must stay in proportion. 38

c) Commentary

39 The submission of the constitutional complaint to the Constitutional Court was not correct because the court may not decide in such case on the abolition of such a provision as sec. 7 of the Decree but only on the abolition of a statute. It therefore rejected the complaint.

40 With respect to the system of compensation for pain suffered and aggravation of social position, however, the Constitutional Court confirmed the current system, which was established based on an objective evaluation of the injury suffered.

41 For an explanation, pursuant to sec. 444 of the Civil Code, both categories of damage to health are currently compensated by a lump sum and the amount is determined by the court pursuant to a point scale set out by a Decree of the Ministry of Public Health together with the Ministry of Social Affairs. This compensation is not fixed, however, and can be altered with respect to the damage or injury caused.

42 The compensation for pain suffered and aggravation of social position is based on a classification system for each injury on a point scale basis. The injuries are considered on an objective basis and are measured with reference to a point scale system, where every point is equivalent to CZK 120 (€ 4.8).[16] The judge applies this scheme to the particular case (the value is determined by a physician). In exceptional cases, special circumstances can be taken into account, whereupon the judge may use his discretionary power to increase the amount of compensation payable.[17] The Decree allows reasonable variation from the set amount and the judge must always justify his decision. In many cases, therefore, the claim for an increase in the amount of compensation is dismissed and only the scale value is applied.

43 The general courts had for a long time followed the case law of the Supreme Court dated 1992. The Supreme Court ruled in its decision[18] that the justification for the increase is to be applied only to exceptional cases when the cultural, sporting or other activities of the injured party were at a very high or abnormal level prior to the injury. However, the Constitutional Court decided on the matter and changed the current case law so that today judges award much higher compensation amounts than under the former interpretation of the point-scale system as developed by the Supreme Court.

44 Based on the principle of proportionality, the Constitutional Court set out three basic points to be taken into account in the case of damage to health and which should help the court to correctly assess the amount of compensation. These include: the severity of the damage, the probability of remedying the damage, and the scope of fault of the wrongdoer. At the same time the Constitutional

[16] Sec. 7 subs. 2 of Decree No. 440/2001 Coll.
[17] Sec. 7 subs. 3 of Decree No. 440/2001 Coll.
[18] Supreme Court R 10/1992.

Court confirmed the right of the courts to use their discretionary power when assessing the amount of compensation.

In the given case, the Constitutional Court explicitly pointed out that the general court shall either make use of the principles of proportionality developed by the Constitutional Court in case III ÚS 350/03 and increase the compensation primarily calculated in connection with the Decree. Alternatively, the general court may refuse the application of the Decree completely (which must be sufficiently reasoned and which is subject to ordinary and extraordinary appeal) for its contravention to the constitutional rights vested in an individual and apply general principles for damages. 45

However, since the limits of the compensation for damage to health stipulated under the Decree no longer exist due to the finding of the Constitutional Court, the results of both solutions must be objectively comparable. 46

2. Ústavní soud České republiky, 17 June 2007, II. ÚS 590/2008: Liability for Custody if the Reasons for Custody are Caused by the Accused Party[19]

a) Brief Summary of the Facts

The plaintiff filed a constitutional complaint against the judgment of the District Court of Prague 2, which dismissed the plaintiff's claim against the state for damage caused by imprisonment. 47

The plaintiff was accused of a crime consisting of an attack against the public authority pursuant to sec. 154 (2) of Act No. 140/1961 Coll., Criminal Act ("Criminal Act")[20]. Due to the nature of the crime and his behaviour, a psychological analysis of the plaintiff's sanity was ordered as part of the criminal proceedings. However, since the plaintiff did not cooperate with the prosecutor and the psychologist, based on sec. 67 (1) lett. a) of Act No. 141/1961 Coll., Act on Criminal Judicial Procedure ("CPA")[21], he was kept in custody. 48

By the decision of the Supreme Court of 28 July 2004, the plaintiff was discharged of the accusation because the act of which he was accused did not present a crime within the meaning of the Criminal Act. Based on this judgment, the plaintiff claimed damages for being kept in custody in the amount of CZK 273 million (€ 10,720,000) and satisfaction for other proceedings in the amount of CZK 10 million (€ 400,000). 49

The liability of the state was dismissed pursuant to sec. 12 (1) lett. a) of Act No. 82/1998 Coll., on Liability for Damage Based Either on Maladministration or on Illegal Decisions ("State Liability Act")[22] because the accused caused his 50

[19] Soudní rozhledy 9/2008.
[20] Zákon č. 140/1961 Sb., trestní zákon.
[21] Zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád).
[22] Zákon č. 82/1998 Sb., o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem a o změně zákona České národní rady č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád).

imprisonment. The District Court for Prague 2 held that the plaintiff knew from the beginning that he was accused of crimes and under these conditions he was obliged to present himself upon request to provide the prosecutor with explanations or otherwise cooperate with other bodies. Despite being aware of this, the plaintiff did not act as requested and even explicitly refused to cooperate with the psychologist charged with evaluating his sanity.

51 The decision of the court of first instance was confirmed by the appellate court as well as by the Supreme Court which refused extraordinary appellation.

b) Judgment of the Constitutional Court

52 The Constitutional Court concluded that the constitutional basis of the claim of an individual for damages in case of criminal proceedings, which are terminated as result of the charges being dropped, must be found not only in the provision of Art. 36 (3) of the Charter of basic rights and freedoms[23] but also in the principles of a legally consistent state stipulated in Art. 1 of the Constitution[24]. If the state is qualified as a legally consistent state, it must be objectively liable for the acts of its public bodies which interfere with the basic rights of an individual.

53 On the one hand, it is apparently a duty of public bodies in the criminal proceedings to prosecute and take legal steps against criminal activity. On the other hand, the state cannot exempt itself from liability for the steps of its bodies if, at a later stage, these steps are qualified as wrongful and an infringement of an individual's basic rights. In such a situation, it is not decisive how the bodies in criminal proceedings analysed the original suspicion but the fact that this suspicion was not confirmed by results of the criminal proceedings.

54 The Constitutional Court had already ruled in the past that every criminal proceeding can negatively influence the personal life of the prosecuted person who is to be seen as innocent from the beginning until the final judgment. Criminal proceedings seriously interfere with the private and personal life of an individual, with his honour, dignity and reputation, even more so when the proceedings appear to be unjustified, which is later confirmed by a final and conclusive judgment.

55 The Constitutional Court admits that the conclusions made in the past always applied to damages for the criminal prosecution and never for damages for the keeping in custody in the proceedings which concluded with the discharge of the accusation.

56 However, the Constitutional Court held that, regardless of the qualification of the particular title for damages in the State Liability Act, in the given case the

[23] Everybody is entitled to compensation for damage caused to him by an unlawful decision of a court, other state bodies, or public administrative authorities, or as the result of an incorrect official procedure.

[24] The Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen.

protection of an individual's basic rights and the principles of a legally consistent state are to be preserved.

The criminal proceedings present a continuous process of finding and examining facts decisive for the evaluation of the act of the accused person and its qualification from the point of view of criminal law. For this purpose, the bodies of the criminal proceedings dispose of competences, which enable and make easier the course of criminal proceedings. These competences, however, cannot be performed in an automatic way. If it becomes apparent in any phase of the criminal proceedings that this purpose cannot be completed because the accused person did not commit a crime and the suspicion of the bodies of the criminal proceedings was incorrect, any and all actions which were made in the criminal proceedings, including the restriction of the personal freedom as custody, must always be qualified as wrongful. 57

Therefore, custody and criminal prosecution cannot be considered separately from the point of view of compensation for damage. If the criminal proceedings appear to be wrongful, the custody as the means leading to the prosecution of the alleged criminal activity was unjust. In other words, if the criminal proceedings were found unreasonable and unjustified, this conclusion must be drawn for any and all actions and institutes which were connected with the criminal prosecution. If the criminal charges had not been brought, the individual would not have been obliged to suffer the particular acts or restrictive practices, including being kept in custody. 58

c) Commentary

The Constitutional Court did not agree with the opinion held by the appellate court that if the complainant caused his custody and the restriction of freedom, he could not be entitled to damages. 59

In the particular case, the complainant was kept in custody based on the suspicion that he would avoid the psychological analysis of his personality and inhibit the prosecution of the alleged criminal activity. This conclusion can be drawn from the reasoning of the resolution based on which the complainant was arrested as well as from the resolution which extended the custody in time. Therefore, an analysis, which was able to discharge the complainant from the accusation, served the prosecutor with a means to restrict his freedom. 60

It is doubtless that the custody presented serious injury for the complainant and that the limitation of his personal freedom in this way was unjust, because the criminal prosecution of the complainant was also unreasonable. In this context, the Constitutional Court held that it is not decisive that the complainant caused the custody by his behaviour, because if the unjust criminal prosecution had not been introduced, the complainant would not have become subject to criminal investigation and his personal freedom would not have been limited through custody. 61

62 From the point of view of applicable law, this conclusion is disputable.

63 The State Liability Act sets forth that damages cannot be claimed by a person who caused the detention, punishment or protective measure on his or her own, whereas no difference is made for which reason the custody was ordered. Moreover, the prosecutor is obliged to discover all the facts (in favour or against the accused) which may serve to arrive at a decision.

64 Therefore, if the accused party refuses any co-operation, the state must ask for protecting measures in order to get background information for its decision or later enforcement of the decision.

65 Based on the above, it should be strongly considered whether the act for which the custody or other protective measure is ordered is only in favour of the accused or if it also serves prosecution purposes. A general application of the conclusion established by the Constitutional Court would lead to an excessive and unjust compensation for damage in any case when charges against the accused were dropped.

3. Nejvyšší soud České republiky, 29 January 2008, 25 Cdo 529/2006: Liability for Operational Activity[25]

a) Brief Summary of the Facts

66 Hops leaves and vines spontaneously ignited on a field used by the defendant in 2000. The fire brigade which was alerted localized the fire. As the dumping site for hops leaves and vines started to burn again, the fire brigade was again summoned. This happened in November 2000. In May 2001, the plaintiff, a young boy, suffered damage to his health as a result of burns on his lower right leg after entering the area used by the defendant for storing the remains of the hops.

67 The Court of First Instance inferred a general liability of the defendant which was taken as given considering that it is generally known that the vegetable material consisting of hops leaves and vines can again spontaneously ignite. Due to the omission of activity, the defendant breached a legal duty even though he placed a danger notice at the edge of the field. He knew that such an alert was insufficient, however, because the sign had been removed many times in the past. Despite knowing this, he had not taken any steps to remove the remaining ignitable sources among the remains of the hops, leaves and vines or compost on his land.

68 The Appellate Court confirmed the decision of the Court of First Instance. The court concluded that the hops, leaves and vines came from the production of hops and after the harvest they were stored for the purpose of later use to improve the fertility of his soil. Therefore, hops, leaves and vines can be in turn

[25] Soudní rozhledy 12/2008, *M. Vlasák*, Náhrada škody způsobené provozní činností – nad jedním rozhodnutím, Soudní rozhledy 6/2008, www.nsoud.cz.

qualified as biological waste which comes from the agricultural activity operated by the defendant and was stored on the field for the purpose of its further use, which can be qualified as an operational activity within the meaning of the provisions of sec. 420a (1) of the Civil Code. The burning is then directly related to this material and the manner of its storing. The Appellate Court held that the damage was partially caused by the activity of the plaintiff within the meaning of sec. 420a (3) of the Civil Code, and this regardless of his fault.

b) Decision of the Supreme Court

For the extraordinary appeal the issue of serious legal importance is whether the spontaneous ignition of the biological material stored on the field, which caused the damage to the health of the plaintiff, has its origin in the activities of the defendant within the meaning of sec. 420a of the Civil Code and if so, whether such an event qualifies as unavoidable and thus as a reason for exemption of liability within the meaning of sec. 420a (3) of the Civil Code. 69

Pursuant to sec. 420a (1) of the Civil Code, any person shall be liable for damage which he causes to another person while operating a business. The damage is considered to have been caused while operating a business if it was caused: (a) by an activity performed in the operation of a business or by an item used in that activity; (b) by the physical, chemical, or biological impact of the operation on its surroundings, (c) by the lawful performance or by making arrangements for such performance of those kinds of work, which causes damage to someone else's immovable or which substantially impedes or makes impossible the use of someone else's immovable. 70

The defendant is an entrepreneur who operates his activity especially in agricultural production, including the sale of unprocessed agricultural products for the purpose of processing and further selling. The vegetable material (hops, leaves and vines) which the defendant stored after the harvest of the hops on the field for the purpose of further usage as fertilizer shall qualify as an item used in the operational activity within the meaning of sec. 420a(1) lett. a) of the Civil Code. The storing of the vegetable material in order to reduce its weight is an activity which is closely connected to the main activity. If this material caused the damage to the health of the plaintiff, it was caused by an item used in an operational activity of the defendant within the meaning of sec. 420a of the Civil Code. 71

In the given case, the self-ignition or spontaneous ignition had its origin in the material (hops, leaves and vines) to whose characteristics belong certain manifestations, including self-ignition under certain conditions. This vegetable material is a by-product of the operation of the defendant in the production of hops, which is one of the most important business activities of the defendant, and it is used for further usage. Thus, this does not present damage which could be caused by unavoidable events outside of the operation of the defendant within the meaning of sec. 420a (3) of the Civil Code. Since under sec. 420a (3) of the Civil Code a person shall only exempt himself from liability for 72

damage upon proving that such damage was caused either by an unavoidable event not arising from the operation of a certain business or by the conduct of the injured party, the defendant cannot use this reason to gain exemption from his liability. If the cause of damage was a so-called internal damaging event, the exemption from liability of the operator based on the reason of unavoidable events does not apply regardless of whether the damage could have been or could not have been prevented.

c) Commentary

73 The Supreme Court more clearly specified the conditions of liability for an item used in an operational activity within the meaning of sec. 420a of the Civil Code. The liability based on the specific cases of liability set out in the Civil Code presents a wide range of cases which must be determined and considered very precisely.

74 It has long been a subject of discussion in Czech legal theory whether the Civil Code contains a general provision for strict liability in sec. 420a of the Civil Code, which should have a subsidiary effect on all cases regulated by Czech law, i.e. for provisions of the Civil Code as well as other statutes. Experts maintain both views. According to the majority opinion, however, there is no general clause for strict liability, which is the case for liability based on fault. The provision of sec. 420a of the Civil Code presents only a case of strict liability without being a general provision.[26]

75 In the given case, the Supreme Court had to decide whether self-ignition or spontaneous ignition of certain vegetable products and the damage caused are conditions which allow the application of sec. 420a of the Civil Code. The Court concluded that since this vegetable material is a by-product of the operation of the defendant and it is used for further usage, it fulfils the conditions stipulated under sec. 420a (2) lit. a), namely damage caused by an activity performed in the operation of a business or by an item used in that activity.

76 At the same time, due to the nature of the vegetable material, it does not present damage which could be caused by unavoidable events outside of the defendant's operation, because the defendant had to be aware of these characteristics. Based on this, the exemption from liability shall be limited to a case when the plaintiff was also at fault.

[26] *M. Pokorný/J. Sala*č in: O. Jehlička/J. Švestka/M. Škárová et al., Občanský zákoník – komentář (Civil Code – Commentary) (8th ed. 2003) 501, other view *M. Škárová* in: J. Švestka/J. Spáčil/M. Škárová/M. Hulmák et al., Občanský zákoník – komentář (1st ed. 2008) 1077.

4. Nejvyšší soud České republiky, 30 July 2008, 25 Cdo 883/2006: Liability of an Expert; Causal Relationship between an Expert Opinion and Damage Suffered based on the Court's Judgment[27]

a) Brief Summary of the Facts

The District Court of Domažlice decided that the defendant had to pay CZK 100,696 (€ 4,000) to the plaintiff. The defendant had in his function prepared an opinion for the transfer of membership rights and duties of a building cooperative and had set the cost of such to be CZK 373,188 (€ 14,900) for the given place and time, whereas an expert opinion prepared for this case arrived at the sum of CZK 563,050 (€ 22,520), but did not find any major fault in the method used in the first expert opinion. The court did find, however, that the defendant had violated a decree of the Ministry of Finance dealing with the assessment of property. Had the defendant's assessment been correct, the value of the plaintiff's property would have increased by CZK 94,931 and in turn not decreased by CZK 5,765 incurred for the additional expert assessments, i.e. in total CZK 100,696. 77

The Appellate Court changed the decision of the Court of First Instance, denying the petition for the payment of CZK 100,696. The court did not find a causal relationship between the violation of legal duties consisting of the faulty value assessment prepared by the defendant and the claimed damage to the plaintiff. The court provided that a court which uses an expert assessment as proof, evaluates the persuasiveness of this assessment with regards to its completeness and relation to the assignment, its logical reasoning and consistency with other items of proof. Thus, if the court decided in the dispute about the cancellation of the common rental of a cooperative apartment on the rights and duties of the tenants based on the free evaluation of evidence, there is no causal relationship between the possible violation of legal duties by the defendant in his assessment and the damage. 78

b) Decision of the Supreme Court

A causal relationship, which is a requirement for the existence of liability for damage, exists if the damage occurred as a result of the wrongful violation of legal duties by the wrongdoer, i.e. without the wrongful violation by the wrongdoer the damage would not have arisen as it did. 79

The Appellate Court justified its conclusion about the non-existence of a causal connection between the violation of the legal duties (the faulty expert opinion) and the damage claimed by stating that it is only the court which can judge the persuasiveness of the assessment in regards to its completeness and relationship to the assignment, its logical reasoning and consistency with other items of evidence. 80

The Supreme Court agreed with the Appellate Court that in the evaluation of evidence through expert opinion sec. 132 of Act No. 99/1963 Coll., the Civil 81

[27] Právní rozhledy 22/2008; www.nsoud.cz.

Procedure Code[28] applies and therefore the court cannot simply accept the conclusions of the expert opinion without further examination, but that in cases of need it must verify its conclusions against other evidence, especially if there are doubts about the correctness of the conclusions of the expert assessment. If the court has doubts about the accuracy of the expert opinion, it cannot substitute it by its own opinion, but has to request that the same expert clarify, amend or correct his opinion, or to prepare a new assessment. It may also order a different expert to evaluate the matter and the accuracy of the initial opinion. The parties to the court proceedings are also entitled to express their doubts about the contents of the expert assessment. In the given case, no doubts were expressed because the wrongdoings of the expert came to light only after the final resolution of the dispute. If the plaintiff cannot get the legal satisfaction to which she is entitled to, then she has incurred damage which was caused by the inaccuracy of the expert opinion which served as the basis for the assessment of payment obligations to the plaintiff.

82 It is therefore apparent that the legal examination of the possible causal connection by the Appellate Court, which names the court decision rather than the violation of the legal duties of the expert to be the cause of the damage incurred, is incorrect. It is clear that even though the expert opinion primarily served as the foundation for the issuance of the decision, its contents were at the same time an important, significant and substantial (even though not sole) cause of the damage to the property. This sets a causal connection between the violation of legal duties by the expert and the damage which was suffered by the plaintiff.

c) Commentary

83 The Supreme Court decided on a causality issue, i.e. whether damage which a plaintiff suffered in judicial proceedings based on a wrongful evaluation made by an expert is in a causal relationship with the decision-making of the court or with the findings and conclusions of the expert.

84 The court pointed out that the question of a causal relationship between the action or omission of a person and damage occurred is not a legal question but a factual one, which cannot be answered generally, but only through the consideration of actual circumstances. The assessment of the existence of a causal relationship has to include the exclusion of the damage from its general context and its isolated examination, only in view of its causes. As a causal connection is a natural and socially inherent principle, this concerns the examination of the fact which caused the damage. In the entire chain of general causal connections (each fact has its own cause and at the same time is a cause of other facts) it is necessary to follow only those causes and results which are important for the responsibility for damage.

85 Therefore, it cannot be considered correct if the court in the proceedings in question reasoned its conclusion based on the fact that there is no causal rela-

[28] Zákon č. 99/1963 Sb., občanský soudní řád.

tionship between the possible violation of legal duties by the defendant and the damages which were claimed by the defendant because of free evaluation of evidence based on the expert opinion.

Thus, the causal connection relevant for the damage which occurred due to a wrongful determination of the value of rights or other item, regardless of the independent evaluation of evidence made by the court, consists in the negligence of the expert. 86

5. Nejvyšší soud České republiky, 27 September 2007, 30 Cdo 1123/2008: Liability for Interference with Personality Rights; Use of Likeness without Consent for Commercial Purposes[29]

a) Brief Summary of the Facts

The defendant breached the personality rights of the plaintiff within the meaning of sec. 11 of the Civil Code[30] in connection with sec. 12 (1) of the Civil Code, when he used the plaintiff's likeness for advertising purposes without her consent. The Regional Court of Brno awarded damages of CZK 100,000 (€ 4,000) as satisfaction for non-pecuniary damage under sec. 13 (2) of the Civil Code[31]. 87

The High Court in Olomouc changed the decision of the Court of First Instance and dismissed the claim for the satisfaction for non-pecuniary damage. The court concluded that the defendant interfered with the personality rights of the plaintiff as discovered by the Court of First Instance; however, it deduced that the presumptions for the adjudication of the requested satisfaction of the non-pecuniary damage in money are not given because no aggravation to the dignity or honour of the plaintiff in society to a considerable extent was proven because the depicted picture had an artistic character and was neither damaging nor vulgar. The court held that it had not been proven that the usage of a label with the face of the plaintiff aggrieved her dignity or honour in society. 88

b) Decision of the Supreme Court

The Supreme Court objected in its first decision that the Appellate Court had not taken into account that the presumption of the serious interference into the personal sphere of an individual shall not be reduced only to cases of reduction in dignity or honour in society, but it is always necessary to take into account 89

[29] www.nsoud.cz.

[30] An individual shall have the right to protection of his personality, in particular of his life and health, civic honour and human dignity as well as of his privacy, name and expressions of personal nature.

[31] (1) The individual shall be entitled in particular to demand that unlawful violation of his personality be stopped, that consequences of this violation be removed and that an adequate satisfaction be given to him. (2) If the satisfaction under paragraph 1 appears insufficient due to the fact that the individual's dignity or honour has been considerably reduced, the individual shall also have a right to a pecuniary satisfaction of the immaterial detriment. (3) The amount of the satisfaction under paragraph 2 shall be specified by the court with regard to intensity and circumstances of the arisen infringement.

other aspects of the case which correspond with the mentioned values. A right vested in an individual is to freely decide whether the values protected by law, in particular photographs shall be used for a commercial purpose (advertisement) beyond the legal frame of the licence pursuant to sec. 12 (2 and 3) of the Civil Code.[32]

90 The High Court in Olomouc followed the opinion of the Supreme Court and further dealt with the compensation for non-pecuniary damage in money. When accounting the satisfaction it considered the fact that the plaintiff was a famous artist with an international reputation. The portrait of her face was connected with products in a commercial based on which the defendant gained a benefit. When determining the amount of the satisfaction for non-pecuniary damage in money, it mentioned the relation which is provided by the provision included in sec. 444 (3) of the Civil Code. Based on this consideration, it awarded the satisfaction of non-pecuniary damages in the amount of CZK 30,000 (€ 1,200).

91 The Supreme Court in its second decision, which followed the judgment of the High Court, held that sec. 13 of the Civil Code grants to an individual aggrieved in his personal sphere the right to claim satisfaction for pecuniary or non-pecuniary loss. Under sec. 13 (3) of the Civil Code, the amount of satisfaction for non-pecuniary damage in money shall be determined by the court after taking into account the seriousness of the harm which has occurred and the circumstances under which the interference with rights occurred.

92 Thus, if the Civil Code grants in sec. 13 (2) of the Civil Code under certain qualified conditions the possibility to award to the injured individual satisfaction in money, it does not set any minimum or maximum limitations for the determination of its amount. Sec. 13 of the Civil Code only sets forth that the satisfaction must be reasonable. The determination of the amount of the satisfaction in money shall therefore become subject to the discretionary power of the court. However, the court is obliged to discover the facts of the case and to rely on particular and provable facts, especially the seriousness of the non-pecuniary damage and the discovered conditions under which the unlawful interference with the personality rights of an individual occurred.

93 The determination of the amount of a claim on adjudication of the satisfaction for non-pecuniary damage in money can be investigated only with serious difficulties. Therefore, the proceedings pursuant to sec. 136 of the CPA shall primarily apply, i.e. the determination of the amount in accordance with the free consideration of the court. This consideration shall also, however, be subject

[32] (1) Documents of a personal nature, likenesses, pictures and images and sound recordings concerning an individual or expressions of his personal nature may be taken or used only with his or her consent. (2) The consent shall not be required if the documents of a personal nature, likenesses, pictures and images and sound recordings are used for official purposes on the basis of an act. (3) Likenesses, pictures and images and sound recordings may be taken or used without the consent of the individual for the purposes of science or art and for the purposes of press, motion picture, radio and television news service. However, this use must not be at variance with the lawful interests of the individual (translation www.mujweb.cz/www/vaske).

to evaluation. The basis for the consideration under the mentioned provision is the finding of such circumstances which enable the court to reason the valuation on a certain quantitative consideration of the basic implications of the given case.

At the same time, however, the court mentioned in connection with the breach of certain elements of the personality the provision of sec. 444 (3) of the Civil Code[33], which regulates compensation in case of homicide. The plaintiff objected such consideration because the provision of sec. 444 (3) relates only to cases of homicide; however, the Supreme Court held that that such a consideration is doubtlessly legitimate, even if it shall not be directly applicable. 94

c) Commentary

In the mentioned decision, two crucial issues can be found: (i) the qualification of interference with personal rights and (ii) the conditions for determination of satisfaction in money. 95

As regards the qualification of the unlawful interference with personality rights, in particular with rights to likeness, the Supreme Court refused the opinion that no aggravation to the dignity or honour of the plaintiff in society to a considerable scope was proven because the depicted picture had an artistic character and was neither damaging nor vulgar. The Supreme Court held that the protection shall not be limited to dignity or honour in society but shall be understood widely as a complex of values which must not be damaged. 96

With respect to the particular right to likeness and depiction, the Civil Code establishes basic conditions for lawful usage thereof, i.e. the usage of personal photographs without the previous consent of the depicted person. This example confirms at the same time, however, the right vested in any individual to freely decide whether the photographs shall be used for a commercial purpose beyond the legal frame of the licence or not. If there is no consent, such a usage could present a breach of an individual's personal rights. 97

The second issue pointed out was the assessment of the satisfaction for such a breach of personal rights. 98

The Supreme Court set basic principles which must be observed when determining the aggravation of the rights, in particular the intensity, character and manner of the unlawful interference, as well as the character and scope of the aggrieved value of the personality persisting in the amount of the suffered 99

[33] (3) A lump sum compensation is awarded to the survivor for damage suffered by homicide, in particular to: a) the wife or husband CZK 240,000 (€ 9,600); b) each child CZK 240,000 (€ 9,600); c) each parent CZK 240,000 (€ 9,600); d) each parent in case he/she loses an unborn child CZK 85,000 (approx. € 3,400); e) each sibling CZK 175,000 (approx. € 7,000); f) any other close person living with the homicide victim in a common household at the time of the occurrence of the event, being the cause of the damage to health with fatal consequences, CZK 240,000 (€ 9,600).

non-pecuniary damage. The High Court's decision complied with these requirements, because the court took into account the seriousness of the damage as well as the conditions under which the interference with rights occurred.

100 The fact that the High Court also took into account the compensation in case of homicide pursuant to sec. 444 (3) of the Civil Code to the current case cannot be seen as negative. Since the mentioned provision sets the limits of compensation for a very serious injury to personality rights, namely the loss of a close person, any other case of interference with personality rights and the subsequent satisfaction should be checked for legitimacy by comparing the aggrieved rights and results.

6. Nejvyšší soud České republiky, 31 January 2008, 30 Cdo 3361/2007: Breach of Personality Rights by Publication of Photographs of a Dead Person[34]

a) Brief Summary of the Facts

101 On 31 January 2006, the son of the plaintiffs died in a traffic accident. On 1 February 2006, in an Internet newspaper as well as on the first and fourth page of a daily newspaper, the defendant published photographs of the accident, showing the burned remains of the passengers, one of which was the son of the plaintiffs. The plaintiffs filed a claim for the protection of their privacy, both in relation to their deceased son in accordance with sec. 15 of the Civil Code[35] as well as in relation to their own persons for the violation of their privacy and family life. The joint issue of both petitions was the publication of the above-described photographs on the Internet and in the printed form of a daily newspaper.

102 The District Court in České Budějovice dismissed a claim requiring the defendant to publish within 14 days an apology on the first page of his website with the wording contained in the court's decision. The court also denied a second petition, requiring the defendant to publish an apology on the first and fourth page of a daily newspaper. However, the court awarded satisfaction for non-pecuniary damage in the amount of CZK 100,000 (€ 4,000).

103 The Appellate Court did not find the publication of the accident photographs to have been an unauthorized violation of the personal rights of the plaintiffs, namely their right to privacy. The court stated that privacy as a part of the personality of an individual, which is protected under sec. 11 of the Civil Code, constitutes the internal intimate sphere of the natural person's life created by circumstances of his personal life, whereas the purpose of the right to the protection of privacy is that these rights should not be made publicly accessible without the consent of this natural person. The right to privacy also includes the right to family life, which consists in the maintenance and development of

[34] Právní rozhledy 14/2008, www.nsoud.cz.

[35] After the death of the individual, the right to protection of his personality may be asserted by his spouse or children or, if there are no spouse or children, by his parents.

reciprocal emotional, moral and social ties among the closest individuals. The death of the plaintiffs' son clearly unsettled their family life in an irrevocable way and thus unequivocally affected their privacy. However, even though the publication of the photographs, according to the Appellate Court, might have had a continuous effect and might have led to negative mental states, it does not constitute a violation of the above-defined right to privacy as it could not have influenced their emotional, moral and possibly social ties. The subjective feelings of affected natural persons are legally not relevant to the decision in this matter, because under sec. 11 of the Civil Code, only an objective point of view can be relevant.

b) Decision of the Supreme Court

The Court of First Instance noted that the defendant interfered with the plaintiffs' rights to privacy and with their existing close family ties, especially the ability to treasure the memory of their closest family member, as the plaintiffs continue to recall the details of their son's death. The Appellate Court then correctly pointed out that the right to privacy also includes the right to family life consisting of the maintenance and development of reciprocal emotional, moral and social ties among the closest individuals, whereas one of the fundamental principles used in making decisions according to sec. 11 ff. of the Civil Code is the objective point of view. Despite this fact, it is obvious that the Appellate Court did not thoroughly clarify the character of such objective interference. 104

A significant constitutionally protected value of the personality of each individual in relation to other subjects is the privacy of the natural person, i.e. personal privacy. Intimacy existing as the basis of each human being requires the effective protection of personal private life. There cannot be any freedom without the protection of privacy. 105

Sec. 11 of the Civil Code deals with the privacy of an individual, the Charter of Basic Human Rights and Freedoms in art. 7 talks about the inviolability of the privacy of an individual and in art. 10 (2) about the protection against unauthorized interference into private and family life. 106

Thus, the interpretation of the term "personal privacy" cannot be unreasonably limited to exclude the "outside world," as the recognition of one's personal life has, to some extent, to include the right to create and develop relationships with other persons. The personal privacy of a natural person can in general be defined as the internal sphere of life of a natural person which is created by the facts of his personal life and which is necessary for his self-realization and further development. Thus keeping in mind both justified individual interests of natural persons as well as necessary societal needs, civil law has to equally assure, among other things, that natural persons have the possibility to freely decide according to their own considerations and self-determination, if, and to what extent they might want to make facts about their personal life accessible to other subjects (the positive element), but also to be able to successfully ward off unauthorized interference into their personal privacy by other subjects of equal legal standing (the negative element). 107

108 It is therefore clear that despite the death of an individual, the developed close ties prevail in the closest relatives of the deceased, namely in the form of piety and treasured remembrance. Therefore, an insensitive and unauthorized violation of this protected sphere, represented by the impossibility of the realization of piety has to be considered a violation of privacy, which depending on circumstances can justify the need of the surviving person for the protection according to sec. 11 ff. of the Civil Code. If such interference at the same time negatively affects the memory of a deceased natural person, then the possibility of a post-mortem protection of this person according to sec. 15 (1) of the Civil Code may also come into effect.

c) Commentary

109 In the given case, the described interference by the defendant consisted of the entirely unjustified publication of photographs depicting, among other things, the burned remains of the deceased son of the plaintiff and thus unjustifiably violated the privacy of the plaintiffs as the closest surviving relatives in the sphere of the realization and development of piety in relation to their deceased son.

110 It is obvious that this interference was generally considered to be significant. Thus, the conclusion of the Appellate Court, which ruled that this case involved only the subjective perception of this interference through the plaintiffs, was not correct.

111 The Supreme Court clarified the term of privacy, as stipulated under sec. 11 of the Civil Code. In its opinion, the interpretation of the term "personal privacy" cannot be unreasonably limited to exclude the "outside world". The personal privacy of a natural person can in general be defined as the internal sphere of life of a natural person, which is created by the facts of his personal life and which is necessary for his self-realization and further development. The civil law has to equally assure that natural persons have the possibility to freely decide according to their own considerations and self-determination, if, and to what extent they might want to make facts of their personal life accessible to other subjects (the positive element), but also to be able to successfully ward off unauthorized interference into their personal privacy by other subjects of equal legal standing (the negative element).

C. Literature

1. *M. Mikyska*, Náhrada újmy na zdraví podle nového občanského zákoníku – krok kupředu nebo zpět, [2008] Právní rozhledy 22/2008, 826 ff.[36]

112 The author compares the current regulation of compensation for damage to health with the new draft of the Civil Code. He criticizes the proposed changes

[36] Compensation for damage to health pursuant to the new Civil Code – a step ahead or backwards?

based on the vague and unclear regulation of particular claims of the injured party and close persons.

2. *K. Svoboda*, Kdo odpovídá za škodu z nezákonného předběžného opatření? [2008] Právní rozhledy, 485 ff.[37]

The author presents the issue of liability for damage arising from illegal interim injunction stipulated in sec. 75 ff. of the CPA.[38] He defines this concept and examines whether the petitioner or the state shall be held liable for damage caused to the obliged party to the interim injunction. 113

3. *K. Svoboda*, Dynamická náhrada škody, [2008] Právní rozhledy, 181 ff.[39]

The author deals with the issue of compensation for damage which can arise in the future, in particular damage as a consequence of damage to health and damage to an item as a subsequent damage in causal connection with a primary breach of duties. The author points out that this issue will influence the willingness of insurance companies to conclude insurance policies in some cases and that legal regulation is therefore required. 114

4. *L. Mikulcová*, Odpovědnost za škodu způsobenou leasingovému nájemci předčasným ukočením leasingového vztahu pro totální zničení předmětu leasingu, [2008] Právní rozhledy, 669 ff.[40]

The author comprehensively presents the issue of compensation for damage caused to the tenant by early termination of the lease relationship due to complete destruction of the object of the lease and criticizes the current case law of the Supreme Court, which does not grant such damages. 115

5. *P. Zima*, Nervový šok a sekundární oběti, [2008] Právní rozhledy, 216 ff.[41]

The author deals with the disputable case law of the Czech Supreme Court, which denies compensation for damage in case of nervous shock suffered as a consequence of another event. The author proposes certain changes to the draft of the Civil Code, which should more clearly state that such damages are possible in certain situations. 116

[37] Who shall be held liable for damage arising from illegal interim injunction?
[38] *J. Hrádek* in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 190, no. 19 ff.
[39] Dynamic damages.
[40] Liability for damage caused to the tenant by early termination of the lease relationship due to complete destruction of the object of the leasing.
[41] Nervous shock and secondary casualties.

6. *M. Vlasák*, Opustí občanský zákoník princip pecuniární kondemnace, [2008] Právní rozhledy, 62 ff.; *K. Eliáš*, Jak hradit škodu? [2008] Právní rozhledy, 258 ff.[42]

117 The authors controvert the new proposal on regulation of compensation for damage as contained in the draft Civil Code, in particular, whether the new draft shall be based on the principle of monetary condemnation or restitution in kind. The current draft gives priority to the latter; however, the injured party shall be entitled to select the most suitable form of damages.

7. *T. Rechberger*, K odpovědnosti správce konkursní podstaty v zákoně o konkursu a vyrování se zvláštním přihlédnutím k pojmu náležité a odborné péče v civilním právu, [2008] Právní rozhledy, 102 ff.[43]

118 The author analyses the controversial issue of liability of bankruptcy trustee pursuant to the provisions of the Act on Bankruptcy and Composition, the Civil Code and the Commercial Code. He examines the term of due care (*diligentia pater familias*) with respect to the conditions of liability.

8. *T. Doležal/A. Doležal*, Několik poznámek k aktuálním rozhodnutím soudů ve věcech náhrady škody na zdraví a kompenzace imateriální újmy, [2008] Právní rozhledy, 562 ff.[44]

119 The authors present an overview of relevant Czech case law relating to compensation for damage to health and non-pecuniary injury. They present the very current decision of the Constitutional Court on compensation for damage to health, in particular ruling Pl. ÚS 50/05 and contradictory decisions of the higher courts and the Supreme Court of the statutes of limitation in case of non-pecuniary damage, namely 1 Co 63/2003 and 30 Cdo 1522/2007.

9. *T. Doležal*, K náhradě škody za nechtěné dítě, [2008] Právní rádce 5/2008, 13 ff.[45]

120 The author deals with the issue of the compensation of wrongful conception, wrongful birth and wrongful life. He presents briefly the only case in Czech jurisprudence and points to legal regulation in Czech law in this area and subsequently presents cases from jurisdictions worldwide.

[42] Should the Civil Code abandon the principle of pecuniary condemnation? How shall damage be compensated?

[43] Liability of the bankruptcy trustee pursuant to the Act on Bankruptcy and Composition with a special view to the term due care in civil law.

[44] A few remarks on actual case law of the courts with respect to compensation for damage to health and non-pecuniary damage.

[45] On compensation for damage for an unwanted child.

10. *I. Rada*, Odpovědnost funkcionářů společnosti, [2008] Právní rádce 2, 3, 4/2008[46]

The author deals with the issue of the liability of a company's officials, in particular members of the Supervisory Boards. The topic is divided into three parts – liability of a company's officials, specific cases of liability and liability towards third parties. Even though such liability can also be qualified as contractual, a certain scope also applies to liability in torts. The author deals with all aspects of liability, from conditions for liability and its nature to the statutes of limitation or contributory negligence. 121

11. *J. Švestka/J. Spáčil/M. Škárová/M. Hulmák et al.*, Občanský zákoník – komentář (1st ed. 2008)[47]

With the first edition the authors have produced a so-called "large commentary" with 2,400 pages and have amended the recent text and case law. The chapter on compensation for damage was written by Dr. Škárová, a Supreme Court judge and although she elaborated on the text formerly drafted by Pokorný and Salač, she comprehensively amended the commentary on sec. 415–450 of the Civil Code. 122

[46] Liability of a company's officials.
[47] Civil Code – Commentary.

V. Denmark

Søren Bergenser

A. Legislation

1 No new tort law legislation was introduced in 2008.

B. Cases

1. Liability of the Real Estate Broker: Vestre Landsret (Court of Appeal) 8 May 2008, UfR (Ugeskrift for Retsvæsen, Weekly Law Report) 2008.2018 V (Vest, West)

a) Brief Summary of the Facts

2 In January 2005 K bought a large farm for an amount of € 9,500,000. The real estate broker who had dealt with the sale of the farm had compiled the sales prospectus with information provided by the seller, S. After having taken over the farm, the buyer realized that the area of the adjoining land was not as large as that stated in the sales prospectus, which read "approximately 274 hectares". A measurement of the land revealed that the precise area was 264.5 hectares. The buyer claimed compensation from the seller and the real estate broker.

b) Judgment of the Court

3 Not surprisingly the court stated that the area of farm land is an essential issue for potential buyers. Furthermore the statement "approximately 274 hectares" in the sales prospectus must be considered a guarantee. The word "approximately" could only leave room for very minor deviations and not a deviation of 9.5 hectares. The court decided that the real estate broker had been negligent and, as the seller had provided a guarantee, the two were jointly and severally liable. Despite the fact that the correct area of land was on two information sheets which were appendices to the sales prospectus, this had no impact on the liability question as the seller and the real estate broker were in a better position than the buyer to detect the contradictory information. The amount of compensation was assessed by taking into account several factors, one being the fact that the term "approximately" had been used in the sales prospectus.

c) Commentary

This decision opens the discussion concerning the professional liability of real estate brokers for information in a sales prospectus. In Danish law the real estate broker is responsible for checking the most important information concerning the sales object, such as the area of the property, the area of the adjoining land, etc. If the real estate broker has included incorrect information in the sales prospectus, he is liable on a no-fault basis. In this decision the real estate broker could have checked the exact area of the farm and there was no need for him to use the word "approximately" or similar phrases giving the reader the impression that there could be any uncertainty regarding the area of the farm land. However there is a grey zone as to how the real estate broker can state information in a sales prospectus when it comes to trade puff information and the question whether information in a sales prospectus can be considered a guarantee. In a town court decision,[1] which at the present time is under appeal, a real estate broker had stated in the sales prospectus that a camping site could easily and at little expense be upgraded from three to four stars. After having purchased the camping site, the buyer however realized that it would be relatively expensive to upgrade it. The real estate broker was not held liable as the statement did not constitute a guarantee and because the buyer failed to investigate possible costs and work necessary to upgrade the camping site prior to buying it. Furthermore it was not considered negligent that the real estate broker had not made further investigations of his own as to how much money it would take to upgrade the camping site. 4

2. Liability of a Solicitor: Vestre Landsret (Court of Appeal) 10 January 2008, UfR (Ugeskrift for Retsvæsen, Weekly Law Report) 2008.1079 V (Vest, West)

a) Brief Summary of the Facts

A solicitor gave legal assistance to the buyer of an ordinary detached house. In Danish law the buyer can take out a home warranty insurance which covers latent defects. In order to conclude such an insurance policy, a survey of the condition of the property must be undertaken by an independent construction specialist. In this case a property condition survey was conducted but a home warranty insurance policy was not concluded. The purchase agreement stated that the buyer could not subsequently claim damages if the house suffered from defects or had defects which should have been detected and mentioned in the property condition survey. The High Court mentioned that the buyer did not have any knowledge about the regulation or any craftsman skills. A little less than five years after the date of possession, the buyer found out that the house suffered from damp due to an attack of fungus. The buyer claimed compensation from the seller and his insurance company but compensation was denied. Subsequently she claimed compensation from her solicitor claiming that her solicitor had advised her not to take out a home warranty insurance. 5

[1] Byretten i Viborg (Viborg Town Court), BS no. 1-13/2007 of 21 August 2007.

b) Judgment of the Court

6 The solicitor stated that she could not remember the actual case, but added that she had never advised any house owner not to take out a home warranty insurance. The High Court decided that the solicitor had not kept any evidence that she had given advice regarding the insurance matter. The Court therefore concluded that the solicitor had not ensured that the buyer was given adequate information regarding the legal consequences of not taking out the home warranty insurance.

c) Commentary

7 In the area of professional liability, professionals are strictly liable in matters considered to be "core" areas in their respective profession. For Danish lawyers the transactions relating to real estate are considered to be a core competence of lawyers. This decision however is in accordance with the decision UfR 1998.344 V[2] where a lawyer was held strictly liable for failing to inform potential buyers of the risks involved in not taking out a security on a house loan. The lawyer had explained to the buyers of the house that there was a risk that the interest rates of the loan could fluctuate in the time period until the purchase of the house was finalised, but the lawyer was however held liable as the rates changed which led the buyer to suffer a loss.

3. Product Liability: Højesteret (Danish Supreme Court) 30 January 2008, UfR (Ugeskrift for Retsvæsen, Weekly Law Report) 2008.982 H (Højesteret, Supreme Court)

a) Brief Summary of the facts

8 Between 1998–99 a company S built a power station as turnkey contractor. In February 2000 S had to change some parts in the power station. In May 2001 the power station burned down and the subsequent investigation showed that S had acted negligently when changing the parts and that this negligence had caused the fire. The insurance company that had insured the power station compensated the owners of the power station for their loss concerning the buildings, goods, loss of profits and costs related to specifying the loss, which amounted to € 600,000. The insurance company hereinafter claimed this amount from S. The High Court decided to award the insurance company compensation based on an estimate of € 520,000. S appealed the decision but only as regards the part of the claim concerning loss of profit and costs related to specifying the loss. S stated that, in their general terms of sales and delivery, claims for indirect losses are expressly excluded and that indirect loss is also excluded in ABT93 (General Conditions for Turnkey Contracts – an agreed document), sec. 35.

[2] Which is treated in *S. Halling-Overgaard/R. Mehl*, Ejendomsformidlerens og ejendomsmæglerens erstatningsansvar (2005) 159 ff. and *V. Ulfbeck*, Erstatningsretlige grænseområder (2004) 42, 46, 52 and 102.

b) Judgment of the Court

The Supreme Court stated that the general terms of sales and delivery were agreed between S and the owners of the power station regarding the reconditioning work. However the Supreme Court decided that the damage concerned a product liability matter and not a question of liability for services which were inadequately performed. Hence the Supreme Court decided that S could not rely on the clause disclaiming loss of profit and other indirect damage. Also, as the case concerned a product liability question, the ABT93, sec. 35 could not be asserted in this case as these clauses regulate the contractual relation between the parties and not matters relating to actions in tort. 9

c) Commentary

In this decision the classic distinction between product liability and the liability for services which have been performed in a faulty manner is in focus as the problem in question was whether liability limitations in an agreed document and in terms of sales and delivery could be applied. This decision supports the theory within Danish law[3] according to which product liability is considered to be a non-contractual liability. The decision is analyzed in the article by Professor Torsten Iversen, Aarhus University mentioned below, (infra no. 17). In transport law there is a parallel problem concerning product liability and claims related to transportation[4]. 10

4. Employer's Liability: Højesteret, 7 February 2008, UfR (Ugeskrift for retsvæsen, Weekly Law Report) 2008.1156 H

a) Brief Summary of the Facts

In the period from 1990 to 1995 a nurse worked in the medical ward of a hospital and in addition she was an official staff representative, a so-called "social steward". From 1995 to 1997 the management of the hospital was involved in a project whose aim was to ease the working situation and environment for hospital employees. In January 1998 the nurse was reported ill due to stress which was reported to the National Board of Industrial Injuries which decided in March 1998 that they would not recognize the nurse's illness as an occupational disease. This decision was affirmed at the appeal board. The nurse decided to claim compensation from the owner of the public hospital – the regional municipality – claiming that the bad working conditions at the hospital caused her illness and that the owners of the hospital had shown negligence in their manner of organizing the hospital. 11

b) Judgment of the Court

The High Court decided that the working conditions at the hospital had not been of such a nature that the owners had been negligent and the High Court did not find the owner of the hospital liable. The High Court stated that the 12

[3] *Ulfbeck* (fn. 2) 139 ff.
[4] The issue is furthermore examined in *Ulfbeck* (fn. 2) 121 and 176.

nurse should have realized how much extra work the task as social steward involved. The Supreme Court affirmed the decision and in addition stated that the nurse should have realized that she took on the job in a generally very stressful ward of the hospital and that the position as a social steward would cause additional stress.

c) Commentary

13 This decision limits an employee's possibility of being economically compensated according to sec. 26 of the Damages Liability Act. According to this decision, the employer cannot be held liable according to this clause for the employee's illness due to stress if the employer has taken adequate measures to remedy problems in the workplace. Furthermore this decision leaves very little room for the employee to be compensated for illness due to stress caused by the working environment according to the general law of tort.

5. Decisions within the area of personal injuries law

14 There were no important Danish decisions within the area of personal injuries law in 2008.

C. Literature

1. *Jens Andersen-Møller/Jacob Brandt*, Kommuners ansvar for afledning af overfladevand (The Liability of Municipalities for Diversion of Surface Rain Water), UfR (Ugeskrift for Retsvæsen, Weekly Law Rewiev) 2008 B.93

15 This article is an analysis of the liability of public authorities for damage caused by surface rain water which was not diverted in time. The authors pose the question whether the severe incidents of rain since the mid 1990s – technically defined as "monster rain" – should have any effect on the legal system as there is currently no regulation regarding the liability of public authorities for severe damage caused by "monster rain".

2. *Søren Skjerbek/Jørgen Vinding*, Arbejdsgiver ikke erstatningsansvarlig (Employer not Liable), Juristen no. 7, 2008

16 The authors of this article analyze the Supreme Court decision which is mentioned as Case number 5 above. In the article the authors analyze the question whether an employee can be compensated according to the general Danish regulation of compensation (as opposed to rules of employment) if the employer dismisses an employee who has been absent owing to psychological reasons entirely or partly caused by the working place. It is furthermore discussed whether an employee can be compensated according to the Damages Liability Act, sec. 26 regarding compensation for injury to feelings and reputation.

3. *Torsten Iversen*, Produktansvar og ansvarsbegrænsningen (Product Liability and Limitation of Liability), Juristen no. 6, 2008

In this article the theme of acceptance, interpretation and overruling of disclaimers and limitation clauses in terms of sales and delivery and the agreed documents ABT93 (General Conditions for Turnkey Contracts) and AB92 (General Conditions for the Provision of Works and Supplies within Buildings and Engineering) regarding product liability outside the area of the Product Liability Directive, no. 374 of 1985 (personal injury and damage to consumer property) is discussed. The theme is analyzed in connection with the Supreme Court decision, Case number 3 above. 17

4. *Jens Hartig Danielsen*, Myndigheds erstatningsansvar (Liability of Public Authorities), Juristen no. 1, 2008

This article analyzes the Danish Supreme Court decision UfR 2007.3124 H (Weekly Law Report) referred to in the 2007 Yearbook. In this decision a claim from a manufacturer of pharmaceutical products against the Danish State was denied by both the High Court and the Supreme Court. The Danish Medicines Agency (DMA) had given a Danish company dealing with the parallel import of medicine permission to import ulcer medicine as the company had submitted an application according to the law. The producer of this medicine withdrew the product from the market as they had made a new product replacing the old product. The producer asked the DMA to force parallel importers to also withdraw the old parallel imported products from the market. DMA did so accordingly. The identical problem had occurred in Sweden and Finland in the parallel court cases where the national courts had decided to ask the European Court of Justice to address the question whether the recall was consistent with EU law. The European Court of Justice decided that the recall was inconsistent with the EC Treaty, art. 28 and 30. Hence the Danish company decided to commence proceedings against the Danish State/the DMA claiming € 400,000 for lost income. The conclusion of the article is that the non-compliance with the EC regulation must be severe in order for a claimant to be compensated. 18

5. *Erik Werlauff*, Forureneren bag forureneren og skadevolderen bag skadevolderen – om hæftelse for et andet selskabs skadeforvoldelse, herunder ved miljøskader (The Polluter behind the Polluter and the Tortfeasor behind the Tortfeasor – Liability for another Company's Tortious Act including Environmental Damage) Revision & Regnskab (Journal of Accounting) no. 12, 2008

This article deals with a question in the judicial border land between company law and tort law. It is discussed whether the owners of a limited company or other limited companies within a group of affiliated companies can be held liable for damage caused by activities in a limited company or if a lifting of the corporate veil can take place. The author, Prof. Erik Werlauff dealt with the theme of this article in his doctoral dissertation "Selskabsmasken" (The Mask of Limited Companies) in 1991 and the article summarizes the legal status of the topic within Danish law. 19

6. *Peter Jakobsen/Niels Hjortnæs/Kristina Askjær,* Erstatning inden for sundhedsvæsenet (Compensation Regarding the Health Authorities) (Thomson Reuters, Copenhagen 2008)

20 This book examines the rules concerning patients' insurance and drug related injuries. The regulation of these legal areas was revised in 2007 and united in one common act even though the nature of these legal areas differs substantially as patient insurance concerns professional liability and the area of drug related injuries concerns product liability. The authors are all practitioners working within the authorities that govern this legal area and the book works well as a handbook for practitioners.

7. *Lars Bo Langsted/Paul Krüger Andersen/Lars Kiertzner,* Revisoransvar (Liability of Accountants) (Thomson Reuters, Copenhagen 2008)

21 This seventh edition deals with the three areas of liability of accountants which is liability for damage, criminal liability and the disciplinary liability. This revised edition sums up the impact of the 2008 revised Danish Act on Accountants and the international guidelines which were adopted in Danish law simultaneously. The Danish Act on Accountants underwent major changes in 2003 and the case law which followed these changes is analyzed. This presentation is a necessary tool for everyone who deals with liability matters of accountants in Denmark.

VI. England and Wales

Ken Oliphant*

A. Legislation

1. *Law Commission*, Administrative Redress: Public Bodies and the Citizen, Consultation Paper No. 187 (2008)[1]

The Law Commission proposes reform of both public and private law systems of redress for loss caused by administrative action. As regards private law, it recommends that the liability of public bodies for "truly public" acts or omissions should be limited by a new requirement of "serious fault" and restricted to situations where the underlying legislative scheme was intended to confer rights or benefits on the individual claimant. The intention is to expand the range of cases in which damages are potentially available – the current mix of causes of action, each of them subject to significant limitations, leaves a number of perceived gaps – but at the same time to counteract any consequential increase in liability costs by raising the threshold of fault. The latter consideration also underpins the Commission's further recommendation that there should be a departure from the ordinary English rule of full "joint and several" liability, which it was felt could operate harshly in the state liability context. Instead there should be a judicial discretion to apportion the liability of a public body for a truly public act or omission when this would be equitable in a given situation. Lastly, the Commission proposes the abolition of the specific tort of misfeasance in public office, committed where the defendant, in the exercise of a public office, deliberately injures the claimant or acts knowing that the act complained of is unlawful and will probably injure the claimant. The Commission observed that the requirement of intention or knowledge has proven very difficult to satisfy in practice, and that the tort therefore plays little practical role in the modern law. 1

* Thanks to Stuart David Wallace for assistance with the referencing and currency conversions. A notional rate of £1.00 : € 1.15 was applied throughout, and the resulting figures were rounded up or down as appropriate.

[1] Noted by *T. Cornford*, Administrative redress: the Law Commission's consultation paper, [2009] Public Law (PL) 70.

2 The Law Commission explicitly links its proposed requirement of "serious fault" with the European Court of Justice's *Francovich* jurisprudence,[2] and the Consultation Paper as a whole shows a commendable openness to the lessons to be learnt from experience in the civilian jurisdictions of Europe. However, the ECJ test seems to have been inadvertently transformed in adapting it to English law. What is in EC law a test of "sufficiently serious breach" becomes in the Law Commission's proposal a test of "serious fault". But the ECJ test does not necessarily entail fault as it is conceived in English law, even if the degree of fault exhibited is a relevant consideration in determining seriousness.[3] At first glance, the Law Commission's proposal therefore seems significantly more restrictive than the test on which it purports to be modelled.

3 The tort law aspects of the proposals have received a rather hostile reception when they have been presented in public forums, especially from private lawyers. There have been recurrent complaints of a lack of clarity and incoherence in the key concepts of "serious fault", "truly public" and "conferral of benefit", as well as criticism that the state is seeking to set itself above the citizen by excluding its liability for "mere" negligence. The harsh judgement of one respected commentator, a public lawyer, is that the proposals are "unprincipled and lacking in coherence".[4] I would not go so far. In fact, I think that the consultation paper constitutes a bold and imaginative attempt to address widely perceived defects in the current English law of state liability. But the ferocity of the opposition it has provoked cannot be denied, and casts doubt upon the prospect of any part of these proposals ever being enacted.

2. *Ministry of Justice*, Pleural Plaques, Consultation Paper CP 14/08, 9 July 2008

4 This consultation paper considers options for the compensation of victims of pleural plaques following the decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd*[5] in 2007. The Law Lords ruled that, as pleural plaques are a benign and usually symptomless consequence of exposure to asbestos, and cannot develop into any serious asbestos-related condition (e.g. asbestosis or mesothelioma), they do not constitute actionable damage in the law of tort. This reversed the accepted legal understanding for the previous 20 years or more. The consultation responds to the strong sense of injustice felt by victims denied compensation as a result of the ruling. The paper indicates the Government's provisional view that overturning the *Rothwell* decision was not desirable because of the implications such an approach would have for the fundamental integrity of the common law of negligence. Recognising liability where no actionable damage has yet occurred might be used as a precedent to

[2] *Law Commission*, Administrative Redress: Public Bodies and the Citizen (2008) § 4.4.
[3] *R v Secretary of State for Transport, ex parte Factortame Ltd and Others (No. 5)* [2000] 1 Appeal Cases (AC) 524.
[4] *Cornford* [2009] PL 70.
[5] [2007] United Kingdom House of Lords (UKHL) 39, [2008] 1 AC 281, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 237 ff., no. 5 ff.

argue for compensation in other situations, for example, for mere exposure to asbestos or risks such as passive smoking or, in the case of those engaged in outdoor work, sunlight. An alternative approach would be to create a no-fault compensation scheme for pleural plaques, though – whether funded by the insurance industry or by the taxpayer – some clear rationale would have to be identified for its introduction. The Government was provisionally inclined to think that such a rationale would be easier to find if the scheme were limited to cases where pleural plaques were diagnosed in a fixed period (e.g. five years) prior to the *Rothwell* decision, as there could be a legitimate sense of unfairness in such cases that expected compensation payments were now being withheld. With respect, the argument based on expectation seems rather weak given the lack of evidence of any detrimental reliance consequent on it, and the lack (so far as I am aware) of any precedent for legislative intervention simply to ease the pain of a judicial ruling that takes away what were previously perceived to be compensation entitlements.

5 The impact assessment contained in an annex to the consultation paper provides useful information about the potential scale of the pleural plaques issue in the United Kingdom, but also demonstrates the considerable uncertainty surrounding the numbers in question. Extrapolating from studies conducted in the United States, the consultation paper estimates that 7.7 million workers have been occupationally exposed to asbestos in the UK (equivalent to 14.6% of the population). Taking account of the number of those who have died, from all causes, reduces the number to four or five million. It is estimated that 25% to 50% of those occupationally exposed to asbestos ultimately develop pleural plaques. The consultation paper further assumes that only 25% to 50% of those who do develop pleural plaques are diagnosed, and further that each diagnosed case results in a claim. The total number of future claims is therefore estimated at between 200,000 and 1.25 million. If these were compensated in the law of tort, by reversing the *Rothwell* decision, the estimated total cost would be between £3.67 billion and £28.64 billion (€ 4.28 – € 33.4 billion), assuming compensation of between £11,500 and £13,400 per claim (€ 13,400 – € 15,600), and legal costs of £14,000 (£8,000 for claimants and £6,000 for defendants) per claim (€ 16,300/€ 9,325/€ 7,000). Though the payments in individual cases would be comparatively small, the accumulation of so many claims – and the costs associated with them – would make for a very large financial burden overall.

6 The estimated cost of no-fault compensation in such cases, assuming a fixed payment of £5,000 (€ 5,800), is between £768 million and £4.667 billion (€ 896 million – € 5.443 billion). The estimated cost of a no-fault scheme limited to cases in which pleural plaques were diagnosed in the five years prior to the *Rothwell* decision is between £52 million and £192 million (€ 61 – € 224 million).

7 The Government is expected to announce its response to the consultation in mid-2009.

B. Cases

1. *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962: Police Shooting; Self-defence; Legitimate Interest in Claiming[6]

a) Brief Summary of the Facts

8 The deceased was shot and killed in a police raid on his flat when an officer burst in on his bedroom during the night, saw the deceased advancing towards him, and fired a single bullet which struck the deceased in the neck. The deceased was naked and unarmed. The officer was charged with murder and tried in a criminal court, but acquitted as there was no evidence to contradict his plea of honest though mistaken self-defence. In the civil courts, the deceased's estate and dependants sued the Chief Constable of the force in question on the basis of vicarious liability for (amongst other things) negligence in the planning, execution and aftermath of the raid, and battery consisting in the shooting itself. The Chief Constable admitted negligence (at least in the planning of the raid, if not the shooting), and conceded liability for the death and all damage suffered by the claimants as a result, including aggravated damages, but resisted the claim for battery by the officer, and the costs of pursuing it, on the basis of self-defence. The claimants persisted in their action for battery, but the first-instance judge gave summary judgment for the Chief Constable on the basis that the claimants had no real prospect of negating the defence of (honest) self-defence. In the alternative, the judge accepted the Chief Constable's contention that, given the concession on liability for all damage, the claimants had no legitimate interest in pursuing the claim.[7] The Court of Appeal allowed the claimants' appeal,[8] and the Chief Constable appealed to the House of Lords.

b) Judgment of the House of Lords

9 The House of Lords dismissed the Chief Constable's appeal.

10 In the civil law, the use of force in self-defence is lawful only if the defendant has a reasonable belief in the existence of an imminent threat. The criminal law's test of honest (even if unreasonable) belief does not apply because the functions of criminal law and the civil law of tort differ. Whereas the former punishes anti-social behaviour, and focuses on the defendant's subjective responsibility, the civil law of tort requires a balance to be struck between the rights of claimant and defendant, and this could be achieved in the present context by a requirement of reasonableness. The claimants' action in battery thus had a genuine prospect of success. The Law Lords expressly reserved their opinion on the questions whether, in assessing reasonableness, it was right to take into account mistaken information provided to the defendant by a third

[6] 23 April 2008. Noted by *N. McBride* [2008] Cambridge Law Journal (CLJ) 461 and *P. Palmer/J. Steele* (2008) 71 Modern Law Review (MLR) 801.
[7] [2005] England and Wales High Court (EWHC) 415 Queen's Bench (QB).
[8] [2006] England and Wales Court of Appeal, Civil Division (EWCA Civ) 1085, [2007] 1 Weekly Law Reports (WLR) 398.

party, and, more fundamentally, whether the civil law required the existence, not merely the reasonable perception, of the threat.

Further, as the claimants had a genuine prospect of success in their battery action, they should not be prevented from pursuing it simply because, even if successful, they stood to win no more compensation than that for which the Chief Constable had conceded liability. Lord Carswell and Lord Neuberger dissented on this point. For the majority, it was not for the court to monitor the motives of the claimants in bringing an arguable and properly constituted claim, though there could be a costs sanction if it later transpired that there was insufficient reason to pursue it. As the claimants, if successful, would be entitled to judgment ordering the Chief Constable to pay damages, it was not necessary to decide whether it would have been appropriate to allow the proceedings to continue only to give the claimants the opportunity to obtain a declaration that the officer had committed a battery by shooting the deceased unlawfully. 11

c) Commentary

The case demonstrates very clearly that the law of tort is not concerned purely with financial compensation for damage. Here the claimants had no prospect of being awarded higher damages by pursuing their action in battery than they would otherwise receive. But, as Lord Scott clearly put it, "[a]lthough the principal aim of an award of compensatory damages is to compensate the claimant for loss suffered, there is no reason in principle why an award of compensatory damages should not also fulfil a vindicatory purpose."[9] Naturally, this vindicatory purpose could not be achieved if liability was denied and no trial ever took place. Lord Scott's opinion, it may be added, contains a very interesting discussion of the role played by tort law in identifying and protecting rights – which he even goes so far as to call tort law's "main function"[10] – and raises the possibility of awarding "rights-centred" vindicatory damages, as distinct from "loss-centred" compensatory damages, in an appropriate case.[11] 12

The case also illustrates the considerable autonomy English law gives to the parties in defining the issues on which the court must rule – sometimes to the detriment of certainty in the law. Indeed, the proper legal approach to cases of mistaken self-defence remains uncertain precisely because the claimants to the present action chose not to rely in the House of Lords on an alternative theory whereby self-defence requires the actual existence, not merely the defendant's reasonable perception, of an imminent threat justifying the countervailing use 13

[9] At [22].

[10] At [18]. Cf. *McBride* [2008] CLJ 462 ("Tort law… exists to vindicate people's rights"). But compare Lord Carswell's similar but more circumspect observation, at [76]: "The function of the civil law… is to provide a framework for compensation for wrongs which holds the balance fairly between the conflicting rights and interests of different people." Here, compensation for wrongs is presented as the function of tort law, and striking a fair balance between conflicting rights and interests appears as a side restraint.

[11] At [22].

of force.[12] The "reasonable belief" approach to self-defence is therefore not yet set in stone.

2. *Corr v IBC* [2008] UKHL 13, [2008] 1 AC 884: Victim's Suicide; Causation and Remoteness of Damage; Contributory Fault[13]

a) Brief Summary of the Facts

14 The claimant's husband committed suicide some six years after a serious workplace accident that almost decapitated him, leaving him with very bad physical and mental scars. He suffered from severe post-traumatic depression, for which he received hospital treatment. He had no prior history of mental illness, and there was no other cause of his suicide. The claimant brought an action for damages on behalf of her husband's estate and his dependants. The defendant, her husband's employer, admitted liability for the initial accident, and for the deceased's physical and mental injuries, but denied they were liable to the dependants for the losses they suffered as a consequence of the deceased's suicide. The trial judge ruled that the suicide was not reasonably foreseeable to the defendant and was therefore too remote to entitle the dependants to recover damages.[14] The claimant's appeal was allowed by the Court of Appeal.[15] The defendant appealed to the House of Lords.

b) Judgment of the Court

15 The House of Lords ruled that, where a victim suffers reasonably foreseeable depression as a result of an accident caused by the defendant's negligence, and subsequently commits suicide as a result of the depression, his widow's claim for damages is not barred by doctrines of causation, remoteness of damage or *volenti non fit iniuria*. The deceased's actions could be regarded as neither fully voluntary nor so unusual as not to be reasonably foreseeable. It was well known that between one in six and one in ten sufferers from severe depression kill themselves.[16]

16 A majority of the House of Lords declined to make any deduction in the damages awarded in respect of contributory negligence, though the Law Lords were not unanimous in their reasons for so doing. Lord Mance and Lord Neuburger declined to reduce the damages only because the issue of contributory

[12] Lord Scott, at [20], considered that such a requirement had a good deal to be said for it, but Lord Carswell, at [76], and Lord Neuberger, at [89], were inclined to think that the defendant did not have to go so far. Lord Rodger, at [55], expressly reserved his opinion on the issue without indicating any provisional view one way or the other.

[13] 27 February 2008. Noted by *C. Mitchell* (2008) 124 Law Quarterly Review (LQR) 543 and *J. O'Sullivan* [2008] CLJ 241.

[14] [2005] EWHC 895 (QB), [2006] Personal Injuries and Quantum Reports (PIQR) P11.

[15] [2006] EWCA Civ 331, [2006] 2 All England Reports (All ER) 929, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 153 ff., no. 26 f.

[16] At [5] per Lord Bingham. Lord Scott, at [28], stated that the normal reasonable foreseeability test did not apply and that it was enough that the outcome was foreseeable as a possibility and was one for which the employer ought to be held liable.

negligence had not been fully argued in the courts below: they considered that the defence could in principle succeed in such a case. Lord Bingham and Lord Walker, by contrast, would not have made any deduction even if the defence had been properly raised in the courts below.[17] Lord Scott (dissenting on this issue) would have reduced the damages by 20%.

c) Commentary

17 The decision has attracted broad approval – except in relation to contributory negligence, which a majority of the House of Lords thought was applicable *in principle* in such a case. There seems to me to be considerable force in one commentator's view that this aspect of the decision shows no understanding of the effects of serious depression. In her words: "the proposition that Mr. Corr was partly to blame for his own death is distasteful and insupportable… [His] suicide was a fatal symptom of a ghastly illness, no more his "fault" than if he had died of cancer triggered by the accident."[18]

18 The decision provides a useful overview of the range of concepts used in English law to limit the scope of liability for tortious conduct. The House of Lords considers the following in turn: the scope of the duty of care, the foreseeability of injury, the doctrine *novus actus interveniens*, whether the victim's unreasonable act broke the chain of causation, remoteness of damage, the principle of *volenti non fit iniuria*, and contributory negligence. Putting the last of these aside for now, the analysis of each point shows a considerable element of overlap, and demonstrates the rather open-textured nature of many of the concepts, especially voluntariness and reasonable foreseeability.

19 The Law Lords' opinions contain some interesting comments on the much debated decision in *Page v Smith*[19] on primary victim claims for "nervous shock", and it seems likely that a direct challenge to that decision will be entertained in the not too distant future.

20 Another case from 2008 with which *Corr* may usefully be compared is *Gray v Thames Trains*.[20] The claimant suffered severe post-traumatic stress after being involved in a major rail crash, and consequently underwent a significant personality change. Almost two years after the crash, he stabbed a stranger to death in the street following an altercation. He pleaded guilty to manslaughter by reason of diminished responsibility and was indefinitely detained under the

[17] Lord Bingham stated, at [22], that he would assess the deceased's contributory negligence at 0%. This seems to be a conceptual error: Lord Bingham thought that the deceased was not blameworthy at all, so this was a case that fell outside the legislative apportionment regime (because there was no "fault"), and not one where the parties' share of responsibility for the death had to be assessed at all. In any case, it may be doubted whether a 0% "share" of responsibility can be distinguished from the 100% the Court of Appeal rejected as legally impossible in *Anderson v Newham* [2002] EWCA Civ 505, [2003] Industrial Cases Reports (ICR) 212.

[18] *O'Sullivan* [2008] CLJ 243 f.

[19] [1996] AC 155. See also *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281, noted by *K. Oliphant* (fn. 5) no. 5 ff.

[20] [2008] EWCA Civ 713.

mental health legislation. The defendants admitted responsibility for the train crash, and the claimant's initial injuries, but disputed liability for the claimant's loss of earnings following hospitalization. The first-instance court found that the claim was barred on grounds of public policy, but the Court of Appeal allowed an appeal. The claim for loss of earnings was not so closely connected with the criminal conduct as to warrant its total exclusion on the basis that the court would otherwise appear to condone his actions. The Court considered the doctrine *ex turpi causa non oritur actio* to be unnecessarily harsh when ordinary principles of foreseeability, causation and contributory negligence could be applied flexibly to the facts to produce a just outcome. The Court considered the following example:[21]

> Suppose a man suffering from clinical depression caused by a tort jumps off a tall building and dies and, just before he does so, he deliberately pushes someone else off, who also dies. Suppose then that both the dependants of the suicide and the dependants of the man who has been pushed off, and thus killed by the suicide, take proceedings against the tortfeasor, it is not clear why, either as a matter of foreseeability or causation on the one hand or public policy on the other, the former should be entitled to recover but not the latter.

Being persuaded that such an approach would be anomalous, the Court of Appeal remitted the case to the High Court to determine the issue of contributory fault in the light of the medical and other evidence. In the meantime, however, the House of Lords has granted leave to appeal.

3. *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225: Liability of the Police; Failure to Protect[22]

a) Brief Summary of the Facts

21 The House of Lords heard two separate appeals together. In *Van Colle v Chief Constable of Hertfordshire*, a witness for the prosecution at the trial of a minor criminal received telephone threats from the accused. He reported the threats to the police. He and another witness were the victims of suspected arson attacks. Before he could meet the officer in charge of the case to give a full statement, he was shot dead by the accused as he was leaving work. A disciplinary tribunal found the officer guilty of not performing his duties conscientiously and diligently in respect of witness intimidation. The deceased's parents brought an action against the police for compensation under the Human Rights Act 1998, relying on a failure in the police's positive obligation to protect life under art. 2 ECHR, and obtained judgment in their favour at first instance.[23]

[21] [2008] EWCA Civ 713 at [51].

[22] 30 July 2008. Noted by *P. Case* (2008) 24 Professional Negligence (PN) 242, *J. Morgan* (2009) 125 LQR 215, *J. Spencer* [2009] CLJ 25 and *K. Williams* [2008] Journal of Personal Injury Law 265.

[23] [2006] EWHC 360 (QB), [2006] 3 All ER 963, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 221 ff., no. 31.

The police appealed first, unsuccessfully, to the Court of Appeal[24] and then to the House of Lords.

In *Smith v Chief Constable of Sussex*, the claimant separated from his former partner (Jeffrey), who first assaulted him – the assault was reported to the police but no prosecution ensued – and then subjected him to a stream of violent, abusive and threatening telephone, text and email messages, including death threats. After some weeks, the claimant reported the matter to the police but the officers assigned to his case declined to look at the messages, made no entry in their notebooks, took no statement from the claimant, and completed no crime form. They asked the claimant to go to the station to fill in forms that would enable the calls to be traced. He did so, but was told it would take four weeks to trace the calls. He continued to receive death threats. He went to the station again, and told an inspector that he thought his life was in danger. The inspector declined to look at the messages the claimant had received and made no note of the meeting. He told the claimant that the investigation was progressing well, and that he should call 999 if he was concerned about his safety in the interim. A week or so later, Jeffrey attacked the claimant at his home address with a claw hammer, causing multiple fractures of the skull, brain damage and ongoing physical and psychological injury. He was charged and convicted of making threats to kill and causing grievous bodily harm with intent. The claimant's action against the police in negligence – he was out of time to sue under the Human Rights Act – was struck out in an unreported decision of the County Court as revealing no reasonable cause of action, but his appeal was allowed by the Court of Appeal.[25] The police appealed to the House of Lords. 22

b) Judgment of the House of Lords

The House of Lords found for the police in both cases. 23

In *Van Colle v Chief Constable of Hertfordshire*, the House of Lords allowed the police's appeal and entered judgment in their favour. There was no liability under the Human Rights Act on the facts. The police's positive obligation under art. 2 ECHR did not arise because the threats were insufficient to establish a "real and immediate risk" to the deceased's life. The Law Lords adapted the test applied by the European Court of Human Rights in its well-known *Osman* decision.[26] However, the warning signs in the present case were very much less clear and obvious than those in *Osman*, which were themselves considered insufficient to satisfy the test by the Strasbourg Court.[27] The narrowness with which that test was drawn reflected the Strasbourg Court's own recognition of the policy arguments against holding the police liable for investigative failures.[28] The Law Lords cautioned, however, that the test depended on not only what the authorities knew, but also what they ought to have known, and it was 24

[24] [2007] EWCA Civ 325, [2007] 1 WLR 1821.
[25] [2008] EWCA Civ 39, [2008] PIQR P12.
[26] *Osman v United Kingdom*, no. 23452/94, 28 October 1998.
[27] At [39] per Lord Bingham, and [118] per Lord Brown.
[28] At [136] per Lord Brown.

not open to them to excuse their ignorance of the facts by reference to stupidity, lack of imagination or inertia.[29]

25 In *Smith v Chief Constable of Sussex*, the House of Lords allowed the police's appeal and restored the order of the first-instance judge striking out the claim (Lord Bingham dissenting). The public policy considerations (the risk of detrimentally defensive policing, the diversion of police resources from their principal function of combating crime) that weighed against the recognition of a duty of care in previous decisions of the House[30] were equally applicable here, and the facts – though "really very strong"[31] – did not warrant an exception.

26 The majority rejected Lord Bingham's proposal of a new principle of liability couched in the following terms:[32]

> [I]f a member of the public (A) furnishes a police officer (B) with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety, B owes A a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed.

For the majority, it was impossible to set logically justifiable limits on the proposed liability rule – if threats to life or physical safety, why not threats to property too?[33] – in such a way as to confine it to exceptional cases, bearing in mind the public policy considerations militating against recognition of a duty of care. Further, as the Court would inevitably be the final arbiter of whether evidence was "apparently credible" and the threat "imminent", the same concerns of defensive policing would inevitably arise as in cases of alleged investigative failure in general.

27 The majority Law Lords also rejected the argument – which had prevailed in the Court of Appeal in *D v East Berkshire Community Health NHS Trust*[34] – that the availability of a Human Rights Act claim undermined the policy considerations militating against recognising a duty of care at common law. The positive duty arising under art. 2 ECHR was far more restrictive than the common law duty contended for, and the latter, if accepted, would further, unnecessarily and undesirably weaken the protection accorded to the police in conducting their investigations and combating crime.[35]

c) Commentary

28 The decision in *van Colle* was comparatively straightforward, and has not (to my knowledge) excited adverse critical comment. It clearly demonstrates the

[29] At [32] per Lord Bingham.
[30] *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495, noted by *K. Oliphant* (fn. 23) no. 27 ff.
[31] At [125] per Lord Browne.
[32] At [44].
[33] At [100] per Lord Phillips.
[34] [2003] EWCA Civ 1151, [2004] QB 558, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2003 (2004) 113 ff., no. 4 ff.
[35] At [99] per Lord Phillips, and [137] per Lord Brown.

high hurdle erected in the path of those seeking damages under the Human Rights Act in respect of a public authority's failure to take positive steps to protect Convention rights. In fact, whether one is considering a public authority's omissions or its positive acts, successful claims for Human Rights Act damages remain very rare. In 2006, the Department of Constitutional Affairs, reviewing more than five years of the Act's operation, reported that there had been only three successful claims for Human Rights Act damages.[36] One of these was the first-instance decision in *van Colle*. Now that the House of Lords has overturned that decision, the figures look even starker.

29 In a related development subsequent to *van Colle*,[37] the House of Lords extended the *Osman* "real and immediate risk" test to a case of suicide by a person compulsorily detained in hospital under the mental health legislation, rejecting the argument that it was necessary to prove gross negligence to establish violation of the positive duty arising under art. 2 ECHR. This was a striking-out application, so it remains to be seen how the test is applied on the facts (or even whether it comes to trial at all).

30 Turning to the common law, the decision in *Smith* confirms the established principle[38] that the police owe no duty of care to particular individuals in their general task of investigating and combating crime, for the policy reasons adverted to above, and declines to make an exception in favour of persons seeking police protection against a threat to their physical safety. There have been occasional hints that liability might exceptionally arise in cases of "outrageous negligence",[39] but this was explicitly doubted in the present decision,[40] and seems inconsistent with the predominant judicial view that the existence of a duty of care in the light of policy considerations has to be assessed "on a class basis", and not case by case.[41] It should be noted, however, that nothing in *Smith* casts doubt on the established liability of the police in other situations, for example, where they have assumed responsibility for an informant's safety.[42]

31 *Smith* also raises the controversial issue of the interrelationship of common law negligence and the Human Rights Act. Lord Bingham stated that there was no simple, universally applicable answer to the question, "Should these two regimes remain entirely separate, or should the common law be developed to absorb Convention rights?"[43] But he agreed with two propositions advanced

[36] *Department of Constitutional Affairs*, Review of the Implementation of the Human Rights Act (2006) 18.
[37] *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.
[38] See *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495, noted by *K. Oliphant* (fn. 23) no. 27 ff.
[39] *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 at [34] per Lord Steyn.
[40] At [101] per Lord Phillips, and [109] per Lord Carswell.
[41] At [126] per Lord Brown.
[42] *Swinney v Chief Constable of Northumbria Police* [1997] QB 464, cited as an example by Lord Brown in *Smith* at [120]. See also *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550: failure to intervene to protect fellow officer who was attacked in the cells.
[43] At [58].

by the majority members of the Court of Appeal: that "there is a strong case for developing the common law action for negligence in the light of Convention rights"[44] and that, "where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it."[45] The majority of the House of Lords, however, was opposed to such an approach, taking the view that the existence of a possible claim under the Human Rights Act precluded the need for further development of the common law action.[46]

4. *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174: Conspiracy; Unlawful Means[47]

a) Brief Summary of the Facts

32 On the assumed facts, the defendants, a Spanish company, were party to a series of "carousel" or "missing trader" frauds. They sold taxable goods (mobile telephones) to a company in the United Kingdom, this sale being zero-rated under EC law for the purposes of value-added tax (VAT). The British company then sold the goods to another British firm at a price inclusive of VAT, which the purchaser was entitled to claim back from the national revenue authorities ("the Revenue"). There followed a series of further sales within the United Kingdom, before the goods were finally sold back to the defendants. That sale, being a sale out of the United Kingdom, was also zero-rated for VAT purposes, and the seller claimed VAT credit from the Revenue on it. The majority of parties in the chain accounted to the Revenue for the VAT they owed, but the first purchaser (the "missing trader") ceased to trade without accounting for the VAT it had received. All the sales took place on a single day. The goods were no more than a token to give the transactions the semblance of reality.[48]

33 The Revenue sued the defendants for conspiracy to cause loss by unlawful means, namely by the common law crime of cheating the revenue, seeking to recover damages in the amount of the unpaid VAT. On a preliminary issue, the judge ruled that the Revenue had a good cause of action even though (as was assumed) the crime of cheating the revenue does not give rise to a concurrent liability in tort.[49] The Court of Appeal reversed the judge's decision and struck out the claim, ruling that "unlawful means" had to involve the commission of a civil wrong that was independently actionable at the suit of the claimant.[50] The Revenue appealed to the House of Lords.

[44] *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39 at [53], per Pill LJ.
[45] [2008] EWCA Civ 39 at [45], per Rimer LJ.
[46] See especially [82] per Lord Hope and [136] per Lord Brown.
[47] 12 March 2008. Noted by *J. O'Sullivan* [2008] CLJ 459. See also *J. O'Sullivan*, Intentional Economic Torts, Commercial Transactions and Professional Liability, (2008) 24 PN 164.
[48] At [5] per Lord Hope.
[49] [2005] EWHC 1 (QB), [2005] Simon's Tax Cases (STC) 637.
[50] [2007] EWCA Civ 39, [2007] 2 WLR 1156.

b) Judgment of the House of Lords

The House of Lords allowed the Revenue's appeal and restored the judge's decision that the claim should not be struck out. 34

Criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant can constitute "unlawful means" and is actionable as the tort of conspiracy whether or not such conduct on the part of a single individual would be actionable at the suit of the claimant as some other tort.[51] This reflected the understanding of "the man on the street", as well as the normal legal meaning of the word "unlawful" as embracing crimes as well as torts.[52] The proposition did not contradict the approach of the House of Lords' decision in *OBG Ltd v Allan*,[53] which decided that "unlawful means" in the tort of causing loss by unlawful means requires the commission of a civil wrong,[54] though not necessarily a wrong actionable by the claimant. That decision did not touch on conspiracy, and there was no need for a uniform definition of unlawful means. The issues raised by a two-party case, such as the present,[55] were different from those in a three-party case, such as *OBG*.[56] Further, the law of tort takes a particularly censorious view where conspiracy is involved, partly because of the greater likelihood of success in achieving the intended unlawful result.[57] To hold otherwise would deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event.[58] 35

The Law Lords accepted that not all criminal conduct, no matter how minor, would count as unlawful means in every case, Lord Mance noting that the pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights should not be liable, even if the claim is put as a claim in conspiracy involving its drivers and directors.[59] But their Lordships thought that it was enough to satisfy the requirement of unlawful means that (as in the present case) the conspiracy related to a crime that existed for the protection of the victim.[60] 36

The House of Lords also ruled that the Revenue's claim was not for the payment of tax but for damages in respect of wrongful loss, and did not constitute an attempt to levy tax without lawful authority, and (Lord Hope and Lord Neu- 37

[51] At [45] per Lord Hope, [56] per Lord Scott, [94] per Lord Walker.
[52] At [90]–[91] per Lord Walker.
[53] [2007] UKHL 21, [2008] 1 AC 1, noted by *Oliphant* (fn. 5) no. 19 ff.
[54] Or, in the case of intimidation, that a civil wrong would have been committed if the party subject to the intimidation had not escaped harm by complying with the defendant's demands.
[55] It is a two-party case because, irrespective of the number of conspirators, they injured the claimant directly and not through the intermediary of a third party.
[56] At [43] per Lord Hope, at [99] per Lord Walker, at [124] per Lord Mance, and at [223] per Lord Neuberger. Lord Hope expressly reserved his opinion on the correct interpretation of "unlawful means" where the conspiracy was to injure the claimant through a third party.
[57] At [221] per Lord Neuberger. See also at [44] per Lord Hope, at [122] per Lord Mance.
[58] At [94] per Lord Walker. See also at [226] per Lord Neuberger.
[59] At [119], adapting an example given by Lord Walker in *OBG Ltd v Allan* [2008] 1 AC 1 at [266].
[60] At [222] per Lord Neuberger.

berger dissenting) that nothing in the statutory VAT scheme could be construed as barring the Revenue's claim for damages in tort.

c) Commentary

38 Carousel fraud is estimated to have cost the United Kingdom in excess of £1 billion in lost revenue in 2004–2005,[61] so the practical ramifications of this decision are considerable. If the Revenue cannot get the unpaid VAT from the missing trader, it can now proceed against any of the parties to the fraud in the tort of unlawful means conspiracy. It is not entirely plain from the decision why the Revenue did not rely on the missing trader's commission of the tort of deceit as the required "unlawful means", rather than the crime of cheating, but perhaps this was because the loss (the unpaid VAT) was not directly attributable to any representation on the part of the missing trader.

39 Tort lawyers, however, have mostly reacted to the decision with dismay, as it appears to undermine much of the clarification introduced to the economic torts by the decision in *OBG Ltd v Allan* just one year earlier. As Hazel Carty has observed, "the *Total* decision has arguably undermined the prospect for clarity that *OBG* represented, and thrown the economic torts back into the mess in which they were before *OBG*."[62] That decision had posited a two-tort structure for the main intentional economic torts – (1) procuring breach of contract and (2) causing loss by unlawful means – and it was assumed to have settled the meaning of "unlawful means" in all the specific torts falling into the second category. That assumption has now been proved false. The Law Lords placed considerable weight on the fact of conspiracy as justifying a different approach from that adopted in *OBG*, though the appropriateness of any distinction between conspirators and individual actors has been doubted on numerous occasions by both judges and commentators.[63] Whether all the relevant pockets of liability can be rationalised by reference to a distinction between two- and three-party cases, as suggested by certain passages in the judgment, is still to be seen. The suspicion remains that, in the final analysis, the Law Lords are simply profoundly divided on the correct approach to "unlawful means" throughout the economic torts, and in particular whether this requirement can be made out by "mere" crimes, as was in fact argued by the two dissenting members of the House in *OBG*.

40 Lastly, it may be noted that Lord Neuberger considered that the present case might have been one in which liability arose in the tort of conspiracy to injure.[64] This tort is generally considered anomalous because it lacks any requirement of unlawful means, though this is offset by the requirement (not found elsewhere in the economic torts) that the injury was the claimant's predominant purpose. In the present case, the Revenue abandoned its claim of conspiracy to injure and relied exclusively on unlawful means conspiracy, apparently be-

[61] At [6] per Lord Hope.
[62] *H. Carty*, The economic torts in the 21st century, (2008) 124 LQR 641, 642.
[63] See, e.g., *Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)* [1982] AC 173 at 189, per Lord Diplock, and *O'Sullivan* [2008] CLJ 460.
[64] At [228]–[229] per Lord Neuberger.

cause of doubts whether the defendants' intention to inflict loss on the Revenue could be said to predominate over their intent to profit from the fraud. Lord Neuberger, however, suggested that both intentions might be regarded as predominant. With respect, this is to redefine the word which, properly construed, refers to the greater influence of one factor over another.

5. *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844: Limitation Periods; Sexual Assault[65]

a) Brief Summary of the Facts

In 1988, the claimant was the victim of an attempted rape for which the defendant was convicted and sentenced to life imprisonment. In 2004, the defendant won £7 million (€ 8 million) in the British national lottery whilst on day release from gaol, and the claimant shortly afterwards commenced civil proceedings for damages against him. The claim was struck out[66] before trial on the ground that it was time-barred since, following the decision of the House of Lords in *Stubbings v Webb*,[67] intentional assaults were subject to a non-extendable limitation period of six years from the date of accrual of the cause of action (Limitation Act 1980, sec. 2). The claimant appealed against the striking-out, unsuccessfully before the Court of Appeal[68] and then in the House of Lords. 41

In the House of Lords, *A v Hoare* was consolidated with appeals in four other cases, each of which also raised issues relating to limitation in respect of sexual assaults. 42

b) Judgment of the House of Lords

The House of Lords allowed the appeal in *A v Hoare*, and ruled that the case should be remitted to the High Court to determine in its discretion whether the claim should be allowed to proceed out of time. The Law Lords' analysis of the proper approach to limitation in the various cases under appeal can be encapsulated in the following propositions. 43

First, the limitation period correctly applied to an intentional (e.g. sexual) assault is not the general limitation period of six years (Limitation Act 1980, sec. 2), which cannot be extended, but the special limitation period provided in respect of personal injury which, while of only three years (sec. 11), commences on "the date of knowledge" as defined in the Act (sec. 14) where this is later than the general starting point (the date of accrual of the cause of action). Unlike the general limitation period, the special limitation period for personal injury may be excluded by the court in an individual case in accordance with an express statutory discretion (sec. 33). (On this point, the House of Lords departed from its previous decision in *Stubbings v Webb*.[69]) 44

[65] 30 January 2008. Noted by *D. Capper* [2008] Civil Justice Quarterly (CJQ) 172 and *S. Tofaris* [2008] CLJ 463.
[66] [2005] EWHC 2161 (QB).
[67] [1993] AC 498.
[68] [2006] EWCA Civ 395, [2006] 1 WLR 2320.
[69] [1993] AC 498.

45 Secondly, in determining when the claimant first had knowledge that the injury in question was "significant" so as to ascertain when time began to run, the statute provides for an objective test: "if the person whose date of knowledge is in question would reasonably have considered it [sc. the injury] sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment" (sec. 14(2)). The question is when it would have been reasonable to consider that a claim was justified, not when it would have been reasonable to expect the claimant to commence proceedings. Personal factors that might reasonably have caused the claimant not to sue at that date, for example, the claimant's desire to suppress his memories of sexual abuse, were irrelevant at this point of the inquiry. (On this point, the House of Lords disapproved the decision of the Court of Appeal in *KR v Bryn Alyn Community (Holdings) Ltd.*[70])

46 Lastly, the court's discretion under sec. 33 of the Limitation Act was unfettered[71] and was the correct place in which to consider the possible inhibiting effect of sexual abuse upon a victim's willingness to sue the perpetrator. Indeed the Act expressly requires the court to take account of "the reasons for… the delay on the part of the plaintiff" (sec. 33(3)(a)). A countervailing consideration, however, is whether the lapse of time has the effect of denying the defendant a fair opportunity to investigate or rebut the claim. In practice, there may be a distinction between a case where the allegation of abuse is made and recorded at the time, and a case where the complaint comes out of the blue years later.[72]

c) Commentary

47 The overruling of *Stubbings v Webb* has been widely welcomed. As the Law Lords noted, the decision had given rise to numerous anomalies and to considerable artificiality in pleading. For example, where a daughter sued her father for sexual assault ten years after the last act of abuse, that claim was struck out as out-of-time, but she was able to proceed in her separate claim against her mother for negligent failure to protect her from the father's abuse.[73] The rule in *Stubbings v Webb* was subject to cogent criticism by the Law Commission in its report *Limitation of Actions* in 2001.[74] The Law Commission recommended statutory reform of the entire law of limitation but this has not yet been effected. In the present case, the outcome depended upon the correct interpretation to be given to the phrase "breach of duty" in sec. 11 of the Limitation Act. The House of Lords based its conclusion that the phrase encompassed intentional assault on its established judicial interpretation in 1954 when the phrase was introduced into the statutory limitation regime and, crucially, on the continued adherence to that interpretation at the time of the Act of 1980, which modernised and introduced flexibility into the personal injury limitation regime.[75]

[70] [2003] EWCA Civ 85, [2003] QB 1441.
[71] See also *Horton v Sadler* [2007] 1 AC 307.
[72] At [86] per Lord Brown.
[73] *S v W (Child Abuse: Damages)* [1995] 1 Family Law Reports (FLR) 862.
[74] *Law Commission*, Limitation of Actions, Law Com No 270 (2001).
[75] See especially *Letang v Cooper* [1965] 1 QB 232.

The High Court subsequently exercised its discretion in favour of allowing the claimant in *A v Hoare* to claim out of time, attaching considerable weight to the seriousness of the assault and the fact that, as the defendant had already been convicted for the assault in a criminal trial, the passage of time could not be said to have substantially prejudiced him in his defence.[76] 48

6. Developments in Personal Injury Law

a) Overview

It is a statutory requirement that anyone who is, or is alleged to be, liable in respect of any accident, injury or disease suffered by any person shall notify the Department for Work and Pension's Compensation Recovery Unit (CRU) within 14 days of receiving a claim for compensation from the injured person.[77] CRU recovers state benefits paid in respect of an accident, injury or disease, and National Health Service (NHS) treatment and ambulance charges, from compensation awarded for it. It is consequently the most comprehensive and reliable source for data on personal injury claims numbers that exists. In 2007–2008, 732,750 claims were registered to CRU, a small rise from 2006–2007 when 710,784 claims were registered. The claims were broken down as follows: 8,876 (8,575) clinical negligence; 87,198 (98,478) employer's liability; 551,905 (518,821) motor claims; 79,472 (79,841) public liability; 3,449 (3,522) other; 1,850 (1,547) unknown. (Figures in brackets are for 2006–2007).[78] These are figures for the United Kingdom as a whole. CRU does not collect information about the size of compensation awards. 49

There is no comprehensive source of reliable data about the size of compensation awards in the UK, but a series of reports commissioned by the insurance industry, culminating in The Fourth UK Bodily Injury Awards Study published in October 2007,[79] contains very full information and analysis about motor claims in the UK on the basis of data supplied by motor insurers. The data are said to represent more than 90% of the motor insurance industry's bodily injury claims. The key findings of the study included:[80] 50

- The total costs of bodily injury claims paid out by UK motor insurers increased at an annual rate of 9.5% between 1996 and 2006 (compared with an increase in national average earnings of 4.3% per annum). This escalation was driven by increases in the number of claims and in the average value of claims.

[76] *A v Hoare* [2008] EWHC 1573 (QB). See further guidance on the exercise of the sec. 33 discretion, see *Cain v Francis* [2008] EWCA Civ 1451, [2009] 2 All ER 579.

[77] Social Security (Recovery of Benefits) Act 1997, sec. 23 and Social Security (Recovery of Benefits) Regulations 1997/2205, reg. 6.

[78] For comparison with claim numbers in previous years, and further analysis, see *R. Lewis/A. Morris/K. Oliphant*, Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom? (2006) 14 Torts Law Journal 158, and *A. Morris*, Spiralling or Stabilising? The "Compensation Culture" and our Propensity to Claim Damages for Personal Injury, (2007) 70 MLR 349.

[79] *International Underwriting Association of London*, The Fourth UK Bodily Injury Awards Study (2007).

[80] Ibid., 9–10.

- The number of motor bodily injury claims increased at an annual rate of nearly 3% in the same period. The increase was particularly marked in claims between £2,000 and £5,000 (€ 2,300–€ 5,750) (typically claims for whiplash).
- The average value of claims increased at an annual rate of 6.5% in the period. Claims inflation was higher in larger value claims. A number of legal changes contributed, including the introduction of reimbursement of NHS treatment costs. Increases in life expectancy used in calculating compensation, and increasing amounts awarded to fund care regimes, also played a role.
- Legal costs rose much faster than national average earnings and, at the time of the Study's publication, contributed 43 pence for every £1 of compensation paid.

b) Damages

51 The law relating to the calculation of damages – which is of crucial interest to the practitioner and merits closer scholarly attention than it generally receives – was probed in a number of decisions in 2008.[81] One feature of English law in this area that should be flagged up for the attention of readers from elsewhere is the use of guidelines developed in leading cases for the calculation of damages and interest upon them. The status of these guidelines, and whether it is permissible to recognise exceptions from them by virtue of the special facts of the case before the court, is not infrequently tested by litigants who see something to be gained from it.[82] In *Fletcher v A Train & Sons Ltd*,[83] the Court of Appeal confirmed that the date for assessing loss of dependency in a claim under the Fatal Accidents Act 1976 was the deceased's date of death, not (as in non-fatal cases) the date of trial, as previously laid down in guidelines by the House of Lords.[84] The Law Lords had made clear at the same time that interest should be awarded on the damages awarded only in respect of pre-trial loss, and at half the short term investment rate, and, though this was "illogical"[85] and capable of doing the claimant injustice,[86] it was not open to the Court of

[81] In addition to the cases discussed in the text, see also *Tameside & Glossop Acute Services NHS Trust v Thompstone* [2008] EWCA Civ 5, [2008] 1 WLR 2207: use of Annual Survey of Hours and Earnings, not Retail Price Index, in making periodical payments order for costs of care and case management; *Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103, [2007] 1 WLR 482 applied.

[82] See, e.g., *White v ESAB Group (UK) Ltd* [2002] PIQR Q6 and *H v S* [2002] EWCA Civ 792, [2003] QB 965 (both attempts to depart from the guidelines were unsuccessful). The most notable departure from previous guidelines in recent years was the decision of the House of Lords in *Wells v Wells* [1999] 1 AC 345, changing the method of calculating the discount rate applied to future pecuniary loss.

[83] [2008] EWCA Civ 413, [2008] 4 All ER 699.

[84] *Cookson v Knowles* [1979] AC 556.

[85] [2008] 4 All ER 699, at [41], per Hooper LJ. Logically, if damages are assessed as at the date of death, the claimant has been kept out of the money from that time on, and interest should be paid on the whole sum at the full amount.

[86] This was the view of the *Law Commission*, Claims for Wrongful Death, Law Com No. 263 (1999), §§ 4.16–4.25. On the facts of *Fletcher*, it was calculated that changing the date of calculation to the date of trial (with appropriate allowance for pre-trial risks relating to the deceased, had he lived) would have increased the damages from £199,682 to £212,737.

Appeal to depart from the guidelines by awarding interest at the full amount on all the damages, including the future loss. The potential injustice inherent in the Law Lords' approach was not a special circumstance allowing the court, in exercising its discretion, to take a different approach. The Court of Appeal nevertheless expressed the hope that the guidelines would be reconsidered by the House of Lords in the light of the criticisms made of them.

52 A further development of note in 2008 was the publication of a new edition of the "official" Judicial Studies Board guidelines for the assessment of damages for non-pecuniary loss in personal injury cases.[87] The guidelines reflect levels of awards and settlements in real cases. The courts are not obliged to follow the guidelines but have done so increasingly in recent years. The new edition updates the figures in the light of inflation. Some illustrations may be given, showing the levels of increase from the previous edition of the guidelines in 2006 (2006 figures in brackets):

- Quadriplegia: £206,750 to £257,750 (£188,250 to £235,000) (€ 241,000 to € 301,000/€ 220,000 to € 275,000).
- Loss of both arms: £154,000 to £191,500 (£140,500 to £174,500) (€ 180,000 to € 224,000/€ 164,000 to € 204,000).
- Total blindness: in the region of £172,500 (£155,250) (€ 202,000/€ 181,000).
- Total deafness and loss of speech: £70,000 to £90,000 (£63,625 to £81,500) (€ 82,000 to € 105,000/€ 74,000 to € 95,000).
- Loss of smell: £16,000 to £21,000 (£14,500 to £19,100) (€ 19,000 to € 24,500/€ 17,000 to € 22,000).
- Total impotence and loss of sexual function in the case of a childless young man: in the region of £95,000 (£86,500) (€ 111,000 to € 101,000).
- A childless woman's infertility with severe depression and anxiety, pain, and scarring: £73,500 to £108,000 (£67,200 to £98,500) (€ 84,500 to € 124,200/€ 78,500 to € 115,000).
- Severe post-traumatic stress disorder: £40,000 to £64,250 (£36,650 to £58,500) (€ 47,000 to € 75,000/€ 43,000 to € 68,000).
- Loss of or serious damage to several front teeth: £5,600 to £7,250 (£5,100 to £6,600) (€ 6,400 to € 8,300/€ 6,000 to € 7,700).

53 It has been estimated that compensation for non-pecuniary loss accounts for about two thirds of the total amount of tort compensation,[88] but this proportion falls with large-value claims, where compensation for future loss of earnings and future medical care becomes the most significant element. The largest claims recorded in the UK Bodily Injury Awards Study were a claim for £19 million (€ 22 million) in 2004 (an uninsured driver claim against the Motor Insurance Bureau), a claim of £16 million (€ 18.6 million) in 2006, and two claims in excess of £15 million (€ 17.5 million) in 2002.[89]

[87] *Judicial Studies Board*, Guidelines for the Assessment of General Damages in Personal Injury Cases (9th ed. 2008).

[88] *Royal Commission on Civil Liability and Compensation for Personal Injury*, Report (1979) vol. 2 § 520.

[89] *International Underwriting Association of London* (fn. 79) §§ 5.3 and 5.6.

54 A damages award attracting considerable media attention last year was the £4.3 million (€ 5 million) awarded to a young Manchester United footballer whose career was ended by a bad tackle in a reserve game.[90] The award included £3.9 million (€ 4.5 million) for loss of future earnings, £456,000 (€ 532,000) for past earnings, and £35,000 (€ 41,000) for non-pecuniary loss (excluding interest). The loss of earnings was calculated using a baseline figure assuming the claimant would have proceeded to play professional football at Championship level (i.e. one division below the Premiership), with reference to average earnings in the division, allowance being made for the claimant's pedigree as a former Manchester United player and his scarcity value as a left-footer. An extra figure was then added in respect of the estimated 60% chance he would have played in the Premiership for one third of his career.

c) Categories of Liability

55 Personal injury cases in the courts represent only the tip of the iceberg of all personal injury claims. Nevertheless, it may be interesting to give a flavour of the sorts of personal injury case entertained by the courts in 2008. In the context of accidents in the workplace, numerous cases probed the meaning of "work equipment" and its "use" in claims brought by injured employees under the health and safety at work legislation.[91] In the law of occupiers' liability, the courts maintained their rather strict line in respect of dangerous activities freely undertaken by the injured entrant.[92] This strict line was also evident in personal injury cases litigated at common law, for example, where a child was injured whilst playing on a "bouncy castle" and the court declined to find a breach of the responsible adult's duty to supervise.[93]

56 2008 also provided evidence that principles of EC tort law are impacting even upon routine personal injury cases in England and Wales. In one case, the Court of Appeal ruled that the Motor Insurers Bureau's application of a shorter limitation period than under general tort law to claims in respect of road traffic accidents caused by untraced drivers violated the claimant's rights under the relevant Motor Insurance Directive in a sufficiently serious manner to give rise to liability under EC law.[94] (The claimant was aged three at the date of the accident, but there was no provision for the suspension of limitation till he reached adulthood.) And in another case, the Court was faced with further "Eurotort" claims arising out of accidents in the workplace and on the roads,

[90] *Collett v Smith* [2008] EWHC 1962 (QB), (2008) 105(33) Law Society Gazette 21.

[91] See, e.g., *Allison v London Underground Ltd* [2008] EWCA Civ 71, [2008] ICR 719, *Smith v Northamptonshire CC* [2008] EWCA Civ 181, [2008] 3 All ER 1054, and *Spencer-Franks v Kellogg Brown & Root Ltd* [2008] UKHL 46, [2009] 1 All ER 269.

[92] See, e.g., *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, [2009] PIQR P1.

[93] *Harris v Perry* [2008] EWCA Civ 907, [2009] 1 WLR 19.

[94] *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574, [2009] QB 66. See also C-63/01, *Evans v Secretary of State for the Environment, Transport and the Regions* [2003] European Court Reports (ECR) I-14447, [2004] Road Traffic Reports (RTR) 32.

though it rejected both on limitation grounds.[95] The Eurotort seems likely to be an increasingly common basis for future claims.

d) Causation

Lastly, in the area of causation, the courts continue to unravel the diverse strands of House of Lords authority authorising a departure from the ordinary "but for" approach. In *Bailey v Ministry of Defence*,[96] the Court of Appeal confirmed that the Law Lords' decision in *Bonnington Castings Ltd v Wardlaw*[97] absolves the claimant from proving on the balance of probabilities that the injury in question would not have occurred but for the defendant's tortious conduct, provided the claimant can establish that the tortious conduct made a material (i.e. more than negligible) contribution to a cumulative process that caused the injury. On the facts, it was shown that negligent treatment of the claimant in the defendant's hospital contributed to her weakened physical state, also stemming from her acute pancreatitis (not attributable to the defendant's negligence), which caused her to aspirate her own vomit some two weeks later, resulting in hypoxic brain damage. The defendant's negligence thus made a material contribution to the injury. The Court took pains to emphasise that this was a case of cumulative rather than alternative causation, to which different legal rules applied. 57

C. Literature

1. *J. Cartwright/M. Hesselink* (eds.), Precontractual Liability in European Private Law, The Common Core of European Private Law Series (Cambridge University Press, 2008)

This is the 11th instalment in the Common Core of European Private Law series, and it lives up to – perhaps even exceeds – the high standards set by its predecessors. The editors observe that the pre-contractual phase is difficult to characterise and resists analysis in either purely contractual or purely tortious terms. All civilian systems studied recognise some form of pre-contractual liability, normally based on good faith; at its most extreme, in cases where negotiations have reached an advanced stage, liability may entail compensation of the innocent party for failure to enter the contract under negotiation. Common law systems, however, are strongly resistant to any liability where the contract remains to be concluded, no matter how advanced the negotiations. Such differences are identified and subjected to analysis according to the usual "com- 58

[95] *Spencer v Secretary of State for Work and Pensions; Moore v Secretary of State for Transport* [2008] EWCA Civ 750, [2009] 1 All ER 314 (claims for failure properly to implement, respectively, the Framework Health and Safety Directive and the Motor Insurance Directive 84/5/EEC).

[96] [2008] EWCA Civ 883, [2009] 1 WLR 1052. Noted by *S. Green* (2009) 125 LQR 44, *J. Lee* (2008) 24 PN 194, *M. Stauch* [2009] CLJ 27, and *G. Turton* (2009) 17 Medical Law Review 140.

[97] [1956] QC 613. See also *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 at [129], per Lord Rodger.

mon core" method: country reports addressing a set of case studies devised by the editors, who add their own comparative observations on each, and then pen the overall conclusions. The result is an excellent comparative study, full of useful information and authoritative analysis.

2. *T. Cornford*, Towards a Public Law of Tort (Ashgate, 2008)

59 Cornford (University of Essex) argues for reform of state liability in English law based on two principles. First, there should be reparation for a public authority's failure to conduct itself as reasonably expected in law in relation to the injured person. Cornford argues that a breach of public law should suffice, as public law duties are intended not just to ensure administrative efficiency but also (sometimes) to benefit particular individuals, and corrective justice requires reparation where there is breach of such a duty. Compensation should, however, be withheld if its award would unduly affect the public interest or the interests of other citizens. I am sympathetic to the broad contours of the liability regime Cornford envisages, even though it goes considerably beyond current English law, but think that he still has a way to go to persuade sceptical private lawyers of the merits of his proposal. It is not self-evident, for example, that an intention to benefit an individual entails a duty to him, or that a duty to an individual entails a (prima facie) duty to compensate for harm resulting from its breach, or that a duty to compensate should extend beyond the scope of protection given to the interests in question in private law. The second principle for which Cornford contends is a principle of strict liability for lawful acts by a public authority. He draws an express comparison with the French principle of *égalité devant les charges publiques*. In his view, the basis for such a liability already exists in English law, through the incorporation of the European Convention right to property via the Human Rights Act 1998. This, like other aspects of the author's thesis, is explained clearly and cogently, and the book as a whole can be enthusiastically recommended.

3. *M. Hinteregger* (ed.), Environmental Liability and Ecological Damage in European Law, The Common Core of European Private Law Series (Cambridge University Press, 2008)

60 This is another useful addition to the Common Core of European Private Law series. Its focus is on how private law regimes in Europe cope with the problem of damage to the environment. Following introductory chapters dealing with international and supranational systems of environmental liability in Europe (M. Hinteregger) and conflict of laws issues regarding cross-border environmental liability (W. Posch), we come to the usual set of case studies with country-by-country analyses – this is the centrepiece of "the common core method". The editor's illuminating comparative remarks accompany each case study, and, in the two concluding chapters, she provides a full comparative analysis and summary. Her conclusions highlight some fundamental differences between national regimes, for example, as to the predominant basis of liability (strict or fault-based), the level of probability necessary to establish causation, the standing to sue – in cases of damage to land – of persons with no interest in the land affected, the treatment of pure economic loss (e.g. follow-

ing pollution of a public water resource), and the prevention and restoration of natural resource damage. The editor's final observation is that this last area is one in which harmonisation between national laws may be expected in future, in consequence of the 2004 Environmental Liability Directive (Dir. 2004/35/EC).

4. *C. Hodges*, The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe, Studies of the Oxford Institute of European and Comparative Law, vol. 8 (Hart Publishing, 2008)

61 The author is Head of the CMS Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at Oxford University, and is already well-known as the author of the leading work on multi-party actions in the UK.[98] Here he examines the principal trends and policy goals relating to collective redress mechanisms in Europe, with reference to three historical phases of development: first, the advent of the collective consumer injunction in the 1960s; secondly, the development of special procedures for managing multiple similar cases, an ongoing process started in the 1980s; thirdly, the introduction of collective actions for damages, the main focus of current debates. The book has three main parts. The first provides an overview of current collective redress mechanisms at national and EU level. Hodges contrasts two models on which such procedures can be based – the representative model (a single claim represents a group of others) and the group litigation model (in which individual claims are grouped together because of their similarity) – but concedes that this categorisation conceals "an almost bewildering flowering of different… approaches" (p. 4). The second part of the book considers the debate at EU level, mostly focused on consumer protection and competition law, and evaluates the main proposals for reform. The last part of the book outlines the policy choices that need to be made and proposes a series of policy benchmarks against which collective redress mechanisms can be measured. Hodges finds significant drawbacks in court-based collective private damages claims, and proposes a combined approach that draws mainly on public regulatory oversight and voluntary dispute resolution, with private litigation playing a subsidiary role. All in all, this information-packed and stimulating work from an acknowledged expert in the field constitutes a major contribution to current debates.

5. *D. Hodgson*, The Law of Intervening Causation (Ashgate, 2008)

62 Hodgson (University of Western Australia) provides a thorough comparative examination of the law of intervening causation (*novus actus interveniens*) on the basis of mainly case-law sources from England, Australia, Canada, New Zealand, and the United States. Successive chapters highlight the legal tests variously adopted (reasonable foreseeability, unreasonableness/abnormality, voluntary and deliberate human action, probability, and scope of risk), then a number of contexts in which the tests are employed (e.g. extraordinary natural phenomena, an accident victim's subsequent suicide, the rescue of persons and

[98] *C. Hodges*, Multi-Party Actions (2001).

property, and escaping from danger or inconvenience). In conclusion, Hodgson highlights the influence in this area of contributory negligence and apportionment legislation (judges prefer the flexibility such legislation offers, and are less likely to rely on *novus actus interveniens*) and the inter-relationship between remoteness of damage and *novus actus interveniens* (the latter involves consideration of distinct issues – e.g. the voluntariness of the intervening act – and cannot therefore be subsumed into the same inquiry). Overall, this is a neatly constructed and useful survey.

6. *J. Levin*, Tort Wars (Cambridge University Press, 2008)

63 This is an opinionated but ultimately dispiriting ramble through highways and byways of the law of tort in the United States. Our progress is enlivened by occasional unexpected pleasures, such as extracts from Socrates' dialogues with Crito and Euthyphro, and a speech by William Gladstone (subsequently British Prime Minister) opposing the Government's blockade of the Greek coast. And the author (an attorney and part-time professor) is amusingly catty about the American legal academy and its supposed failure to understand how tort law works in practice ("they write… with a sheltered and parochial insidedness": p. 7). But the breathless pace, numerous digressions and disorientating changes of direction take their toll, and the generally hectoring tone soon wearies. The author's apparent message is that "tort wars" are better than real wars, and that would we give tort law more credit than we are accustomed for ensuring the peaceful resolution of disputes. That is doubtless a fit aspiration for dysfunctional systems in which law is a last resort, self-help having failed, but should we not set the bar higher for ourselves?

7. *D. Rolph*, Reputation, Celebrity and Defamation Law (Ashgate, 2008)

64 Rolph (University of Sydney, Australia) addresses the protection of reputation in the common law by the tort of defamation. He argues that the meaning of reputation is not immutable, but changes over time in response to social, political, economic, cultural and technological changes. It follows that the value of a good reputation is not immutable either. Following American constitutional scholar Robert Post, Rolph identifies three concepts of reputation: reputation as property, reputation as honour, and reputation as dignity. This provides the framework for the centrepiece of his book: a series of case studies drawn from recent Australian defamation law. One conclusion that emerges is that a single case, brought by a single claimant, frequently manifests multiple concepts of reputation. In the final part of his book, drawing upon the literature of media and cultural studies, Rolph develops a new concept of reputation, reputation as celebrity, which he submits is characteristic of an era of mass communications. I felt that this was a promising line of analysis, but that more needs to be done to explain how a concept of reputation as celebrity might be applied in defamation law. Still I would certainly recommend this thoughtful and well-written book to anyone looking for new insights into the legal protection of personality rights.

8. *M. Stauch*, The Law of Medical Negligence in England and Germany: A Comparative Analysis (Hart Publishing, 2008)

This short but beautifully executed study skilfully weaves English and German materials into a clear and well-constructed analytical framework. The author begins by setting out the social background to medical negligence claims, highlighting the different healthcare institutions and regulatory arrangements in his two systems. He then outlines the private law framework for such claims, explaining the different role played in the two systems by contract and tort. There then follow the core chapters of the study, devoted to substantive liability law, issues of proof, and non-disclosure of treatment information. Relevant legal principles in both systems are clearly and succinctly described and subjected to comparative assessment. A further chapter deals with reform in the light of widespread dissatisfaction with private law approaches to medical injury claims. Reform initiatives in both countries are considered, and compared with "no fault" approaches adopted elsewhere. Why "no fault" has so far been rejected in England and Germany is also addressed. The author's conclusions highlight how apparent divergences in legal rules (e.g. whether malpractice claims are classified as tortious or contractual) are of little import in practice. However, Stauch also finds that the German system generally exhibits a more "patient friendly" stance than that in England, for example, in assessing whether the doctor has met the relevant standard of care, in reversing the burden of proving causation in cases of gross negligence, and in respect of disclosure malpractice in general. 65

9. *T. Keren-Paz*, Torts, Egalitarianism and Distributive Justice (Ashgate, 2007)

This impressive study aims to provide a new theory of tort law that is based on distributive justice and egalitarianism. It is explicitly distinguished from the main rival theories of tort law based on corrective justice and economic analysis. Like the economic analysis of tort law, but in distinction from corrective justice theory, it is an instrumentalist account. Unlike economic analysis, the focus is on equality, not efficiency. Furthermore, the approach is pluralist – equality is only one of a set of goals, which also include efficiency, that tort law should pursue. Having carefully set out this theoretical framework, the author proceeds to defend the thesis against possible objections: illegitimacy (political decisions should be taken accountably, not by the judiciary); the randomness inherent in redistribution through private law litigation; excessive cost relative to other mechanisms (e.g. taxation); and the likely ineffectiveness of reliance on the courts to promote distributive goals. His responses are (inter alia) that judging is inevitably political, even when it preserves the status quo, that tort's randomness is counteracted by the aggregating effect of insurance, that a pluralist approach naturally guards against excessive cost because equality must be weighed against such factors as efficiency, and that equality is likely to be more effectively pursued if courts take egalitarian considerations into account than if they do not. The remainder of the book explains how the author's theory could be translated into practice, with reference to the duty of care and standard of care in negligence, and alternatives to the rule 66

of *restitutio ad integrum* in the assessment of damages (including standardized assessments and a judicial discretion to reduce the damages in view of the defendant's means, though neither is considered in detail). A particularly interesting chapter advocates treating discrimination as a form of negligence. Some of the author's claims may not attract universal assent (e.g. "we should normally hold the better-off individual to a higher standard of care than we do the disadvantaged": p. 85). But overall this is a very significant contribution to the literature, and a valuable counterpoint to the formalist accounts of tort law advanced by scholars in the corrective justice tradition.[99]

10. Selected Articles

67 **Negligence:** *B. Barrett*, Psychiatric stress – an unacceptable cost to employers, [2008] Journal of Business Law (JBL) 64; *C. Butcher*, Auditors, Parliament and the courts: the development and limitation of auditors' liability, (2008) 24 PN 66; *M. Jones*, Liability for fear of future disease? (2008) 24 PN 13; *C. McIvor*, The positive duty of the police to protect life, (2008) 24 PN 27; *R. Mulheron*, The "primary victim" in psychiatric illness claims: reworking the "patchwork quilt", (2008) 19 King's Law Journal (KLJ) 81.

68 **Economic Torts:** *H. Carty*, The economic torts in the 21st century, (2008) 124 LQR 641; *P. Edmundson*, Conspiracy by unlawful means: Keeping the tort untangled, (2008) 16 Torts Law Journal (TLJ) 189; *J. Neyers*, Rights-based justifications for the tort of unlawful interference with economic relations, (2008) 28 Legal Studies (LS) 215; *J. O'Sullivan*, Intentional economic torts, commercial transactions and professional liability, (2008) 24 PN 164.

69 **Property Torts:** *S. Douglas*, The abolition of detinue, [2008] Conveyancer and Property Lawyer (Conv) 30.

70 **Causation and Loss of Chance:** *A. Burrows*, Uncertainty about uncertainty: damages for loss of a chance, [2008] Journal of Personal Injury Law (JPIL) 31; *H. McGregor*, Loss of chance: where has it come from and where is it going? (2008) 24 PN 2; *L. Khoury*, Causation and risk in the highest courts of Canada, England and France, (2008) 124 LQR 103; *Lord Neuberger of Abbotsbury*, Loss of a chance and causation, (2008) 24 PN 206.

71 **Vicarious Liability:** *P.J. Yap*, Enlisting close connections: a matter of course for vicarious liability, (2008) 28 LS 197.

72 **Tort and Human Rights:** *J. Steele*, Damages in tort and under the Human Rights Act: remedial or functional separation? [2008] CLJ 606.

73 **Choice of Law:** *T. Hartley*, Choice of law for non-contractual liability: selected problems under the Rome II Regulation, (2008) 57 International and

[99] See, e.g., *A. Beever*, Rediscovering the Law of Negligence (Hart Publishing, 2007) and *R. Stevens*, Torts and Rights (Oxford University Press, 2007), both noted by K. Oliphant (fn. 5) no. 34 and 41.

Comparative Law Quarterly (ICLQ) 899; *A. Rushworth/A. Scott*, Rome II: Choice of law for non-contractual obligations, [2008] Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) 274.

Comparative Tort Law: *H. Eidenmüller et al.*, The common frame of reference for European private law – Policy choices and codification problems (2008) 28 Oxford Journal of Legal Studies (OJLS) 659; *P. Giliker* Codifying Tort Law: Lessons from the Proposals for Reform of the French Civil Code, (2008) 57 ICLQ 561. 74

Tort theory: *A. Beever*, Corrective Justice and Personal Responsibility in Tort Law, (2008) OJLS 393; *J. Murphy*, Rights, reductionism and tort law, (2008) OJLS 393;[100] *J. Neyers*, On the Right(s) Path, (2008) 19 KLJ 413;[101] *C. Witting*, The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence, (2008) 71 MLR 621.[102] 75

[100] A review article on *Stevens* (fn. 99). See also the short review by *P. Cane* (2008) 71 MLR 641.
[101] A review article on *Beever* (fn. 99) and *Stevens* (fn. 99).
[102] A review article on *Beever* (fn. 99).

VII. Estonia

Janno Lahe and Irene Kull

A. Legislation

1 The year 2008 was not very intensive concerning legislative changes. The main legal acts regulating delictual liability remained unchanged and even legislative initiative was not remarkable compared to the previous years. On the other hand, the developments in tort law were notable if we look at the latest judgments and especially the reasoning of the Supreme Court in the recent delictual liability cases.

2 There were also some significant publications, where scholars and practitioners introduced their understandings of modern tort law and pointed out shortcomings in Estonian law, which emerged from court practice.

1. Transplantation of Organs and Tissues Act[1] of 30 January 2002, [2002] Riigi Teataja (RT)[2] I, 21, 118

3 The existing legal act on the transplantation of organs and tissues was amended[3] by the amendment act of 4 July 2008.[4] Firstly, the heading of the law was changed to "Handling and Transplantation of Cells, Tissues and Organs Act", and secondly, the regulation of some legal issues, based on the rules of the respective EU Directives, was changed remarkably compared to the previous very general and in many ways inadequate regulation. Concerning tort law cases, new articles providing clear rules on informed consent in cases of transplantation and processing of cells, organs and tissues were added. Rules about the form of the consent (the consent can be given also on a digitally signed

[1] Available in English, but not updated as of the time of writing of this report: >http://www.legaltext.ee/et/<.

[2] Riigi Teataja (State Gazette, RT).

[3] The Act was amended according to the requirements of Commission Directive 2006/86/EC of 24 October 2006, Commission Directive 2006/17/EC of 8 February 2006, and Commission Directive 2004/23/EC of 31 March 2004.

[4] Elundite ja kudede siirdamise seaduse, kunstliku viljastamise ja embrüokaitse seaduse ning nendega seonduvalt teiste seaduste muutmise seadus (Transplantation of Organs and Tissues Act, Artificial Insemination and Embryo Protection Act and Related Acts Amendment Act). Passed on 4 July 2008, RT I (2008) 25, 163. Available in Estonian: >https://www.riigiteataja.ee<.

form via the health information system)[5] were also modified according to the needs of modern practice and medical theory.

2. General Part of Environmental Code Act, Draft of 3 November 2008 (Keskkonnaseadustiku üldosa seadus. Eelnõu)

A very important development in Estonian environmental law is the draft *General Part of Environmental Code Act*,[6] which was finished last year and which also contains rules on environmental damage and compensation. The new Code, which is currently being examined by various ministries and public bodies with a view to approval, does not aim to change the regulation of delictual liability provided for in the Law of Obligations Act (LOA) in cases of environmental liability. The aim was to define the main concepts of civil liability from the point of view of environmental law and provide the definitions which are not regulated by the Law of Obligations Act. The draft also contains some proposals to amend or supplement the LOA with regulations based on the special need for environmental protection. The most significant changes are introduced in the field of definition of the main concepts such as environmental damage, which is the key concept in environmental liability. The concept of tortfeasor was also widened and allows for an extension of the rules governing liability to persons who exercise activities dangerous to the environment. The draft also provides that the existing Environmental Liability Act[7] of 14 November 2007 would be replaced by the new Act. 4

B. Cases

1. Personal Injuries

A majority of personal injury cases in Estonia arise from road accidents where the damage is usually compensated by the motor third party liability insurer of the person liable. It should be noted that a new law on motor third party liability insurance is being drafted. There are many questions still under discussion, one of the most significant changes among the members of the drafting commission being the raising of the upper limit of compensation for non-pecuniary damage for insurers (which is currently EEK 10,000). It is clear now that the amount of non-pecuniary damage compensated by insurers no longer corresponds to the actual damages known in judicial practice. 5

In the event of bodily injury or damage to health, the aggrieved person is entitled to compensation for both pecuniary and non-pecuniary damage. The scope of claims for pecuniary damage is regulated by LOA § 130 (1), according to which a person who has suffered damage to his/her health or bodily injury 6

[5] On the digital health information system see: >http://eng.e-tervis.ee/<.
[6] Available in Estonian: >http://www.just.ee/33099<.
[7] The purpose and content of the Estonian Environmental Liability Act, passed in 2007, is described in *J. Lahe/I. Kull*, Estonia, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 1–8.

can claim from the obligated person compensation for expenses arising from such damage or injury, including expenses incurred as a result of the increased needs of the aggrieved person, and for damage arising from total or partial incapacity to work, including damage arising from a decrease in income or a worsening of the future economic potential of the aggrieved person. The Estonian judicial practice has neither established specific rules or limits nor are there any proposals to that end being currently discussed.

7 The Supreme Court has confirmed the tendency to relieve the aggrieved person's burden of proof concerning personal injury. For example, a doctor is not released from liability for error in treatment if the damage to health and other damage were caused not only by the error in treatment, but also by other circumstances for which the doctor is not liable. Compensation may be reduced if the aggrieved person's own grave negligence caused or contributed to the damage.[8] In the event of competing causes of bodily injury or death, the defendant has to prove, in order to be released from the obligation of compensation, that the death was not caused by his or her act but by one of the other alternative circumstances.[9]

8 Compensation for non-pecuniary damage is limited by the cases stipulated by law. The Supreme Court has also found that in order to give rise to a claim for compensation of damage under LOA § 130 (2), damage to health need not last until the time of filing an action. The aggrieved person may also claim financial compensation for earlier health damage.[10] Furthermore, the Supreme Court has clarified that compensation for damage is subject to the hierarchy of compensation cases arising from law, i.e. a person who has suffered a bodily injury or damage to health must always receive a reasonable financial compensation if the defendant is liable for the damage. It can be argued that cases of personal injury are in principle cases of unlimited compensation for non-pecuniary damage, which is why the compensation amounts should generally be higher than in those cases where compensation for non-pecuniary loss is limited. In other cases, compensation should be determined, taking into account the consequences of the personal injury to the aggrieved person, i.e. the estimated "value of the harm".[11] However, compensation amounts for non-pecuniary damage have been rather modest in Estonia and no significant changes have occurred in this respect recently.

2. Riigikohus (Supreme Court) 28 May 2008, No. 3-2-1-43-08, (2008)[12]: Pecuniary and Non-Pecuniary Damage

a) Brief Summary of the Facts

9 The plaintiff filed an action against the defendant, requesting compensation of approximately € 7,673 (EEK 120,000) for pecuniary damage. The plaintiff

[8] Judgment of the Supreme Court, Civil Chamber, Case No. 3-2-1-78-06.
[9] Judgment of the Supreme Court, Civil Chamber, Case No. 3-2-1-53-06.
[10] Judgment of the Supreme Court, Civil Chamber, Case No. 3-2-1-43-06.
[11] Judgments of the Supreme Court, Civil Chamber, Cases No. 3-2-1-54-07 and 3-2-1-19-08.
[12] Judgments of the Supreme Court have not been printed in the State Gazette since 2006, decisions (with some exceptions) are available at: >www.riigikohus.ee<.

lives in an apartment which is in the same house as the defendant's shop. The shop is part of a major, popular and high-turnover chain of shops in Estonia. The plaintiff's apartment is on the first floor and shares the outer wall with the defendant's shop. The apartment's windows are on the same side of the house as the shop's back doors, through which goods are taken into the shop after being unloaded from delivery vehicles. The unloading platform is close to the windows of the plaintiff's apartment. As the shop has a high turnover, 30–40 delivery vehicles arrive every day; some of the vehicles are refrigerator trucks. While goods are being unloaded from the refrigerator trucks, the drivers of the trucks leave the trucks' engines running, causing additional noise and air pollution. The plaintiff argued that the noise and air pollution caused by the delivery vehicles had caused pecuniary damage to him. The plaintiff specified the pecuniary damage as reduction in the selling price of the apartment, the expenses of appraisal and of measuring the noise level in the apartment, the expenses of finding a new dwelling (telephone, Internet, petrol), the expenses of obtaining credit (contract fee 1% of the loan amount, 5% interest per annum), notary fees and state fees for selling the apartment and buying a new one, and removal expenses.

The county court granted the action in part and ordered the defendant to pay the expenses of the noise level measurement to the plaintiff. The circuit court left the county court's judgment unchanged. 10

b) Judgment of the Court

The Supreme Court did not change the decision, but did change some of the reasons given by the circuit court judgment. The Supreme Court clarified that since the plaintiff had not proved that the defendant had caused the reduction in the value of the plaintiff's property, the courts were justified in dismissing the action. However, the Supreme Court added that if the courts had established that the defendant had caused damage to the plaintiff and had held the defendant liable for damage caused by the culpable violation of the plaintiff's right of ownership under LOA § 1045 (1) 5), the first sentence of LOA § 132 (3) – according to which if damage is caused to a thing, compensation for the damage shall cover, in particular and among other things, the decrease in the value of the thing – should have been applied to the compensation as a specific provision instead of the general rule defining direct pecuniary damage. In addition, the Supreme Court clarified the possible decrease in the value of the apartment due to the impermissibly high noise level. According to the Supreme Court's clarification, ambient noise can reduce the value of a thing, but only if causing the noise is contrary to law and if the plaintiff has no right to demand termination of the noise (e.g. if the noise is within the limits of normal toleration levels which members of society can reasonably be expected to tolerate in the course of human co-existence, or if a request to terminate the noise would be contrary to public interest). 11

c) Commentary

12 The Estonian Supreme Court has not previously discussed the issues of whether the value of a thing can decrease (and an aggrieved person incur compensable damage) even if the thing has not been physically damaged; the conditions under which external circumstances could reduce the value of a thing, and the presumptions on which a person can, in such case, resort to civil law remedies. The case is also of significance because, even though according to LOA § 132 (3) compensation for damage shall cover, in particular, the reasonable costs of repairing the thing and the potential decrease in the value of the thing, the aggrieved person cannot claim compensation if the thing has not been physically damaged.

13 The interesting argumentation of the Supreme Court suggests a certain position in the interpretation of applicable law and can be presumed to serve as the basis for settling similar disputes in the future. The Supreme Court has, firstly, posed the question of whether the noise to which the apartment's owner was subjected could reduce the value of the apartment without the latter as a thing having incurred any physical damage.

14 The Supreme Court found that ambient noise can reduce the value of a thing, such as an apartment, without physically damaging the thing, if the noise prevents the use of the thing and the owner of the thing cannot demand termination of the disturbance. Therefore, a civil law defence is possible on two conditions: the noise has to prevent the use of the thing and it must be impossible, for some reason, to demand termination of the noise. The Supreme Court has further referred to a situation where causing noise constitutes an offence, referring to LOA § 1055 (1), according to the first sentence of which, a person may demand the termination of damage if the damage is caused continually. However, termination of damage cannot be demanded if it is reasonable to expect that the damaging behaviour can be tolerated in human co-existence or due to significant public interest (LOA § 1055 (2)). In such case, the aggrieved person may file a claim for compensation of unlawful damage.

15 It may be concluded from the above that the value of an apartment can decrease within the meaning of the first sentence of LOA § 132 (3) only if it is clearly impossible according to LOA § 1055 (2) to terminate the causation of the noise as an unlawful act which disturbs the use of the apartment or to reduce the noise to a lawful level. In its judgment the Supreme Court thus also recognised the possibility of damage without physical changes to a thing, in this case without physical damage to the apartment, while entitlement to compensation arises only after it has been established that the aggrieved person has no right to demand the termination of the influence.

16 Another important view stressed in the Supreme Court judgment is the definition of pecuniary damage in a situation where the market value of a thing has considerably increased by the time of the judgment compared to the time when the damage was caused. Namely, the Supreme Court considered some of the circuit court's reasons for partial dismissal of the compensation claim to be

irrelevant. The circuit court had found in its decision that the plaintiff had not incurred pecuniary damage since the market prices of apartments had risen. According to the difference hypothesis that determines the purpose of compensation for damage in Estonian law (LOA § 127 (1)), upon compensation for damage, the aggrieved person should be placed in a situation as near as possible to that in which the person would have been if the circumstances which are the basis for the compensation obligation had not occurred. The Supreme Court dedicates only one sentence to reasoning the incorrectness of the circuit court's position and finds that a price rise of a thing, which is independent of the offender's activities, does not undo the reduction of the value of the thing which already occurred due to the offender's activity. Namely, the circuit court found that even though the plaintiff was not able to sell the apartment for the desired market price, there was no ground for granting the action. The court found that as market prices fluctuate and the selling price of an apartment can depend on many factors, and further since the ownership of the apartment had actually not been transferred, the plaintiff had not incurred any damage. Should the reduction of value that already occurred be understood as the period when the market prices had not yet increased, i.e. the damage that the owner would have incurred if he had sold the apartment at the time when the apartment prices had not significantly risen? Apparently, the decision should be based on the difference between the selling price of the given apartment and other similar apartments at the time of making the decision. According to § 65 of the General Part of the Civil Code Act, the usual value of an object is its average local selling price at the time of filing the claim for damages.

3. Riigikohus 9 April 2008, No. 3-2-1-19-08, (2008): Personal Injuries and Death; Non-Pecuniary Damage to Close Persons

a) Brief Summary of the Facts

The defendant's employee (coach driver) caused a road accident in which the coach collided with the van driven by the plaintiff's husband. The plaintiff's husband died of his injuries. The plaintiff argued that she suffered emotional and psychological distress as a result of her husband's death, and that her constitutional right to the inviolability of family life had been breached. She also argued that she was entitled to non-pecuniary damages under LOA § 134 (3), according to which in the case of an obligation to compensate for damage arising from the death of a person or a serious bodily injury or damage to health caused to the person, the persons close to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances. In the action she requested that the defendant be ordered to pay a compensation of approximately € 64,000 (EEK 1 million) for the non-pecuniary damage which she suffered. 17

b) Judgment of the Court

Both the county court and circuit court dismissed the claim. The Supreme Court left the circuit court decision unchanged and dismissed the appeal in cassation. 18

19 In its judgment the Supreme Court found that the plaintiff's claim was based on the causation of a road accident by the defendant's employee in which the plaintiff's husband died. Pursuant to the judgment, causing a road accident and a claim for compensation of the resulting damage can be classified according to different provisions. Firstly, LOA § 1057, which regulates the liability of the direct possessor of a motor vehicle for damage caused upon the operation of the motor vehicle as a major source of danger, should be applied. A person who manages a major source of danger shall be liable, among other things, for causing the death of, bodily injury to or damage to the health of a victim (LOA § 1056 (1)). This is regardless of the fact that a person was injured or killed in a collision of several vehicles, i.e. due to the combined effect of several major sources of danger.[13] The Supreme Court stresses that, according to LOA § 1056 (3), cases covered by strict liability can at the same time be covered also by delictual liability based on culpability (according to LOA § 1043). The plaintiff and the courts relied on the fact that the death of the plaintiff's husband was unlawfully caused by the coach driver, for whose activity the defendant was liable as the driver's employer. The courts found that the coach driver was liable for causing the death of the plaintiff's husband under LOA § 1045 (1) 1), while the defendant as the driver's employer was liable for the damage caused by the driver upon performance of his work duties under LOA § 1054 (1). The defendant did not prove that the coach driver was not culpable (LOA § 1050 (1)).

20 The Supreme Court added that if the defendant, i.e. the driver's employer, had been liable for the damage, this would not have precluded the driver's liability. Where several persons cause damage, they bear solidary liability under LOA § 137 (1) regardless of the basis for liability. In addition, special rules apply to the limitation period for the right of recourse between solidary obligors (LOA § 70), which in this case would have allowed the defendant to exercise its right of recourse with respect to the driver.

21 The Supreme Court also found that if a person close to the person whose death was caused suffered damage to their health due to the death, such damage may be subject to compensation under LOA § 130 (2). The plaintiff did not rely on the fact that she suffered damage to her health due to her husband's death.

c) Commentary

22 The judgment is important especially as regards the part analysing the presumptions for filing a claim for compensation for non-pecuniary damage caused to a third party.

23 The Supreme Court found that while, as a rule, compensation is applicable only to the damage caused to the aggrieved person himself, LOA § 134 (3)[14]

[13] Compensation for damage caused by a combination of several major sources of danger has been analysed by the Supreme Court in its judgment of 24 September 2007 in Case No. 3-2-1-75-07, at page 12. Comments on that case are available in *Lahe/Kull* (fn. 7) no. 10–17.

[14] The Estonian Law of Obligations Act (LOA) § 134 (3) was drafted according to the model of the Swiss OR art. 45 (3). LOA § 134 (3): In the case of an obligation to compensate for damage

also provides for compensation for non-pecuniary damage to those close to the person who died or suffered a serious bodily injury. However, according to this provision, persons close to the deceased or the aggrieved person have such a right of claim only if compensation is justified by exceptional circumstances. The judgment thus covers three very important aspects regarding the application of LOA § 134 (3). These are: the objective of allowing such compensation, the definition of the circle of entitled persons, and the description of the circumstances justifying compensation.

The LOA does not define "close persons", which leaves the definition to the courts. The Supreme Court takes the view that there is no common and uniform definition of "close persons", but each case should be assessed individually, based among other things on the relations, family ties, living arrangements of the persons, and other circumstances. Certain persons, such as the spouse and children who lived together with the deceased, are undoubtedly included in the circle of close persons.[15] 24

As regards the interpretation of exceptional circumstances, the Supreme Court arrived at the following conclusions. The Supreme Court found that the causation of death or a serious bodily injury cannot serve as an "exceptional circumstance" within the meaning of LOA § 134 (3), but there must be additional circumstances justifying pecuniary 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. 25

According to the Civil Chamber, a claim for compensation of damage incurred by a close person under LOA § 134 (3) 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, e.g. 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 adds that a claim would be justified if there had been a deliberate desire to attack or damage persons close to the aggrieved person, 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. The commentaries to the LOA mention another precondition – affect, post-traumatic stress disorder or other serious psychological condition of the 26

arising from the death of a person or a serious bodily injury or damage to health caused to the person, the persons close to the deceased or the aggrieved person may also claim compensation for non-pecuniary damage if payment of such compensation is justified by exceptional circumstances.

[15] The Supreme Court has defined the concept of close persons also in a judgment of 2005, in which the child of the victim was regarded as a close person. Judgment of the Supreme Court, Civil Chamber, No. 3-2-1-129-06.

close person. Judicial practice has thus developed a certain understanding of the circumstances that do not justify compensation of a third party for non-pecuniary damage under LOA § 134 (3), while the positive list is still speculative and based on the published case law of other countries.

4. Riigikohus 22 October 2008, No. 3-2-1-85-08, (2008): Personal Injuries; Non-Pecuniary Damages; Contributory Negligence

a) Brief Summary of the Facts

27 The defendants' Caucasian Shepherd dog attacked the plaintiff who was seven years old at the time of the incident. The dog attacked the girl outside in the vicinity of the defendants' home. When the door of the defendants' apartment was opened, the dog escaped to the street, where it attacked and bit the plaintiff. As a result of the attack, the plaintiff received hospital treatment for ten days, also spending time in an intensive care unit. The plaintiff underwent multiple surgical procedures: repeated stitching of the wounds on both shoulders and legs, followed by a second operation necessitated by the inflammation of the wounds caused by hot weather. The injured person was diagnosed with lacerations in the upper arm and elbow joint areas, posture abnormalities in the thoracic part of the spine, and emotional instability. A claim was filed for compensation of pecuniary and non-pecuniary damage. The plaintiff filed an alternative claim for future plastic surgery, requesting an amount corresponding to the cost of the operation after seven years, or the establishment of damage without specifying its extent. The plaintiff assessed her damage to be approximately € 19,000 (EEK 300,000). The county court ordered the payment of approximately € 11,000 (EEK 166,000), of which € 5,400 (EEK 85,000) was compensation for non-pecuniary damage.

b) Judgment of the Court

28 Upon reducing the amount requested by the plaintiff, the county court found that obstacles to studies cannot be regarded as non-pecuniary damage, as these also depend on other circumstances. The court considered it important, in determining the amount of compensation, to take into account the victim's suffering: the shock and the future operations; the lack of physical integrity, which in the court's opinion had only partly negative consequences; the enhanced attention of other people and limitations to self-expression. The court also reduced the amount because it regarded the plaintiff's behaviour upon the release of the dog from the house as the plaintiff's own gross negligence.

29 The court also analysed photos and descriptions which were made public over the Internet and on which the defendants based their arguments. For instance, the plaintiff argued that the scars on her body did not allow her to wear short-sleeved clothes, while in the photos on the Internet she was wearing short-sleeved and sleeveless clothes. The court also questioned the alleged fear of dogs, because in the photos on the Internet, the plaintiff posed with a wolfhound and the plaintiff's family also has a dog. In summary, the court found that the materials published on the Internet (photos and descriptions) might not be the whole truth and may

contain some degree of wishful thinking, because it is generally accepted that a person can write untrue things on the Internet about himself or herself. Considering the plaintiff's age (eight years old), the court disregarded the materials published by the plaintiff about herself on the Internet.

The circuit court annulled the county court's decision as regards granting the claim for non-pecuniary damages, granted the claim for the establishment of damage, and left the amount of compensation to be decided in the future. The Supreme Court annulled the circuit court decision as regards the dismissal of the action for pecuniary compensation for non-pecuniary damage and referred the case back to the same circuit court for another hearing. 30

c) Commentary

The judgment is in many respects relevant to subsequent practice of compensation for bodily injuries. The first important aspect is the Supreme Court's position that the purpose of the provision, which is applied in other cases of damage, should not be taken into account upon compensation for non-pecuniary damage. Namely, LOA § 127 (2) allows for limiting compensation for damage, which would be fully compensable under the difference hypothesis, to the extent that prevention was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose. The Supreme Court found that pecuniary compensation for non-pecuniary damage is subject to only the special provision of law – LOA § 130 (2)[16] – according to which a reasonable amount of money shall be paid as compensation for non-pecuniary damage if a bodily injury or damage to health was caused to the aggrieved person. The court may decide on the amount to be paid and need no longer additionally consider the objective of the provision. In the event of a claim for pecuniary compensation of non-pecuniary damage (as in the event of pecuniary damage), the court has to decide whether there is a causal relationship between the plaintiff's alleged and proved non-pecuniary damage and the defendant's act (LOA § 127 (4)). It should be added that in the event of a bodily injury or damage to health, the aggrieved person may claim compensation for non-pecuniary damage without having to additionally prove the non-pecuniary damage. In other cases, the aggrieved person has to always prove that he or she indeed suffered compensable non-pecuniary damage.[17] 31

The Supreme Court also found that in the new hearing of the matter, the circuit court should among other things, upon application of LOA § 130 (2), assess the plaintiff's claims that she would suffer the inconvenience of scars on her body for seven years (because surgery should be performed when the plaintiff attains the age of majority). Since LOA § 130 (2) refers to the principle of reasonableness in connection with determining the amount of compensation, 32

[16] LOA § 130 (2): In the case of an obligation to compensate for damage arising from a bodily injury or damage to health caused to a person, the obligated person shall pay the aggrieved person a reasonable amount of money as compensation for non-pecuniary damage caused to the person by such damage or injury.

[17] Judgment of the Civil Chamber of the Supreme Court in Civil Matters No. 3-2-1-19-08.

the circumstances specified in LOA § 7 (2) should be taken into account when assessing the amount of compensation.

33 The Supreme Court stressed the earlier positions that as opposed to the burden of proof upon a claim for compensation of pecuniary damage (the occurrence and amount of damage), in the event of non-pecuniary damage it usually suffices to prove the circumstances, the occurrence of which the law relates to a claim for compensation of non-pecuniary damage. The amount of compensation for non-pecuniary damage must correspond to the general standard of living in society and be comparable under similar conditions in order to ensure a general fundamental right to equality. Pecuniary compensation should be determined, taking into account the individual consequences of each personal injury to the aggrieved person, i.e. the "value of the harm".[18]

34 As regards the concept of lack of physical integrity, the Supreme Court stressed that the subject of assessment is not whether the plaintiff lost an organ of the body, but whether the body of the aggrieved person no longer functions, due to the dog bite, as it would have functioned had the dog not bitten her.

35 The judgments being commented on are also important as regards complicity in causing damage, and the application of relevant provisions to specific circumstances. LOA § 139 (1) provides that if damage is caused in part by circumstances dependent on the aggrieved party or due to a risk borne by the aggrieved party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage. In the event that the death of a person or damage to the health of a person is caused, the compensation for damage may be reduced only if the aggrieved person contributed to the damage intentionally or through gross negligence (LOA § 139 (3)). In addition to the fault of the aggrieved person in the causing of injuries, also the failure to minimize the consequences after the harmful result occurred has been considered to constitute contributory negligence (in comparison to the equivalent term in common law). In our case the main problem that arose during the proceedings was the evaluation of the behaviour of the victim.

36 The aggrieved person's intention, according to LOA § 139 (3),[19] means the intention to harm oneself and not the aggrieved person's intentional acts that only contributed to pecuniary damage. The court found that the aggrieved person's intentional self-damaging conduct usually precludes the obligation to compensate for damage, because there is no causality between another person's act and the aggrieved person's damage.[20] The aggrieved person's intention as a contributor to damage and a circumstance reducing compensation for pecuniary dam-

[18] The Supreme Court has taken the same view in the judgment of 8 April 2008, No. 3-2-1-19-08.

[19] LOA § 139 (3): In the event that the death of a person or damage to the health of a person is caused, the compensation for damage may be reduced on the grounds specified in subsection (1) of this section only if the aggrieved person contributed to the damage intentionally or through gross negligence.

[20] The lack of causality in the event of intentional self-damaging was analysed by the Supreme Court also in judgment No. 3-2-1-54-07.

age under LOA § 139 (3) may occur when the aggrieved person intentionally increased his or her damage after the initial damage was caused, such as refusal of treatment or intentionally jumping over a fence to let a dog bite her. Another important position of the Supreme Court is that LOA § 139 is not applicable to claims for compensation of non-pecuniary damage. However, the behaviour of the aggrieved person who contributed to the damaging event is taken into account when determining financial compensation under LOA § 130 (2). It is irrelevant whether the aggrieved person's behaviour counts as negligence or whether the person had active legal capacity at the time of the damage. Therefore, LOA § 139 (3) does not allow for a reduction of compensation for pecuniary damage in a situation where the aggrieved person's negligence contributed to his or her health damage. However, the court may take such behaviour into account when determining the amount of compensation for non-pecuniary damage.

These positions indicate the Supreme Court's general preference to limit compensation for non-pecuniary damage to as few cases as possible and to increase the discretion of the courts. On the other hand, compensation for non-pecuniary damage in the event of bodily injuries and damage to health has become much more usual and perhaps even simpler in the Supreme Court's practice compared to earlier practice. 37

5. Riigikohus 22 October 2008, No. 3-2-1-85-08, (2008): Personal Injuries; Non-Pecuniary Damages; Contributory Negligence

a) Brief Summary of the Facts

The popular Estonian weekly newspaper *Eesti Ekspress* ("Estonian Express") published an article titled "The Case of Pastor S.", describing among other things the loss of the pastor's car and of the things in the car. The article cited the statements of many persons which suggested that the plaintiff stole the car. After the article was published, the court established the guilt of a third party in the theft of the car and the things in it. 38

The plaintiff filed an action again Eesti Ekspressi Kirjastuse AS (the defendant). The plaintiff requested the publication in the newspaper *Eesti Ekspress* and its online version www.ekspress.ee at the defendant's expense of an apology, stating that the published claims referring to the plaintiff as a possible car thief, such as "when the pastor was called to pick up his car, police said that the pastor's car was stolen by the plaintiff and his friends" and "for a year, S. asked his acquaintances in Rakvere how to recover his stolen property (including his ecclesiastical robe and gold cross), mentioning the plaintiff as the thief", were incorrect. The plaintiff found that his personality rights had been violated as he had not been convicted of the alleged theft.[21] 39

The defendant found that a newspaper cannot take responsibility for the correctness of each and every published statement, while it does have responsibility for correctly reflecting a person's views. 40

[21] Note that the wording of the plaintiff's claim has been shortened.

b) Judgment of the Court

41 The Harju County Court granted the claim in part and ordered the defendant to publish a correction in the newspaper *Eesti Ekspress* and its online version at the defendant's expense. In its judgment of 5 October 2007, the Tallinn Circuit Court annulled the county court's judgment in part as regards the reasons and the decision (it changed the wording of the correction to be published at the defendant's expense). The Supreme Court did not change the main part of the circuit court judgment, but omitted one sentence which the defendant ought to have published as a correction according to the circuit court's judgment.

42 The Supreme Court found that the defendant's argument to the effect that the plaintiff's requested refutation of an incorrect statement of fact impinged on journalistic freedom was essentially correct. However, obliging the publisher to refute or correct incorrect information was a proportionate impingement on journalistic freedom. The fact that the defendant published the arguments of third parties did not render a statement of fact a value judgment. Even when publishing the statements of third parties, the publisher can choose whether or not to publish the statement. The freedom of expression is contrasted by a person's personality right not to have incorrect information published about him or her, i.e. the right to honour and good name. In this dispute, the courts have established that in the published article an incorrect argument about the plaintiff followed from two statements mentioned in the action, which justifies the demand to publish a correction concerning the incorrect statements of fact. According to LOA § 1047 (4), it is irrelevant whether the published statement was defaming. It is the incorrectness of the statement that is relevant. This is in line with the second sentence of § 45 (1) of the Constitution, allowing for a restriction of the right of expression by law in order to protect, among other things, the honour and good name of others.

43 According to the Supreme Court, the published statements of fact should be taken as they are, i.e. in the event of a dispute the court has to establish, in an objective and reasonable manner, what the defendant made public. What the publisher had in mind is irrelevant. A person may be publicly misrepresented also by publishing indirect facts from which direct facts about the plaintiff can be reasonably concluded. In such cases, the court can demand that the publisher also refute the fact that may be concluded from the published information.

c) Commentary

44 In this case, the courts had to consider two important values: journalistic freedom on the one hand and an individual's right to honour and good name on the other. More specifically, the case concerns coverage of "conflict situations" in the press.

45 There are usually at least two people involved in a conflict and at least one of them (but possibly both) usually makes incorrect statements. This is why the defendant found with good reason that, according to such judicial practice, coverage of any conflict would serve as grounds for an action.

The Supreme Court judgment should make the press more cautious about covering conflicts as, according to the judgment, it is not only the person who made the incorrect statement to the press who is liable, but also the publisher. 46

C. Literature

1. *J. Lahe*, Judgments of the Estonian Supreme Court in Developing the Concept of Strict Liability (Riigikohtu praktika tähendus riskivastutuse edasiarendamisel) Kohtute aastaraamat 2007, Tallinn, OÜ Greif 2008, 99 ff.

The author of the article analyses two Supreme Court judgments which are highly relevant to the development of strict liability. According to Estonian law, there are two principal ways of dealing with a situation where an aggrieved person falls from the tortfeasor's horse and is injured as a result. The first approach is that the tortfeasor does not bear strict liability (but may be liable according to the general elements of delict); the second approach is that the tortfeasor does bear strict liability, but the claim has to be reduced because of the aggrieved person's own contribution to the damage. The author of the article advocates the second approach. 47

The author offers the following criterion for deciding in which cases the aggrieved person is not entitled to rely on strict liability based on the principle of good faith: if the aggrieved person would bear strict liability for damage caused to third parties by the relevant major source of danger, the aggrieved person cannot file a claim based on the provisions governing strict liability. 48

As regards mutual damage caused by two major sources of danger, the author notes that, as regards the type of liability to be applied, there is, as a rule, no difference whether two persons managing major sources of danger are liable to each other for damage on the basis of strict liability or general liability, because the aggrieved person's role in causing the damage has to be taken into account in any case (LOA § 139). This means that when strict liability is applied, the person who is 100% liable for the damage may file a claim, but should be refused compensation insofar as the other person had no part in damaging him or her (the compensation has to be reduced to zero under LOA § 139). 49

There is an essential difference between strict liability and liability based on culpability in a situation where neither of the persons managing major sources of danger was culpable of causing damage. If strict liability is applied, each should compensate the other for the damage; in the event of liability based on culpability, each would bear their own respective damage. The author believes that it would be reasonable to apply strict liability in such a situation, as the main idea of strict liability is to impose liability regardless of culpability. 50

2. *M. Vutt*, Compensation for Non-Pecuniary Damage in the Estonian Courts: What Does the Analysis of Court Practice Show in 2007? (Mittevaralise kahju hüvitamine Eesti kohtutes: mida näitas kohtupraktika analüüs aastal 2007?) Juridica 5 (2008) 283 ff.

51 The author of the article analyses whether and to what extent the practice of Estonian courts in matters concerning compensation for non-pecuniary damage has changed after the entry into force of the LOA. The objective of this article is to provide an overview of decisions related to claims for the compensation of non-pecuniary damage that were made in 2006 by Estonian courts of first and second instances in civil and administrative cases. The article does not separately focus on the legal rules governing the compensation of non-propriety damage, and only expresses a few ideas that complement earlier literature in the field, which in the author's opinion merit further discussion.

3. *K. Sein*, Should Punitive Damages be Permissible under Estonian Law? (Kas Eesti õiguses tuleks lubada karistuslikke kahjuhüvitisi?) Juridica 2 (2008) 93 ff.

52 The author analyses in her article the concept of punitive damages which are characteristic of Anglo-American legal systems but which have become an object of discussion in Estonia. Somewhat surprisingly, a number of proposals have been made recently by Estonian jurists to allow for punitive damages under Estonian law, in particular in cases of violation of personality rights, such as in the case of defamation. This is explained by the fact that defamation is not currently punishable as an offence under Estonian law, due to which victims are often left without effective legal protection. The purpose of this article is to analyse the characteristics of punitive damages, the possibilities and need for introducing this institution in Estonian law, and whether the introduction of punitive damages could be contrary to the values set out in the Constitution. The author focuses primarily on the question of whether it would be necessary to implement punitive damages in cases of defamation or violation of other personality rights and expresses mainly a negative attitude toward the idea of the implementation of punitive damages.

4. *I. Nõmm*, Compensation for Pure Economic Loss under the General Conditions of Delictual Liability (Puhtmajandusliku kahju hüvitatavus delikti üldkoosseisul põhineva vastutuse korral) Juridica 2 (2008) 84 ff.

53 In his article the author concentrates on the problems of compensation for pure economic loss. The Supreme Court has in its interpretation of the current Estonian law of delict stated that the law of delict does not protect a person's property as a whole; rather it primarily protects specific legal rights. One and the same wrongful act may cause harm to many persons' legal rights, which inevitably cannot all be compensated for. If this were the case, a person who acts wrongfully could not foresee liability, and the person's liability could become disproportionately great. For this reason, the Civil Chamber of the Supreme Court is of the opinion that pure economic loss should not as a rule be com-

pensated. The author of this article agrees with the Supreme Court's finding that under the current law of delict, compensation for pure economic loss is the exception. In the article, the author takes a closer look at the Chamber's reasoning and exposes the theory behind the Supreme Court's position. Separately, the author addresses the question of the limits of compensation for pure economic loss under the Estonian law of delict, that is, whether and to what extent such damage must be compensated under the LOA.

VIII. Finland

Suvianna Hakalehto-Wainio

A. Legislation

1. Tort Liability Act

1 The most significant Finnish statute applying to liability in damages is the Tort Liability Act (412/1974: *vahingonkorvauslaki*). The Tort Liability Act applies both to tort liability and the quantum of damages. In contrast, it does not apply to contractual liability or damage or to liability provided in another Act, unless otherwise provided.

2 No relevant tort law legislation was introduced in 2008.

3 The Advisory Board on Personal Injuries has operated within the Ministry of Justice since 2006. The Advisory Board consists of representatives of judges and the chairmen of the Patient Injuries Board and the Traffic Injuries Board.

4 The duties of the Advisory Board include keeping up with the development of court practice and board practice concerning personal injuries and to give general recommendations on amounts of damages when ordered according to chap. 5 Tort Liability Act on temporary or permanent pain, suffering and loss of amenities.

5 The Advisory Board on Personal Injuries examined over 3,000 district court decisions on damages and in 2008, based on them, gave its first recommendations covering over 100 of the most general damage situations. The function of the recommendations is to provide guidelines for court practice and board practice to ensure uniformity as regards non-pecuniary damages.

B. Cases

1. Supreme Court, 8 February 2008, KKO 2008:10: Tort Liability of the State due to Damage due to Imprisonment of Innocent Person

a) Brief Summary of the Facts

A was captured by a border guard on 14 October 2004. He was taken via two prisons to Konnunsuo placement prison on 18 October 2004. When it was discovered that A had already completed over two thirds of his prison sentence, he was released on parole on the same day. A had been imprisoned for four days. 6

The Supreme Court had to decide if A was entitled to damages because of the loss caused by the loss of his freedom either according to the Act on Compensation from State funds for the Arrest or Detention of an Innocent Person, according to the Tort Liability Act or according to some other ground. 7

The Supreme Court referred to the preparatory works relating to the Tort Liability Act where it is stated that the Act on Compensation from State funds for the Arrest or Detention of an Innocent Person should not be applied if the convicted person is held in prison for too long because of an error in enforcement. In that kind of case the Tort Liability Act should be applied. The Supreme Court noted that the special legislation mentioned above does not include a regulation according to which A could be awarded damages because of the anguish he had suffered due to the loss of his liberty. The cases where damages have been awarded in court practice according to that special legislation have been different from the facts of the present case. 8

b) Judgment of the Court

Under chap. 3, sec. 2 Tort Liability Act, a public corporation is vicariously liable in damages for injury or loss caused through an error or negligence in the exercise of public authority. However, the liability of the public corporation arises only if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it. Tort liability covers only personal injury or damage to property. Anguish caused by infringement is compensable only when the requirements laid down in chap. 4, sec. 4a and sec. 6 are met. This was not so in the case concerning A. 9

In the Tort Liability Act there is no requirement according to which compensating anguish or other immaterial damage has to be based on a special rule. The court practice has been reserved when it comes to compensating anguish on grounds other than rules in legislation. In the preliminary works of the Tort Liability Act, it is stated that the Law is not meant to cover general principles of tort law comprehensively. It was thought that tort law will develop in interaction between court practice and jurisprudence. The Supreme Court stated that it is necessary to assess whether the judicial environment affecting compensable damage has changed significantly after the passing of the Tort 10

Liability Act and the Act on Compensation from State funds for the Arrest or Detention of an Innocent Person.

11 In the Finnish Constitution, according to chap. 2 sec. 7.3, the personal integrity of an individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed by an Act. According to the European Convention on Human Rights, art. 5, everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. Chap. 2, sec. 22 of the Finnish Constitution requires that the court must interpret legislation in a way that it promotes the realization of basic rights and liberties and human rights.

12 A was deprived of his freedom for three and half days. The loss of freedom was a consequence of the fact that he was captured in Helsinki but, according to the authority regulations, the decision to set him free had to be taken by a certain authority in Konnunsuo prison. For this reason, A was taken there. The decision to set A free was made correctly.

13 Enforcing a punishment has an element of exercise of public authority and it is an interference with personal liberty which is protected as a basic liberty and a human right. The state is obliged to establish the requirements for releasing a prisoner for parole in practice in a manner that administrative formalities do not unreasonably delay release. The Supreme Court stated that it had to evaluate if the establishment of these requirements and the rules covering it had been organized in a way that the performance of it, in view of its nature and purpose – protecting liberty, had met the reasonable requirements set for it.

14 The Supreme Court stated that the delay had been caused by administrative formalities. The procedure could not be acceptable as the case concerned personal liberty even if the procedure was faultless according to the rules. The Supreme Court stated that there was an omission in a use of public power. Because the task had an effect on personal liberty, the Supreme Court decided that the reasonable requirements set for the task had not been met.

15 According to the Supreme Court, the delay of three and half days was unreasonable. The establishment of the necessary requirements and the decision-making process could have been organized quicker in practice.

16 The Supreme Court stated that A did not have a right to damages according to the two above mentioned Laws. However, nothing in the preparatory works of those Laws refer to the idea that it was a conscious decision not to compensate loss of freedom in a situation similar to A's. The loss of freedom suffered by A is an infringement of personal liberty which is protected as a basic liberty and as a human right. The Supreme Court decided that A has a right to legal protection in domestic courts. According to the Supreme Court, when deciding the amount of damages, it is justifiable to follow the same grounds used when applying the Act on Compensation from State funds for the Arrest or Deten-

tion of an Innocent Person. According to the Supreme Court, the reasonable amount in this case is € 400.

c) Commentary

The Supreme Court voted on this decision. The minority (two judges) would not have awarded A any damages. They argued that the domestic rules governing the process of parole were exact and the practice of the authority was established. According to the minority, art. 5 of the European Convention on Human Rights cannot be applied in A's case because there was a legal ground for the process. 17

Chap. 3, sec. 3(2) of the Tort Liability Act (provision on standard) is problematic when it is applied to the infringement of human rights. This rule requires that the negligence is more severe than ordinary negligence. According to the European Convention on Human Rights, the infringement alone is sufficient ground for finding the state liable. In A's case the infringement was considered to be sufficiently severe. According to the writer, all infringements of human rights must be seen as so severe that the threshold of provision on standard is met. This result can be reached if the Tort Liability Act is interpreted in a manner amenable to constitutional rights and to human rights. The collision must be resolved so that the outcome realises the constitutional rights and the human rights of the person in question to the highest degree achievable. There may be situations where these requirements mean that the provisions of the Tort Liability Act or domestic tort law doctrine must be overridden. 18

The Supreme Court did not base the award of damages due to anguish suffered on the Tort Liability Act but on the European Convention on Human Rights and on the Finnish Constitution. One of the judges would have based the decision on the Tort Liability Act. He would have interpreted the Act in a manner amenable to human rights. 19

The Supreme Court could have pointed out that the result of the case in a domestic court must be at least as effective as that which could be reached according to the practice of the European Court of Justice. The Convention must be interpreted at a national level in a manner which guarantees the effective protection of human rights. 20

Also the level of the compensation should be coherent with the practice of the European Court of Human Rights (ECHR). The Supreme Court could have stressed more the principle according to which the parties to the European Convention of Human Rights have engaged themselves to implement the protection at the national level. 21

C. Literature

1. *Mika Viljanen*, Vahingonkorvauksen määrä. Tutkimus vahingoista ja rahoista (The Quantum of Damages – a Study in Monies and Losses) (Suomalainen Lakimiesyhdistys, Helsinki 2008)

22 In his doctoral thesis the author addresses the questions of how losses are compensated and how attempts can be made to right a wrong. The study seeks to answer these questions by analyzing the monetary techniques deployed to facilitate compensation, i.e. to calculate the amount of damages.

23 The author points out that the traditional principles such as full compensation, no compensation for non-pecuniary damage and an all-or-nothing approach are held in high esteem, but on the level of actual norms, their explanatory and justificatory power is in decline. The existing rules and their interpretations contradict the old theoretical structures, but only the old structures are available. Thus, there is a dire need of a new set of theories that could give a normative direction to the norms.

24 Dr. Viljanen argues that the traditional modern approach to the assessment of damages is simultaneously a nightmare and a dream. It requires an easy and unproblematic assessment of damages, which – if adhered to – requires very little work to justify the normative conclusions based on it. According to the author, this conception has in fact ceased to explain and order the rules and, therefore, it should be replaced.

25 The author aims to reconstruct the traditional understanding of what compensation means. Money is a theme that runs through the entire course of the study. The basic idea is that compensation is only possible if monetary technologies are used. The loss must be transformed into a pecuniary expression. An analysis of the monetary technologies tells us how we in fact compensate losses. The opposite might be true as well. An inquiry into compensation might tell us what money is and what monetary technologies are.

26 In this study four monies are found in tort law. The first one is a passive tool that does not have sense-making capabilities of its own. It just facilitates true physical work. The second conception mobilizes accountants and their professional expertise. It creates another space for the significance of monetary compensation, now defined by conventional practices of how business results are reasonably represented.

27 According to Dr. Viljanen, the most important finding in the study is that loss is in fact a plural concept, and thus, tort law contains multiple ontologies for losses. Losses are diverse and innumerable.

28 The author argues that even though monetary spaces are imagined and enacted within the law, they have a general significance. He points out that our understanding of money could and should be updated to reflect these monetary tech-

nologies, narratives of what money is. In the end, money just might not prove to be fixed and motionless, cold and heartless as we have thought. He thinks that perhaps we can make sense of our losses.

2. *Vilja Hahto*, Tuottamus vahingonkorvausoikeudessa (Negligence in Tort Law) (WSOYpro 2008)

The author examines one of the most fundamental concepts of tort law – negli- 29
gence. She shows how this concept must be applied to various situations and to various parties. The author aims to prove that the content of the concept cannot be defined with only few rules. In the Finnish Tort Liability Act no definition of negligence is given.

In the book the concept of negligence is analyzed and opened with several 30
examples. According to the author, in tort law the concepts of criminal law have been used when explaining negligence even though the aims of criminal law differ from the aims of tort law. The author points out that in tort law the main issue is to balance the interests of the tortfeasor and the damaged party. So the question of who is to blame for the action cannot be at the centre as it is in criminal law.

The book covers the basic elements of the assessment of negligence typical 31
in Finnish tort law: the norm-based asessment of negligence, the risk-based assessment of negligence and enhanced duty of care. The author examines negligence in different contexts including for example the damage caused by a minor, the damage caused by an animal, the liability of the owner of a building and the liability for taking care of the road.

3. *Suvianna Hakalehto-Wainio*, Valta ja vahinko. Julkisen vallan käyttäjän vahingonkorvausvastuu vahingonkorvauslaissa (Power and Liability. Tort Liability of Public Authorities under the Tort Liability Act) (Talentum, Helsinki 2008)

In Finland, the tort liability of public authorities has been seen as a phenom- 32
enon not properly a part of tort law, but rather of administrative law. However, in administrative law, liability arising from the exercise of public power has been studied primarily as the personal liability of the individual official, rather than as the constitutionally protected due process right of a person who deals with the public authorities. In this doctoral dissertation, the tort liability of public authorities, that is, liability arising from the exercise of public power is looked at as a phenomenon with links to tort law, administrative law, constitutional law and European law. The dissertation covers the special characteristics of negligence in the exercise of public power, the compensability of non-pecuniary loss arising from the exercise of public power, and the significance of tort liability as a remedy for persons sustaining injury or loss in their dealings with the public administration.

In the Tort Liability Act (*vahingonkorvauslaki*), there are three provisions 33
limiting the liability of public authorities. According to one of them, chap. 3,

sec. 3(2), of the Act (provision on standard), liability arises for injury or loss ensuing from error or negligence in the exercise of public power only if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it. The provision on standard eases the tortious liability of the public authorities in comparison to general liability based on negligence.

34 The regulation of the tort liability of public authorities has the premise of immunity as its value basis. The freedom of action of the authorities is protected in the name of their duty to make decisions and in the interests of smooth public administration. The author points out that this model for the liability of public authorities is not supported by the value basis of tort law, with its emphasis on the protection of the weaker party and the allocation of liability on the party with the best resources to cover it. The model is likewise contrary to the value basis of administrative law, whose main premise is the protection of the individual against the exercise of public power.

35 In tort law, the public authority and the person sustaining the injury or loss are viewed through the lens of private law, as if they were operating on an equal basis, without reference to the rights and duties imposed on them by the legal system. In contrast, the view emphasised by the author is that the special nature of administrative action and the special characteristics of the legal relationship between the authority and the person should be taken into account when assessing the degree of negligence in the exercise of public power. Public administration is characterised by the need to protect the interests of private parties, the requirement of appropriate action (e.g. the principle of good government), the pursuit of the public interest, and the exercise of discretion. The assessment of negligence on the part of the public authorities must be based on the requirements that the Constitution and the general principles of administrative law impose on administrative action. An administrative legal relationship is in its proper context a legal relationship incorporating the exercise of various degrees of power; by no means does the private person have a position equal to that of the public authority. The duty to make a decision, the assumption of administrative competence and the requirement of appropriate action give rise to a legitimate expectation that the activities of the authorities are free of errors.

36 The requirements in the Constitution and subordinate legislation concerning appropriate administrative action and administrative competence, as well as the pursuit of the objectives generally linked to the administrative action, mean that the standard of the duty of care owed by the public authorities ought to be higher than the general liability based on negligence. It is justifiable to emphasise the legal protection of the person sustaining the injury or loss when making an assessment of negligence on the part of the public authorities. From case to case, this “due process assessment” of negligence may be based e.g. on legitimate expectations, the protection of the weaker party or the security interests of the person sustaining the injury or loss.

37 The scope of the administrative machinery and the variety of the tasks entrusted to this machinery have increased the risk of injury or loss in administrative action. The extension of regulation to yet new areas has given rise to new types of due process needs. A claim for damages against the public authorities has been only sporadically discussed as a possible administrative remedy. The author shows in the dissertation that it is essential, for reasons of due process, that the tort liability of public authorities is organised in an appropriate manner, so that it also safeguards in practice the interests of persons sustaining injury or loss by reason of administrative action. Nowadays the victim has no effective due process rights when the tort liability of the public authorities under the Tort Liability Act has as its foundation the limitation of liability.

38 The author introduces the idea of non-pecuniary due process loss arising from unlawful action on the part of the authorities being compensable. Such loss is the natural consequence of inappropriate administrative action and can be described as an experience of injustice. What is lost is the protection of the law that a private individual is entitled to in an administrative legal relationship. Comparable positions have been taken in the case-law of the European Court of Human Rights, which has considered various unpleasant consequences of human rights violations to constitute compensable injuries.

39 The European Convention on Human Rights imposes certain minimum standards on national tort law when a national court is seised with a claim for damages based on a violation of the Convention. The provisions in the Tort Liability Act on the tort liability of public authorities restrict the realisation of the rights enshrined in art. 6 and 13 ECHR without the legitimate criteria for human rights restrictions having been met.

IX. France

Olivier Moréteau[1]

A. Legislation

1. Law no. 2009-561 of 17 June 2008, Reforming Civil Prescription[2]

1 The Law of 17 June 2008 (*loi portant réforme de la prescription en matière civile*) rewrites entirely two titles of Book III of the French Civil Code (Of the Various Ways How Ownership is Acquired): Title XX (Of Extinctive Prescription) and Title XXI (Of Possession and Acquisitive Prescription). The new law is partly based on the Catala *Avant-projet* of reform of the law of obligations and prescription,[3] though not completely. This may be regarded as good news wherever such departure leads to improved convergence with other European systems. To some extent, the new law brings some simplification to this long neglected and complicated area of the law.[4]

2 The very nature of extinctive prescription remains controversial, as it was in the past. Art. 2219 gives a definition: "Extinctive prescription is a means of extinction of a right resulting from the inaction of its holder during a certain lapse of time." Such language is imprecise and confusing, since the definition does not indicate whether it is the substantive right that is extinguished, or the procedural right to sue. This is a consequence of French formalism rather than pedagogy.[5]

[1] The author thanks Christelle Demangeat, LL.M. Candidate and Research Assistant at Louisiana State University, for her research and a first draft of Case no. 1. He is grateful to Jennifer Lane, Agustín Parise, and Donna Stockenhuber for their help in the editing process. He also thanks François-Xavier Licari for his comments on the new law of prescription.

[2] *B. Fauvarque-Cosson/J. François*, Commentaire de la loi du 17 juin 2008 portant réforme de la prescription en matière civile, Recueil Dalloz (D.) 2008, 2512; *A.M. Leroyer*, Législation française, Revue Trimestrielle de Droit Civil (RTDCiv) 2008, 563.

[3] *O. Moréteau*, France, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) (Project to Reform the Law of Obligations) no. 1–11; *id.*, France, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) (Project to Reform the Law of Obligations (Catala Project): One Project, Two Translations) no. 1–8.

[4] Significant comparative work has been done in this area in very recent years, such as contributions by R. Zimmermann, J. Kleinschmidt, F. Fusco and B. Askeland, presented at the 7th Annual Conference on European Tort Law and published in *H. Koziol/B.C. Steininger* (eds.), European Tort Law 2007 (2008).

[5] See *Leroyer*, RTDCiv 2008, at 564. Others may say that this is a pragmatic approach, allowing some adjustments in the area of private international law.

The new law keeps opposing extinctive prescription (extinction of a right) to acquisitive prescription, defined in art. 2258 as a "means of acquiring property or a right by the effect of possession." "Extinction of a right" and "acquisition of a right," this makes for an elegant binary distinction, a symmetrical *jardin à la française*. As often with French law, aesthetics prevail over clarity, the reflection on what extinctive prescription really is paves the way for intellectually exciting exam questions, doctoral thesis topics, or *leçon d'agrégation*.[6] Careful analysis indicates that extinctive prescription is a defence: according to art. 2247, the judge may not raise prescription on his own motion. It bars a right to performance or to damages, but does not extinguish the obligation. In addition, no restitution may be ordered in the case of payment of a prescribed debt, such payment transforming what had become a natural obligation into a civil obligation.[7] This is a clear indication that there is no extinction of the substantive right but simply a defence, and that French law "is in line with what is widely recognized internationally."[8]

Major changes have been made in prescription periods and in the way they are calculated. The main purpose of the reform is to favour the convergence of legal systems and bring some needed simplification. This presentation is not intended to be comprehensive, but to give a general idea of the new law and detail those provisions that may apply in the context of tort disputes. 3

Art. 2262, which used to state that "All actions, real as well as personal, are prescribed by thirty years," is abrogated. The very lengthy thirty-year period is no longer the default rule. According to the new art. 2224, "personal actions or those pertaining to movables prescribe five years from the day the holder of a right knew or ought to have known the facts permitting to exert it."[9] The Civil Code presents this rule as the default rule.[10] The thirty-year rule is now limited to real actions pertaining to immovables.[11] The default five-year rule applies to all actions that had special rules in the past, with periods shorter than thirty years. 4

One should not dream of an oversimplified world however. Exceptions exist, some having an impact on tort claims. A thirty-year period applies to damage to the environment, starting from the event generating the damage.[12] A twenty- 5

[6] See *O. Moréteau*, Bilan de santé de l'enseignement du droit, in: Etudier et enseigner le droit: hier, aujourd'hui et demain. Etudes offertes à Jacques Vanderlinden (2006) 273.

[7] Civil Code, art. 1235.

[8] See *R. Zimmermann*, "Extinctive" Prescription under the Avant-projet, 15 European Review of Private Law [ERPL] 2007, 805 at 812.

[9] This is a literal translation: the sentence should end on a plural. Does "it" refer to personal actions or to the right? This reveals the ambiguity of prescription under French law, discussed at no. 2 above.

[10] It is the only article constituting Section I of Chapter II (Of Periods and Starting Points of Extinctive Prescription), entitled "*Du délai de droit commun et de son point de départ*."

[11] Art. 2227.

[12] Code de l'environnement, art. L 152-1: "Les obligations financières liées à la réparation des dommages causés à l'environnement par les installations, travaux, ouvrages et activités régis par le présent code se prescrivent par trente ans à compter du fait générateur du dommage."

year period applies to damage caused by torture or acts of barbarism, or sexual violence or assault on minors.[13] A ten-year period applies to actions in compensation of bodily injury.[14]

6 All distinctions between tort and contract are abandoned. The law unifies the prescription of actions based on contractual or extra-contractual liability. This is good news, to be saluted as a step towards European harmonization. The Catala *Avant-projet* indeed moves towards a unification of the regimes of contractual and extra-contractual liability.[15] Regarding prescription, the basic distinction now is between bodily injury and other heads of damage.

7 Considering bodily injury, the ten-year prescription period runs from the time of consolidation of the initial or aggravated damage. Consolidation means the stabilization of bodily injury, or the state of the victim once medical care comes to an end: this is the moment where one moves from sometimes extensive temporary incapacity to usually and hopefully limited permanent incapacity, in case the victim is permanently incapacitated at all.[16] The same test applies to cases where the prescription period is extended to twenty years, following torture or acts of barbarism, or sexual violence or assault on minors.[17]

8 In the case of harm other than bodily injury and environmental damage, the five-year default prescription period applies.[18] The five years run from the time the victim knew or ought to have known the facts giving rise to the claim. The Catala *Avant-projet* was more victim-friendly, making the test purely subjective since it requested actual knowledge of the facts.[19] The addition of constructive knowledge is welcome. It brings French law in line with German law[20] and also the Unidroit Principles of International Commercial Contracts.[21] The solution comes close to the Principles of European Contract Law, and the test of reasonable discoverability of the damage.[22] The subjective test is complemented with an objective one. Art. 2232 imposes a "long-stop" period (*délai butoir*), making it impossible to move the starting point of prescription, or to suspend or interrupt prescription beyond twenty years commencing from the moment the right starts to exist. This novelty,[23] proposed in the Catala

[13] Art. 2226 par. 2.
[14] Art. 2226 par. 1.
[15] See *Moréteau* (fn. 3), YB 2005, at no. 5; *id.*, Revisiting the Grey Zone Between Contract and Tort: The Role of Estoppel and Reliance in Mapping out the Law of Obligations, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 60.
[16] The concept of consolidation is borrowed from labour law and welfare law: this is the moment where one moves from daily compensation (*allocations journalières*) to a permanent pension in the case of labour accidents. See *Y. Lambert-Faivre*, Le droit du dommage corporel (4th ed. 2000).
[17] Art. 2226.
[18] Art. 2224.
[19] Avant-projet, art. 2264 par. 2.
[20] BGB § 199 I No. 2.
[21] Art. 10.2(1).
[22] Art. 14:301.
[23] Though the technique is used in other areas of French civil law: see Civil Code, art. 215, 921 par. 2, and 1386-16.

Avant-projet,[24] is justified by the "slippery" point of departure of prescription.[25] It is another element of convergence of French law with German law and other European legal systems. The "long-stop" rule does not apply to cases of bodily injury or to other cases listed in art. 2232.

9 Prescription does not run or is suspended in case of "impossibility to act following an impediment resulting from the law, the convention, or force majeure."[26] This is new in the Code. French courts used to apply the *contra non valentem* rule, though restrictively, and some fear that its legislative presence may give the judge a broader discretion.[27] Prescription does not run or is suspended against unemancipated minors or majors in tutorship,[28] as well as between spouses or partners in a registered union.[29]

10 Prescription is also suspended wherever the parties agree to resort to mediation or conciliation, or failing such agreement from the day of the first mediation or conciliation meeting. Prescription runs again from the time one or all parties or the mediator or conciliator declare the mediation or conciliation terminated.[30] The same rule applies whenever the judge orders investigation measures prior to litigation, until the moment the measure is executed.[31] In all these cases, when prescription runs again, it cannot be for a period inferior to six months.[32]

11 Seven articles deal with the causes of interruption of prescription.[33] There is nothing special there but the application of well known rules that prescription is interrupted by a law suit[34] except where the plaintiff abandons his claim or is finally dismissed.[35] The admission by the debtor of the right of the other party also interrupts prescription.[36]

12 The new law favours contractual arrangements, and parties are left free to contract on prescription periods, as well as on causes of suspension and interruption.[37] Parties may expressly or tacitly waive prescription once the time has run.[38] According to art. 2254, "The prescription period may be abbreviated or prolonged by agreement of the parties. However it may neither be reduced to less than one year nor extended to more than ten years." One may wonder, however, whether it is permissible to limit prescription in the case of bodily

[24] Avant-projet, art. 2278, proposing a ten-year long-stop period.
[25] *Leroyer*, RTDCiv 2008, at 569.
[26] Art. 2234.
[27] *Leroyer*, RTDCiv 2008, at 570.
[28] Art. 2235.
[29] Art. 2236.
[30] Art. 2238.
[31] Art. 2239.
[32] Art. 2238 par. 2 and 2239 par. 2.
[33] Art. 2240–2246.
[34] Art. 2241.
[35] Art. 2243.
[36] Art. 2240.
[37] Art. 2254.
[38] Art. 2250 and 2251.

damage, where the prescription period is ten years. Art. 2226 is written in such a way that it is not totally clear whether it is mandatory (*d'ordre public*) or not. The courts will be called to decide this and several other matters. On the one hand, one notes a tendency of French jurisprudence to accept contractual arrangements in the case of bodily damage. On the other hand, such clauses may be treated as invalid because they limit or exclude liability. Will freedom of contract triumph, based on the general rule set at art. 2254? At a recent conference on the new law of prescription at the University of Metz (May 2008), A.M. Leroyer, S. Hocquet-Berg and D. Mazeaud sounded very skeptical.

B. Cases

1. Cass. 1st Civ. 8 November 2007, Bull. Civ. I, no. 350: Duty of Information of Tobacco Companies and Causation, No Compensation for Heavy Smokers[39]

a) Brief Summary of the Facts

13 The victim had smoked Gauloises cigarettes since the age of 13. Having smoked for 25 years, she died of lung cancer. Her husband and children sued the SEITA (French national tobacco manufacturer) for failure to inform the victim of the danger of tobacco consumption and addiction.

b) Judgment of the Court

14 The lower court denied that SEITA had been at fault for failure to provide information. The victim started smoking before the law of 9 July 1976 came into effect, putting tobacco manufacturers under a legal duty to inform customers of the danger of tobacco consumption. The Court added that even if SEITA had been a fault, there was no causation.[40] The Court of Cassation affirmed, checking that the victim must have been informed by her parents and the media during her adolescence, and later on by medical doctors, especially when she was pregnant. There would therefore be no causation between the alleged fault of the SEITA and the victim's death, the latter not being in a legitimate position to expect tobacco to be safe.

c) Commentary

15 The French Court of Cassation continues to deny the liability of tobacco manufacturers.[41] Interestingly, the Court seems to create a presumption of information of the smoker of the dangers of tobacco. The manufacturer does not have to prove that it had informed the consumer as the law of 1976 eventually

[39] D. 2008, 50 note *J. Revel*; RTDCiv 2008, 107, observations *P. Jourdain*; La Semaine Juridique: Juris Classeur Périodique (JCP) 2008, I, 125, observations *Ph. Stoffel-Munck*; D. 2008, 2896, observations *Ph. Brun/P. Jourdain*.

[40] CA Montpellier, 22 March 2006, JCP 2006, 10158, note *B. Daille-Duclos*.

[41] See Cass. 2nd Civ. 20 November 2003, JCP 2004, II, 10004, note *B. Daille-Duclos*; JCP 2004, I, 163, observations *G. Viney*, commented in European Tort Law 2003 (2004) 161, no. 24–28.

required, but the consumer may have to prove that she was not properly informed, which comes to a reversal of the burden of proof. The Court thereby astutely bypasses the need of discussing whether the SEITA was at fault or not, thus avoiding repeating the denial it had made in a previous case.[42]

The Court of Cassation decision stands on stronger feet regarding causation. 16
The damage was caused by the victim's behaviour. The doctrine of "efficient causation" is hereby applied: the Court weighs the respective importance of various factors in determining the legal cause of the damage.[43] This enables the Court to decide that the victim's behaviour was the legal cause, thereby excluding other causes that were less efficient. French law has a rule that the victim's fault fully exonerates the tortfeasor only in cases where it amounts to force majeure. In other cases, the victim's fault would only reduce the amount of compensation. Applying the doctrine of efficient causation has the effect of limiting the scope of the rule, or creating an exception to it, as some may prefer to say. The victim's behaviour being the legal cause, there will be no apportionment of liability.

It is clear that French courts do not want to open a path towards the compen- 17
sation of smokers or their successors for fear of mass litigation. As we noted commenting on an earlier case, "The French legal system – so generous towards victims engaged in the most absurd activities (…) – seems reluctant to act in cases where significant amounts of money are involved."[44] The sale of tobacco generates important tax resources and the industry was nationalized until 1995!

2. Cass. 1st Civ. 6 December 2007, Bull. Civ. I, no. 380: Duty of Information of Doctors, No Compensation for Non-Pecuniary Damage[45]

a) Brief Summary of the Facts

A heart patient was about to undergo carotid surgery. The surgeon omitted to 18
inform him of possible complications following this procedure. Such risk occurred, the patient suffering hemiplegia after surgery, and dying three years later following subsequent deterioration. His heirs sued the surgeon, both on the patient's behalf and for compensation of their own harm, arguing that there had been a loss of a chance and non-pecuniary damage.

b) Judgment of the Court

The Court of Appeal rejected the claim based on the loss of a chance, arguing 19
that the patient would have consented to surgery even if informed of the possibility of this rather unusual risk. However, damages were granted to com-

[42] Ibid.
[43] *G. Viney/P. Jourdain*, Les conditions de la responsabilité (3rd ed. 2006) no. 340.
[44] Supra fn. 41.
[45] D. 2008, 192, note *P. Sargos*; RTDCiv 2008, 303, observations *P. Jourdain*; JCP 2008, I, 125, no. 3, observations *Ph. Stoffel-Munck*; D. 2008, 2894, observations *Ph. Brun/P. Jourdain*.

pensate the non-pecuniary damage suffered by the patient himself. This part of the judgment was reversed by the Court of Cassation. The Court held that the medical duty to inform aims at favouring a lucid consent by the patient. The only recoverable damage in case of failure to inform is the loss of a chance to avoid the risk that eventually occurred.

c) Commentary

20 The obligation of doctors to inform is solidly established in French law: it originated in jurisprudence[46] before making its way into the Civil Code.[47] The patient may not be compensated for the full damage resulting from the occurrence of a risk, but only for a fraction of it, since this is nothing more than a loss of a chance.[48] There is no loss of a chance whenever it is clear that the patient would not have refused the procedure even if informed of the risks,[49] which is clearly the situation in the present case, where the patient's life was seriously in danger.

21 Should violations of the obligation to inform remain without sanction in the many cases where no loss of a chance may be adduced? This is where the present case is troubling its many commentators. The Court of Cassation must be approved where it decides that the heirs had no cause of action on their own right, as victims *par ricochet*. The Court of Appeal had checked that the patient was fully able to receive the information and give a lucid consent. The right to medical information is attached to the person of the patient. Information is due to close relatives only in those cases where the patient may not express consent.[50] However, the family also sued in their capacity as direct heirs of the patient. This is where the possibility to repair the non-pecuniary damage is denied by the Court of Cassation, when it insists that only a loss of a chance may be compensated.

22 Yet, the Court of Appeal had fully characterized the existence of a non-pecuniary damage, insisting that had the patient been informed, this would have reduced the shock caused by the accident that occurred after surgery. This non-pecuniary damage has been characterized as "unpreparedness harm" (*préjudice d'impréparation*),[51] information having the effect of preparing the patient of the possibility of more serious harm. The victim had been deprived of the possibility of a psychological preparation, which may have reduced the traumatism and made the whole experience less violent. Damages should be granted, even if minimal or nominal. The medical fault remains without sanction and we are after all dealing with a fundamental right of the patient.

[46] See *Viney/Jourdain* (fn. 43) no. 508.
[47] Art. 16-3 par. 2, introduced by law no. 2004-800 of 6 August 2004.
[48] Cass. 1st Civ. 7 December 2004, D. 2005, 403, observations *J. Penneau*.
[49] Cass. 1st Civ. 20 June 2000, Bull. Civ. I, no. 93; see other cases cited by *P. Jourdain*, RTDCiv 2008.
[50] Art. R 4127-36 par. 3 Code de la santé publique: "Si le malade est hors d'état d'exprimer sa volonté, le médecin ne peut intervenir sans que ses proches aient été prévenus et informés, sauf urgence ou impossibilité."
[51] *J. Penneau*, note on Angers, 11 September 1998, D. 1999, 48.

It may be noted that in this case, the cassation or reversal was based on art. R 4127-36 of the Health Code[52] and also on art. 1382 of the Civil Code. It indicates that the obligation to inform the patient is not contractual.[53] French scholars have a hard time believing that this may be true.[54] Liability for medical malpractice may be shifting from the realm of contractual to extra-contractual liability: let us keep an eye on further evolution before concluding that this is the end of another *exception française*! The reform of prescription commented above, unifying the regime of contractual and extra-contractual liability, has paved the way to such an evolution, which would be most welcome.[55] 23

3. Cass. 1st Civ. 22 May 2008, Bull. Civ. I, no. 148: Vaccination against Hepatitis B and Causation, Opening the Way to Compensation[56]

a) Brief Summary of the Facts

The employee of a private clinic had been vaccinated against hepatitis B, as part of a vaccination programme imposed by the employer. Shortly after, he experienced major health problems and was diagnosed as suffering from multiple sclerosis. He received compensation from the State, as part of a national plan of compensation of victims of compulsory vaccination, in addition to health care and other benefits as a victim of a labour accident. He also sued Sanofi-Pasteur, the manufacturers of the vaccine. 24

b) Judgment of the Court

The claim was dismissed. There is no scientific evidence that a vaccination against hepatitis B may provoke multiple sclerosis, the etiology of this disease being unknown. There was no sufficient probability that it may have been caused by the vaccine and therefore there was no causation. The Court of Cassation reversed, insisting that the existence of the damage, the defect of the product, and causation may result from presumptions. The mere reference to the absence of a scientific and statistical link between the vaccine and the development of the disease is not sufficient. Lower courts must examine, based on the evidence in the case, whether other proof exists, which may be based on presumptions. 25

c) Commentary

This is an important change. In previous Court of Cassation decisions, the scientific doubt prevailed: though it was impossible to exclude a link between the vaccination and the disease, this was not sufficient to establish causation.[57] The 26

[52] See fn. 50.

[53] This would be a major change, *une petite révolution juridique*, as noted by *Jourdain*, RTDCiv 2008, at 304.

[54] P. Sargos thinks that this may be a typo!

[55] See *Moréteau* (fn. 15) Revisiting the Grey Zone, no. 21.

[56] RTDCiv 2008, 492, observations *P. Jourdain*; JCP 2008, I, 186, no. 3, observations *Ph. Stoffel-Munck*; D. 2008, 2897, observations *Ph. Brun/P. Jourdain*.

[57] Cass. 1st Civ. 23 September 2003, Bull. Civ. I, no. 188; RTDCiv 2004, 101, observations *P. Jourdain*, commented in European Tort Law 2003 (2004) 164, no. 39–41. See also Cass. 1st Civ. 27 February 2007, D. 2007, 2899, observations *Ph. Brun*.

Council of State (the highest court for administrative law cases) had adopted a more flexible attitude, accepting a possible causation, taking into account the brief lapse of time between the vaccination and the development of the condition, on the one hand, and the prior good health of the patient and the absence of predisposition to such pathology, on the other hand.[58] The Court of Cassation adopts a similar position. Yet, rather than relying on expert evidence not excluding the possibility that vaccination may cause the disease, as the Council of State did, it invites judges to consider all available circumstances and derive presumptions therefrom. The approach is pragmatic and much room is left to judicial appreciation, which is after all a good thing.

4. Cass. 1st Civ. 13 March 2008, Bull. Civ. I, no. 76: No Partial Exoneration for the SNCF[59]

a) Brief Summary of the Facts

27 A female passenger travelling from Marseilles to Toul took a walk on the platform as the train called in Avignon and precipitately tried to board the train as it departed. She fell under the train and lost her leg. She sued the SNCF, the French national rail carrier, for compensation of the damage.

b) Judgment of the Court

28 The Court of Appeal of Aix-en-Provence held the SNCF 50% liable, considering that the victim's fault had contributed to the damage. The Court of Cassation reversed, indicating that the victim's fault may only be taken into account to exonerate the SNCF in those cases where it constitutes force majeure and was the exclusive cause of the accident. This was not the case since there was no system preventing the opening of the doors once the train was in motion. The carrier owes passengers a contractual obligation of safety. This obligation is of result and the victim's fault cannot allow partial exoneration. It may only exonerate fully, when characterized as force majeure.

c) Commentary

29 Readers of the Yearbook on European Tort Law know how easily victims of train accidents can be compensated by French courts: jumping off a train in motion does not constitute sufficient fault on the victim's part to exonerate the SNCF, since it does not result from force majeure.[60] The incident may be regarded as reasonably unpredictable, yet it is not impossible to prevent by an adequate system keeping the doors shut whilst the train is in motion… It is now confirmed that the victim's fault cannot even reduce the carrier's liability. This time the case was decided on the basis of the contractual obligation of safety,

[58] CE 9 March 2007, D. 2007, 2204, note *L. Neyret*; D. 2007, 2897, observations *Ph. Brun/P. Jourdain*.

[59] JCP 2008, II, 10085, note *P. Grosser*; RTDCiv 2008, 312, observations *P. Jourdain*; JCP 2008, I, 186, no. 8, observations *Ph. Stoffel-Munck*; D. 2008, 2899, observations *Ph. Brun/P. Jourdain*.

[60] Other cases have been commented in previous volumes: Cass. 2nd Civ. 27 February 2003, European Tort Law 2003 (2004) 166, no. 46–53; Cass. Plen. Ass. 14 April 2006, European Tort Law 2006 (2008) 202, no. 25–31.

derived from art. 1147 of the Civil Code. It makes the carrier as strictly liable as the regime of tort liability based on the fact of the thing (art. 1384 par. 1).

At least, when liability is extra-contractual and based on the fact of the thing, partial exoneration remains possible based on the contributory negligence of the victim.[61] It seems that this possibility is removed in cases of contractual liability where there is an obligation of safety characterized as "of result." Where the obligation is "of means," negligence must be alleged and proved. When "of result," liability is strict and exoneration is possible only by way of force majeure. At least in the past French courts accepted partial exoneration based on the victim's fault, much as they did with tort liability based on the fact of a thing (art. 1384 par. 1).[62] 30

The removal of partial exoneration in the context of contractual liability reminds the legal community of the very radical *Desmares* case decided in 1982.[63] It removed the possibility of partial exoneration based on the victim's fault in cases where liability was based on the fact of a thing. This all or nothing approach (full exoneration remained possible based on force majeure) had triggered the discussion and vote of the law of 5 July 1985 improving the situation of victims of road accidents. Shortly after, the Court of Cassation abandoned the all or nothing approach, and moved back to possible partial exoneration.[64] Regarding train accidents, force majeure is always rejected. This new jurisprudence makes the French railway a friendly world for the fools who hop on and off trains in motion. 31

5. Cass. 2nd Civ. 8 November 2007, Bull. Civ. II, no. 246: The Limits of Causation[65]

a) Brief Summary of the Facts

An employee was wrongfully dismissed by his employer. Five months later, he married, and died the next day. His widow was refused the benefit of the life-insurance that had been subscribed by the former employer to the benefit of the employee: the dismissal had indeed the effect of terminating the policy. She sued her husband's former employer for compensation of the loss of the insured capital. 32

b) Judgment of the Court

The claim was dismissed: the husband was no longer an employee, and there was no causal link between the employer's fault in the exercise of the right to dismiss and the alleged loss sustained by the victim. The Second Civil Chamber of the Court of Cassation affirmed. 33

[61] Cass. 2nd Civ. 27 February 2003, fn. 60 at no. 53.
[62] See the cases cited by *Jourdain*, RTDCiv 2008, at 313.
[63] Cass. 2nd Civ. 21 July 1982, RTDCiv 1982, 606, observations *G. Durry*.
[64] Cass. 2nd Civ. 6 April 1987, Gazette du Palais (Gaz. Pal.) 1987, 2, 240; D. 1987, 32, note *Ch. Mouly*.
[65] RTDCiv 2008, 307, observations *P. Jourdain*.

c) Commentary

34 This case offers a good classroom example for the discussion of fault, damage, and causation in the context of French law.

35 Fault: the alleged fault lies in a failure to perform a contractual obligation. The dismissal had been wrongful. A third party may sue in tort on the basis of improper performance of a contractual obligation.[66]

36 Damage: was the widow entitled to the insurance capital? Such a right could only potentially exist from the day of the wedding, to become effective at the time of the insured's death. For this to happen, the husband must have been an employee at the time when he got married. The alleged victim had no rights whatsoever at the time when her future husband was dismissed. Things may have been different if the victim had been married at the time of the dismissal.

37 Causation: based on the doctrine of equivalence of the conditions (*équivalence des conditions*), all acts that contribute to the damage, loss or injury should be treated as causal factors, even when some of the acts concerned would have played only a minor part in bringing about the negative outcome: it is enough that such act appears as a *conditio sine qua non*. It is clear that the wrongful dismissal deprived the surviving spouse of the benefit of life-insurance that she would have received had the employment contract not been terminated. The Second Civil Chamber of the Court of Cassation favours this doctrine,[67] but puts it aside in situations where one or several events occurred between the alleged fault and the alleged detriment. It then moves back to the doctrine of adequate causality (*causalité adéquate*), where the only cause of damage, loss or injury recognised is the one that normally causes that type of damage. This introduces a reasonable foreseeability test and allows the exclusion of events that contributed to the damage in some extraordinary manner, even if they could also be described as *conditio sine qua non*.[68] The present case illustrates this solution. The dismissal was certainly a condition of the alleged detriment, but a forthcoming element was needed, the marriage. Marriage was not a consequence of dismissal. It was rather a voluntary initiative of both the widow and her deceased husband, and it is not the cause of the alleged damage. The unfair dismissal of a future husband is not the adequate cause of the then widow's loss of a benefit that had already extinguished before she got married: French law does not console the wife of one day with such generous gifts.

[66] Cass. Plen. Ass. 6 October 2006, D. 2006, 2825, note *G. Viney*, European Tort Law 2006 (2008) 205, no. 32–41.
[67] See for instance, Cass. 2nd Civ. 27 March 2003, Bull. Civ. II, no. 76.
[68] See for instance, Cass. 2nd Civ. 13 July 2006, RTDCiv 2007, 128, observations *P. Jourdain*.

6. Cass. Plen. Ass. 9 May 2008, Bull. Ass. Plen., no. 3: Tort Liability of Third Party Inducing Non-Performance of a Contractual Obligation[69]

a) Brief Summary of the Facts

38 The owner of an apartment had given a non-exclusive mandate of sale to an estate agent. According to the contract, the commission was due by the seller even in the case of a sale concluded after the expiration of the mandate with a buyer presented by the agent. A couple visited the apartment during the mandate, using a false identity. They later purchased directly from the seller, who did not pay the stipulated commission to the agent. The agent sued the purchasers on the basis of art. 1382 of the Civil Code, claiming damages corresponding to the amount of the commission that he had been deprived of.

b) Judgment of the Court

39 The Court of Appeal found for the agent. The judgment was reversed by the First Civil Chamber of the Court of Cassation, who noted that since the commission was not owed by the buyers, there was no damage.[70] The case was remanded to another Court of Appeal. The purchasers were found liable, since they caused by their fraud the estate agent to lose the commission that he was entitled to (Nice, 23 January 2007). The Plenary Assembly of the Court of Cassation affirmed. True, the purchasers did not owe the commission. However, by their fraud, they caused the estate agent to lose the benefit of it, and this in a situation where the agent had been instrumental in creating the contractual relationship with the seller. Consequently, they owe compensation to the agent on the basis of tort liability. In addition, it was clear from the circumstances that the purchasers had full knowledge of the existence of the estate agent's right to a commission.

c) Commentary

40 A third party to a contract may be liable in tort to a party victim of non-performance of this contract, when contributing to such non-performance; there is abundant jurisprudence on this point.[71] The third party must be at fault, knowing the existence of the contractual obligation.[72] There is nothing new here.

41 The case has the advantage of making it clear that the liability of the third party is in tort,[73] and has all the characters and consequences of tort liability. The absence of a contractual obligation does not exclude the fault of the purchasers

[69] RTDCiv 2008, 485, observations *P. Jourdain*.
[70] Cass. 1st Civ. 27 April 2004, Bull. Civ. I, no. 111.
[71] *G. Viney*, Introduction à la responsabilité (3rd ed. 2008) no. 207 ff. For a comparative approach, see *B. Gardella Tedeschi*, L'interferenza del terzo nei rapporti contrattuali, un'indagine comparatistica (2008).
[72] Ibid., no. 207-3.
[73] The question was once disputed, R. Demogue having suggested that this should be contractual liability. However, the majority of authors and also the jurisprudence decided for tort liability. *Viney* (fn. 71) no. 207.

and the loss suffered by the agent. It is precisely because the purchasers were not parties to the contract that their liability is in tort. The agent, party to the mandate, was suing a third party, not on the basis of a contractual obligation, but of a fault generating tort liability. All conditions were met here to trigger tort liability based on fault: fault (fraud to allow the seller to bypass a contractual obligation known to the purchasers), damage (the loss of the commission), and causation. This may compare to the English tort of inducing a breach of contract.

42 However, we should note that this solution generates an additional avenue for the agent to recoup his loss. The agent had a contractual action against the seller. Does this render the damage uncertain, since it only exists in the eventuality of non-payment of the commission by the seller? Should the tort action have a subsidiary character? There is ample jurisprudence to this effect. There are cases deciding that a notary can only be made liable to his client for failure to draft a proper contract or register a security when the client proves that he failed in getting compensation from the other party.[74]

43 Clearly, the Plenary Assembly did not indicate that the agent should have sued the seller first, in performance of the contractual obligation. There is no subsidiary of the tort action. Rightly so, but what would happen if the agent, having recovered in tort from the purchasers, later sued the seller in payment of the commission? Res judicata (*autorité de la chose jugée*) may not be pleaded. There is no identity of action and of parties. The seller may be forced to pay a contractual, liquidated debt. He may not argue that the debt was assumed or paid by a third party, since the payment by the purchasers is on a debt of a different nature. May then the purchasers sue the agent in restitution for enrichment without a cause? The authority of the previous judgment may be an obstacle to such action, as may the turpitude of the purchasers: *nemo auditur propriam turpitudinem allegans*: *fraus omnia corrumpit*!

7. Cass. 1st Civ. 8 April 2008, Bull. Civ. I, no. 101: Greenpeace, Freedom of Expression, Trademarks, and Liability for Fault[75]

a) Brief Summary of the Facts

44 In a web campaign for the protection of the environment, the association Greenpeace used trademarks of Areva, the French company created in 2001 as a result of the merger of nationalized groups in charge of the development of nuclear energy. The logo and the name of Areva were associated to slogans such as "Stop plutonium", and to such images as a skull and crossbones or the logo on some dead or sick fish. Areva tried in vain to seek protection under the law of trademarks, and later sued Greenpeace in tort, on the basis of fault liability (art. 1382 of the Civil Code).

[74] See for more detail and references, *Viney/Jourdain* (fn. 43) no. 287-1.
[75] D. 2008, 2402, note *L. Neyret*; JCP 2008, II, 10106, note *C. Hugon*; RTDCiv 2008, 487, observations *P. Jourdain*; D. 2008, 2898, observations *Ph. Brun/P. Jourdain*.

b) Judgment of the Court

The trial court and the Court of Appeal found for Areva. Injunction was granted to stop the use of trademarks, and nominal damages were awarded. The combination of the marks of Areva with symbols of death conveyed the impression that the products and services of this company had a mortal character. The Court of Cassation reversed in part. Its First Civil Chamber agreed that the application of art. 1382, though not appropriate to repair damage to the reputation of the company itself, may be a suitable way to redress harm to its products and services. However, also checking art. 10 of the European Convention on Human Rights, the First Chamber ruled that Greenpeace had acted within the scope of its purpose of serving the general interest and public health; it had used "means proportionate to this end." Therefore Greenpeace had not abused their freedom of expression. 45

c) Commentary

The combination of fault based tort liability (art. 1382) with freedom of expression and freedom of the press was recently explored in a previous case.[76] We then blamed the Court of Cassation for excluding totally and upfront any application of the general clause to cases that may fall under the provisions of the law of 29 July 1881 on freedom of the press. Here is a new combination of art. 1382 with freedom of expression, this time in the context of trademarks. The Court of Cassation makes room for the article to apply, but in a rather restrictive manner. Harm should be directed at products and services by a wrongful use of marks, and not to the general reputation of the company. Paradoxically, this offers a better protection to things such as goods and services than to persons, since the protection of the reputation of a person can only be based on the more restrictive conditions imposed by the law of 1881 on freedom of the press.[77] However, it may be a good idea to accept the applicability of the general clause of art. 1382 to take care of abuses of freedom of expression aiming at products or services, whether or not they aim at trademarks. 46

The First Civil Chamber of the Court of Cassation does a good job in combining the application of art. 1382 with art. 10 of the European Convention on Human Rights and adopting a balance of interests approach. The Commercial Chamber of the same Court acted in a similar way in a case decided on that same day.[78] We may wish the part of the judgment checking on proportionality to be more developed.[79] Some commentators argue that the Court of Cassation has acted in a somewhat authoritarian way, quashing the judgment of the Court of Appeal without remanding the case to another Court, thereby making sure it has the last word.[80] If the check on proportionality is a question of law, the Court of Cassation cannot be blamed. If a question of fact, the last word should 47

[76] Cass. 1st Civ. 27 September 2005, D. 2006, 485, note *T. Hassler*; European Tort Law 2006 (2008) 201, no. 20–24.
[77] See *Jourdain*, RTDCiv 2008, at 487 f.
[78] Cass. Com. 8 April 2008, Bull. Civ. IV, no. 79; RTDCiv 2008, 487, observations *P. Jourdain*.
[79] The question is largely discussed by *L. Neyret*, D. 2008, at 2402.
[80] See *Ph. Brun*, D. 2008, at 2899.

be left to the lower judges. Still, do we need a fourth court to pronounce on this case? Let Areva take care of nuclear energy and the green go in peace. Freedom of expression is paramount; everyone visiting the Greenpeace website cannot expect to read positive things on nuclear energy.

8. TGI Paris 16 January 2008, JurisData no. 2008-351025: The Sinking of the Tanker Erika: The Recognition of Environmental Harm[81]

a) Brief Summary of the Facts

48 The tanker Erika split in two off the French Atlantic coast in severe weather on 12 December 1999 and spilled 15,000 tonnes of her heavy fuel oil cargo. The entire crew of 26 was airlifted to safety. The two sections, with a further 15,000 tonnes of fuel oil remaining in the cargo tanks, sank in 120 metres of water about 100 km from the mouth of the River Loire. The spilt cargo was blown east towards the coast and on 25 December the first oil washed ashore. By early January various stretches along a 400 km length of French coastline had been polluted, and thousands of seabirds had been oiled. The State, a number of local authorities, associations, and individuals had initiated criminal proceedings, together with claims in damages (*plainte avec constitution de partie civile*), against Total, the French multinational oil company owning the cargo, the carrier, and other protagonists of the catastrophe.

b) Judgment of the Court

49 The Paris Tribunal found parties guilty of marine pollution, an offence broadly defined in art. 8 of law no. 83-583 of 5 July 1983.[82] Those at risk for punishment under this law were the ship-owner, operator, their legal or de facto representatives and any person having control of the vessel,[83] for error of navigation or negligence in the maintenance of the vessel, causing marine pollution. Corrosion of the vessel was recognized as the cause of the disaster, and all parties having intervened after the loading of the ship, including the shipmaster, were therefore acquitted with the benefit of the doubt. The ship-owner and the classification society were found guilty and therefore liable. Total, the owners of the cargo, were also found guilty and liable because of the vetting or control they had voluntarily exerted on the tanker.

50 In addition to fines ranging from € 75,000 for individuals to € 375,000 for corporate bodies, substantial damages were awarded, all convicted parties being found liable in solidum. A compound of € 164 million was awarded to repair pecuniary losses sustained by the State, local authorities, and also environmental associations having incurred substantial expenses in their effort to salvage

[81] *L. Neyret*, Naufrage de l'Erika: vers un droit commun de la réparation des atteintes à l'environnement, D. 2008, 2681. See also *K. Le Couviour*, Après l'Erika: réformer d'urgence le régime international de responsabilité et d'indemnisation des dommages de pollution par hydrocarbures, JCP 2008, I, 126.

[82] Art. L 218-10 ff., Code de l'environnement, recently amended by law no. 2008-757 of 1 August 2008.

[83] Art. L 218-22, IV, Code de l'environnement.

birds. A number of travel agents and local merchants were also able to recoup some of their losses.

A total of € 26 million was awarded to compensate non-pecuniary damage, especially of local authorities and resort areas all along the 400 km of polluted coasts, suffering damage to their reputation. 51

In addition, "damage resulting from harm to the environment" was also compensated, for a total amount of € 1,315,000. Only those local authorities having a special competence in environmental matters were allowed to benefit from that compensation, such as the Département du Morbihan, since it had acquired 3,000 hectares of sensitive natural space for which it spends € 2.3 million tax money every year.[84] Likewise, the *Ligue de protection des oiseaux* (LPO) obtained € 300,000 corresponding to € 5 compensation per removed dead bird. 52

c) Commentary

This judgment has the effect of recognizing the autonomous existence of "damage resulting from harm to the environment." It also extends liability to a large oil company owner of the cargo. A few years ago, we noted the poor compensation received by the many victims of the major pollution caused by the sinking of the tanker Erika:[85] "A French fund called POLMAR (*Fonds d'intervention contre les pollutions marines accidentelles*) was used to cover some € 125 million of public works to clean up, to which the government added another € 100 million for renovation purposes. This disaster revealed that the International Oil Pollution Compensation Funds based on the 1992 international convention (in French called FIPOL and in English IOPC Funds) provides for insufficient coverage. Only six months later, in July 2000, did the IOPC Funds fix a compensation rate covering 50% of the victims' damage. One year later, the Fund had paid not more than € 6 million. The State quickly organized a compensation system to provide victims with substantial cash advances on the expected compensations. On 11 September 2000, cash advances were transformed into additional compensation to allow victims to receive full compensation. Meantime, the State had organized, through the banking system, similar cash advances to enterprises having suffered from the pollution, especially in the tourism sector. Ever since France has pressed the IOPC Funds to increase its coverage to € 2 billion." The carefully written judgment of the Paris Court dramatically increases the compensation of a wide array of victims. 53

As to the compensated damage, two things must be noted. Firstly, the very precise definition and calculation of each head of damage. Secondly, the recognition of "damage resulting from harm to the environment." "The local authorities to whom the law grants a specific competence in matters of environment, 54

[84] The Court calculated the compensation based on the tax money spent over two years on the 662 hectares affected by pollution.

[85] *M. Cannarsa/F. Lafay/O. Moréteau*, France, in: M. Faure/T. Hartlief (eds.), Financial Compensation for Victims of Catastrophes (2006) 81, at 114, no. 80.

conferring upon them a special responsibility in the protection, management, and preservation of a territory" are eligible to compensation of such harm.[86] Only those authorities having proved effective harm to a sensitive zone got compensation.[87] Given its object, the LPO is also eligible. The Court notes the great impact of the disaster on the thousands of birds hibernating in the region, and also the very efficient role of LPO in taking care of the birds over a period of several months, in connecting with the local authorities and population, as well as its national and international representativeness.[88] Such harm appears to be considered objectively rather than in consideration of the person of the victim.[89] It had been recognized before but never with such high scale compensation.[90]

55 The condemnation of Total, as welcome as it may be, may appear more controversial, revealing a tendency of French courts to revert to deep pockets. In submitting the tanker Erika to vetting inspection, Total interfered in the management of the vessel and could therefore be regarded as guilty of the offence of maritime pollution. Oil companies have abandoned their fleets to escape liability. Yet, they try to keep control of the vessels they charter. In making Total guilty and liable, the Paris Court may not comply with international conventions.[91] It acknowledges the deficiency of the international compensation system, namely the IOPC Funds, which may be complemented by the application of ordinary rules, as the Court does. Indeed, as noted above, the IOPC Funds only offer partial compensation,[92] and do not recognize the concept of harm to the environment. The Erika judgment may not be appeal-proof, yet it will hopefully serve as a beacon or lighthouse for those navigating towards a better regime of compensation of environmental harm.

9. Cass. 2nd Civ. 15 May 2008, Bull. Civ. II, no. 112: Preventive Expenses Compensated[93]

a) Brief Summary of the Facts

56 The defendant had done clearing and earthworks on his hillside land, endangering the property of the claimant, his neighbour living down the cliff. Previously solicited expert opinion revealed that the excavations had created unstable masses requiring drainage and some wall construction. The claimant consequently incurred expenses to prevent the risk of landslide. He sued the defendant in payment of the cost of the works, amounting to € 23,690.

[86] Par. 3.1.2.2.2.3. of the Judgment.
[87] See supra no. 52.
[88] Par. 3.1.2.2.6. of the Judgment.
[89] See *Neyret*, D. 2008, at 2685.
[90] See ibid., at 2681, and *L. Neyret*, La réparation des atteintes à l'environnement par le juge judiciaire, D. 2008, 170, at 172.
[91] See *Le Couviour*, JCP 2008, I, at 13.
[92] Supra no. 53.
[93] RTDCiv 2008, 679, observations *P. Jourdain*; JCP 2008, I, 186, no. 1, observations *Ph. Stoffel-Munck*; D. 2008, 2900, observations *Ph. Brun/P. Jourdain*.

b) Judgment of the Court

The Court of Appeal found the expenses reasonable and granted damages amounting to the cost of the preventive works. The Court of Cassation affirmed, checking that the existence of damage had been characterized in the challenged judgment. 57

c) Commentary

Was the damage hypothetical or real? There is no compensation without certainty of damage. Hypothetical damage (*préjudice éventuel*) and preventive expenses were discussed last year in the context of prevention of a serious health risk to a heart patient, and we regretted the Court of Cassation's reluctance to compensate preventive expenses.[94] As clearly noted by a commentator, the damage does not lie in the risk, but in the expense incurred in order to prevent it.[95] The present judgment is a step towards the recognition of compensation for preventive expenses.[96] One may regret the strange wording used in the judgment, describing as characterized "a damage including the conditions for its realization."[97] A provision such as art. 2:104 of the Principles of European Tort Law would make things easier: "Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred." Such a provision is contained in the Catala *Avant-projet*,[98] and we hope it also finds its place in the project prepared by the Ministry of Justice. 58

10. Cass. 2nd Civ. 15 May 2008, Bull. Civ. no. 108: Liability of Companies: Back to Vicarious Liability[99]

a) Brief Summary of the Facts

The victim's husband was the manager of a small company who had his office in an annex to his father's house. He had equipped the room with a French window that opened onto a balcony, giving access to the office, located on the first floor. As his wife closed the window before leaving the office, the handle dislocated. This caused the victim to lose her balance, fall back and break the provisional balcony railing, thus reaching the garden level without using the stairs. She sued her father-in-law, who was the owner of the premises, her husband, the company manager, and their insurance companies. The latter also called on the manufacturers of the window and of the handle, the wholesale dealer, and the company that occupied the premises. 59

[94] Cass. 1st Civ. 19 December 2006, JCP 2007, II, 10052, note *S. Hocquet-Berg*; European Tort Law 2007 (2008) 282, no. 33–40.
[95] *Jourdain*, RTDCiv 2008, at 680.
[96] See also Cass. 1st Civ. 28 November 2007, Bull. Civ. I, no. 372, JCP 2008, I, 125, no. 7, observations *Ph. Stoffel-Munck*.
[97] In the original French, "un préjudice portant en lui-même les conditions de sa réalisation."
[98] Art. 1344.
[99] RTDCiv 2008, 679, observations *P. Jourdain*.

b) Judgment of the Court

60 The Court of Appeal found the owner of the premises and the company negligent for not having installed a safer railing, and made them liable each for one half. On appeal from both defendants, the Second Civil Chamber of the Court of Cassation held that negligence could not be disputed, and that the company was to be held liable for the negligence of its manager, based on liability for others and not on the basis of a personal fault of the company.

c) Commentary

61 "Under most legal systems, legal entities are subject to vicarious liability for torts of their organs or agents."[100] French law traditionally regards the liability of companies as justified by the fact that they are legal entities, and actions by their organs are imputed directly to the juristic person.[101] This is by the way the position of the majority of the European Group on Tort Law.[102] The present judgment takes a different route and regards the organ of a company as equivalent to an auxiliary, making the company liable not based on its personal fault as an autonomous entity (art. 1382) but on the act of its auxiliary (art. 1384 par. 5). Legal orthodoxy seems to require that organs of a company, expressing an autonomous will, act on behalf of the company and not as auxiliaries. The latter quality may only be suitable in those cases where the manager is also a company employee.[103] There is no reason however to comment heavily on this regrettable drawback,[104] the company being liable all the same, be it vicariously or for its own fact.

62 Last but not least, there was no room here for product liability: the selected handle was inadequate for that type of door and had been assembled the wrong way around. The balcony served as a landing giving access to the office, and both defendants should have installed a much safer rail!

C. Literature

1. *Mireille Bacache-Gibeili*, Droit civile – La responsabilité civile extracontractuelle, in: C. Larroumet (ed.), Les obligations, vol. V (Economica 2007) 783 pages (pp.)

63 The phrase "extra-contractual liability" had already been used by Philippe Brun as the title to his remarkable book on French tort law.[105] The multiplication of special regimes (road traffic accidents, product liability and medical malpractice, to name the main ones) justifies this phraseology, nowadays used

[100] Principles of European Tort Law, comments under art. 6:102 (*O. Moréteau*), at no. 21.
[101] Cass. 2nd Civ. 17 July 1967, RTDCiv 1968, 149, observations *G. Durry*; Cass. 2nd Civ. 17 March 1993, Bull. Civ. II, no. 108.
[102] Ibid.
[103] *Jourdain*, RTDCiv 2008, at 682.
[104] Art. 1353 of the Catala *Avant-projet* recognizes the fault of legal entities.
[105] See our review in European Tort Law 2006 (2008) 210, no. 49.

by many, and yet still perceived as controversial. The present volume complements the series inaugurated by Christian Larroumet, who never came to write the volume on tort liability, which is not his favourite subject.[106] It offers a very clear and simply organized presentation of the topic, making it accessible to students. The book is the result of good research and a true piece of scholarship, with full exposure of all opinions on controversial issues. Whether or not one shares the personal views of the author, one must agree that this is a very valuable addition to the existing literature.

2. *Cyril Bloch*, La cessation de l'illicite. Recherche sur une fonction méconnue de la responsabilité civile extracontractuelle (Dalloz, Nouvelle bibliothèque de thèses 2008) 673 pp.

64 The author shows that beyond compensation, civil liability aims at the cessation of unlawfulness. This may very visibly be the case in jurisdictions such as the United States where tort law performs a regulatory function and aims at eliminating undesirable and socially unacceptable conducts. Cyril Bloch shows that this is also true of French tort law, as revealed for instance, by the frequent use of the word "trouble," meaning disorder or disturbance. Provisions exist that permit the quick elimination of "an obviously unlawful disorder" by the use of interim injunctions. The interest of the book is that not only does it focus on special provisions aiming at the elimination of unlawfulness, but it shows that the whole idea permeates the entire law of extra-contractual civil liability. It complements and renews the work of major predecessors such as M.-E. Roujou de Boubée[107] and Marc Puech.[108]

3. *Caroline Lacroix*, La réparation des dommages en cas de catastrophes (LGDJ Bibliothèque de droit privé, vol. 490, 2008) 424 pp.

65 This is the first book entirely devoted to the compensation of the victims of catastrophes under French law. It covers most aspects described in the French Report in Financial Compensation for Victims of Catastrophes,[109] an international publication not cited in the abundant bibliography, which is short of foreign publications. By a practice that may be described as the rule of the three Fs, French scholars, young and old, only cite French law sources published in the French language and in French publications.[110]

66 The first part of the book gives a fair and complete description of the complex system of compensation of victims. The reading is not dry however, the author insisting on the social perception of catastrophes and the importance of the media. The second part is entirely devoted to the judicial process, with a strong

[106] See the review by *G. Durry*, RTDCiv 2008, 367.
[107] *M.-E. Roujou de Boubée*, Essai sur la notion de réparation, LGDJ 1974.
[108] *M. Puech*, L'illicéitié dans la responsabilité civile extracontractuelle, LGDJ 1973.
[109] *Cannarsa/Lafay/Moréteau* (fn. 85) 81–118.
[110] Further studies are also ignored, but were not available at the time: *O. Moréteau*, Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility, in: W.H. Van Boom/M. Faure/T. Hartlief (eds.), Shifts in Compensation between Private and Public Systems (2007) 199–218.

focus on criminal law. The author believes that beyond the benefit of insurance and compensation funds, victims need a catharsis experience, a possibility to address publicly the alleged tortfeasors. She calls for extended criminal repression of unintentional conduct to give direct victims and associations a suitable forum to express their grief. Throughout the book, she addresses the collective and emotional impact of catastrophes. This is strongly taken into account in French court practice, as noted earlier in our comment to the very carefully drafted Erika judgment.[111] The second part is probably the most interesting part of the book, which will all together remain a reference for all scholars working on the law of catastrophes.

[111] Supra, no. 48–55.

X. Germany

Florian Wagner-von Papp and Jörg Fedtke

A. Legislation

1. Versicherungsvertragsgesetz (Insurance Contracts)[1]

This reform of German insurance contract law was passed by Parliament in late 2007; most of its provisions, however, only came into force in January 2008.[2] It thus seems appropriate to address this important piece of legislation in the current Yearbook. 1

The main operative part of the Act (Art. 1) brings about a general overhaul of the law applicable to insurance contracts. Large parts of its predecessor, the Act on Insurance Contracts, had remained unchanged since their enactment in 1908 and were considered hopelessly outdated. The courts had brought about substantial changes in this area of the law over the past century, usually strengthening the position of the insured party; the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) and the Federal Court of Justice (Bundesgerichtshof, BGH) confirmed this trend, in particular with regard to transparency requirements, in 2005. The Act now seeks to enhance the statutory position of the insured party, and to increase transparency in insurance contracts. The *travaux préparatoires* also mention explicitly that the reformed Act may have a greater chance than its outdated predecessor to serve as a model for a harmonised European approach. The emergence of a European insurance contract regime in the short to medium term is, however, considered rather unlikely.[3] 2

Art. 1 of the Act provides general rules, applicable to all types of insurance contracts, as well as separate chapters on different forms of insurance. The 3

[1] Gesetz zur Reform des Versicherungsvertragsrechts vom 23.11.2007, Bundesgesetzblatt (BGBl) 2007 I 2631. For an overview see *T. Langheid*, Die Reform des Versicherungsvertragsgesetzes, Neue Juristische Wochenschrift (NJW) 2007, 3665 (Part I); NJW 2007, 3745 (Part II). For comprehensive commentaries, see *W. Rüffer/P. Schimikowski*, Versicherungsvertragsgesetz (2008); *P. Schwintowski/C. Brömmelmeyer*, Praxiskommentar zum Versicherungsvertragsrecht (2008).

[2] Art. 12 of the Act.

[3] Drucksachen des Deutschen Bundestages (BT-Drs) 16/3945, 47.

following chapters of Art. 1 are of greatest interest in the present context: Indemnity Insurance,[4] Third Party Insurance,[5] Fire Insurance for Buildings,[6] Disability Insurance,[7] and Accident Insurance.[8] For tort victims, the rules on Mandatory Third Party Insurance[9] will be of particular importance as the victim may have a direct claim against the insurer – for instance if insurance is made mandatory by the Act on Mandatory Insurance (Pflichtversicherungsgesetz) or if the insured party is insolvent,[10] and the victim notifies the insurer within two weeks.[11] This direct claim may – to a limited extent – exist even in cases in which the insured party itself would not have a claim against the insurer.[12] Judgments, settlements, or acknowledgements of a debt *against the third party* that have become final (regardless of whether they were obtained by the insurer or the insured party) will not only have effect *inter partes* but can be relied on both by the insurer and the insured party.[13] If the third party obtains a judgment, settlement, or acknowledgement of a debt *against the insurer*, the insured party will have to accept the existence of liability toward the third party as given in case the insurer subsequently seeks recourse, unless the insured party can show that the insurer did not take due care in defending against the claim.[14]

2. Gentechnikgesetz (Genetically Modified Organisms)[15]

4 The Act on Genetically Modified Organisms[16] establishes strict liability for research and production sites as well as any other activities involving GMOs which may not yet be generally circulated.[17] Liability outside this specific area follows from the general rules of German tort and, more importantly, property law (nuisance).[18] The most recent reform of the Gentechnikgesetz does not change this bifurcated system of liability – despite much criticism from both the pro- and anti-GMO lobbies in Germany. The statute, however, also establishes safety standards which indirectly affect liability under the German Civil Code. Two changes in this area are thus important to note.

[4] § 74–99.
[5] § 100–124.
[6] § 142–149.
[7] § 172–177.
[8] § 178–191.
[9] § 113–124.
[10] § 115.
[11] § 119, 120.
[12] § 117.
[13] § 124(1).
[14] § 124(2).
[15] Erstes Gesetz vom 1.4.2008 zur Änderung des EG-Gentechnik-Durchführungsgesetzes (BGBl 2008 I 497) and Gesetz vom 1.4.2008 zur Änderung des Gentechnikgesetzes, zur Änderung des EG-Gentechnik-Durchführungsgesetzes und zur Änderung der Neuartige Lebensmittel- und Lebensmittelzutaten-Verordnung (BGBl 2008 I 499).
[16] Gentechnikgesetz (GenTG).
[17] See § 32 GenTG.
[18] For details see *J. Fedtke*, Economic Loss Caused by GMOs in Germany, in: B.A. Koch (ed.), Economic Loss Caused by Genetically Modified Crops. Liability and Redress for the Adventitious Presence of GMOs in Non-GM Crops (2008) 222 ff.

First, the general safety standards established by § 16b (2) and (3) GenTG have now been set out in more detail by ordinance.[19] Specific duties include providing timely and comprehensive information to authorities and neighbours;[20] safe storage[21] and transportation;[22] careful use of machinery;[23] the removal of alien plants from the field (so-called *Durchwuchs*);[24] and detailed documentation.[25] 5

More importantly, the exact size of safety corridors designed to prevent or minimalise cross-fertilisation between conventional forms of agriculture and GM farming has now been defined in an annex to the ordinance. At present, only a single GM crop – corn of the variety Mon 810 – is licensed for use in Germany. A farmer wishing to grow this plant must leave a corridor of 150m to any neighbour with conventional crops and 300m to any neighbour farming organically.[26] These distances can be reduced by agreement[27] though this will require the neighbour to label his own produce as "genetically modified" even if contamination levels – unless completely insignificant – remain below 0.9% as prescribed by EU legislation and § 17b GenTG. This strict standard results from the fact that German law only tolerates low contamination levels without a warning if they are technically unavoidable. The new ordinance now draws the line between unavoidable levels (below 0.9% *despite* adherence to the safety corridors) and avoidable contamination (*any* level if the safety corridors were reduced by private agreement). 6

An additional – related – point should be mentioned in this context. Food products may not be labelled as "free of GMOs" if genetically modified feed is used in the production of one of its components. This rule applies, e.g., to dairy products made from milk which is produced by cows feeding on GM corn or soya. Past use of GM feed is allowed within defined limits.[28] This change in the law – the so-called "no-GM labelling rule" – may even require a new approach in free speech cases.[29] 7

[19] Verordnung über die gute fachliche Praxis bei der Erzeugung gentechnisch veränderter Pflanzen (Gentechnik-Pflanzenerzeugungsverordnung, GenTPflEV) of 7 April 2008, BGBl 2008 I 655.
[20] § 3 and 5 GenTPflEV.
[21] § 6 GenTPflEV.
[22] § 7 GenTPflEV.
[23] § 9 GenTPflEV.
[24] § 10 GenTPflEV.
[25] § 12 GenTPflEV.
[26] See no. 1 and 2 of the annex to the GenTPflEV concerning genetically modified corn.
[27] § 16b(1) GenTG.
[28] § 3a and 3b Gesetz zur Durchführung der Verordnungen der Europäischen Gemeinschaft auf dem Gebiet der Gentechnik und über die Kennzeichnung ohne Anwendung gentechnischer Verfahren hergestellter Lebensmittel (EGGenTDurchfG) as amended by the Act of 1 April 2008 (see fn. 15).
[29] See case 6 at no. 37 below.

3. Gesetz zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums (Intellectual Property Rights)[30]

8 This piece of legislation was enacted pursuant to European Union law aimed at the harmonisation of measures, remedies and procedures protecting against the infringement of intellectual property rights across the Community,[31] and is designed in particular to combat piracy and counterfeiting. The omnibus law, which came into force on 1 September 2008, deals with the infringement of patents, utility models, trademarks, copyrights, plant varieties, semiconductor products, and industrial designs by amending the relevant German statutes.[32]

9 The main substantive changes focus on remedies. These include damages appropriate to the prejudice suffered and, alternatively, the award of payments equal to the royalties that would have been due to the holder of the right in question. This approach, which takes into account a range of factors including losses suffered by the injured party and "moral" prejudice, reflects to a large extent German case law prior to the enactment of the EU Directive. Punitive damages cannot be claimed. The position of victims is, however, further strengthened by the introduction of rights designed to expose infringements. The German Copyright Act, for example, now establishes information rights against copyright infringers, users of their products, and individuals or entities which facilitated the violation; similar rights have been introduced to the other statutory IP regimes. The information rights against facilitators of copyright infringements are thereby expected to impact quite heavily on internet service providers (ISPs), who may have to disclose details of individuals or entities (for example exchange sites or sales portals) if certain conditions are met. One of the most controversial issues here was the requirement that the actual copyright infringement reflect a commercially significant violation. The solution eventually adopted is a combination of the total number of accessible uploads to the ISP and the size of single files (e.g., complete movies, music albums, or audio novels).

10 Changes to the Copyright Act also include the introduction of a statutory cap on the costs of cease-and-desist proceedings in simple cases involving non-commercial copyright infringements. These are now limited to € 100.

[30] Gesetz vom 7.7.2008 zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums (BGBl 2008 I 1191).

[31] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Official Journal (OJ) L 157, 30.4.2004, 45–86 ('Enforcement Directive').

[32] The amended statutes include the Patent Act (Patentgesetz), the Utility Model Act (Gebrauchsmustergesetz), the Trademark Act (Markengesetz), the Semiconductor Protection Act (Halbleiterschutzgesetz), the Copyright Act (Urheberrechtsgesetz), the Industrial Design Act (Geschmacksmustergesetz), the Plant Variety Act (Sortenschutzgesetz), and a number of laws which ratify international agreements in these areas.

B. Cases

1. BVerfG, 13 June 2007, NJW 2008, 39: Artistic Freedom v Personality Rights I (Esra)[33]

a) Brief Summary of the Facts

The applicant (defendant in the contested decisions) is a publishing house which published the novel *Esra*. The applicant challenges several injunctions prohibiting further publication of this book. It claims that these injunctions infringe its constitutionally guaranteed artistic freedom. In *Esra*, the author essentially describes his love affair with the first claimant of the original lawsuit. Intimate particulars of the relationship and of the first claimant's private life are disclosed in great detail. The novel reveals the minutiae of the sexual relationship between the two, describes quarrels between the first claimant and her mother (the second claimant), and discloses details of an illness of the first claimant's daughter. While the names of the protagonists are fictionalised, the claimants were readily identifiable in the novel as originally published, inter alia, because the fictional characters were respectively described as laureates of the Bundesfilmpreis and the Alternative Nobel Prize – honours which have in fact been conferred on the two claimants. 11

Following the initiation of court proceedings, the defendant/applicant agreed to delete some of the identifying information and to fictionalise the names of the prizes. The claimants nevertheless sought – and obtained – injunctions preventing the applicant from publishing the novel. The Regional Court,[34] the Higher Regional Court,[35] and the Federal Court of Justice all held that the remaining personal details were sufficient to identify the claimants, and that the information disclosed in the novel was detrimental to their reputation and violated their personality rights. The injunctions were issued pursuant to § 823(1), 1004 of the German Civil Code[36] in conjunction with Art. 2(1) of the German Constitution (Basic Law).[37] The courts did acknowledge that the claimants' personality rights had to be balanced against the author's and the applicant's right to artistic freedom following from Art. 5(3) GG, but came out in favour of the claimants. 12

b) Judgment of the Court

The majority opinion of the Federal Constitutional Court stresses a number of well-established principles: First, despite the difficulties in defining the term "art" in abstracto, *Esra* fulfils the criteria of a creative composition in which the artist's experience and impressions are articulated in a formalised way of expression.[38] Despite the similarity between the description and real events, 13

[33] Case 1 BvR 1783/05 = Juristenzeitung (JZ) 2008, 571 with a case note by *Chr. Enders*.
[34] Landgericht (LG).
[35] Oberlandesgericht (OLG).
[36] Bürgerliches Gesetzbuch (BGB).
[37] Grundgesetz (GG).
[38] These defining criteria for a work of art were established in BVerfG, 24 February 1971, 1 BvR 435/68, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 30, 173, 188 f. – *Mephisto*.

there were sufficient artistic elements to justify characterising the book as a work of art. Secondly, although artistic freedom is primarily directed against public authority, it is also part of the "objective" legal order; courts (which exercise state power) thus have to take this right into account even when dealing with disputes between private parties.[39] Thirdly, artistic freedom protects not only the creation of an artistic work but also its dissemination; publishers can rely on this right just as artists can.[40] Fourthly, while balancing fundamental rights in disputes between private parties – and, in particular, the factual basis for this exercise – will usually be subject to only limited review by the BVerfG, the injunction against the publication of an artistic work is such a strong interference that the Court will review its constitutionality based on the entire context of each specific case. Fifthly, while artistic freedom is not expressly subject to limitations, it has to be balanced against competing fundamental rights of third parties, in particular the general personality rights derived from Art. 2(1), 1 GG. The latter will be of particular weight if the infringement goes to the core of the personality right and affects human dignity. Personality rights of children and their relationship to their parents will also demand stronger protection.[41]

14 In applying these principles to the case at hand, the Court concludes that the claimants' personality rights are implicated because (1) they can be identified as the role models for the fictional characters by others; and (2) the descriptions in the novel are by their nature sufficiently critical and thus capable of severely infringing these rights. The Court does not require that a significant proportion of readers connect the novel's protagonists to the claimants. The judgment stresses, however, that a mere possibility of identifying the real role model for a character on the basis of more than insignificant research would not suffice lest the creative process of translating the artist's experiences into artistic work be chilled. The Court holds that the implication of the claimants' personality rights in itself is not sufficiently severe to completely disregard the competing right to artistic freedom. The two rights thus need to be balanced against each other. Two determinative factors are singled out: (1) The degree of abstraction from reality; and (2) the intensity of the infringement of personality rights. As to the first factor, the Court emphasises that in evaluating creative work, one has to bear in mind that the audience will understand that art is not meant to be a faithful depiction of reality. The Court then focuses on the reciprocal relationship between the two factors. The more a work of art differs from reality, the greater liberties an artist can take (and vice versa). In applying these principles to the case, the Bundesverfassungsgericht finds that the ordinary courts have failed to sufficiently distinguish between the first and the second claimant. In relation to the latter, the Court finds that the novel makes sufficiently clear that the storyline is fictional; one of the relevant as-

[39] For the indirect application of human rights in Germany between private parties, see the leading case BVerfG, 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198, 204 ff. – *Lüth*; *J. Fedtke*, Drittwirkung in Germany, in: D. Oliver/J. Fedtke (eds.), Human Rights and the Private Sphere – A Comparative Analysis (2007) 125 ff.

[40] See BVerfG, 24 February 1971, 1 BvR 435/68, BVerfGE 30, 173, 189 – *Mephisto*.

[41] See Art. 6(1), (2) GG.

pects is seen in the narrative style which describes the related events as second hand knowledge and rumours. Therefore, the Court finds that while the second claimant is identifiable as the role model for one of the novel's protagonists, readers would recognise that the stories about this figure cannot be attributed to her. With respect to the first claimant, however, the Court holds that there *was* in fact a violation of personality rights. She *was* readily identifiable as one of the protagonists; the stories *were* depicted as the narrator's first-hand experience; and they *did* relate to the intimate sphere of the claimant's life – in particular her sexual life – which is worthy of a higher level of protection than the purely private sphere. Furthermore, the description of the life-threatening health condition of the first claimant's daughter is also held to be unacceptable. The Court finds that the lower courts were right in deciding that they could enjoin the publication of the entire novel; it was not necessary to single out passages which are deemed to be injurious to the claimants' personality rights. The case is remanded to the BGH for a decision on the second claimant.

The two dissenting opinions[42] criticise the restrictive approach the majority takes to artistic freedom. They stress that the danger of being identified is condicio sine qua non for an infringement of personality rights, but that the *degree* of such danger cannot be used as an aggravating factor if one is serious about artistic liberty. According to this view, the majority's opinion would lead to the untenable result that sexual or intimate scenes could never survive scrutiny in novels where the protagonists *are* identifiable. The dissenters also criticise what they regard as an arbitrary distinction in the application of the majority's approach to the two claimants, and tilt the scales in favour of artistic freedom as long as the work of art is not a mere excuse for the denigration of others. 15

c) Commentary

The majority opinion is clearly more liberal than the former leading case in this area, the *Mephisto*-decision.[43] *Mephisto* invoked liberal principles, stressing that a work of art has to be interpreted *as a work of art* and cannot be measured with the same yardstick as a biography. However, *Mephisto* applied these principles restrictively[44] while the majority in *Esra* is willing to go a lot further.[45] As a matter of principle, the dissenters seem right in pointing out that one should *either* categorise a work of art as fictional (here, attribution of fictional actions of its characters to real individuals is not possible, hence no infringement of personality rights) *or* reject the fictional character of the work and bar recourse to the protection offered by artistic freedom. The majority's uneasy compromise leads to a distinction between the two claimants which does not seem very persuasive. Drawing the line according to narrative style seems peculiar. Choosing to write a work of fiction – rather than an (auto)biog- 16

[42] One jointly by Justices Hohmann-Dennhart and Gaier, the other by Justice Hoffmann-Riem.
[43] See fn. 40.
[44] Cf. Dr. Stein's dissenting opinion in *Mephisto* (fn. 40) 200 ff.
[45] It is interesting to note that the majority opinion in *Esra* invokes several times with approval Dr. Stein's dissenting opinion in *Mephisto* (fn. 40).

raphy – and using a character who claims to have only second-hand knowledge should have the same effect. The majority opinion, however, seems to distinguish between the choice of a genre (novel) and deployment of a mechanism (the character with second-hand knowledge) *within* a fictional framework. As a matter of principle, the dissenters' approach appears more persuasive. From a pragmatic point of view, however, the motivation for the majority to try to find limitations *within* the area of artistic freedom is understandable. Even a fictitious account of real and identifiable persons and their actions might lead readers to speculate whether and what parts of the narrative have a grounding in reality – aliquid semper haeret. The problem with pragmatic but unprincipled compromises is that they may offer a solution for the case at hand but provide little guidance for future disputes. Courts will presumably have to frame their considerations in terms of the two-factor test. It is doubtful whether this will make the result of the balancing exercise any more predictable.

2. BGH, 16 September 2008, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2009, 83: Artistic Freedom v Personality Rights II (Ehrensache)[46]

a) Brief Summary of the Facts

17 The claimant is the publisher of the dramatist Lutz Hübner, author of *Ehrensache*, a play about honour killings by second and third generation immigrants in Germany. The defendant is the mother of a teenage girl who was in fact the victim of such an honour killing. She had demanded that individual theatres not stage the play because her daughter was the identifiable inspiration for one of the protagonists, and was depicted in an unfavourable light. The publisher seeks a judgment declaring that the mother has no right to prevent the staging of *Ehrensache*. The Landgericht granted, the Oberlandesgericht rejected the claim. The latter held that the daughter's *postmortem* personality rights were infringed by the play.

b) Judgment of the Court

18 The Court reverses the ruling of the Oberlandesgericht and reinstates the first of the two lower courts' decisions in favour of the claimant by applying the principles of the "art-specific interpretation" as established by the Federal Constitutional Court in *Esra*.[47] The presumption of fiction applies despite the fact that the model for the characters in *Ehrensache* are readily identifiable – and even where they are portrayed in a negative light – as it cannot be assumed that the audience will transfer particular characteristics onto the person who provided the inspiration. The Court stresses that many of the scenes in question are only second-hand reports by fictitious characters whose credibility is thrown into doubt by the play itself. Not even the scenes describing or depicting scenes of a sexual nature are deemed objectionable; this would only be the case if the text implied that they reflect real events. *Esra* is distinguished on

[46] Case VI ZR 244/07 = Beck-Rechtsprechung (BeckRS) 2008 23817 = Multimedia und Recht (MMR) 2009, 68.

[47] See no. 11 ff.

the fact that there the author was drawing from his own experience while here it was clear that the experience of other, fictitious, characters is described. The Court is, moreover, not influenced by the fact that the claimant's daughter was a minor at the time. Stronger protection of children is justified by the need for safeguarding the further development of their personality, a consideration which does not come into play in the case of a deceased minor.

c) Commentary

The Court applies the presumption of fiction quite aggressively, and seems to be more in line with the approach taken by the dissenting opinions in *Esra* than the ruling of the majority in that case. The BGH does take the cue from *Esra* in stressing the higher degree of fiction – here because of the unreliable reports by fictitious characters and because of the second-hand experience in scenes of a sexual nature. Interestingly, the Court does not discuss in detail the two-interrelated-factors-test of the Federal Constitutional Court (balancing of the abstraction from reality with the intensity of the infringement); indeed, in *Ehrensache*, the BGH hardly focuses on the probability of identification at all. The description and depiction of sexual scenes involving a minor are given relatively short shrift. One of the reasons for this curtailed balancing exercise may be that the Court in *Ehrensache* was dealing with *postmortem* personality rights. These are based on Art. 1 GG only, which, on the one hand, means that once they are infringed there can be no balancing against other interests; the threshold for finding an infringement, on the other hand, is higher than in the case of personality rights of living individuals, which are based on Art. 1(1) and 2(1) GG. 19

3. BVerfG, 26 February 2008, NJW 2008, 1793: Press Freedom v Privacy I (Caroline von Hannover)[48]

a) Brief Summary of the Facts

With her original claims, Caroline von Hannover had sought injunctions against the publishers of two magazines prohibiting the further publication of several pictures: (1) The first image, accompanying an article about the illness of the claimant's father and the turns family members took in caring for him, showed her skiing. (2) The second image, alongside a piece about vacations of aristocrats, depicted Caroline von Hannover and her husband walking in a street. (3) The third picture, printed together with a story about the area where they spent their winter holidays and her husband's birthday, showed the couple in a ski-lift. (4) The fourth picture, finally, again showing the couple in a street, accompanied an article about "the rich and the beautiful" who demonstrated austerity by renting out their holiday homes. After some to-and-fro in the lower courts, the BGH allowed publication of the first image but objected to the further use of pictures (2)–(4). Discarding the traditional distinction between "absolute" and "relative" persons of contemporary history, the BGH 20

[48] Cases 1 BvR 1602/07, 1 BvR 1606/07 and 1 BvR 1626/07 = JZ 2008, 627 with case note by *Chr. Starck*.

went straight to balancing the protected interests – the right to one's image and privacy versus freedom of the press. This made necessary an enquiry into the informational value of the pictures and their intrusiveness with respect to the affected individuals. A predominantly entertaining article can still qualify in terms of informational value because entertainment can touch on questions of general public interest. Pure curiosity, however, will not usually suffice to trump privacy – even in the case of celebrities – if the core of the private sphere is concerned (as in the case of holiday pictures).

21 The two publishers challenged the constitutionality of this decision insofar as it prohibits the publication of pictures (2)–(4). Von Hannover challenged the constitutionality of the decision insofar as it allowed publication of picture (1).

b) Judgment of the Court

22 The Federal Constitutional Court upholds the decisions as to pictures (1)–(3) but quashes the judgment as to picture (4): Freedom of the press requires that the publisher be permitted to use this image alongside the article about the austerity of "the rich and the beautiful."

23 The Court first analyses the interrelationship between the European Convention on Human Rights (ECHR) and the German Constitution. While the Convention only enjoys the rank of an ordinary Act of Parliament, both the document itself and the case law of the European Court of Human Rights (ECtHR) can be used to interpret the scope of the fundamental rights granted by the Grundgesetz. The Court then sets out a number of principles concerning news about celebrities. The judgment emphasises that coverage need not be restricted to scandalous, morally or legally objectionable behaviour. Coverage about the "everyday life" of celebrities can serve the purpose of shaping public opinion on questions of general interest. Entertaining coverage, too, is not in itself objectionable. Entertainment may be necessary to draw attention to an article which deals with a question of public interest; and even "pure" entertainment may indirectly support press freedom if it is necessary to achieve journalistic and economic success. Entertaining articles may also serve as starting points for discussions about questions of public interest. Primarily entertaining content may, however, require closer scrutiny when balanced with conflicting legal interests. In this balancing exercise, courts may not evaluate media coverage as valuable or worthless, serious or questionable. They must, however, determine the extent to which a publication contributes to the formation of public opinion. The informational value of pictures can be inherent to the image or follow from the context of an accompanying article. The picture can transcend the written content of the article, demonstrate its authenticity, or merely attract the reader's attention. However, an article will not justify the publication of accompanying images if it is a sham, i.e. if its sole purpose is to create a platform for the publication of the picture. If there *is* sufficient justification, the use of photos which have not been taken on occasion of the publication may be acceptable; indeed, permitting the use of archive pictures will actually help *reduce* the nuisance which the taking of new pictures would entail. Further aspects to be considered in the balancing exercise are the cir-

cumstances in which the pictures were taken (e.g., secretly or in persistent pursuit) and the situation in which the person is depicted (in particular if the "target" can legitimately expect to be left alone, as in private spaces). The press may thus have to substantiate how it obtained the pictures in question. Courts must also bear in mind that press freedom serves both the publisher's and the public interest. Finally, the judgment stresses that the Federal Constitutional Court never condoned an entirely unrestricted use of pictures showing "persons of contemporary history" by the press.

In applying these principles to the case at hand, the Court approves of the BGH's change to a direct balancing exercise; this new approach at least is not objectionable from a constitutional point of view. The Bundesverfassungsgericht stresses that the previous distinction between "absolute" and "relative" persons of contemporary history had never *replaced* a balancing test, but had *integrated* some of its aspects and served as the starting point of the analysis. In the end, even under the traditional approach the relevant step was a comprehensive balancing of all relevant interests. The Court also approves of the general principles established by the BGH and their application to the first three pictures. 24

With respect to the fourth image, the Court allows the publisher's appeal and remands the case to the BGH. According to the Bundesverfassungsgericht, the accompanying article about the new austerity of "the rich and the beautiful" raises sufficient questions for public debate to justify the addition of an image. The mere fact that this is a holiday picture (and thus part of the core private sphere as defined by the BGH) is insufficient cause to prohibit its publication as it is not merely used to satisfy the general public's curiosity. The mere fact that the picture was not taken specifically for the purposes of this article is equally irrelevant. 25

c) Commentary

This is yet another battle in the protracted war between von Hannover and the German tabloid press, but the wider dimension of the case is a European one: The Court was clearly dissatisfied with the reproach by the ECtHR in the *Caroline von Hannover*-decision of 2004.[49] This accounts for the length at which the Bundesverfassungsgericht explains that the traditional distinction between "absolute" and "relative" persons of contemporary history was not (as implicitly assumed by the ECtHR) a substitute for the balancing of competing interests but merely a conceptual shortcut which provides the starting point for a comprehensive balancing exercise. Strasbourg had created a difficult situation in Germany: The European balancing exercise between Art. 8 and 10 of the Convention was superimposed on the already existing intricate German test involving personality rights, as protected by Art. 2(1), 1(1) GG, and freedom of the press, as protected by Art. 5(1), (2) GG. This new *von Hannover* 26

[49] ECtHR (Third Section), 24 June 2004, Appl. No. 59320/00, NJW 2004, 2647 – *Caroline von Hannover/Germany*.

case demonstrates that the courts are still trying to come to terms with these new complexities. The BGH – with the BVerfG's approval – has abolished the old test involving "absolute" and "relative" persons of contemporary history; instead, it proceeds directly with the balancing exercise and develops the concept of a "core" personal sphere. In application of the balancing exercise, courts are torn between the principle that they may not assess the quality of an article – which would infringe press freedom – and the necessity to evaluate the extent to which the coverage in question is capable of contributing to the formation of public opinion. The Court takes a fairly liberal approach to the latter aspect. The problem is that *every* picture and article can serve as a *starting point* for public debate. Indeed, the legal action at hand is proof of the fact that *all* the pictures were capable of contributing to such debate – the courts, after all, were vigorously discussing (and disagreeing on) whether press freedom or the personality rights of the depicted persons should prevail. Nevertheless, this can hardly be the touchstone lest the publication of *any* picture would ultimately be permissible. In this situation, the distinction between evaluating the extent of the publication's capacity to contribute to the formation of public opinion (required) and a "quality assessment" (prohibited) becomes even less clear. The only safe conclusion seems to be that pictures cannot be used where they affect the core of the private sphere[50] *and* cater only to curiosity. As soon as a tentative connection to a remotely contentious issue is made, courts have to embark on a case-by-case balancing exercise with little general guidance. It is unfortunate that the judgment could leave undecided the exact scope of a permissible publication – after all, the Court only had to assess whether the approach taken by the BGH was in conformity with the German Constitution. There may well be more than one answer to the question, all of which could be compatible with the Grundgesetz. It can safely be predicted that it will require a number of further cases to ensure some degree of legal certainty in this area.

27 On remand, the BGH decided – as could be expected – that the lower court had committed no error in law in denying an injunction against the publication of the fourth picture.[51] The reasoning more or less reflects that of the BVerfG in the decision summarised here; it does, however, become quite apparent that the BGH only reluctantly accepts that the mere possibility of an image giving rise to a public discussion should suffice to trigger a full balancing exercise.

4. BGH, 24 June 2008, NJW 2008, 3134: Press Freedom v Privacy II (Heide Simonis)[52]

a) Brief Summary of the Facts

28 The claimant is Heide Simonis, a former state prime minister of the Land Schleswig-Hostein. She lost this position on 27 April 2005. On that afternoon,

[50] In particular, the core of the private sphere may be implicated in the case of holiday pictures, but also includes images of children and pictures in rooms where the person has a legitimate expectation to be left alone.

[51] BGH, 1 July 2008, VI ZR 67/08, NJW 2008, 3141.

[52] Case VI ZR 156/06 = Versicherungsrecht (VersR) 2008, 1268.

she went shopping. Photographers of the tabloid *Bild* took pictures of her on this occasion, and also followed her on the following day despite her repeated pleas to be left alone. The claimant demands disclosure of all pictures that were taken during these two days and seeks an injunction against their future publication.

b) Judgment of the Court

The Court denies the injunction and rejects the claim for disclosure. It affirms that the publication of pictures in the press has to meet the conditions of § 22, 23 of the Artists' Copyright Act.[53] Pursuant to § 23 KUG, pictures involving "contemporary history" can be published without prior authorisation – which is regularly required under § 22 KUG – unless legitimate interests of the affected individuals are violated. The Court stresses that classification of a picture as falling into this area requires case-by-case balancing between the interests of the public and legitimate interests of the individual. The BGH then reiterates the principles described in more detail above: In the case of politicians, public interest will be attracted not only by scandalous, morally or legally objectionable behaviour but also by normal everyday life; and even entertaining information can serve a legitimate public interest (while prompting closer scrutiny). The Court points out that it is not relevant that Mrs Simonis no longer held public office at the time – first, the pictures were taken in the immediate aftermath of her resignation, and, secondly, she remained an influential politician. This distinguished her from the position of other private individuals and made her behaviour newsworthy. The Court also rejects the submission that the distressing circumstances under which the pictures were made should tilt the balance in favour of the claimant. While these circumstances may be a relevant factor (e.g., in cases of persistent harassment), the Court stresses that – in the interest of a free press – they would render the publication of images illegal only in exceptional cases; it was thus not erroneous that the lower court considered the harassment by the photographers as legitimate in the light of the strong public interest during the days in question. The BGH indicates that such a degree of pressure might well be illegitimate if exerted over an extended period of time but that two days in the immediate aftermath of a resignation from high public office had to be endured by a politician. 29

The claim for disclosure, finally, could only succeed in conjunction with a valid claim for their surrender or destruction. The Court states that the latter might exist where the production of pictures, itself, infringed personality rights of the affected individual. The claim is rejected here because each of the pictures might legitimately be used in the future, depending on the specific context of the publication. 30

c) Commentary

Most of this decision is a straightforward application of principles established in Germany after the *von Hannover*-case of the European Court of Human 31

[53] Kunsturhebergesetz (KUG).

Rights. Equally unsurprising is the fact that the press is not required to stop reporting about a politician the minute this individual steps down. Very little weight, however, is given to the allegedly aggressive pursuit by the reporters, though the exact details are not clear from the decision itself; it may thus have simply been a case of photographers persistently following Mrs Simonis over the course of two days, without any additional harassment. Another more problematic aspect of the decision are potentially contradictory statements concerning the claim for disclosure. The Court stresses that a claim can exist if the taking of pictures itself infringes personality rights, but also states that a claim for destruction will only lie in case the pictures can *never* be published, which depends on the specific context and cannot be determined ex ante. This appears to grant a right with one hand, only to take it with the other. A very restrictive interpretation would be that a claim for destruction, and hence disclosure, only lies where taking the pictures affects the "core area of the personality right" and thus human dignity; at least in this very narrow category, it is inconceivable that a publication would be permissible under *any* future circumstances. The Court, however, does not clarify whether claims for destruction and/or disclosure are restricted to this narrow area or can also arise in other contexts.

32 The BGH had to apply the principles developed in its own *von Hannover*-judgment in a number of further cases in 2008, a fair share of them again brought by Caroline and Ernst August von Hannover. In one case, the BGH upheld a decision of the lower court which stopped the further publication of a picture of the Prince drinking a beverage on the terrace of a hotel during his holidays, a picture which was accompanied by an article about his inflammation of the pancreas and alcohol consumption.[54] The Court held that both the picture and the accompanying article discussing the claimant's state of health implicated his private sphere. Even if there is a legitimate public interest in these matters, any interest in publishing the image is outweighed by the claimant's interest in the integrity of his private sphere. The state of health of a (merely) public figure is considered off-limits, at least in the absence of an exceptional justification and in contrast to the health of important politicians, business leaders, or heads of state. This result was not affected by the fact that the claimant's father had died in roughly the same period of time, and that the claimant had given interviews about his illness just two days after the publication of the disputed article and picture.

33 In a parallel case published on the same day, the BGH also upheld the decision of lower courts to stop the further publication of a picture of Ernst August and Caroline von Hannover taking a walk during the Prince's recovery from the same illness.[55] This setting was again deemed to fall into the core area of privacy. The same consideration prevailed in a third and fourth decision of this day, where publication of a picture of the couple drinking wine on the hotel terrace

[54] BGH, 14 October 2008, VI ZR 256/06, BeckRS 2008 23934 = Zeitschrift für Urheber- und Medienrecht (ZUM) 2009, 58.
[55] BGH, 14 October 2008, VI ZR 260/06, BeckRS 2008 23935.

was stopped.[56] In contrast, the actor and talkshow host Karsten Speck, who had been sentenced to two years and ten months in prison, could not object to the publication of a picture showing him on a furlough only two weeks after he had begun to serve his sentence.[57] Where reports and images of convicts are concerned, additional factors affecting the balancing exercise are the nature and gravity of their crimes, the amount of time that has passed since the crimes were committed, and whether there is a particular current event which makes the publication newsworthy.[58] The BGH considered the short time between imprisonment and the claimant's first furlough relevant; it also stressed the role of the press as a public watchdog in respect to the proper administration of prisons and the danger that celebrities might be granted special treatment (although the administration's decisions were in fact legal and accurately reported as such). Rehabilitation of the plaintiff was not in danger; the trial had taken place only a year before and was still fresh in the public's mind anyway.

5. BGH, 5 June 2008, Neue Juristische Online Zeitschrift (NJOZ) 2008, 4549: Commercial Aspects of Personality Rights (Zerknitterte Zigarettenschachtel – War das Ernst? Oder August?)[59]

a) Brief Summary of the Facts

The claimant is – once more – Ernst August von Hannover. In 1998, he had attacked a cameraman with his umbrella; in 2000, he was involved in another brawl. The defendant, an advertising firm developing a PR campaign for the cigarette brand Lucky Strike, decided to capitalise on this publicity. The advertisement depicted a crumpled package of cigarettes under the heading "Was this Ernst? Or August?" The claimant contacted the defendants and made them sign an undertaking to stop the advertisement. The claimant now seeks an account of profits, damages, and a refund for expenses incurred for obtaining the undertaking. The courts below found for the claimant. 34

b) Judgment of the Court

The BGH rejects the claims and reverses the lower judgments. The Court emphasises that only pecuniary aspects of the claimant's personality rights are in dispute. These are protected by statute rather than constitutional law; absent an insulting or otherwise seriously negative effect, the claimant's personality rights are thus not implicated. While the claimant's right to his name has a statutory basis (§ 12 BGB), the defendants can rely on freedom of expression as constitutionally protected by Art. 5(1) GG. This provision also covers commercial expression.[60] The Court then explains that the advertisement touches 35

[56] BGH, 14 October 2008, VI ZR 271/06, BeckRS 2008 23936 and VI ZR 272/06, BeckRS 2008 23937 = GRUR 2009, 86.
[57] BGH, 28 October 2008, VI ZR 307/07, BeckRS 2008 25268 = GRUR 2009, 150 = ZUM 2009, 148.
[58] BVerfG, 5 June 1973, 1 BvR 536/72, BVerfGE 35, 202 – *Lebach*.
[59] I ZR 223/05 = Wettbewerb in Recht und Praxis (wrp) 2008, 1527.
[60] BVerfG, 12 December 2000, 1 BvR 1762/95 and 1787/95, BVerfGE 102, 347 = NJW 2001, 591 – *Benetton*.

on questions of public interest, i.e. the claimant's involvement in fights, in a satirical form. The public interest outweighs the claimant's right not to have his name used. It is obvious that the advertisement does not create the impression that the claimant is supportive of the defendant's products. For these reasons, the defendants' interest in freedom of expression outweighed the claimant's interests as protected under ordinary law. The use of his name was thus neither illegal for the purposes of unjust enrichment under § 812 BGB nor an infringement of his personality rights under § 823 BGB.

c) Commentary

36 In this important decision concerning pecuniary aspects of personality rights, the BGH makes clear that any greater weight attached to them in the wake of the recent *von Hannover* jurisprudence will not automatically strengthen claims which only find statutory protection under German law. The decision does, however, contain some important limitations for advertisers. Well-known individuals will have to suffer some degree of comical or satirical reference to their person, but any use of their name will have to stop short of suggesting an endorsement of or support for the product in question. This seems to be a balanced outcome, bearing in mind that the defendants swiftly terminated the advertisement after being approached by the claimant.

6. BGH, 11 March 2008, NJW 2008, 2110: Freedom of Expression v Corporate Personality Rights (GM Milk)[61]

a) Brief Summary of the Facts

37 The claimant is a corporate group which sells milk and milk products under the brands *Müller* and *Weihenstephan*. The company seeks an injunction against the assertion – made by Greenpeace, the defendant – that "Müller milk is genetic milk." Greenpeace had made this statement in numerous internet publications and highly publicised protest events. The claimant argues that the description contains a factually incorrect statement. While the cows whose milk is used in its products are fed with genetically modified plants, the company argues that the description as "genetic milk" contains the further, and untrue, claim that modified DNA can be transmitted into the milk itself.

b) Judgment of the Court

38 The BGH dismisses this case in an appropriately short judgment. The Court agrees that the defendant's description of the products in question does affect the claimant's commercial interests, which are protected both by its corporate personality right – Art. 2(1) and 12 GG – and the right to an "established and exercised business enterprise" pursuant to § 823(1) BGB. The defendant, however, is protected by the freedom of expression granted under Art. 5(1) GG. The Bundesgerichtshof accepts that untrue statements of fact, in themselves or as part of a statement of opinion, have less weight when balancing competing

[61] Case VI ZR 7/07. See the case note by *T. Gostomzyk*, Äußerungsrechtliche Grenzen des Unternehmenspersönlichkeitsrechts – Die Gen-Milch-Entscheidung des BGH, NJW 2008, 2082.

interests. However, the Court finds that the factual content of the description "genetic milk" is so vague that it is impossible to assess it as either true or untrue. It is not possible to modify milk genetically; only living organisms can be modified. The expression "genetic milk" can therefore only be understood to mean that there is *some* connection between GM technology and the product in question. The context in which the statement was made is also relevant. The defendant's crusade against the use of genetically modified plants for feeding purposes without labelling the dairy products accordingly, clearly explained in various Greenpeace publications, makes it clear what the defendant meant. The statement was, finally, part of a contentious debate in a matter of significant public interest; a presumption of free speech therefore arises in the defendant's favour. This presumption covers criticism even if it is fierce, pejorative and/or polemical. In contrast to journals aiming specifically at consumer protection, persons engaging in a political debate are not required to be objective. In so far as the claimant complains about having been singled out by the claimant, the Court observes that arbitrary or selective choice of specific enterprises as the target of criticism without objective justification *can* potentially render criticism impermissible. The defendant, however, had focused on the claimant because the company was an influential and well-known enterprise; and if this enterprise had changed its approach to "GM" milk, this could have led other producers to follow suit. "Singling out" the claimant therefore made the criticism more effective. This is, according to the BGH, not objectionable.

c) Commentary

Both reasoning and result in this case were fairly predictable for German lawyers, which raises the question why the company chose to pursue the issue at all. One explanation might be that the claimant simply tried to put an end to the defendant's persistent criticism with the help of (protracted) litigation. A second possibility is that the company hoped to profit from the uncertainty that currently characterises the area of personality rights, and to extend their reach to corporations. That said, it should be pointed out that the ability of consumers to distinguish between political battles and consumer protection, and their awareness of the scientific details (even if correctly explained in the defendant's publications), might be more limited than assumed by the BGH. German law has, furthermore, recently seen important changes with respect to labelling requirements when it comes to food products. The use of ingredients which were produced with the help of GMOs (such as modified animal feed) will now prevent labelling the end-product (which could be made of milk) as "GM free." In this sense, "genetically modified milk" *does* now exist.[62] 39

[62] See no. 7.

7. BGH, 22 April 2008, NJW 2008, 2262: Press Freedom v Right of Public Bodies to Corrigendum (*Germany v Focus*)[63]

a) Brief Summary of the Facts

40 The claimant is the Federal Republic of Germany (FRG), represented by its Federal Criminal Agency.[64] The Agency demands that the magazine *Focus* print a corrigendum concerning certain factual allegations contained in an article about the terrorist Abu Mussab al-Sarkawi. *Focus* had claimed that the BKA had deliberately manipulated a file on al-Sarkawi and distributed it among its employees in order to find a leak within the Agency. The article stated further that the interests of other German and foreign agencies working on the case were ignored in a single-minded effort to identify the source of information to the press.

b) Judgment of the Court

41 The Court holds that the FRG has a right to demand a corrigendum based on § 823(2) BGB in conjunction with § 186 of the Criminal Code.[65] The latter provision makes libel and slander a criminal offence. The Bundesgerichtshof concludes, first, that the statements were statements of fact, although the author had formally distanced himself from the allegation by use of the term "apparently" before stating each accusation. The Court rejects the defence that this turned the statement into an opinion for which a corrigendum cannot be demanded under German law. Secondly, the BGH holds that not only the allegations about the objective details (that files were manipulated) were statements of fact, but also that speculation about the BKA's motivation (to identify a leak) were statements of ("internal") facts. Thirdly, the Court finds it sufficiently proven that the statements were indeed untrue. While there is no positive proof to that effect, the BGH accepts that, procedurally, falsehood is sufficiently established. The burden of proof lies with the claimant; a reversal, which is found in § 186 StGB, cannot be transferred to private legal disputes. The defendant may nevertheless have to provide evidence in its possession, inaccessible to the claimant, and on which the defendant bases its case, so that the claimant can in turn try to disprove the allegations.

42 In determining the extent to which allegations need to be substantiated by the defendant, care must be taken not to produce a chilling effect for the use of free speech; in particular, the press does not have to identify its source. However, the Court holds that more is required than to say that the information came from a "reliable source within the BKA." The Bundesgerichtshof considers it irrelevant that the Agency was searching for a leak, that there were different versions of the relevant file, and that the BKA did in fact search premises in order to uncover the informant. These facts were not relevant for the question whether the BKA had *deliberately manipulated* the files in order to find the leak; it is therefore not an error in law that the lower court did not hear the

[63] Case VI ZR 83/07.
[64] Bundeskriminalamt (BKA).
[65] Strafgesetzbuch (StGB).

witnesses named for these propositions. The Court leaves undecided whether these facts would have sufficed to publish a report on the *suspicion* of deliberate manipulation.

Fourthly, the Court decides – against the views of some commentators – that the FRG and its agencies can, in principle, be the target of libel and slander, at least if the specific allegation is capable of severely hindering an agency in the exercise of its duties. The BGH is aware of the danger that public bodies might use private actions to block legitimate criticism. However, it believes that this danger is sufficiently reduced by the fact that the courts will have to balance any claims for libel or slander against press freedom, and that this freedom will be a particularly important interest where the reputation of a public body (rather than an individual's honour) is concerned. 43

In applying these principles to the facts of the case, the Court, finally, holds that the balance tilts towards a corrigendum. While control of public bodies is an important function of the press, and therefore of some weight, the grave accusations advanced in the article and the international ramifications which they can potentially trigger, would have required more diligent research. The BGH reiterates that the control of public bodies by the press, a crucial element in today's society, requires that courts be mindful not to place too high a burden on the press. Where research was conducted with due diligence there will be no criminal punishment, no claim for damages, and no claim for a recall of a printed edition. However, even in such cases a claim for a corrigendum may exist. 44

c) Commentary

Had the claimant been a private individual, the decision would not have been out of the ordinary; the fact that the claimant was the FRG makes it more controversial. State interference with the press in a matter of public interest is a particularly thorny issue. This is the reason why the Court emphasises at several points in the decision the importance of press freedom and the control that the press exerts over public bodies. The demands on proper journalism are nevertheless substantial. While the Court reiterates that the burden of proof is on the claimant, the duty to substantiate statements – as defined by the BGH – can be onerous. It will often be difficult to establish the reliability of a source without disclosing details which might lead to its exposure. In this particular case, the Court may have been influenced by the willingness of *Focus* to publish allegations as facts without proper investigation; and it may also have been particularly critical of the defendant because this was not the first time the magazine was in this position.[66] Bad cases can, however, make bad law. One can only hope that this decision will not trigger a wave of libel actions by governmental and other public bodies. Any such attempts would ultimately be stopped in Karlsruhe, either by the BGH or the Bundesverfassungsgericht. 45

[66] See BGH, 30 April 1997, I ZR 154/95, NJW 1997, 2681; see also *R. Zuck,* Focus-Hokuspokus: Die 500 besten Anwälte, NJW 1994, 297.

Lower courts might, however, be less sympathetic and expose particularly smaller publications to a dangerous chilling effect.

8. BGH, 11 March 2008, NJW 2008, 2262: Press Freedom (Unknown Expert)[67]

a) Brief Summary of the Facts

46 The defendant newspaper published an article stating that the claimant, the majority shareholder of a company, had sold a collection of photographs to this company for € 100,000 and that an "independent but unknown" expert had provided a valuation shortly afterwards placing the collection at a value of € 60 million. This led to a rise of the company's shares from some € 400 to about € 3,000. The newspaper article reported that nearly the entire net value of the company was due to the collection, and that the high share price was probably not sustainable. The lower court held the term "unknown expert" to be an abusive personal attack (*Schmähkritik*) capable of denigrating the claimant.

b) Judgment of the Court

47 The BGH allows the appeal and rejects the claim. While the Court agrees that the attribute "unknown" indicates that the expert had no significant standing in the relevant circles, and that the choice of this person could thus affect the claimant's reputation, the strict requirements for an "abusive personal attack" are not fulfilled. Such qualification places a statement outside the ambit of free speech and consequently eliminates the necessity to balance this right against personality rights. An attack is only considered abusive and personal if it does not primarily deal with the substance of a dispute but focuses rather on denigrating the person beyond the limits of mere polemic and exaggerated criticism. The BGH states, first, that this particular allegation could not fulfil these conditions because the statement did not refer to the claimant directly but only to the expert. Also, the article was clearly not concerned with the claimant personally but with the substance of the issue at hand, namely the fragile basis of the company's valuation. A balancing between the implicated personality rights of the claimant and press freedom therefore becomes necessary. While the truth or falsehood of a factual statement *can* be a relevant factor even if it is mixed with an opinion, the factual element may be so bland that it does not influence the balancing exercise. Here, the statement that the expert was "unknown" was primarily a statement of opinion; at least in relation to the claimant, the factual substance of the statement is negligible. The article, too, dealt primarily with the substance of the dispute. The statement is thus covered by free speech (Art. 5 GG).

c) Commentary

48 In the light of its facts, it is a little surprising that this case was litigated right up to the BGH. That said, the judgment is a welcome warning to lower courts not to avoid balancing competing rights by resorting too easily to the concept of an "abusive personal attack".

[67] Case VI ZR 189/06.

9. BGH, 12 February 2008, NJW 2008, 1381: Medical Malpractice I (Standard of Proof for Secondary Injury)[68]

a) Brief Summary of the Facts

The claimant had injured his left index finger with a hammer and sought treatment by the defendant, a physician. The latter X-rayed the finger, diagnosed a severe contusion, but considered the claimant able to work. A month later, the claimant slipped and hit the same finger against a wall. A different physician diagnosed a *renewed* fracture. A case of Sudeck's syndrome later developed. The claimant has since been unable to work. He alleges (1) that he had fractured his finger in the first accident; (2) that the defendant had negligently failed to diagnose this and immobilise the finger at the time; and (3) that the development of Sudeck's syndrome was the consequence of this negligence. The LG granted € 500 for pain and suffering during the delay in treatment but rejected any further claims. The OLG did not allow the appeal, arguing that it was possible – though improbable – that the Sudeck's syndrome had been caused by the first event. 49

b) Judgment of the Court

The BGH reverses the decision of the OLG and remands the case back to the lower court. There is agreement that the defendant had been negligent in not diagnosing the fracture and immobilising the finger after the first accident. However, the Bundesgerichtshof holds that the OLG had applied too high a standard of proof when putting in question the causal link between these mistakes and the development of the Sudeck's syndrome. The lower court had applied § 286 of the Code of Civil Procedure,[69] which requires that evidence convinces the judge to a degree of certainty appropriate for the circumstances of daily life. The BGH points out that this standard only applies to *primary* injuries caused by negligence. Here, the primary injury caused by the defendant was the omission to immobilise the finger and any resulting physical discomfort. The Sudeck's syndrome was therefore a *secondary* injury, a consequential loss flowing from the first.[70] The standard of proof for such secondary injuries (a category which includes the deterioration of pre-existing conditions) is lower;[71] here, it may suffice that *on the balance of probabilities* it appears more likely that the injury was a consequence of the primary injury. The case is remanded to the OLG for a determination whether the claimant has sufficiently proved causation to satisfy this lower standard. The Court also points out that even if this were not so, it remains to be determined whether failure to diagnose the fracture was grossly negligent, in which case the burden of 50

[68] Case VI ZR 221/06.
[69] Zivilprozessordnung (ZPO).
[70] The BGH distinguishes this from a previous decision in which Morbus Sudeck was the primary injury (see BGH, 4 November 2003 – VI ZR 28/03, NJW 2004, 777). In that case, the victim of a car accident had apparently sustained no significant primary injury but developed Morbus Sudeck within two months of the accident. This was considered the primary injury, so that the strict standard of proof in § 286 ZPO applied. The victim was unable to discharge this burden.
[71] See § 287 ZPO.

proof for causation would shift from claimant to defendant. This will require medical expertise. A shift of the burden of proof would, however, only occur if the claimant can show that the secondary injury (the Sudeck's syndrome) is a *typical* consequence of the primary injury.

c) Commentary

51 At first glance, this may appear to be a case decided on its own facts only. However, while this decision does not establish any new principles, it may be a signal for lower courts to strengthen the position of claimants in medical malpractice cases even where the conditions for a reversal of the burden of proof (such as a failure to inform of risks or gross negligence in diagnosis or treatment[72]) are not met. The current situation is certainly not satisfactory. In most medical malpractice cases, the question is only whether the conditions for a reversal are met. Whoever bears the burden of proof is not usually able to discharge this burden; it is more or less a *probatio diabolica.* The decision discussed here shows that this is not invariably so. While the facts appear to be fairly particular, it will often be a matter of pleading whether a particular consequence is considered a primary or a secondary injury. In the former case, the strict standard of proof required by § 286 ZPO has to be met; in the latter scenario, the more lenient standard of § 287 ZPO applies. It will quite often be possible to identify with sufficient evidence some (possibly insignificant) primary injury, which can then be claimed to be the cause for the relevant secondary injury. In the case which the BGH distinguishes here, for example,[73] it would have been sufficient for the claimant to prove that the accident had caused *some* – even mild – primary injury exceeding the threshold of mere inconvenience. While the difference in the standard of proof for primary and secondary injuries is in itself consistent from a legal perspective, the fine distinction may well lead to "strategic" pleading by counsel.

10. BGH, 8 July 2008, NJW 2008, 2846: Medical Malpractice II (Wrongful Conception)[74]

a) Brief Summary of the Facts

52 The first claimant, when pregnant, had agreed with the defendant gynaecologists that she would be sterilised by tubal ligation on occasion of the planned Caesarean section. Prior to surgery, she was informed that the failure rate of this procedure was 0.1%. Four months after the birth of twins, she was again pregnant. After the birth of the third child, her fallopian tubes were cut and coagulated. The medical file mentions that the tubes had previously been tied with a green thread but did not show any signs of electro-coagulation. The claimants' own medical expert testified that this could only be interpreted as a

[72] For a 2008 case see BGH, 8 January 2008, VI ZR 118/06, NJW 2008, 1304 where the Court found that where gross negligence was proven (here: lack of hygiene in the course of a knee injection) it was for the defendant to resolve doubts whether an inflammation of the joint was due to an infection or an allergic reaction.

[73] Fn. 70.

[74] Case VI ZR 259/06.

failure to coagulate at all; in the first claimant's particular circumstances, mere ligation of the tubes was bound to be ineffective. The court-appointed expert essentially agreed with this assessment but would not completely rule out the possibility that state-of-the-art coagulation had taken place; the increased flow of blood in the area after the birth of the twins may, in her view, have affected the appearance of the tubes. The parents claim damages and an indemnification against all future costs connected to the birth of their third child. The lower court rejected the claim and held, first, that malpractice had not been proven and, secondly, that there had been informed consent.

b) Judgment of the Court

The BGH reverses the judgment and remands the case to the lower court. It reiterates, first, established principles under which the financial burden connected to the birth of a child is part of an enforceable claim for damages, and that even a pregnancy without complications can attract compensation for pain and suffering. The Court also states that there are concurrent contractual claims, and that the father is included in the protective sphere of the mother's agreement with the defendants. 53

Secondly, the BGH holds that the claimants had sufficiently proven medical negligence in the course of the first sterilisation attempt. Bearing in mind that medical experts are sometimes protective of their colleagues for reasons of professional courtesy, both experts had essentially agreed in their assessment. The lower court had applied too high a standard of proof – negligence need not be established with a probability "bordering on certainty." An approach which takes into account any reasonable doubts of a judicious, conscientious, and experienced observer is sufficient. Merely theoretical possibilities, for which there is no actual evidence, are irrelevant. In applying this yardstick, it would have been reasonable to conclude that the electro-coagulation had not been executed properly on occasion of the C-section. 54

Thirdly, the Court finds that even if the opinion of the court-appointed expert had been interpreted differently, the lower court would have been obliged to confront her with the view of the claimants' own expert. This omission contravened established case law according to which the trial judge has to follow up on any doubts or contradictions ex officio; in particular, the judge has to try to resolve conflicts between expert opinions. It was insufficient that the claimants' own expert was present in court when his court-appointed colleague testified. The claimants were also not at fault for having introduced their expert at a fairly late stage. 55

On remand, the lower court will also have to take into account the possibility that the defendants may have been in breach of a second duty of care – the duty to inform the claimants of the different failure rates associated with the available methods of sterilisation. Furthermore, the operating gynaecologist would have had to inform the claimants ex post of the fact that he decided to choose a different method of sterilisation from the one initially agreed on, and its respective chances of success. 56

57 The BGH, finally, rejects the way in which causation was denied. The lower court saw the fact that the claimants did not use contraceptives following the second sterilisation attempt as an indication that they would not have used contraceptives after the first attempt either, and that the pregnancy in question might therefore fall within the normal failure rate. The BGH accepts that the claimants might well have acted otherwise had they known that the fallopian tubes had only been tied in the first attempt, and that the failure rate was therefore higher than discussed prior to the operation.

c) Commentary

58 As in the previous case, the Court objects to the standard of proof applied by the lower court; and the result is again a lower burden for the patient even where there is no full reversal. While the principles developed by the BGH seem acceptable if applied within strict limits, any further relaxation would be problematic. There is a reason for the current allocation of the burden of proof. If there is informed consent – and no grossly negligent treatment – the unfortunate outcome may well be due to fate rather than medical malpractice. A lower standard of proof for patients in cases where the conditions for a full reversal are not met bears the risk of over-enforcement; physicians could be held liable although the outcome was not due to any fault of theirs. Here, the BGH was right to intervene; the procedural errors made by the lower court had deprived the claimants of the chance to prove their case.

11. BGH, 29 January 2008, JZ 2008, 999: Dangerous Sports and Insurance[75]

a) Brief Summary of the Facts

59 The parties were involved in a car collision while participating in a motoring event on the Hockenheim racing circuit. It remains unclear who caused the accident. Both parties initially claimed compensation of their respective repair costs. Both parties enjoy coverage under their respective (compulsory) vehicle insurance policies.

60 The court of first instance rejected both claims. It held that the event was a *car race* and that both parties had waived any possible claims resulting from the ordinary negligence of other participants by taking part. While the cause of the collision remained unclear, the accident was in any case *not* a result of gross negligence or intent of either side. The Oberlandesgericht confirmed this outcome on appeal from the claimant in these proceedings. Though not a race (as assumed by the Landgericht), the event was in fact a *dangerous activity* in which only slight rule violations would not attract compensation. The BGH invalidated this decision and remanded the case to the lower court.

[75] Case VI ZR 98/07 (OLG Karlsruhe) = VersR 2008, 540.

b) Judgment of the Court

The BGH reiterates, first, its approach to dangerous sports activities in the exercise of which harm can easily be caused despite complete adherence to, or only minor violations of, the rules. If caused by uninsured participants, this kind of harm will not attract compensation for three reasons. All participants, first, expose themselves to the same risk, and it will often depend on pure chance whether one or the other party suffers harm. As in this case, it may, secondly, be difficult to reconstruct the exact sequence of events in activities of this kind, and to determine the cause of an injury. Finally, all participants accept a considerable degree of danger; claiming damages for harm caused by minor violations of the existing rules would thus be contrary to the principle of good faith (§ 242 BGB). This approach was developed in a case involving a car race organised by a small motorsports club on a professional race circuit in 2003. Insurance coverage did not exist on that occasion.[76] 61

The BGH then goes on to draw a distinction between *uninsured* participants and those *with* insurance coverage – a point the same Senate had no reason to address five years earlier.[77] The Court now argues that two of the conditions outlined previously did not apply. It can, first, not be assumed that participants in a dangerous sports activity would want to waive claims for compensation against *insured* competitors nor, secondly, does it seem in any way *unfair* if they actually pursue such claims since the financial burden is ultimately shifted from the co-competitor to the insurer. This, the BGH feels, is true also for scenarios involving compulsory forms of insurance. Finally, the Court is not willing to protect insurance companies by excluding dangerous activities from coverage if the terms of the contract in question provide protection. It is not the function of tort law to define the content of insurance contracts or the reach of compulsory third party insurance. 62

c) Commentary

The jurisprudence of the BGH concerning harm suffered in the course of sports activities has gradually developed over the past thirty years and is now supplemented by this important decision involving insurance law. Injuries will not attract compensation if the rules of the game were not violated. The Court established this fundamental starting point by recourse to the notion of venire contra factum proprium in 1974.[78] The area of application initially involved only sports with physical contact between the participants but was extended in 2003 to activities which by their very nature involve a high risk of injury even if the participants adhere to the rules. The event in question now was not a race, but did involve modifications to general traffic law which substantially increased the danger of accidents (higher speeds, no safety corridor between 63

[76] See Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 154, 316 = VersR 2003, 775 = Zeitschrift für Schadensrecht (ZfS) 2003, 393. For a summary and discussion of this decision see *J. Fedtke*, Germany, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2003 (2004) 190 ff.

[77] Ibid.

[78] BGHZ 63, 140 = JZ 1975, 122 ff.

vehicles, and overtaking on both sides). There can thus be no doubt that the parties were participating in an activity which falls within the parameters set out by the BGH five years ago. The difference, of course, is the existence of insurance. Here, the Court is – in principle – right in allowing claims to succeed, subject to the conditions of tort law, as the core considerations which led to the gradual exclusion of liability in the first place seem far less persuasive if the tortfeasor is insulated from overly burdensome financial consequences. This was, however, an easy case due to the type of coverage provided by the insurer and the fact that *both* parties were protected by compulsory insurance. The BGH (again correctly, it would seem) decided that the loss of allowances under the terms of this particular insurance contract or moderate increases in premiums would not be an unreasonable burden. The financial loss can, however, be considerable if the insured party has to make a contribution towards the costs; and things become even more complex if only *one* of the parties is covered by insurance in the first place. Should one participant then be (indirectly) liable while the other is not? Without convincing answers to these questions, it would therefore seem prudent to limit the wider effects of this ruling to cases of dangerous sports activities involving no or only minor rule violations *and* to situations covered by compulsory third party insurance. But whatever the next step in this evolving jurisprudence may be, the insurance industry is in any case likely to adapt its contract terms, both in the area of (compulsory) vehicle and general third party insurance. Like it or not – developments in tort law *do* affect insurance law.

12. BGH, 17 June 2008, VersR 2008, 1260: Workplace Accidents and Employers' Privilege[79]

a) Brief Summary of the Facts

64 The claimant, an independent truck driver, was on the premises of the (now insolvent) first defendant waiting for his vehicle to be loaded by the second defendant in this action, at the time an employee of the first defendant. The claimant and the second defendant had discussed in detail where and in which sequence the goods were to be loaded. The claimant approached the vehicle to secure the latches after the second defendant had completed his work in the front section of the truck. He was heavily injured by the forklift operated by the second defendant. The claim is for compensation of all pecuniary and non-pecuniary loss resulting from the accident. The relevant employers' liability insurance association classified the incident as a workplace accident. The lower courts dismissed the claim with regard to the immunity established by Part VII of the Federal Social Security Code[80] for the second defendant and principles of the so-called "disturbed internal settlement between joint debtors"[81] for the insolvent first defendant.

[79] Case VI ZR 257/06 (Bremen).
[80] Bundessozialgesetzbuch VII (SGB VII).
[81] So-called *gestörter Gesamtschuldnerausgleich*. On this see *B. Markesinis*, Comparative Law in the Courtroom and Classroom (2003) 165.

b) Judgment of the Court

The BGH confirms the approach taken by the lower courts. Both defendants are immune from liability. The second defendant, in particular, is protected from the general rules of tort law due to the privilege established by § 106(3), 105(1) SGB VII. The immunity of the first defendant is a consequence of this result. The claimant is thus limited to compensation provided by the statutory accident insurance scheme.[82] 65

Because the employers' liability insurance association had formally classified the incident as a workplace accident, the case now falls irrevocably within the ambit of the special rules established by the relevant sections of the Federal Social Security Code. The claimant was, furthermore, injured by the employee of another company – equally protected by the statutory insurance scheme – while interacting in the same place of work. The Court addresses three issues here. The fact that the claimant is not "employed" does not, first, exclude the application of § 106(3) SGB VII, which by its wording only applies to accidents "between *employees*" of different companies. Settled case law has, however, established that the provision covers employers and employees alike. The degree of interaction between the claimant and the second defendant may, secondly, have been rather limited. There was nevertheless some discussion and co-ordination of questions immediately related to a common purpose (the loading of the truck), and a certain risk that one or the other person might be injured in the course of the exercise. This is deemed sufficient interaction within the meaning of the Code. Finally, the BGH focuses on the difference between an employer who has made contributions to the statutory insurance scheme (albeit for his employees) and *self-employed* individuals who do not make any contribution (as the claimant in this case). The Court acknowledges that the latter are, in principle, neither beneficiaries of the scheme nor subject to the limitations established by the Social Security Code. They are therefore able to sue for damages under general tort law.[83] This is, however, not true for the claimant, who was as a consequence of the accident included in the scheme by the decision of the liability insurance association. This, the BGH notes, is not objectionable, for it reflects an appropriate balance between the protection offered by the accident insurance scheme and the loss of claims under the general rules of tort law. 66

c) Commentary

The Bundesgerichtshof has in the past years been confronted with a constant flow of cases involving the borderline between tort law and accident insurance, and has regularly come out in favour of applying the latter. This is to be welcomed given the complexity of contemporary employment arrangements and the increasing fluidity of insurance coverage outside traditional statutory regimes. Workers inevitably interact, and in times characterised by outsourcing do so increasingly with the employees of other companies, other employers, or 67

[82] Gesetzliche Unfallversicherung (GUV).
[83] See the decision of the Federal Social Security Court of 26 June 2007, Case B 2 U 17/06 R.

(as in this case) self-employed entrepreneurs. While it would seem inappropriate to simply exchange tort law by social security legislation for all accidents that occur in the workplace, it is also true that the rules of the Social Security Code provide a predictable – if limited – source of compensation which caters to the interests of most workers and facilitates smooth interaction between persons associated with different companies. This is, of course, no reason to impose statutory limits on someone (the claimant) who is not part of that system. The BGH acknowledges this and requires – quite rightly – a port of entry, which is in this case provided by the decision of the employers' insurance association. The reported facts do not explain how the association became involved but do indicate that the process was not initiated by the defendants. If the claimant, however, *sought* compensation via accident insurance, it seems only right that recourse to the potentially more beneficial general rules of tort law should be barred.

13. BGH, 1 July 2008, VersR 2008, 1264: Liability for Pharmaceutical Products[84]

a) Brief Summary of the Facts

68 The claimant, who suffers from rheumatism, was given medication to control increasing levels of pain caused by the condition. The product was taken off the market by the defendant in 2004 after potentially serious side effects had become known. Evidence provided by the claimant suggests that she had used the product regularly and in a relevant concentration for a period of more than four years, and that she had suffered from acute symptoms of tachyarrhythmia (fast heart rate), requiring hospitalisation for more than four weeks, in late 2004. She now claims compensation for all pecuniary and non-pecuniary loss on the basis of § 84 of the Pharmaceutical Products Act[85] or, alternatively, disclosure of all known effects and side effects of the product (§ 84a AMG). Both the court of first instance and the Higher Regional Court (Kammergericht in Berlin, KG) held that the evidence provided by the claimant did not sufficiently establish a potential link between her heart condition and the product in question. The KG, moreover, is not convinced that the claimant had shown the product to have possible negative side effects which exceed the reasonable limits accepted by medical science.[86] The claim is rejected by both courts.

b) Judgment of the Court

69 The Bundesgerichtshof remands the case to the Kammergericht. The facts provided by the claimant with respect to the long-term use of the product, the (significant) dosage, and her heart condition are sufficient in terms of § 84(2) AMG. The Court also holds that a scientific article which had raised doubts concerning the safety of this type of medication, published in a prominent German medical journal (the *Deutsches Ärzteblatt*) in September 2006 and

[84] Case VI ZR 287/07 (KG).
[85] Gesetz über den Verkehr mit Arzneimitteln (AMG) of 24 August 1976 as subsequently amended.
[86] § 84(1) no. 1 AMG.

submitted as evidence by the claimant, as well as a separate expert opinion, raised sufficient questions concerning the possible side effects of the product.

c) Commentary

The Bundesgerichtshof is concerned that the strict rules on the liability for pharmaceutical products established by the AMG could be watered down by overly harsh standards as far as the factual evidence required from the patient is concerned. Not only is liability under § 84(1) AMG strict; under § 84(2) AMG, patients need only show that a product could reasonably have caused the harm in question. It is then for the producer of the pharmaceutical to either establish an equally convincing alternative cause (which may *not* simply be a second medication taken by the patient) or prove that the harmful effect of the product was not the result of a mistake in its development or production. Judging by the reported details of this case, it would seem that the facts provided by the claimant were indeed sufficient to shift the burden of proof to the pharmaceutical company. The AMG was substantially reformed in 2005 in order to further strengthen the position of patients beyond the strict liability regime which already existed at the time. Both the reversal of the burden of proof and the exclusion of other medical products as alternative causes were centrepieces of that reform and necessary to create a more level playing field between patient/consumer and the pharma industry. Given the information provided by the claimant about her prescription, the harmful side effect, and the serious scientific concerns about the product in question, there seems little more a patient in her position can reasonably be required to do. 70

14. Personal Injury

a) Primary shock victims

A question which continues to attract the attention of German courts is how to deal with (primary) shock victims. A woman who witnessed the killing of her cat by her neighbour's dog was awarded € 70 in 2008.[87] The decision took into account the fact that the neighbour had already been fined € 200 in separate legal proceedings, which in the eyes of the Amtsgericht diminished the need to provide satisfaction through the award of non-pecuniary damages in tort (*Genugtuungsfunktion*). 71

b) Consequential psychological damage

The LG Braunschweig awarded € 3,000 to the victim of a whiplash injury who had subsequently developed a phobia against driving, which caused him heart problems and sweating. The Court held that these symptoms would be likely to disappear over time with the help of an appropriate therapy.[88] 72

[87] AG Viersen, 26.3.2008, 34 C 175/07, *S. Hacks/A. Ring/P. Böhm*, Schmerzensgeld-Beträge (26th ed. 2008) = *Hacks/Ring/Böhm* Nr. 27.15.

[88] LG Braunschweig, 31 January 2008, 8 O 2419/06 = *Hacks/Ring/Böhm* Nr. 27.869. For a comparable award of € 5,000 for a psychologically induced pain syndrome, also following a whiplash injury, see OLG Köln, 25 October 2005, 4 U 19/04, SVR 2006, 222 = *Hacks/Ring/Böhm* Nr. 27.1250.

73 Psychological damage appears to have been the major factor in the award of € 30,000 to a victim of unnecessary force during the search of a vehicle. The claimant also suffered two broken ribs in the course of this police operation. The authorities had obtained a search warrant for guns and hand grenades which the claimant, known to be somewhat paranoid, was suspected to have in his possession. The SWAT team decided that a search of the claimant's flat would be too dangerous, and instead ambushed his car, dragged him out of the vehicle, allegedly beat and kicked him, and pinned him to the ground. No hand grenades were found, and the only weapons in the flat were disabled guns for which the claimant had a license. Since the incident more than seven years ago, the claimant has suffered from psychological and psychosomatic problems without any hope for recovery in the near future. The Court held that – based on the meagre information available to the police authority – the only proportionate response would have been a search of the *vacant* flat rather than a direct physical confrontation with the claimant.[89]

c) Whiplash syndrome and other spinal injuries

74 Non-pecuniary awards for whiplash injuries continue to differ considerably. Factors which influence German courts are 1) verifiable proof of the injury, 2) the severity of the impediment caused, and 3) the gravity of any other injuries that the victim may have suffered.

75 In the past, some courts had applied a *prima facie* rule that whiplash is unlikely to occur where the difference in velocity was smaller than 10 km/h. In 2003, the BGH rejected such a general rule and required trial courts to conduct a case-by-case analysis.[90] The BGH has now confirmed this position[91] and extended it to cases of head-on collisions.[92]

76 Previously, several courts had refused to award any compensation for minor whiplash injuries[93] while most others typically awarded damages for non-pecuniary loss in the range of € 150 to € 1,000. Higher awards are usually based on additional injuries or other aggravating circumstances, though awards of € 1,500 are not infrequent even in the absence of such additional factors. In 2008, the AG Osnabrück awarded € 400 in a case in which a Type 1-whiplash victim was unable to work for eight days.[94] The LG Aachen awarded € 1,000 in a case involving not only the cervical spine but also the thoracic and lumbal sections. This victim was completely unable to work for four weeks and

[89] LG Bonn, 15 February 2008, 1 O 414/03 = *Hacks/Ring/Böhm* Nr. 27.2362 = BeckRS 2008 07728. An additional aggravating factor taken into account was that the defendant denied any wrongdoing.

[90] BGH, 28 January 2003, VI ZR 139/02, NJW 2003, 1116.

[91] BGH, 3 June 2008, VI ZR 235/07, Neue Juristische Wochenschrift-Rechtsprechungs-Report (NJW-RR) 2008, 1380.

[92] BGH, 8 July 2008, VI ZR 274/07, NJW 2008, 2845.

[93] E.g. AG Cloppenburg, 12 December 2000, 18 C 336/00 (XVIII) = *Hacks/Ring/Böhm* Nr. 26.4; AG Iserlohn, 7 June 1990, ZfS 1991, 372 = *Hacks/Ring/Böhm* Nr. 27.5; AG Nürnberg, 21 January 1994 = *Hacks/Ring/Böhm* Nr. 26.12.

[94] AG Osnabrück, 22 February 2008, 7 C 447/06 (4) = *Hacks/Ring/Böhm* Nr. 27.78.

suffered a 50% reduction of his ability to work for another three.[95] The OLG Frankfurt awarded € 1,250 in another case, taking into account the fact that the injury had affected the claimant for a total of seven months.[96] In a case where the whiplash injury was accompanied by a bleeding wound, and the victim, a self-employed commercial agent, was unable to work for one week, the court awarded € 1,300. This decision took into account the fact that the defendant insurance company had dealt with the claim very slowly.[97] The LG Ravensburg awarded € 1,500 for a whiplash injury in a case in which the claimant had to cope with severe impediments and required pain medication for three months.[98] Where the whiplash injury was accompanied by skull, leg and shoulder contusions and left the victim unable to work for three days and in pain for a whole month, the court awarded € 1,700 and reserved judgment for the award of future non-pecuniary damages.[99]

d) Insults

In a case where the tortfeasor hit the victim in the face and insulted her and others by calling her/them "bloody lesbians," a court awarded € 250 for the insult (and another € 500 for a hairline fracture of the nose).[100] 77

e) Non-pecuniary damages of more than € 200,000

With one exception, all non-pecuniary damages awards exceeding € 200,000 included in the compilation by *Hacks/Ring/Böhm* were medical negligence cases in which newborn children or infants suffered severe injuries. 78

In 2008, the highest amount reported by *Hacks/Ring/Böhm* thus far was awarded to a claimant who, as a newborn, had been deprived of sufficient oxygen and is now both mentally and physically severely disabled. Now twelve years old, his mental capacity is still equivalent to that of a baby. He is nearly blind, suffers from epileptic seizures, and cannot walk or stand or hold things. Taking into account that the defendant had not made any payments prior to the judgment, the Court awarded € 500,000 plus a monthly rent of € 500 which equates to a current net value of approximately € 619,000.[101] 79

€ 300,000 plus € 600 monthly rent and a reserved judgment for future non-pecuniary loss were awarded in a case in which a mother was not sufficiently informed of the relative risks of vaginal versus Caesarean delivery when the 80

[95] LG Aachen, 26 June 2008, 2 S 45/05 = *Hacks/Ring/Böhm* Nr. 27.321.
[96] OLG Frankfurt, 28 February 2008, 4 U 238/06 = *Hacks/Ring/Böhm* Nr. 27.403 = ZfS 2008, 264 = BeckRS 2008 10210.
[97] LG Fulda, 19 March 2008, 2 O 21/06 = *Hacks/Ring/Böhm* Nr. 27.417.
[98] LG Ravensburg, 27 March 2008, 1 S 216/07 = *Hacks/Ring/Böhm* Nr. 27.494.
[99] AG Freiburg, 19 February 2008, 4 C 49/07 = *Hacks/Ring/Böhm* Nr. 27.527.
[100] AG Düsseldorf, 3 June 2008, 43 C 2072/07 = *Hacks/Ring/Böhm* Nr. 27.204.
[101] OLG Zweibrücken, 22 April 2008, 5 U 6/07, *Hacks/Ring/Böhm* Nr. 27.3016 = BeckRS 2008 11967. The same amount had been awarded in 2003 (LG Kiel, 11 July 2003, 6 O 123/03, VersR 2006, 279 = BeckRS 2007 06739; confirmed by OLG Schleswig, 9 November 2003, 9 U 92/03 = BeckRS 2007 07173). Adjusted for inflation, this latter judgment is the higher award.

baby was in breech. During the vaginal delivery, the claimant's spine was injured so severely that he cannot sit or walk; his fine and basic motor skills are severely impaired; he is unable to control his bowel movements; he suffers increasingly under his condition; and it is unclear whether he will be able to complete secondary school.[102]

81 The only case listed in *Hacks/Ring/Böhm* which did not concern medical negligence and yet led to an award of more than € 200,000 involved a 15-month-old girl who had been injured through the negligence of her own mother in a car accident.[103] The mother, who was a trained nurse, subsequently gave up her work in order to care full time for her daughter, who is permanently quadriplegic, but is now able to attend high school. The Court awarded € 325,000 and reserved judgment for future non-pecuniary losses. The fact that it had been the mother who had caused the injury was considered a mitigating circumstance as the claimant did not have to be granted satisfaction.

82 Non-pecuniary damages of € 300,000 (and a reserved judgment for future non-pecuniary loss) were awarded to a claimant who suffered severe brain damage due to gross negligence on the part of the physician supervising the birth who failed to order blood tests despite a computerised tomography which clearly indicated pathologic circumstances.[104]

83 Where medical staff by gross negligence failed to react to increased protein levels in a mother's urine on two occasions and in consequence failed to detect haematoma in the child's brain, which led to hemiplegia and reduced aural and mental capacity, the Court awarded € 250,000 and reserved judgment for future non-pecuniary loss.[105]

f) Injuries inflicted intentionally and/or with guns

84 A comparably high amount was awarded to a victim who was shot in a gun rampage. The victim can no longer walk without aids, is unable to control his bowel or bladder activity, and has erectile dysfunctions; the insertion of a catheter to empty his bladder may lead to infections. The court awarded € 200,000.[106]

85 In a crime of passion, the tortfeasor intended to permanently maim a 36-year-old woman. The wounds inflicted would have led to her death if they had not been treated in time. Her shins were broken, and the tortfeasor cut her legs several times with a knife. The victim cannot drive cars, has difficulty sitting for

[102] OLG Nürnberg, 15 February 2008, 5 U 103/07 = *Hacks/Ring/Böhm* Nr. 27.3007 = Medizinrecht (MedR) 2008, 674 = VersR 2009, 71.
[103] OLG Düsseldorf, 11 February 2008, 1 U 128/07 = *Hacks/Ring/Böhm* Nr. 27.2881 = BeckRS 2009 01674.
[104] OLG Oldenburg, 28 May 2008, 5 U 28/06 = *Hacks/Ring/Böhm* Nr. 27.2879 = BeckRS 2008 11208.
[105] LG München I, 11 February 2008, 9 O 23090/03 = *Hacks/Ring/Böhm* Nr. 27.2861.
[106] LG Amberg, 22 January 2008, 22 O 278/06 = *Hacks/Ring/Böhm* Nr. 27.2840.

longer periods of time, and cannot exercise a number of sports. The scars are clearly visible and cannot be removed. She is in ongoing psychiatric therapy, and is unable to work. The court awarded € 75,000.[107]

The victim of a hunting accident was hit in the back by 200 pellets, of which 94 pierced his clothes. 53 pellets had to be surgically removed; the remainder had to be left in the victim's body. The Court awarded € 25,000 (reserving judgment on future non-pecuniary loss), taking into account that there was a (low) chance of delayed lead poisoning; that the defendant was unwilling to acknowledge any wrongdoing; the existence of third-party insurance; and that the defendant had acted with a higher degree of negligence than was usual in cases of this kind.[108] 86

A pupil who suffered a broken nose, lost five teeth, and was left with a number of concussions, was awarded € 6,500. The Court took into account the psychological effects resulting from permanently visible dental work.[109] 87

C. Literature

1. *G. Schlegelmilch* (ed.), *R. Geigel*, Der Haftpflichtprozess: mit Einschluss des materiellen Haftpflichtrechts (C.H. Beck, 25th ed. 2008)

This volume, produced by a team of 14 experts, can best be described as a practitioner's commentary to tort litigation; in its 25th edition, it is by now a classic in Germany. The material is presented under three main headings which cover the basics of tort liability (including separate chapters dealing with, inter alia, contributory negligence, compensation for harm caused to things and persons, psychological harm, pain and suffering, indirect victims, time prescription, and questions of insurance law); the most important types of claims (both within the BGB and in special statutes); and a set of chapters about the procedural details of a tort action. Strong revisions have been made to the parts about insurance contracts, disputes between neighbours, harm caused by psychological factors, causation, contributory negligence of minors, the obligation to limit harm caused by traffic accidents, specific duties of care in a wide variety of areas (*Verkehrssicherungspflichten*), medical malpractice, and product liability. The authors stress that most of these changes were made necessary by new developments in the courtroom, which once again confirms the importance of judges as "oracles of the law" (John Dawson) in a civil law system. The book, which approaches tort law from a highly practical angle, continues to be exceptionally useful for practitioners and academics with an interest in case law. 88

[107] LG Düsseldorf, 25 April 2008, 11 O 334/07 = *Hacks/Ring/Böhm* Nr. 27.2701.
[108] OLG Hamm, 2 April 2008, 13 U 133/07 = *Hacks/Ring/Böhm* Nr. 27.2292 = BeckRS 2008 10782.
[109] LG Köln, 28 February 2008, 37 O 670/07 = *Hacks/Ring/Böhm* Nr. 27.1377.

2. *H.-P. Götting/C. Schertz/W. Seitz* (eds.), Handbuch des Persönlichkeitsrechts (C.H. Beck 2008)

89 The growing practical importance of personality rights in Germany is reflected in the publication of a large new volume dealing with the protection of individuals against the media and the state. Separate chapters address the protection offered to the right to one's own image, name, and voice by private law, criminal statutes, and copyright legislation. Other sections of the book deal with the constitutional limits of personality rights as established by press freedom, freedom of expression, and artistic freedom. The "handbook" (at 1,227 pages a daring title) also covers the most influential foreign jurisdictions as well as the European Convention on Human Rights; its most interesting feature, however, is the combination of public and private law issues. It thus provides an excellent basis for the study not only of the famous *Caroline* cases of both German courts and the European Court of Human Rights but also analyses in great detail the most important constitutional cases involving the violation of personality rights by public authorities.

3. *G. Müller*, Der Schutzbereich des Persönlichkeitsrechts im Zivilrecht, VersR 2008, 1141–1154

90 As Vice-President of the Bundesgerichtshof and President of the Senate which deals with the large majority of German tort law cases, *Müller* is exceptionally qualified to present the latest developments in the jurisprudence of the BGH, the Federal Constitutional Court, and the European Court of Human Rights in areas affected by the allgemeines Persönlichkeitsrecht. The contribution is highly topical due to the large number of important decisions which these courts have recently handed down. Cases involving, inter alia, controversial public debate, violations of the private sphere, critical press reports, artistic freedom, satire, the publication of photos, monetary claims (especially for pain and suffering), the commercial exploitation of personality rights, and their reach after death, have featured regularly in German courtrooms and are discussed here in their wider legal and historical context. The narrative identifies, in particular, an increasing practical importance of injunctions and a stronger emphasis on commercially relevant aspects of the allgemeines Persönlichkeitsrecht. Of wider interest to the international audience are the sections dealing with the relationship between German law and the European Convention on Human Rights. Here, *Müller* argues that German courts have successfully adapted their jurisprudence to Strasbourg case law with respect to "prominent persons of contemporary history" while stopping short of abandoning the traditional German approach to the balance between privacy rights and press freedom.

4. *H. Strücker-Pitz*, Verschärfung der ärztlichen Aufklärungspflicht durch den BGH, VersR 2008, 752–756

91 A cursory review of past German Yearbook contributions shows that the duty of doctors to adequately inform patients about possible risks of the suggested medication or treatment has attracted a constant stream of new and important BGH decisions. *Strückler-Pitz'* article pulls together the different strands of this jurisprudence, which are presented under eight headings – (1) the duty to

inform patients about particular dangers of a medication which go beyond the general risks attached to the treatment in question (*Risikoaufklärung*); (2) new medical products; (3) new treatment methods (*Neulandverfahren*);[110] (4) non-traditional approaches (*Außenseitermethode*); (5) altruistic procedures (here a blood donation[111]); (6) the rights of minors; (7) the delegation of duties to inform patients as part of standard hospital routine; and (8) the delegation of duties to inform patients under the terms of special contractual arrangements (*Wahlleistungsvereinbarungen*). Two trends emerge from the narrative, which highlights the more recent cases but also flashes back to important decisions handed down several years ago. The author stresses the BGH's contribution to a legal framework which will allow new pharmaceuticals and medical techniques to develop. This does not, however, happen at the expense of the patient, for the right to be informed about the risks connected to medical products and procedures has been strengthened in parallel. This jurisprudence, which goes back to cases decided by the Reichsgericht, finds its fundamental justification not only in the constitutional right to one's physical integrity but also – and significantly – in the right to self-determination as a component of human dignity. The author commends this case law and identifies only two areas which, in her view, will require some adjustment – the right to be informed about side effects of pharmaceuticals and the position of minors. Anyone interested in this very vibrant and practically relevant area of German medical law will profit from this contribution.

5. *J.M. Schubert*, Punitive Damages – das englische Recht als Vorbild für das deutsche Schadensrecht? Juristische Rundschau (JR) 2008, 138

92

The author briefly describes the approach English tort law takes to exemplary damages, and endorses the adoption of similar rules by the German system. *Schubert* argues that effective deterrence should be one of the core goals of tort law. According to the author, exemplary damages should be paid if – and only if – the victim could have made an equivalent gain by entering into a consensual transaction with the tortfeasor before the fact. In these cases, the author argues that the policy reasons underlying § 97 of the German Copyright Act (UrhG) apply. If – or insofar as – the award of exemplary damages is necessary for deterrence but could not have been the object of such contract, damages should be paid over to the public purse. *Schubert* believes that his suggestions would also ensure that the European principle of effectiveness, as established by the European Court of Justice in *Courage v Crehan*[112] and *Manfredi*,[113] is given effect.

[110] On the so-called "Robodoc" decision of the Bundesgerichtshof (BGH NJW 2006, 2477) involving highly automated hip surgery see *J. Fedtke*, Germany, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 228 f.

[111] BGH MedR 2006, 588. On this decision see *Fedtke* (fn. 110) 226–228.

[112] ECJ C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[113] ECJ joined cases C-295/04 to C-298/04, *Manfredi* [2006] ECR I-6619.

6. *A. Dutta*, Amtshaftung wegen Völkerrechtsverstößen bei bewaffneten Auslandseinsätzen deutscher Streitkräfte, Archiv des öffentlichen Rechts (AöR) 133 (2008) 191–234

93 The use of German military forces outside the country's borders has increased over the past decades; current hotspots involving German military personnel include the Kosovo (KFOR), Bosnia and Herzegowina (EUFOR), Afghanistan and Usbekistan (ISAF), the Sudan (UNMIS), and the waters off the Horn of Africa (OEF). These missions are authorised under the rules of public international law and subject to a large number of limitations designed to protect, inter alia, the human rights of local populations. Despite these safeguards, emphasised by numerous internal regulations of the German army,[114] a greater number of operations inevitably increases the risk that German soldiers – on their own account or in collaboration with foreign troops – violate international law. This, in turn, raises the question addressed by the author in this topical contribution – what, if any, is the individual liability of the German state for violations of international law committed by its armed forces in the course of international deployments? *Dutta's* detailed analysis, which takes into account two fairly recent decisions of the Bundesgerichtshof,[115] suggests that claims for damages can be brought by individual victims under the general rules of the German Civil Code dealing with the liability of German public authorities (§ 839 BGB) in conjunction with Art. 34 of the German Constitution. Domestic courts are, in particular, competent to hear such claims; the national legal order is applicable despite the international context; and, finally, German law also provides an effective legal framework within which to resolve such conflicts whereas secondary rules of international law establishing state responsibility vis-à-vis individual victims still remain to be developed in this area. These issues cover new ground with respect to German law but will also be of interest, in comparative terms, for public international and human rights lawyers from other countries with international troop deployments.

7. *G. Wagner*, Das neue Umweltschadensgesetz, VersR 2008, 565–580

94 This contribution by *Wagner* focuses on the new Environmental Damage Act (Umweltschadensgesetz),[116] which covers harm caused to the environment itself rather than individual rights such as life, physical integrity, health, or property. While the latter interests are protected by the Environmental Liability Act (Umwelthaftungsgesetz),[117] this new piece of legislation – made necessary by Community law[118] – is designed to address harm caused to specific parts

[114] See, e.g., German Ministry of Defence, Zentrale Dienstvorschrift Nr. 15/2 (1992).

[115] BGHZ 155, 279 of 26 June 2003 (*Distomo*) and BGHZ 169, 348 (*Varvarin*) of 2 November 2006.

[116] Gesetz zur Umsetzung der Richtlinie des Europäischen Parlaments und des Rates über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden of 10 May 2007, BGBl 2007 I 666.

[117] Umwelthaftungsgesetz vom 10. Dezember 1990 (BGBl 1990 I 2634), zuletzt geändert durch Art. 9 Abs. 5 des Gesetzes vom 23. November 2007 (BGBl 2007 I 2631).

[118] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, 56–75.

of the environment as identified by the Flora-Fauna-Habitat Directive of the European Union.[119] The approach of the Act is entirely regulatory in the sense that it provides the necessary public law authority for environmental protection agencies to intervene in case of a threat or damage to particular species, habitats, water resources, or soil. The contribution explains in great detail the ambit of the Act and places it within the wider context of environmental liability in Germany. It will be of particular interest for corporate environmental lawyers and environmental protection associations, which are given specific locus standi rights under this legislation.

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[119] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, 7–50.

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densabrechnung, NJW 2008, 1349 ff.; *Chr. Grüneberg*, Haftungsquoten bei Verkehrsunfällen: Eine systematische Zusammenstellung veröffentlichter Entscheidungen nach dem StVG (11th ed. 2008); *B. Herz*, Haftung für Verletzungen der Straßenverkehrssicherungspflicht, NJW-Spezial 2008, 361; Handbuch der KFZ-Schadensregulierung (2008); *R. Heß/M. Burmann*, Anscheinsbeweis – Typischer Geschehensablauf als Voraussetzung, NJW-Spezial 2008, 233 f.; *C. Hugemann*, Der wirtschaftliche Totalschaden im Lichte der BGH-Rechtsprechung, NJW-Spezial 2008, 41; *T. Kadner Graziano/Chr. Oertel*, Ein europäisches Haftungs- und Schadensrecht für Unfälle im Strassenverkehr? Eckpunkte de lege lata und Überlegungen de lege ferenda, ZVerglRWiss 2008, 113 ff.; *H. Lemcke/R. Heß*, Abrechnung des Fahrzeugschadens: Das Vier-Stufen-Modell des BGH, NJW-Spezial 2008, 489 f.; *M. Nugel*, Haftungsquote bei einem Verkehrsunfall zwischen Fußgänger und Pkw, NJW-Spezial 2008, 425 f.; *J. Pamer*, Der Kaskoschaden (2008).

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XI. Greece

Eugenia Dacoronia

A. Legislation

1. Law 3691/05.08.2008[1]: Prevention and Suppression of Money Laundering and of Terrorism Financing

1 The above Law, which generated a lot of criticism from the legal world, and in particular from legal practitioners, as its provisions are harsh and interfere with professional secrecy, includes a provision (art. 47), which gives the State the right to claim damages from the person convicted, by an irreversible decision, of a crime described in art. 2 and 3 thereof. Said damages, which are not immediately related to the crime said person was convicted of, will consist of any property said person has acquired from another crime of said art. 2 and 3, even if, for some reason, there is no charge for such crime.

B. Cases

1. Areios Pagos 1345/13.06.2008[2]: Judicial Expenses as Part of the Damage Compensated

a) Brief Summary of the Facts

2 AP 1345/13.06.2008: The defendants, who were lawyers, falsely pretended they were acting on behalf of a company and in order to cause damage to the plaintiffs, filed against them three civil actions without being legally authorized by that company. The defendants to that actions and plaintiffs in the present case were obliged to hire other lawyers, to whom they paid € 102,914 as fees, in order to represent them in the Court actions. All the actions of the defendants were rejected and subsequently, the plaintiffs filed a civil action on grounds of art. 914 Greek Civil Code (GCC) for the compensation of their damage amounting to the sum of € 102,914 they paid to their respective lawyers. The Court of Appeal rejected their action.

[1] Published at the Official Gazette A´ 166.
[2] Published at NOMOS data base.

b) Judgment of the Court

The Greek Areios Pagos 13 June 2008 No. 1345, confirming the judgment of the Court of Appeal, held that it derives from art. 914 GCC that in case of a tort, the tortfeasor is obliged to pay damages for the damage which is causally connected to the event that caused it. The expenses the party that sustained the damage voluntarily incurs in order to support his civil claims against the tortfeasor, such as the judicial and extra-judicial expenses before and during the litigation are included in this damage, as long as they fall in the protective ambit of art. 914 GCC; the judicial expenses that can be claimed on the basis of art. 176, 178, 181, 184 and 189 of the Greek Code of Civil Procedure (GCCP) cannot be recuperated on the basis of art. 914 GCC. Otherwise, the relevant provisions of the GCCP, which regulate the matter of judicial expenses to the exclusion of other provisions that could ground a relevant claim (AP 1609/2007), would be set aside. 3

c) Commentary

Art. 173–193 GCCP regulate how the expenses related to litigation are to be borne by the litigants. Said expenses are characterised as *judicial*, encompassing the Court expenses (payable to the State) and *extra-judicial*, encompassing the amounts payable to lawyers, bailiffs, etc. as fees and expenses.[3] The claim for the payment of the expenses is a claim of substantive law, which depends, however, on the fulfilment of the conditions set by the above mentioned relevant provisions of GCCP.[4] The commented decision follows the consistent jurisprudence of the Courts of Appeal[5] according to which said expenses cannot be recuperated on the basis of art. 914 GCC, as long as they can be claimed on the basis of GCCP. 4

2. Areios Pagos 1498/27.06.2008[6]: Consideration of Benefits in the Calculation of Damage

a) Brief Summary of the Facts

The plaintiff had previously won two civil actions against the defendant bank, after which the bank was obliged to pay her the amount of GDR 85,260 (€ 250) as a residue of a housing mortgage loan as well as the amount of GDR 10,000,000 (€ 29,347) as compensation for the consequential damage she suffered for not having sold the mortgaged apartment and, thus, for having lost interest on the sale amount (GDR 8,000,000 (€ 23,477)) of said apartment, which she would have deposited with the bank. Later, she filed a third action claiming more interest from the bank for still not having sold her apartment. This action was rejected by the Court of Appeal. 5

[3] See, among others, *G. Orfanidis*, Introductory Remarks to art. 173–193 GCCP, in: K. Kerameus/D. Kondylis/N. Nikas (eds.), Code of Civil Procedure (2000) 397.

[4] *Orfanidis* (fn. 3) 398.

[5] Athens Court of Appeal 6590/2003 Episkopissi Emporikou Dikaiou (EpiskEmpD) 2004,162; Athens Court of Appeal 4027/1978 Armenopulos (Arm) 1979, 21; Piraeus Court of Appeal 1290/1996 Epitheorissi Dikaiou Polykatoikias (EDPol) 1998, 176; Creta Court of Appeal 133/1971 Arm 1971, 1001.

[6] Published at NOMOS.

b) Judgment of the Court

6 The Greek Areios Pagos 27 June 2008, No. 1498, confirming the judgment of the Court of Appeal, held that it derives from the provisions of art. 288, 298 and 914 GCC, that in case of tort liability any profit the party who sustained the damage gained from the event that caused the damage is also taken into consideration, so that the tortfeasor's obligation is restricted to the restitution of the actual damage. Taking into consideration both the damage and the profit is a method to calculate the precise extent of the damage, and is not related to the set off, as a means of extinction of obligations (art. 440 GCC).

7 In this case, the plaintiff had strongly benefited from not selling her apartment, as its value had significantly increased on the one hand, and on the other she had saved rent. The Court of Cassation, thus, held that the Court of Appeal, by holding that the benefits should also be taken into consideration, did not violate the above mentioned provisions or those of art. 178, 281, 450 and 919 GCC and that its judgment was fully justified.

c) Commentary

8 The damage causing event may, in parallel to the damage, entail benefits to the person who sustained the damage. The question that arises is whether said benefits are to be deducted from the amount of damages to be paid by the tortfeasor, which means that if the benefits are equal to or greater than the damage sustained, the tortfeasor is freed from the payment of any damages. Given that the aim of Greek tort law is to help the victim annihilate the detrimental consequences of the damage causing event, not to make him richer or to punish the tortfeasor, it prevails[7] that the benefits must be deducted from the damages, as is also accepted by the commented decision. This principle, however, must not be without exceptions, as the deduction of the benefits may, in some cases, prove unjust to the victim.[8]

3. Areios Pagos 1339/13.06.2008[9]: Lifting of the Illegal Character of the Damage Causing Behaviour

a) Brief Summary of the Facts

9 On 28 May 1996, one of the defendants reported that a person broke the window of his car and stole his briefcase, which among other things also contained a block of cheques, which were immediately annulled by his bank. However, on 1 June 1999, the plaintiff served the defendant with a court order to pay one of the above mentioned cheques. The defendant filed an appeal against this court order, after having filed charges against the plaintiff for theft and forgery. During the criminal procedure, the other two defendants also testified before the competent judicial authorities confirming the second defendant's allega-

[7] See, among others, *Ath. Kritikos*, Damages from traffic road accidents (4th ed. 2008) § 15 no. 12 ff.
[8] See in details *M. Stathopoulos*, Law of Obligations, General Part (2004) § 9 no. 48 ff.
[9] Published at NOMOS.

tions. The plaintiff then filed charges against the defendants for libel and perjury. Consequently, the appeal of the defendant against the court order to pay the cheque was irrevocably accepted, and all of them, defendants and plaintiff, were found not guilty by the criminal courts of the charges filed respectively against each other. However, the plaintiff filed a civil action claiming for moral harm due to the fact that the defendants acting illegally and culpably had violated his personality right according to art. 57 GCC. The Court of Appeal held that, independently from the fact that the defendants did not objectively commit the above penal acts, they illegally and culpably committed a tort against the plaintiff, because, despite the fact that they had the opportunity to foresee the damage of the plaintiff, they did not show the care they would have shown when acting in their own interest, hoping that they would avoid the said damage; thus, they acted consciously negligently against the plaintiff as well as illegally and culpably, their behaviour violated the provisions of art. 281 GCC, was abusive, and consequently directly illegal. The defendants filed an appeal against this judgment before the Supreme Court.

b) Judgment of the Court

The Greek Areios Pagos 13 June 2008, No. 1339 held that it derives from the provisions of art. 299, 300, 330, 914 and 932 GCC that tort liability presupposes an illegal and culpable behaviour, damage and causality between the behaviour and the damage. The behaviour is illegal if a prohibitive or a peremptory provision of law is violated. Also according to art. 367 of the Greek Penal Code (GPC), the cases mentioned in art. 361 GPC (crimes against one's honour) are not illegal if they constitute manifestations for the execution of legal duties or for the exercise of legal authority or for the protection of rights, etc. According to the Court of Cassation, this provision applies, by way of analogy, also to the field of civil law, especially in the case of art. 57–59 GCC, for the sake of unity of the legal order. Thus, if the above mentioned acts are not considered to be illegal according to penal law, the illegal character of the damaging behaviour, as a necessary condition for the relevant civil law tort, should also be excluded. Consequently, if the defendant invokes the application of art. 367 GPC, this invocation constitutes a plea, which leads to the lifting of the illegal character of the offence, also in cases of civil tort liability. A different approach would violate the provision of art. 367 GPC. 10

c) Commentary

The decision stresses the interrelation between penal and civil law as regards illegality. A behaviour which is justifiable according to the provisions of the GPC, and thus not illegal, cannot be characterised as illegal for the application of art. 914 ff. GCC. 11

4. Areios Pagos 422/05.03.2008[10], 731/09.04.2008[11]: Liability of the Supervisor According to Art. 923 GCC

a) Brief Summary of the Facts

12 AP 422/05.03.2008: On 18 March 2002, A, the defendant-appellant, was driving his car on the highway in heavy traffic when the plaintiffs' nine-year-old son suddenly tried to cross the road. A did not manage to stop his car and as a result the nine-year-old boy was injured. The boy's parents filed an action for compensation.

13 The Court of Appeal held that A was exclusively liable for the boy's injury, because, out of negligence, he failed to exercise the attention which an ordinary prudent driver under the same circumstances would have. As a consequence, he was not able to foresee and avoid the accident. The Court also found that there was no fault on the part of the parents in exercising the supervision of their child. However, even if the parents were to be held, according to art. 926 GCC, jointly liable with the driver for not exercising the appropriate supervision, such liability is not based on art. 923 GCC, as invoked by the appellant.

14 AP 731/09.04.2008: The parents and in particular the father of a ten-year-old child, in exercising his parental care, temporarily assigned A, who was well known to him, with the supervision and custody of his son. A was a bulldozer driver and took the minor with him to a mine, without the consent of his father. Unfortunately, the minor was fatally injured by the bulldozer driven by A. The vehicle was insured for civil liability against third parties by the appellant insurance company. The parents filed an action against A and the insurance company, in order to be compensated for the funeral expenses and for pain and suffering for the death of the minor. The Court of Appeal accepted their action and rejected all the defendants' allegations for concurrent fault of the minor and his parents.

b) Judgment of the Court

15 The Greek Areios Pagos 5 March 2008, No. 422 held that, according to art. 923 GCC, the following conditions have to be met in order that the liability of the supervisor is established: a) the existence of a duty to supervise a minor or an adult put under judicial assistance, who have to be looked after for their sake or the sake of third parties. The extent of the necessary supervision in various situations is found only after all the particular circumstances have been taken into consideration; the age, maturity, mental ability of the person under supervision as well as the foreseeability or the dangerousness of the behaviour that caused the damage can be used as criteria, b) a culpable degree of negligence in the supervision, hence, the supervisor's omission to take all the necessary and possible measures in order to avoid the third parties' damage caused by the person under supervision, c) an illegal damage caused to third parties by an act

[10] Chronika Idiotikou Dikaiou (ChrID) H/2008, 785 followed by remarks of *K. Christakakou*.
[11] Efarmoges Astikou Dikaiou (EfAD) 2008, 660 = ChrID Θ/2009, 33 followed by remarks of *Christakakou*.

or omission of the person who is under supervision, which meets the objective conditions of a tort, d) a causal connection between the illegal behaviour of the person under supervision and the damage of the third party, as well as a causal connection between the supervisor's neglect and the behaviour that caused the damage. The aim of this provision is to protect third parties from minors or persons under judicial assistance, who are usually insolvent and cannot be blamed for their conduct, and not to protect the person under supervision for the damage he suffers as a result of a violation of the duty to supervise. Thus, if the person who is under supervision suffered damage as a result of the neglect of his supervision, the supervisor's liability towards said person will not be based on art. 923 GCC, but either on the provisions that regulate the special relation (legal or contractual), from which the obligation to supervise derives (art. 1531, 1632, 1680, 335 ff., 380 ff. GCC), or, possibly, on art. 914 GCC.

16 The Greek Areios Pagos 9 April 2008, No. 731 held that it derives from art. 916 and 917 GCC that, as a principle, a minor between ten and fourteen years old is liable for the tort he committed unless he acted "without discretion", i.e. lacking the capacity to discern the illegality of his act. When said minor is not liable for the tort he committed, the plea of art. 300 GCC for concurrent fault cannot be raised against him. Moreover, it derives from art. 923 § 1 GCC that "supervision" is the custody, surveillance and protection of a person, depending on the circumstances, and is primarily exercised, in case of a minor, by the persons who exercise the parental care according to the provision of art. 1510 GCC; the supervision may, by means of an informal contract, be assigned to a third person at a certain place and time. This person will then be obliged to supervise the minor according to this contract and is liable for the damage the minor illegally causes to somebody else. Thus, a rebuttable presumption is established against the parent (supervisor), who is presumed culpable regarding the exercise of the supervision; how this supervision is exercised depends on the totality of the circumstances, especially on the age, maturity, education as well as the health (physical and mental) condition of both the supervisor and the person under supervision. The said presumption can be rebutted if the supervising parent alleges that in this particular case, he properly exercised the supervision, or that, despite the appropriate supervision, the damage could not have been avoided. The presumption is also rebutted when the father alleges and proves that the exercise of the supervision was objectively impossible, or when the damage was caused during a period when a third person was assigned, by a contract with the father, with the supervision of the minor. In this last case, the father is freed from his liability only if he had ensured that the third party had the necessary qualities to undertake the supervision and he had also checked that the said third party properly fulfils the undertaken obligation or if it was objectively impossible to co-exercise the supervision with the third party.

c) Commentary

17 In the remarks following the decision of Areios Pagos 5 March 2008, No. 422, the commentator notes that the said decision correctly tries to demarcate the field of application of art. 923 GCC and to make clear that the legislator in

art. 923 GCC regulates the liability of the supervisor against third parties and not against the person under supervision; if the latter suffers damage as a result of the neglect of his supervision, he can hold the supervisor liable not according to art. 923 GCC, but either according to the provisions that regulate their special relation (parental care, tutorship, contract, etc.) or, possibly, according to art. 914 GCC. The commentator concludes that it derives from the above that if the supervising parent has taken all appropriate measures for the upbringing and surveillance of the child according to the provisions of family law (see in particular art. 1518 GCC) and has shown no negligence, said parent is not liable against the child in case of the latter's damage. He might, however, be held liable against third parties who suffered damage as a result of the conduct of the person under supervision for violation of the duty of care said supervisor has towards said third parties for damage caused to them by the person he supervises. The differentiation lies in the aim of art. 923 GCC, which is to compensate third persons for damage caused by persons under supervision, who, as a rule, cannot be imputable in tort.

18 In the remarks following the decision of 9 April 2008, No. 731, the same above commentator notes that the decision follows the settled view of the jurisprudence according to which the plea of art. 300 GCC for concurrent fault cannot be invoked against a minor when the latter has not been held liable for the tort he committed.

5. Areios Pagos 1417/25.06.2008[12]: Claim for Lost Profits from Work Illegally Provided (Art. 298 and 929 GCC).

a) Brief Summary of the Facts

19 The plaintiff, an Albanian citizen, had agreed to be employed as a worker during the olive collection period for the years 2000–2001 and she was also employed as a cook with a contract which would expire on 31 October 2000. It had been agreed that the plaintiff would hold the same position in the following summer. However, after being injured in a car accident, the plaintiff became absolutely incapable of working. Therefore, she filed an action claiming the income she would have obtained if the accident had not taken place. The Court of Appeal rejected her action on the ground that she did not hold a work permit in Greece at the time of the accident, and, thus, she could not legally work.

b) Judgment of the Court

20 The Greek Areios Pagos 1417/25.06.2008 quashed the judgment of the Court of Appeal holding that the latter violated the provisions of art. 298 and 929 GCC. According to the Court of Cassation, the provision of work by a foreigner who does not have a working permit in Greece and is not a citizen of a Member State of the European Union, is entitled to claim compensation for lost profits, i.e. loss of income due to the work interruption, even if such work was done illegally.

[12] Published at NOMOS.

The claim for damages based on art. 929 sent. a GCC in combination with art. 298 GCC is different than the claim of payment of wages deriving from a void employment contract which is based on the provisions on unjust enrichment (art. 904 GCC ff.). The lack of a work permit does not hinder the existence of a claim for damages nor is a presupposition for the said claim that the injured person previously had a claim for wages according to art. 904 GCC ff.; it suffices in principle for claims based on art. 298 and 929 sent. a GCC that such revenues could be acquired in the future (AP 3/2004 (full bench), AP 2067/2006). 21

c) Commentary

The Court of Cassation, after the reversal of the previous jurisprudence with its decision 3/2004 (in full bench)[13], steadily holds[14] that the existence of a valid work permit is not necessary for claims deriving from a tortious act. 22

6. Areios Pagos (in full bench) 18/23.06.2008[15]: Disfiguration (Art. 931 GCC)

a) Brief Summary of the Facts

The plaintiff was employed by the defendant company as an assistant to its chemical engineer. On 9 March 2008, due to the culpability of an employee of the defendant company, said plaintiff suffered problems of an aesthetical and psychological nature, which will lead to serious and unfavourable consequences for his social future. The Social Insurance Fund (in Greek IKA), to which the plaintiff was insured, undertook the restoration of the latter's material damage from the accident. The Court of Appeal held that the defendant company should pay an amount to the plaintiff for disfiguration (art. 931 GCC), which is due in addition to the amount adjudicated for moral harm (art. 932 GCC). 23

b) Judgment of the Court

According to Areios Pagos (full bench) 23 June 2008, No. 18, it derives from art. 931 GCC, combined with art. 298, 299, 914, 929 and 932 GCC, that the disablement or disfiguration caused to the victim, irrespective of sex, in addition to the effect it can have on claims based on art. 929 and 932 GCC, can also establish an independent claim for compensation if it affects the victim's future. This independent claim of art. 931 GCC only refers to compensation for future *material* damage and not to a pecuniary satisfaction for moral harm, which is given according to art. 932 GCC and cannot be based on art. 931 GCC. Thus, always according to the Court of Cassation, as the plaintiff was insured by IKA, which is, according to the law, exclusively liable to pay damages for all damage, IKA had to pay all damages, including damages for disfiguration (art. 931 GCC), given the material character of such claim; the em- 24

[13] For a summary of the decision AP 3/2004 (in English) see *E. Dacoronia*, Greece, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 337, no. 35–38.

[14] Areios Pagos 1385/2007 not published**;** 1155/2007 not published; 1156/2007 published at NOMOS. For a summary of these decisions (in English) see *E. Dacoronia*, Greece, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 321, no. 41–45.

[15] ChrID H/2008, 783.

ployer, who is vicariously liable for his employee who caused the damage, is only then liable to damages – consisting in the difference between the amount paid by IKA and the amount payable according to common tort law – when the said employee intentionally caused the damage. If the damage was committed as a result of negligence, the injured person has only a claim for compensation for moral harm against the vicariously liable employer, as this compensation is always judged according to the common tort law provisions (art. 914, 922, 932 GCC).

25 However, a dissenting minority of eight members of the Court were of the opinion that art. 931 GCC also provides a claim for pecuniary satisfaction due to moral harm, as long as it covers the pecuniary satisfaction of the injured for the restoration of his future social discomfort caused by his invalidity or disfiguration. This reasonable amount of money should be adjudicated in parallel to the pecuniary satisfaction of art. 932 GCC, as this provision, like the provision of art. 929 GCC on material damage, does not cover restoration of future social discomfort caused by invalidity or disfiguration.

c) Commentary

26 Contrary to legal doctrine which firmly supports the view that art. 931 GCC does not introduce an independent claim for the compensation of a future pecuniary damage as, when applying art. 929 or 932 GCC, full damages must be granted, the Supreme Court, in a string of decisions, which is confirmed with the commented decision (taken in full bench), firmly considers that. art. 931 GCC introduces an independent claim for the establishment of which particular incidents, other than those required for the establishment of the claims based on art. 929 and 932 GCC, are required[16]. Another issue which now puzzles the Court of Cassation concerns the material or immaterial character of this independent claim. To this puzzle a unanimous solution could not be found.

7. Areios Pagos 951/07.05.2008, 1024/19.05.2008, 401/04.03.2008, 1546/03.07.2008, 1581/09.07.2008[17]: Issues Related to Prescription (Art. 937 GCC)

a) Brief Summary of the Facts

27 AP 951/07.05.2008: According to the appellants' action filed on 31 March 2000, on 14 June 1971, A, who had written two holographic wills, died. In one of these wills he had designated five hundred pounds to be given to the first plaintiff and three hundred pounds to the second. However, B, A's spouse and successor, who found the two wills after his death, presented to the Court for publication only one of them, and until her death hid the will which included

[16] For the relevant doctrine and jurisprudence see (in English) *E. Dacoronia*, Greece, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2001 (2002) 279, 280; European Tort Law 2002 (2003) 240–242; European Tort Law 2004 (2005) 338, 339 and European Tort Law 2006 (2007) 252–255.

[17] All five decisions are published at NOMOS.

the above mentioned provisions in favour of the plaintiffs, in order for the above mentioned sums not to devolve to the plaintiffs and to be illegally appropriated by her. After B's death on 15 October 1994, the plaintiffs found and published the second will, on 19 September 1997. Based on these facts, the plaintiffs lodged a claim against the defendant, B's only successor, to be bound to accredit each of them with the respective amounts mentioned in the concealed will. The Court of Appeal, after evaluating as principal ground of said action the provisions on tort and not those on unjust enrichment, decided that the action was not subject to the five-year prescription of art. 937 § 1 sent. a GCC, given that the plaintiffs found and published the will, thus took knowledge of the damage and the tortfeasor on 19 September 1997, the date from when the above mentioned prescription period began to run, and was not completed until the moment of the filing of the action. However, it was subject to the twenty-year prescription of art. 937 § 1 sent. b GCC, according to which the claim is prescribed twenty years after the commission of the tort, without regard to the moment the damage occurred or was felt, because when B published one of the wills on 8 June 1972, she was also bound to publish the other. Thus, at that date, her intention to hide one of the wills and to illegally appropriate the amount of eight hundred pounds was manifested and the tort was committed. From that date the twenty-year prescription of the compensation claims started to run and was completed on 8 June 1992. Accordingly, the Court of Appeal rejected the action on grounds of prescription.

AP 1024/19.05.2008: On 11 July 1994, the plaintiffs, responding to an offer to the public for the lease of a basement of a building complex, drew up a contract with the defendants for the lease of the said basement. Although the plaintiffs had clearly stated that they intended to use the basement as a gym and swimming pool, the defendants not only never specified the legally allowed use of the premises in question, but they also unconditionally accepted the plaintiffs' intended use. However, when the plaintiffs filed a petition before the competent authorities to be granted a permit to operate, they discovered that this basement was only allowed to be used as an "auxiliary space" and that in any case it could not be legally exploited as a gym. As a result the plaintiffs' gym was closed by the authorities on 6 May 1996. On 7 May 2001, they filed an action claiming for compensation for their damage and moral harm. The Court of Appeal rejected their action, judging that their claim was submitted to the five-year prescription according to art. 937 GCC. 28

AP 401/04.03.2008: The plaintiff was employed by the Greek Telecommunications Organization (in Greek OTE) with an employment contract of indefinite time and was subject to the OTE internal working regulation. When employees were assessed for their chances of being promoted in the years 1993 to 1995, the competent organs of OTE omitted to promote the plaintiff, despite the fact, that, according to his allegations, he was better than his promoted colleagues, because of his superior qualifications. As a consequence, he filed an action which was served to OTE on 12 June 2001. In the said action he also alleged that this omission was illegal (abusive), culpable and caused him damage, which amounted to the difference between the salaries of the deputy 29

manager and those of the section head officer for the period from 1 January 1993 to 31 May 1995. The Court of Appeal rejected the action, judging that the plaintiff had taken knowledge of his omission to be promoted and of the promotion of his colleagues as soon as the relevant decision had been taken; thus, all his claims were subject to the five-year prescription of art. 937 GCC. The plaintiff had alleged that he took knowledge of the merits of his promoted colleagues for the first time in December 1997 (four years and seven months after the first omission and two years and nine months after the last omission respectively) from his trade-union and that until then he could not have been aware of whether he was better than his colleagues and of whether the omissions were of an illegal nature so as to file a court action earlier.

30 AP 1546/03.07.2008: In 1986 the Greek School Buildings Association expropriated ground belonging to the plaintiffs. On 4 April 1990, the amount of GRD 1,692,600 (€ 4,967) was adjudicated to them as the legal compensation for the loss of their property and was deposited to the competent public authority. However, the plaintiffs collected this amount on 13 March 2002, due to the fact that their proprietary right had meanwhile been judicially disputed by the defendants, who had filed petitions to be compensated for the expropriation of the same ground using falsified proprietary titles. On 11 September 2002, after the plaintiffs' right had been irrevocably recognized by the competent courts, the plaintiffs filed an action against the defendants to be compensated for the loss of interest they suffered during the period from 4 April 1990 to 13 March 2002 as well as for moral harm. The defendant, acting in person and as an heir of his brother, who died before the filing of the action, alleged that the plaintiffs' claim had been submitted to the five-year prescription of art. 937 GCC, as the latter took knowledge of the damage in 1990 and filed their action only in 2002.

31 AP 1581/09.07.2008: On 19 April 1997, the plaintiff was injured in a car accident, for which A was exclusively liable. On 22 December 1998 the plaintiff filed an action against A and the insurance company for consequential damage from the day of the accident until 30 October 1998 as well as for pecuniary compensation for moral harm, on 31 March 2001 an action claiming positive and consequential damage from 1 January 1999 to 31 March 2001 and, on 27 August 2002, an action claiming compensation for the amounts that he spent on physiotherapy, medication, and taxi fees, as well as for the amount of € 26,933. 97 he lost due to his inability to work after the accident, from 1 April 2001 to 31 August 2001. Against this last action the defendants alleged that the plaintiff's claims had been prescribed, on the ground that the above mentioned action was served to them on 24 September 2002, more than five years after the accident. From the day of the accident the plaintiff knew of its damaging consequences, as they were not due to an unforeseeable significant deterioration of his health; thus, there was no prolongation of the prescription period to twenty years. The plaintiff alleged that he took knowledge of the damage in question, which was not foreseeable at the time of the accident in early 2001, when his health began to unforeseeably deteriorate. The Court of Appeal accepted the defendants' objections and rejected the plaintiff's action.

b) Judgment of the Court

The Greek Areios Pagos 7 May 2008, No. 951 held that art. 937 § 1 sent. b GCC regulates, in addition to art. 937 § 1 sent. a GCC, an accessory prescription for claims based on tort. In order for the certitude of law to be served, a maximum time limit has been enacted (twenty years from the commitment of the tort), without regard to whether the person who sustained the damage took knowledge of the damage or of the tortfeasor. The act is considered to be committed at the time of the tortfeasor's behaviour (positive act or omission) and not at the time of the manifestation of the damage. Consequently, the twenty-year prescription period may begin, by derogation from the rule of art. 251 GCC, even before the manifestation of the damage, as happens in cases of art. 157 sent b and 1380 § 2 sent. b GCC, which include similar provisions. Thus, if the damaging consequences of the tort are continuously produced, as in the case of torts committed by omission, the claim for compensation is not continuously reborn, but was born once, when the omission took place for the first time, from when also the twenty-year prescription period provided by art. 937 § 1 sent. b GCC begins. 32

The Greek Areios Pagos 19 May 2008, No. 1024 held that in case of continuous damage the claim is not continuously reborn, but it is born, regardless of whether for damage which has already occurred or for future damage, from the moment the detrimental consequences of the act appeared, provided that – according to the ordinary course of things – the damage could be foreseen. By "knowledge" of the damage is meant the knowledge of the first damaging consequences and not of the exact extent of the damage or of the amount of the damages to be paid (AP (in full bench) 24/2003). The above, however, presuppose that the damage is the result of a single and completed tort. 33

When the persistency of the damage is due not to the once committed tort, but to the illegal and culpable omission of the tortfeasor to remove the damaging situation, the tort cannot be considered as completed, given that the illegal omission continues; thus, the prescription period begins to run from the moment the person who sustained the damage took knowledge of the whole damage. In case the tort regards fraudulently hidden deficiencies of the leasehold property, resulting in a lease contract which otherwise would not have been concluded (civil fraud – art. 147, 149, 914 GCC), the omission or the breach of the promise to remove such deficiencies does not constitute an illegal omission in the above meaning. 34

The Greek Areios Pagos 4 March 2008, No. 401 held that the decisions of the employer's organs for the professional progress of their employees can be examined by the courts on grounds of art. 281 GCC. If an employee who is generally more capable compared to those who were promoted, is not promoted, a direct violation of art. 281 GCC is committed which also constitutes a tort according to art. 914 GCC, subject to the five-year prescription of art. 937 GCC. This prescription period begins from the time the employee took knowledge of the decision that he was not to be promoted, from which time his claim could also be judicially pursued. By "knowledge" of the damage, in order that 35

the five-year prescription period begins to run, is meant the knowledge of the damaging consequences of the act, not the knowledge of the extent of the damage or of the amount of damages to be paid. Thus, the five-year prescription period runs for all damage – that which has occurred or that which will occur in the future – apart from that which is not foreseeable according to the usual course of events.

36 Moreover, the illegal non-promotion of an employee, in violation of art. 281 GCC constitutes a tort in the meaning of art. 914 GCC and every claim of such an employee either aiming at the recognition that he should have been promoted earlier, or at the payment of compensation for his positive damage or lost profits, is subject to the above mentioned five-year prescription of art. 937 GCC, from the moment that he took knowledge of the damage and of the tortfeasor. The reason for this is that all partial claims derive from the employer's tort, i.e. the illegal omission to promote the employee. Accordingly, a distinction between the above claims cannot be made, which would mean that the claim for recognition of the promotion retroactively would be subject to the general twenty-year prescription of art. 249 GCC and the other claims to the short term prescription of art. 937 GCC. The Court of Cassation also held that the knowledge of the illegal character of the omission is not required in order that the prescription period of art. 937 GCC starts to run; specifically, for the pecuniary compensation for moral harm, the relevant prescription begins from the moment the tort is committed and the moral harm occurs, i.e. from the moment the claim is born and can be legally pursued.

37 The Greek Areios Pagos 3 July 2008, No. 1546 held that the longer prescription provided in art. 937 § 2 GCC in combination with the provisions of the GPC does not presuppose the existence of a verdict of guilt nor the submission of a relevant penal charge but it suffices that there is an objectively punishable act according to penal law. However, it has been ruled that this longer prescription period does not apply to the tortfeasor who dies before the filing of the tort action; for said tortfeasor the five-year prescription of art. 937 § 1 GCC applies to the claim brought against his heirs.

38 AP 1581/09.07.2008: The Greek Areios Pagos 9 July 2008, No. 1581 held that the defendant who alleges the prescription of a claim according to art. 937 GCC has to invoke and, in case of challenge, to prove the facts that sustain the prescription. More particularly, the defendant has to prove when the plaintiff took knowledge of the damage and of the person bound to compensate; in case of an aggravating unforeseeable consequence of the tortfeasor's damaging act, which generates a new separate prescription period, the argument of the plaintiff that the aggravating consequence was unforeseeable from the beginning does not constitute a counter-plea, but a rejection of the prescription plea. Thus, the plaintiff is not obliged to invoke that his damage was unforeseeable, but the defendant has to invoke and prove that the damage was foreseeable from the beginning, as this is the content of his plea.

Furthermore, it derives from the provisions of art. 10 §§ 1 and 2 of L. 489/1976, also taking into consideration art. 241 GCC, that the two-year prescription of the injured person's direct claim against the insurance company begins to run not from the same but from the next day of the accident. The relevant action has to be filed and served within these two years (art. 215 GCCP). If it is served after the passing of the two years, the defendant insurance company can admissibly raise the plea of prescription. In order for the above two-year prescription period to begin to run, whether and when the injured person took knowledge of the damage is not taken into consideration. The provision of art. 937 GCC does not apply in this case. The provision of art. 10 § 2 L. 489/1976, specifically regulating the compensative claim against the insurer, prevails over the general provision of art. 937 GCC. The two-year prescription period covers the cases of damage that could be foreseeable from the beginning. It does not apply to damage which was not foreseeable from the beginning. Thus, the said two-year prescription period does not apply in the case of unforeseeable, according to medical data, significant deterioration of the health of the injured party. 39

c) Commentary

The Supreme Court seems to have two different approaches regarding the beginning of the prescription of claims for damages that derive from continuous damage. In the first decision (AP 951/2008) it is ruled that if the damaging consequences of the tort are continuously produced, as in the case of torts committed by omission, the claim for compensation is not continuously reborn, but was born once, when the omission took place for the first time, from when also the twenty-year prescription period provided by art. 937 § 1 sent. b GCC begins, whilst in the second (AP 1024/2008) another view is followed, the view that when the persistency of the damage is due not to the once committed tort, but to the illegal and culpable omission of the tortfeasor to remove the damaging situation, the tort cannot be considered as completed, given that the illegal omission continues; thus, the prescription period begins to run from the moment the person who sustained the damage took knowledge of the whole damage. 40

We are of the opinion that the second approach, which is also shared by Greek scholars[18], is more convincing. Thus, in the first case, as the possibility B had to present for publication to the Court the will at issue did not cease with the publication of the other will, the plaintiffs seem to have argued with reason that, given that the non-publication of the will constituted a continuous omission, which lasted until B's death, the omission ended and the twenty-year prescription period started to run only after B's death, when B ceased to have the objective ability to present the will for publication. 41

The remainder of the above mentioned decisions tackle important issues related to prescription, such as the issue of the role the knowledge of the extent of the damage or of the illegal character of the omission plays as regards the 42

[18] See *Ap. Georgiadis*, in: Ap. Georgiadis/M. Stathopoulos (eds.), Civil Code (1982) art. 937, no. 23.

commencement of the prescription period, the issue of who bears the burden of proof of invoking that the damage was foreseeable from the beginning, etc.

8. Athens Court of Appeal 732/2008[19], 2896/2008[20]: Claim of Pecuniary Satisfaction for Pain and Suffering of the Relatives of a Foreigner (Art. 14, 18, 26, 932 GCC)

a) Brief Summary of the Facts

43 Athens Court of Appeal 732/2008: D, an Albanian citizen, was killed in a car accident. His daughter filed an action against the culpable driver claiming pecuniary satisfaction for pain and suffering for her father's death. The Court of First Instance accepted her action applying Greek law.

44 Athens Court of Appeal 2896/2008: On 3 March 2005, P, a Pakistani citizen, was riding his bicycle completely outside the asphalted part of the main road leading from Athens to Lavrio when the defendant, driving his car on the above mentioned road deviated from his course and crashed into D, causing his death. P's relatives (widow, parents, brothers and sisters) filed an action against the defendant claiming pecuniary satisfaction for pain and suffering for their beloved relative's death. The Court of First Instance accepted their action and adjudicated amounts on the above mentioned ground.

b) Judgment of the Court

45 The Athens Court of Appeal No. 732/2008 confirmed the judgment of the Court of First Instance and rejected the appeal. It held that if the child of a foreigner (Albanian) who died in an accident claims pecuniary satisfaction for pain and suffering, art. 18 GCC should apply in order to be decided whether such person belongs to the family of the deceased, as required by art. 932 GCC. Thus, the claim of the minor child should be examined according to Greek law, due to the fact that the tort was committed in Greece, while the judgment concerning which persons belong to the family of the deceased and, thus, are entitled to claim pecuniary satisfaction for pain and suffering according to art. 932 GCC, should be taken in accordance with Albanian law, given that the deceased and his daughter are Albanian citizens. From the application of said provisions it derives, according to the Court, that given that Albanian law does not recognise the right of relatives of the deceased to claim pecuniary satisfaction for pain and suffering, Greek law applies, the latter being the law of the last common residence of the involved persons (father – child). Consequently, the minor daughter of the deceased is included in the persons that belong to the family of the deceased, and, thus, she can claim pecuniary satisfaction for pain and suffering for her father's death.

46 The Athens Court of Appeal 2896/2008 confirmed the decision of the Court of First Instance and rejected the defendant's appeal. It held that, according to the

[19] Nomiko Vima (NoV) 56, 884, followed by a note of *H. Konstantopoulos*.
[20] NoV 56, 1807, followed by a note of *H. Konstantopoulos*.

testimonies of witnesses and the autopsy of the police, the defendant was exclusively culpable for P's death. It also held that, according to the Certificate of Family Status, issued by the Pakistani authorities, the plaintiffs were relatives of the deceased. The parental relation constitutes an element that is correlated to the legality of the marriage from which the alleged relation derives. As the deceased held Pakistani citizenship, the parental relation should be provided by Pakistani law. Thus, given it was proved that the plaintiffs were the real family (spouse, parents and brothers of the deceased), the said persons are entitled to claim pecuniary satisfaction for pain and suffering, an issue which is judged according to Greek law by the *locus delicti* (art. 26 and 932 GCC). Consequently, the Court of Appeal held that given the circumstances of the accident, the exclusive culpability of the defendant, the age of the deceased, the mental bond with his relatives (plaintiffs), and the social and economic status of the litigants, the plaintiffs suffered pain and suffering and thus, they were entitled to compensation.

c) Commentary

47 The above decisions confirm once again the well-established tendency in Greece to compensate the family of the victim for his/her death, even if the latter is a foreigner. In the notes that follow the above decisions, the commentator approves the second decision, which correctly, according to him, applies art. 26 GCC when the death of a foreigner is caused in Greece and, thus, gives the members of the family of the deceased compensation for pain and suffering, even if such a claim is not recognised in their countries, provided only that they prove their parental relation to the deceased. He criticises the first decision, which arrives at the same conclusion, i.e. that the members of the family of the deceased are entitled to compensation for pain and suffering, but by unnecessarily seeking attaching elements of the claim of the foreign plaintiffs to the applicable law.

9. Personal Injury Compensation

48 The amounts awarded in cases of tetraplegics or severe brain damage caused by road accidents have risen during the last years. For example, for the very severe injury reported in AP 776/2007[21] (cranium-brain bruise, brain rupture, traumatic syndrome), the Court of Appeal confirmed the decision of the Court of First Instance, which had adjudicated € 80,000 to the victim on grounds of art. 932 GCC and € 40,000 on grounds of art. 931 GCC; € 80,000 as moral harm were also adjudicated for the very severe injury reported in AP 436/2008[22] (the victim had to be put on a life support machine for five days and had to undergo several operations); € 75,000 were awarded by the Lamia Court of Appeal 264/2006[23] to the victim who suffered a permanent disablement, confined to bed for all his life, whilst ten years ago, in 1999, the amount of € 5,870 was awarded as moral harm to one of the victims who

[21] Published at ISOKRATIS data base.
[22] Published at ISOKRATIS.
[23] The amount initially adjudicated by the Court of First Instance was € 100,000.

suffered a very severe disablement and just € 4,403 to the other who suffered a cranium-brain injury[24].

C. Literature

1. *K. Christakakou-Fotiadi*, Liability in Tort of Minors and their Parents or Guardians (Ant. N. Sakkoulas eds., Athens 2008)

49 The author deals with the liability in tort of minors and of their parents or guardians for damage caused to third parties. In the first chapter, two basic issues, deriving from the application of art. 917 GCC, are examined: a) the issue of when the ten- to fourteen- year old minor acts "without discretion", i.e. lacking the capacity to discern the illegality of his act and b) the issue of whether a minor, who has been judged capable of imputation in tort, is obliged to fully satisfy the victim on the basis of the "all or nothing" principle. In the second chapter, art. 918 GCC is analysed as well as the possibility of invoking art. 300 GCC on concurrent fault against a minor. In the third and final chapter, the presuppositions, the field of application and the consequences of the application of art. 923 GCC regarding the liability of the person supervising a minor are tackled.

2. *Ath. Kritikos*, Damages from Traffic Road Accidents (Athens 4th ed. 2008)

50 This up-to-date, fully revised, extensive (1,055 pages) volume includes the most recent developments in theory and in legislation and the latest jurisprudence on the subject matter, covering in a detailed way all relevant issues. In the first chapter, the author deals with the notion and kinds of civil liability and in the second with damage and its extent. The third chapter is devoted to the obligatory insurance of civil liability for traffic road accidents and to the liability of the insurer and the fourth chapter to the judicial and extra-judicial solution of the litigation related to road accidents.

3. *Z. Tsolakidis*, Contractual and Delictual Liability for Assistants (Ant. N. Sakkoulas eds., Athens 2008)

51 The author starts with a comparative analysis of art. 334 and 922 GCC. Then, in the first part of his book, he presents the legal nature and function of said provisions, proceeds with their delimitation and gives the grounds for their selection by the legislator. In the second part, he deals with the accession of the auxiliary person to the field of action and risk of the master and, after detecting a *lacuna* in the field of pre-contractual liability, he tries to fill it with the creation of a rule of law equivalent to those provided in art. 334 and 922 GCC. The author concludes by addressing the said provisions as forming part of a sub-system, which aims at the establishment of vicarious liability of the per-

[24] Thessaloniki Court of Appeal 2041/1999 Sygchronos Epitheorissi Sygkoinoniakou Dikaiou (SESygkD) 2001, 482.

sons who use others to act on their behalf. This sub-system is a manifestation of a general legislative choice, which imposes on the persons who voluntarily expand their field of action the obligation to shoulder the relevant risks.

4. *I. Karakostas,* Pecuniary Satisfaction due to Moral Harm in Case of Civil Liability of the State, EfAD 2008, 379–385 (Prepublication from the Honorary Volume for *G. Kallimopoulos*)

52 According to the author of the article, the civil liability of the State (art. 105–106 of the Introductory Law of the Civil Code) constitutes an essential remedial mechanism for the application of the principles of lawfulness and of the "just state". Independently from the compensation for property damage, the State is also liable to pay a reasonable pecuniary satisfaction for moral harm, the relevant provisions of GCC being applied by analogy. The aim of the claim for satisfaction of moral harm coincides with the compensatory aim of damages, as such aim is expressed in the provision of art. 297 GCC. In case of civil liability of the State, no culpability is required for the claim for satisfaction of the moral harm. This is due to the nature of the liability introduced by the provision of art. 105 of the Introductory Law of Civil Code, being an objective one. The author also tackles the issue of the application of the proportionality principle to the extent of the pecuniary satisfaction and of whether the Court of Cassation has the authority to examine the relevant judgment of the Court of Appeal.

5. *L. Kiossé-Pavlidou*, Sexual Harassment at Places of Work – The Approach of the National Legislator, Dikaio Epicheiriseon kai Etairion (DEE) 2008, 1214–1224

53 The author presents how the phenomenon of sexual harassment was dealt with in Greek law before the introduction of L. 3488/2006 and how it is dealt with after the said Law which incorporated the Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.

6. *P. Masouros,* The Applicable Law in Extra-Contractual Obligations according to Regulation "Rome II" (864/2007), EfAD 2008, 625–654

54 The author looks into the provisions of Regulation Rome II and proceeds to an economic analysis of the international private law concerning torts. Passing Regulation Rome II was mainly dictated by economic reasons. It is proved that these aims of the Community legislator are harmonized with the spirit of the basic principles of the economic analysis of law. What is left to be examined is whether the two principle rules of the Regulation (art. 4 § 1 and § 2 thereof) are also in accordance with the evaluations of the economic analysis of law. An economic analysis of the private international law concerning torts should be based on the economic analysis of general tort law, given that private international law is part of private law. Thus, the tort collision rules should aim at a decrease of the global social costs of accidents, which include primary, secondary and tertiary costs. *Lex loci damni* (art. 4 § 1 of the Regulation) reduces the primary and tertiary accident costs, and thus, it proves to be an

economically effective provision. Respectively, the exception of the common usual residence (provided by art. 4 § 2 of the Regulation), though it does not usually affect the primary costs, reduces at least the tertiary costs, and is accordingly approved by the economic analysis of law.

7. *N. Mavrikas,* Civil Liability of the State in the Light of the "Principle of Risk Liability", Theoria kai Praxi Dioikitikou Dikaiou 2008, 415–421

55 The author deals with the issue of the civil liability of the State in the light of the "principle of risk liability". The jurisprudence of the Court of Cassation and of the Council of the State, set in a string of decisions, does not accept the liability of the State in case of facts that fall into the notion of the "principle of risk liability". According to the author, the few contradictory decisions of lower courts on the basis of art. 4 § 1 and 5 of the Greek Constitution do not seem to be correct in view of the absence of a special provision of law.

8. *S. Vliamos/M. Chatziplaton,* Economic Analysis of Medical Mistakes, ChrID H/2008, 584–590

56 The authors proceed to an economic analysis of medical mistakes. Many deaths are due to medical mistakes, which lead citizens to accuse doctors and the National Health System. As a result, the insurance fees are excessively increased, and/or the insurance coverage for medical mistakes is completely withdrawn.

57 According to the said economic analysis, medical mistakes are considered to be an unwanted sub-product of medical care, with a significant chance of unfavourable results for the parties. Thus, medical mistakes constitute an "insurable incident", which the majority of doctors are willing to purchase despite its high cost. Nevertheless, the economic loss from medical mistakes remains very high and is due to the production method of the medical care in combination with the method of compensating injured persons. According to the authors of the article, medical mistakes are primarily the consequence of the systemic character of the problem (absence of sufficient economic sources with significant difficulties in providing medical services, few medical theories and practices which scientifically substantiate the generating causes of diseases, etc.).

58 The authors conclude their article by stating that compensation adjudicated in case of medical mistakes should not be of a speculative nature, imposing sanctions of higher value than the damage caused. Consequently, an examination of the relations between the perpetration of the medical mistake (and thus, its prevention cost) and the value of the damage caused to the individual and society should be undertaken by economists, applying the criteria of social justice and economic effectiveness, in order for social prosperity to be maximized.

XII. Hungary

Attila Menyhárd

A. Legislation

1. Draft of the New Hungarian Civil Code

The Draft of the New Hungarian Civil Code was submitted in the Parliament of the Hungarian Republic on 5 June 2008. The Parliament closed the discussion of the Bill on 10 March 2009 and the closing vote is now scheduled for June 2009. The complete details of the Bill were not known at the time of finalising this report because more than four hundred proposals for amendments of the Bill were submitted to Parliament during the discussions and further amendments are to be expected. At this stage of the law-making process it seems that the New Civil Code would not bring any dramatic changes in Hungarian tort law. The main attempt of the legislator was – at least as far as the proposed tort law regulation is concerned – to incorporate the court practice settled already and this attitude resulted in extremely limited ambitions in the course of revising the present regulation. 1

The time for passing the Bill is far from optimal; it is not yet clear when the New Civil Code is to come into force but, as an adequate period should be left for its presentation to practitioners and the public and the fact that the passed bill, which may be preceded by a preliminary control of the Constitutional Court, still has to be signed by the President of the Republic of Hungary, its entry into force may not occur before the new elections in spring 2010. If that is the case, a Parliament with new members and new governing parties would probably rewrite the text of the Civil Code or stop and restart the whole legislative process before the passed Civil Code could come into force. This possibility may undermine the reliance upon the forthcoming new regulation. 2

A further problem is the absence of general professional consensus in the solutions and the text of the Bill which may result in unpredictable court practice and legal uncertainty. The process of recodification which started in 1998, was interrupted in 2007 as the Ministry of Justice dissolved the drafting committee and started to re-write the text of the draft – which also that time was not perfect yet – in order to accommodate demands of interest groups putting pressure 3

on the government and to implement vague ideas with unprepared and unadvised solutions. As the original draft has been rewritten many times without the contribution of the drafters working with the text so far, the text – at several points – has lost its coherence and the mistakes of the original drafts have remained uncorrected. Moreover, where the task to be solved in this phase seemed or proved to be too difficult – e.g. regulation of landlord and tenant law, state liability, regulation of associations, etc. – the problem has simply been left out of the codification process, postponing the solution to a later stage of law-making in separate legislation. In this phase of codification the Ministry of Justice did not consult with professional bodies and also ignored to consider the consensus already reached with these bodies at the previous stage.

4 The tort law regulation of the Draft and the Bill is very conservative in the sense that the primary goal obviously was no more than implementing the results of court practice and incorporating the principles established by courts as norms in the new Civil Code. There were not any real attempts to implement a reform in tort law or to find solutions to problems on the basis of a comprehensive comparative legal analysis.

5 The change to be brought by the New Hungarian Civil Code which is discussed most often is the abolition of non-pecuniary damages and replacing them with direct compensation for pain and suffering as a specific sanction for wrongful interference with basic personality rights. The idea behind this change – suggested from the outset – was that awarding non-pecuniary damages is a specific sanction for wrongful interference with basic personality rights and replacing it with this form of direct compensation would result in a clearer system which is free from the conceptual incoherence of speaking of damage as a prerequisite of liability for compensating a loss that cannot be expressed and measured in money.

6 Another new element of tort law regulation to be provided by the New Hungarian Civil Code is the introduction of a general foreseeability limit in tort law as well as in liability for breach of contract. The idea behind this suggestion was that in the court practice it is an inherent limitation of liability cutting the causal link where the loss was too remote or could not have been foreseen by the tortfeasor[1] and this limitation should be expressed on the level of the Civil Code in a normative form too. This would make the regulation more direct and would provide a tool which judges could use to legitimize their decisions when rejecting claims for damages rather than merely referring to the absence of a causal link. Although the foreseeability limit is a well known tool for limiting liability for breach of contract in contractual cases through the application of the Vienna Convention on the International Sale of Goods, which is part of Hungarian law, it is not clear at all how this limit should be interpreted in the context of tort law where the parties normally do not negotiate before allocating the risks in a bargaining process and finally with conclusion of the contract

[1] *Gy. Eörsi*, A közvetett károk határai, in: Emlékkönyv Beck Salamon születésének 100. évfordulójára (1985) 62 ff.

and stipulating its terms. This limit may be an inherent part of court practice in tort law (as the drafters argue) but – even if it really exists – it is far from obvious as regards its meaning and content.

In Hungarian private law as it stands today there is no specific provision for culpa in contrahendo. Claims for damages on the basis of the wrongful conduct of the parties under the contracting process are to be covered by general provisions and principles of tort law. This never caused problems for the courts as the general concept of unlawfulness is wide enough to cover these cases too and such claims can be decided without difficulty by applying basic rules of liability in torts. It is, however, suggested to introduce a specific rule of liability for breach of the general duty to cooperate in the course of the contracting process.[2] The suggested provisions, neither in their content nor in their predictable result, would lead to answers other than those which would be provided under general rules of liability as they are suggested in the Bill. Their function is not clear at all; the most probable reason for drafting them was a servile reception of solutions from foreign laws where a different and narrower concept of unlawfulness makes such direct provisions necessary. 7

The most disappointing – at least as far as tort law is concerned – is, however, not what *is* in the Bill, but what *is not* there, i.e. problems that should have been addressed by the drafters. Not only are the most sensitive areas, like damages for wrongful birth and wrongful life[3] or the need for a comprehensive regulation of state liability[4] not addressed in the Bill of the Civil Code, but a revision of employers' liability (or in a more general way liability for auxiliaries),[5] the introduction of enterprise liability,[6] the introduction of specific rules (limits) for compensating economic loss and specific rules for professional liability (doctors, auditors, etc.) have been completely left out of consideration. The model of state liability remains a special form of vicarious liability and although the replacement of employers' liability with a more flexible concept was considered during the discussions in the Drafting Committee, ultimately nothing was changed. 8

2. Act no. CI of 2008 on the National System of Mitigating Agricultural Loss and the Agricultural Loss Mitigating Contribution

This legislation introduces a compensation scheme for providing partial compensation of losses suffered by producers of agricultural products as a result of draught, subsoil water and frost damage. The funds providing the coverage for 9

[2] § 5:31 subpar. (3) and (4) of the Bill of the New Hungarian Civil Code.

[3] E.g. in France the Loi no. 2002/303 of 4 March 2002. Suggested also in the revised version of the New Austrian Tort Law Draft (in § 1321 of the 2007 version). *B.C. Steininger*, Austria, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 134 ff., 167.

[4] Provided in the Czech Republic, in the Baltic States and also discussed in Hungarian legal literature.

[5] PETL Art. 6:102, *European Group on Tort Law* (ed.), Principles of European Tort Law – Text and Commentary (2005) 115 ff.

[6] PETL Art. 4:202 based also on the Swiss Draft for Tort Law Reform; *European Group on Tort Law* (fn. 5) 93 ff.

this partial compensation system are to be financed from contributions from producers and the – at least equal – contribution from the state budget. The regulation complies with the requirements provided in Art. 87. and 88. of the Treaty of Rome and the Commission Regulation no. 1857/2006/EEC of 15 December 2006 (Art. 11).

3. Act no. XXII of 2008 on Promulgating the London Convention on Limitation of Liability for Maritime Claims of 1976 and the London Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976

10 Hungary joined both the London Convention on Limitation of Liability for Maritime Claims of 1976 and the London Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976. The Convention was made part of Hungarian law by Act no. XXIII of 2008.

B. Cases

1. Supreme Court, Unifying Resolution no. 1/2008, 12 March 2008: No Damages for Wrongful Life[7]

a) Brief Summary of the Facts

11 One of the appellate divisions of the Supreme Court in 2007 initiated a procedure for the unification of law in order to pass a unifying resolution of the Supreme Court concerning the right of a child born with genetic or teratological deficiencies to claim damages for wrongful life in his own name if his mother could not have decided for an abortion, otherwise permitted by the law, as a result of failing to get the correct diagnostic information on the foetus' deficiency from the doctors advising her during pregnancy. The appellate division initiating the unifying procedure declared that they wanted to deviate from the already settled practice of the Hungarian Supreme Court allowing such claims against the doctors or the hospital in the child's own name.

b) Judgment of the Court

12 The Supreme Court established that the child shall not be entitled to claim either pecuniary or non-pecuniary damages from the medical service provider for being born with genetic or teratological deficiencies on the ground that, during the pregnancy, his/her mother could not have decided for an abortion because of the incorrect information given to her by the medical service provider if an abortion would have been otherwise permitted in such a case. The unifying resolution is to be restricted to wrongful life cases i.e. to cases where the genetic or teratological deficiency is of a natural origin and developed independently of the activity of the medical service provider or its employees. Thus, claims for damages as compensation for prenatal injuries (compensation

[7] Magyar Közlöny (Official Journal of the Hungarian Republic) no. 2008/50 (26 March 2008).

for injury suffered as a result of intervention of doctors during the pregnancy) are not covered with the resolution. The resolution does not affect the claims of parents.

c) Commentary

Passing such a unifying resolution establishes and declares that the Supreme Court would not pass a decision in the future which does not comply with the interpretation of law settled in the resolution. The procedure for passing such a resolution is to be initiated if higher courts handed down decisions diverging in their interpretation of the law. The goal of passing such decisions is to guarantee the uniformity of court practice through declaring the interpretation to be followed by the Supreme Court in cases where high courts follow different interpretations of the law. 13

The necessity to pass such a resolution concerning damages for wrongful life arose because, although the Supreme Court followed a settled practice of accepting such claims,[8] this interpretation did not correspond to the practice of some of the high courts in Hungary which also declared and published their interpretation rejecting such claims brought by the child.[9] Not only the tension created by diverging practice of high courts but also the obvious deviation from the trends presented by European legal systems[10] led the Supreme Court to revise its practice in such cases. As a result, obviously influenced by court practice of other European jurisdictions and with the clear intention of harmonising Hungarian court practice with the trend of rejecting such claims in most European jurisdictions, the Supreme Court decided to revise its former decisions and to adopt a uniform practice of rejecting claims for damages for wrongful life. The decision was also supported by arguments referring to decisions of the European Court of Human Rights as well as to constitutional aspects. 14

The result of passing such a resolution in Hungarian law is to lay down the law covered by the resolution with the effect of an authoritative interpretation which might – perhaps should – have been given by the legislator too. The necessity of passing such a resolution in Hungarian law supports the argument that such sensitive issues may and should be addressed by the legislator even if this does not seem to be compatible with the flexible system of tort law. The process of making law, in a democratic society, designed for channelling and harmonising different social values and interests – in such sensitive areas – seems to be a more appropriate way of fixing such principles than court decisions. 15

[8] Supreme Court, Legf. Bír. Pfv. III 22.193/2004 sz. – EBH 2005 1206 sz. Reported by *A. Menyhárd*, Hungary, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) no. 9–11.

[9] Opinion of the Civil Law College to the Regional Court of Pécs no. 1/2006 (VI 2), Opinion of the Csongrád County Court, referred to in the explanatory notes to the Unifying Decision of the Supreme Court.

[10] Explicitly referred to in the explanatory notes to the Unifying Decision of the Supreme Court. See also *B.A. Koch*, Comparative Overview, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 608.

2. Memorandum on the National Discussions of 23–25 January 2008 of High Courts' Civil Law Colleges and the Civil Law College of the Hungarian Supreme Court

a) Brief Summary of the Facts

16 In these discussions the experience of medical malpractice cases in court practice was considered. The results of the discussions on this topic may be summarized as follows.

17 The number of medical malpractice cases in Hungary is relatively low (200–300 new lawsuits per year) although they are of great importance and they raise specific problems. The number of this type of cases is not growing in general, except in Budapest, where an upward tendency is to be recognized. The average length of this type of case is mostly one to three years. Some of them, however, exceed this duration and exceptionally may take more then five years. In most of the cases the necessity of appointing judicial experts and getting their opinion prevents a settlement of the procedure in a reasonable time. Typically also the defendants do not cooperate with the courts in order to bring the lawsuit to an end quickly.

18 As far as the sums awarded as non-pecuniary damages are concerned, the lowest sum awarded in 2008 was HUF 200,000 (approx. € 700) while the highest sum awarded was HUF 14 million (approx. € 46,000). The sums awarded as non-pecuniary damages show a moderate upward tendency.

19 A lowering or loss of the chance to recover is taken into account in the context of causation as well as in establishing fault. The tendency is that the relevance of the loss of or decrease in the chance to recover has been shifted more or less to considering fault as a prerequisite of liability.

20 Concerning risks of surgical intervention (including its complications and its possible adverse consequences) a doctor was not at fault if the proper information had been given to the patient (informed consent). Disclosure of risks was appropriate if it was individualized and took into account the intellectual abilities of the patient. High risks shall always be disclosed while risks occurring only by chance do not necessarily fall under the duty of disclosure. Extremely serious risks, however, shall always be disclosed, even if the probability of their realization is very low. The consent of the patient may prevent the fault of the doctors from being established only if the patient had been informed adequately.

21 The absence of or incomplete documentation of treatment is considered by the courts as falling to the burden of the doctors; it is their duty to keep the documents updated and they deprive themselves of the opportunity of establishing that their conduct complied with the required standard of conduct if they cannot present the necessary documentation supporting this.

22 Claims for damages for loss of relatives are accepted by the courts, although their scope is limited. The ground for awarding damages to relatives for losing

the victim – i.e. their protected interest – is their right to live in a complete and healthy family. For this reason, in court practice parents, minor children, the spouse and brothers shall be entitled to damages for the death of the victim. Courts are, however, not inclined to widen this circle and they reject claims of grandparents as well as an already adult child who did not live together with the victim. The basis of liability in most cases is liability for breach of contract.

3. Supreme Court, Legf. Bír. Kfv. III. 37.145/2007 – EBH 2008 1837 sz.: Liability of the User of Environment for Restoration of Original State

a) Brief Summary of the Facts

The defendant, as a public authority, ordered the plaintiff and two other (bankrupt) companies to restore land which had been polluted with chemicals to its original state on the ground that the plaintiff was the user of the land at some point when the pollution allegedly occurred. The defendant authority could not establish at all to what extent the companies contributed to the pollution. It was also established that, although it could not be proved that the plaintiff actually contributed to the pollution, its activity – according to its nature – might have resulted in such an effect and might have contributed to the pollution. The plaintiff contested the decision of the defendant authority on the ground that its contribution to the pollution has not been proved. The plaintiff also argued that it had abided by all the relevant regulations and had not infringed any law. 23

b) Judgment of the Court

The Supreme Court – as well as the lower court – rejected the claim on the ground that environmental protection regulation does not require actual contribution to pollution to find the owner or user of land liable for restoring the land to its original state jointly and severally with other subsequent users. The Court also held that the pursuit of an activity which results in pollution is sufficient ground for establishing the liability of the owner or user of the environment to restore the land to its original state even if the owner or user abided by all the relevant regulations; violating the relevant regulation is not a precondition of this obligation. The fact that the plaintiff company was the owner of the land in a period which partly covered the probable period when the land was polluted and pursued an activity which might have resulted in the relevant pollution are enough to establish such an obligation according to § 101 and 102 of the Act no. LIII of 1995 on the Protection of the Environment. 24

c) Commentary

The decision concerns public law liability and in its result clearly shifts the risk of unclear circumstances to the owner (user) of land concerning uncertainty as regards the period of the actual polluting activity as well as the fact whether the owner, whose activity might have contributed to the pollution, actually did so or not. The decision suggests that the plaintiff could have escaped liability for restoring the polluted land to its original state only by proving that it was not the owner or user of the land in the period when the land was polluted or by proving that it did not contribute to the pollution at all. Merely proving the 25

adherence to statutory provisions and environmental protection regulations itself is not enough to prove that.

4. Supreme Court, Legf. Bír. Mfv. I. 10.710/2007 – EBH 2008 1803 sz.: Increasing Risk and Causation

a) Brief Summary of the Facts

26 The plaintiff claimed non-pecuniary damages as compensation for the dyspnoea he suffered. The plaintiff, who was the employee of the defendant, argued that his disease is at least partly the result of the work he did for the defendant, painting traffic signs on roads and the maintenance of vehicles including painting them too. The judicial expert appointed by the court of first instance established that although the occupational hazard the plaintiff was exposed to while working for the defendant might have contributed to the plaintiff's illness due to the adverse effect of the chemical materials used by the plaintiff in the course of his work, the direct causal link between the plaintiff's illness and the exposure to chemical pollution could not be established. According to the judicial expert opinion, the exposure to the chemical pollution at the defendant's company might have worsened the plaintiff's state of health but as the expert's opinion did not establish that the occupational hazard was the cause of the plaintiff's health damage, the courts of first and second instance rejected the claim. According to the courts of first and second instance, the worsening of the plaintiff's state of health was not enough to establish the causal link between the plaintiff's health damage and the occupational hazard he was exposed to at the defendant company.

b) Judgment of the Court

27 The Supreme Court quashed the decision of the court of second instance and ordered a new procedure. According to the instructions given by the Supreme Court, it has to be considered in the re-launched proceedings that the increase in risk established in the judicial expert's opinion may be held as a partial cause resulting in the defendant's liability. The decisions of the lower courts are incorrect to the extent that they excluded the defendant's liability due to the absence of a causal link and ignored the fact that increasing the risk may have contributed to the damage and as such may be – at least partially – deemed as the cause establishing the causal link between the defendant's conduct and the damage occurred.

c) Commentary

28 The decision of the Supreme Court suggests that increasing the probability of the occurrence of damage may establish a causal link between the tortfeasor's conduct and the damage. The decision does not make it clear how this approach relates to the relevance of loss of a chance or how far this may lead from the traditional concept of (natural) causation. It indicates, however, an inclination to see the causal link in a more flexible way and a softening of the traditional approach that natural causation has to be proven by the plaintiff in order to establish the defendant's liability. The decision was passed by the

Labour Law College of the Supreme Court within the context of employers' liability towards the employee but the considerations providing the ground for the decision are of a general nature, extending the relevance of the case beyond labour law relationships to general civil law liability.

5. Supreme Court, Legf. Bír. Pfv. V. 20.173/2008 – EBH 2008 1785 sz.: Exhausting Procedural Remedies in the Context of Liability of Judicial Executors

a) Brief Summary of the Facts

29 The house of the plaintiff's debtor was seized in order to put it up for auction as a means to enforce a judgment for the plaintiff. The house was sold at the auction. The lowest auction price was fixed at 50% of the market price because the defendant, as judicial executor managing the auction process, fixed the lowest auction price as the house, at the time of the auction, was occupied. The lowest auction price for houses and flats put up for auction as occupied property is normally 50% of the market price. The house of the plaintiff's debtor was sold at the auction as an occupied property at the discounted and very low price with the result that the plaintiff could not recover the money awarded to him by the court as there were not any other funds providing coverage for the debt in the debtor's property. The plaintiff alleged that the house had not been occupied at the time of the auction and, therefore, the defendant, as judicial executor, was wrong to set the price at 50% of the market price as if the house had been occupied. If the auction price of the house had been set correctly, the property might have been sold at a higher price, providing funds for the plaintiff's claim too. On this ground the plaintiff claimed damages for the loss caused by the defendant by auctioning the house at such a low auction price. The defendant claimed that the plaintiff, although he had submitted complaints in the course of the execution process to the courts, had not filed any complaints within the statutory time-limits concerning the improper setting of the lowest auction price.

b) Judgment of the Court

30 The Court rejected the claim on the ground that although under the execution process the plaintiff submitted complaints against the executor's activity, he did not make any complaints concerning the qualification of the house as an occupied property – at least not within the statutory terms. § 349 of the Hungarian Civil Code provides that the precondition of claiming damages for wrongful acts due to the failure of judges, public prosecutors, administrative bodies or employees of the state administration is that the damage could not have been remedied in the course of the procedure, i.e. the plaintiff exhausted the remedies provided by the law without success. The Court established that in the course of considering whether the plaintiff had exhausted all possible remedies, only those remedies shall be taken into account which – according to their actual content – aimed at directly avoiding the committed infringement. Unsuccessful complaints with the aim of finding a remedy explicitly for the executor's other allegedly unlawful conduct could not open the way for getting a remedy under liability in tort.

c) Commentary

31 The Supreme Court established that only those complaints, appeals or other procedural remedies may be referred to as unsuccessful remedies and may result in liability for failure of state administration which – according to their content – referred to the same allegedly unlawful administrative act as the one being the ground for claiming damages.

6. Supreme Court, Legf. Bír. Pfv. III. 20.288/2008 – EBH 2008 1781 sz.: Maintenance of Liability Regimes as Alternatives to Product Liability

a) Brief Summary of the Facts

32 The plaintiff suffered serious illness as the result of a side-effect of a pharmaceutical product and claimed compensation from the defendant state on the basis of a statutory compensation scheme, which was maintained by the state at the time of suffering the health damage, for damage caused by pharmaceutics. The plaintiff did not claim compensation from the producer of the pharmaceutical product because she believed that the producer could be exonerated from product liability as the side-effect was not recognizable due to the state of scientific development at the time of putting the pharmaceutical product into circulation on the market.

b) Judgment of the Court

33 The Court rejected the claim on the ground that liability of the state under the specific statutory compensation scheme for pharmaceuticals shall be applied only insofar as the liability of the producer could not be established under the product liability regime. Thus, damages under the statutory compensation scheme may be awarded only if the claim against the producer had been rejected. The Court established that the liability of the state under this compensation regime shall be deemed as secondary which may be applied only if no-one, including the producer, can be held liable to compensate the damage caused by the pharmaceutical product.

c) Commentary

34 The statutory compensation scheme referred to in the decision and provided by the Act no. XXV of 1998 on Pharmaceutics Used in Human Medicine since 2005 is no longer in force in Hungary but the interpretation given by the Supreme Court in the decision presents a clear conceptual view of the relationship between product liability legislation and other compensation regimes. The context in which the liability of the producer is put according to this view makes product liability a specific form of liability which is to be applied primarily but not exclusively to cases of liability for defective products. Considering the interpretation given by the European Court of Justice especially in the decisions of ECJ C-183/00, *María Victoria González Sánchez v. Medicina Asturiana SA* and ECJ C-327/05, *Commission v. Denmark* it is rather doubtful whether the interpretation provided by the Hungarian Supreme Court, which holds product liability legislation as a specific primary system but not as an ex-

clusive one at all, is compatible with the interpretation of the European Court of Justice regarding the product liability regime as exclusive and seeing the Product Liability Directive as achieving full harmonisation. The interpretation of product liability legislation given by the European Court of Justice would not allow one to interpret the Directive (and the legislation implementing it) as an alternative – even if primary – regime. The decision itself would not be incompatible with European law as it rejected the claim but the interpretation given by the Supreme Court to the Product Liability Act[11] implementing the Product Liability Directive in Hungary is obviously incompatible with European law concerning the product liability regime and considering the practice of the European Court of Justice. The argumentation and the basis of the decision are not in line with a proper interpretation of the Product Liability Directive in the light of the decisions of the European Court of Justice. There was no reference to the preliminary ruling in the case which could have avoided the occurrence of this incompatibility.

7. Supreme Court, Legf. Bír. Pfv. VIII 20.759/2008 – EBH 2008 1772 sz.: Liquidation of the Insured Company Does Not Affect the Insurer's Obligation under Third Party Insurance

a) Brief Summary of the Facts

The plaintiff's husband died in an occupational accident some decades ago. His employer was found liable to pay an annuity as damages to the plaintiff. The defendant was the insurer of the employer of the plaintiff's deceased husband, being obliged to pay the annuity under third party insurance. The defendant insurance company started to pay the annuity in 1976 on the basis of an agreement with the former employer of the victim and the plaintiff and this was confirmed in a judgment of the court. Now the plaintiff claimed an increase of the monthly sum of the annuity directly from the defendant insurance company. The defendant pleaded that the claim should be rejected because the insured company – being liable primarily for damages – had been liquidated (closed down without successor) in the meantime. As they shall pay compensation under a third party insurance, their obligation is founded by the obligation of the insured person. Thus, they could not be brought under an increased payment obligation without increasing the annuity vis-à-vis the original obligor. As the primary obligor – the insured company – no longer exists, the defendant could not be obliged to pay instead of it; the liquidation of the insured company necessarily means that there is no-one to be liable for under the third party insurance. 35

b) Judgment of the Court

The Supreme Court reversed the decision of the court of second instance which rejected the claim and decided for the plaintiff. The Court established that the liquidation of the insured company may not have any effect on the obligation of the insurer under the third party insurance. Thus, the defendant insurance 36

[11] Act X of 1993 on Product Liability.

company shall be obliged to pay the annuity until the plaintiff's death. From this it follows that the plaintiff had a right to claim the increase in the annuity, which the court also found as justified.

c) Commentary

37 The core problem to be decided was if and how far the obligation of the insurance company in third party insurance shall be held as an independent obligation. The answer given by the Court established the obligation of the insurance company as an independent obligation which may extend beyond the existence of the insured person being primarily liable for paying damages and also includes the possibility of increasing the annuity vis-à-vis the insurance company.

8. Supreme Court, Legf. Bír. Pfv. VIII 20.091/2008 – EBH 2008 1769 sz.: Widow's Pension and Damages

a) Brief Summary of the Facts

38 The plaintiff's wife died in an accident caused negligently by the car driver who was the owner of the car. The defendant liability insurer acknowledged that, as the owner of the car (the insured) was responsible for the accident, they, the company, shall be obliged to compensate the plaintiff for the harm he suffered by losing his wife. They argued, however, that since the plaintiff as the widower of the deceased person received a pension from the national health insurance fund, his losses were at least partly covered from this state pension fund. On this ground they discounted the sum to be paid by them as compensation to the plaintiff with this sum. They paid to the plaintiff a sum accepted by them as a claim for damages but they reduced this by an amount equal to the income received by the plaintiff as widower's pension from the state. The plaintiff, claiming full compensation from the defendant insurance company, asked the court to oblige the defendant to pay the rest of the damages. The defendant pleaded that preventing victims from gaining on their loss is an inherent principle of private law. From this it follows that they shall be entitled to set-off the sum received as widower's pension and reduce the compensation to be paid by them with it.

b) Judgment of the Court

39 The Supreme Court decided for the plaintiff and obliged the defendant to pay full compensation to the plaintiff without setting off the sum received by the plaintiff from the state pension fund. The Court established that such a set-off would result in depriving the plaintiff of the widower's pension he became entitled to under the national health insurance system. According to the Court, this would be incompatible with the function of this type of state allowance which is not of a compensatory nature.

c) Commentary

40 A general principle of Hungarian tort law – which is similar to other continental tort law systems – is that the victim should be prevented from making

a profit on her own loss. The principle is generally accepted but not expressly declared in the current Civil Code, although it clearly follows from the concept of damage (i.e. that damage includes the actual loss, lost profits and the costs of prevention and avoidance of the loss) and restitution of unjust enrichment. According to this principle, in the course of calculating the sum of damages to be awarded, the amount of damages shall be reduced by the sum the victim earned or saved as a result of the damage (e.g. payments under a national health care system[12] or an increase of value in the property of the victim as a result of the event which caused damage). In line with the principle of full compensation, the plaintiff shall be compensated for all the losses she suffered but cannot be paid more.[13] With this decision the Supreme Court made a distinction between allowances paid from the national health care system with a compensatory function (damages shall be reduced by these sums according to the court practice) and pensions which are not of a compensatory nature (the sum to be paid as damages shall not be reduced by these).

9. Supreme Court, Legf. Bír. Pfv. III 20.292/2008 – EBH 2008 1768 sz.: Child's Claim for Damages for Post-natal Injuries

a) Brief Summary of the Facts

The plaintiff, as a new and prematurely born baby, stayed in the defendant hospital after her birth for some weeks. During this period she was given a routine infusion treatment. The infusion was not correctly administered and the surface of the plaintiff's skin on her feet was damaged which caused a permanent injury to the plaintiff. The incorrect administration could have been detected in the course of the treatment if careful supervision had been exercised but the defendant's employees failed to comply with the standards required for such a situation. The plaintiff sought pecuniary and non-pecuniary damages as compensation for the injury and the costs of permanent treatment she would have to undergo for the rest of her life. The claim was actually submitted by the mother in the plaintiff's name. The defendant pleaded that even if the claim is founded, it is not the child but her mother caring for her who is the one who could be entitled to damages as she (the mother) is the one who suffered the actual loss. On this ground the defendant asked that the claim be rejected. 41

b) Judgment of the Court

The Court decided for the plaintiff and established that even if the mother is obliged to take care of her child according to the family law regulation, the victim in such cases is inevitably the child. Even if the mother pays for the costs of maintaining the child, she is to be deemed as if paying for the tortfeasor being liable for damages. If in such cases the mother claims compensation for the costs she already incurred and would incur in the future, she does so 42

[12] Supreme Court Legf. Bír. Mfv. I 10.244/2002/3 sz. – EBH 2002 695 sz.; Supreme Court Legf. Bír. Mfv. I 10.744/2006 sz. – BH 2007 354 sz.; Supreme Court Legf. Bír. Mfv. I 10.697/2006 sz. – BH 2007 274 sz.

[13] *G. Gellért* (ed.), A Polgári Törvénykönyv Magyarázata (7th ed. 2007). Comments to § 355 of the Hungarian Civil Code no. 4.

for the child and the claim could not be rejected on the ground that it is not the child but the parent who suffers the actual loss.

c) Commentary

43 If the victim is a small child living together with her parents and taken care of by them, the question as to who the correct claimant for damages is may not have great practical importance but in cases of older children who – albeit being still under-aged – do not necessarily live with their parents (or with both of their parents), the question may be of crucial importance. Concerning pecuniary damages the decision gives an option for cases where the parents incur costs to cover their child's losses: either the child or the parent may claim for compensating the loss in the form of damages.

10. Supreme Court, Legf. Bír. Pfv. III 22.125/2006 – BH 2008 18 sz.: Non-Pecuniary Damages are of an Indivisible Character

a) Brief Summary of the Facts

44 The plaintiff suffered a personal injury and claimed – as compensation for her losses – pecuniary and non-pecuniary damages. She claimed that her non-pecuniary damages amounted to HUF 3,500,000 but at the moment of submitting the claim she sought only HUF 2,000,000. She declared that later on she may extend her claim for the remainder (HUF 1,500,000). As the defendant being liable for the damage did not appear at the first hearing, the court of first instance, by a mandatory injunction, obliged him to pay damages according to the content of the claim submitted by the plaintiff. The defendant paid to the plaintiff the sum of HUF 2,000,000, according to the mandatory injunction. The plaintiff in a new procedure claimed the remainder (HUF 1,500,000) for non-pecuniary damages. The defendant pleaded that he had already paid the damages according to the mandatory injunction which makes a *res iudicata* between him and the plaintiff so the plaintiff shall not have the right to claim something which has already been finally decided by the court.

b) Judgment of the Court

45 The Supreme Court rejected the claim on the ground that non-pecuniary damages are not to be divided into several parts. Non-pecuniary damages are the sanction for wrongful interference with inherent personality rights. As personality rights are not to be divided into several parts, damages awarded as compensation for wrongful interference with them are also not to be so divided.

c) Commentary

46 The decision declares that the claim for non-pecuniary damages cannot be divided into several parts and one cannot claim non-pecuniary damages in two parts in two different procedures. The decision actually touches upon the question as to whether damages can be claimed in two parts. It does not really address the problem whether damage could be divided into more parts. The decision establishes that claims arising from interference with personality rights

(or personality rights themselves) are not to be divided. It is not clear whether the decision may have far-reaching conclusions in (material) tort law or implies only a logical conclusion concerning procedural law. This latter seems to be the correct explanation.

11. Supreme Court, Legf. Bír. Pfv. III 20.091/2006 – BH 2008 61 sz.: Liability of the Driver if the Passenger Fails to Use the Seatbelt

a) Brief Summary of the Facts

47 The plaintiff was involved in a car accident as a passenger of a car. He was not wearing a seatbelt while in the car and when the car collided he fell out of the car and suffered serious bodily injuries. He claimed damages from the defendant insurance company under compulsory third party insurance. The defendant insured the owner of the car who was driving the car at the time of the accident which he caused. The defendant pleaded that it was the plaintiff's own fault that he did not wear a seatbelt and, because of this, the plaintiff himself should be liable for most of the damage he suffered.

b) Judgment of the Court

48 The Supreme Court decided for the plaintiff. The Court established that the driver of the car shall bear responsibility when their passengers do not wear a seatbelt. If the passenger suffers an injury as a result of not wearing his seatbelt, the liability of the driver for the injury suffered by the passenger is established. As the passenger, now the plaintiff, shall be deemed as contributing negligently to the injury suffered as a result of not wearing his seatbelt, the loss shall be shared among the passenger and the driver. The Supreme Court established that, according to the correct ratio in such cases, the driver has to bear 80% of the loss while the passenger has to bear the remaining 20% (the lower courts divided the liability on a 50%–50% ratio). Accordingly, the Court decided that the defendant has to compensate 80% of the loss suffered by the plaintiff.

c) Commentary

49 The decision is in line with the already established court practice making a driver liable if a passenger suffered personal injury as a result of not wearing a seatbelt. In former reported decisions, however, the complexity of the facts of the case[14] did not make it possible to conclude the basically applicable ratio. This decision suggests that in a standard case – i.e. if there is no additional fault of the passenger – this ratio shall be 80%–20% where the bigger part (80%) falls on the driver.

[14] E.g. in Supreme Court, P. törv. III 20 652/1991 sz. – BH 1992 242 sz.

12. Supreme Court, Legf. Bír. Pfv. V 21.996/2006 – BH 2008 62 sz.: Non-Pecuniary Damages for False Accusation

a) Brief Summary of the Facts

50 The plaintiff had been charged with committing a crime but was released by the criminal court of second instance. After being released from the charge the plaintiff submitted a claim against the police and the public prosecutor as defendants claiming non-pecuniary damages for being accused of and exposed to the criminal procedure.

b) Judgment of the Court

51 The Court found that the police and the public attorney arrived at their decision to bring charges against the plaintiff after a proper weighing and consideration of the revealed facts of the case. The fact itself that in the criminal court procedure the charge was found false by the court does not mean that the police or the public attorney committed a mistake, were negligent or that the accusation itself was improper. On this ground the Court rejected the claim.

c) Commentary

52 The decision covers decisions made on a discretionary basis and establishes that, for such decisions, authorities may be found liable if they did not consider the facts and circumstances of the case properly and this led to the false decision.

13. Supreme Court, Legf. Bír. Pfv. V 22.083/2007 – BH 2008 119 sz.: Contributory Negligence and Reliance on Land Registry

a) Brief Summary of the Facts

53 The plaintiff bought a flat. Before concluding the contract he asked for a certification of the proprietary status of the flat from the Land Registry. After concluding the contract and paying the price of the flat, it turned out that the certification did not contain the correct status of the flat and the plaintiff could not acquire title on the flat. The plaintiff could not recover the price from the seller. He claimed damages from the Land Registry Office, the defendant, as compensation for the losses he suffered as a result of concluding the contract and paying the price relying on false data contained in the certification. The defendant Land Registry Office pleaded that the actual status of the flat could have been made clear for the plaintiff if he had checked the data of the immovable in a more detailed way at the office including the contracts and facts which formed the basis of the certificate. As the plaintiff had failed to do so, he himself contributed negligently to the loss he suffered.

b) Judgment of the Court

54 The Court decided for the plaintiff and rejected the plea of the defendant. The Court established that the required duty of care standard does not include checking the data of the Land Registry if the certification given out by the office is correct in form and content.

c) Commentary

The decision suggests that the Land Registry, being responsible for the register, shall keep the records as well as the certificates issued on the basis of them accurate. It can neither share the liability with the victim suffering losses as a result of relying on the data of the certification nor shift – wholly or partly – the liability to the victim for the incorrect content of the certificate even if the victim could have been aware of the incorrect data (and the false information contained by the certificate) by checking the basic content of the registry. 55

14. Supreme Court, Legf. Bír. III 21.191/2007 – BH 2008 184 sz.: Liability of a Hospital for Negligence in Treatment of Newborn Premature Baby

a) Brief Summary of the Facts

The plaintiff was one of two twins born prematurely. Both twins received special treatment. For the plaintiff's twin sister, who presented symptoms of inflammation (e.g. high fever), the treatment included a course of antibiotics. The plaintiff, who did not present any signs of inflammation, did not receive the same treatment with antibiotics. After some days, however, the plaintiff presented the same inflammatory symptoms which soon turned out to be an indication of serious meningitis and apoplexy. The result of the illness was – together with other complications – serious brain damage and, as a consequence of this, a permanent mental and physical deficiency. The plaintiff claimed damages from the defendant hospital, arguing that if the doctors of the defendant had administered the same antibiotic treatment as her twin sister had received, her disease and her permanent deficiency could have been prevented. The defendant pleaded that as the plaintiff did not show any signs of having the same disease as her twin sister, no indications were present for administering the same treatment with antibiotics. The defendant argued that as their doctors did not fail to comply with the required standard of duty, they cannot be held liable for the damage suffered by the plaintiff. 56

b) Judgment of the Court

The Supreme Court decided for the plaintiff and established that the defendant shall be liable for pecuniary and non-pecuniary damages. The Court found that the symptoms of the plaintiff's twin sister should have indicated to the doctors that the plaintiff had been exposed to the same risk. Thus, the doctors of the defendant would have complied with the required duty of care if they had concluded that the plaintiff was exposed to the same risk and administered the same treatment to the plaintiff too. 57

c) Commentary

It is remarkable, although it has not been stressed in the reported decision, that it could not be established that the plaintiff would have avoided the meningitis and/or its consequences if the doctors had decided for the antibiotic treatment. According to the Court, in order to establish liability, it was enough that such a 58

treatment could have reduced the risk of meningitis and its consequences and that it might have avoided the illness or mitigated its consequences.

15. Supreme Court, Legf. Bír. Pfv. III 21.543/2007 – BH 2008 211 sz.: Compensation for Loss of Value of Land with a Mobile Transmission Tower

a) Brief Summary of the Facts

59 The plaintiffs bought a plot of land and built on that land a restaurant with a guest-house. Subsequently, the defendant erected a transmission tower for her mobile phone network on neighbouring land. The plaintiffs claimed compensation for loss in the value of their immovable (which is a well-known and generally accepted consequence of having such a transmission tower on neighbouring land). The defendant pleaded that, at the time of building the restaurant and the guest-house, the plaintiffs, as a neighbour, had already been informed of the building of the transmission tower in the administrative procedure for issuing the building permit. As the plaintiffs at the time of beginning the construction works for the restaurant and guest-house must have known that a transmission tower was to be erected on the defendant's neighbouring land, they chose to take the risks involved, the consequences of which could not be shifted to the defendant.

b) Judgment of the Court

60 The Court decided only partly for the plaintiffs and awarded damages for the loss in the value of the plot of land only. The Court rejected the part of the claim concerning damages as compensation for the loss in value of the buildings on the ground that, as the planned construction of the transmission tower was known to the plaintiffs at the time they decided to build a restaurant and guest-house, they have to bear the risk of suffering loss as a result of having such equipment in the neighbourhood.

c) Commentary

61 Claims for damages for loss in value of land due to the erection of cell phone network transmission towers have created a group of typical cases in Hungarian court practice. At the outset courts were quite open to award damages in such cases but later – according to different specialities of the occurring cases, like the risk undertaken by the plaintiff in this case – the tendency has become more restrictive.

16. Supreme Court, Legf. Bír. Pfv. V 20.459/2008 – BH 2008 112 sz.: Non-Pecuniary Damages for False Criminal Procedure

a) Brief Summary of the Facts

62 The police set up an investigation against the plaintiff as there were strong suspicions of forgery. The plaintiff submitted several complaints to the Public Prosecutor supervising the police which had been rejected but finally the Supreme Public Prosecutor quashed the public prosecutor's decisions rejecting the com-

plaints and stopped the procedure. It was later discovered that the decision of the police to launch an investigation had been a result of a serious fault on the part of the investigators. The plaintiff claimed non-pecuniary damages as compensation for having been exposed to a criminal procedure causing him stress and health problems. The police as defendant pleaded that the plaintiff could not prove actual harm suffered as a result of the criminal procedure and their decision could not be held as a negligent failure as the public prosecutor of first instance also rejected the plaintiff's complaint thereby confirming their procedure.

b) Judgment of the Court

The Supreme Court decided for the plaintiff and awarded non-pecuniary damages to him. The Court found that exposure to a criminal procedure itself is such a mental and psychic burden which must be held as an interference with the inherent rights of the person establishing a claim for non-pecuniary damages without further proof of actual harm. The fact that the supervising Public Prosecutor rejected the complaints does not establish the correct procedure of the police. 63

c) Commentary

The case does not seem to bring further conclusions beyond the fact that if authorities expose someone to a criminal procedure with a wrong decision negligently, it normally shall be a ground for awarding non-pecuniary damages. 64

17. Supreme Court, Legf. Bír. Pfv. VIII 21.303/2007 – BH 2008 214 sz.: Liability of the Central Recompense Fund

a) Brief Summary of the Facts

The defendant with his vehicle negligently caused an accident which caused harm to another person. As it turned out, the defendant did not have valid compulsory third party insurance and – under a special statutory compensation system for car accidents – the Central Recompense Fund maintained by the Association of Hungarian Insurance Companies compensated the victim. The Central Recompense Fund as plaintiff claimed the reimbursement of the paid compensation from the defendant. The defendant refused to pay the reimbursement to the plaintiff. 65

b) Judgment of the Court

The Supreme Court decided for the plaintiff and established that if the Central Recompense Fund pays compensation to the victim of an accident instead of the keeper of a car who does not have compulsory third party insurance, it may claim back the paid compensation from the keeper of the car. 66

c) Commentary

The decision is correct on the basis of statutory regulation but the result would also have been the same if the Central Recompense Fund had claimed the paid sum back as unjustified enrichment. 67

C. Literature

1. *Márta Görög,* A kegyeleti jog és a nem vagyoni kártérítés (The Right to Respect the Memory of a Dead Person and Non-Pecuniary Damages) (Pólay Elemér Alapítvány, Szeged 2008)

68 The author provides in her book a specific analysis of protection of basic personality rights and non-pecuniary damages by addressing the problem of the right to respect the memory of a dead person. She addresses the problem and unique nature of this specific right in the context of protection of basic personality rights. At the centre of these specific personality rights is a person who is already dead. The author gives an overview of the right to respect the memory of the dead person, then an analysis of the extension of non-pecuniary damages to the protection of basic personality rights and finally she addresses the problem of transferability of the claim for non-pecuniary damages which is accepted only in a limited way in Hungarian court practice. She applies a comparative method and provides a functional analysis. In Hungarian professional literature this book is the first comprehensive analysis of the problem of protecting the right to respect the memory of a dead person in private law. The author is associate professor of civil law at the University of Szeged, Faculty of Law.

2. *Petra Jenovai,* Emberi környezet – polgári jogi felelősség (Human Environment – Civil Law Liability) Acta Conventus de Iure Civili Tomus VIII (Lectum, Szeged 2008) 13–62

69 This article provides an overview of the civil law liability aspects of environmental protection. The author addresses the relationship of civil law liability provided in the Civil Code and specific regulation. The author gives a description of relevant legislation and court practice. The author is a student at the University of Szeged, Faculty of Law.

3. *Miklós Boronkay,* Hipotetikus okozatosság a kártérítési jogban (Hypothetical Causation in Tort Law) Jogtudományi Közlöny, Vol. LXIII (2008) no. 3, 119–128

70 The author provides a comprehensive analysis of the problem of hypothetical causation in tort law, using a comparative approach and examining Hungarian private law in the period before the Second World War. He concludes that this specific form of causation should be covered with specific regulation in the Civil Code. He suggests texts for possible norms. The author is a law clerk.

4. *Levente Tattay,* Növekvő trend a bíróságok által megítélt nem vagyoni kártérítések összegében (Upward Trends in Non-Pecuniary Damages) Gazdaság és Jog 2008, no. 10, 11–14

71 The author presents how the amounts of non-pecuniary damages awarded by the courts indicate a clear increasing tendency. The author refers to court decisions to reinforce his results. The author is a professor of civil law at the Pázmány Péter Catholic University, Law Faculty, Budapest.

5. *József Szalma,* Reflexiók az új Ptk. tervezeteire a polgári jogi felelősségi alapelvek tekintetében (Reflections on the Drafts of the New Hungarian Civil Code Concerning Principles of Liability) Jogtudományi Közlöny, Vol. LXIII (2008) no. 10, 497–503

The author gives a survey of the texts of the drafts of the New Hungarian Civil Code and attempts to provide an overview on how the underlying policy of tort law regulation could be outlined in these drafts and what kind of changes could be expected. The author is a professor of civil law at the University of Novi Sad, Serbia. 72

XIII. Ireland

Eoin Quill

A. Legislation

1 There were no major legislative changes to tort law in Ireland in 2008; some limited amendments were made, for example, in the field of occupational injuries.[1] The operation of various statutory schemes in force fell for consideration in some cases. These are considered in the overview of personal injuries at the end of Section B, below.

B. Cases

1. *O'Keeffe v Hickey, The Minister for Education & Science, Ireland and the AG*, 19 December 2008, [2008] Irish Supreme Court (IESC) 72:[2] Vicarious Liability; Conditions for a Sufficient Employment Relationship

a) Brief Summary of the Facts

2 The plaintiff was sexually abused when she was 8–9 years old by the school principal of the primary school she attended; the abuse occurred during music lessons, after school. She obtained € 53,000 from the Criminal Injuries Compensation Tribunal (which does not give compensation for pain and suffering). She also instituted tort proceedings against the perpetrator and the state, but not the school manager, its management board or the Catholic Church.[3] The

[1] Safety, Health and Welfare at Work (Quarries) Regulations 2008 (Statutory Instrument (SI) 28/2008), which provides an extensive set of regulations (71 sections and 4 schedules) governing the safe operation of quarries. Legislative materials can be accessed on the website of the Attorney General's Office (AG), http://www.irishstatutebook.ie/home.html.

[2] The current cases in this report are available on the Irish Courts Service judgments database, http://www.courts.ie/Judgments.nsf/Webpages/HomePage?OpenDocument&l=en and on the British and Irish Legal Information Institute website, http://www.bailii.org/.

[3] Many schools in Ireland are run by members of religious institutions and the local parish priest, or in this case a priest acting on his behalf, would act as the school manager. The history of the idiosyncratic structure of Irish schools' management is set out in considerable detail in the judgments of Mr Justices (JJ) Hardiman & Fennelly, in this case and is briefly referred to on the judgment of Geoghegan J. Geoghegan J indicates that practical reasons, flowing from the death

first defendant did not dispute the case and judgment was obtained against him; however, as a retired teacher with no significant means, he was unable to pay much, if any, of the amount awarded against him. The state was granted a non-suit in respect of negligence in not detecting and preventing the abuse from occurring. In the trial court, the state's pleas that the action was statute barred or that there was undue delay in proceeding with the claim were both rejected, but the state was relieved of vicarious liability for the first defendant's tort on the basis that it was not his employer.[4] The plaintiff appealed to the IESC against the ruling on the vicarious liability issue; there was no cross appeal on the limitation of action or delay issues.

b) Judgment of the Court

The IESC upheld the IEHC decision that the state is not the employer of a school teacher and so, is not vicariously liable for abuse of the plaintiff by the first named defendant. While the state paid for the running of such schools, including teachers' salaries, set the academic syllabus (except in respect of religious education), established qualification requirements for teachers, inspected the schools and had a role in disciplinary processes, it was not involved in the day to day management of the school. The school manger had day to day management of the school's affairs, in particular, the hiring and firing of teachers. While the state has a constitutional obligation to provide for free primary education, this has always been treated as distinct in law from a direct obligation to provide such education and is regarded as an obligation to have sufficient measures in place to ensure provision, which is satisfied by financing third party provision of education.[5] Relying on the well established position in previous cases that financial arrangements are distinguishable from other facets of the employment relationship for vicarious liability purposes and that control is the core factor for establishing a sufficient relationship for the purpose of determining tortious responsibility, the IESC, by a 4–1 majority, held that the state was not the perpetrator's employer.[6] 3

c) Commentary

The outcome of the case is not particularly surprising, if a little disappointing, in not taking the opportunity to review the application of the control test for the existence of a sufficient relationship for vicarious liability purposes. The test has proved difficult to apply in some instances and has been the subject of 4

of the school manager in the intervening period between the abuse and commencement of the litigation, were offered as an explanation for the omission of the Church or school management as defendants. This is not an entirely convincing explanation.

[4] [2006] Irish High Court (IEHC) 13, noted by *E. Quill*, Ireland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) no. 21–24. The damages payable by the first defendant were assessed at just over € 300,000.

[5] The principal case on the constitutional role of the state in the field of education is *Crowley v Ireland* [1980] Irish Reports (IR) 102; analysed in *G.W. Hogan/G.F. Whyte* (eds.), J.M. Kelly: The Irish Constitution (4th ed. 2003) no. 7.6.248 ff.

[6] Vicarious liability is considered in *B.M.E. McMahon/W. Binchy*, The Law of Torts (3rd ed. 2000) chap. 43; *E. Quill*, Torts in Ireland (2nd ed. 2004) chap. 14; *J. Healy*, Principles of Irish Torts (2006) chap. 2, sec. IV.

much academic critique throughout the common law. The majority diverged on the precise interpretation of the test. The more restricted view of control, looking at the actual control exercised, was expressed by Hardiman J. He forcefully stated that "[v]icarious liability is a form of strict liability which can be immensely burdensome on the party upon whom it is imposed. It cannot in my view justly occur at all except in a situation where the paying party said to be vicariously liable has a real and actually exercisable power of control, in the relevant area of behaviour, over the person for whom it is said to be vicariously liable." Historically, there have been many cases where vicarious liability has been imposed in Ireland that would not satisfy this test, such as where an employer has a theoretical entitlement to control that is not exercised in practice, or where there is an employee with specialist skills, where the employer has no more than administrative authority over the worker. In such cases, the personal service element of the relationship is taken into account and persons doing the vast bulk of their work regularly for the same entity are treated as employees for vicarious liability purposes.[7] Fennelly J refers to Hardiman J's treatment of control but expresses no clear view on whether he endorses it, but goes on to refer to a lack of relationship in this case under "normal principles" of vicarious liability. The Chief Justice (CJ), Mr. Justice Murray agreed with both judgments on the absence of a relationship, while Denham J agreed with Fennelly J on the issue. Geoghegan J, dissenting, found that the state's role in education went considerably beyond the financial and inspection aspects emphasised by the majority and presented a much more borderline question on the classification of the relationship between the state and the teacher. While he was unwilling to hold that the state would have a sufficiently close relationship to be vicariously liable for negligence in day to day matters, such as supervision of children, it would have a sufficient relationship in respect of those facets of a teacher's behaviour that impinged on suitability to hold the position. This more nuanced approach has not found favour; it is also probably fair to conclude that the restrictive approach advocated by Hardiman J has insufficient support and so, the approach to determining a sufficient relationship remains unchanged. This makes the case of limited value as a binding authority outside of the specific fact at issue – the relationship between the state and teachers is insufficient to support vicarious liability. It is, nonetheless, significant as it is the first IESC ruling on the specific issue and so, carries greater authority than earlier IEHC rulings.

5 Of greater interest are the dicta on the scope or course of employment – i.e. which tortious acts are sufficiently connected to a worker's employment to generate vicarious liability in the event of there being a sufficient employment relationship between the worker and the defendant. The court was also divided on this issue, but the majority expressed support for a broader interpretation than that traditionally employed. Fennelly J found that other common law jurisdictions are converging in the development of a "close connection test",

[7] See for example *Phelan v Coillte Teo* (the state forestry company) [1993] 1 IR 20; *Byrne v Ryan* [2007] IEHC 207, noted by *E. Quill*, Ireland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 23–26.

which is heavily factually dependent and he acknowledged that there was an element of enterprise liability theory involved in the interpretation of the scope of employment; on the facts of this case he suggested that music lessons on the school premises were sufficiently connected to the principal teacher's employment.[8] Murray CJ concurred with Fennelly J on the issue, while Geoghegan J based his decision on a broader policy footing, drawing on different facets of the cases cited to the court.[9] Hardiman J preferred to confine vicarious liability within traditional bounds and stated that imposing liability in these circumstances "would require an enormous revolution in the principles of vicarious liability as applied in Ireland." He also specifically denounced the judicial imposition of liability on grounds of deep pockets or enterprise liability, stating such an extension was best left to the legislature to decide upon. He was also critical of the 1975 IESC decision in *Moynihan v Moynihan*,[10] imposing vicarious liability on an insured homeowner in respect of gratuitous domestic services provided by her daughter – clearly a decision influenced by deep pocket thinking. Fennelly J reserved his view on the correctness of *Moynihan*, as it had no relevance to the case at hand and he described it as "based on highly unusual facts". In a similar vein, Geoghegan J described the decision as sui generis and having no application to the current case. The court did not address the difference in approach between the state's position in respect of schools and its position in respect of residential institutions (as noted in the commentary on the IEHC decision in the 2006 Yearbook).[11] Clearly there is divergence on the precise parameters of vicarious liability in Ireland and on the proper underlying rationale for its imposition. There is a sufficient suggestion that the IESC is open to developing the boundaries of liability (at least on the scope of employment issue, if not on the determination of an employment relationship) to encourage plaintiffs' lawyers to pursue novel claims on this front.

[8] Reliance was placed on *Bazley v Curry* [1999] 2 Supreme Court Reports, Canada (SCR) 534; *Lister v Hesley Hall Ltd.* [2002] 1 Law Reports, Appeal Cases (AC) 215 and *New South Wales v Lepore* (2003) 212 Commonwealth Law Reports (CLR) 511; The IEHC dictum of O'Higgins J in *Delahunty v South Eastern Health Board* [2003] 4 IR 361, also supporting this approach, was approved; the finding of a lack of sufficient connection in that case (because the victim was a visitor and not a child under the perpetrator's care) was also approved. The common law developments are analysed by *P. Giliker*, Comparative Perspectives on Vicarious Liability: Defining the Scope of Employment, in: J. Neyers/E. Chamberlain/S.G.A. Pitel (eds.), Emerging Issues in Tort Law (2007).

[9] He relies in particular on McLachlin J in *Bazley v Curry* [1999] 2 SCR 534 and the subsequent Canadian decision in *Blackwater v Plint* [2005] 3 SCR 3 (involving joint vicarious liability of Church and state). He eschewed any narrow focus on the scope of employment, but was more broadly concerned with the justice of the case.

[10] [1975] IR 192; the decision was also criticised by the High Court of Australia (HCA) in *Scott v Davis* (2000) 74 Australian Law Journal Reports (ALJR) 1410.

[11] *Quill* (fn. 4) no. 24.

2. *Grant v Roche Products (Ireland) Ltd. and Others*, 7 May 2008, [2008] IESC 35: Wrongful Death; Vindication of Rights as a Purpose of Tort Law

a) Brief Summary of the Facts

6 The plaintiff's son was a 20 year old university student with no personal or family history of depression. His general medical practitioner referred him to a dermatologist, who prescribed a four-month course of treatment for acne, using one of the Roche group of defendants' products – Roaccutane. During the treatment, the young man displayed behavioural changes and, in the final week of the treatment, he committed suicide. The plaintiff instituted a fatal injuries claim against the Roche defendants, the Irish Medicines Board and the dermatologist. The Roche defendants offered to pay fatal injuries damages in full and costs without admission of liability; the plaintiff refused the offer. The Roche defendants sought dismissal of the claim as an abuse of process, as it could generate no material benefit to the plaintiffs. The President of the High Court (P), Mr. Justice Finnegan rejected the application and the defendants appealed to the IESC.[12]

b) Judgment of the Court

7 The IESC rejected the appeal and found that vindication of rights was a form of benefit, so the plaintiff was entitled to pursue the case to seek judicial determination of whether the defendants acted wrongfully and he should not be forced to accept the settlement offer. Hardiman J (Murray CJ and Geoghegan J concurring) stated that "where a very young man has died by his own hand, there is a manifest benefit to his father and other relatives in establishing, if it be the case, that his death had an exogenous cause and was not the result of a free decision on his part."

c) Commentary

8 The decision clarifies some procedural points which may be of marginal academic interest, but are of significant importance for practitioners. First, the offer by the defendants was not a tender or lodgement within the procedures set out in the rules of court; this does not, in itself, preclude the bringing of an application to dismiss; the inherent jurisdiction of the court may be invoked.[13] In the present case, the application was rejected on its substantive merits, not on any procedural infirmity. The court went on to review several authorities on the exercise of the jurisdiction to strike out; first, it reiterated the established parameters for doing so on the grounds that the litigation has no prospect of success and ruled that, while the current plaintiff would have a difficult task

[12] [2005] IEHC 161.

[13] The court considered a number of cases on the right of access to the courts in reaching this decision, including *AA v The Medical Council* [2003] 4 IR 302; *Johnson v Gore Wood & Co. Ltd.* [2002] 2 AC 1; *Ashingdane v UK* (1985) 7 European Human Rights Reports (EHRR) 528 and *Fayed v UK* (1994) 18 EHRR 393. It was also noted that there was an outstanding justiciable issue between the parties about the classification (as costs or losses incurred) of some expenses incurred by the plaintiff.

proving his case, his case was not obviously without any chance of success.[14] The court then considered what would constitute a sufficient abuse of process and accepted that it had expanded past its historical bounds of having an ulterior improper motive for proceeding and also incorporated situations where no material benefit could ensue.[15] In a rare judicial foray into the conceptual purposes of tort claims the court found that such claims were an important part of the machinery by which the state can fulfil its constitutional mandate to vindicate the personal rights of the people in respect of injustice.[16] The defendant's argument that tort claims such as this were solely concerned with the monetary remedy was rejected. The decision is to be welcomed, as it highlights the importance of doing justice in public and prevents a powerful corporate defendant from denying the victim's family their day in court and using its financial muscle to avoid the potential for setting a precedent in respect of their liability.[17] The view expressed on the purposes of a claim is similar to that of the House of Lords in *Ashley v Chief Constable of Sussex Police*,[18] but the IESC does not cite that decision.

3. *Herrity v Associated Newspapers (Ireland) Ltd.*, 18 July 2008, [2008] IEHC 249: Privacy[19]

a) Brief Summary of the Facts

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. 9

b) Judgment of the Court

Dunne J confirmed the existence of an action for enforcement of the constitutional privacy right against a private defendant. She accepted that there is a 10

[14] Leading cases include *Jodifern Ltd. v Fitzgerald* [2000] 3 IR 321; *Conlon v Times Newspapers Ltd.* [1995] 2 Irish Law Reports Monthly (ILRM) 76; *DK v King* [1994] 1 IR 166.

[15] The traditional scope of abuse of process can be found in *Varawa v Howard Smith Company Ltd.* (1911) 13 CLR 35 and *Williams v Spautz* (1992) 174 CLR 509; the broader view is derived from *McSorley v O'Mahony* unreported (unrep.) IEHC, 6 November 1996 (Costello J).

[16] Art. 40.3.2 of the Constitution provides that "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

[17] While the cost and expense of litigation was cited by the defendants as their reason for preferring settlement, the avoidance of a judicial determination on the liability issue seems more plausible, given that the Irish courts have a history of plaintiff friendly decisions; see for example *Best v Wellcome Foundation Ltd.* [1993] 3 IR 462, contrast with *Loveday v Renton* [1990] 1 Medical Law Reports (Med LR) 117; both are discussed in *R. Goldberg*, Causation and Risk in the Law of Torts (1999) chap. 4.

[18] [2008] 1 AC 962, noted by *N.J. McBride* [2008] Cambridge Law Journal (CLJ) 461. On vindication more generally, see *N. Weitzleb/R. Carroll*, The Role of Vindication in Torts Damages (2009) 17 Tort Law Review (Tort L Rev) 16.

[19] Noted by *N. Cox*, (2008) 3(2) Quarterly Review of Tort Law (QRTL) 18.

distinction between information that by its very nature is private and unsuitable for disclosure to third parties and information which is susceptible to disclosure, based on competing considerations; in respect of the latter, disclosure may be actionable if unlawful means are used to obtain the information. The present case was concerned with the second aspect. The recording of the phone conversations amounted to a breach of sec. 98 of the Postal and Telecommunications Services Act 1983, as the phone subscription was in the plaintiff's sole name, leaving her husband without the authority to give a valid permission for the recordings. In addition to outlawing unauthorised recording, the section also precludes disclosure of the information obtained. Dunne J ruled that this legislative constraint on freedom of expression was one that could be taken into consideration by the court in giving primacy to privacy over freedom of expression. Having regard to the principles on the assessment of damages set out by the IESC in *Shortt v Commissioner of An Garda Síochána* (the Irish police),[20] she awarded the plaintiff € 60,000 in ordinary and aggravated compensatory damages and a further € 30,000 in exemplary damages.

c) Commentary

11 The decision is a welcome one, which builds on developing jurisprudence in the field of privacy protection in Ireland. The judgment contains a thorough review of Irish authorities on privacy and takes the next logical step in the development of this field. The defendant argued that the invasion of privacy claim, established in earlier cases, was confined to state liability and did not extend to claims against private entities. Dunne J accepted that only the state had so far been held liable for damages actions that had gone to a full trial, but noted that the enforceability of privacy rights against private parties had been an underlying assumption in a number of interlocutory proceedings.[21] After reviewing those decisions in detail, she concluded that an action for damages against private entities is available in suitable circumstances. She did not engage in any detailed consideration of the classification of the action, but treated it as a straightforward breach of constitutional rights claim.[22] Because this action succeeded, she did not need to determine the other issues raised and did not express any views on them. Those issues were protection of privacy under the European Convention on Human Rights and Fundamental Freedoms, breach of confidence, breach of statutory duty and conspiracy.

12 Dunne J's distinction between information which is inherently unsuitable for disclosure without permission and that which may be disclosed, depending on a balance between competing considerations, is appropriate. The distinction between the two may be difficult to delineate in practice, but the dividing line

[20] [2007] IESC 9, noted by *Quill* (fn. 7) no. 4–8.

[21] *M v Drury* [1994] 2 IR 8 and *Cogley v RTE* [2005] 2 ILRM 529 in particular. This does overlook some Irish Circuit Court (IECC) trials on the liability of private parties (one of which was upheld by the IEHC in an *ex tempore* judgment), see *Quill* (fn. 7) no. 21, fn. 37. For detailed treatment of privacy in Ireland, with comparative analysis, see *H. Delany/E. Carolan*, The Right to Privacy (2008).

[22] The classification issue is discussed by *Quill* (fn. 7) no. 20–21.

did not need to be drawn on the facts raised. She identified freedom of expression and public interest concerns as relevant counter-considerations in the latter category of case and acknowledged that freedom of expression was given significant weight in previous cases; those cases show a preference for legislative over judicially imposed constraints.[23] On the present facts, the breach of telecommunications legislation plainly exceeded any legitimate grounds for publication. The story of a relationship between a married woman and a priest may be of public interest and reporting it may legitimately come within the newspaper and the husband's realm of expression, but the inclusion of the content of the calls could not be protected by those interests.

13 The amount of damages awarded is high compared to the amount awarded in *Gray v Ireland*,[24] where the plaintiffs were forced to move home as a result of the invasion of privacy by the police; they had to live for a year in unsuitable accommodation, and one of them suffered post-traumatic stress disorder over a period of approximately seven years. Mrs. Gray, who suffered PTSD, was awarded € 50,000, while her husband was awarded € 15,000. These awards look particularly low in comparison to the award in the present case. It is submitted that it would be more appropriate to balance the awards by raising the levels in cases like *Gray*, rather than reducing them in cases such as the present. As there were no awards for aggravated or exemplary damages in *Gray*, these categories could be utilised as a vehicle to redress the balance.

4. *Fitzpatrick and Ryan v K and the AG*, 25 April 2008, [2008] IEHC 104: Battery; Capacity to Refuse Consent to Medical Treatment

a) Brief Summary of the Facts

14 The plaintiffs were representatives of a hospital that admitted Ms. K, a 23 year old non-national who did not speak English, as a maternity patient; she had been receiving ante-natal care for over two months before being admitted for delivery. After the delivery of her son, Ms. K suffered a major haemorrhage, placing her life in peril, but she refused a blood transfusion on the grounds that she was a Jehovah's Witness; she had represented that she was Roman Catholic when she initially registered with the hospital. Communication was conducted through a friend of Ms. K's (related via marriage), who acted as an interpreter. Ms. K was temporarily stabilised by the use of artificial blood products, but the hospital remained concerned that she might die if another haemorrhage occurred. She continued to refuse a transfusion and, on the day of the birth, the hospital applied *ex parte* to the IEHC for an order permitting them to give a transfusion. Abbott J, in an *ex tempore* judgment, granted an order permitting the hospital to give Ms. K all appropriate treatment, including transfusions and clotting agents. The order was put into effect approximately

[23] See in particular *M v Drury* [1994] 2 IR 8, relying on Lord Justice (LJ) Hoffman (as he then was) in *R. v Central Independent Television Plc* [1994] Law Reports, Family Division (Fam) 192.

[24] [2007] 2 IR 654, noted by *Quill* (fn. 7) no. 18–22; *R. Byrne/W. Binchy*, Annual Review of Irish Law 2007 (2008) 563 f.

an hour after it was issued; Ms. K recovered and she and her son were discharged from the hospital a week later. The case then came on for a full trial for declaratory relief by the hospital; a permanent injunction, in similar form to the interlocutory order, was originally pleaded, but was not pursued since it became irrelevant after Ms. K's recovery and discharge. Ms. K counterclaimed for trespass, breach of rights under the constitution and the European Convention on Human Rights and Fundamental Freedoms and for various declaratory reliefs. The Attorney General was added as a defendant in light of the potential constitutional issues that might be raised.

b) Judgment of the Court

15 Laffoy J held that the treatment of Ms. K contrary to her wishes was lawful, as she lacked sufficient capacity to validly refuse the treatment. The hospital was granted declaratory relief in a more limited form of declaration than that sought and the patient's counterclaims were rejected. In arriving at her conclusion, Laffoy J expressed the following principles as governing the situation; adult patients are subject to a rebuttable presumption of having sufficient capacity to accept or refuse medical treatment; a competent adult may refuse treatment for any or no reason (even an irrational reason); the gravity of the consequences are relevant to capacity, such that clear and convincing evidence on the issue is required in cases of extreme consequences (such as life and death decisions);[25] the patient lacks capacity if she "does not sufficiently understand the nature, purpose and effects" of the proposed treatment.[26] In answering this enquiry "the question of capacity falls to be determined by reference to what was known to the Hospital personnel at the time of her refusal about Ms. K's condition and her circumstances." As Ms. K demonstrated a lack of understanding of the gravity of her condition, the hospital was objectively justified in doubting her capacity to refuse consent and so had not acted unlawfully.

c) Commentary

16 While the Irish courts have previously considered the question of who has the power to give or withhold consent to medical treatment in the case of clearly incompetent patients, such as a comatose individual,[27] and in the context of

[25] These propositions are based on dicta from *In Re a Ward of Court* [1996] 2 IR 79 and the English Court of Appeal decision, per Lord Donaldson, in *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All England Law Reports (All ER) 649.

[26] *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 All ER 819, per Thorpe J. Laffoy J also noted the clarification offered by Dame Butler-Sloss P (as she then was) in *Re B (Adult: Refusal of Treatment)* [2002] 2 All ER 449 and Butler-Sloss LJ (as she then was) in *Re MB (Medical Treatment)* [1997] 2 Family Law Reports (FLR) 426, that the ability to understand should not be confused with the basis for making the decision to refuse, the latter of which may stem from a difference in values between doctor and patient.

[27] *In Re a Ward of Court* [1996] 2 IR 79; see also *Law Reform Commission*, Consultation Paper on Vulnerable Adults and the Law: Capacity (CP37-2005), particularly Chapter 7 on capacity to make health care decisions. The final reform proposals are in the Report: Vulnerable Adults and the Law (LRC 83-2006); *M. Donnelly*, Assessing Legal Capacity: Process and the Operation of the Functional Test [2007] 7(2) Judicial Studies Institute Journal 141; the Mental Capacity and Guardianship Bill 2008, noted by *H. Kennedy*, (2008) 14(2) Medico-Legal Journal of Ireland (MLJI) 51.

young children,[28] they have not previously had to consider the parameters of capacity in a case involving a lucid patient, expressing a clear, if controversial view. The test for capacity, derived from *Re C*, was accepted by all parties, so the authority of this decision is more limited than it would have been had there been contested argument on the issue. The manner in which the test was applied to the facts of the case is uncontroversial, provided the test itself is accepted; the patient expressed the view that her condition could be improved by consumption of "tomatoes, Coca Cola, eggs and milk", clearly demonstrating a lack of appreciation of realistic options in the circumstances. In practice, the dividing line between irrationality demonstrating a failure to properly assimilate information (which affects capacity) and irrationality in making a decision (which falls within a competent person's autonomy) may be difficult to draw in future cases; it may be particularly difficult in cases where a person's faith causes her to doubt that she is actually in danger, as opposed to a situation where a person appreciates the danger, but because of her faith chooses to let nature run its course for better or worse.[29]

A more controversial facet of the decision is that capacity is to be determined by a standard of objectively justified doubt on the part of the medical staff, based on the evidence available to them at the time the decision is made. It is understandable from a practical point of view that medical personnel should be free to act once they reasonably believe they are entitled to do so, but it is an inroad into patient autonomy which may be questioned in the future. The standard applied by Laffoy J may be appropriate in a negligence claim, but historically trespass has given greater weight to the individual's autonomy. The decision is consistent with an earlier IESC decision made in the context of informed consent to eschew the use of trespass in cases of medical error.[30] However, even informed consent decisions in negligence are moving from a reasonable doctor to a reasonable patient standard of measurement.[31] Trespass has an advantage, from the patient's point of view, of being actionable per se. Thus, the absence of harmful consequences would not preclude an award of substantial damages for the violation of the patient's rights. 17

On the question of the burden of proof, the proposition that there is a rebuttable presumption of capacity would indicate that it is the hospital that should prove 18

[28] *W v North Western Health Board* [2001] 3 IR 622; see *E. Feldman*, Informed Consent. Should there be a Reasonable Parent Test? in: C. Craven/W. Binchy (eds.), Medical Negligence Litigation: Emerging Issues (2008). The *ex parte* ruling by Abbott J and other *ex parte* hearings concerning treatment of children are considered by *N. Hayes*, Religious Objections to Blood Transfusions (2008) 102(1) Law Society Gazette (Gaz) 20.

[29] A mental illness may similarly create a difficulty in drawing the line. In *Re C*, the patient had delusions that he had a great medical career, but this was not adjudged to deprive him of the ability to assimilate and assess the necessary information, though it may have led him to an irrational decision; he was held to be competent and Thorpe J refused to order treatment. In *NHS Trust v T (Adult Patient: Refusal of Medical Treatment)* [2005] 1 All ER 387; the patient's belief that blood was evil was regarded by Charles J as a sufficient "misconception of reality" to deprive her of capacity for the purposes of the test.

[30] *Walsh v Family Planning Services Ltd.* [1992] 1 IR 496.

[31] *Fitzpatrick v White* [2008] 2 ILRM 99, noted by *Quill* (fn. 7) no. 15–18.

incapacity. However, on the issue of clear and convincing evidence in cases of severe consequences, it is plain in the judgment that the burden is placed on the patient to show competence. This paradox can be explained on the basis that the burden normally rests with the hospital, but transfers to the patient in cases of extreme consequences. This is, in part, a consequence of constitutional jurisprudence that a high level of proof is required to demonstrate a waiver of constitutional rights.[32] If the patient is asserting that she was willing to risk her life, thereby waiving her right to life, she must clearly demonstrate this; it is not for the hospital to demonstrate that she had not waived the right. The net effect of the rulings on standard of measurement and burden of proof mean that in life and death situations the patient must convince a hospital (not a court) that she is competent and it is not for the hospital to satisfy itself, or an impartial adjudicator, that the patient lacks competence.

19 Given the ruling on competence, the court did not have to consider the more vexed question of whether a competent adult's decision can be outweighed by countervailing constitutional considerations, such as the child's rights. This latter issue had formed the basis of Abbott J's interlocutory ruling, as he had presumed the patient to be competent. Furthermore, the question of the effect of the European Convention rights did not require determination and no view was expressed on them.

20 Finally, on the question of procedure, Laffoy J considered the propriety of the *ex parte* application. Adopting the procedural guidelines set out by the English Court of Appeal *St. George's Healthcare NHS Trust v S*,[33] she considered that it was an irregular procedure, however its irregularity was not sufficient to constitute a violation of Ms. K's constitutional rights so as to set aside the order of Abbott J. The patient's provision of false information on her religion resulted in the hospital facing an emergency situation, which could have been avoided; given the predicament the hospital was faced with, Laffoy J held that an application to the IEHC was justified and, while an *inter partes* hearing may have been preferable, it would have been difficult to arrange representation for Ms. K at such short notice. Other irregularities noted were the hospital's failure to give an undertaking in damages and that the provision on liberty to apply in respect of the order did not fully recognise the patient's right to seek variation or discharge of the order.[34] In consequence, the order of Abbott J would not preclude Ms. K pursuing a claim for damages if she had made out a sufficient case on the substantive issue. The judgment finishes with helpful suggestions on putting proper procedures in place to deal with such situations in the future, including hospital guidelines, a practice direction for the IEHC and a state designated representative to carry out the functions performed by the Official Solicitor in England and Wales in such cases. An application by the representative body for Jehovah's Witnesses in Ireland to be heard as *amicus curiae* was earlier rejected by Clarke J in the IEHC.[35]

[32] *G v An Bord Uchtála* (the adoption board) [1980] IR 32. *Hogan/White* (fn. 5) no. 7.1.68–7.1.78.
[33] [1999] Fam 26.
[34] The principles governing undertakings are set out in *B. Kirwan*, Injunctions: Law and Practice (2008) no. 6.76–6.80 and 6.241–6.246.
[35] *Fitzpatrick and Ryan v K and the AG* [2008] 1 ILRM 68.

5. *Dempsey v Waterford Corporation*, 29 February 2008, [2008] IEHC 55: Private Nuisance; Public Authority Liability; Statutory Authority Defence

a) Brief Summary of the Facts

21 The defendant local authority was carrying out work on sewers in a major upgrade of the service. In the course of connecting existing sewers to a new main drainage system, sewage travelled through a disused 17th century brick culvert into a room in the plaintiffs' house, destroying an expensive parquet floor and causing a noxious smell. The disused sewer did not appear on any maps or other records of the defendant. The plaintiffs instituted proceedings, pleading negligence, breach of statutory duty, trespass, nuisance and the *Rylands v Fletcher* principle. The plaintiffs were successful in the Circuit Court and the defendant appealed to the IEHC.

b) Judgment of the Court

22 Peart J allowed the appeal, holding that where a sewage leak was neither inevitable nor negligent, but an unforeseen accident (in the pure sense of the term), then no liability could attach. He ruled out trespass and breach of statutory duty without further explanation and then considered the remaining three causes of action. Negligence was ruled out due to the lack of a breach of the standard of care; any duty imposed could not require "an exploratory digging of [the street on which the plaintiffs lived] in order to confirm the existence or non-existence of such a culvert that they had no basis for suspecting might exist." Nuisance and *Rylands v Fletcher* were considered together and ruled out on the basis that, to be liable for creating a nuisance, one had to have knowledge of how one's behaviour would be a nuisance. The defendant's ignorance of the presence of the old culvert precluded it from knowing that its works could be a disruption to the plaintiffs in the manner which occurred.

c) Commentary

23 The decision is based on the following statement from a leading English practitioners' text: "As the general rule is that no one is liable for nuisance unless he either created it or continued it after knowledge or means of knowledge, it follows that it is a defence to prove ignorance of the facts constituting the nuisance, unless that ignorance is due to the omission to use reasonable care to discover the facts."[36] Peart J held that this meant the defendant must have knowledge of the likely interference via the disused drain at the time of acting. Several difficulties arise from this interpretation of the statement and its application to the facts. First, there is a question as to whether creating and continuing should be considered disjunctively, with the statement in respect of knowledge being confined to continuing (or adopting) a nuisance generated by another? Liability in nuisance distinguishes between liability for creating a hazard and liability for omissions, with a higher level of liability for the former, so it is more consistent with authority to say that the knowledge require-

[36] *A.M. Dugdale* (ed.), Clerk and Lindsell on Torts (18th ed. 2000) no. 19.66.

ment relates to the latter only.[37] Even if knowledge of risk is required,[38] surely the general awareness that work on sewers may cause flooding in adjacent premises suffices.[39] The higher degree of knowledge on the defendant's part demanded here, that the precise means by which the harm may ensue must be foreseen, brings the position closer to negligence than the traditional strict liability of private nuisance for material damage caused by active conduct.[40] A narrower ground for rejecting the plaintiffs' claim would be the defence of statutory authority.[41] The case law provides such a defence where the nuisance is an inevitable side effect of authorised works, but not where there has been negligence in the conduct of the work; there is no clear authority on the present type of case, where the disruption was neither inevitable nor negligent. Extending the defence to the current scenario would have the benefit of protecting public authorities (assuming that is considered to be appropriate), while restricting the ability of private parties to avoid liability for disruption to neighbours based on restricted risk awareness. A more general question raised by the case is should a homeowner bear liability for the unanticipated side effects of someone else's activities? As between the actor and the victim, the greater unfairness appears to lie in a finding of no liability. Where the actor is a public authority, the fact that a private individual has to bear the cost of an accident seems particularly odious. A home insurance policy may cover the material losses, though this is not certain. Even if it does, it will not cover the disruption caused to the use and enjoyment of the property, but only the material costs.

6. General Overview of Personal Injuries Cases

24 The statutory assessment scheme for personal injuries compensation, applicable to cases where liability is conceded, has shown no significant change of pattern. The Personal Injuries Assessment Board's statistics for the period

[37] *McMahon/Binchy* (fn. 6) no. 24.72–24.84; *Quill* (fn. 6) 217–23; *Healy* (fn. 6) no. 10.36–10.37.

[38] A view supported by *J. Eekelaar*, Nuisance and Strict Liability (1973) 8 Irish Jurist, New Series (Ir Jur (ns)) 191 and more recently by *M. Lee*, What is Private Nuisance? (2003) 119 Law Quarterly Review (LQR) 298. However, *M.A. Vennell*, The Essentials of Nuisance: A Discussion of Recent Developments in The Tort of Nuisance (1977) 4 Otago Law Review (Otago L Rev) 56, cogently argues that foreseeability has historically had no part to play in nuisance by active conduct causing material harm to land and should be confined to cases of interference with use and enjoyment and nuisance by omissions.

[39] In *Gibbings v Hungerford* [1904] 1 IR 211 the discharge of sewage was described by the Lord Chancellor (C), Lord Ashbourne as a nuisance as well as a trespass, although the claim was for trespass only.

[40] The leading authorities on material damage are *Halpin v Tara Mines Ltd.* [1976–1977] ILRM 28 and *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629. Peart J's approach mirrors that taken in respect of the *Rylands v Fletcher* principle in *Superquinn Ltd v Bray Urban District Council and Others* [1998] 3 IR 542, following *Cambridge Water Co. Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, discredited by the House of Lords in *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1.

[41] As occurred in England in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42. Leading Irish authorities on the defence are *Woodhouse v Newry Navigation Co.* [1898] 1 IR 161; *Guardians of Armagh Union v Bell* [1900] 2 IR 371; *Wallace v McCartan* [1917] 1 IR 377; *Smith v Wexford County Council* (1953) 87 Irish Law Times Reports (ILTR) 98; *Kelly v Dublin County Council* unrep. IEHC, 21 February 1986 and *Superquinn Ltd v Bray Urban District Council and Others* [1998] 3 IR 542.

January to September 2008 puts the total value of assessments issued in that period at € 167 million, of which € 100 million worth of assessments were accepted. The savings on costs, compared to the litigation costs that would have been incurred, is estimated at € 38.5 million. The breakdown of the categories of claims is 4,890 motor, 762 employment, 1,158 public liability (which encapsulates all other tort claims covered by the scheme). The highest assessment made was € 519,784, the lowest was € 1,000 and the average was € 24,479. Just over half of the assessments were in the € 10,000–20,000 range and a little over one fifth were in the € 20,000–30,000 range.[42] One of the promised benefits of the scheme on its introduction was lower motor insurance, through savings in costs; while there was a steady downward trend for car insurance in the years 2004–2007, 2008 has shown a rise of almost 7%, suggesting that the economic downturn is currently outweighing any influence that falling claims' administration costs is having.[43] The volume of cases going through the courts is still significant, despite the filtering process of the PIAB. While 2008 statistics are not yet available, the figures for 2007 show that almost € 22 million was awarded in 133 IEHC personal injury cases, with 5 awards in excess of € 1 million. The IECC awarded just over € 13.5 million in 968 personal injury cases.[44]

There was some limited case law affecting the PIAB process during the year. 25
The IESC has upheld two IEHC procedural rulings. In *O' Brien v PIAB*,[45] the PIAB policy of refusing to contact solicitors acting for applicants and corresponding directly with the applicants was confirmed to be an unlawful interference with the relationship between professional and client; the IESC did, however, find that the PIAB is entitled to copy the applicant with correspondence. In *Campbell v O'Donnell* the IESC confirmed that claims against the Motor Insurers' Bureau of Ireland (MIBI) in respect of uninsured or untraceable drivers are covered by the PIAB process, as the claim originates as a tort by the driver, even though the MIBI is not liable as a tortfeasor.[46] The PIAB's Book of Quantum is to be taken into account as a persuasive authority in judicial decisions on damages, under sec. 22 of the Civil Liability and Courts Act 2004. In *Davis v Jordon* Herbert J did have regard to the Book of Quantum in assessing non-pecuniary damages at € 98,000 in respect of a leg injury involving a broken tibia, fibula and ankle, leading to the early onset of arthritis and restricted

[42] Available on the PIAB website, http://www.injuriesboard.ie/eng/Injuries_board.html (accessed 2 February 2009). The Board has changed its operating name to the Injuries Board; there is no legislative change in the title or status of the board.

[43] Detailed statistics can be found in the Central Statistics Office, Consumer Price Index available on the CSO website at http://www.cso.ie/releasespublications/pr_prices.htm (accessed 2 February 2009). Car insurance has fallen by almost 10% per year; the position for other categories of vehicle is more varied.

[44] Statistics for 2007 are available on the Courts Service's website, www.courts.ie (accessed 23 April 2009); it also records that almost 6,000 IEHC personal injuries summonses and 566 medical negligence summonses were issued.

[45] [2008] IESC 71, upholding [2005] IEHC 100, see *E. Quill*, Ireland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) no. 6. The IESC decision is noted by *S. Gilhooley*, A Beacon of Light in the PIAB Gloom (2009) 103(1) Gaz 18.

[46] [2008] IESC 32, upholding [2005] IEHC 266, see *Quill* (fn. 45). The scheme is considered in detail in *C. Noctor/R. Lyons*, The MIBI Agreements and the Law (2005).

movement, causing ongoing pain (four years after the event) and reduced amenity – described by Herbert J as "a moderate continuing disability".[47] This is within the range provided for in the Book of Quantum, but there is little by way of explanation as to how the precise figure was reached.[48] Conversely, in *Adams v Galway County Council*, Peart J made no reference to the Book of Quantum in assessing non-pecuniary damages at € 55,000 for acceleration of degeneration in the plaintiff's hip and spine.[49] However, given the vagueness of the description of injuries and the wide range of compensation levels specified in the Book of Quantum, it is difficult to see what use it would have been in placing an amount on the very detailed and clearly specified consequences and surrounding circumstances identified by Peart J.[50]

26 Another statutory compensation scheme was affected by the case of *C v The Hepatitis C and HIV Compensation Tribunal*.[51] This case considered the relationship between the statutory scheme under the Hepatitis C Compensation Tribunal Acts 1997 & 2002 and Part IV of the Civil Liability Act 1961 (which deals with claims by dependants in cases of fatal injuries). The IESC held that the scheme incorporates the quantification process and the definition of eligible dependants, but not the procedural constraint that only a single action on behalf of all dependants can be made. In this instance, claims were made by the widow, children, parents and siblings of the deceased; the widow accepted the tribunal's award and its apportionment between the dependants. Some siblings wished to challenge both the quantum and the apportionment. The stance

[47] [2008] IEHC 200. The case arose out of a road accident and also shows a typical application of the law on the standard of care for drivers and contributory negligence; the defendant was driving at 45 mph, despite his vision being impaired by an oncoming driver with full headlights (undipped); the plaintiff was walking on the left side of the road (with his back to traffic), where there was no margin, but a bank with dense foliage; there was a five foot grass margin on the opposite side. Responsibility was apportioned in a 60/40 ratio between the defendant and the plaintiff.

[48] The range for significant ongoing tibia and fibula injuries is € 21,300 to € 73,900; for significant ongoing ankle injuries, it is € 10,000 to € 49,400. The gap between the combined maximums in these ranges may be explained by the fact that Herbert J regarded the plaintiff's injuries as moderate.

[49] [2008] IEHC 57. The case involved an occupational injury suffered by a fire-fighter crossing a bog at night and applies principles on employer's breach of duty (specifically the relevance of following a standard practice with an inherent defect) and contributory negligence of an experienced worker; the ruling demonstrates the established preference for apportionment of responsibility, rather than treating the worker's behaviour as the sole cause of the injury – *McSweeney v JS McCarthy Ltd.* unrep. IESC, 28 January 2000; analysed in *R. Byrne/W. Binchy*, Annual Review of Irish Law 2000 (2001) 418–422; *O'Reilly v Iarnród Éireann* unrep. IESC, 8 May 2002; *McMahon v Irish Biscuits Ltd & Quinnsworth* [2002] IEHC 15, both analysed in *R. Byrne/W. Binchy*, Annual Review of Irish Law 2002 (2003) 491–496; *E. Quill*, Ireland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2002 (2003) no. 15–17 and 31–35; see also *Quill* (fn. 6) 95 and 433 f.; *Healy* (fn. 6) no. 7.02.

[50] The total awarded is within the lower end of the range for substantially recovered back and hip injuries in the Book of Quantum – the range for substantially recovered vertebral injury is € 22,100 to € 76,500; for substantially recovered hip or pelvis injury, the figure is up to € 23,300. In this case the plaintiff suffered an acceleration of injuries, which would have occurred in any event. Although the injuries were ongoing, the period for which they could be compensated had effectively run out by the time of trial.

[51] [2008] IESC 33.

taken by the tribunal was that, since the dependency claim under the 1961 Act was a single representative action on behalf of all dependents, the same was applicable to claims by dependants before the tribunal and that, as the widow's claim incorporated the other dependants, her acceptance of the award and apportionment bound all the others. The siblings' argument that each had a separate claim and could each appeal the award and/or the apportionment was upheld by a majority in IESC (Finnegan J, Murray CJ concurring; Kearns J dissenting).

Questions of proof have been the subject of several cases during 2008. *Ward* 27
v South Western Health Board & Others[52] concerned a patient who was negligently subjected to a diagnostic procedure which caused acute pancreatitis, requiring three months hospitalisation and periodic short stays over the following months. A dispute arose over other neurological conditions, affecting speech, balance and co-ordination; the plaintiff claimed them as a consequence of pancreatitis, while the defendants claimed hereditary conditions. Quirke J found on balance of probabilities that the intensive treatment triggered the neurological disorders, despite a lack of evidence of such treatments having any history of neurological consequences, and he awarded € 150,000 in damages for their effects on the plaintiff. This causal inference appears contrary to the evidence; a plaintiff normally has to establish both general and specific causation – that the behaviour complained of is capable of causing a loss of the type complained of and that this particular behaviour caused this particular loss. The evidence identified in the judgment suggests that the general causal question was not satisfied; Quirke J appears to have been strongly influenced by the close temporal connection between the pancreatitis and the onset of the neurological conditions in reaching a conclusion on specific causation, while overlooking the lack of support for general causation. *Cosgrove v Ryan & The Electricity Supply Board* (ESB)[53] concerned proof of negligence in a case where an agricultural contractor was injured when the silage harvester he was operating came in contact with an overhead power line. The maximum height of the machine was 13 feet and internal ESB documentation indicated a normal height of 15 feet for overhead cables; the field had no unusual slopes or undulations that would cause the machine to rise by more than a few inches and there was no significant history of accidents with such machines. The ESB did not adduce any evidence at the trial, but succeeded in the IEHC with an argument based on the machine rising on a slope. Geoghegan J for the IESC found that it was not necessary to resolve the difficulties arising out of alternative

[52] [2008] IEHC 201. The plaintiff took approximately one year to recover physically. His wedding day was also rendered less enjoyable because of his weakened state and the honeymoon was cancelled. € 75,000 non-pecuniary damages were awarded for the pancreatitis; special damages of € 22,368.75 were agreed. Proof of causation in medical cases is considered by *R. O'Brien*, Balance of Probabilities (2008) 102(9) Gaz 38 and *R. O'Brien*, Probable Cause (2008) 102(10) Gaz 28.

[53] [2008] IESC 2. The case also involved a routine application of contributory negligence principle, including the apportionment of responsibility between the parties; see *McMahon/Binchy* (fn. 6) chap. 20, sec. II; *Quill* (fn. 6) 430–435; *Healy* (fn. 6) no. 2.77–2.88.The case was remitted to the IEHC for assessment of damages.

formulations of the *res ipsa loquitur* principle to determine the case;[54] either version was sufficient to support an inference of negligence and the evidence at trial on the condition of the field did not support the theory adopted by the trial judge. *Quigley v Complex Tooling & Moulding*[55] involved a claim for negligently inflicted psychiatric harm, resulting from bullying in the workplace. In this appeal the IEHC was overturned on a lack of proof of causal connection between the negligent behaviour and harm alleged. The evidence adduced on behalf of the plaintiff only linked his injury to his dismissal from employment, for which he was already compensated in a statutory unfair dismissals claim; consequently, there was insufficient evidence of any injury resulting from the other behaviour, prior to his dismissal, complained of by the plaintiff.

28 There were several cases applying established principles on the standard of care. In *Clarke v Minister for Defence*,[56] a soldier's claim for physical injuries and consequential psychiatric injury sustained on duty in the Lebanon was rejected by Irvine J on the grounds that there was no negligence on the defendant's part, applying the standard principle that the level of precaution must be proportionate to the magnitude of the risk. In *Murtagh v Minister for Defence*,[57] the plaintiff soldier successfully sued the state for the failure to diagnose and treat his post-traumatic stress disorder. The injury itself was not the result of any negligence on the army's behalf, but their response to the plaintiff's plight was found to fall below the requisite standard. In *Doyle v ESB*,[58] the plaintiff suffered a repetitive strain injury from use of a compression tool to crimp electrical connections in his work as a cable jointer for the national electricity company. There was no breach of the common law duty of reasonable care,[59] but there was a breach of statutory regulations, imposing a

[54] The difficulties stem from *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629 and *Rothwell v MIBI* [2003] 1 IR 268, noted by *E. Quill*, Ireland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2003 (2004) no. 18–21; *R. Byrne/W. Binchy*, Annual Review of Irish Law 2003 (2004) 572 f.; on *res ipsa loquitur* generally in Ireland, see *McMahon/Binchy* (fn. 6) chap. 9 sec. II; *Quill* (fn. 6) 441–447; *Healy* (fn. 6) chap. 3 sec. VI.

[55] [2008] IESC 44, overturning [2005] IEHC 71, analysed by *R. Ryan/D. Ryan*, Employers' Liability in Negligence: Recent Approaches in the Irish Courts (2008) 3(2) QRTL 1.

[56] [2008] IEHC 105, noted by *Ryan/Ryan* (2008) 3(2) QRTL 1; applying the principles established by the IESC in *Ryan v Ireland* [1989] IR 177, governing the obligation owed by the army towards soldiers in billets (as opposed to combat situations); see *McMahon/Binchy* (fn. 6) no. 18.129–18.137; *Quill* (fn. 6) 79 f.; *Healy* (fn. 6) no. 9.03; *R. Byrne/W. Binchy*, Annual Review of Irish Law 1989 (1990) 410-8.

[57] [2008] IEHC 292, noted by *Ryan/Ryan* (2008) 3(2) QRTL 1, applying *McHugh v Minister for Defence* [2001] IR 424. On occupational stress generally, see *N. Neligan*, Jurisdictions and Causes of Action: Commercial Considerations in Dealing with Bullying, Stress and Harassment Cases, Parts 1 & 2 (2008) 15(1) Commercial Law Practitioner (CLP) 3, 15(2) CLP 38.

[58] [2008] IEHC 88. The case also involves routine application of the balance of probabilities standard of proof of a causal connection between breach of duty and injuries suffered; the employer was found to have breached a number of statutory duties other than the one for which liability was imposed, but no sufficient connection to the injuries was established. A routine application of common law principles on employers' liability and contributory negligence principles can be seen in *Lendrum v Clones Poultry Processors Ltd.* [2008] IEHC 412.

[59] Relying on *Bradley v Coras Iompair Éireann* (the state transport company) [1976] IR 217 and *Dalton v Frendo* Unrep. IESC, 15 December 1977; see *McMahon/Binchy* (fn. 6) chap. 18 sec. III; *Quill* (fn. 6) 92-8; *Healy* (fn. 6) chap. 7, sec. II and IV.

strict duty in respect of the provision of suitable equipment;[60] hydraulic and electrical variants of the tool had been available, but the employer continued to employ a manually powered tool. *Dunne v Eastern Regional Health Authority* involved a routine application of the principle that there is no breach of a doctor's standard of care where there is a difference of professional opinion on the appropriate procedure to follow and the defendant has chosen one of the recognised options, even if it ultimately turns out to be less effective than the alternative available procedure.[61] *Gordon v Louth Motorcycle Racing Club*[62] involved the application of routine principles on the standard of care in an unusual context; the organisers of a road race were held negligent in not using sandbags or other shock-absorbing material to guard a kerb against which the plaintiff struck his knee, after losing control of his motorcycle.

In *Farrell v Whitty & Ors* Birmingham J held the MIBI to be an emanation 29
of the state for the purposes of *Francovich* liability.[63] The European Court of Justice (ECJ), in an earlier ruling, was unable to determine the issue as there was insufficient information available to the court on the MIBI's status. The court did indicate that if the MIBI was not such an emanation, then the state itself could be liable under *Francovich* for failure to properly transpose Directives 72/166/EEC, 84/5/EEC and 90/232/EEC on compulsory insurance for passengers in vehicles.[64]

C. Literature

1. *Dr. N. Cox*, Recent Developments in Defamation and Breach of Privacy Law (2008) 3(2) Quarterly Review of Tort Law (QRTL) 18

Three decisions on aspects of defamation law are considered in this article, 30
as well as *Herrity v Associated Newspapers* (Case 3 above). Dr. Cox argues that the decision in *Tolan v An Bord Pleanála* (the planning appeals board)[65]

[60] Regulation 19 of the Safety, Health and Welfare at Work (General Application) Regulations 1993 (SI 99/1993), as interpreted in *Everitt v Thorsman Ireland Ltd.* [2000] 1 IR 256.

[61] [2008] IEHC 315, applying *Dunne v National Maternity Hospital* [1989] IR 91. There was also a minor issue on the limitation of actions, but the defendant failed to adduce sufficient evidence to establish that the claim was statute barred.

[62] [2008] IEHC 175. For discussion of standard of care principles, see *McMahon/Binchy* (fn. 6) chap. 7; *Quill* (fn. 6) 72–80; *Healy* (fn. 6) chap. 3, sec. III. For consideration of negligence rules in sport in a different context, see *T. O'Connor*, Bringing it Down on their Own Heads: Negligence and Changes to the Laws of Rugby (2008) 26 Irish Law Times (ILT) 191. For a broader consideration of negligence and sports injuries, see *J. Anderson*, Personal Injury Liability in Sport: Emerging Trends (2008) 16 Tort L Rev 95.

[63] [2008] IEHC 124.

[64] ECJ C-356/05 [2007] 2 Common Market Law Reports (CMLR) 1250. The plaintiff was a passenger sitting on the floor in the back of a van, with no passenger seating. The European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations, 1992 (SI 347/1992) in Ireland did not include such persons within the scope of the MIBI scheme; the ECJ held that Art. 1 of the third directive did require cover for such persons and that the article was directly effective.

[65] [2008] IEHC 275; the relevant statutory provision is sec. 24 of the Defamation Act 1961 and the Second Schedule to that Act.

misapplies both common law and statutory qualified privilege and in particular applies the wrong burden of proof to the issue of malice in respect of the common law defence.[66] The defendant was held liable for a defamatory statement in a document in a publicly available planning file. He notes that the decision in *Desmond v MGN Ltd.*[67] makes it almost impossible for a defendant to get a defamation claim struck out. In this case the IESC held that even though there was a significant and unwarranted delay by the plaintiff in proceeding with the action (he had decided to let the matter lie during the course of a judicial tribunal, but had not informed the defendant), the balance of convenience favoured allowing the case to proceed, otherwise a serious allegation against the plaintiff (to which the defendants had pleaded justification) would go unchecked. *Evans v Carlyle*[68] raised the issue of the availability of interlocutory injunctions in respect of defamation. While the courts are generally reluctant to engage in prior restraint or continuing restraint,[69] Hedigan J did grant both a mandatory and prohibitory injunction in the unusual circumstances of the case. The defendant expressed his view of his neighbour, with whom he was having a boundary dispute, via the medium of graffiti on his own (the defendant's) gable wall. Hedigan J ordered the defendant to remove or paint over the existing graffiti and not to add any new material. Dr. Cox notes that such injunctions are exceptionally rare and suggests that the unusual fact scenario will prevent the decision having wider application.

2. *Dr C. Craven*, Recoverability of Damages for Pregnancy and Children: Variations on the Theme of *Byrne v Ryan* (2008) 3(1) QRTL 8

31 This article considers aspects of wrongful birth claims beyond those determined by the IEHC in *Byrne v Ryan*,[70] concerning a healthy child born after a failed sterilisation operation. It looks at the situation of a disabled child being born, a child being born to a disabled parent and the awarding of a "conventional sum" in UK cases.[71] The article notes that the reasoning in *Byrne* may militate against

[66] The relevant statutory provision is sec. 24 of the Defamation Act 1961 and the Second Schedule to that Act. Dr. Cox's criticism in respect of the statutory defence may be unfounded; while the schedule does list material in public registers, the sec. 24 defence is expressly intended for media reports and broadcasts of such material and not the original body that holds the register. His criticisms on the application of the common law defence and burden of proof are entirely apposite.

[67] [2008] IESC 56.

[68] [2008] IEHC 143; [2008] 2 ILRM 359. Further procedural facets of defamation considered in cases in recent years are outlined by *R. Ryan/D. Ryan*, Practice and Procedure in Defamation: An Analysis of Recent Judicial Developments, (2008) 3(1) QRTL 1. A book on leading Irish defamation cases, aimed at the general reader has also been published, *A.J. Davidson*, Defamed! Famous Irish Libel Trials (2008).

[69] *X v RTÉ* unrep. IESC, 27 March 1990; *M v Drury* [1994] 2 IR 8; *NIB Ltd v RTÉ* [1998] 2 ILRM 196; *Reynolds v Malocco & Others*, unrep. HC, 21 December 1998; *Foley v Sunday Newspapers* [2005] IEHC 14; *Cogley & Aherne v RTE* [2005] 4 IR 79. See *M. McGonagle*, Media Law (2nd ed. 2003) 229–235; *N. Cox*, Defamation Law (2007) no. 12.2–12.3.

[70] [2007] IEHC 207, noted by *Quill* (fn. 7).

[71] Focusing in particular on *Parkinson v St. James & Seacroft University Hospital NHS Trust* [2002] Queen's Bench (QB) 266, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2001 (2002) no. 47–53 and *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, noted by *P. Cane* (2004) 120 LQR 189 and *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger, European Tort Law 2003 (2004) no. 34–41.

acceptance of liability for the economic costs of child rearing in either of the two additional scenarios considered, but that an award of a sum comparable to the solatium in fatal injuries cases, or damage for loss of consortium, should be available in respect of the violation of autonomy involved in such cases.

3. *U. Connolly*, Paternity Fraud and the Tort of Deceit (2008) 3(1) QRTL 24

32 The author compares the approach taken by English and Australian courts to the use of the action in deceit in respect of financial loss and mental distress resulting from false paternity claims.[72] She notes that there is some support in Irish cases for the use of deceit in the context of personal relationships,[73] but concludes that it is far from clear whether the English or Australian approach would succeed were a paternity fraud case to arise here.

4. *R. Ryan/D. Ryan*, Liability in Tort for Inducing a Breach of Contract (2008) 2(4) QRTL 7

33 The article analyses the House of Lords decision in *OBG v Allan*[74] on the conceptual structure of the economic torts. That decision rejected the so-called unified theory, that the nominate economic torts (such as intimidation, conspiracy and inducing breach of contract) were species of a common genus – the action for unlawful interference with economic interests and re-iterated the distinct nature of the various economic torts recognised in English law. The authors then go on to analyse Irish cases on inducing a breach of contract and note that it is commonly regarded as a species of a broader genus, in line with the unified theory. No definite opinion is offered on whether the Irish courts should follow the House of Lords, but it is suggested that *OBG* has brought "a heightened degree of clarity" to the analysis of this area, which will assist in any future consideration by an Irish court.

5. *N. Reilly*, Collective Redress for Consumers Under the Consumer Protection Act (2008) 26 ILT 260

34 The article considers two compensation provisions under the Consumer Protection Act 2007. While the Act is predominantly regulatory in nature, it does

[72] Recovery permitted in England – *P v B (Paternity: Damage for Deceit)* [2001] 1 FLR 1041, noted by *R. Bagshaw* (2001) 117 LQR 571; *A v B* [2007] 2 FLR 1051. The HCA ruled out the availability of such a claim on public policy grounds in *Magill v Magill* (2006) 231 Australian Law Reports (ALR) 277, noted by *K.R. Handley* (2007) 123 LQR 337.

[73] *Ennis v Butterly* [1997] 1 ILRM 28, a preliminary ruling on a case primarily concerning a commercial agreement between a cohabiting couple; *K v K* [2004] 1 IR 224, where a *dictum* by Murray J indicated that a false representation of eligibility to marry could be actionable in deceit.

[74] [2008] 1 AC 1, noted by *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 19–31, *H. Carty*, The Economic Torts in the 21st Century (2008) 124 LQR 641 and *G.C.K. Yew*, Of Unities and Disunities in Economic Torts: OBG, Douglas and Mainstream (2008) 19 King's Law Journal (KLJ) 158. For a more general criticism that the tort of unlawful interference with economic interests is anomalous and under-theorised, see *J. Neyers*, Rights Based Justifications for the Tort of Interference with Economic Relations (2008) 28 Legal Studies (LS) 215.

make some provision for compensation; the features considered here are compensation orders made, at the request of the National Consumer Agency (NCA), in the course of criminal proceedings (provided for in sec. 81) and collective settlements negotiated with traders by the NCA on behalf of those affected by an unlawful practice (provided for by sec. 73). The author notes that the new process is broader than its predecessor under sec. 17 of the Consumer Information Act 1978 and that the collective actions help to overcome the lack of incentive for individual claims, where the damage to any single customer is small.[75]

6. *S. O'Halloran*, Peek-A-Boo I Can Sue You: Barristers' Immunity In The Twenty-First Century – Parts I & II (2008) 26 ILT 278 & 304

35 Part I traces the origins of the position in the common law that advocates do not owe a legal duty of care to their clients, including the various justifications offered for the so-called immunity. It then examines the reasons for its abolition in England,[76] Canada[77] the United States of America[78] and New Zealand.[79] Part II goes on to consider the retention of the immunity in Australia[80] and Scotland.[81] The author suggests that Irish courts are likely to be persuaded by the line of reasoning abolishing the immunity, leaving the underlying justifications to be addressed by less drastic means than a complete bar to proceedings.

[75] An individual right of action is also provided for in the legislation (sec. 74); see *A. Schuster*, Impact on Tort Litigation of the Consumer Protection Act 2007 (2008) 3(2) QRTL 7. See also *A. O'Neill*, The Consumer Protection Act 2007 – "Enforcing the New Rules" (2008) 26 ILT 46.

[76] *Arthur J.S. Hall & Co. v Simons* [2002] 1 AC 615, noted by *R. English* (2001) 64 Modern Law Review (MLR) 300. For more detailed analysis, see *M. Seneviratne*, The Rise and Fall of Advocates' Immunity (2001) 21 LS 644; *J. Goudcamp*, Is There a Future for Advocates' Immunity? (2002) 10 Tort L Rev 188. See also the prescient comments of *Sir R. Carswell*, Professional Negligence – The Sword of Damocles (1997) 48 Northern Ireland Legal Quarterly (NILQ) 197, 199–201.

[77] *Leslie v Ball* (1863) 22 Upper Canada Queen's Bench Reports (UCQB) 512; *Demarco v Ungaro* (1979) 95 Discrimination Law Reports (DLR) (3d) 385.

[78] *Ferri v Ackerman*, 444 United States Supreme Court Reports (US) 193 (1979).

[79] *Chamberlains v Lai* [2006] New Zealand Superannuation Cases (NZSC) 70; *R. Tobin,* An Uncommon Common Law: Barrister's Immunity in New Zealand (2006) 14 Torts Law Journal (TLJ) 224.

[80] *D'orta-Ekenaike* (2005) 223 CLR 1, critiqued by *T. Anthony*, Australia's Anachronistic Advocates' Immunity: Lessons from Comparative Tort Law (2007) 15 Tort L Rev 11.

[81] *Wright v Paton Farrell* [2002] Scottish Court of Session (ScotCS) 341, distinguishing *Hall* on the basis that it dealt with alleged negligent conduct of civil trials, whereas the present case concerned the conduct of a criminal trial; also the House of Lords in *Hall* expressly acknowledged that there may be differences between English and Scots law. On appeal, the scope of the immunity in Scotland was explained in more detail and is more nuanced than that which had applied in other jurisdictions – *Wright v Farrell & Ors* [2006] ScotCS Inner House, Court of Session (CSIH) 7 (this decision is not included in the article).

XIV. Italy

Emanuela Navarretta and Elena Bargelli

A. Legislation

There was no relevant legislation concerning tort law in 2008. 1

B. Cases

1. Cassazione (Italian Supreme Court, Cass.) 11 November 2008, no. 26972: Personal Injuries[1]

a) Brief Summary of the Facts

Because of a medical mistake, one testicle was removed from a male patient. Therefore, he claimed for both *danno biologico* (personal injury) and loss of amenities of life. While the first claim was upheld by the Tribunal and the Court of Appeal (£ 23,000,000 + £ 6,411,484 in interest, approx. € 11,000 + € 3,000), and, therefore, became uncontroversial, the second was rejected by the first instance judges. As a consequence, the plaintiff appealed to the Supreme Court. In the appeal, the claimant changed the basis of his claim and asked for *danno esistenziale* ("existential damages") instead of "loss of amenities of life". 2

The Supreme Court referred the question to the Plenary Session. It argued that the question whether a distinct claim for "existential damages" could be recognized was highly controversial under Italian law. In particular, the Supreme Court asked the Plenary Session to address the following questions: 3

A) Whether three different types of non-pecuniary loss are conceivable – *danno biologico*, *danno esistenziale* and pain and suffering – or whether the concept of non-pecuniary loss should be held as unitary.
B) Whether damages for non-pecuniary losses are allowed both in tort law and in the contractual field.

[1] Nuova giurisprudenza civile commentata (NGCC), I, 2009, 102 ff., with notes of *E. Bargelli*, Danno non patrimoniale: la messa a punto delle sezioni Unite; *M. di Marzio*, Danno non patrimoniale: grande è la confusione sotto il cielo, la situazione non è eccellente.

C) How damages for non-pecuniary loss have to be calculated.
D) How damages for non-pecuniary loss have to be proved.

b) Judgment of the Court

4 The present decision aims at settling the dispute.

5 As regards Question A), the present decision quotes and confirms the rules stated by two leading cases in 2003 (Cass. 8827, 8828/2003) on the one hand, but goes further on the other hand.

6 As regards the confirmation of the doctrine stated by the precedents in 2003, the Court reasserts the constitutionally oriented interpretation of art. 2059 CC. Because this article literally restricts damages for non-pecuniary losses to the cases provided for by specific legal dispositions, in 2003 the Supreme Court stated that it should be interpreted in accordance with the Italian Constitution, and admitted compensation for non-pecuniary loss as long as the violation of an inviolable right having constitutional relevance takes place. The present decision stresses this principle again. In particular, it affirms the interpretation of art. 2059 CC, according to which the term "legal dispositions" also includes the constitutional principles protecting inviolable human rights. According to this view, tort law would be divided into two fields – pecuniary and non-pecuniary damage. On the one hand, pecuniary damage may be awarded in case of violation of any protected interest; on the other hand, compensation for non-pecuniary damage may be justified only in two cases: if a specific legal provision allows it or if a constitutionally protected human right is violated.

7 The Supreme Court mentions the specific legal provisions stating compensation for non-pecuniary harms: art. 185 C.P. (Criminal Code), art. 2 L. 117/1998 (unjustified imprisonment), art. 29 subs. 9 L. 675/1995 (violation of data protection), art. 117 subs. 4 Dlgs. 286/1998 (discriminatory treatment), and art. 2 L. 89/2001 (violation of the right of reasonable duration of trials).

8 As regards the list of the protected interests which may justify compensation for non-pecuniary loss, the Supreme Court firstly mentions health, which is explicitly protected by the Constitution (art. 32). The Supreme Court also mentions art. 138 Dlgs. 209/2005, which introduced a legal definition of *danno biologico* (personal injury). It is defined as the impairment of bodily or mental health as ascertained by a medical doctor. Moreover, among the legally protected interests, the Court also includes family rights. As a consequence, damage suffered by persons who have or had a close relationship to the deceased or seriously injured victims is recoverable. The Court also quotes the health and the dignity of workers as constitutionally protected interests, which must be protected within the employment contract.

9 More generally, life, bodily or mental integrity, reputation or other personality rights (name, image, privacy), and human dignity enjoy protection. However, the Supreme Court repudiates the idea of a closed list of protected interests

explicitly mentioned by the Constitution, inasmuch as the constant social evolution requires the recognition of new interests having a constitutional rank. It is worth stressing that the Supreme Court denies that the human rights listed by the ECHR are automatically included among the constitutionally relevant interests. It argues that the European Convention of Human Rights is neither a constitutional legal source in the Italian legal system, nor does it have the same relevance as European Union legislation.

10 After having reaffirmed the constitutionally oriented interpretation of art. 2059 CC, the Supreme Court goes further, and corrects a point the cited precedents left unclear. While the decisions of 2003 distinguished three types of losses – *danno biologico*, pain and suffering and "existential damage" – the present judgment denies "existential damage" representing a distinct category of damage. The Plenary Session analyses the pro and contra attitudes, and concludes in favour of the contrary opinion. According to the upholders of "existential damage", damages should be granted in case that a concrete loss of amenities of life is ascertained, as long as the victim changed his/her life agenda as a consequence of the unlawful act. This loss would consist in the simple worsening of the quality of life (that is, no longer enjoying life). The Supreme Court stresses that several first instance judges (so-called judges of the peace) followed this view, and, as a consequence, allowed compensation for minor damage, such as waiting for a delayed flight, having hair badly cut, inability to watch a football match due to a power cut, suffering for the death of the pet, and so on and so forth. According to the Supreme Court's opinion, the main deficiency of this theory is its focus on the consequences of the grievance, without considering the wrongfulness requirement – that is the relevance of the interest violated by the harmful act. The Court also briefly mentions the extreme version of the "existential damage" theory, according to which every suffering of the victim causing a worsening of his/her daily life would imply the violation of a constitutionally protected interest. The Court criticizes this reasoning, observing that it confuses two different aspects – the wrongfulness requirement and the concrete loss. Moreover, the Court argues that this theory leads to the implicit abrogation of art. 2059 CC, on whose basis the distinction between pecuniary and non-pecuniary losses takes place in the Italian legal system.

11 According to the Supreme Court, the existential damage doctrine is contradicted by the wrongfulness requirement as regulated by art. 2059 CC. This limit cannot be overcome by case law. Because of its higher position than the Member State's statutes, only European Union legislation could abolish art. 2059 CC, stating, for example, that compensation for non-pecuniary losses is allowed without restriction.

12 More generally, the Court stresses that a certain degree of gravity of the violation, as well as the minimal relevance of the loss are requirements to be awarded damages. As a result of the balancing between the solidarity towards the victim and social tolerance, damages are allowed as long as a minimal degree of gravity is reached, and the loss is not purely trivial.

13 As regards Question B), the Supreme Court also admits compensation for non-pecuniary losses in the field of contractual liability. While the traditional view denied such compensation on the ground that art. 2059 CC applied only to tort responsibility, the Supreme Court rules that damages for non-pecuniary losses must be recognized also in contractual liability. It argues that damages are the minimal remedy to be allowed in case of violation of human rights, and therefore, they must be granted in both tort and in contractual liability.

14 As regards assessment of non-pecuniary losses (Question C), the Court affirms two main guidelines: on the one hand, damages must be integral – that is they must cover all the losses suffered by the victim; on the other hand, they cannot exceed that amount (therefore, no punitive function is recognized).

15 As regards the proof of non-pecuniary losses (Question D), all circumstances of the case have to be taken into account. Presumptions, documents, and evidence are allowed.

16 As regards the case to be judged, the Supreme Court comes to the conclusion that the loss of amenities of life cannot be compensated as a distinct and autonomous type of damage. Since the victim has already been awarded damages for *danno biologico* (that is, for personal injury), the consequences of the physical impairment on the victim's social life must be taken into account in calculating his *danno biologico*. In fact, the loss of amenities of life (under the aspect of the sexual sphere) represents one of the circumstances which have to be taken into account in order to asses the damage suffered by the victim. Therefore, damages cover not only the mere physical impairment, but also its dynamic projection in the concrete life of the victim.

c) Commentary

17 The cited decision is the first of four (no. 26972, 26973, 26974, 26975), which the Plenary Session passed together on the same day – 11 November 2008 – in order to provide new guidelines on non-pecuniary damages. All of them repeat the same doctrines briefly summarized supra no. 4–16.

18 The aim of the Plenary Session is to settle several disputes on non-pecuniary damages, which arose in the last decade in the Italian legal system. One of the most strong issues relates to the extent to which existential or hedonic losses may be recovered in the Italian legal system.

19 In order to appreciate the importance of the four cited decisions it is worth describing the debate which has arisen since 1986. The conventional interpretation of art. 2059 CC as limiting compensation for non-pecuniary damage to those cases expressly provided for by the criminal law, caused the shifting of compensation for personal injuries as such under a disposition originally meant to provide for the redressing of strictly pecuniary losses (art. 2043 CC), on the assumption that injuries to bodily or mental health are capable of re-

dress apart from any economic losses.[2] However, this solution failed to address the question of the irrational disparity between mentally or physically injured persons who could find redress under art. 2043 CC, and those injured in other fundamental rights who were left without remedies unless the injury had arisen from a crime (art. 2059 CC).

In order to grant compensation for non-pecuniary losses in case of injury to personality rights, some scholars argued that, because art. 2043 CC mentions the notion of "damage", this includes both material and immaterial losses. As a consequence, the restricted rule of art. 2059 was reduced to recover only pain and suffering (with consequent exclusion of loss of amenities of life and so on and so forth).[3] 20

Other scholars, on the other hand, argued that the binary model of the Italian Civil Code should not be distorted. However, because they were conscious the restricted rule on non-pecuniary damage was not consistent with a modern tort law, they proposed to widen the extent of art. 2059 CC, in order to grant compensation beyond the limits stated by this provision.[4] 21

In the last decade the doctrine of "existential damage" (*danno esistenziale*) was put forward.[5] According to this doctrine, the victim might recover compensation for non-pecuniary losses as long as the unlawful act caused a worsening of his/her everyday life. Therefore, existential damage should be compensated if, for example, the victim does not feel like going to the cinema, going out with friends, or, more generally, does not enjoy life any more as a consequence of the unlawful act. This doctrine focuses the attention on the consequences of the grievance, not inquiring as to the nature of the interest violated by the unlawful behaviour. The most recent version of the doctrine goes further, and argues that having suffered hedonic losses implies as such the injury to a personality right protected by the Constitution.[6] 22

The doctrine of *danno esistenziale* was highly disputed in the theoretical debate. Even if the need for a less restrictive view on non-pecuniary damages was unanimously upheld, several authors criticized this approach, stressing that the protected interest issue should be distinguished from the damage issue.[7] 23

[2] Cassazione (Italian Supreme Court, Cass.) 14 July 1986, no. 184, Responsabilità civile e previdenza (RCP) 1986, 520, with notes of *G. Scalfi* and *A. Gambaro*.

[3] *R. Scognamiglio*, Il danno morale, Rivista di diritto civile (RDC) 1957, I, 288 ff.; *id.*, Danni alla persona e danno morale, Rivista di diritto privato (RDP) 2008, 472 ff.; *V. Scalisi*, Danno alla persona e ingiustizia, RDC 2007, 147 ff.

[4] *F.D. Busnelli*, Progettando il futuro tornando al passato (remoto), in: F.D. Busnelli (ed.), Il danno biologico. Dal "diritto vivente" al "diritto vigente" (2001) 245 ff.; *A. Jannarelli*, Il danno non patrimoniale. Le fortune della "doppiezza", Danno e responsabilità (DR) 1999, 717 ff.; *E. Navarretta*, Diritti inviolabili e risarcimento del danno (1996).

[5] *P. Cendon/P. Ziviz* (eds.), Il danno esistenziale. Una nuova categoria della responsabilità civile (2000).

[6] *P. Ziviz*, E non rimase nulla, RCP 2003, 709 ff.

[7] *C. Castronovo*, La nuova responsabilità civile (2006) 80 ff.; *F. Gazzoni*, Alla ricerca della felicità perduta (psicofavola psicogiuridica sullo psicodanno psicoesistenziale), Rivista diritto commerciale (RDComm) 2000, I, 690 ff.; *E. Navarretta*, I danni non patrimoniali nella responsabilità extracontrattuale, in: E. Navarretta, I danni non patrimoniali (2004) 9 ff.; *G. Ponzanelli* (ed.), Il risarcimento integrale senza danno esistenziale (2007).

24 Several decisions referred to the term "existential damage" in the last decade. However, while the Supreme Court selected the interests to be legally protected, and allowed compensation in the most serious cases[8], the courts of first instance granted compensation for non-pecuniary losses even for trivial injuries.

25 The present decisions are in line with the doctrine stated by the Supreme Court and the constitutional court in 2003, which interpreted the "cases provided for by the law" as bearing on the protection of fundamental human rights and freedoms under art. 2 of the Italian Constitution. In doing so, the cited courts followed the scholarly proposal putting forward the constitutional interpretation of art. 2059 CC.[9]

26 The essence of the cited decisions consists in rejecting the doctrine of existential damage on the one hand, and in confirming the constitutional interpretation of art. 2059 CC and the theory of inviolable rights on the other hand.

27 In rejecting the doctrine of existential damage, the court recalls the argument that, because the Constitution protects interests and not damages, the mere worsening of everyday life does not imply in itself the injury of an inviolable right.[10] As a consequence, compensation for non-pecuniary losses requires the violation of an inviolable human right – that is, human dignity, liberty and other personality rights protected by the Italian Constitution.

28 The Plenary Session affirms that personal injuries as well as injury to human dignity, liberty, and other personality rights fall under the same rule – that is, art. 2059 CC as newly interpreted by the Supreme Court in 2003. However, while personal injuries correspond to the impairment of the victim's bodily or mental health as ascertained by a medical doctor, the other injuries are not subject to a similar method of evaluation. In particular, in order to avoid compensation for trivial non-pecuniary losses, the Supreme Court now requires a minimal degree of injury. In particular, it requires that the injury is serious enough or, at least, is not irrelevant or merely trivial. In spite of its recognition in other legal traditions, this minimal standard is something new in Italian case law. However, in the 1990s it was proposed by some Italian scholars looking at the German case law and art. 49 subs. 1 of the Swiss Law of Obligation. More recently, a new theoretical basis was provided – the need to find a balance between the protection of human rights on the one hand, and social tolerance on the other hand.[11] Therefore, the Supreme Court upholds this line of thought.

29 To summarize, as regards the protected interests and the fundamental elements of liability, the Supreme Court's doctrine refers to the human rights recognized

[8] Cass. 12 February 2008, no. 3284, DR 2008, 445 ff., with footnote of *G. Ponzanelli*, Ci vuole un diritto fondamentale per la concessione del danno non patrimoniale, rejected the claim for *danno esistenziale* arguing that no fundamental human right was violated in the present case.

[9] *Navarretta* (fn. 4).

[10] *Navarretta* (fn. 7) 9 ff.; *id.*, Il valore della persona nei diritti inviolabili e la complessità dei danni non patrimoniali, RCP 2009, 65 ff.

[11] *E. Navarretta*, Il danno alla persona fra solidarietà e tolleranza, RCP 2001, 789 ff., 801 ff.; *id.* (fn. 7) 29 ff.

by the Italian Constitution and the ECHR as well. Moreover, the connection between art. 2059 CC and art. 2 of the Constitution (inviolable human rights) has instilled in the texture of compensation a quest for joining solidarity and tolerance, and, as a consequence, compensation would not be allowed for minimal offences. As regards the sources and the methods of assessing damages, the Supreme Court's doctrine allows all the circumstances to be taken into account.

After several years of debate, the Supreme Court has finally opted for a binary model of tort law, according to which both pecuniary and non-pecuniary damages are allowed, but are not subject to identical rules. However, the question which has been highly controversial in the Italian legal system until now is going to remain disputed also after the last development. The commentators in favour of "existential damage" have strongly criticized the decisions of the Plenary Session,[12] while the scholars inclined toward the binary model of tort law have agreed with them.[13] While several scholars argue that pecuniary and non-pecuniary damages fall under the same rules, others stress the need to distinguish the respective fields. 30

After the *revirement* in 2003 and 2008, the Italian legal system is not the laboratory in which "biological damages" were shaped. It has joined most European countries and the European Convention of Human Rights in giving fundamental rights the basic protection entrusted by compensation of non-pecuniary losses. Despite all these developments, there is still much theoretical work and empirical research to be done in the law of non-pecuniary damages, notably in the realm of definition of inviolable rights, and that of quantification of damages. 31

2. Cass. SS. UU. 11 January 2008, no. 583: Prescription

a) Brief Summary of the Facts

In 1990 the plaintiff discovered she was suffering from hepatitis C, caused by an infected blood transfusion. In 1999 she sued the Health Ministry and claimed damages. The tribunal and the court of appeal rejected the claim for damages because of its prescription, which took effect from 1990. The plaintiff appealed to the Supreme Court, arguing that the prescription period does not start from the knowledge of the illness (that is, 1990), but from 1996, when she knew for certain that the hepatitis was caused by an infected blood transfusion, and was admitted to avail herself of law no. 210/1992. 32

b) Judgment of the Court

The Supreme Court partially upheld the claim. 33

The Supreme Court summarizes the evolution of the rules on commencement of the prescription of tort claims. Art. 2947 CC states that a claim for damages 34

[12] *P. Cendon*, L'urlo e la furia, NGCC 2009, 71 ff.
[13] *E. Navarretta*, Danni non patrimoniali: il compimento della *Drittwirkung* e il declino delle antinomie, NGCC 2009, 81 ff.

lapses after five years, and that the *dies a quo* starts from the day on which the harmful event occurred. However, the case law has step by step corrected this rule by interpreting it in a more favourable sense for the claimants. Since the 1970s the Supreme Court has opted for a flexible prescription regime. Firstly, the Cassazione no. 1716/1979 stated that the prescription takes effect from the day on which the damage was "externalized". In other words, prescription would run only if the victim knows, or could reasonably know, the entire consequences of the harmful event. According to this doctrine, it would not be enough that the unlawful conduct (or the omission) takes place, but that all the damage occurred. Of course, this can happen after a long time, as in the latent damage cases.

35 Afterwards Cass. 5701/1999, 12666/2003, 9927/2000 went further, and specified that the prescription period starts from the day on which the damage is perceivable by the claimant, and added that also its juridical relevance should be knowable.

36 The present decision confirms this doctrine, and reasons that there are situations in which, even if the damage is perceivable by the victim, s/he ignores its cause. This is the case in which the victim contracts an illness like hepatitis, whose cause is not known from the beginning. Therefore, while the impairment of the physical health is clearly perceivable, the victim may ignore whether it derives from an unlawful act or from other causes. In such cases, several decisions of the Supreme Court have affirmed that the prescription period started from the day on which the damage is perceived as a consequence of the harmful act of someone else, according to the standard of medical knowledge (Cass. 21/02/2003, no. 2645; Cass. 05/07/2004, no. 12287; Cass. 08/05/2006, no. 10493).

37 According to this doctrine, the *dies a quo* is fixed on the basis of two guidelines: the knowledge of the damage on the one hand and the causal link on the other hand.

38 The Plenary Session argues that requiring the mere knowledge of the damage does not grant the full protection of the plaintiff if s/he could not have had access to all the information necessary to decide whether to bring the judicial claim before a court. The main example is provided by medical malpractice.

39 The Supreme Court also mentions two statutes which have already upheld this doctrine. On the one hand, art. 23, subs. 1 Law 31 December 1962, no. 1860 (text modified by D.p.r. 10 May 1975, no. 519) on use of nuclear energy, states that a claim for damages may be brought before a court within three years, which start from the day on which the victim found out about the damage and the identity of the responsible party, or would have to know it according to the normal standard of diligence. On the other hand, art. 13, subs. 1 and 2 D.p.r. 24 May 1988, no. 224 (liability for defective products) provides that the claim for damages is barred in three years, which start from the day on which the damaged party knew or would have to know the damage, the defect, and the identity of the liable party.

In order to fix the starting point of the prescription period, the Supreme Court combines two parameters. It takes into account both the diligence of the victim and the objective standard of scientific knowledge available at a certain time. As a consequence, the victim is required to undergo a medical examination, but not to gather autonomously the scientific information necessary to discover the cause of the illness. As long as the physician asked by the patient was able to provide this information (or would have been able to do so if the patient had asked) the prescription time begins. 40

Following this doctrine, the Supreme Court upholds the recourse, and reverses the decision of the Court of Appeal, which had fixed the commencement of the five year prescription period in 1990 (date of the blood transfusion). According to the Supreme Court, the prescription period starts from the day on which the claimant found out that the illness was the consequence of the infected blood transfusion. As a consequence, it defers the judgment to the Court of Appeal again, which is required to apply the following guideline: the prescription time for tort law claims starts from the day on which the victim perceived that the illness is the consequence of a tortious act, taking into account the normal standard of diligence and the objective degree of scientific knowledge. 41

c) Commentary

The present decision is one of several (no. 576, 577, 578, 579, 580, 582, 583, 584, 585) the Plenary Session passed on the same day (11 January 2008) on prescription and causality in tort law. All deal with infected blood transfusion cases. While the causality issue will be dealt with in the next section (infra no. 46 ff.), in the following section we will focus attention on the commencement of the prescription period. 42

The cited set of decisions deal with a typical case of latent damage, combined with serious and serial personal injuries.[14] Moreover, it is worth reminding that in the field of tort liability the brief prescription period of five years (instead of the regular term of ten years) applies in Italian law. 43

The latent damage cases have served as an argument to reinforce the "subjective" approach to the commencement of prescription also in other European legal systems.[15] According to this line of thought, the discoverability of the damage determines the regular commencement of prescription.[16] The "subjective" model is also consistent with the maxim *agere non valenti non currit praescriptio*.[17] 44

[14] On the topic see, for a general overview, *M. Bona*, I nuovi confine della causalità giuridica: la conoscibilità del nesso di causa ai fini del decorso della prescrizione, in: P.G. Monateri (ed.), Il nesso di causa nel danno alla persona (2005).

[15] *R. Zimmermann/J. Kleinschmidt*, Prescription: Framework and Problems Concerning Damages Claims (2008) 48 ff.

[16] Ibid., 61 ff.

[17] *F. Fusco*, Commencement of the Prescription Period in Case of Damage Caused due to Omissions, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 79.

45 It is worth stressing that the multiple decisions we are commenting on extend the subjective model. In fact, they state that it is not enough that the victim gains knowledge (or should gain knowledge) of the damaging consequences, but requires that also the causal link between the unlawful event and the damage is knowable. In particular, the prescription runs when the victim gains knowledge that the damage can be ascribed to a specific wrongdoer.

3. Cass. SS. UU. 11 January 2008, no. 581: Prescription and Causality[18]

a) Brief Summary of the Facts

46 As a consequence of infected blood transfusions, the plaintiffs contracted hepatitis C and HIV in the period 1978–1980. They sued the Health Ministry for damages. The Ministry raised the defences of prescription and of lack of causality as well. As regards the first defence, we refer to supra, no. 27 ff. We focus on the causality issue now. In particular, the Ministry stresses that, because the hepatitis and HIV viruses have been known since the 1980s, no responsibility could be ascribed for infections caused before that time. In fact, both fault and causality requirements lacked. In particular, the defendant objects that no legal provision imposed a duty on the Health Ministry to supervise the blood's quality at the time of infection.

b) Judgment of the Court

47 The court rejects the defence of the Ministry.

48 As regards the question whether the legal duty to control the quality of blood existed when the plaintiffs were infected by the transfusion, the court provides as follows. Already before the law 4 May 1990, no. 107 (regarding transfusions) came into force, several legal provisions stated the duty of the Health Ministry to provide for the organization, coordination and control of the transfusion services (it cites, for example, the law no. 592/1967, the law no. 519/1973, the law no. 833/1978, the D.L. no. 433/1987). As a consequence, the omission of the Ministry to control whether the blood was healthy makes it responsible for the infections occurred.

49 The court stresses that the Ministry is responsible according to tort law rules on fault liability (art. 2043 ff. CC). As a consequence, the plaintiffs are entitled to claim for damages, which have to be assessed according to the amount of the losses each of them has suffered. These damages have to be distinguished from the award granted by law no. 210/1992, which automatically derives from infections caused by blood transfusions. This award is calculated according to legal standards, which do not take into account the concrete losses suffered by the victims.

[18] DR 2008, 1011 ff., with note of *R. Simone*, Equivoci della causalità adeguata e contaminazione dei modelli di spiegazione causale.

The court upholds the doctrine, according to which the award granted by L. 192/1992 may concur with tort law rules. As a consequence, L. 192/1992 would not exclude the victims' claims for damages. 50

As regards the causality requirement in case of faulty omission, the court puts forward the normative approach. It reasons that liability due to omission requires the violation of a specific disposition imposing a duty to act, or, alternatively, the infringement of a general duty to prevent damage. According to this line of thought, natural causation cannot take place in case of damage due to omission, as long as *ex nihilo nihil fit*. Conversely, the preliminary requirement for ascribing liability consists in the specific or general duty to prevent the damage. 51

After having ascertained that the wrongdoer breached the duty to prevent the damage, liability is not automatically ascribed to him. The breach of this duty is deemed to have caused the harmful event if, according to a probabilistic reasoning, the event would not have occurred if the wrongdoer had fulfilled the duty to prevent the damage. However, there is no difference between unlawful action and omission. The "regular causation" rule applies to both types of conduct. As a consequence, the wrongdoer is responsible only for the damaging consequences of his/her action or omission which were foreseeable when the harmful event occurred. In particular, the court adopts the *ex ante* approach, and rejects the *ex post* one. According to this approach, the probabilistic prognosis has to refer to the time when the action or omission took place. Therefore, only the foreseeable (at that time) consequences of the positive or negative conduct can be ascribed to the wrongdoer. 52

The court concludes that the causality prognosis has the same features in case of action and omission. In both cases the general rules stated by art. 40–41 CP (Criminal Code) apply. 53

The court explains that this approach to causation applies to fault and strict liability. In case of strict liability, of course, at the root of the causal link is not necessarily the conduct of the responsible party but one of the circumstances taken into account by specific provisions in order to ascribe the liability to him/her. 54

As regards the comparison between criminal responsibility and tort liability, the court considers the burden of proof to lie at the core of the distinction between these two fields. In fact, while the "beyond any reasonable doubt" standard applies to criminal liability, the "more probable than not" parameter applies to tort responsibility. 55

As regards the present case, the court comes to the conclusion that the Ministry was obliged to control and supervise the blood transfusion activities. After having stated the violation of its duty to prevent harms deriving from infected blood, the court applies the probabilistic standard above mentioned. Even if the HBC virus has only been known since 1978, the HIV since 1985 and the 56

HCV since 1988, the court holds that the duty to prevent harm has existed in any case since 1978. Therefore, it holds that since 1978 the HBC, HIV and HCV infections, more probable that not, have been consequences of infected transfusions.

57 The court refers the judgment to the Court of Appeal of Rome, which will decide according to the doctrine provided by the Plenary Session.

c) Commentary

58 Firstly, the present decision is in line with the recent tendency to stress the distinction between civil and criminal liability as regards causation.[19] This tendency was confirmed by several decisions of the Supreme Court in recent years.[20]

59 Secondly, the present decision opts for the normative approach to causation, in case that the harmful event is due to an omission. The question whether the normative model of causation is more convincing than the natural causation theory has been controversial in the Italian system.[21] The Supreme Court intends to settle the dispute, giving certain guidelines for future disputes.

4. Cass. SS. UU. 18 November 2008, no. 27337: Prescription

a) Brief Summary of the Facts

60 Two years after a car accident which caused serious personal injuries, the plaintiff sued the defendant for damages before the Tribunal and the Court of Appeal of Turin. Both these courts rejected the claim on the basis of prescription. While art. 2947 CC provides a prescription period of five years for tort law claims, art. 2947 subs. 2 CC, states that claims for damages are barred after two years if the harmful event is caused by a car accident. However, if the harmful act is also a criminal offence, this short prescription period does not apply. In particular, the more favourable prescription period provided for the crime applies also to the tort law suit unless the crime is extinguished for grounds different from prescription or an irrevocable criminal judgment was passed (art. 2947 subs. 3 CC). As a consequence, if the same unlawful act potentially gives rise to a civil and a criminal suit as well, the longer criminal law prescription period, instead of the very brief tort law one (that is, two years), applies also to the civil claim.

61 Cass. SS.UU. 5121/2002, however, proposed a strict interpretation of the cited rule, according to which the general provision on prescription claims for dam-

[19] Cass. SS. UU. 10 July 2002, Foro italiano (FI) 2002, II, 601, with footnote of *Di Giovine*. See also *M. Bona*, Il nesso di causa nella responsabilità civile del medico e del datore di lavoro a confronto con il decalogo delle sezioni unite penali sulla causalità omissiva, RDC 2003, II, 362 ff.

[20] Cass. 18 April 2005, no. 7997, Guida al diritto 2005, 60; Cass. 16 October 2007, no. 21619, DR 2008, 43, with footnote of *R. Pucella* (see *E. Navaretta/E. Bargelli*, Italy, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 40 ff.).

[21] For an overview, see *Fusco* (fn. 17) 86 f.

ages deriving from car accidents (art. 2947 subs. 2 CC) continues to apply if the claimant did not bring the criminal action against the tortfeasor.

In the present case, the harmful act was also a criminal offence. Nevertheless the plaintiff did not present the criminal action, but only the tort law claim. Both the Tribunal and the Court of Appeal upheld the doctrine stated by Cass. SS. UU. 5121/2002. Therefore, they apply the prescription period of two years instead of the more favourable one provided for the criminal action, and, as a consequence, dismissed the claim for damages. The plaintiff appealed in front of the Supreme Court. 62

b) Judgment of the Court

The Supreme Court upholds the recourse, and reverses the doctrine stated by the precedent decision of the Plenary Session in 2002. 63

The Supreme Court summarizes the pro and contra attitudes concerning the interpretation of art. 2947 subs. 2 CC. In particular, it mentions the arguments put forward by Cass. SS. 5121/2002. The *ratio decidendi* of the decision 5121/2002 was the following: Art. 2947 subs. 3 CC would aim at avoiding a situation where different prescription periods apply to the same fact if both a tort claim and criminal action are brought. In particular, if the plaintiff brings the criminal action within the prescription period, it would be unjust to deny damages because of the prescription of this suit. The same *ratio decidendi* explains why the general rule on prescription in case of damages which arise as a result of car accidents (two years) continues to apply if the plaintiff does not present a criminal action. Since there is no risk that two different prescription periods run for the same offence, there would consequently be no reason to apply the prescription period provided for the criminal offence. Therefore, the two year prescription period starting from the harmful event should apply. 64

After 2002, the case law has constantly followed the doctrine above cited, and, lacking the criminal action, has applied the two year prescription period to damages claims. 65

The present decision rejects this doctrine. 66

Firstly, it observes that art. 2947 subs. 3 CC provides only two requirements for the application of criminal prescription: the harmful act being also a criminal offence, on the one hand, the crime being barred after a longer time than two years, on the other hand. The cited provision does not require that the offence is also concretely indictable. Therefore, the main question is whether the criminal action is the mere condition for the offence being prosecutable, or a requirement for the existence of the offence. 67

Secondly, the court argues that the criminal action is required only for the prosecution of the offence, not for the existence of the offence. As a conse- 68

quence, art. 2947 subs. 3 CC applies also in case that the criminal action was not concretely brought.

69 As a consequence, the Supreme Court upholds the appeal.

c) Commentary

70 The present decision upholds the most extensive interpretation of art. 2947 subs. 3 CC. In fact, it puts forward the idea that the longer prescription period provided for the crime applies also to the claim for damages, and that the criminal action is not a necessary requirement for this purpose.

71 It is worth stressing that the concrete case concerns serious personal injuries due to a car accident. In this area, some recent statutes have provided harsher criminal punishments as well as longer prescription periods for the crime of serious or very serious personal injuries or killing. The underlying ratio consists in reinforcing the legal protection of life and health, as well as preventing damages deriving from road circulation, which is held as particularly dangerous.

72 The present decision is in line with the tendency to reinforce the protection of the victim suffering serious personal injuries also through the prescription rules. In particular, it shows the need for a flexible interpretation of the harsh rules on prescription, as particularly valuable interests are injured.

C. Literature

1. *M. Barcellona*, Il danno non patrimoniale (Giuffré, 2008)

73 The present book revisits the evolution of the doctrines on non-pecuniary loss in Italian law. It focuses attention on the most recent judgments of the Supreme Court, which affirmed the constitutionally-oriented interpretation of art. 2059 CC relating to the bipolar structure of tort liability. The author critically argues that, since the list of the inviolable rights under art. 2 Const. is not exhaustive, the constitutional interpretation of art. 2059 CC is not able to select the legally protected interests. According to the author's view, the most recent doctrine of the Supreme Court would deny any substantial meaning to art. 2059.

74 Moreover, the author puts forward the idea that the distinction between pecuniary and non-pecuniary loss is merely artificial and movable. The meaning of the "pecuniary" standard is essentially social, and, as a consequence, can change according to social evolution. As a consequence, it would be quite difficult to draw a distinction between pecuniary and non-pecuniary loss.

2. *A. Gnani*, Sistema di responsabilità e prevedibilità del danno (Giappichelli, 2008)

75 The present book deals with the predictability requirement, which is stated by art. 1225 CC in the field of contractual liability. The author confirms the

traditional view, according to which this requirement does not apply to the general rule on tort law (art. 2043 CC). However, the author aims to show that the predictability requirement plays a role in the no-fault liability rules, which are stated by art. 2047 ff. CC (for example, vicarious liability for harmful acts committed by minors or by mentally insane persons, liability for dangerous activities, and so on and so forth) and by statutes as well.

3. Europa e diritto privato 2 (2008) 289 ff.

Europa e diritto privato is an Italian journal dealing with private law issues from a European perspective. The first part of the second issue in 2008 of this journal focused exclusively on several tort law questions. 76

The first essay (A. Di Majo, La responsabilità civile nella prospettiva dei rimedi: la funzione deterrente) deals with the question of the deterrent function of tort law. 77

The second essay (C. Castronovo, Del non risarcibile aquiliano: danno meramente patrimoniale, c.d. perdita di chance, danni punitivi, danno c.d. esistenziale) deals with several controversial issues – pure pecuniary losses, loss of chance, punitive damages, and existential damages. 78

The third (M. Serio, La responsabilità civile e la stagione dei doveri) focuses on the borderline field between tortious and contractual liability, with particular regard to Italian and English law. 79

The fourth (*G. Smorto*, Il criterio di imputazione della responsabilità civile. Colpa e responsabilità oggettiva in civil law e in common law) provides an overview of fault liability and strict responsibility rules in both continental and common law. 80

4. *T. Montecchiari*, Violazione dei doveri familiari e risarcimento del danno (Esi, 2008)

The book deals with the topic "liability for violation of family duties". It puts forward the idea that tort law provides efficient remedies to protect the personality rights of family members, in case of violation of marriage duties and parental obligations. 81

5. *R. Scognamiglio*, Danni alla persona e danno morale, Rivista di diritto privato 2008, 472 ff.

It is worth quoting this essay, which reaffirms the doctrine stated by the author in a fundamental article written in 1957 (Il danno morale, Rivista di diritto civile 1957, 288 ff.). As stressed supra no. 29, in 2008 the Supreme Court confirmed the binary model of tort liability based on the distinction between pecuniary and non-pecuniary damage. Again in 2008, the author puts forward the opinion that both harms fall under the same rule (that is, the general tort law clause: art. 2043 CC). 82

6. *M. Sesta* (ed.), La responsabilità nelle relazioni familiari (Utet, 2008)

83 The volume provides a complete overview of the state of art regarding family liability and a deep analysis of each type of family injury as well. M. Sesta and S. Patti provide an introduction which aims to trace the evolution of tort law in this field – from the original contra attitudes until the recent evolution of case law. The volume is divided into four parts.

84 The first part deals with the various types of responsibility of spouses – breach of marriage proposal, seduction after marriage proposal, breach of the duty to disclose any factor giving rise to the avoidance of marriage, breach of marriage duties, illegal use of marital name by the ex-wife, injury of the paternal rights in case of abortion. Moreover, this part also analyses parental responsibility – breach of parental duties, violation of custodial judicial dispositions. Finally, this part contains two chapters on pecuniary damages for violation of parental or matrimonial duties.

85 The second part deals with topics related to torts caused by third parties injuring the family relationship: for example, a chapter regards loss of amenities of life as a consequence of the death of a relative.

86 The third part analyses minors' responsibility and the vicarious liability of the parents.

87 The fourth part contains five chapters on the remedies provided by criminal law in case of family violence.

XV. Latvia

Agris Bitāns

A. Legislation

1. Amendments to the Competition Law (Grozījumi Konkurences likumā) Latvian Herald (Latvijas Vēstnesis) No. 51 (3836) 2 April 2008

On 13 March 2008 the Latvian parliament adopted amendments into the Competition Law, which has been in force since 1 January 2002. The main idea is to harmonise the Competition Law to Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty[1]. 1

Besides defining more precisely terms such as "dominant position", "significant influence" and other important issues related to competition, the present statute introduces a new regulation regarding compensation for losses incurred due to a violation of this Law. 2

According to art. 21, a person who has incurred losses due to a violation of this Law is entitled to seek compensation for losses from the violator directly through court. It is important to mention that the legislator now allows parties to seek compensation if the latter suffer loss from *any* breach of the Competition Act and not only under limited circumstances as was previously the case. In addition to compensation for losses, the Law provides a right to request statutory interest as defined by art. 1765[2] of the Civil Law. 3

[1] Official Journal (OJ) L 1, 4.1.2003, 1–25.

[2] Art. 1765: The interest rate shall be precisely stipulated in the document or transaction. If this has not been done, as well as in cases where the law requires calculation of lawful interest, that is, at six per cent per year. The lawful interest amount for the late payment of such a money debt, which is contracted for as compensation in the contract for the supply of goods, for purchase or provision of services, shall be seven percentage points above the basic interest rate (Section 173, Paragraph three) per year, but in contractual relations in a consumer participates – six per cent per year.
The basic interest rate shall be four per cent. This basic rate shall change every year on 1 January and 1 July by such percentage points in which amount since the previous interest basic rate changes has increased or decreased the latest refinancing rate, which the bank of Latvia has

4 The amount of compensation is to be established based on general civil law principles. The latest legal theory[3] recognises three preconditions for compensation of damage (pecuniary loss): 1) unjustifiable act (conduct), which includes an evaluation relating to culpability; 2) existence of loss and 3) a causal connection between the unlawful act and pecuniary loss.

5 However, the statute provides a new possibility which is uncharacteristic for the establishment of compensation in civil law. The amendment gives victims the right to request that the court set the amount of compensation at its discretion. This amendment partly introduces the principle which is defined by the second sentence of art. 2:105[4] of the Principles of European Tort Law.

2. Law on the Evangelical Lutheran Church of Latvia *(*Latvijas evaņģēliski luteriskās Baznīcas likums*)* No. 188 (3972) 3 December 2008

6 On 20 November 2008 the Latvian parliament adopted the Law on the Evangelical Lutheran Church of Latvia. This statute has been in force since 17 December 2008. The purpose of the statute is to facilitate the development of open, law governed and harmonic society and cultural environment as well (sec. 1 art. 2). Since the Evangelical Lutheran Church of Latvia has a long tradition in Latvia and the Church is in possession of significant national cultural and artistic property, it is important to regulate the legal relationships between the state and the Church (sec. 2 art. 2). However, the regulation also deserves attention from a tort law perspective.

7 The statute states that only the Church, its parishes, and institutions founded by the Church are allowed to use the name of Evangelical Lutheran Church of Latvia. The designation of other religious organisations, associations, or foundations must be clearly different from the Church designation (sec. 4 art. 3). The Law grants the Church the right to request the termination of use of its name, as well as compensation for suffered damage (pecuniary loss) (sec. 5 art. 3). This regulation is somewhat unique in that the legislator directly describes legal remedies for the illegal use of a name. However, it appears from the legal norm that the statute does not grant a right to compensation for non-pecuniary loss suffered as a result of the illegal use of a name. There is no justification for such a limitation.

specified prior to the relevant half-year date. After the 1 January and 1 July each year, the Bank of Latvia shall publish without delay in the newspaper Latvijas Vēstnesis a notice regarding the interest basic rate in effect in the relevant half-year.
Interest shall be calculated only on the principal itself. But if within the term stipulated, the interest is not paid for one year or more, pursuant to the demand of the creditor, lawful interest shall be calculated on the outstanding amount of interest from the commencement of the term referred to.

[3] *K. Torgāns*, Saistību tiesības, I daļa (Obligation Law, vol. I) (2006) 209

[4] Art. 2:105: Proof of damage
Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly.

The Church has the right to store information about parishioners in accordance with procedure established by the Church, but has to comply with general principles of processing of personal data established by the Law (sec. 6 art. 3). These principles are to be found in the Personal Data Protection Law which has been in force since 20 April 2000. 8

3. Law on the Orthodox Church of Latvia (Latvijas Pareizticīgās Baznīcas likums) No. 188 (3972) 3 December 2008

On 20 November 2008 the Latvian parliament adopted the Law on the Orthodox Church of Latvia. This statute has been in force since 17 December 2008. The purpose of the statute is to facilitate the development of open, law governed and harmonic society and cultural environment as well (sec. 1 art. 2). Since the Orthodox Church of Latvia has a long tradition in Latvia and is in possession of significant national cultural and artistic property, it is important to regulate legal relationships between the state and the Church (sec. 2 art. 2). However the regulation also deserves attention from a tort law perspective. 9

The statute states that only the Church, its parishes, and institutions founded by the Church are allowed to use the name Orthodox Church of Latvia. The designation of other religious organisations, associations or foundations must be clearly different from the Church designation (sec. 5 art. 3). The Law grants the Church the right to request the termination of use of its name, as well as compensation for suffered damage (pecuniary loss) (sec. 6 art. 3). This regulation is unique in that the legislator directly describes legal remedies for the illegal use of a name. However, it appears from the legal norm that the statute does not grant a right to compensation for non-pecuniary loss suffered as a result of the illegal use of a name. There is no justification for such a limitation. 10

The Church has the right to store information about parishioners in accordance with procedure established by the Church, but has to comply with general principles of processing of personal data established by the Law (sec. 8 art. 3). These principles are to be found in the Personal Data Protection Law which has been effective since 20 April 2000. 11

B. Cases

1. Senate of the Supreme Court, 2 April 2008 No. SKC–143:[5] Preconditions for Compensation of Pecuniary Loss: 1) Unjustifiable Act (Conduct) 2) Loss 3) Causal Link

a) Brief Summary of the Facts

The plaintiff initiated civil proceedings against the defendant – an association of apartment owners. On 1 September 2003 the plaintiff sent a letter to the defendant requesting it issue a confirmation that the plaintiff had fully paid all his 12

[5] Published at >http://www.at.gov.lv/lv/info/archive/department1/2008/<.

heating expenses for the time period from October 2001 to April 2002. Since the plaintiff had participated in the Chernobyl clean-up efforts such a confirmation would have allowed the plaintiff to be reimbursed by a foreign NGO for the heating expenses in the above-mentioned time period. As the defendant did not provide such a confirmation, on 29 October 2003 the plaintiff initiated civil proceedings, with a request to oblige the defendant to issue a confirmation that the plaintiff did indeed pay LVL 137.83 (approx. € 200) in heating costs for the above-mentioned time period. The first instance court satisfied a claim on 29 April 2004 and the second instance court satisfied a claim on 14 November 2004. However, the defendant issued a confirmation only on 19 June 2006. On 12 January 2004 the plaintiff received a letter from the NGO "Chernobyl-86" that the plaintiff's request for compensation of LVL 137.83 (approx. € 200) had been denied due to the fact that the plaintiff had not submitted a confirmation regarding the payment of heating costs for the time period 2001/2002 within due time. Based on art. 1775 and 1779 of the Civil Code, the plaintiff once again initiated civil proceedings against the same defendant for compensation of damage equal to the amount which would have been reimbursed if a confirmation had been submitted by the defendant i.e. LVL 137.83 (approx. € 200).

13 The first instance court rejected the claim, but the appeal court fully satisfied the claim on 24 October 2007 based on art. 1779 of the Civil Code. The appeal court disagreed with the first instance court that there is no illegal unjustifiable conduct regarding the failure to issue a confirmation concerning paid heating expenses. This failure led to the plaintiff not being reimbursed for his heating expenses from a third party. Also, there is a clear causal link between the illegal behaviour of the defendant and the loss suffered.

14 The defendant submitted cassation. The defendant argued that it was not certain that the plaintiff would have had his heating expenses reimbursed under Russian law and, therefore, the court could not come to the conclusion that there is a real loss as a precondition for the awarding of compensation. In addition the defendant pointed out that the court did not apply art. 1776 of the Civil Code which states that a victim may not claim compensation if he or she could have, through the exercise of due care, prevented the loss. The plaintiff did not inform the defendant that the confirmation was necessary in order to have his heating costs reimbursed by the NGO "Chernobyl-86".

15 The Senate dismissed cassation and upheld the judgment of the second instance court.

b) Judgment of the Court

16 The Senate declared that the latest legal theory recognises three preconditions for compensation of damage (pecuniary loss): 1) unjustifiable act (conduct), which includes an assessment of culpability; 2) existence of loss and 3) a causal connection between the unlawful act and pecuniary loss. The court of appeal established that the defendant's conduct was not justified as it failed to issue a confirmation regarding payments for heating. This subsequently led to damage

in the amount of LVL 137.83 (approx. € 200) which was causally linked with the above mentioned behaviour. Therefore the court of appeal established all necessary preconditions for the satisfaction of the claim.

Additionally, the Senate took into account the fact that there was a similar judgment where the court had satisfied the similar claim of the plaintiff against the defendant for another time period, namely 2002/2003 and 2003/2004. 17

c) Commentary

This is the first judgment of the Senate where the court has recognised the latest conclusions of legal theory regarding the number of preconditions for compensation of damage (pecuniary loss). The Senate cited[6] and therefore accepted Professor K. Torgāns' conclusion that only three preconditions: 1) unjustifiable act (conduct), which includes an evaluation of fault; 2) the existence of loss and 3) a causal connection between the unlawful act and pecuniary loss are necessary for compensation of damage (pecuniary loss) to be awarded. Previously court practice recognised that four preconditions: 1) unjustifiable act (conduct); 2) the existence of loss; 3) a causal connection between the unlawful act and pecuniary loss and 4) fault (culpability) are necessary to establish civil liability and for compensation of damage (pecuniary loss) to be awarded. When Professor K. Torgāns became a Senator his ideas became increasingly popular in the Senate. 18

It is important that the court recognised as unjustifiable the act (behaviour) of delaying the confirmation regarding payments for heating which prevented the plaintiff from receiving compensation from third persons for these expenses. This means that the court is ready to accept as unjustified behaviour which is not necessarily a breach of the law but which is wrongful for the victim. This is a positive tendency. 19

2. Senate of the Supreme Court, 9 January 2008 No. SKC–13:[7] Failure to Inform Blood Donor of Hepatitis C; Right to Compensation of Suffered Loss for such Failure

a) Brief Summary of the Facts

On 21 January 1998 the plaintiff donated blood to the defendant (University Clinical Hospital). The defendant discovered that the plaintiff was suffering from hepatitis C but, contrary to art. 17 of the Epidemiological Safety Law, the plaintiff had not been informed of his illness. The plaintiff, in his job as a policeman, regularly attended health examinations and, as a result, the Clinic of the Ministry of Interior Affairs discovered the plaintiff's sickness. The plaintiff was referred to the Infection Centre of Latvia where hepatitis C was diagnosed. 20

[6] *Torgāns* (fn. 3) 209.
[7] Published at >http://www.at.gov.lv/lv/info/archive/department1/2008/<.

21 Since the plaintiff had not been informed about his sickness, he could not start treatment in due time. Thereby the treatment which the plaintiff underwent in 2003 at the Infection Centre of Latvia was unsuccessful and the only other chance of treatment would be for the plaintiff to take the medication, *Copegasys + Ribavirin*, which costs approximately LVL 15,000 (approx. € 21,000). According to the plaintiff, he could only have been infected till 1998 in the Sea Medical Centre, where he underwent surgery on his appendix on 4 March 1991.

22 The plaintiff initiated civil proceedings against two defendants – the University Clinical Hospital and the Clinic of the Ministry of Interior Affairs and a third party – the Sea Medical Centre on 22 July 2004. According to art. 20 and 21 of the Medical Treatment Law, sec. 1 of art. 17 Epidemiological Safety Law, art. 1635, 1770 and 2347 of Civil Code, the plaintiff claimed compensation of LVL 15,000 (approx. € 21,000) as medical expenses and LVL 15,000 (approx. € 21,000) as lost profit.

23 The University Clinical Hospital rejected the plaintiff's claim and explained that personnel of the Blood Preparing Department do not provide medical treatment under sec. 1 of art. 1 of the Medical Treatment Law. Therefore, the defendant is not a medical person and the claimant is not a patient according to the Medical Treatment Law and the Epidemiological Safety Law. Accordingly, the obligation to inform patients under sec. 1 art. 14 of the Epidemiological Safety Law is not applicable to the present case. The University Clinical Hospital had only professional suspicions and until properly tested, the plaintiff had not been qualified as an ill or infected person. Additionally, the University Clinical Hospital was not obliged to inform the plaintiff about the result of the laboratory test and professional suspicions because he was not subject to mandatory medical and laboratory examination under art. 20 of the Epidemiological Safety Law.

24 The Clinic of the Ministry of Interior Affairs and the third party – the Sea Medical Centre – rejected the plaintiff's claim as they had not been informed about the plaintiff's disease and the law does not require a mandatory test for the diagnosis of hepatitis C.

25 The first instance court and court of appeal rejected the plaintiff's claim but the Senate reversed the judgment by its 2 November 2005 judgment and returned the case to the court of second instance for review. The plaintiff submitted adjustments to the claim since he was included as a result of a decision of the Council of Health Ministry in a list of persona whose medical expenses are to be partly reimbursed. Therefore the plaintiff reduced the amount of his claim to LVL 2,810 (approx. € 4,000) as compensation for medical expenses and LVL 140 (approx. € 200) as compensation for legal costs. The court of second instance rejected the claim on 24 April 2006, but the Senate again reversed the judgment by its 23 August 2006 judgment and returned the case to the second instance for review.

The appeal court, in its 26 June 2007 judgment, partly satisfied the claim and awarded LVL 2,201.56 (approx. € 3,150) as compensation for damage and LVL 440.31 (approx. € 630) as compensation for legal costs from the University Clinical Hospital but rejected the claim against the Clinic of the Ministry of Interior Affairs. The University Clinical Hospital submitted cassation. The defendant argued that the second instance court incorrectly applied art. 1779 of the Civil Code and, since the action related to tort liability, it is necessary to establish all four preconditions of civil liability under art. 1779 which must be interpreted in conjunction with art. 1773 of the Civil Code. In addition, the second instance court did not evaluate all circumstances of the case extensively and in an objective manner. The Senate dismissed cassation and upheld the judgment of the second instance court. 26

b) Judgment of the Court

The Senate stated that there is no discussion that the University Clinical Hospital did not inform the plaintiff about the results of his blood test which showed him to be suffering from hepatitis C. According to art. 14 of the Epidemiological Safety Law, if health care practitioners have established that a patient has an infectious disease, or if there is cause for suspicion that a patient has become infected, health care practitioners shall have an obligation: to organise without delay the medical examination and medical treatment of the patient; to organise the necessary laboratory tests to clarify the diagnosis; to request information from the patient, which is necessary for the organisation of counter-epidemic measures, and also information regarding exposed persons and possible sources of the infectious disease; and to register the case of the infectious disease pursuant to the procedures prescribed by the Cabinet of Ministry. 27

According to the Senate, the above-mentioned activities include an obligation to inform the person concerned about symptoms of an infectious disease, which is connected to a right granted by sec. 1 art. 18 of the Epidemiological Safety Law which includes: a medical examination, consultations for the making of a diagnosis of an infectious disease, and also anonymous medical and laboratory examinations if public health is not threatened by an outbreak of such infectious disease or by an epidemic; a confidential laboratory examination, medical treatment and consultations in matters of health; and the implementation of the necessary counter-epidemic measures at the dwelling-place, place of work or residence of such persons. 28

An interdependent analysis of the above-mentioned legal norms leads to the conclusion that the defendant had an obligation to inform the plaintiff about the result of his blood tests. In addition, according to sec. 1 art. 1 of the Medical Treatment Law, medical treatment consists not only of the treatment of diseases and care of patients, but also prevention and diagnosis. Therefore if health care practitioners suspect that a patient has become infected by Anti HVC + under art. 14 of the Epidemiological Safety Law, health care practitioners shall have an obligation to inform the person that he/she should take necessary steps to protect his/her health. 29

30 Since the defendant's passive behaviour did not comply with the above-mentioned legal norms including human rights, the plaintiff's claim is therefore consistently acceptable. The Senate rejected the defendant's argument that there is no causal link between the plaintiff's sickness and the failure of the defendant to inform him of his illness. Since the plaintiff used the medicine PegasysR for medical treatment, these expenses were compensated.

c) Commentary

31 The present judgment is a positive development for both health care law and tort law. The court clearly recognised that, according to sec. 1 art. 1 of the Medical Treatment Law, medical treatment is wider than only the medical treatment of diseases and care of patients, but also includes the prevention and diagnosis of diseases. Accordingly, an individual becomes a patient, not when medical treatment starts, but also in the prevention and diagnosis of diseases. Therefore there is a positive obligation for health care practitioners to inform individuals about any suspicious regarding their state of health. These conclusions create a clearer border when health care practitioners could be liable for loss, even if they did not provide care of the patient.

32 The court declared that health is a constitutional human right which cannot be limited. The failure to inform a patient of the result of a test prevents the patient from engaging in activities to protect his health including starting appropriate medical treatment for a long period, which no doubt limits the prevention of damage to his health as well.

33 The court correctly established a causal link between the University Clinical Hospital's omission (inaction) and negative financial consequences for the plaintiff. The rejection of the defendant's argument, that treatment with a particular medicine could not grant recovery as assumption, could be a first step towards the recognition of the loss of chance concept in Latvian case law.

3. Senate of the Supreme Court, 9 January 2008 No. SKC–9:[8] Damages can be Determined by Considering Level of Liability of each Person Involved in Car Accident

a) Brief Summary of the Facts

34 The limited liability company X as plaintiff initiated civil proceedings on 6 January 2005 against the defendant, insurance company Y, as the latter had failed to pay an insurance indemnity of LVL 1,808.16 (approx. € 2,600) following a road accident. Despite the fact that the police found the individual K.G. guilty (responsible) for the accident, the insurance company Y decided to pay out just 30% of the insurance indemnity LVL 2,583.09 (approx. € 3,600).

35 There was no discussion between the parties that the insurance event occurred. The insurance company referred to the statement of the expert from the Me-

[8] Published at >http://www.at.gov.lv/lv/info/archive/department1/2008/<.

chanical Institute of Riga, Technical University. According to this statement, the allocation of fault between the drivers involved in the present road traffic accident is divisible whereby 70% was attributable to the plaintiff's car driver and 30% to K.G. Therefore the defendant considered that the plaintiff, as an accessory (though its driver) in the road traffic accident, is entitled to receive only 30% of the insurance indemnity for the damage.

The first instance satisfied a claim for the full amount of insurance indemnity, and the appeal court satisfied a claim as well. The appeal instance court referred to existing case law – judgment of the Senate of the Supreme Court, 28 February 2007 No. SKC-97[9] – which stated that only institutions authorised by law have the right to declare any person at fault in a road traffic accident, based on particular legislative acts and procedures. Since the traffic police declared the fault of the driver, K.G., and he did not appeal this decision, there is no ground to re-evaluate the fault of those involved. 36

The defendant submitted cassation. The insurance company argued that the police, as state institution, can only act within the scope provided by law. Accordingly, the police evaluating any person's fault in a road traffic accident only consider administrative offences. Therefore the police have no duty to evaluate any person's fault in a road traffic accident regarding losses suffered and the establishment of civil liability. 37

The Senate reversed the judgment of the second instance court and returned the case to second instance for review. 38

b) Judgment of the Court

The Senate indicated that the appeal court had incorrectly applied the wording of art. 31 of the Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners, which was not in force when the road accident happened. 39

The Senate specified that, according to sec. 3 art. 33 of the Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners, if losses have been caused in a road traffic accident to the property of several owners, the insurance company shall compensate the losses in proportion to the fault of each owner. Moreover the Senate indicated that it was incorrect to apply the general norms of the Law on Insurance Contracts when the Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners as special legal act is applicable. 40

The Senate indicated that, in case No. SKC–546, 2007, an extended Senate concluded that it is incorrect that the court is not obliged to evaluate the fault of drivers involved in a road traffic accident if the traffic police have already made a statement in this regard. 41

[9] See the short description and my comments in *A. Bitāns*, Latvia, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 20–28.

c) Commentary

42 The Senate corrected the mistake which was made in the judgment of the Senate of the Supreme Court, 28 February 2007 No. SKC-97, criticised in my 2007 report[10]. The Senate correctly referred to Professor K. Torgāns' book[11] in which it is stated that it is incorrect to apply terms and definitions from administrative law in the insurance context.

43 The Senate provided a correct interpretation of sec. 3 art. 33 of the Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners – if losses have been caused in a road traffic accident to the property of several owners, the insurance company shall compensate the losses in proportion to the fault of each owner. This means that insurers and courts should evaluate the fault of drivers involved in a road traffic accident if the amount of pecuniary loss can alter depending on the drivers' degree of fault. This could be done even if traffic police issued a declaration for an administrative fine only to one driver involved in a traffic accident.

4. Senate of the Supreme Court, 14 May 2008 No. SKC–205:[12] Awarding of Damages for Pecuniary loss and Other Remedies

a) Brief Summary of the Facts

44 The plaintiff initiated civil proceeding against three defendants – Limited Liability Company, Z, the Register of Enterprises of the Republic of Latvia and a natural person, A.O. The plaintiff was of the opinion that changes in the registration records of Company Z were based on illegal and false documents and, therefore, all these documents should be declared null and void, as should the registration of the company in the Register of Enterprises of the Republic of Latvia. The plaintiff requested that the court restore him as a shareholder of Company Z.

45 The plaintiff initiated criminal proceedings against the natural person, A.O. Since an expertise confirmed that the signatures on the documents of Company Z were not written by the plaintiff, the Criminal Court declared A.O. guilty of fraud.

46 The court of first instance satisfied the claim, but the second instance court satisfied the claim only partly – it declared null and void the documentation partly – only regarding alienated shares which belonged to the plaintiff and restored his position as a shareholder of Company Z. The Senate reversed a judgment of the second instance court and returned the case to the second instance review of the satisfied part.

47 The appeal court rejected the claim fully on 1 November 2007. The court provided several arguments. The plaintiff received the full amount for the disputed

[10] See *Bitāns* (fn. 9) no. 28.
[11] Saistību tiesības. II daļa (Obligation Law. II part) (2008); see report about it infra no. 53.
[12] Published at >http://www.at.gov.lv/lv/info/archive/department1/2008/<.

shares and only later, after submitting the claim, did he return the received amount. Based on art. 1402 of the Civil Code, A.O. has to compensate the damage to the plaintiff but in his turn the plaintiff received an amount of money without bringing a proprietary action.

The plaintiff submitted cassation. His attorney-at-law argued that the appeal instance court incorrectly interpreted art. 1402 of the Civil Code, because this norm does not aim to award the victim only damages (compensation for damage) without the restoration of previous status (restitution of *status quo*). The Senate reversed the judgment of the second instance court and returned the case to the second instance for review. 48

b) Judgment of the Court

The Senate stated that the legal relationship between the plaintiff and A.O. emerged from a tort which, according to art. 1402 of the Civil Code, is one basis for establishing obligations. Further the Senate indicated that the main goal of compensation is to eliminate the results of an infringement of a person's rights. 49

Since the claim was not for compensation of pecuniary loss regarding 50 shares in the Company Z, but to declare null and void all transactions regarding the alienation of disputable shares which belonged to plaintiff, there is no ground for rejecting the claim if the previous *status quo* is not restored. 50

c) Commentary

This is a significant judgment passed by the Senate where the court recognised that civil remedies for tort are not limited only to compensation of pecuniary loss. Compensation is merely one of the remedies which aim to restore the *status quo* which existed before the wrong was committed, i.e., eliminating the negative results of an infringement of a person's rights. 51

The Senate arrived at the important conclusion that it would be unjust if the negative result of an infringement of one's rights were not eliminated because one party achieved a desirable result by compensating incurring losses to another party. 52

C. Literature

1. *K. Torgāns*, Saistību tiesības, II daļa (Obligation Law, vol. II) (Riga, Tiesu nama aģentūra 2008)

The present book is the second volume of a textbook for legal studies on Obligation Law, where Professor K. Torgāns provides a general overview of obligations which arise from tort law. In addition to a brief historical introduction, he provides a comparative summary of tort law in different countries including common law systems. Unfortunately he does not provide a definition of tort, which is a very complicated issue. 53

54 The author describes liability for personal injury (including non-pecuniary loss) and pecuniary loss. He reviews personal injury from abnormally dangerous objects, breach of honour and reputation, and privacy. In particular he devotes his attention to liability for loss caused by state institutions, especially investigators, prosecutors or judges.

55 In addition to tort, Professor K. Torgāns provides a general overview of obligations which arise from *quasi torts*.

56 Separately he addresses unjustified enrichment as an additional ground for civil obligation.

2. *G. Slaņķe*, Morālā kaitējuma institūta iztulkošana civiltiesībās (Interpretation of Concept of Moral Injury in Civil Law) Likums un tiesības 11/2008, 322–333

57 The article is dedicated to the understanding of the concept of moral injury (non-pecuniary loss) in Latvian legislative acts. The author provides a comprehensive summary of all legislative acts where the terms "moral loss" or "non-pecuniary loss" are mentioned.

58 The author provides an interpretation of art. 1635 of the Civil Code of the Republic of Latvia and her main conclusion is that the above-mentioned norm leads to anti-constitutional consequences when it is interpreted literally. However, it should be interpreted widely thus leading to the solution where the above norm could be stated as a concretization of art. 92 of Constitution of the Republic of Latvia and the respective human rights granted by other normative acts.

59 Logically the author provides a suggestion as to how the text of art. 1635, should be improved which eliminates the requirement to prove non-pecuniary loss on some occasions, but unfortunately does not solve all problems regarding the definition and understanding of non-pecuniary loss.

3. *M. Papēde*, Zaudējumu atlīdzības noteikšana intelektuālā īpašuma tiesību aizskāruma gadījumos (Estimation of Damages Caused by Infringement of Intellectual Property Rights) Likums un tiesības 12/2008, 354–360

60 In the article the author analyses the methodological aspects of the estimation of the amount of damages for an infringement of intellectual property rights. For the most part the author focuses on different forms of remedies for infringements of intellectual property rights, including, compensation for actual damage, unjustified enrichment and licence royalty.

61 The author refers to foreign case law and legal doctrine. Despite the fact that the author arrives at the conclusion that the intellectual property right-holder, depending on the available evidence and expectations of the court proceedings, may choose any of the three methods of calculation of the damages, and the in-

tellectual property right-holder may change the method at any stage of the proceedings, at least it is a disputable conclusion that the implementation of more than one method at a time is not permitted, as this would lead to contradictions with the restoration element of compensation for loss.

XVI. Lithuania

Herkus Gabartas and Loreta Šaltinytė

A. Legislation

1. Smurtiniais nusikaltimais padarytos žalos kompensavimo įstatymo pakeitimai (Amendments to the Law on Compensation of Damage Caused by Violent Crimes) Valstybės žinios, 1998, No. 137-5387 (entered into force on 1 March 2009).

1 The Law on Compensation of Damage Caused by Violent Crimes (hereinafter – the Law) is destined to protect the rights and lawful interests of victims of violent crimes as well as to ensure the implementation of the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, 15–18. The amendments to the original version of the Law from 2005 expanded the scope of application of the Law, since only 30% of applications for compensation fell within the scope of covered incidents. Amendments to the Law expand the concept of a violent crime and encompass all criminal activities disregarding their gravity which lead to a loss of human life or damage to human health (except for minor damage to human health), or as a consequence of which human freedom is restricted (e.g. trafficking in human beings, violent restriction of freedom).

2 The Law further provides that the right to compensation of damage caused by violent crimes would be granted to persons holding a court award of pecuniary and non-pecuniary damage. A very positive improvement is that the list of instances when the compensable amount can be reduced (e.g. due to the conduct of the victim) is rescinded: the amendment was made considering that these circumstances are already taken into consideration by a court when it decides the question on the size and type of compensable damages and there is no need to reconsider this question for the Ministry of Justice, which is in charge of considering victims' applications for compensation.[1]

[1] Teisingumo Ministras, Lietuvos Respublikos smurtiniais nusikaltimais padarytos žalos kompensavimo įstatymo pakeitimo įstatymo projekto aiškinamasis raštas (Ministry of Justice, Explanatory memorandum on the draft amendments to the Law on Compensation of Damage Caused by Violent Crimes) 8 November 2007. Available in Lithuanian at www.lrs.lt.

B. Cases

1. *Vilnius City Police Headquarters and Police Department under the Ministry of the Interior v. P.S.*, Lithuanian Supreme Court, 17 November 2008, No. 3K-7-496/2008: Right of Subrogation

a) Brief Summary of the Facts

In 2005 a police officer was chasing a suspect (the defendant) of a car theft. The defendant tried to escape from his arrest and unwillingly hit the police officer's cheek with his elbow. As a result, the police officer was injured by the defendant: his right cheekbone was broken, insignificant health impairment was diagnosed. 3

According to Lithuanian legislation, every police officer is covered by life and social security insurance at the expense of the State. Following the special statutory rules on the calculation of the compensation payable to police officers[2], the Police Department (the plaintiff) calculated and paid to the injured police officer compensation in the amount of LTL 29,067 (the equivalent of € 8,418), which equals his average annual salary. In order to recover these costs, the plaintiff sued the defendant based on its right to subrogation and claimed damages amounting to the compensation paid by the plaintiff to the police officer, i.e. LTL 29,067. 4

The defendant argued that the compensation paid by the plaintiff was in fact much higher than the actual damage suffered by the police officer, because the amount of compensation was calculated on the basis of some special statutory rules, irrespective of the actual damage suffered by the police officer. Therefore the defendant should not be held liable for the compensation paid by the plaintiff; instead he may be held liable merely for the actual damage suffered by the police officer. Thus, the issue of the case was the scope of the plaintiff's right of subrogation: whether the plaintiff is entitled to the amount of compensation which was established under some special statutory rules and actually paid by the plaintiff to the police officer, or, as an alternative, to the actual amount of damage which has been suffered by the police officer, irrespective of the compensation amount paid to him by the plaintiff. 5

The court of first instance partially approved the claim and, due to the defendant's poor financial situation, awarded LTL 25,000 (the equivalent of € 7,240) in favour of the plaintiff. According to this court, all conditions necessary for the establishment of the defendant's tort liability were satisfied. The court concluded that the compensation paid by the plaintiff to the police officer may be equated to the amount of damage suffered by the police officer. After the plaintiff had paid the compensation to the injured police officer, it acquired from the police officer all creditory rights in the amount of paid compensation against the defendant. 6

[2] Part 3 of Art. 40 of the Statute of Interior Office approved by the Law No. IX-1538 of 29 April 2003, the Government Resolution No. 530 of 5 December 1991 and the Government Resolution No. 1130 of 2 September 2004.

7 The appellate court approved the decision of the court of first instance. According to the appellate court, the plaintiff proved the actual amount of damage suffered by the police officer, because the amount of the compensation payable to the police officer was calculated on the basis of special statutory rules, and the defendant did not deny the legitimacy of such calculation. The paid compensation is related to the damage suffered by the police officer. The plaintiff acquired the right of subrogation against the defendant with respect to the total amount of compensation paid to the police officer, because such a right to subrogation is established by special statutory rule.[3] The defendant appealed the decision of the appellate court to the Supreme Court of Lithuania.

b) Judgment of the Court

8 The Supreme Court of Lithuania (the Court) also denied the defendant's appeal and approved the decision of the appellate court.

9 The Court agreed with the defendant's argument that, if the compensation paid to the police officer exceeds the amount of damage suffered by the latter, then the institution which paid the compensation may claim (based on its right of subrogation) from the tortfeasor only that part of the compensation which covers the damage suffered. The third party which acquires the subrogation right (in this case the plaintiff) may not acquire more rights than the primary creditor (in this case the police officer) originally had (art. 6.113 of the Lithuanian Civil Code).

10 However, due to the fact that the amount of compensation was calculated according to some standardized criteria, it should be presumed that the compensation paid fully compensated the actual damage. This presumption is, of course, rebuttable, but the burden to deny this presumption falls on a person who argues that the paid compensation exceeds or is lower than the actual damage.

11 Thus, if a victim argues that the compensation does not fully cover his damage, then he has the burden of proving that the damage is higher than the compensation paid. Similarly, if a tortfeasor (in this case the plaintiff) argues that the victim has been paid a compensation which exceeds his actual damage, then he has the burden of proving that the damage is lower than the compensation received.

12 In this case the defendant did not dispute the amount of actual damage suffered by the police officer. The amount of the paid compensation, unless it is proved otherwise, *per se* does not imply that the injured police officer did not suffer the damage to the same extent. The Court therefore held that the damage suffered by the police officer amounted to the compensation received by him, because the defendant did not prove otherwise.

[3] Art. 26 of the Government Resolution No. 530 of 5 December 1991.

c) Commentary

The implications of this case are rather radical, because to some extent it shifts the burden of proof as regards the determination of the amount of damage from the plaintiff to the defendant. Following this precedent, it is a defendant (and not a plaintiff), who has the burden of proving the amount of damage suffered by the plaintiff; otherwise it is assumed that the amount of damage is equal to the amount of compensation that the plaintiff is entitled due to his/her public service. Such presumption of the amount of damage is rather dubious not only due to part 1 of art. 6.249 of the Civil Code and art. 178 of the Civil Procedure Code (which attribute the burden of proving the amount of damage to an aggrieved party), but is also in a potential conflict with the general tort law principle of *restitutio in integrum*. It is therefore not very surprising that the dissenting written opinion of one judge has also been issued in this case. 13

On the other hand, this case provides some clarity to the previous jurisprudence of the Court in this specific area of law, which has been rather contradictory until now. Two earlier Court's rulings may be quoted for this purpose. Thus, following the Court's ruling in the case No. 3K-3-400/2007 of 16 October 2007, the right of subrogation, acquired by the social security authorities which made an insurance payment to a victim, is not an absolute one: social security payments to a victim may exceed his/her actual damage, therefore social security authorities do not automatically acquire from a victim the right of subrogation against the tortfeasor in the full amount of social security payment received by a tortfeasor. A court has an obligation to establish which part of the social security payment received by a victim may be attributed to his/her actual damage, and to award to the social security authorities the right of subrogation only to the latter extent. 14

The aforesaid Court's ruling, however, slightly deviates from another Court's ruling in the case No. 3K-3-571/2007 of 18 December 2007, where it was held that a one-time insurance payment is to be treated as a constituent part of damages for the purposes of part 1 of art. 6.249 of the Lithuanian Code, which implies that compensation payable by social security authorities would never exceed the amount of damage suffered by a victim. Thus, there is no room for the argument that social security authorities, after paying an insurance payment to a victim, may acquire more rights than the primary creditor (i.e. a victim) would have. The right of subrogation of social security authorities has therefore been treated as being absolute. 15

In the authors' opinion, the case at hand (i.e. of 2008) overrules the aforesaid Court ruling of 2007 and denies the implication that the right of subrogation is an absolute right. Bearing in mind that this 2008 case was decided by the Court's broadened panel of seven judges (rather than of three, which is usually the case), and notwithstanding the dissenting written opinion of one judge in this case, the new guidelines enlisted therein should serve as a rather important precedent for further determination of the scope of a public institution's right to subrogation in cases when compensation is paid out of state or other public funds. 16

2. *J.M.Š. v. State Enteprise "Registers' Center", bailiff L.U.D.*, Lithuanian Supreme Court, 26 March 2008, No. 3K-7-59/2008: Conditions for Application of Solidary Liability

a) Brief Summary of the Facts

17 In 1995 a private individual (the plaintiff) acquired a title to a garage (the Garage). In 2000 the State Enterprise "Registers' Centre" (a public institution performing the functions of the Lithuanian Real Estate Register) (the Register), while transferring the data related to the Garage to the public computer database, made a mistake and indicated in the public database some third person J.Š. (the Nominal Owner), rather than the plaintiff, as the owner of the Garage. In 2005 the bailiff L.U.D (the Bailiff) sold the Garage, as alleged property of the Nominal Owner, to a third person J.B., and the latter sold the Garage to a third person A.V. In 2007 in a separate criminal case the Nominal Owner, who pretended to be the real owner of the Garage, was convicted of fraud and document forgery. However, the plaintiff refused to seek the recovery of damages from the Nominal Owner. Instead, the plaintiff sued the Register and the Bailiff, as alleged solidary defendants, for LTL 15,000 (€ 4,344) as the damages suffered due to lost Garage.

18 The court of first instance partially approved the claim and awarded the recovery of all damages from the Register. The plaintiff's claim with respect to the Bailiff was denied, because no illegal actions of the Bailiff were established.

19 The appellate court approved the decision of the court of first instance and confirmed the Register's liability for all the damage. The court held that the plaintiff may choose the defendant(s) from several tortfeasors. The plaintiff chose to sue the Register and the Bailiff as the solidary defendants, and refused to involve the Nominal Owner in this case. According to the court, after the Register was held liable for all the damage to the plaintiff, the Register retained the right to sue the Nominal Owner, as a solidary defendant, in separate proceedings for the partial recovery of those damages.

20 The Register argued that there is no causal relationship between the damage suffered by the plaintiff and the illegal actions of the Register. There is such a link, however, with the illegal actions of the Nominal Owner. Therefore the Register appealed the decision of the appellate court to the Lithuanian Supreme Court.

b) Judgment of the Court

21 The Lithuanian Supreme Court (the Court) annulled the decisions of the court of first instance and of the appellate court, and returned the case to the court of first instance for repeated proceedings. The plaintiff lost her Garage essentially due to the actions of several persons: the Register, the Bailiff, the Nominal Owner as well as third persons J.B. and A.V., who acquired the title to the Garage later. Therefore there is a plurality of debtors in this case. The courts should have included all the debtors in the proceedings of this case and

should have analysed all their actions. The general principle applies that each of them may only be compelled to perform the obligation separately and only up to his/her share of the debt (i.e. obligation is divisible), unless the law says otherwise (i.e. unless the obligation is deemed under the law to be solidary). A solidary obligation of debtors may not be presumed. Instead, it should be based upon some common element between the debtors not necessarily only with respect to damages, but also with respect to their illegal actions, fault or causal relationship.

Solidary liability is usually applied in tort relations when there is at least one of the following conditions: (1) the tortfeasors are related due to their common actions with respect to consequences (e.g. two tortfeasors directly cause damage); (2) the tortfeasors are related due to their common actions with respect to illegality, i.e. solidary liability may arise even if the tortfeasor does not directly cause any damage but is aware of the illegality of the actions of the other tortfeasor who directly caused damage; (3) the tortfeasors, even though they do not directly cause any damage, contribute to the provocation or initiation of such damage, i.e. when the tortfeasors are essentially related due to their common fault, irrespective of whether it was committed intentionally or negligently; (4) the tortfeasors are not related due to their common actions and they do not know each other, but they cause damage and it is impossible to establish to what extent each of them contributed to such damage, or damage was caused due to all of their actions; (5) the obligation to compensate damage arises on a different basis (e.g., based on contract and based on tort); (6) damage is caused by the tortfeasor, but another person is responsible for the tortfeasor's actions. 22

None of the aforesaid conditions was established in the present case. According to the Court, the lower courts did not take into account the fact that (i) the tortfeasors did not act in concert and that they acted at different times, (ii) the relationship of their actions to the damage caused was different and (iii) their fault was not the same. The lower courts also failed to establish a legal basis for the application of solidary liability or to provide motives why they did not apply divisible liability. Therefore the case was returned to the court of first instance. 23

c) Commentary

Bearing in mind the fact that this case was decided by the Court's broadened panel of seven judges (rather than of three, which is usually the case), and that the language of the judgment is rather broad and far-reaching, it should serve as an important precedent for further differentiation of the grounds for application of solidary and divisible liability. This ruling has already been cited in another recent Court case No. 3K-3-388/2008 of 15 September 2008, where the Court's application of solidary liability was based on the common actions of the two tortfeasors not only with respect to illegality of their actions (i.e. both tortfeasors illegally published and distributed some intellectual property items), but also with respect to indirect damage (i.e. due to the actions of both 24

tortfeasors the plaintiff suffered damage in the form of lost income).[4] In this regard the mere enumeration of six conditions, when the solidary liability is to be applied in tort situations (see supra no. 22), creates more clarity and establishes some line of demarcation between the concepts of solidary and divisible liability; on the other hand, an exhaustive list of conditions for the application of solidary liability is *per se* risky due to a potential failure to indicate some other relevant condition or due to a constant development of the Court's jurisprudence in this area of law.

25 Finally, clarification of the grounds for application of solidary liability becomes even more important in the light of a recent Court holding that the concept of solidary liability should be applied by courts at their own discretion: when it is established in the case that the obligations of the debtors are solidary, then the court should apply solidary liability *ex officio,* i.e. irrespective of the existence of the plaintiff's request to apply such liability (Court case No. 3K-3-388/2008 of 15 September 2008). Thus, the courts may no longer ignore the issue of application of solidary liability due to the plaintiff's failure to request such liability; instead, a court should apply solidary liability *ex officio* in tort cases every time when at least one of the aforesaid six conditions (see supra no. 22) is established.

3. Compensation in Personal Injury Cases

26 There were no major changes in the jurisprudence of the Court in 2008 with respect to the compensation amounts awarded in personal injury or wrongful death cases. To the best of the authors' knowledge, the top award of € 145,000 as non-pecuniary damages in a case from 2005 has not yet been exceeded.[5] However, there were several judgments in 2008 related to the determination of the amount of non-pecuniary damages that are nevertheless worth mentioning in this report.

27 In the case *D.G. and V.G. v. AB "(duomenys neskelbtini[6])"* (Lithuanian Supreme Court, No. 3K-3-556/2008 of 10 December 2008) the Court awarded non-pecuniary damages of LTL 140,000 (approx. € 40,500) to parents of their deceased son, even though two courts of lower instance had dismissed the plaintiffs' claim completely. Their son, working as a stock keeper in a big factory, died as a result of an accident at work, for which the employer was found liable. His parents, who were living together with their son until the accident and had a close relationship with him, suffered mental pain and suffering, emotional depression and huge psychological distress due to the wrongful death of their son. Each of the parents was therefore awarded non-pecuniary damages of LTL 70,000 (approx. € 20,250).

[4] Thus, both conditions (1) and (2) for the application of the subsidiary liability, as indicated by the Court in the case No. 3K-7-59/2008 and enlisted in no. 22 above, have been satisfied in this case.

[5] *H. Gabartas/M. Laučienė* in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 402–405.

[6] Data about the defendant is not public.

The second case *Ž.Ž. v. UAB "Ekstra žinios" and UAB "Lietuvos rytas"* (Lithuanian Supreme Court, No. 3K-3-393/2008 of 14 August 2008) is related to compensation for the breach of the right to privacy (and not for personal injury or wrongful death), however, it reflects the trends relating to the amounts paid out in compensation for non-pecuniary loss. In this case the plaintiff's right to private life was breached by a newspaper, which published an article about the plaintiff's illegitimate child and his pre-marital sexual relations without obtaining any consent from the plaintiff. The Court held that in cases of the breach of personal non-property rights and values such as the right to private life, personal honesty and dignity, the non-pecuniary loss is usually not so obvious as in cases of personal injury or wrongul death, therefore the seriousness of the breach and the tortfeasor's fault are important when determining the amount of non-pecuniary damages in such cases. The Court therefore reduced the non-pecuniary damages of LTL 25,000 (approx. € 7,250) that were determined by the appellate court and awarded the plaintiff LTL 10,000 (approx. € 2,900). 28

In the authors' opinion, the awards of non-pecuniary damages, varying from LTL 10,000 (approx. € 2,900) for the breach of the right to privacy to LTL 70,000 (approx. € 20,250) for the relative's wrongful death, do not significantly deviate from the Court's earlier practice and adequately reflect the general economic standing of the country. 29

C. Literature

1. *S. Cirtautienė*, Neturtinės žalos atlyginimas kaip civilinių teisių gynimo būdas (Compensation of Non-Pecuniary Damage as a Legal Remedy) Justitia 2008

The monograph is based on the doctoral dissertation written during the period of 2003–2007 and defended at Mykolas Romeris University in 2008. In this study the author analyzes compensation of non-pecuniary damage as a legal remedy, its legal regulation and the way the issue is applied by courts. The focus is on the factors inducing the development of this institute and the criteria defining the limits of compensable amounts. It is the first study on this topic in Lithuania. It is a comparative study which seeks to analyze the law and practice of European countries, compare it with the practice of Lithuanian courts and identify the ways this practice could be improved. The study is a systematic analysis of the models of compensation of non-pecuniary damage. It criticizes the traditional approach to this topic which allows for compensation of non-pecuniary damage only in exceptional circumstances and for instances prescribed by law. The study also identifies the criteria which could be applied when deciding the issue of compensation of non-pecuniary damage. 30

The study is structured into four chapters. The first chapter contains a general comparative analysis of the regulation of compensation of non-pecuniary damage in European countries. Key historical stages of development on the 31

issue are discussed: the current model of a general rule of compensation of non-pecuniary damage as a legal remedy has developed from a model of compensation of non-pecuniary damage as a penalty for violation of non-pecuniary values. However, in view of the author, the current model faces a problem of a balancing of legal interests and legal certainty, since non-pecuniary damage cannot be calculated solely on the basis of objective financial criteria.

32 In the second chapter a comparative study of the purposes of the institute of compensation of non-pecuniary damage is made, leading to a conclusion that it seeks to compensate the victim and to re-instate the balance of violated interests.

33 The third, longest chapter, focuses on the core criteria which lead the courts to their decision whether to award non-pecuniary damages. The legal grounds leading to an award of non-pecuniary damages are discussed, just as the possible claimants (natural persons and legal entities) who could claim such damages. The chapter is concluded with an observation that the damages awarded are directly dependent on the importance of the value infringed, but the current regulation is not sufficiently efficient. The author suggests introducing legislative criteria which the courts should take into consideration when deciding the claims for an award of non-pecuniary damages, which could then be developed in court practice and doctrinal writings. She sees this as a solution to the problem of abuse of the institute of compensation of non-pecuniary damage. She also considers that the current trend to expand the possibilities to obtain non-pecuniary damage for third parties should be restricted, and the best way for that would be to introduce a legislative provision clearly identifying who could claim such damages. She further argues that it is necessary to clearly define the circumstances under which legal entities could claim non-pecuniary damages.

34 The final chapter focuses on the criteria assessing compensable non-pecuniary damage. It leads to a conclusion that there are limits to the discretion of courts in assessing non-pecuniary damage. Since compensation needs to be reasonable, it is necessary to apply clear criteria which would reflect social changes, take into consideration the particular circumstances of each case, would not unreasonably restrict or expand the scope of civil liability, and would duly take into consideration the lawful interests of both the claimant, the defendant and society, and would not encourage abuse of the right to claim compensation for non-pecuniary damage.

2. *S. Selelionytė-Drukteinienė*, Valstybės deliktinės atsakomybės raidos tendencijos (Development Trends of Tort Liability of States) doctoral dissertation, Mykolas Romeris University 2008

35 The dissertation was written in the period 2004–2008 and defended in 2008 at Mykolas Romeris University. It seeks to identify development trends of tort liability of states and to consider the approach of Lithuanian courts to this topic in a comparative context. The dissertation is divided into two parts. The first part deals with the concept of state immunity, its historical development and

the factors on which the doctrine of state immunity is based, its specificities. In this part the author seeks to disclose the content of the doctrine of state immunity as it is applied in selected countries under national law and compares it with the understanding of the doctrine which is applied in Lithuania. The author concludes that the doctrine of state immunity no longer corresponds with the purposes of a modern rule of law state. The courts of a modern rule of law state should be ready to apply a general rule of tort liability also against the state. Although this principle is applied in Lithuania, the practice could be improved by providing for state liability in the case of damage which occurs as a consequence of lawful acts when this is necessary in order to ensure the principles of social solidarity and equality. Since no written legal provision precludes establishing liability for lawful acts, the courts are free to interpret them as allowing such liability. The scope of state liability under Lithuanian law could be legitimately controlled: a state liability regime could be applied only for damage occurring as a consequence of *iure imperii* acts; the content of the notion of wrongfulness could be restricted; a requirement to establish that a wrongful act within the meaning of the public law has occurred could be imposed if a "sensitive" area of state activity is involved, the notion of qualified fault (or an "official fault") could be introduced.

The second part of the dissertation addresses the scope of state tort liability and its prerequisites – the notions of fault and wrongfulness. It is argued that the "official fault" doctrine is no longer sufficient for the purposes of state liability. The relationship between the notions of wrongfulness under public law and under tort law is considered, as well as the problems arising in this field due to the nature of the acts which cause damage (discretionary and regulatory legislation) and due to the entities which adopt them (i.e. legislative acts or judicial decisions). The author also discusses state liability for lawful acts arguing that such liability is necessary in a modern state. She argues that the efficient protection of rights can only be ensured if the law allows parties to obtain reparation for damage caused by all state institutions, including the legislature and the judiciary. The author suggests that the wording of Lithuanian legislation concerning immunity and state liability should be improved, as they raise questions concerning their constitutionality and efficiency. Furthermore, disregarding the absence of restrictions on state liability in legislative acts, the courts remain confused as to how to interpret them. They tend to apply the doctrine of immunity, they remain reluctant to apply the doctrine of state liability without fault, they do not recognize state liability for damage caused by the legislature and do not accept the possibility of awarding damages for discretionary and regulatory measures. As a result, in practice, the rules on state liability are distorted and do not ensure efficient protection of the rights of private persons. Finally, the author suggests specific amendments to the laws currently in force which could encourage the courts to expand the scope of state liability under Lithuanian law.

3. *V. Mikelėnas,* "Kailiukų bylos" pamokos: keli klausimai perskaičius Europos žmogaus teisių teismo sprendimą byloje Jucys v. Lietuva (Lessons from the "Fur Case": Several Thoughts after Reading the European Court of Human Rights Judgment in Jucys v. Lithuania Case) Justitia No. 2 (68) (2008) 2–12

37 The article is written by perhaps the greatest authority on Lithuanian civil law, a former Supreme Court judge, a co-author of the Civil Code of 2000, and a long-term professor of civil law at Vilnius University. It focuses on the 2008 case, *Jucys v. Lithuania*, decided by the European Court of Human Rights. The author analyzes the mistakes made by the Lithuanian courts which led to this judgment.

38 The case arose in December 1995, when Lithuanian customs authorities decided to confiscate a cargo of furs brought from Denmark allegedly as contraband goods. The prosecutor then decided to auction the goods assuming that the cargo was perishable. The state organized an auction which generated 2/3 of the amount the owner had paid for the furs originally. In January 1997 all charges were dismissed. The owner subsequently brought a claim for compensation of damage under art. 512 of the Civil Code of 1964 (hereinafter – CC). Litigation before Lithuanian courts continued until October 2007, when the Supreme Court decided to uphold the decision of a District Court, which had awarded the claimant LTL 590,056.05, having deducted the costs of organizing the auction and the VAT, which constituted less than 45% of the original value of the confiscated goods. The court also awarded interest from the date of the judgment of the Supreme Court of 2006. The European Court of Human Rights found a violation of the right to property.

39 The author considers that the major error of the Lithuanian courts was the decision to treat the claim as a claim of unjust enrichment (governed by art. 512 of the CC) instead of a claim for tort liability of the state (art. 486 of the CC). Whereas a claim for tort liability entitles the claimant to seek restoration of the situation which was prior to the violation, the legal regulation of unjust enrichment only allows restitution of property to its lawful owner – there is no possibility to claim compensation of non-pecuniary damage. Also, both the CC of 1964 and the CC of 2000 treat the regulation of unjust enrichment as subsidiary to the regulation of tort or contractual liability. Furthermore, Lithuanian law respects the principle of *non cumul*, which means that a person does not have a right of choice between the possible claims.[7] Notably, the rules of unjust enrichment could be applied if the rules on tort liability would not lead to full compensation of damage. This possibility is envisaged also in art. 6.249 of the CC 2000. Noting that the practice of Lithuanian courts on this issue is inconsistent and contradictory,[8] the author argues that the dismissal of charges in criminal investigations should be accepted as a factor demonstrating wrongfulness for the purposes of tort claims. The author also heavily criticizes the decisions of the courts regarding the award of interest.

[7] *Mikelėnas*, Justitia No. 2 (68) (2008) 4.
[8] Ibid., 6.

4. *D. Ambrasienė/S. Cirtautienė*, Ikisutartinės atsakomybės kvalifikavimo problema: sutartinė, deliktinė ar sui generis (The Problem of the Nature of Pre-Contractual Liability for Breach of Contract: Contractual, Tort or Sui Generis) Jurisprudencija Vol. 10 (112) (2008) 52–63

The article is authored by two professors teaching at Mykolas Romeris University who also have extensive practical experience. D. Ambrasienė was a judge at the Supreme Court of Lithuania, whereas S. Cirtautienė previously worked as a legal advisor at the same court. 40

The article begins with the observation that there is no consistent doctrine on pre-contractual liability neither in recent Lithuanian legal writings nor the court practice. Opinions vary especially on the question of which type of liability rules – contractual, tort or *sui generis* – should be applied when a party breaks off negotiations in bad faith. The authors consider that it is necessary to establish a clear scope of pre-contractual liability and to identify precisely the liability rules which apply in such cases for the purposes of legal certainty and stability of contractual relationships. In the first part of the article the authors provide an overview of the regulation of pre-contractual liability in European countries. They observe that, although most legal systems recognize the need to regulate the parties' relations at the stage of contract formation, their approach to this issue differs, especially regarding its scope and the way pre-contractual liability should be established. Some civil law jurisdictions generally recognize this duty as a general principle of law, whereas others provide for specific governing legal framework. 41

In the second part of the article the authors discuss whether the rule requiring the parties to negotiate in good faith and the claim for pre-contractual liability of a defendant is a matter of tort, contract or quasi-contract. The authors argue that in order to establish pre-contractual liability it is necessary to identify the nature of negotiations and the factors determining the scope of liability for their breach. The authors conclude that neither the Civil Code of the Republic of Lithuania nor the practice of courts provide for sufficient grounds allowing the application of contractual or tort regimes fully for the pre-contractual stage. They distinguish two reasons for this. Firstly, an ultimate factor leading to liability during the pre-contractual stage is the reliance of the negotiating parties. In such relations the aggrieved party may recover only the expenses incurred during the negotiations and the costs of lost opportunity to conclude another contract with a third person (a so-called reliance or negative interest), but it is not possible to claim profits which would have been earned had the original contract been concluded (a so-called expectation or positive interest). Consequently, there is not sufficient ground to treat pre-contractual liability as contractual. A contrary finding would lead to a breach of the principle of the autonomy of the parties and their freedom of contract. Secondly, under a general rule, an understanding that negotiations involve an inevitable risk and that the parties are free to contract means that no responsibility could be established. Consequently, only if a contract is formed may the courts consider the contract to understand the relations and obligations between the parties. 42

In case of ambiguity, the court may analyze other evidence. If no contract is concluded, the obligations between the parties usually have to be considered under the rules of tort law, although this regime might be insufficient to protect the interests of an aggrieved party. In addition, when the parties conclude a preliminary agreement, the extent of liability is determined not only by the statutory regulation, but also by the preliminary agreement of the parties. The authors conclude that in the Lithuanian legal system pre-contractual liability should be treated as a separate – *sui generis* – kind of liability.

5. *S. Selelionytė-Drukteinienė*, Deliktinės ir sutartinės atsakomybės konkurencija (Delimiting Tort and Contract Liability) Justitia No. 1 (67) (2008) 2–14

43 In this article the author considers the issue of how to delimit tort and contract liability under Lithuanian law. She also extensively discusses the understanding of this problem in France, Germany, England and Estonia. The issue has never been addressed in Lithuanian scholarly writings before, and the practice of courts is rather scarce. The author analyzes two Supreme Court cases of 2003, noting that in neither of them did the Court analyze the issue closer, and describes the approach the Court took there as "reminiscent of an attempt to reinvent a bicycle".[9] The author concludes with the following observations: a) even though a case would involve a conflict between tort and contract liability, the Supreme Court so far has not identified the issue; b) the Supreme Court so far has not allowed the claimant to choose whether to invoke tort or contract liability, and c) the Court applies the rules of tort liability.

44 Further, the way the Supreme Court addresses the situation of contractual chains is discussed. In one such case the Court decided that there were no *legal relationships* between an airline company, which concluded a contract with a travel agency for the provision of airline services, and the claimants (unsatisfied travellers who had bought a travel package and lost their luggage on the flight with these airlines). In view of the Court, legal responsibility could be invoked only against the travel agency.[10] The author considers that the Court was mistaken deciding that there were no legal relationships between the airline company and the travellers. Although there was no contract between these persons, since the activities of the airline resulted in damage to the travellers, the issue of tort liability could arise. In another case the Court decided that a producer of a peat-based soil substrate was not a correct respondent in a case of a person whose plants were damaged as a result of the product, because the product was bought from a retailer, and not directly from the producer.[11] However, the subsequent case law of the Supreme Court indicates different guidelines on this issue.[12] Regretting that the Supreme Court did not explain

[9] *Selelionytė-Drukteinienė*, Justitia No. 1 (67) (2008) 7.
[10] Supreme Court Case No. 3K03-524, decision of 6 October 2004.
[11] Supreme Court Case No. 3K-3-458, decision of 19 October 2005.
[12] The author discusses the Supreme Court Case No. 3K-3-364, *UAB "Estinos arka" v. AB "Pagirių šiltnamiai"*, decision of 20 June 2006, where the court decided to allow a direct tort claim, despite the absence of a contract between the parties.

the reasons which led to its choice, the author concludes that it nonetheless tends to apply the model of the English and German courts on the issue of contractual chains. Nonetheless, she concludes, it remains unclear whether the Court would allow any exceptions from the model.

6. *S. Selelionytė-Drukteinienė*, Valstybės veiksmų neteisėtumas kaip pagrindas atlyginti žalą (Wrongfulness of State Act as a Condition of State Liability) Justitia No. 2 (68), (2008) 13–24

In this article the author considers the notion of unlawfulness as a necessary condition for finding state liability. Taking into consideration the double nature of the rules of state liability, the article particularly focuses on the relationship between the notion of wrongfulness under public law and wrongfulness under tort law in order to determine whether the former is sufficient to find state liability. The author also discusses the importance of fault for the purposes of state liability. A comparative analysis of German, French, Belgian and Dutch regulation of the question is made. In this context the practice of Lithuanian administrative courts and the courts of general competence is extensively analyzed. The author concludes that for the purposes of legal certainty and clarity it is necessary to find public wrongfulness in order to establish liability in tort. However, exceptions from this rule are necessary, for example when the institution on its own initiative has corrected its wrongful conduct, when wrongfulness is due to inaction, etc. With regard to fault, the author concludes that Lithuanian law provides for strict state liability, except for damage which occurs as a consequence of unlawful acts of judicial institutions. She also concludes that under Lithuanian law it is sufficient to establish wrongfulness within the meaning of public law in order to find wrongfulness for the purposes of state liability. 45

7. *K. Zamarytė*, Civilinės atsakomybės už klinikinių vaistinių preparatų tyrimų metu tiriamajam asmeniui padarytą žalą probleminiai aspektai (Problematic Issues of Liability in Clinical Trials of Medicinal Products) Jurisprudencija Vol. 12 (114) (2008) 52–63

Noting that Eastern European countries are particularly attractive to pharmaceutical companies to conduct their clinical trials of medicinal products, the author discusses legal regulation of liability in this area in Lithuania. Initially she considers whether the obligations of an investigator are equivalent to those of a doctor, finding that, depending on the purpose of the research trials, they could be similar and the conduct of investigation might fall within the scope of the notion of health care services under art. 6.275 of the Lithuanian Civil Code. 46

Art. 6.264 of the Civil Code provides for a mechanism of indirect liability, when damage is to be compensated not by a person as a consequence of whose conduct they have occurred, but his employer. For the purposes of establishing liability for health damage, the Law on Patients' Rights and Compensation of Health Damage requires either demonstrating the fault of the institution or its workers or proving that the institution ignored the ethics requirements of biomedical trials. The Law further provides that fault may be established even 47

if those requirements are met although the patient's health has deteriorated or he died as a consequence of intentional conduct to cause damage or lack of due diligence. The Supreme Court interprets the obligation of due diligence as an obligation to act in accordance with the law, to adhere to professional standards and to be as diligent as one would expect from a good faith service provider. In his claim for liability a patient needs to establish a violation of an obligation to provide qualified and diligent assistance, occurring damage and a causal link between the lack of due diligence of a doctor and the occurring damage.[13] However, the Court has not yet had an occasion to interpret what conduct would be considered as inconsistent with the requirements of biomedical research ethics.

48 Another question is whether a health care provider would be liable for damage occurring without fault or for a violation of due diligence standards. Art. 6.248 of the Civil Code does not preclude the need to compensate such damage, but it needs to be envisaged in a contract or a separate law. Such liability is governed by art. 11 of the Law on Biomedical Research Ethics, which identifies that liability for health damage and non-pecuniary damage lies on the sponsor and the investigator, unless they prove that damage occurred due to reasons unrelated to the biomedical research or due to intentional conduct of the patient. The Law also omits to regulate practical issues concerning liability in damages between the sponsor of the trials and the investigator for liability without fault. Consequently, it is necessary to include relevant provisions into a contract. A rational rule would provide for liability of the sponsor of the trials. With regard to non-pecuniary damage, the Law on Patients' Rights provides that a maximum award of non pecuniary damages is 50 minimum monthly salaries. The author considers that this restriction is not constitutional.

49 In the other parts of the article the author considers the reasons which would preclude liability in medical research trials and the issues relating to liability insurance, discussing EC Directive 2001/20/EC on the issue and the way it was implemented in Lithuania. The author notes that the minimal amount of such insurance under the insurance rules valid in Lithuania is LTL 100,000 (approx. € 30,000), which is far too low taking into consideration the minimal amounts defined by the laws of other European countries. The author also notes that compulsory health care services insurance does not encompass damage which occurs as a consequence of clinical trials of medicinal products which violate legal regulation. The laws also do not provide for a possibility of voluntary liability insurance in similar instances. The author considers that the Rules of Insurance must be supplemented with clear definitions of the notions of lawful and unlawful biomedical trials and linking them with the permit to conduct the trial. Also, the law should provide for a possibility to insure the liability of the health care institution for damage caused to patients.

[13] Supreme Court Case No. 3K-3-556/2005, judgment of 9 November 2005.

8. *G. Dabulskytė*, Ginčai dėl materialinės atsakomybės darbo ginčų sistemoje (Employment Liability Disputes) Teisė Vol. 68 (2008) 85–96

In her article the author, a doctoral student at Vilnius University, discusses the topic of employment liability disputes under Lithuanian law. She notes that despite a new legal instrument governing employment law – an Employment Code – the essential principles of regulation are from the Soviet law, just as the distinction between individual and collective dispute settlement and lack of familiarity with a classification of employment disputes in accordance with their subject matter. The author seeks to identify the drawbacks of this particular distinction and suggests a system to settle employment disputes. In the first part of the article she questions whether the employee liability disputes fall within the category of individual disputes and thus whether it is possible to consider that they should be decided by courts. Having analyzed the legal framework concerning the applicable procedural law for their resolution, she concludes that legal regulation does not provide a clear answer to this issue. She contrasts this practice with the practice of Russia and Estonia. 50

Further, she points out that the Employment Code includes a notion of collective agreement of employee liability pursuant to which liability for damage would be incurred by all employees who have signed it. The question is whether disputes concerning such agreements should be treated as individual disputes or collective ones. Some Lithuanian legal scholars consider that they are collective. Under the laws of Latvia and Estonia, the groups of employees in such disputes would be considered as individual claimants. 51

The author also points out that the disputes concerning employer's liability for employee's death under the legislation would not be considered as individual disputes, because the legislation defines them as disputes which occur only between an employee and an employer, whereas in these disputes the parties may be also the dependents of the deceased or those who had a right to maintenance by the deceased. As a consequence, the procedure to resolve employment disputes would not be applicable to such disputes in Lithuania, although it would in, for example, Germany. The author considers that employment liability disputes should be decided by courts, omitting the need to refer the dispute to a pre-trial dispute resolution commission. 52

9. *R. Volodko,* Neturtinės žalos identifikavimo ir įrodinėjimo problemos (Legal Problems Related to Determining and Proving Non-Pecuniary Damage) Justitia No. 2 (68) (2008) 25–35

Having noted that not every breach of a right causes non-pecuniary damage, in this article the author discusses how to determine whether non-pecuniary damage has occurred and the problems of proving it. She notes that expert evidence on the occurrence of non-pecuniary damage is rarely sought in the practice of Lithuanian courts due to duration of the proceedings and financial concerns, but also due to a lack of awareness of the questions which would need to be posed to an expert. Noting that the principle of presumption of non-pecuniary damage is not recognized under Lithuanian civil law, the author draws atten- 53

tion to the opinion of some writers that in certain cases such a presumption could be applied. She notes that such practice might not always be fair with respect to respondents and discusses a few cases demonstrating that the courts differ in their opinion as to whether this presumption could be applied or not. She argues that the position against the presumption of occurrence of non-pecuniary damage should be preferred and expert evidence should be sought more often in order to establish whether such damage has actually occurred.

10. *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 Vol. 66 (2) (2008) 112–126

54 This article considers the question whether the insurance company of a person who has caused a car accident could be concurrently liable for non-pecuniary damages and the possible scope of such liability. In view of the author, the practice of courts on this question differs from the views expressed in scholarly writings and is quite inconsistent. The author discusses the problems arising out of the Law on Liability of Motor Vehicle Owners which was already amended in 2004 and which has been clarified by the practice of the Supreme Court. As amended, the Law provides that the insurer is liable in non-pecuniary damages up to € 500. The issue remains topical in practice, since the version of the Law which is discussed in the article remains applicable for claims arising out of events which occurred before the Law was amended. Yet, even after the entry into force of the amendment to the Law on Liability of Motor Vehicle Owners, the issue remains hotly discussed both in recent court practice and during the drafting process of the new edition of the Law. Although the courts follow a general rule that full compensation needs to be paid, in insurance claims the victim may file a claim against the insurer directly, and may file a concurrent claim against the violator if the compensation awarded from the insurer does not cover all occurring damage. However, the courts differ on the question whether this rule applies for claims for non-pecuniary damages. The first edition of the Law on Liability of Motor Vehicle Owners did not include a clear rule concerning compensation of non-pecuniary damage, although it used an abstract notion of personal injury, which could be interpreted as also encompassing non-pecuniary damage. There is consensus in civil law doctrine that the notion of personal injury encompasses the possibility to claim for both pecuniary and non-pecuniary damage. However, the practice of the courts on this issue varies. One position is that the insurer is only liable in non-pecuniary damages if the insurance contract includes a specific provision to this effect. The courts base this opinion inter alia on the amendment of the Law restricting insurer's liability to € 500 arguing that this Law could not apply retroactively.

55 On the other hand, the Supreme Court follows the doctrinal opinion that the insurer is liable for both pecuniary and non-pecuniary damages within the insurance amount. However, since the Supreme Court itself has emphasised that only those decisions which are approved in its guidelines of unification of

court practice constitute legally binding precedents, the problem of inconsistent decisions remains. The problem became even more acute after the Constitutional Court issued a ruling stating that the courts of general competence are bound by their own decisions and the decisions of the courts of higher instance. It was expected that the issue would be finally decided after the decision of the Supreme Court in *O.V. v.UAB DK "PZU Lietuva"*[14] which was decided by the Supreme Court in its expanded composition and was later approved in its Practice of Courts' Unification Guidelines. In this case the Court followed the principle that what is not prohibited is allowed – consequently since the Law did not provide that the insurer is not liable for non-pecuniary damages, there was no rule which could preclude the courts from awarding them. The subsequent amendment of the Law should be viewed as only restricting liability of insurers, and not imposing it.[15] Despite this decision, the author discusses one subsequent decision which disregarded this approach, arguing that the problem is not yet fully resolved. She also notes that the subsequent amendment restricting the amount of non-pecuniary damages to € 500 has also raised doubts in the courts as to its constitutionality – a reference to the Constitutional Court on this question is currently pending. The author also raises a question whether this restriction does not contradict the EU Directives on the issue and the practice of the ECJ, although there is no clear answer whether the issue remains a matter to be governed by the national state or is to be considered as falling within the harmonized insurance rules.

11. *L. Didžiulis*, Bendrovės vadovų civilinė atsakomybė kreditoriams (Company Directors' Liability to Creditors) Justitia No. 3 (69) (2008) 53–65

The author addresses the institute of company directors' liability to creditors. 56
The article is a comparative study of the institute, as it is governed in the U.S., the U.K., France, and Lithuania. The first part of the article describes the restrictive and repressive theories of company directors' liability. Referring to a Supreme Court of Lithuania case of 2006[16] the author concludes that Lithuania follows the interim theory, pursuant to which company directors in general are not liable to creditors, but under certain circumstances, such as when criminal activities are committed, such liability may be established. In the second part of the article the author considers closer the statutory rules of Lithuanian law which could be invoked for the purposes of establishing company directors' liability and their development. The article is concluded with a discussion of the doctrine of wrongful trading.

[14] Supreme Court Case No. 3K-7-115/2006 of 11 April 2006.
[15] *Volodko*, Teisė No. 66 (2) (2008) 119.
[16] Supreme Court of the Republic of Lithuania, decision in Case No. 3K-7-266/2006 of 25 May 2006.

12. *A. Matkevičius,* Civilinė atsakomybė bendrovės komercinių paslapčių apsaugos pažeidimų atvejais (Civil Liability for Misappropriation of Commercial Secrets) Jurisprudencija Vol. 5 (107) (2008) 50–60

57 In this publication the author, a doctoral student at Mykolas Romeris University, considers mostly the legislative regulatory issues of civil liability for misappropriation of commercial secrets under Lithuanian law. The issue is in principle governed by art. 1.116 of the Civil Code of the Republic of Lithuania of 2000, but has not so far been considered in legal writings. The author describes the major legislative concepts relating to liability for disclosure of commercial secrets under Lithuanian law. In the first part of the article he discusses the system of legal remedies available under civil law, in the second part he outlines the particularities of civil liability for disclosure of commercial secrets, and finally he addresses issues relating to civil liability for disclosure of commercial secrets during a pre-contractual stage of the relationship of the parties. In the second part he notes that, apart from contractual liability, disclosure of commercial secrets and/or confidential information may incur tort liability, as the duty to safeguard this information may arise from laws. For example, the duty of confidentiality is included in art. 6.164 of the Civil Code, and under the company law company managers are under a duty of confidentiality regarding the confidential information and commercial secrets that they learn while working for the company. Disclosure of commercial secrets to a competitor is considered as one of the grave violations also under the Labour and Employment Codes.

13. *G. Surblytė*, Atsakomybė už neteisėtą komercinės paslapties įgijimą, atskleidimą ar jos naudojimą (Responsibility for Misappropriation, Disclosure or Disposition of Commercial Secrets) Justitia No. 3 (69) (2008) 41–52

58 In her article the author, a doctoral student at Munich University, addresses the topic of liability for breach of obligations regarding commercial secrets under Lithuanian law. She also addresses the general legislative legal regulation of commercial secrets starting with a rather detailed discussion on their definition. In the second part of her article she mostly focuses on criminal responsibility for misappropriation of commercial secrets, their disclosure or disposition. She also briefly discusses relevant civil liability issues.

14. *A. Marcijonas/I. Žvaigždinienė,* Miško savininkų atsakomybė už žalą aplinkai, padarytą neteisėtais kirtimais jiems nuosavybės teise priklausančiame miške (Forest Owners' Liability for Damage to the Environment Occurring as a Consequence of Unlawful Forest Cuttings) Teisė Vol. 68 (2008) 7–20

59 The authors, an associate professor and an assistant lecturer at Vilnius University Department of Administrative and Constitutional Law, were prompted by practical reasons to write this article – the number of unlawful forest cuttings in Lithuania is increasing, and the majority of them occur in private forests. The authors analyze the legal regulation of responsibility for such unlawful

activities (administrative, criminal and substantive), the practice of courts on this issue and seek to identify the ways to improve it. Substantive responsibility under Lithuanian administrative law encompasses an obligation to compensate damage to the environment and also an obligation to cover the preventive measures and insurance, as well as an obligation to restore the environment to the situation it was in prior to the violation. However, the authors note an inconsistency between the Law on the Forests and the Law on Environmental Protection. The former requires either restoration of the situation which was prior to the violation *or* compensation for the damage caused, whereas the latter requires both restoration of the situation prior to the violation *and* compensation for the damage which occurred. Art. 23(1) of the Law on Forests is also important because it makes a clear distinction between the damage to forests which are either owned, managed or used or to other property and lawful interests (damage to the forest as an object of property) and the damage to the forest as an object of the environment. This distinction determines the mechanism chosen to compensate the damage.

60 The damage to the environment is determined on the basis of the rules approved by the governmental resolution No. 521 of 2002. This provides that legal and juridical persons have to compensate the damage inflicted on the environment by their unlawful activities or, if possible, to restore the environment to the situation it was in prior to the violation. Thus, this provision provides for responsibility based on fault, which contradicts the Law on Environmental Protection, as it does not subject the duty to compensate with the factor of legality of the act or fault. Further, the provision follows the regulation of the Law on Forests, providing for an alternative duty either to pay compensation or to restore the environment to the status it was in prior to the violation. However, the owners of private forests are always under an obligation to both compensate the damage to the environment and to restore the environment to its previous status.

61 A more complicated situation arises when the damage in private forests is inflicted by other persons – it is always difficult to establish the violator, and in such situation neither the damage to the environment, nor the damage to the owners, managers or users of the forest would be compensated. Despite that, the owners, managers or users of the forest would remain under an obligation to restore the forest to the situation before the violations occurred.

62 The authors consider that it would be reasonable to establish a stricter responsibility of the owners, managers or users of the forest to ensure sanitary and phytosanitary measures in their forests and to take adequate measures to prevent unlawful cuttings in the forests.[17] Currently, the Code of Administrative Violations provides for a fine for similar violations in the range of LTL 200 to LTL 1000 (approx. € 60 to € 290). In the view of the authors, these fines are not sufficiently "encouraging" to ensure more efficient and intensive preventive measures. The authors are satisfied with the practice of courts imposing

[17] *Marcijonas/Žvaigždinienė*, Teisė Vol. 68 (2008) 17.

the fines for similar violations, although some problems arise with regard to the application of the regulations governing the determination of damage. In this regard the authors note one case of the Supreme Court[18] where the Court made two important findings regarding responsibility for damage to the environment. First, the damage to the environment needs to be calculated not on the basis of the market value of the damaged area, but on the basis of the nature of the cuttings, the group of the forest and the amount and quality of the trees cut down unlawfully. Second, the decision is important also because the Court interpreted the obligation to compensate the damage in the context of restitution of the nationalized private property. The Court found that a person who has conducted unlawful cuttings in a forest which later was restituted to him is only under an obligation to compensate the damage to the environment, and not to the state as a de facto manager of the forest. The Court considered that it was immaterial that the person was granted formal property rights to the forest only after the unlawful cuttings.

[18] Supreme Court Case No. 3K-3-472/2004.

XVII. Malta

G. Caruana Demajo, L. Quintano and D. Zammit

A. Legislation

1. Prevention and Remedying of Environmental Damage Regulations (Subsidiary Legislation 435.80)[1]

The only piece of legislation with relevance in the field of tort law to be enacted during 2008 was the Prevention and Remedying of Environmental Damage Regulations, enacted on 29 April 2008 by Legal Notice 126 of 2008 under the Environment Protection Act[2]. The purpose of these Regulations is to establish a framework of environmental liability based on the polluter-pays principle, to prevent and remedy environmental damage and to implement the provisions of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004. 1

The Regulations designate the Malta Environment and Planning Authority as the competent authority responsible for the environment. Operators of economic activities are placed under a duty to take all necessary preventive measures to avoid environmental damage and to take remedial measures where damage has occurred. 2

The liability of the operator for environmental damage is not absolute but is based on fault, and the operator may avoid liability if he shows that he was neither at fault nor negligent and that he observed all relevant regulations and conditions. 3

The authority may initiate proceedings to recover the cost of the preventive or remedial measures within five years from the date when the measures were completed or when the liable party was identified, whichever is the later, unless more than thirty years have passed since the damage occurred. 4

Third parties who are affected or likely to be affected by the environmental damage or who can show sufficient legal interest are entitled to submit to the 5

[1] http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/435/80.pdf.
[2] http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt435.pdf.

authority any observations relating to instances of environmental damage of which they are aware and are also entitled to request the authority to take action under the Regulations. For the purposes of this provision, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law is deemed sufficient.

B. Cases

1. *Yvonne Cassone et v. Alfred Calamatta et nomine*, Writ no. 1247/1994, Court of Appeal, 29 February 2008: Liability of Employer for Criminal Activity of Third Parties[3]

a) Brief Summary of the Facts

6 The husband and father of the plaintiffs was employed by the defendant company as catering manager in a catering establishment run by the defendant. While on the premises of the defendant company in the course of his duties, he was murdered by unknown third parties during an armed robbery. The plaintiffs alleged that the defendant company was liable for damages because it failed to take proper precautions, citing the fact that (1) there was no alarm system whereby the employees could summon help in the case of an emergency; (2) there was no emergency exit; and (3) there was insufficient lighting.

b) Judgment of the Court

7 The first instance court held that the defendant company was liable. The duty of an employer to provide a safe place of work places upon him the obligation to do all that is reasonably possible to protect his employees from dangers caused not only by machinery, plant and other inanimate objects and by negligence, but also by malevolent human agency. Force majeure excludes liability only where no fault of the employer contributes to the event. It is not possible to control access to the public area of a commercial establishment; it is therefore not implausible that persons with criminal intent may freely enter. Accordingly, the employer should have seen to the safety of his employees by at least providing an escape route or a secure enclosed space for use in case of danger.

8 The Court of Appeal reversed the judgment of the first instance court, and held that the defendant company was not liable. Without rejecting the principle that, in addition to taking precautions against health hazards, occupational risks, and safety risks which are inherent to the workplace, the employer may also be bound, in appropriate cases, to take measures to protect his employees even against harm caused by malevolent human agency, the Court of Appeal found, as a matter of fact, that there was no causal link between the alleged shortcomings of the defendant company and the harmful event. Therefore, the defendant company was not liable.

[3] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-02-29_1247-1994-1_47955.PDF.

c) Commentary

The decision of the Court of Appeal is a wise one. It is hardly fair to hold employers responsible for everything that happens on the premises particularly when the harm is the result of a criminal action. This was a clear case where the employer could not by any stretch of the imagination be held civilly liable for the death of an employee. Even sophisticated gadgetry cannot withhold criminals on the rampage. This judgment provides a check on the increasing tendency to move towards a de facto strict liability regime where accidents in the workplace are concerned[4]. 9

2. *Joseph Agius et v. All Services Limited*, Writ no. 1809/2001, Court of Appeal, 25 April 2008: Industrial Accident; Employer's Duty[5]

a) Brief Summary of the Facts

The plaintiffs were the parents and the brothers and sisters of the deceased who was 36 years old at the time of the incident. The deceased, an employee of the defendant, died while transporting boxes from a truck to a shop. The truck was overloaded and the deceased apparently fell or inadvertently jumped on a rod which went straight into his body. He died a few days later. 10

b) Judgment of the Court

The defendant company argued that it was not at fault for what had happened. Actually nobody saw the incident, but a fellow employee gave what was probably a correct version of the events when he said that the deceased had jumped on a rod. The First Hall of the Civil Court decided that the defendant company, which had provided the employees with safety shoes, was partly (¾) at fault for failing to provide adequate training. The First Hall also ruled that the degree of dependency of the survivors on the deceased was low and hence it reduced the amount due by 50%. Finally the lump sum was reduced by 12% to compensate for the fact that future earnings were being paid in advance. 11

The defendant appealed claiming that the first court should never have attributed any responsibility to it for what had happened. The Court of Appeal revised the decision of the First Hall on the degree of responsibility attributed to the defendant. The evidence showed that the deceased had been mainly (¾) responsible for what had happened. On the other hand, the defendant was still partly responsible (¼) because the truck had been overloaded and matters became more complicated as the employees had to resort to double parking. Hence the room for manoeuvre was further restricted. Providing safety shoes was not enough. 12

[4] Cf. case no. 2, below.

[5] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-04-25_1809-2001-1_48732.PDF.

c) Commentary

13 This judgment follows a long line of decisions on industrial injuries or deaths where the employer is found liable, at least to some extent, when accidents happen. The First Hall found that the employer had not given "adequate training" but this was hardly a case where technical know-how was indispensable or, indeed, relevant. The Court of Appeal may have been influenced by the evidence that the truck had been overloaded. On the limited evidence available, it appears that this was one of those cases of an "unfortunate" incident rather than a case of negligence on the part of the defendant. The judgment supports the view that, where industrial accidents are concerned, although the courts have not altogether abandoned the notion of fault-based liability, and, indeed, motivate their decision by finding a degree of fault, they are in reality increasingly leaning towards a system of strict liability.

3. *Grezzju Portelli v. Godfrey Leone Ganado et nomine*, Writ no. 76/1993, Court of Appeal, 25 April 2008: Industrial Accident; Employer's Duty; Faults of Third Parties[6]

a) Brief Summary of the Facts

14 An employee suffered an electric shock while working as a linesman for a telephone company. The telephone wire was higher than the electricity supply wire and the linesman rested on the electricity supply bracket which was not insulated. The Telephone Company and the Electricity Supply Company denied responsibility for the incident and submitted that the plaintiff had been negligent. The degree of disability was 20%.

b) Judgment of the Court

15 The First Hall of the Civil Court held that the linesman had not been negligent and that both companies were at fault. The Electricity Company had failed to provide proper insulation. On the other hand, the Telephone Company had not asked for the suspension of the electricity supply while its employees were carrying out the repairs, it had not given any proper training to its staff, and no safety equipment was given to the workers.

16 For the purpose of assessing damages, the First Hall considered that, although the employee was still on the company's books, he would no longer be eligible to work overtime and he would lose chances of being promoted. He was also unlikely to find alternative employment with a higher salary.

17 Only the Electricity Company appealed. The Court of Appeal confirmed the judgment of the First Hall. The Electricity Company, as a service provider, has the duty to ensure that its installations do not create any danger. In practice the cables are insulated from the brackets. If this work is properly carried out, there should be no contact between the cables and the bracket.

[6] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-04-25_76-1993-1_48744.PDF.

The Electricity Company also submitted that the Telephone Company should have asked for the suspension of the electricity supply. The Court of Appeal held that the shortcomings of third parties do not exonerate one of one's responsibilities. 18

c) Commentary

This decision is consistent with the case law on responsibility for quasi-torts in industrial accidents. Employers have to exercise the utmost care where the safety of their employees is concerned. In industrial accidents, case law has practically moved from liability based on fault to strict liability. Where two or more service providers are involved, the negligence of one party does not exonerate the other. 19

4. *A v. B*, Writ no. 624/2001, Court of Appeal, 25 April 2008: Traffic Accident; Personal Injury; Quantum of Damages[7]

a) Brief Summary of the Facts

The plaintiff, a 22-year-old male, suffered 100% disability when he was run over by a car while he was hurriedly crossing the street. The defendant had applied the brakes to avoid hitting the plaintiff but this attempt was futile because his speed, although within the legal limits, was somewhat high. 20

b) Judgment of the Court

The First Hall of the Civil Court held that both parties were to blame. While it was true that tests showed that the defendant had a high alcohol level at the time of the incident, this factor had not led to the accident. The accident had happened because of the negligence of the plaintiff while crossing the road without checking whether any traffic was approaching before running to the other side of the street. On the other hand, although the defendant was driving at a speed which was within the legal limits, he should have been more careful given the physical lay-out of the road. The defendant had to exercise great diligence and hence he could be considered as still driving at an excessive speed when going faster than prudence demanded. 21

The court applied a multiplier of 33 years and considered the plaintiff as responsible for two-thirds and the defendant for one third. The court further held that the 100% disability implied that the plaintiff would be unable to work not only with his present employer but also with any future employer. One has to consider for how long a victim could have worked without ignoring the chances and changes of life. 22

The plaintiff appealed. He submitted that the defendant should have been more careful and that the court should have awarded a multiplier of 40 years. The Court of Appeal confirmed the decision of the First Hall of the Civil Court. It 23

[7] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-04-25_642-2001-1_48737.PDF.

held that the plaintiff was primarily at fault and that the multiplier established by the First Hall of the Civil Hall was a reasonable one. The fact that the plaintiff was only 22 years old at the time of the incident did not mean that the multiplier should be higher when one takes into consideration "the chances and changes of life".

c) Commentary

24 This judgment is an important one because it underlines two principles: (a) Driving within the legal speed limits does not necessarily mean that one is not civilly liable if an accident happens. While driving, a driver has to take all the relevant factors into consideration, such as the state of the road and its gradient. (b) The multiplier need not necessarily be the difference between the age of the victim and retirement age. This is because life offers chances and challenges, and one never knows what these may be when calculating future earnings.

25 However, it is arguable that the multipliers habitually adopted are on the low side when one considers that in most cases people do not retire before the statutory retirement age; the "chances and challenges of life" principle makes a rule out of the exception.

5. *A v. B*, Writ no. 1000/2002, Court of Appeal, 30 May 2008: Medical Malpractice, "Wrongful Pregnancy"[8]

a) Brief Summary of the Facts

26 The plaintiff had given birth to her first child by caesarian section. When she again became pregnant she was advised that she would again have to have a caesarian section, and that this procedure would probably be necessary in future pregnancies. Since she did not wish to undergo this procedure in the future, the plaintiff instructed and authorised the surgeon to cut her fallopian tubes (tubal ligation) as a secondary procedure while performing the caesarian section, so as to avoid future pregnancies. Notwithstanding this, she again became pregnant for a third time some months later. Alleging that the pregnancy would cause her the unnecessary trauma of another caesarian delivery – her third – within a very short time after the previous one, and also that the birth of a third child would cause financial strain, the plaintiff sued the surgeon for damages. The plaintiff also alleged that the surgeon did not inform her of the possibility of a pregnancy notwithstanding the tubal ligation.

b) Judgment of the Court

27 The First Hall of the Civil Court held that a surgeon is not liable for an error of judgment or for a "professional error", that is, an error due to the limitations of medical science; he is only liable for gross error, or if the error is due to negligence or to incompetence in the exercise of his profession. Medical evidence

[8] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-05-30_1000-2002-1_49384.PDF.

showed that, even when the tubal ligation procedure is performed *secundum artem*, as in the present case, in rare cases it may happen that the fallopian tubes may reconnect by a natural process.

On the matter of the duty to inform the patient about the risk of failure of the procedure, the first instance court held that, although the surgeon ought to have informed the plaintiff about this remote possibility, the failure to do so is not tantamount to negligence in the performance of the procedure itself. 28

The Court of Appeal agreed that the surgeon was not at fault and it confirmed the judgment. However, it disagreed that, in the present case, the surgeon was under a duty to inform the patient. The duty to inform is not an absolute duty but one which depends on generally accepted medical practice and is governed by medical criteria. In the present case there was no evidence that it is a generally accepted medical practice that patients about to undergo tubal ligation are informed of the remote possibility of natural reconnection. 29

c) Commentary

This is the first case of which we are aware that deals, albeit indirectly, with the issue of "wrongful birth" or, rather, "wrongful pregnancy". There is nothing particularly remarkable in the reasoning which led the court to reject the claim, except, perhaps, that it has revived the notion of "gross" error as a criterion for the liability of a professional. However, on the facts, there is nothing to suggest that the surgeon was negligent even to a slighter degree. 30

What is worth noting is that the court did not reject outright the notion of "wrongful" birth, or that damages may be sought for the trauma of childbirth. However, it must be said that it did not expressly accept these notions either, and one cannot predict what would have been the outcome had the surgeon been found culpably negligent. 31

It is also interesting to note the restriction of the scope of the duty to inform. Whilst the judgment may perhaps offer a "weak" precedent, because the possibility of a spontaneous reconnecting of the fallopian tubes is remote, it nevertheless strengthens the view that the criteria are medical rather than legal. 32

6. *Victor Attard et v. Ganni Attard*, Writ no. 214/2000, Court of Appeal, 30 May 2008: Abuse of Procedural Rights in Litigation; Deprivation of Use of Money[9]

a) Brief Summary of the Facts

In terms of a judgment partitioning an inheritance delivered on 27 October 1995, the court ordered the defendant to pay the plaintiffs a sum of money, representing their share of the inheritance. In order to enforce payment of this 33

[9] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-05-30_214-2000-2_49366.PDF.

sum, the plaintiffs initiated proceedings for a judicial sale by auction of the defendant's property. However the defendant caused this judicial sale to be suspended for four years as he sued the plaintiffs requesting this suspension, as well as the revocation of the court judgment which had partitioned the inheritance. Both of the defendant's requests were eventually rejected by two judgments delivered on 25 November 1999. He subsequently paid the plaintiffs the sums owed to them by means of a contract published on 23 June 2000, after receiving a judicial letter from the plaintiffs requesting him to pay this sum on 10 May 2000. A proviso in the contract stated that the contract did not prejudice the plaintiffs' claims vis-à-vis the defendant for the payment of interest on the sum they were owed as from the date of the original judgment of 27 October 1995 until 23 June 2000, when the contract was published. Following this, the plaintiffs sued for compensation for the damage suffered and interest lost as a result of the court proceedings initiated by the defendant, which led to a delay in the payment of the sum due to them.

b) Judgment of the Court

34 The first court explored the juridical basis of the plaintiffs' action, specifically whether it was a claim for damages based on tort or a claim for damages arising from a delay in the performance of an obligation to pay a determinate sum of money. In the latter case, damages would have been restricted to the payment of interest at the rate of 8% per annum following intimation by a judicial act served on the defendant. The court concluded that it was a claim for damages based on tort, specifically on art. 1047[10] of the Civil Code, which relates to the damage caused by depriving the plaintiffs of the use of their own money. This was because the sum of money which would have to be paid by the defendant in this case had to be established by the court and could not therefore be regarded as an obligation to pay a "determinate" sum. The court also held that the running of the two year prescriptive period applicable to the right to sue for damages in tort had been suspended by the judicial proceedings instituted by the defendant and had not expired when the plaintiffs sued for damages. However, the court held that art. 1047 could only be applied if the plaintiffs could prove that the defendant failed to pay them the sum he owed "knowingly to cause them damage". Since this proof had not been brought in this case, the court decided that it could only award the interest due to the plaintiffs on the sum payable to them as from 10 May 2000 – when they sent a judicial intimation to the defendant requesting that he pay the sum owed to them – until 23 June 2000, when they were effectively paid this sum.

[10] Art. 1047 (1) The damage which consists in depriving a person of the use of his own money, shall be made good by the payment of interest at the rate of eight per cent a year.
(2) If, however, the party causing the damage has acted maliciously, the court may, according to circumstances, grant also to the injured party compensation for any other damage sustained by him, including every loss of earnings, if it is shown that the party causing the damage, by depriving the party injured of the use of his own money, had particularly the intention of causing him such other damage, or if such damage is the immediate and direct consequence of the injured party having been so deprived of the use of his own money.
(3) The sum to be awarded in respect of such loss of earnings shall be assessed by the court having regard to the circumstances of the case.

The Court of Appeal confirmed the judgment of the first court, observing that the action was correctly classified as tortious, as it was a clear example of an abuse of rights in terms of art. 1030[11] of the Civil Code. The defendant had capriciously and arbitrarily abused his procedural rights to initiate and contest litigation when he sued to annul the judgment of 27 October 1995 and to request the suspension of the judicial sale of his property, since he should have known that he had no chance of winning in either case and utilized absurd arguments in the process. As regards prescription, the Court of Appeal agreed that this could only commence to run as from the moment when the plaintiffs could have taken action to enforce the payment of the sum which was due to them, something which they were prevented from doing by the lawsuits initiated by the defendant. It also agreed with the first court that the defendant could be found liable to pay damages which extend far beyond the legal interest due as a consequence of the delay in the fulfilment of his obligation towards the plaintiffs. However, the court went on to hold that in order for the defendant to be found liable to pay these more extensive damages, it would have been necessary for the plaintiffs to show, in terms of art. 1047(2), firstly that they had effectively suffered this more extensive damage and secondly that the defendant had acted in a malicious manner towards them, with the intention of harming them. Such proof was lacking in this case and the court held that while the defendant had abused his procedural right to initiate litigation, this did not mean that he had acted maliciously and with the aim of harming the plaintiffs. Moreover the plaintiffs had declared in court that they were only pursuing the case in order to be paid the interest owed to them and not for other damages. The court therefore quantified the damages payable as € 567.16, representing interest calculated at the rate of 8% on the sum payable and covering the period from 10 May 2000, when the plaintiffs sent a judicial letter to the defendant requesting him to pay the sum due to them, until 23 June 2000, when this payment was effectively made. 35

c) Commentary

This judgment is an important one, firstly because it clearly follows the approach of the French courts by accepting that the concept of abuse of rights has a broad application and can be invoked even where the rights concerned are the procedural ones to initiate and contest litigation. The judgment makes clear that even a non-malicious use of a procedural right which is arbitrary and capricious and does not respect the proper limits may give rise to an action for damages in tort. Secondly the judgment sheds light on the interpretation of art. 1047 by the courts, particularly the meaning of "depriving a person of the use of his own money". This expression is interpreted to include cases where the abusive taking of legal action delays the plaintiff from receiving what is owed to him by virtue of an executive title, such as a court judgment. 36

At the same time the court's statement that, in order to apply art. 1047(2) the plaintiff must provide cumulative proof, not only that this damage was effec- 37

[11] Art. 1030. Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.

tively suffered but that the defendant acted with an *animus nocendi*, appears to go beyond the literal wording of the law. In fact, art. 1047(2) appears to create two alternative routes from which the plaintiff may choose when it states that, in cases where the party causing the damage has also acted maliciously, the court may grant a greater degree of compensation: "if it is shown that the party causing the damage … … … had particularly the intention of causing him [the victim] such other damage, or if such damage is the immediate and direct consequence of the injured party having been so deprived of the use of his own money." Moreover the judgment is open to the objection that it defines malicious action too narrowly by referring to the need to prove that the defendant had acted with the intention of harming the plaintiffs. Usually malicious action is understood to include action carried out with an awareness of doing wrong, which is a less onerous requirement than that of proving an *animus nocendi*.

38 Another notable feature of this judgment is that it focuses almost exclusively on art. 1047(2) and, after concluding that the plaintiffs had not managed to provide the proof that would be needed to render it applicable to their case, does not consider whether art. 1047(1) should apply. This is rather surprising as art. 1047(1) does not refer to the need to prove malice or the intention to injure, but simply states that: "the damage which consists in depriving a person of the use of his own money, shall be made good by the payment of interest at the rate of eight percent a year." It would therefore appear to be prima facie applicable to this case. Moreover, applying this sub-article would have made a significant difference to the quantum of damages assessed by the court in this case as art. 1047(1) is usually interpreted to mean that interest at 8% per annum starts to run automatically the moment a person is deprived of the use of his money and without any need to first send a judicial intimation to the defendant. Had art. 1047(1) been applied, the plaintiffs in this case would have received damages consisting of the interest at an annual rate of 8% for the full five-year period for which they were deprived of their money instead of for the month which intervened between their sending a judicial intimation to the defendant and the signing of the contract between them. The court's decision to disregard art. 1047(1) may have been justified as a matter of sticking to the claim made by the plaintiffs as they appear not to have mentioned art. 1047(1) in their written submissions to the court. However it also contradicts the court's own judgment that the basis of this action was to be found in tort law and specifically in the concept of abuse of rights.

7. *M (a Pensioner) v. Social Security Department*, Writ no. 75/2005, Court of Appeal, Inferior Jurisdiction, 17 October 2008: Liability in Tort of Government Departments; Pure Economic Loss[12]

a) Brief Summary of the Facts

39 As a result of an amendment to the Social Security Act which came into force on 6 January 1996, the plaintiff was entitled to a substantial increase in her

[12] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(INFERJURI)/2008/2008-10-17_75-2005-1_51200.PDF.

social security pension with effect from that date. However, since the increase was to be calculated on a somewhat complex formula and also due to a heavy workload, the Social Security Department continued paying the pension at the old rate and it was only in April 2000 that it calculated the new pension. The difference between January 1996 and April 2000 was paid as a lump sum on 15 April 2000.

That same year the Inland Revenue Department changed its policy on the assessment of tax on payments of arrears: whereas before 2000 arrears were taxed on a "when earned" basis, with effect from 2000 they started being taxed on a "when paid" basis. As a consequence, the arrears paid to the pensioner in 2000 were charged to tax as income for that year rather than spread out over five years, and were charged at the higher marginal rate. The plaintiff's overall tax on the arrears increased substantially as a result. 40

The plaintiff therefore sued the Social Security Department claiming, as damages, the extra tax she had paid. She argued that, had the Department started paying her pension at the increased rate when such increase was legally due, i.e. in 1996, she would have paid tax at a lower rate, because the increase in her pension, taken year by year and not as a lump sum for five years, would not have increased her income sufficiently to fall within a higher tax bracket. The Social Security Department claimed that the case against it be dismissed because the issue before the court was one of taxation which fell within the remit of another Department. 41

b) Judgment of the Court

The Magistrates' Court found for the plaintiff. It held that the Social Security Department was guilty of maladministration in taking over four years to assess and pay the proper pension due to the plaintiff; it should therefore compensate the plaintiff for the consequences suffered as a result of administrative mismanagement. The Department appealed. 42

The Court of Appeal, in confirming the judgment of the Magistrates' Court, observed that this was a straightforward action in tort and the issue was therefore whether (i) the plaintiff had suffered damage, (ii) whether the defendant had by his acts or omissions violated the general principle of *neminem laedere*, and (iii) whether there was a causal link between the defendant's act or omission and the damage suffered by the plaintiff. There was no doubt that the defendant's failure to observe an express provision of law – payment of the increased pension on the due date – was a wrongful act, and that there was a clear causal link between the defendant's wrongful act and the damage suffered by the plaintiff. 43

c) Commentary

This was a case of pure economic loss. The judgment is of interest because it does not categorise the damage but rather treats the claim as a normal tort action. Indeed, although the Maltese courts do allow compensation for pure 44

economic loss, and recognise no exclusionary rule in this regard, the concept is merely a doctrinal one and it is not considered an autonomous form of damage in judicial practice.

8. *George Borg et v. Anthony Borg et*, Writ no. 139/2002, Court of Appeal, 20 October 2008: Liability for Fault of the Managers of a Restaurant; Indirect Liability for Minor Children; Quantum of Damages for Lucrum Cessans[13]

a) Brief Summary of the Facts

45 The plaintiffs' five-year old daughter suffered a permanent disability which was medically assessed as amounting to 16% when she was playing, together with a group of other children, in the yard of the restaurant in which her parents were eating. At the time the restaurant was managed by the three defendants and the yard was accessible from the dining room of the restaurant and enclosed by a low wall around three feet (91cm) in height, upon one side of which there lay a stone trough around two feet (61cm) long and containing some plants. At a certain point this trough fell upon their daughter's right hand, causing her serious injuries which included the partial amputation of three of her fingers. The plaintiffs, acting in the name and on behalf of their daughter, therefore sued the defendants for compensation for the injuries she had suffered.

b) Judgment of the Court

46 The court of first instance excluded any contributory liability of the parents for the injury suffered by their daughter. It held that such contributory liability would have to be based on a lack of diligence in supervision, or *culpa in vigilando* in terms of art. 1034[14] of the Civil Code. However, one could not say that the parents failed to show diligence in supervision if they did not monitor every single movement of their child, given that the yard she was playing in was an area of the restaurant where children were allowed to play. The first court held that art. 1041[15] of the Civil Code, which deals with the indirect liability of the owner of a building for any damage caused by its fall, applies to this case as it covers cases where even part of a building collapses. It therefore found the defendants jointly and severally liable for the injury once they did not ensure that the trough was somehow bolted or fixed in place, knowing that it had already fallen on a previous occasion, and particularly since they had allowed children to play in the yard. The resulting damages were assessed according to the multiplier method and using a multiplier of 40 years and an adjusted average annual salary of MTL 6,000.

[13] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-10-20_139-2002-2_51238.PDF.

[14] Art. 1034. Any person having the charge of a minor or of a person of unsound mind shall be liable for any damage caused by such minor or person of unsound mind, if he fails to exercise the care of a *bonus pater familias* in order to prevent the act.

[15] Art. 1041. The owner of a building shall be liable for any damage which may be caused by its fall, if such fall is due to want of repairs, or to a defect in its construction, provided the owner was aware of such defect or had reasonable grounds to believe that it existed.

The appellate court agreed with the first court that the defendants were primarily responsible for the injury suffered by the plaintiffs' daughter. However it considered that this liability was based on general principles of tort, particularly art. 1032[16] of the Civil Code which bases liability on failure to observe the diligence of a bonus pater familias. As managers of the restaurant, the defendants should have foreseen that children, once allowed to play in the yard, might try to shift the water trough. Although the yard in the restaurant was not a playground, it became one once children were permitted to play in it. Consequently, the defendants were liable because they had failed in their duty to ensure the reasonable safety of visitors to the premises they controlled when using these premises for the purposes for which they were invited or permitted to visit. 47

The appellate court further disagreed with the first court as it found that the plaintiffs were also partly responsible for the injury suffered. This was both because the plaintiffs had admitted that they were aware the children were playing with the trough before it fell and injured their daughter and also because they did not supervise their daughter adequately, since they had not visited the yard regularly to monitor their daughter's activities. The plaintiffs had therefore failed to exercise their duty of supervision of their minor daughter as required by art. 1034 of the Civil Code. The court considered this failure on their part to be less objectionable than that of the defendants, who should have prepared a safe environment in their restaurant, particularly since they knew that children were permitted to play there, in the yard. The court therefore assessed the plaintiffs' responsibility at 20% and that of the defendants at 80%. 48

In assessing damages the appellate court used the same principles as those applied by the first court, although it then proceeded to reduce the sum payable by the defendants in proportion to their share of the responsibility. The court argued that the use of the multiplier method in the case of a five-year-old child was still justified as: (1) the period of 40 years corresponded to that for which she was likely to work, (2) the adjusted annual income of MTL 6,000 used in this formula, although higher than the minimum wage, was not too high when one factors in the probability of future inflationary increases in salaries and the cost of living, (3) the injury had affected the child psychologically and (4) even if the injury were to be considered as having had no real impact on her work/career, it would still be compensable provided one could point to a reduction in the child's capacity to work in the abstract. 49

c) Commentary

In this case the first court appears to have misapplied art. 1041 of the Civil Code as the defendants were managing a restaurant but seem not to have been the owners of the building in which it was housed. The Court of Appeal cor- 50

[16] Art. 1032. (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus pater familias.*
(2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.

rectly abandoned this reasoning and instead found that the liability of the defendants was based on their lack of diligence in terms of art. 1032 of the Code. Moreover it identified this lack of diligence in the fact that the defendants had allowed children to make use of a particular area without taking all the safety precautions they should have carried out. While this appears to have been the right approach, it is rather strange that the court went on to quote common law textbooks to explain the meaning of negligence, given that art. 1032 is far closer to art. 1382 of the French Civil Code than to the common law rules.

51 Particularly worthy of note is the impact of this judgment on the interpretation of art. 1034 of the Code, which regulates the indirect liability of persons "having the charge" of a minor, "for any damage caused by such minor". While this article appears to deal with the indirect liability of parents for damage caused by the minor *to third parties*, in this case the appellate court invoked this article so as to determine whether the parents were liable for damage caused by the minor *to herself*. As the parents were not parties to this lawsuit in their own names but only sued for damages in the name of their daughter, doubts may arise as to whether the appellate court was correct to even try to assess the contributory negligence of the parents in the first place. However the stance of the court seems to have been that it is practically unheard of for a five year old to be held liable on grounds of her contributory negligence and that in practice it is usually the negligence of the parents which would be taken into account for purposes of determining comparative fault. The role of art. 1034 would therefore lie in the way it clarifies the logic behind holding parents responsible in tort for injuries suffered by their children, basing it on *culpa in vigilando*. This role would clearly imply that it is really art. 1031/1032, which create a general liability for fault that are being applied to this case and art. 1034 is only being referred to by way of analogy.

52 Furthermore it appears quite clear from the references made to psychological damage and also to income-earning capacity in the abstract that this judgment falls within a growing trend to downplay the strictly patrimonial criterion when assessing damages for loss of future income.

9. *Anthony Caruana v. William Mock*, Writ no. 560/1991, Court of Appeal, 20 October 2008: Self-Defence[17]

a) Brief Summary of the Facts

53 The plaintiff and the defendant had a previous history of conflict between them. This lawsuit stems from a fight which developed between them when the defendant drove near the plaintiff, who threw a bunch of keys at the defendant's car. The defendant reversed his car and parked it close to the plaintiff, at which point the plaintiff forcibly entered the defendant's car to pursue the quarrel. The defendant, who had an iron bar in his car, used it to hit the plaintiff on the head and subsequently bit off part of the plaintiff's ear, causing

[17] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-10-20_560-1991-2_51237.PDF.

him a 5% permanent medical disability, without himself suffering comparable physical injury. The plaintiff claimed from the defendant the damages which resulted from this injury, including actual loss of income as well as future loss of earnings caused by the permanent disability he suffered.

b) Judgment of the Court

The court of first instance held that the plaintiff and defendant were both responsible for the injury suffered by the plaintiff. It assessed the liability of the latter at 30% and proceeded to quantify damages accordingly. 54

The Court of Appeal confirmed the judgment of the first court, holding that criminal law principles are applicable as the damages claimed in this case could not be described as stemming from negligence or breach of contract, but as the consequential damages arising from criminal behaviour. It followed that the defendant's plea that he could not be held liable as he had acted in self-defence had to be interpreted in terms of criminal law, which stresses that this defence can only be successful if the aggression experienced was unjust, grave and inevitable and if the defendant's actions were proportionate to the plaintiff's aggressive behaviour. Neither inevitability nor proportionality were present in this case and the fact that the defendant's plea of self-defence had been successful in the criminal case could have no bearing on the outcome of the plea in the civil case for damages. Once self-defence had been excluded, the Court proceeded to adjust the damages payable as *lucrum cessans* and *damunum emergens*. 55

c) Commentary

This judgment confirms that the criteria which must be satisfied in order to successfully plead self-defence as a general defence to liability in tort in Malta are defined in the same way as in criminal law. At the same time, the judgment stresses the independence of the criminal and the civil judgments, finding that the defendant was liable and that his behaviour could not be considered as self-defence from the civil law perspective, notwithstanding that he had successfully invoked self-defence in the criminal case arising from the same incident. This discrepancy between the criminal and the civil judgments makes clear that in practice self-defence is interpreted in a more liberal way in criminal cases than it is in civil cases. 56

10. *Teresa Monreal et v. Piju Grech et*, Writ no. 1393/1993, Court of Appeal, 31 October 2008: Liquidation of Damages in Case of Death[18]

a) Brief Summary of the Facts

The plaintiffs – husband and wife – were injured in a road accident when their car collided with that of the first defendant. Their son, a minor, lost his life in the accident. 57

[18] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-10-31_1393-1993-1_51560.PDF.

58 The accident occurred when the first defendant, who was driving at excessive speed, lost control of his vehicle and hit the plaintiffs' vehicle head on. The defendant pleaded that he was not at fault; he argued that he had lost control of his vehicle when he attempted to avoid a trench which had been improperly filled in. The fault therefore lay with the Public Works Department, which is the public authority responsible for the upkeep of roads. At the request of the first defendant, the Public Works Department was called into the suit as second defendant.

b) Judgment of the Court

59 The first judgment delivered by the First Hall of the Civil Court dealt with the issue of liability. The judgment found that the main cause of the accident was the first defendant's excessive speed. However, the improperly filled trench was also a contributory factor, and liability was therefore apportioned between the first and second defendants. The court then invited the plaintiffs to quantify their claim for damages and adjourned the hearing to hear submissions thereon.

60 In line with the prevailing doctrine and case law, the plaintiffs based their claim for *lucrum cessans* in respect of the death of their minor son on the following factors:

- Multiplier (working life expectancy) – 35 years;
- Average annual income – € 12,100 (approx.);
- Disability – 100%, death being considered as permanent total disability;
- Reduction in respect of "degree of dependency" – 50%;
- Reduction in respect of "personal consumption of deceased" – 25%;
- Reduction in respect of "lump sum payment" – 5%.

61 In its second judgment, on the liquidation of damages, the First Hall awarded the amount claimed by the plaintiffs; however, it also made it clear that it was only the rule against *ultra petita* which kept it from assessing a higher amount. Its comments are reproduced here in free translation:

62 "An average annual income of (approximately € 12,100), calculated on the basis of a 35 year multiplier, verges on the absurd. However, since the plaintiffs appear to be satisfied with that figure, it will be adopted. Perhaps it is also time to review the maximum of 35 years traditionally adopted as the highest multiplier, particularly in view of the fact that constantly improving medical care has increased life expectancy and that the retirement age will probably also be raised in the near future. However, since the plaintiffs appear to be satisfied with that multiplier, it also will be adopted. Moreover, the court also disagrees that the sum awarded as damages should be reduced on account of "degree of dependency" and "personal consumption". Art. 1046 of the Civil Code provides that the court may "award to the heirs of the deceased person damages, as in the case of permanent total incapacity", without providing for any reductions in the case of death other than those applicable in the case of permanent total incapacity. However, since the plaintiffs concede that these deductions should be allowed, they will be taken into consideration."

This notwithstanding, the second defendant appealed since he considered the damages awarded as "overly generous". The Court of Appeal, in rejecting the appeal, made the following comments which are reproduced hereunder in free translation: 63

"The relevant provision is that of art. 1046 of the Civil Code, which provides that "Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred, *award to the heirs of the deceased person damages, as in the case of permanent total incapacity* … … …" Although the courts, over a number of years, have felt the need to moderate the amount of damages assessed in the interest of the heirs in case of death, in particular by introducing the element of "dependency" and the reduction in respect of "personal consumption", nevertheless the declaration of the first instance court that such deductions ought not to be made was fully in accordance with the law." 64

The Court of Appeal however went on to say that the factors taken into account by the plaintiffs in quantifying their claim correctly reflect the prevailing position adopted by the courts. 65

c) Commentary

The judgment is of interest particularly with respect to the manner of quantifying damages in the case of death, and also with respect to the issue of who is entitled to such damages. 66

Traditionally the courts have not been very generous with plaintiffs in personal injury cases and have always sought ways and means to keep damages assessed in such cases within "moderate" limits. 67

Art. 1046 equates death with "permanent total incapacity". A literal reading of this article would disallow deductions in the case of death if these deductions are not also allowed in the case of permanent total incapacity. However, although art. 1046 states clearly that damages are due "to the heirs of the deceased", case law[19] does not interpret "heirs" as meaning merely "successors in title" to the deceased but requires also a measure of "dependency" on the deceased, such that if the heirs were not fully dependant on the deceased, a proportionate deduction would be allowed to the benefit of the defendant. A further deduction, based on the assessment of what the deceased would have consumed had he survived, is also allowed, on the assumption that in such a case the heirs would have inherited only the residual portion of the award. 68

As a result, it is better for the defendant (and his insurers) to kill rather than to maim, because he benefits from the "dependency" and "personal consumption" deductions in the first case but not in the second. 69

[19] See *Giuseppa Cortis et v. Cecil Baker noe*, Court of Appeal, 31 January 1997, unreported.

70 The judgment of the first instance court is, in effect, in conformity with the prevailing doctrine because the damages actually assessed were those claimed by the plaintiffs, who, assuming that the court would follow normal practice, had taken the deductions into account when quantifying their claim. What is significant in the present case is not that the First Hall explicitly stated that it would have been willing to discard the deductions – it had already done so in earlier cases which were, however, overturned on appeal[20] – but that the Court of Appeal approved, or, at least, did not disapprove of that statement.

71 Of course, in the present case the First Hall's statement and the approval of the Court of Appeal were somewhat academic because, in effect, the deductions had already been incorporated in the plaintiffs' claim. It remains to be seen whether the Court of Appeal would have been as willing to confirm the judgment of the First Hall if it had actually disallowed the deductions. In view of the statement reproduced above (supra no. 65), and also of what the same Court of Appeal decided, barely a month later, in *Formosa v. Spiteri*[21] reviewed below, it would appear that the answer is in the negative.

11. *Laura Formosa et v. Emanten Spiteri et*, Writ no. 2059/2000, Court of Appeal, 28 November 2008: Liquidation of Damages in Case of Death[22]

a) Brief Summary of the Facts

72 The plaintiffs' father lost his life when he was run over by a public transport vehicle driven by the first defendant who failed to stop at a red traffic light. The second defendant, who was the owner of the vehicle, had employed the first defendant as a driver knowing that he did not have insurance cover.

73 The first defendant (the driver) did not contest the action. The second defendant (the owner) pleaded that he had no part in the accident because he was not present when it occurred.

b) Judgment of the Court

74 The liability of the first defendant is not at issue; what is at issue is the quantum of damages and the liability of the second defendant. The First Hall of the Civil Court found that the second defendant was at fault in allowing his vehicle to be driven without insurance cover, and he was therefore liable *in solidum* with the first defendant. For the purposes of quantifying loss of future earnings, the court considered that the victim was 44 years old when he died, and it therefore

[20] See *Anthony Turner et v. Francis Agius et*, Writ no. 120/1994, Court of Appeal, 28 November 2003:
http://www2.justice.gov.mt/sentenzi/judgm_result.asp?FrmNo=&FrmYear=&FrmSeq=&FrmDate=&FrmDate2=&FrmCourt=&FrmJudge=&FrmOkkjo=Turner&FrmOkkjo2=Agius&Frmkeywords=&FrmMatch=All&search=Search&FromThis=1&FrmPageNo=1&FrmProcessyear=ALL&FrmSection=1&lng=ENG&FrmList=10.

[21] Case no. 11.

[22] http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/TA%27%20L-APPELLI%20CIVILI%20(SUPERJURI)/2008/2008-11-28_2059-2000-1_52212.PDF.

adopted a multiplier of 12 years; it also considered that his average earnings per annum during those 12 years would be his earnings during the final year of his life increased by 20%, without taking into account deductions in respect of social security contributions and income tax.

The court also considered that, notwithstanding the wording of art. 1046 of the Civil Code – which equates death with total permanent incapacity and provides that damages are awarded "to the heirs of the deceased" – damages are due to the heirs *iure proprio* and not *iure hereditatis*, which means that the heirs will not necessarily be awarded the same amount which would have been awarded to the victim had he survived with permanent total incapacity. The court therefore deducted 25% to compensate for what the victim would have consumed had he survived, but it made no deduction in respect of degree of dependency because the plaintiffs, being the victim's daughters, were closely related to the deceased. 75

The second defendant appealed the judgment, both on the finding of joint liability with the first defendant and also on the quantum of damages. 76

On the matter of liability, the second defendant pleaded that he was not liable for *culpa in eligendo* in terms of art. 1037[23] of the Civil Code because the person he had employed as a driver was competent. The Court of Appeal rejected this argument, holding that the liability of the second defendant arose not from art. 1037 but from art. 1033[24], as a result of his own failure to perform a duty imposed on him by law, namely to ensure that the vehicle and its driver were covered by a proper insurance policy. 77

On the matter of quantum of damages, the Court of Appeal agreed with the first court that a 20% increase on the victim's current annual earnings for the purpose of assessing his average future income over a 12 year period was reasonable. It also approved of the reduction of 25% in respect of the personal consumption of the deceased. However it disagreed with the conclusion of the first court that no deduction was to be allowed in respect of the slight degree of dependency of the plaintiffs on the victim. The plaintiffs were the victim's three daughters; two were married, and therefore not dependent on the victim, and there was no evidence that the third, although unmarried, was not employed and capable of supporting herself. A reduction of one third in respect of degree of dependency was therefore to be allowed. 78

[23] Art. 1037. Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others.

[24] Art. 1033. Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.

c) Commentary

79 This judgment makes it clear that, notwithstanding its comments in *Monreal et v. Grech et*[25], the Court of Appeal will not depart from the established practice of allowing defendants deductions in respect of personal consumption and the plaintiffs' degree of dependence on the victim.

80 The reason given for considering that the heirs are entitled to damages in their own right and not *iure hereditatis* is that the deceased was not himself vested with that right since he died before it could vest in him. However, this is not to say that the right, or, rather, the expectation to inherit the deceased's estate is not a relevant consideration. The Court of Appeal went on to reason as follows (the relevant paragraph being here reproduced in free translation):

81 "Although the damages assessed ought to be reduced because of the dependency factor, nevertheless this reduction ought not to be of two thirds as in the case of *Turner v. Agius*. In that case the victim was a 17 year old girl who, in the normal course of events, would have formed her own family had she survived, and her parents and siblings would most probably not have been her heirs. In the present case the plaintiffs are the daughters of the victim, and they would have been expected to inherit his estate eventually. Because of the victim's untimely death, however, the plaintiffs inherited his estate earlier than would normally have been the case, so that their share of the fruits of their father's working life was substantially reduced."

82 However, the argument that damages are awarded to the heirs *iure proprio* and not *iure hereditatis* gives rise to the question – which, to our knowledge, has not been addressed in the decided cases – of what happens if the victim survives long enough for the right to enter his patrimony. This question will probably become a purely academic one once the amendments to the Civil Code introduced by Act VI of 2004[26] come into effect.[27] The amendment substitutes the present art. 1046 as follows:

"**1046.** (1) Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred by the deceased which may be payable to the heirs of the deceased, award to the dependants of the deceased and to his close relatives damages to be assessed as is provided in the following sub-articles of this article, and the heirs of the deceased shall have no claim for damages based on the loss of future earnings of the deceased.

(2) For the purposes of this article a dependant is a spouse, descendant or ascendant of the deceased and the brothers and sisters of the deceased who at the time of the deceased person's death were being maintained by the person whose death has been caused. The total sum to be awarded to all dependants under this sub-ar-

[25] Case no. 10.

[26] http://www.gov.mt/frame.asp?l=1&url=http://www.doi.gov.mt.

[27] Art. VI of 2004, enacted on 20 July 2004, was to "come into force on such date as the Minister responsible for justice may by notice in the Gazette establish"; the date of coming into force has not yet been established.

ticle shall not exceed the sum that would have been payable to the deceased had he not died but remained alive with total permanent disability after deducting thirty percent in consideration of what the deceased person would have required for own consumption. In assessing such sum the court shall take into account the amount of maintenance that the deceased person would have been liable to pay had he remained alive as well as the time after which the dependant person would have been able to maintain himself and no longer be dependant on maintenance from the deceased. Where at the time of death any person referred to in this sub-article is not in receipt of maintenance but there is a strong likelihood that had the deceased remained alive such person would in the future require maintenance from the deceased, the court shall grant damages accordingly.

(3) For the purposes of this article a close relative of the deceased is a spouse, descendant, ascendant or a brother or sister of the deceased living in the same household of the deceased. The total amount of damages that may be awarded under this sub-article shall be twenty thousand liri or such higher sum as the Minister responsible for justice with the concurrence of the Minister responsible for finance may by notice from time to time establish. Where more than one person claims or may claim under this sub-article, the court shall assess the sum payable to each such person on the basis of the pain and suffering caused to the person who has a claim and of the relative closeness of such person to the deceased and may award such damages to one or more of such persons to the exclusion of all others."

Damages for pain and suffering are not allowed under the present law. 83

C. Literature

1. *C. Micallef-Grimaud*, The Rationale for Excluding Moral Damages from the Maltese Civil Code: A Historical and Legal Investigation (University of Malta, Dissertation 2008)

This study seeks to answer the intriguing question "*Why* are moral damages excluded from the Maltese Civil Code?" The author advocates a change in the law, and the conclusions of his investigation only strengthen this conviction further. 84

Despite the fact that the foreign reference points for the Maltese legislator seemed to indicate one way of thinking, Maltese tort law clearly contains certain provisions that are actually quite "unique". Early judgments that were debating whether or not moral damages were compatible with the Maltese Civil Code provisions regulating "responsibility" in tort are highlighted first. The study endorses the theory (with reference to early case law) that the wording of the Maltese provisions dealing with responsibility (greatly influenced by the French Civil Code[28]) 85

[28] Art. 1031 of the Maltese Civil Code states that "*Every person ... ...shall be liable for the damage which occurs through his fault*" whereas art. 1382 of the French Civil Code states that "*Any act committed by a person which causes damage to another obliges that person by whose fault it occurred to make reparation*".

is general enough to encompass also moral damages. The problem in Maltese tort law is the wording of the provisions regulating the liquidation of compensation (damages). These provisions (which are not found in French law) are rather unique in that they seriously limit the ability of the courts to determine adequate compensation due on a case-by-case basis. Contrary to the general fault-based liability which lies at the heart of the provisions regulating responsibility in tort, the structure of the provisions regulating damages is actually a reflection of common law principles (a result of the influence British rule in Malta had on Maltese legislation). If the tort in question does not fall within one of the classes of compensable damage contemplated in these provisions, the court cannot liquidate any damages – even if the defendant is deemed liable for a particular moral injury/harm. This discrepancy between responsibility in tort on the one hand and damages on the other and also between general fault-based liability on the one hand and specific classes of compensable damage on the other, is the main reason why Maltese tort law is so complex and at times difficult to apply in practice.

86 The main sources referred to by the 19th century legislator are also analysed. French law and Austrian law (both of which greatly influenced Maltese tort law) are analysed in detail and contrasted with the peculiarities of Maltese law which are, in turn, examined in the light of the legislator's own rationale. The motivations of the Maltese legislator for drafting its "custom-made" provisions dealing with compensation in tort are also explored. The author concludes that such initial rationale might actually appear justified when one takes into consideration the way the Maltese Civil Code came to be, and the legislator's own fears at the time (unjustified enrichment, the financial ruin of the defendant, etc.). The courts' initial trepidations can also be clearly understood even though it must be said that in certain judgments (especially in recent years), the courts have interpreted the law quite liberally to reach a particular result. In some cases, particularly in those claims based on a general type of *iniuria* (not regulated by any specific law), the courts have come to accept that a general civil remedy may be granted which includes also moral damages. This rationale is based on concepts derived from Roman law (which are examined in early sections of the work) rather than any specific provision in the Civil Code. Basically, the courts are forced to work with what they have and often complain about the lack of "tools" available to them in this regard.

87 The legal and chronological investigation carried out in the study also concludes that the Maltese courts' rationale for excluding moral damages over a span of more than a hundred years was never one based on ideology or legal theory. It was always determined by the lack of an explicit legal basis in respect of the provisions regulating damages. No court has ever stated that "Moral damages should not be introduced". On the contrary, some judgments even declared that moral damages should be introduced preferably sooner rather than later. The writer proves that the Maltese courts are not opposed to moral damages being allowed in the Civil Code by examining the ways in which the courts compensate the claimants – at times clearly steering away from a literal interpretation of the wording of the law. An entire chapter is dedicated to exploring other areas of Maltese law where moral damages are explicitly

available (Press law, Promises of Marriage law, Human Rights law, Consumer law and Intellectual Property law). Each of these branches of law has its own reasons for allowing moral damages explicitly and the author explores these reasons and why similar innovations have not taken place *vis-à-vis* the general provisions of the Maltese Civil Code itself.

88 The main conclusion reached by the writer is that, today, there is no sufficient evidence to prove that following the drafting of the Civil Code in 1868 there has been a good enough reason to exclude moral damages from the Maltese Civil Code. In other words, the "rationale for excluding moral damages from the Maltese Civil Code" seems to have only become weaker with time and can no longer be said to be justified.

2. *R. Bernard*, Medical Malpractice – The Need for Local Legislation (University of Malta, Dissertation 2008)

89 In this work the author suggests changes in the law to make clear the definition of what constitutes medical negligence and also to provide alternative remedies in addition to, or instead of, those offered by the traditional fault-based system. Considering that the Maltese Criminal and Civil Codes were enacted long before the contemporary medical advances, the author examines the current state of the law before offering a number of alternative mechanisms, the possible effectiveness of which is critically analysed in a manner which complements the general theme of the work.

90 The opening chapters of the work introduce the reader to the realm of medical law, specifically medical malpractice, by introducing the basic notions of consent (with particular emphasis on informed consent) and duty of care respectively. The latter concept is analysed in the light of the duty owed by a doctor to his patient as well as of the possibility of the existence of a duty to third parties.

91 Chapters three and four are the central points of the work. The former deals with the complexities, and corresponding importance, of the requirement of establishing a breach of duty. Central to this topic is the causal nexus between the breach of duty and the damage suffered by those who allege it. This is dealt with in considerable detail under the sub-heading Causation. The writer also discusses a number of defences available to the defendant in a typical medical malpractice action, such as contributory negligence, *volenti non fit injuria* and limitation of action/prescription. The chapter queries whether criminal law (i.e. criminal negligence) should play any role in the sphere of medical malpractice. Chapter four begins by identifying the shortcomings of a tort-based, adversarial system in this context and offers a number of alternative mechanisms, such as the no-fault system and various forms of alternative dispute resolution. The effectiveness of these mechanisms is critically analysed not by overwhelming the reader with a sequence of reports or statistical studies, but through an analysis of the relevant legal problems. The writer compares different systems of law while carrying out this exercise. This is especially relevant for Malta, where, owing to its size and relatively limited malpractice litigation, this field of law is less developed.

92 In the final chapter the writer stresses the importance of the protection of medical pluralism and he also highlights the delicate link between medicine and the law. This relatively brief thought-provoking chapter ends the work on a somewhat philosophical note.

93 The writer's principal source of inspiration for this work was common law. This means that certain aspects of the Maltese law pertaining to this subject have only been discussed from the perspective of common law concepts and principles. While limiting coverage of Maltese law to some extent, this is evidently a measured choice, in view of the increasing prominence which common law writers and court decisions play in the jurisprudence of the Maltese courts.

3. *N. Mallia,* Pure Economic Loss: Is it Compensable under our Law of Tort? (University of Malta, Dissertation 2008)

94 This study starts with an overview of the concept of pure economic loss. It aims at marking the difference between what may be termed as pure economic losses and other kinds of damage. Where some kind of patrimonial harm or personal injury is inflicted, most consequential damages are recoverable without question. On the other hand, pure economic loss strikes only the victim's wallet, and it is when we come to compensate these losses that problems begin to arise. The writer then discusses whether intentional wrongdoing in pure economic loss situations can have any bearing on the compensability of such damage. The discussion then shifts to an analysis of the different categories into which pure economic loss situations may be classified, and the question of pure economic loss arising within the ambit of existing or anticipated wealth of the victim.

95 The second chapter is dedicated to reviewing the lessons imported from the English experience. It may be true that the Maltese law of tort does not per se partake of a common law approach. However it is also true that the Maltese legal system has been influenced by English law, not least when it comes to quantifying compensable damages for loss of future income or other earnings. Thus the boundary between the civil law and the common law influences is not always neat or easy to define. Within this context, this chapter seeks to explore the restrictive English approach to the concept of pure economic loss. It makes an extensive overview of judgments given by the English courts, with the aim of identifying as much as possible the practical situations where the English concept of "pure economic loss" comes, or rather, does not come into play.

96 The third chapter discusses the concept in the continental tradition, with particular emphasis on the jurisdictions which have mostly influenced Maltese civil law, namely, France, Italy, Germany and Austria. What is mostly noticeable in this regard is that the divide on the subject does not only exist between the common law and the civil law traditions, but also between the civil law systems themselves.

The fourth chapter tackles pure economic loss within the Maltese legal system; it analyses the legal provisions governing compensation under tort law in the Civil Code. Art. 1031, which lays down the general principle of liability for fault, being closely linked to the French art. 1382/1383, seems to place no limits preventing the courts from awarding pure economic loss. Art. 1045, on the other hand, with its mention of the word "actual", leads one to question whether pure economic loss may be considered as an "actual" form of damage or not. Also, art. 1045, being the provision on compensability of damage, only compensates future loss of profit subject to there being permanent bodily harm. A third issue which serves as food for thought is the concept of "unlawfulness" which is the filter to art. 1033. This concept gives the article a German/Austrian dimension. All this brings together elements from the three predominant currents which mark the jurisdictions analysed earlier on, and which have marked the treatment of pure economic loss in the western world. This does not make it easy for one to infer the direction that is being taken on the subject in Malta. 97

In this work the Maltese treatment of the subject is also viewed from the practical angle of the decided cases. Several issues which arise from a legal point of view are compared to real life cases which cover various situations giving rise to problems concerning the compensability of pure economic loss. 98

4. *K. Camilleri Xuereb,* Negligence Defined, Negligence Refined, in Law and Practice (Chamber of Advocates, Malta 2007–2008)

The article mainly discusses the concept of negligence (or as it is otherwise known, *culpa*) from the criminal perspective. However, since the concept is contained in one sole provision of the Maltese Criminal Code,[29] the author delves into a study thereof with the aid of sources, comparisons, authors and case law from the civil domain on which he bases his research and findings. For this reason, although written mostly from a criminal law perspective, the article also provides useful insight into the civil notion of negligence. 99

Under Maltese law, criminal negligence comprises different forms or aspects, although it is considered as one unitary concept. The aim of the entire article is to distinguish one form of negligence from the other. In other words, culpa is made to consist in "*carelessness*", in "*imprudence*", in "*unskilfulness*", and in "*non-observance of regulations*" (similar to the Italian and French present position) and the author attempts to distinguish one form from the other by describing, and defining, each single locution and its peculiar factual and/or legal implications. 100

In the first part of the article, the author introduces the general principle of *culpa* as obtaining under Maltese penal legislation and then turns his attention to defining the two aspects of "imprudence" and of "carelessness". The second 101

[29] Art. 225**.** Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding four years or to a fine …

part of the article focuses entirely on "unskilfulness in an art or profession" and therein discussed are themes such as professional error and the taking of an unwarranted risk. Here, the author makes ample reference to principles established by case law and by authors, mostly from the civil sphere. The third part of the article then examines the most specific form of *culpa*, namely, "non-observance of regulations" and discusses, inter alia, whether the element of foreseeability is a dominant characteristic in this as in the other aspects. In the fourth and final part of the article, the author analyses how foreign penal codes have sought to formulate a legislative definition of negligence, pointing to the pros and cons and comparing their respective stance with the Maltese Code.

102 Throughout the entire article, the author stresses the point that the subject under study is a very flexible and fluid branch of the law, whether assessed from the criminal stance or from the civil one, and as he states, "*negligence is virtually a recognizable creature but impossible of acute and accurate definition*". However, the attempt is not to rigidly define the topic but simply, by going a step beyond the express provisions of domestic legislation, to expose those essential features that serve to refine the juridical perception of *culpa*. Hence the title of the work. As the author himself admits, "*if the aim of defining culpa proves to be vested with the robe of impossibility, the aim of refining it dwells in the realm of possibility*".

XVIII. The Netherlands

Michael G. Faure and Ton Hartlief

A. Introduction

In 2008 there were a few interesting developments on which we can report as far as tort law in the Netherlands is concerned. As usual much legal doctrine has been published and this is no exception for 2008. 1

The legislator has been relatively silent and important decisions that have been awaited for many years (e.g. a regulation concerning the amounts for pain and suffering) have not advanced the legislative process at all. 2

As usual most of the interesting news in the Netherlands comes from case law and more particularly from the Hoge Raad. Again in 2008 the Hoge Raad was very active and rendered a few interesting decisions which we will discuss in this contribution. Quite striking is the decision of the Hoge Raad whereby it explicitly imposes a duty to insure on employers for traffic accidents that occur to employees in the course of the exercise of their work for the particular employer. The least one can say is that it is remarkable that such a duty to insure is not the result of legislative action, but of a decision of the Hoge Raad, which again shows the importance of this institution in the Netherlands. 3

B. Legislation and Evolutions at Policy Level

1. A Variety of Legislative Proposals

An interesting proposal concerns the so-called "partial trials". In legal doctrine it had often been suggested that sometimes parties could almost reach a settlement but for example only disagree on one particular aspect of the dispute. It could lead to a substantial cost reduction if parties were allowed to limit their dispute to one particular aspect of the case. That is more particularly the goal of a legislative proposal that was published in 2008.[1] 4

[1] Documents of the Second Chamber of Representatives (2007/2008) 31 518.

5 Another legislative proposal concerns income losses suffered by third parties. The proposal has not been formally introduced in the Second Chamber of Representatives, but a draft has been published.[2]

2. Result-based Compensation for Lawyers

6 In the Netherlands contingency fees, i.e. fees of which the amount would be totally dependent on the result of the case, are prohibited in the Netherlands. It has been a debated issue for a long time and the government has appeared to be in favour of a so-called "no win, no fee" system.[3] Such a system would mean that a lawyer would be allowed to abstain from charging a fee if he lost the case whereas if he won, he would be allowed to charge a "success fee" which would amount to double the normal hourly rate. The government sought advice concerning this proposal *inter alia* from the Netherlands Order of Attorneys, but the latter expressed a preference for a pure "no cure, no pay" system since the success fee proposed in the government's proposal may be too limited to make this attractive for attorneys. It is likely that on this point a further point of view will be published in 2009, most likely allowing an experiment with some kind of result-based payment for lawyers.

3. The Future of the Hoge Raad

7 The so-called Hammerstein Commission published a report on the future of the Hoge Raad, devoting much attention to the fact that the Hoge Raad also creates legal norms and provides suggestions on how the position of the Hoge Raad in this respect can be further improved. Hammerstein's report suggests a certain shift from the law as protective instruments to "law making". In this respect Hammerstein highlights several areas which are worthy of attention:

- the possibilities to ask for a revision by the Supreme Court in the interest of the law;
- the introduction of a system whereby permission would have to be granted to call on the Hoge Raad (hence a selection to limit the number of cases submitted to the Hoge Raad);
- the introduction of the possibility for lower judges to ask the Hoge Raad prejudicial questions.[4]

8 Various scholars have commented on these proposals of the Hammerstein Commission. Some ask for a better delineation of the law-making task of the Hoge Raad.[5] Others see advantages at different levels such as:

[2] For a discussion of this draft see *E.F.E. Engelhard*, Naar een nieuw criterium voor de vergoeding van derden: het voorontwerp inkomensschade en het wetsvoorstel re-integratiekosten, Verkeersrecht (VR) 2008, 1–6.

[3] Documents of the Second Chamber of Representatives 2007/2008, 31 200 VI, no. 93.

[4] For a discussion of these evolutions see *inter alia I. Giesen*, De normstellende rol van de Hoge Raad in het aansprakelijkheidsrecht, Aansprakelijkheid, Verzekering & Schade (AV&S) 2008, 111 and *T. Hartlief*, Belangrijke mensen in het recht: Lucia de P., Hammerstein en Kooiker, Nederlands Juristenblad (NJB) 2008, 869.

[5] See in this respect more particularly *J.M. Barendrecht*, Rechtsvorming via hogere rechtspraak. Heeft de Commissie Hammerstein de oplossing? NJB 2008, 1070.

- using the limited capacity (in manpower) of the Hoge Raad for those cases that really matter;
- creating more speedily clarity about legal issues and thus about the state of the law;
- allowing a more informed based decision-making (for example using information provided by insurers).

4. Needs of Victims

In the previous Yearbook we referred to a research study executed by scholars from the Free University of Amsterdam who investigated the specific demands of accident victims.[6] The government has accepted the research results.[7] This research held that victims do not only seek financial compensation, but also satisfaction of non-pecuniary needs, they seek the truth or have the desire to prevent that the same would happen to others. After an accident usually only compensation is sought via a procedure. This procedure can contribute in a positive way to satisfying the needs of victims. However, this procedure can also have a negative impact and thus limit the ability of victims to recover. 9

An important lesson from this research is that tort law should abandon the idea that merely providing a victim with "a bag of money" would solve all problems and heal all wounds.[8] Tort law could hence also consider alternatives such as finding adequate medical and other support for example by providing a helping hand in the household and supporting the victim's reintegration. Recent initiatives in that respect show positive results.[9] Better results (as far as the victim's position is concerned) can be achieved if one realises that the victim is not only interested in "the bag of money" but also has particular emotional needs. Direct satisfaction of the victim's needs can hence be an interesting approach. 10

C. Case law

1. Strict Liability

a) For Persons

Much attention has been paid to a Hoge Raad decision concerning the party centre called Groot Kievitsdal.[10] The Hoge Raad decision of 9 November 2007[11] 11

[6] *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 417 f., no. 5.

[7] Documents of the Second Chamber of Representatives 2006/2007, 28 781, no. 13.

[8] See *T. Hartlief*, De markt van pijn en smart, NJB 2008, 263.

[9] See *M.A.M. Westerhof*, Ontzorgen bij letselschade helpt, Tijdschrift voor Vergoeding Personenschade (TVP) 2007, 130–133.

[10] We discussed this case also in earlier Yearbooks as far as the decisions in lower instances were concerned. See *Faure/Hartlief* (fn. 6) 426 f., no. 23.

[11] But only published and commented in the main law reviews in 2008; that is the reason why we discuss it in this Yearbook. See Hoge Raad 9 November 2007, Rechtspraak van de Week (RvdW) 2007, 960; Jurisprudentie Aansprakelijkheid (JA) 2008, 25. See for comments also *S.D. Lindenbergh*, Olie op het vuur (Groot Kievitsdal), Ars Aequi (AA) 2008, 358–361 and

deals with the scope of Art. 6:170 of the Civil Code but is indirectly also of great importance for employers' liability as regulated in Art. 7:658 of the Civil Code. The reader will recall from our earlier discussion of lower decisions that the facts concerned a staff party that got slightly out of hand on a Saturday night: during a barbecue oil was thrown on the fire as a result of which a fire started, resulting in millions of Euros of damage. The procedure only dealt with the question whether the presumably wrongful behaviour of the employees involved can also be attributed to the employer. The application of Art. 6:170 requires a functional connection with the employment. The civil court in first instance held that there was no such functional connection; the court of appeals that there was. The latter decision was upheld by the decision of the Hoge Raad of 9 November 2007.

12 For the court of first instance it was of major importance that being present at the barbecue was not the primary task of the employees involved; they moreover were not obliged to be present at the staff party neither were they morally obliged to be there. The court of appeals on the other hand considered it of greater importance (*inter alia*) that the activity was organised and facilitated by the employer himself, that the persons present at the activity were only present because they were employees and that moreover the goal of the meeting was to create a kind of group spirit. Moreover, the persons present at the party considered their superior at the workplace also as "their boss" in this informal setting and acted during the activity concerned as a unity.

13 The Hoge Raad therefore held that, in order to establish that there is a functional connection in the sense of Art. 6:170 of the Civil Code, one has to take into account all relevant circumstances, including the place and time of the wrongful behaviour and also that the work relationship created the occasion. A crucial issue for the Hoge Raad was also whether the damage was caused using instruments that the persons involved received in their work relationship. In addition the Hoge Raad indicated that other circumstances can also be of importance, such as the question whether the person in charge can be blamed. In this particular case it was of importance since the "boss" was present and did not intervene; it was even suggested that he might have provided an active input himself. Equally important was whether the employees acted as a unity, whereby it is irrelevant that the activity itself did not take place within the exercise of employment duties. The Hoge Raad equally indicated that the mere absence of a duty or obligation to be present at the party does not mean that a functional relationship with the employment no longer exists. As a result the Hoge Raad upheld the decision of the court of appeals and hence confirmed the liability of the employer for the damage that was caused.

14 Commentators have held that the decision of the Hoge Raad is striking since the Hoge Raad quoted the text of Art. 6:170 al. 1 very often, but does not

E.M. Tjon-Nen-Fa, Het functioneel verband van art. 6:170 BW wordt losjes aangelegd. HR 9 November 2007, LJN BA 7557 (Groot Kievitsdal), Maandblad voor Vermogensrecht 2007, 257–261.

specifically test whether the formal conditions for its application were met in the present case.[12] The application of this article (making the principal liable for damage caused by the fault of an agent) is that the probability of damage must have increased as a result of the assignment to execute a specific task and second that the principal had "command" concerning the wrongful behaviour. In a recent decision of the court of appeals of Amsterdam, where a welder was hindered by his colleague during a break, liability of the employer was denied since the court of appeals held that these formal conditions were not met.[13] Given the recent decision of the Hoge Raad one can wonder whether this decision of the court of appeals of Amsterdam would be upheld by the Hoge Raad. It is, moreover, striking that the Hoge Raad provides no explanation as to why it chose clearly a broad application of Art. 6:170 of the Civil Code. The Hoge Raad also does not discuss the ratio for the liability for damage caused by others as incorporated in Art. 6:170. As far as the criteria to decide on liability are concerned, the Hoge Raad basically follows what had been discussed and presented in legal doctrine earlier. It is, however, remarkable that applying these criteria (such as the place of the event, time and nature of the behaviour) one would expect that this would not lead to liability: none of them were related to the employment relationship. It is probably the presence and involvement of the "boss" that played a crucial role for the Hoge Raad in deciding the question of liability. Still some unanswered questions remain. It remains for example unclear how the Hoge Raad would have decided if the boss had protested against the behaviour of the employees and had perhaps even attempted to prevent the damage. A fault of the employer is normally not a condition for liability on the basis of Art. 6:170, neither is it required that the employee acted against the instructions of the employer. It hence remains rather unclear to what extent this role of the boss was really crucial in deciding upon the liability issue.

Further questions also arise more particularly as to whether this broad interpretation adhered to by the Hoge Raad can also be applied in cases of employers' liability for accidents that occur during staff parties on the basis of Art. 7:658 of the Civil Code. That issue has clearly not been finally settled yet and it can be expected that a further refinement in the case law of the Hoge Raad in that respect will still follow.[14] 15

b) And for Objects

The system of strict liability for persons and objects under one's responsibility in sec. 6.3.2 of the Civil Code entails that, in case of a professional use of a specific object, it is no longer the possessor, but the person making the 16

[12] See in this respect more particularly *T. Hartlief*, Actualiteiten aansprakelijkheids- en schadevergoedingsrecht 2007-2008, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2008, no. 24.

[13] Hof Amsterdam 22 November 2007, Nederlandse Jurisprudentie Feitenrechtspraak (NJF) 2008, 100.

[14] See for a further discussion of these and related issues, *G.T. de Jong*, Het belang van het begrip "bedrijfseenheid" in verband met de contractuele aansprakelijkheid voor hulp personen, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 6742 (2008) 138–145.

professional use of the object who is responsible. A few decisions from lower instances show that it is not always easy to determine whether there is such a professional use, nor is it always easy to determine who the professional user is. A (factually) interesting case in that respect was dealt with by the kantonrechter in Bergen op Zoom on 16 January 2008 and concerned a horse, Pina Colada, that, when with a professional horse pension, caused damage to another horse.[15] A similarly interesting case was dealt with by the civil court of Utrecht on the same day (16 January 2008) and concerned a case whereby an employee suffered damage as a result of a defective ladder.[16] These cases also make clear that in some situations multiple parties could be liable on the basis of the strict liability in Art. 6:181 of the Civil Code.[17]

2. "Employers' Liability"

17 Recently the Hoge Raad has rendered a few decisions concerning what could be called "employers' liability". A few are worth mentioning:

In the Hoge Raad decision of 7 December 2007[18] the liability of Shell was denied in the case of an accident where an employee simply missed a ladder's rung in the warehouse of the employer. The ladder concerned was inadequate, but the employer Shell had also provided a decent ladder.[19]

18 The decision of the Hoge Raad of 8 February 2008[20] deals with the door of a truck which, as a result of strong winds is blown in the face of an employee. Liability is denied. It could apparently not be expected that the employer would take additional preventive measures since the risk of truck doors closing as a result of strong wind should be well-known, even if the employee had not been warned.

19 In a decision of the Hoge Raad of 11 April 2008,[21] liability was accepted. The case concerned an employee who slipped in a laundrette where the floor was a little wet. The court in lower instance had rejected liability, but the Hoge Raad held that the lower courts too easily assumed that the employer could simply trust that safety shoes and other more adequate measures (like specific

[15] Kantonrechter Bergen op Zoom 16 January 2008, JA 2008, no. 40, 332.
[16] Rechtbank Utrecht 16 January 2008, JA 2008, no. 38, 319.
[17] Strict liability has also been discussed in legal doctrine. See for example a contribution discussing the strict liability for damage caused by animals (on the occasion of the escape of a (now) famous gorilla Bokito from the Rotterdam Zoo Blijdorp): *E. van Schagen/D. Stubbé*, Lachen met Bokito, Ars Aequi 2007, 645–651. And see on the strict liability of the guardian of roads the second edition of *C.C. van Dam et al*., Aansprakelijkheid van de wegbeheerder, The Hague (2007) and the comparative analysis on this topic by *C.C. van Dam*, Aansprakelijkheid van de wegbeheerder in Engeland, Frankrijk en Duitsland, VR 2007, 404–406.
[18] Nederlandse Jurisprudentie (NJ) 2007, 643; JA 2008, 33 with case note by *B.M. Paijmans*.
[19] See for more details concerning this case *D.E. Alink*, Werkgeversaansprakelijkheid ex art. 7:658. De eigen verantwoordelijkheid van de werknemer. HR 7 December 2007, NJ 2007, 643, Maandblad voor Vermogensrecht 2008, 108–113.
[20] NJ 2008, 93.
[21] NJ 2008, 465.

rubber floors) would be used (which was also the case after the accident happened).

The decision of the Hoge Raad of 6 June 2008[22] again concerned a case whereby the court of appeals had denied employers' liability which was subsequently reversed by the Hoge Raad. In the particular case an employee had slipped over the step of a hut. 20

Much attention has been paid in the legal doctrine in the Netherlands to the evolutions in the case law of the Hoge Raad concerning employers' liability. This more particularly considers a question which we also addressed in previous Yearbooks, being whether the Hoge Raad has changed its position by perhaps moving away from the very severe employers' liability as laid down *inter alia* in the case concerning the so-called Multivac machine.[23] Also some of the recent cases we just discussed seem to confirm the stringency of the Hoge Raad in this domain.[24] 21

In any case it is striking that the above-mentioned decision of the Hoge Raad of 11 April 2008 refers to a high level of safety although it merely concerned an employee who slipped on a small puddle of water. In other words the Hoge Raad also requires a high level of safety for those cases which are outside of the sphere of dangerous machines (like the Multivac machine). Repeatedly the Hoge Raad stresses the need to take effective preventive measures.[25] 22

3. Work-related Traffic Accidents

Again this is an issue that we have discussed in previous Yearbooks: the question to what extent employers can be held liable for accidents involving an employee, but where the relationship with the employment is not always that clear.[26] The problem with these work-related traffic accidents is that Art. 7:658 will not help. Since accidents that occurred outside of the sphere of influence of the employer are usually concerned, the employer can in most of these cases 23

[22] NJ 2008, 326.

[23] For a discussion of this case see *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 418, no. 9.

[24] For overviews of case law in the domain of employers' liability see *inter alia, A. Kolder*, Werkgeversaansprakelijkheid: de Hoge Raad weer op koers? AV&S 2007, 161–171; *A.J. Verheij*, Kroniek van werkgeversaansprakelijkheid, AV&S 2008, 153–162; *C.J.M. Claassen*, De aansprakelijkheid van de werkgever op grond van art. 7:658 BW, hoe staat het ermee? Sociaal Maandblad Arbeid (SMA) 2008, 210–221 and *R.A.A. Duk*, Cassatierechter en arbeidsovereenkomst: op de keeper beschouwd, SMA 2008, 19–26.

[25] *Hartlief*, NTBR 2008, no. 31.

[26] See *Faure/Hartlief* (fn. 6) 425 f., no. 22; *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 345 f., no. 17; *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 426 f., no. 26; *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 434 f., no. 28; *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2003 (2004) 297 f., no. 55–58 and *M. Faure/T. Hartlief*, The Netherlands, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2001 (2002) 367–369, no. 34–37.

successfully argue that he did not breach any duty of care. The Hoge Raad has, however, developed a system of protection also outside of the scope of Art. 7:658 of the Civil Code. In the well-known case, Schuitemaker/Bruinsma Tapijt of 16 October 1992,[27] the Hoge Raad accepted liability on the grounds of Art. 6:248 al. 1 for damage to the employee's own car. Later, in the case Vonk/Van der Hoeven of 12 January 2001,[28] liability was also accepted for personal injury suffered by the driver. A further step was set in the case De Bont/Oudenallen of 9 August 2002 where it was held that the employer had to cover damage of the employee which was not covered by insurance.[29] This case law was interpreted in such a way that there was a general liability of the employer for traffic accidents occurring in the course of the employment (not being the journey between home and work) and this irrespective of the behaviour of the employee (except for the case of intent or gross negligence) and irrespective of whether there was a violation of any duty of care of the employer.

24 However, there were doubts in lower case law with respect to the scope of this liability. The liability was dogmatically no longer based on the so-called reasonableness and equity of Art. 6:248 of the Civil Code, but rather on the general duty of a proper employment laid down in Art. 7:611 of the Civil Code. The case law of the Hoge Raad led to various questions, *inter alia* concerning the delineation between the journey between home and work and the journeys undertaken in the course of the employment.[30] There was a question whether biking or walking employees would also fall under the protective regime of Art. 7:611[31] and the question arose as to what the exact level of damages should be: the normal level of damages in tort (being full compensation of all material loss and non-pecuniary losses) or the amount the employee would have received if the employer had insurance cover (which can be substantially lower).

25 Some of these questions were answered (and many others created) in two decisions of the Hoge Raad of 1 February 2008 with respect to this issue.[32] The decisions have, given their importance, meanwhile been commented upon by many scholars.[33] The crucial point decided by the Hoge Raad in these two decisions is:

[27] NJ 1993, 264.

[28] NJ 2001, 253 and for a discussion see: *Faure/Hartlief* (fn. 26) European Tort Law 2001, 367–369, no. 35–37.

[29] NJ 2004, 235.

[30] See for example court of appeals of the Hague 26 January 2007, VR 2007, 106 and Hoge Raad 30 November 2007, RvdW 2007, 1030; JA 2008, 32 with case note by *E. van Orsow* and *J. Potharst*.

[31] Court of appeals of the Hague 12 January 2007, VR 2007, 105.

[32] Hoge Raad 1 February 2008, RvdW 2008, 176 and Hoge Raad 1 February 2008, RvdW 2008, 178; JA 2008, 53 with case note by *A.R. Houweling*.

[33] *A. Kolder*, De aansprakelijkheid van de werkgever voor schade door verkeersongevallen, Maandblad voor Vermogensrecht 2008, 66–76; *M.S.A. Vegter*, Werknemers in het verkeer verplicht verzekeren, Sociaal Recht 2008, 124–126; *J.J.M. de Laat*, De verhouding tussen art. 7:658 en art. 7:611 BW, Sociaal Recht 2008, 53–55; *T. van Nieuwstadt*, Werkgeversaansprakelijkheid voor ongevallen in het schemergebied tussen werk en privé: licht aan het eind van de (verkeers) tunnel? Arbeidsrecht 2008, 8–14 and *J.J. van der Helm*, Een behoorlijke verzekering voor verkeersongevallen van werknemers, VR 2008, 97–101.

- that since Art. 7:658 of the Civil Code does not provide absolute protection to employees, the same goes for Art. 7:611 of the Civil Code; Art. 7:611 as a consequence provides for a limited liability. The Hoge Raad clearly also pays attention to the importance of "unity in the system" of employers' liability: Art. 7:611 can in that respect not go further than Art. 7:658;
- the risk of a driver being involved in an accident is a risk which many take and which is well insurable for reasonable premiums. Given the insurability of this risk, the employer is, on the basis of Art. 7:611, obliged to take out reasonable insurance to the benefit of employees whose work could lead them to cause accidents as a driver;
- the scope of this obligation is dependent upon the circumstances. In that respect one has to take account of *inter alia* the insurance possibilities that existed at the moment of the accident as well as what the general opinion was in society concerning a reasonable insurance;
- this insurance should not cover accidents caused by intent or gross negligence of the employee;
- the mere fact that obligations rising from a collective labour agreement have been met does not mean that an insurance which would have been concluded on that basis is automatically satisfactory;
- also when the employee uses his own car the employer should make sure that this employee has insurance coverage himself;
- in case of a violation of this duty to insure, the liability of the employer is limited to the damage that is suffered as a result of that violation.

26 To be very clear: the compulsory insurance that the Hoge Raad refers to in these new cases of course only refers to a compulsory insurance for damage caused to the employee himself when the employee as a driver is involved in an accident and suffers damage himself. For damage caused by the employee towards third parties of course the compulsory insurance for motor vehicles applies. It may be clear that these are spectacular decisions since the Hoge Raad clearly accepts that there should be a duty imposed on the employer to take out insurance coverage for these work-related traffic accidents. This of course raises important questions *inter alia* with respect to the task of the Hoge Raad in "law-making". Some of the commentators mentioned in the earlier footnotes have openly asked whether it is the task of the Hoge Raad to make such decisions. In fact the Hoge Raad is intervening in the scope of social security which was, moreover, a politically very sensitive issue on which legislation was being drafted.[34]

27 The decisions are also interesting as far as the scope of liability is concerned: the Hoge Raad makes clear that the liability is limited to damage suffered as a result of the fact that no insurance coverage is available. As a general rule the resulting damage (for which the employer will then be held liable) is equal to the insurance monies the victim (employee) missed, increased with interest. One of the crucial questions is of course whether this has implications as well for other (employer) liabilities equally constructed on the basis of Art. 7:611.

[34] See in that respect also *Hartlief*, NTBR 2008, no. 37.

Moreover, even though these 1 February decisions of the Hoge Raad may have answered some questions they have equally created many questions as well. For example:

- How is it possible to find out what the social opinion was concerning a need to take out insurance coverage at the time of the accident?
- Is there a difference between an employee who takes part merely incidentally in traffic and the case whereby this has a more structural nature?
- What about traffic accidents where non-motorised employees (cyclists or walkers) are involved?
- How can the journey between home and work (which is covered through a different regime) be distinguished from taking part in traffic for the employer?
- What precisely can be considered adequate insurance and related to this point:
  - What level of compensation is required?
  - Is only the best available insurance policy on the market high enough? And
  - Can exclusions and exceptions be included in the insurance policy?[35]

4. The Right to a "Patient Card"

28 A complicated issue and still related to tort law is whether the victim has a right to a so-called "patient card" (the patient's medical file). This is in fact related to the social security issue that the victim can only enjoy specific benefits when a particular injury is the consequence of an accident. For those who have to pay (injurers and their insurers) the danger is that this may lead to a moral hazard problem whereby even the smallest health problem would still be related to the accident. This question has led to very principled discussions since the injurers (and their insurers) of course argue that such an assessment is only possible after a full disclosure of information and hence, they argue that they should be entitled to review this so-called "patient card". Victims on the other hand argue that allowing injurers (and mostly their insurers) to review the victim's "patient card" would violate their privacy and thus Art. 8 of the European Convention of Human Rights.

29 The lower case law was divided on the issue. The civil court of Amsterdam held that the insurer has a serious interest in having this information as a result of which this "patient card" should not only be available to an expert, but also to the medical advisor and attorney of the (liability) insurer.[36] In another decision of the same civil court of Amsterdam it was, however, held that disclosure of this private information to the attorney of the liability insurer has no added value.[37] The court of appeals of Arnhem had to deal with the insurer's request that the victim fully disclose his medical file to the medical advisor of the li-

[35] For a discussion of these and other remaining questions after the Hoge Raad decisions, see Hartlief, NTBR 2008, no. 38.
[36] Civil court of Amsterdam 27 May 2005, NJF 2006, 44.
[37] Civil court of Amsterdam 28 December 2005, NJF 2006, 262.

ability insurer Allianz.[38] Given that an opinion was formulated by an independent expert who could review all the documents of the case, the court held that it is only important that this independent expert indicate on which documents his opinion was based. Thus the insurer can formulate remarks or questions or provide comments without the need to fully disclose the medical records of the victim to the liability insurer.

30 In two recent decisions of 22 February 2008 the Hoge Raad seemed to follow a different approach.[39] In both cases the insurer had asked for a preliminary opinion by an expert and had equally asked that the victim be ordered to disclose his medical record. The Hoge Raad held that, according to civil procedure, a preliminary report by an opinion should provide evidence concerning specific facts and circumstances relevant to the procedure. The goal of this preliminary expert report is therefore that an answer is provided to specific questions that were submitted to the expert who will address these questions according to the best of his knowledge and in an impartial way. According to the Hoge Raad, as a consequence, it is primarily the expert who decides what evidence he needs. Parties are obliged to co-operate in this collecting of evidence. Within this framework there is, according to the Hoge Raad, no possibility to explicitly ask *ex ante* that the victim be forced to disclose a medical record to the expert.

31 This question whether the claimant (the liability insurer) has a right to review the documents (in this particular case the medical record) that have been submitted to the expert thus remains complex. In principle the rules of civil procedure concerning a fair trial imply that both parties should be able to review all the documents on the basis of which the expert has formulated his opinion. However, an exception applies for medical data, but here again an exception applies when the adversary is an insurance company with a medical advisor. In the latter case all documents that the victim (or his attorney) provides to the independent expert have equally to be provided to the medical advisor of the insurer. It is, however, important to stress that the medical advisor of the insurer is under a duty of confidentiality, also with respect to his own insurer.

32 The Hoge Raad therefore holds that it is basically up to this independent expert to decide which documents he should receive and which documents he will or will not use. When he then decides also to use medical records (referred to as the "patient card") of the victim then this information will also have to be provided to the medical advisor of the insurer. But as long as the victim decides not to provide particular data to the expert and the expert does not request them, the general rule is that the regulation concerning the preliminary expert report does not constitute a legal basis to oblige the victim to disclose this information unless there were serious reasons for such an obligation. What these serious reasons could be remains unclear. One could argue that the (medical

[38] Court of appeals of Arnhem 27 June 2006, NJF 2006, 416.

[39] Hoge Raad 22 February 2008, RvdW 2008, 256 and Hoge Raad 22 February 2008, LJN/BB 3676, JA 2008, 72 and 73. See equally civil court of Arnhem 5 December 2007, JA 2008, 74 with case note by *J. Quakkelaar*.

advisor of the) insurer has a stronger argument that information should be disclosed to him in case of e.g. a potentially high claim; personal injury damage which is very hard to assess in an objective manner and thus is highly subjective; medical problems (like stress) which can also occur without an accident. These and other reasons may potentially be considered as important reasons to oblige a victim to disclose his medical records, although the legal basis to do so would then not be the preliminary expert procedure.[40]

33 The first comments in legal doctrine on these decisions of the Hoge Raad are, to put it mildly, not very positive.[41] The comments *inter alia* hold that the Hoge Raad clearly deviates from the line of reasoning which was set out by the earlier mentioned decision of the court of appeals of Arnhem the reasoning of which had some support in legal practice. The solution of the court of Arnhem was that the expert would see the whole file, that irrelevant data would remain with the expert and that relevant data can only be examined (also by the medical advisor of the insurer) if this is unavoidable. In the system worked out in the decisions of the Hoge Raad, everything that comes to the expert will also be seen by the medical advisor of the insurer and in some cases even by the insurer himself. The Hoge Raad thus creates a central role for the expert and legal doctrine holds that it is unclear what consequences this will entail. It is *inter alia* unclear whether experts will now receive many requests from parties and unclear is equally how experts will fulfil this role imposed upon them by the Hoge Raad. Also the relationship between the medical advisor of the insurer and the independent expert may have changed. It is for example not that clear what the medical advisor can do when he, contrary to the expert, judges that specific data are of importance.

34 Moreover, legal doctrine equally indicates that the entire system worked out by the Hoge Raad in these decisions of February 2008 only relate to the specific context where a provisional expert report has been requested. What has not been decided is how these issues should be decided outside of the context of this preliminary expert report. Whether the (medical advisor of the) insurer then is entitled to disclose information contained in the "patient card" and if so, under which specific conditions, has not been clarified at all by these recent decisions. In that respect still many questions remain.

5. Causation

35 The question how in case of strict liability damage can be attributed to a particular tortfeasor was "regulated" by a decision of the Hoge Raad of 13 June 1975 in the Amercentrale case.[42] The Hoge Raad held in that decision that, in case of strict liability, a more limited attribution is possible. Legal doctrine had, however, asked whether this position was still up to date. A recent decision of

[40] See *Hartlief*, NTBR 2008, no. 48.

[41] See *inter alia*, *A. Kolder*, De Hoge Raad en de patiëntenkaart: een gemiste kaart, NJB 2008, 1278–1282 and *S.M. Christiaan/W.J. Hengeveld*, Februari-arresten: de patiëntenkaart; partijen wikken, de deskundige beschikt, TVP 2008, 51–56.

[42] NJ 1975, 509 with case note by *G.J. Scholten*.

the Hoge Raad concerned the application of Art. 6:169 al. 1 of the Civil Code.[43] The specific provision concerns the liability of parents for damage caused to third parties by children younger than 14 years of age. The recent decision by the Hoge Raad implies that there is no general rule as far as attribution in strict liability cases is concerned. The scope of this attribution therefore depends on the specific strict liability involved.

6. Contributory Negligence and the Duty to Mitigate

Art. 6:101 of the Civil Code deals with fault on the side of the victim. The general rule is that the fault of the victim can lead to a proportional reduction of the compensation due. However, the last part of Art. 6:101 al. 1 of the Civil Code holds that other solutions (varying from no compensation at all to full compensation) can be followed when equity requires such a solution taking into account *inter alia* the relative seriousness of the fault involved or other specific circumstances of the case. There is often discussion on how this so-called equity correction has to be applied in practice.[44] A question that often arises in practice (although not in the published case law) concerns what the duty to mitigate damage entails in case of a loss of the capacity to work. Can one, for example, require a victim to mitigate his income loss by taking another job? This was the question that arose in a Hoge Raad decision of 14 December 2007.[45] This case concerned a woman who was involved in a traffic accident at the age of 28. At the time of the accident, she had a full-time job as a nurse. After the accident she could resume her employment as a nurse, but was unable to work for more than 24 hours a week. If she had taken another job, she would possibly have been able to work full-time. The question therefore arises whether the victim who can no longer continue with her previous occupation can be forced to accept other work that may generate a similar income as that which she received prior to the accident. Advocate-General Wuisman argues that to answer this question one has to look at various aspects such as the age and the education of the person involved, the type of work exercised before the accident and the length of time this was exercised and the potential to exercise other types of work. However, Wuisman also stresses that it is important to remember that the victim has been brought into this position against her will and that the injurer is liable for this. He further points to the wrongful birth decision of the Hoge Raad[46] in which the Hoge Raad pointed at the freedom of a victim to arrange his or her life according to her own wishes and expectations. The court of appeals had judged that in this specific case it could not be demanded from a victim that she accept another job and Wuisman agrees with this decision and consequently advises to leave this decision untouched. Unfortunately, however, for formal reasons the Hoge Raad dismissed the case (thus indeed leaving the decision of the court of appeals untouched) as a result of which the Hoge Raad did not express itself on the merits of the case.

36

[43] Hoge Raad 25 April 2008, NJ 2008, 262. For a comment see *I. Giesen*, Causaliteit en toerekening naar redelijkheid: geduld is, en blijft, een schone zaak…, WPNR 6762 (2008) 563–566.

[44] For a discussion of earlier case law, see *T. Hartlief*, Ernstig letsel en eigen schuld: billijkheid of smartengeld? NJB 2007, 2672–2675.

[45] RvdW 2008, 18.

[46] Hoge Raad 21 February 1997, NJ 1999, 145 with case note by *C.J.H. Brunner*.

7. Damage

a) Damage Assessment: in abstracto or in concreto?

37 In the summer of 2008 the Hoge Raad rendered an important decision concerning Art. 6:108 of the Civil Code. It more particularly concerned Art. 6:108 al. 1, d. According to this provision, someone who is liable for an accident as a result of which another dies is forced to compensate for lost income to the person who lived with the deceased in a family when the deceased contributed to a common household. Liability in that case is limited to the extent that damage is suffered since after the death other provisions need to be made for the household. The question that arises in these cases is whether the damage needs to be assessed in the abstract or whether specific concrete circumstances can be taken into account. An earlier decision of the Hoge Raad of December 2005 gave reason to think that a certain assessment *in abstracto* was possible.[47] The recent decision of 11 July 2008[48] provides more clarity.

38 The facts concern a case from 7 June 1993 when a mother died as a result of a traffic accident. Achmea was the liability insurer of the car that caused the accident and recognised liability for the damage which followed from the accident. Prior to the accident the mother had lived together with the father and their common children. At the time of the accident the children (born in 1986 and 1989) were seven and four years old. The father had worked shifts before the accident, and continued to do so after the accident, for 38 hours a week. The mother had worked for 20 hours a week as a management secretary. While the mother was at work, either the father or the grandmother (mother of the mother) took care of the children. It was accepted as a fact that the mother would have started to work for 30 hours a week once the oldest started school (1 September 1993).

39 On 1 October 1995 the father remarried. His new wife already had a child. She had no income of her own. The father arranged for an assessment of the damage suffered by his children as stipulated in Art. 6:108 of the Civil Code to be performed by a consultant who assessed this damage for the oldest child at € 42,033.21 and for the youngest at € 53,559.68. These amounts also included the costs for household help. The conflict at hand deals with a claim for damage suffered by the children as a result of the death of their mother, more particularly the costs for assistance in the household from the moment of the accident until the children reached adulthood. The court of appeals rejected this part of the claim *inter alia* because it assessed that *in concreto* this family did not incur specific separate costs for taking care of the children or assistance in the household. Moreover, since the father remarried on 1 October 1995, the household tasks could be taken care of by his new wife. Hence, the father and children cannot prove that real and substantial expenses have been incurred for assistance in the household. The court of appeals holds explicitly that there is only a duty to compensate the victims for expenses which they

[47] Hoge Raad 16 December 2005, NJ 2008, 186 with case note by *J.B.M. Vranken*.
[48] RvdW 2008, 724.

actually incurred. The court of appeals explicitly rejected a damage assessment *in abstracto*.

The Hoge Raad held *inter alia* that the extent to which the children need support will indeed depend upon specific circumstances such as their age, the nature of their family and the financial position of the children after the death of one of the parents. However, the Hoge Raad continued that to some extent one has to disregard the concrete circumstances. It continued by arguing that, in order to assess whether a person suffers damage in the sense of Art. 6:108 al. 1, d, it is not essential whether at the time of the decision by the judge the victim actually incurred costs for assistance in a household. The Hoge Raad considered it to be general knowledge that when someone dies the emptiness is often filled by voluntary help from family, friends and others, especially in case the family budget does not allow for the possibility to pay for professional help. Moreover, the Hoge Raad explicitly held that the fact that the widower remarries cannot be taken into account since the result would be that the duty to take care of the children would then be placed on the new partner instead of on the liable person. The Hoge Raad therefore explicitly opted for a more objective approach (or, if one wants, assessment *in abstracto*) of the damage assessment. 40

The result is therefore not surprisingly that the Hoge Raad held that the decision of the court of appeals that denied compensation cannot be upheld. 41

b) Damage Assessment in Personal Injury Cases

At the end of 2007 there was another decision of the Hoge Raad which we did not discuss earlier which equally regards the problem of damage assessment.[49] In order to assess the damage, the general rule of damage assessment in Dutch law is to compare two situations: the one with and the one without the accident. Art. 6:97 of the Civil Code gives the judge much discretion in assessing the damage in a manner that appears just to him. The general rule is a concrete damage assessment; an abstract damage assessment is the exception. In the field of personal injury, the general rule is a concrete damage assessment. To be clear: in this case we refer neither to the loss of the ability to work nor to the costs resulting from death that was dealt with in the previous case. 42

The starting point in Dutch tort law is to remedy as far as possible the concrete damage suffered by the victim. This also concerns the damage the victim may suffer in the future. The way this often takes place in practice is that the victim receives a one-off payment, sometimes referred to as "capitalisation" of the loss. This means that one has to predict what would have happened in a situation without the accident and on that basis a certain amount is fixed that will have to be paid by the injurer. However, this procedure often leads to points of discussion. One point of discussion is which interest rates will have to be taken into account and whether one can equally take into account the fact that 43

[49] Hoge Raad 30 November 2007, RvdW 2007, 1025; JA 2008, 22; TVP 2008, 36–40 with case note by *W.J. Hengeveld* and *H.Th. Vos*.

the one-off payment may lead to increased taxation of the amount received by the victim.

44 In personal injury cases there is a difference between the date of the accident and the date on which compensation is paid. In reality the first period (between the accident and date of the assessment of damage) is usually dealt with on the basis of an assessment of the real loss, whereas a capitalisation takes place for the future. This means that for the past the judge (or the parties involved in negotiations) will assess the extent of the loss suffered by the victim to which the interest rate will be added since the damages were not paid at the moment of the accident but a few years later.

45 In the specific case at hand it was remarkable that also for the past a capitalisation had taken place even though the decision was made much later. This led in the specific case to the question which fiscal regime should be applied: the old fiscal regime at the time of the accident (1986) or the date of the decision (2001). The court of appeals had applied the first period, whereas the Hoge Raad holds that the second period should be applied. The reason is that the Hoge Raad holds that the damages should, as far as possible, correspond to the real loss suffered by the victim. The Hoge Raad holds that a capitalisation in the past is theoretically possible on the condition that the damage has been correctly assessed. This includes *inter alia* that the judge should take into account knowledge of what happened after the date of capitalisation, for example the fact that a new fiscal regime applied.

8. Doctrine

46 In doctrine with respect to a few relevant evolutions:

47 We already mentioned that legal doctrine in the Netherlands with respect to tort law is (as usual) very rich and this was not different for the year 2008. To some extent we have referred to legal doctrine in footnotes when discussing case law since much of the legal doctrine also involves a discussion of case law.

48 At this point we would only like to mention a few issues explicitly:

a) Increased Danger

49 In previous Yearbooks we discussed the fact that case law in the Netherlands accepts an increased liability in case of so-called increased danger.[50]

50 These issues have now also given rise to many comments in legal doctrine. For example, Gerrit van Maanen provides a legal and economic discussion of case law applying this liability for increased danger.[51] In an interesting contribution

[50] *Faure/Hartlief* (fn. 6) 420, no. 10; *Faure/Hartlief* (fn. 26) European Tort Law 2006, 342–344, no. 10–14; *Faure/Hartlief* (fn. 26) European Tort Law 2005, 417–420, no. 7–13.

[51] *G.E. van Maanen*, De Nederlandse Kelderluik-arresten. Al meer dan 100 jaar – rechtseconomisch! – op de goede weg in Europa! NTBR 2008, 42–49.

Tjong-Tjin-Tai applies a historical and comparative legal analysis concerning liability for omissions.[52] An interesting tendency in case law discussed in a contribution by Paijmans is the increasing interest in liability of schools, in particular when accidents occur during physical exercise at school.[53]

b) Statutes of Limitations

51 Even though we did not discuss this issue explicitly in our overview of case law this year, usually much case law in the Netherlands deals with the statutes of limitations, since in this domain recent statutory changes have taken place.[54] In this respect we should refer to a dissertation that we will mention below by Smeehuijzen, explicitly dealing with the statutes of limitations, but also to an interesting overview of the case law and recent legislative changes by Van Dijk.[55] Van Dijk sketches all the evolutions that have taken place especially at the level of case law and argues that there still is a considerable amount of uncertainty. Because of this, he proposes that the legislator explicitly lays down all the evolutions since 1992 in clear legislative provisions.

D. Literature

1. Proceedings, Volumes and Special Issues

a) *K. Bernauw et al.* (eds.), Aansprakelijkheid, aansprakelijkheidsverzekering en andere vergoedingssystemen, (Mechelen, Kluwer 2007)

52 Even though this book was published in Belgium and thus contains many contributions on Belgian tort law it is worth mentioning in this report on the Netherlands as well. Not only do some of the (Belgian) contributors refer to evolutions in the Netherlands as well and also discuss topics concerning liability law at a high level of generality, there is also one contribution in this volume explicitly dealing with Dutch tort law. It is the contribution by Ton Hartlief, "Heeft het aansprakelijkheidsrecht (de) toekomst". It is the last contribution to the volume where, at a more abstract level, the possibilities and limits of tort law are generally discussed.

b) *W.H. van Boom/I. Giesen/A.J. Verheij* (eds.), Gedrag en privaatrecht. Over gedragspresumpties en gedragseffecten bij privaatrechtelijke leerstukken (The Hague, Boom Juridische Uitgevers 2008)

53 This is a highly interesting volume that contains a large number of contributions in which the question is asked to what extent private law is able to influ-

[52] *T.F.E. Tjong-Tjin-Tai*, Nalaten als onrechtmatige daad, NJB 2007, 2540–2546.

[53] See in that respect *B.M. Paijmans*, Gymongevallen: wanneer is een school aansprakelijk? VR 2007, 207–210.

[54] For a discussion in earlier Yearbooks see *Faure/Hartlief*, (fn. 26) European Tort Law 2004, 422 f., no. 5; *id.* (fn. 26) European Tort Law 2003, 280 f., no. 7–9 and *id.* (fn. 26) European Tort Law 2002, 308, no. 8.

[55] *Chr.H. van Dijk*, Stuiting en verjaring: nog steeds veel onzekerheid? AV&S 2008, 141–152.

ence behaviour of people. The interesting aspect of this volume is that not only (tort) lawyers contribute to the volume, but that much attention is also paid to the results of cognitive psychology and the consequences this literature has for private law in general. Several contributions explicitly address topics that are relevant for tort law as well. Paepe, for example, discusses product warnings and provides a few psychological lessons for lawyers. Lindenbergh and others discuss the prevention of illness at work and labour-related accidents, while considering the role of civil liability in this respect. Martien van Dam provides an overview of theoretical and empirical research on the behavioural effect of fault and no-fault systems for traffic accidents.

c) *W.H. van Boom/M.L. Tuil/W. Dijkshoorn* (eds.), Autonomie en paternalisme in het privaatrecht (The Hague, Boom Juridische Uitgevers 2008)

54 This volume contains interesting papers written by students from the law faculty of the Erasmus Universiteit Rotterdam (where Willem van Boom is reading tort law). Various topics in private law are discussed, such as paternalism, consumer law and the law of contract, but much attention is also paid to topics related to tort and insurance.

d) *C.C. van Dam* (ed.), Aansprakelijkheid van de wegbeheerder (The Hague, ANWB 2007)

55 This is an interesting proceedings volume edited by the well-known Dutch tort lawyer Cees van Dam. It contains case law concerning claims for damages resulting from defects in roads. The book *inter alia* discusses when a defect is considered dangerous, what can be expected of the user of the road himself and on what basis the liability of the guardian of the road can be assessed.

e) *I. Giesen/T.F.E. Tjong-Tjin-Tai*, Proportionele tendensen in het verbintenissenrecht. Een rechtsgeleerde dialoog (Deventer, Kluwer 2008)

56 This volume contains the keynote speeches drafted by Ivo Giesen and Erik Tjong-Tjin-Tai preceding the annual meeting of the Association for Civil Law in the Netherlands. It deals with proportionality in contract and tort law and of course pays considerable attention to the question how tort law should deal with uncertainty concerning causation.

f) *P. Langstraat et al.* (eds.), De kosten van het geschil. Inleidingen gehouden op het symposium van de Vereniging van Letselschadeadvocaten 2008 (Lelystad, Sdu 2008)

57 This volume is the annual report with the introductions presented at a conference organised by the Association of Personal Injury Lawyers[56] in 2008. Various tort lawyers discuss the costs of claiming. Arno Akkermans pays much attention to the so-called emotional costs of a claim whereas Wim Weterings *inter alia* examines the costs of claims handling at a macro level.

[56] Referred to as the Vereniging voor Letselschadeadvocaten.

g) *J. Meyst-Michels*, Kroniek medische aansprakelijkheid, AV&S 2007, 293–303

This is an overview of the case law with respect to liability for medical malpractice in the Netherlands. The author discusses *inter alia* the consequences of informed consent and related causation problems. She also discusses damage related to birth: consequences of mistakes made during delivery and the well-known wrongful birth cases. 58

h) *M.J.J. de Ridder*, Kroniek rechtspraak civiel recht, TVG 2008, 114–127

Again also this paper contains an overview of case law in the domain of medical malpractice liability. 59

i) *N. Vloemans*, Kroniek aansprakelijkheid voor niet-loondienstgerelateerde asbestschade, AV&S 2008, 35–47

This article examines a very important topic, being the question how liability for asbestos-related damage is dealt with when the damage occurs outside of the work environment. Liability issues then concern claims against producers, constructors, schools, etc. There are now various decisions in lower courts that have dealt with liability issues arising out of asbestos claims.[57] This overview by Vloemans provides insights into these decisions and other recent cases as well as into the positions of legal doctrine.[58] 60

2. Monographs

a) *C.J.M. Claassen*, Schadevergoeding: algemeen deel II, Monografieën BW (Deventer, Kluwer 2007)

This volume deals with the important problem of damages assessment. The Dutch law with respect to the assessment of damages is discussed in detail as well as the problem of the requirement of causation. 61

b) *E.F.E. Engelhard/G.E. van Maanen*, Aansprakelijkheid voor schade: contractueel en buiten-contractueel, Monografieën BW (Deventer, Kluwer 2008)

This monograph, mainly written for students, provides an easy to read introduction to contract and tort law and discusses generally liability for damage. 62

c) *S.D. Lindenbergh*, Schadevergoeding; algemeen, deel I, Monografieën BW (Deventer, Kluwer 2008)

This monograph deals in general with the duty to compensate for damage and discusses in detail the concept of damages under Dutch tort law. The choice between damages *in concreto* and *in abstracto* is discussed as well as many other aspects related to damages. 63

[57] See for example civil court of Roermond 20 February 2008, NJF 2008, 164 and civil court of Utrecht 26 March 2008, JA 2008, 108.

[58] The issue is equally discussed by *J.W.M.K. Meijer/S.D. Lindenbergh*, Asbestschade buiten de werkomgeving, NJB 2008, 436–442.

d) *S.D. Lindenbergh*, Smartengeld, 10 jaar later (Deventer, Kluwer 2008)

64 In October 1998 the well-known Rotterdam tort law professor Siewert Lindenbergh defended his doctoral dissertation on non-pecuniary losses (in Dutch: Smartengeld) at the then Rijksuniversiteit Leiden under the supervision of the former president of the Hoge Raad, Professor Bloembergen. Exactly ten years later he published this volume which mainly discusses the evolution of non-pecuniary losses since 1998. He discusses the grounds for awarding non-pecuniary compensation, the nature of the claim for damages and the amount of damages awarded.

e) *G.M. van Wassenaer*, Schadevergoeding: personenschade, Monografieën BW (Deventer, Kluwer 2008)

65 This volume, in particular, discusses personal injury and provides an overview of the various sources of compensation, including insurance and tort law. The problem of damage assessment is discussed in detail and attention is paid to the compensation for non-pecuniary losses as well.

3. Dissertations

a) *J.L. Smeehuijzen*, De bevrijdende verjaring (Vrije Universiteit Amsterdam 2008)

66 This doctoral dissertation by Smeehuijzen discusses the role of the statutes of limitations in tort law. A critical theoretical analysis is provided, the case law of the Hoge Raad is discussed in detail and various recommendations for improvement are formulated.

b) *N. van Tiggele-Van der Velde*, Bewijsrechtelijke verhoudingen in het verzekeringsrecht (Deventer, Kluwer 2008)

67 This doctoral dissertation deals with the law of evidence in insurance. Dr. Van Tiggele discusses the formation of the contract of insurance, the obligations of the insured when the insured risk emerges and obligations emerging from the law of evidence. Much attention is paid to the case law of the Hoge Raad in that respect.

4. Inauguration addresses

***C.C. van Dam*, Onderneming en mensenrechten. Zorgvuldigheidsnormen voor ondernemingen ter voorkoming van betrokkenheid bij schending van mensenrechten (The Hague, Boom Juridische Uitgevers 2008)**

68 The already often mentioned and well-known Dutch tort lawyer Professor Cees van Dam was recently nominated to the Law Faculty of the University of Utrecht as Professor of tort law. He held an inauguration address in 2008 and took the 60th anniversary of the Universal Declaration of Human Rights as the starting point for his inauguration address: he examines duties of care imposed upon (multi-national) corporations and examines to what extent tort law can play a role in providing multi-national corporations with the right incentives to prevent violations of human rights in third countries.

Van Dam claims that tort law can play an important role in the prevention of these human rights violations. 69

Annex

Anne L.M. Keirse

1. Introduction

Turbulent is a word apt to be an adjective for the year 2008 if one referred to Dutch liability law. A suitable title for my contribution could be: *The Rise and Fall of Dutch Tobacco Litigation.* 70

In was in the year 2008 that the first Dutch tobacco case reached trial; this (first) case will, in all probability, also be the last. But before exploring the merits of this case, let me shed some light on the context: 71

a) Context

Dutch smokers suing tobacco companies is, in itself, not unique. Without a doubt the fact that the tobacco industry is presently subject to altercation of worldwide proportion needs no further elaboration. Lawsuits have been taken up against tobacco companies all over the world. 72

It all started, over 50 years ago, in the United States of America. It was here, in 1954, that the first wave of tobacco litigation began with the filing of *Lowe v. Reynolds Tobacco*. Many cases were to follow. From the 1950s onwards American smokers have continued to sue tobacco companies for damages and illnesses allegedly caused by smoking. To name just a figure of 2008: the number of tobacco cases pending on 31 December was 3,251. 73

Europe follows at a discrete distance with short-lived and lost cases in, for instance, the UK and France. 74

In France smoker Richard Gourlain, suffering from cancer, sued the French cigarette manufacturer SEITA. At first his claim seemed successful. In 1999 the District Court of Montargis held SEITA partially liable for the damage incurred by Gourlain on the grounds that the company had failed to fulfil its obligation to inform of the health risks acquired by smoking. In appeal, this decision was reversed. Both the *Cour d'Appel* and the *Cour de Cassation* rejected liability. They considered SEITA not to be at fault for failing to provide information, in so far as providing this information was the sole responsibility of government authorities. It should be mentioned that SEITA at that time was a state-owned company. 75

76 It was in the same period of time that a tobacco case was tried in the United Kingdom. The Scottish *McTear* case reached trial in 2003. It was comprehensively lost in 2005 as Lord Nimmo Smith held that the tobacco industry was legally not responsible. Moreover, the judge found the *McTear* case to fail on every single issue and smashed the claim with a verdict of hundreds of pages.

b) So what happened in the Netherlands?

77 We now know that the Dutch certainly were not the first; nor were they the quickest. In fact, tobacco litigation progressed only very slowly in the Low Countries.

78 In 1999 some 20 smokers announced their intention to take up action against the tobacco industry and tried to march into the court room. In the years to come, preliminary hearings followed. A gentleman named Terschegget was to star in this judicial pursuit but he sadly died before formal disposition even took place.

79 It was then that Peter Römer started to play the leading part in this case. Basically it is all about him… Born in 1937, he started his smoking career at the age of 20, a habit he adroitly renounced in 1983. In 1996 however, he, regrettably, fell ill.

80 Peter Römer undertook action and summoned two companies belonging to British American Tobacco. He stated that he had smoked subsequently Caballero, Peter Stuyvesant and Lord cigarettes from 1957 to 1983, the year he stopped smoking. According to the plaintiff, he was diagnosed with lung emphysema in 1996 and he suffered two strokes: one in 2002 and the next in 2004. This impairment to his health, Römer claimed adamantly, was a direct consequence of smoking the enticing cigarettes. What is more, claimed the plaintiff, the tobacco industry is liable as it had wilfully disregarded the obligation to warn of the risks of smoking tobacco when they must have known those risks. Still they refrained from warning, no, on the contrary, the industry even promoted tobacco products with sleek advertisements, in the meantime obscuring the health risks attached to the smoking of their produce! I, said plaintiff, was unaware of any risks until 1981. 1981 being the year the Dutch government started labelling the cigarette packs with warnings.

81 At the request of both parties the court of law first defined and answered the legal questions thereby assuming the claims of the plaintiff to be rightfully posed with regard to his smoking history and the (inflicted) health damage and the causality.

82 And then the whole procedure ended in the court of first instance with the verdict of the court of law in Amsterdam on 17 December 2008. Just to establish that smoking can result in inflicting health damage is not sufficient for liability! The court stated that health hazards were known to the public from 1963 onwards when plaintiff Römer started smoking his Stuyvesant cigarettes. Tak-

ing into account various scientific reports and acknowledging the plaintiff's fine educational background, the court rules: he must have been familiar with the possible risks.

The court found the effort to minimize potential risks in advertising reprehensible, but still insufficient for liability. It held that there was an accessible source of information from the media to enable individuals to foresee imminent perils. Case dismissed. Römer left with nothing. 83

As plaintiff Römer decided not to take the matter to the court of appeal, due to the overwhelming negative publicity and the small chances of winning, and as the afore-mentioned other plaintiffs refrained from further action, it looked like the claims against the tobacco industry all went up in smoke as, for the time being, new cases are unlikely to emerge. 84

c) Conclusion

Was it all then for nothing? Did the whole issue (re-)turn to ashes before it had even properly started? Not quite: Tobacco litigation has transformed the prospects of tobacco control. In the Netherlands as in other European countries, a legislative and policy approach has achieved some results, such as: 85

- A rise of taxes on tobacco
- A banning of tobacco commercials
- A deployment of health and safety legislation to reduce passive smoking in the working environment.

In short:

- The ban on smoking in public areas

I would even argue that these side-effects of tobacco litigation demonstrate how law can play a more useful role. Instead of suing the tobacco companies to hell it offers a different perspective. The focus should be on preventing health risks and illnesses instead of compensating damage and thereby filling lawyers' pockets. 86

But apart from these results the tobacco industry in the Netherlands, like a truly righteous Goliath, seems to have succeeded in damping down a mildly glowing but faltering David. 87

XIX. Norway

Anne Marie Anfinsen and Bjarte Askeland

A. Legislation

1. Tvisteloven (Act relating to Mediation and Procedure in Civil Disputes/The Dispute Act) 17 June 2005 no. 90, chap. 35

1 Tvisteloven was enacted in 2005, but parts of the Act came into force only in January 2008. Chapter 35 provides a legal basis for class actions, something that is a novelty within Norwegian law. The main reason for the new option of class actions for Norwegian litigants is primarily that it will make it cheaper for a party to go to trial. This may ensure both protection of the litigants and compliance with legislation. The possibility of a class action may contribute to a greater conformity in the application of the law although to date extensive use has not been made of this possibility with only thirteen pending cases.

2 Tvisteloven chapter 35 comprises 14 provisions which set conditions for class actions and prescribe regulations for the litigation process. The rules are primarily designed for forming a group of claimants, but they may also be applied to a group of defendants as far as the provision fits this situation.[1]

3 It was a concern during the consultation process before the Law was enacted that the procedure for class actions could involve great practical problems determining whether the alleged defendant is liable in torts in relation to each of the claimants in a class action. It was stressed that a (joint) process involving many claimants could result in a degeneration of the law of torts and damages. For instance, it was asserted that there was a danger that courts would reduce the standard of proof relating to the causal link between the alleged tort action and the loss suffered by each claimant. The Ministry did not share these concerns and emphasised that, in order for a class action to be filed, the claims must have the same or a substantially similar factual basis. The Court also has discretion to divide the hearing and adjudication into separate claims. In this way, it is possible to combine the need for individual determination of some aspects of a case with a class action procedure. An example of this is that

[1] See Tvisteloven § 35-15.

the individual assessment of damages in a case can be considered separately. The Ministry states, however, that the most suitable tort cases for class actions are those that are based on standardised rules for the assessment of damages. Cases in which the most important issue is whether the defendant can be said to have caused the alleged injury in relation to each claimant will rarely be found suitable for a class action procedure. The same is the situation for cases in which the injuries were caused over time due to dangerous products or pollution.

2. Skadeserstatningsloven (The Compensatory Damages Act, skl.) 13 June 1969 no. 26, § 3–8: New Hearing

From 1 January 2008, it is possible to demand a new hearing of certain judgments and settlements concerning compensatory damages. Skl. § 3–8 reads as follows: 4

"A claimant is entitled to demand that a closed case relating to compensation for "menerstatning"[2] or for future loss of income or expenses, be given a new hearing if the claimant's health deteriorates in a manner that was not foreseen during the initial hearing, and it is clearly more than 50 per cent probable that this deterioration will entitle the claimant to a much higher compensation." 5

The criterion "a closed case" refers both to compensation claims settled between the parties, claims decided by a court and in-court settlements.[3] The right to a new hearing is only intended to be in favour of the claimant. A typical example of a situation that can give rise to a new hearing is where the medical condition of the claimant has deteriorated in a manner that was not expected during the original hearing. This also includes situations where new physical injuries are discovered after a long time, and the causal link can be traced back to the occurrence of the injury. It is not a requirement that it would have been possible to predict the subsequent circumstances at the time of the original decision as long as the causal link can be traced back to the occurrence of the injury. 6

The right to a new hearing of the case does not include situations where the claimant's earning capacity has deteriorated more than was expected at the time of the original hearing or settlement. The same applies to situations where the claimant's overall income is lower because of changes in the social security system. 7

It is important to note that it is not the aggravation of the medical condition in itself that entitles the claimant to a new hearing. It is the financial consequenc- 8

[2] "Menerstatning" is a standardised compensation for chronic or lasting loss of amenities, more precisely loss of life quality in various ways, see The Compensatory Damages Act § 3-2. One example of this may be that the claimant suffers permanent injury from the loss of a leg, which deprives him or her of the enjoyment of playing soccer.

[3] This and the further statements concerning the provision can be found in the preparatory works made during the conciliation process, see Odelstings proposisjon no. 51 (2004–2005).

es of a change in his or her medical condition that is decisive, as the wording "much higher compensation" highlights. The decision concerning the question of a new hearing must be based on a discretionary overall assessment.

9 The general law on litigation does not include a basic principle of a right to a new hearing of a case based on circumstances that arise subsequent to hearing or settlement. The provision in the Compensatory Damages Act therefore represents an exception made especially for the type of claims mentioned in the provision.

B. Cases

1. Høyesterett (Supreme Court, Hr) 17 January 2008, Norsk Retstidende (Rt.) 2008, 65: Personal Injury and Solidary Liability

a) Brief Summary of the Facts

10 A 16-year-old girl V escaped from a child welfare institution. She lived temporarily with a man she had met, and after some weeks she joined him when he visited a friend of his in Oslo. They arrived at the friend's flat at 6 p.m. There were at least five other men present in the flat and they all spent the evening watching a pornographic movie. In the course of the evening V smoked heroin while some of the others smoked cannabis.

11 Some time during the late evening the host dragged V into the bathroom and raped her. Afterwards one of the other men tried to break into the bathroom but V managed to keep him out. Later V returned to the living room and kept on smoking heroin. She became heavily drugged. Later that night V was taken into a bedroom and undressed. Her mobile phone was taken from her. During the night five men had sexual intercourse with her, some of them more than once. Despite her condition, V was aware what was happening and protested all along that she did not want to have sexual intercourse with any of the men. In the morning she was driven to the centre of Oslo and dropped off at a hotel, suffering from abdominal bleeding. Due to severe pain, V had difficulties walking.

12 V claimed compensation from the five men. She claimed that they should pay compensation separately so that each of them was to pay NOK 120,000 (€ 15,000). The defendants claimed that they were only liable *in solidum*.

b) Judgment of the Court

13 There was no doubt concerning liability. The legal basis for compensating non-pecuniary damage of this kind is skl. § 3-5 ("Oppreisning"), a provision on compensation for pain and suffering. The question for the Supreme Court was solely whether the five men were to pay *in solidum* or whether each of them should pay an amount somewhat higher than the standard compensation for rape (NOK 100,000 reflecting approx. € 12,500). The majority of the Court

analysed preparatory works and doctrinal literature on the question of "oppreisning" and solidary liability. The majority found that the gang rape had led to the "same damage" in the eyes of the law, cf. skl. § 5-3, the Norwegian rule on solidary liability for multiple tortfeasors. According to this provision, all five men should pay damages *in solidum*. The minority, one judge, held in unusually strong terms that each of the men should pay a compensation of NOK 120,000 (€ 15,000). The judge put weight on the fact that the girl must have experienced each rape as a new infringement, each incident causing a feeling of humiliation and exploitation. As such, the repeated incidents of sexual intercourse could not be regarded as one infringement or the "same damage". He also pointed to the fact that the men otherwise would be granted a sort of "quantum discount", something that he considered to be a repulsive solution given the circumstances of the case.

c) Commentary

The most interesting part of the decision is the effect of solidary liability when applied to personal injuries. There is little doubt that the concepts of "same damage" and solidary liability are developed primarily in relation to damage to property and financial interests. The minority certainly has a point when stressing that a personal injury of this kind is experienced as more than one and the same injury. The majority seems to have a somewhat mechanical and formalistic perception of the rules. 14

Firstly, and from an academic point of view, one may emphasise that the case shows that rules on solidary liability have an economic rationality whereas rules on assessment of non-pecuniary loss do not necessarily fit into this rationality. Secondly, there was a good possibility to point to factors that suggested that the gang rape had to be regarded as more than "one damage". Especially as regards non-pecuniary loss, there are sound reasons for regarding each isolated moment of pain and humiliation caused by the respective perpetrators as isolated incidents of infringement. A personal injury is felt moment by moment in a totally different way than damage to property. There was a good possibility to point to these special features of the sexual assault as reasons for not seeing the series of rapes as one infringement. The decision was subject to great attention in the media, and especially the fact that the majority adopted a solution comprising a "quantum discount". 15

2. Hr, 3 April 2008, Rt. 2008, 453: Compulsory Motor Vehicle Insurance – Apportionment of Damages

a) Brief Summary of the Facts

A man travelling as a passenger in a car, whose driver was heavily intoxicated, was injured in a car accident. The plaintiff was aware that the driver was drunk. The parties agreed that the plaintiff had been contributorily negligent because he travelled voluntarily in the vehicle even though he knew that the driver was drunk. The question before the Court was how the damages should be apportioned. 16

b) Judgment of the Court

17 In the lower courts, the apportionment of damages had been 60%. The Supreme Court found that this was disproportionate. The Court emphasised that the national provisions cannot be interpreted in a way that deprives the EU Directives of their effectiveness. The First, Second and Third Directives[4] concerning compulsory insurance for civil liability in respect of motor vehicles are designed to ensure the free movement of vehicles normally based in Community territory, and of persons travelling in those vehicles and to guarantee that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the Community the accident has occurred.

18 The Court stated that the guidelines in the Candolin judgment, *Candolin et al. v. Pohjola and Ruokoranta*,[5] and the Farrell judgment, *Farrell v. Whitty, Ireland and Motor Insurers' Bureau of Ireland*,[6] from the European Court of Justice could be harmonised with the guidelines in the preparatory works to § 7 subsec. 1, of the Motor Vehicle Liability Act (Lov om ansvar for skade som motorvogner gjer, 4 February 1961, bal.). In consequence, the compensation could only be reduced on the basis of the passenger's contribution to the injury he or she suffered, if there were concrete circumstances that could establish that the plaintiff had contributed to the occurrence of his/her injuries. The Court held that a preventive aim could not form the entire basis for this argument. In all circumstances, the compensation could not be limited in a manner that is unfair and socially unjust.

19 In deciding whether the circumstances in the concrete case can justify a reduction in the compensation, the court has to compare the behaviour on both sides and the extent to which the driver and the plaintiff contributed to the occurrence of the injury.[7] Unlike the lower courts, the Court found that the plaintiff did not play an active part in the driving. Thus his contribution was to voluntarily go along on the trip. However, since he knew of the driver's drunken state, his behaviour could be characterised as grossly negligent. The wording in the paragraph also states that account should be taken of "other circumstances", which the preparatory works specify as the plaintiff's degree of medical disability and reduction in earning capacity. The plaintiff was so severely injured that the injuries would have a huge impact on his future quality of life. The Court deemed the consequences to be especially severe because of his young age. The plaintiff was only 18 years old when the accident occurred. The damages were reduced by 40%.

c) Commentary

20 Firstly, one can question the Directive's impact on the interpretation of the Norwegian Motor Vehicle Liability Act § 7 concerning contributory negligence.

[4] Directives 72/166/EEC, 84/5/EEC, 90/232/EEC.
[5] C-537/03, *Candolin et al. v. Pohjola and Ruokoranta* [2005] ECR I-5745.
[6] C-356/05, *Farrell v. Whitty et al.* [2007] ECR I-3067.
[7] See bal. § 7 subsec. 1.

In relation to the Court's methodical approach to the problem, the Directives seem to have a secondary role. In reality, however, they seem to have had some influence on the formulation of the principle guidelines for the assessment.

In the *Candolin* judgment sec. 30, it is stressed that: "It is only in exceptional circumstances that the amount of the victim's compensation may be limited on the basis of an assessment of his particular case." In the Norwegian case, the plaintiff's contribution was to go along on the trip, and he was grossly negligent because of his knowledge of the driver's drunken state. The main rule therefore seems to be that a passenger is contributorily negligent when he or she accepts a car ride from a drunken driver. As a result, the passenger's knowledge of the driver's drunken state is sufficient to reduce damages by as much as 40% even if there is no evidence that the passenger took an active part in how the car was driven. In future cases the Norwegian Supreme Court should probably be cautious about an even more extensive reduction of damages in similar cases in order to keep the Court practice consistent with the Directives. 21

3. Hr, 28 May 2008, Rt. 2008, 755: Vicarious Liability

a) Brief Summary of the Facts

A community nurse stole a credit card from an elderly woman while working in the elderly woman's flat. She later misused the credit card and charged an amount of NOK 310,799 to the card. The community nurse had stolen the card from the elderly woman's purse as she was out walking the elderly lady in her wheelchair. The employer – the municipality – was sued for the stolen money based on the rule of the *respondeat superior*.[8] The theft was an intentional tort and the question was whether the act was within the scope of the employment.[9] 22

b) Judgment of the Court

The Supreme Court pointed out that, in principle, an employee's intentional torts are covered by the employer's vicarious liability.[10] As emphasised in the preparatory works, however, in the case of intentional torts committed by an employee, the employee's tortious act will generally be outside the scope of the employer's vicarious liability. In salient decisions from the Supreme Court, the decisive question has been whether there is a sufficient connection between the wrong committed and the nature of the employee's work operations. The Supreme Court stated that, in this assessment, extra weight should be placed on whether the potential plaintiff had an opportunity to protect himself/herself from the theft. The Supreme Court approaches the question by underlining that it is a direct consequence of the work duties that a nurse will have physical access to necessary items and sensitive information which could be used to exploit the users of the healthcare services. It is thus not the employee that represents the problem or risk, but the situation itself, even though theft is a 23

[8] See skl. § 2-1 no. 1.
[9] See skl. § 2-1 no. 1.
[10] See the wording "negligent or intentional acts" in skl. § 2-1 no. 1.

common problem in this kind of service. The users have a legal right to the service[11] and, despite the risk of theft, the best solution for both parties is to provide healthcare services in private homes. The users of the services, on the other hand, have very little opportunity to protect themselves from this kind of risk. The user in this case was 92 years old, and totally incapable both physically and mentally of keeping a watchful eye on the nurse and to forward her suspicions in an adequate way to the municipality. All in all, the Court therefore found that the municipality was "the nearest to shoulder the loss" or to carry the risk of loss caused by the situation.

c) Commentary

24 The judgment follows a line taken in several relatively recent decisions by the Supreme Court, in which the Court has addressed the issue of intentional torts by employees and the scope of the employer's vicarious liability. The judgment is especially interesting in relation to an earlier judgment from the Court, Rt. 1982, 1349, to which the Court also devotes some attention. In that case, cleaners from a professional firm stole clothes from a shop during their work. The Court found that the employer was not liable in tort. The grounds for this were that the employees were not supposed to handle the clothes in the shop during their work, and that it was practically possible for the plaintiff to supervise the shop while the cleaners were working. Based on this argumentation and later decisions, the Court has provided guidelines for when the nature of work operations in itself is an argument for liability. In this case, however, this seems to be a less important practical element in the assessment of whether there is a sufficient connection between the wrong committed and the employee's employment relationship. The decisive point does not seem to have been whether the municipality or the plaintiff was in the best position to prevent the theft from happening, but whether the municipality or the plaintiff should carry the regular risk of theft caused by the necessity of providing healthcare services in private homes, in a situation in which there was little opportunity for both parties to prevent the loss.

4. Hr, 28 August 2008, Rt. 2008, 1078: Direct Claim

a) Brief Summary of the Facts

25 A vendor of a house supplied incorrect information to a purchaser due to errors in an appraisal produced by a surveyor. The error consisted of calculating the size of the house incorrectly – it was stated that the house was 30 square metres larger than it actually was. Because of this the purchaser claimed a reduction in price. The difference in the price was paid by the vendor's insurance company, which had insured the entire transaction under a "hidden defect insurance" policy ("eierskifteforsikring"). This insurance company then claimed that the surveyor's liability insurer should pay the price difference. The defendant contested this view, arguing that the only basis for the insurer's claim against the liability insurer was a subrogated claim from the vendor. However, the vendor

[11] See The Social Services Act (Lov om sosiale tjenester 13 December 1991 no. 81) § 4-3.

had no claim against the surveyor. In fact, the vendor had made a greater profit than he would have done if the appraisal had been correct.

b) Judgment of the Court

The Supreme Court found that the surveyor was liable *in tort* for a sum of money equivalent to the sum paid to the purchaser. One of the main questions before the Court was whether the insurance company that provided the "hidden defect insurance" had a direct, non-contractual claim against the surveyor's liability insurance company. The legal basis for this claim was that the purchaser had suffered a loss because of justifiable reliance on the incorrect information in the appraisal. In the criterion of justifiable reliance lies the limitation that the provider of the information must have known or ought to have known that the recipient would rely on the information in making the decision that caused the loss. The Court found that the purchaser fell into a group of proximate recipients. The Court stated that the legal content of the principles concerning justifiable reliance in American law could also be regarded as the relevant guidelines in relation to torts based on incorrect information in Norwegian law.[12] 26

Another main question was whether there are special legal considerations in relation to claims based on insurance that strongly favour a solution that precludes the insurance company from lodging a direct claim in this situation. If that is the case, the insurance company can only base a claim against the surveyor on the right of recourse. The Court concluded that, as long as the purchaser, pursuant to the law, could have directed his claim against the surveyor and his liability insurance company, it would be an arbitrary advantage for the surveyor if the purchaser chose to direct his claim against the vendor and his liability insurance company. The fact that the vendor had profited as a result of the incorrect information did not alter this conclusion. The Court emphasised that the preventive intention of tort law rules was an argument in favour of the vendor's insurance company having a claim against the tortfeasor/surveyor who committed the negligent act, and his insurance company. 27

c) Commentary

First of all, it is interesting that the Court confirms that the legal issues and criteria from international soft law principles are relevant in Norwegian tort law. On this point, the decision is a fundamental one in Norwegian tort law, and it can be assumed that the statement from the Court will have a decisive influence on the principles applied in cases involving loss resulting from incorrect information. The argumentation in relation to the concrete solution in this case also appears to be unproblematic at first sight. However, there are factual complications relating to the solution that allows an insurer to claim against 28

[12] In its analysis, the Court quoted a doctoral thesis concerning direct claims, *A. Bjøranger Tørum*, Direktekrav (Direct Claims) (2000). On the page quoted (page 505), the author states that the mentioned American principles are summarised in Restatement (Second) of Torts § 522 no. 1 and 2. The author also stresses that the essential legal issue of "justifiable reliance" is closely related to similar issues in art. 2:207 in the principles from the Study Group on a European Civil Code and the legal issue of "a special relationship" in the Principles of European Tort Law art. 4:102.

the liability insurer directly. Until now, the prevailing view in cases of this type involving insurance companies has been that the claim of the obligated party (the vendor) against the negligent tortfeasor (the surveyor) is subrogated to the insurer. But in this case, the vendor actually suffered no loss. As mentioned, he profited from the negligent behaviour of the surveyor. It is interesting that the decision confirms a solution that resembles situations in which a party obtains unjust enrichment. On the other hand, it would hardly be an appealing solution to allow the surveyor to walk away without paying despite his negligent appraisal. In order to arrive at a sound result in the concrete case, the Supreme Court allowed the insurance company to bring a claim against the surveyor directly.

5. Hr, 21 October 2008, Rt. 2008, 1336: Reduction in Damages

a) Brief Summary of the Facts

29 A cash processing centre (Norsk Kontantservice) was robbed of NOK 57,440,575. The robbers were armed and during the robbery a policeman was shot. The robbers, including a security guard who did not participate in the robbery, were later convicted of the crime. The security guard was sentenced to three years' imprisonment as an accessory to aggravated robbery because he had given the robbers important information about the processing centre. One year and six months of the sentence was suspended for a probationary period of two years. The security guard was also ordered to pay damages of NOK 51,465,574 (approx. € 6 million) to the insurance company.

b) Judgment of the Court

30 The provision in skl. § 5-2 states that damages may be reduced in exceptional cases if full compensation would represent an oppressive burden on the defendant seen in relation to the magnitude of the harm, the tortfeasor's financial situation, insurance situation and possibilities for insurance, blameworthiness and other circumstances.

31 The Court noted that there was no doubt that, in this case, the amount of the damages would be an onerous burden on the defendant. The cash processing centre was also insured and, even though it is not explicitly emphasised in the wording of the section, the Court noted that there could generally be good reason to take into account that the defendant's possibilities for rehabilitation would be better if he or she did not have a heavy burden of debt. The Court also pointed out that it could be questioned why the insurance company should be awarded huge damages that the defendant would never be able to pay.

32 In accordance with its earlier decisions, the Court stressed that the main criterion for the assessment should nevertheless be the blameworthiness of the tortfeasor's act. The Court underlined that the most important factor in this connection was that the security guard was aware of the robbers' intention when they asked for the information. In addition, the defendant had abused his position of trust as a security guard – a position whose purpose was to prevent precisely the kind of crime that occurred. He had given vital information to persons he knew had both the ability and a certain predisposition to carry out

the crime. And, on top of this, he had the knowledge required to foresee the extent of the damage in the worst case, because of the amount of money that was kept in the cash processing centre. In conclusion, a denial of reduction (of damages) could not be characterised as an oppressive burden.

The Court also supported this conclusion by underlining that the solution could not in any way be based on a sum that was appropriate to the defendant's financial situation. Adjusting the sum to the defendant's financial situation would mean such a small amount of damages that it would hardly have any deterrent effect. 33

c) Commentary

This decision shows that the reduction of damages is even more exceptional in cases where the liability is the result of a criminal act. In these types of cases, the courts should place decisive weight on the blameworthiness element in order to deter others. This judgment will thus hardly have an important role as a guideline for the reduction in damages in cases based on torts with no criminal intention. This divergence in case law and the important role of intentional motivation can be illustrated by two cases in relatively recent case law. 34

In the first case, Rt. 2004, 165, the damages were set at NOK 1.4 million. As in the case at hand, the defendant was a security guard who had access to a building which he set on fire. Like the security guard in the 2008 case, the security guard's job was, among other things, to prevent the kind of crime that he committed. However, the damages were reduced to the sum of NOK 750,000, and the reason for this was that there was no understandable motive for the commission of the crime. The tortfeasor seemed to be mentally disturbed at the time of the action and the deterrence consideration therefore did not have the same important role in relation to the reduction in damages as in other civil liability cases based on criminal acts. In a case reported in Rt. 2005, 901, on the other hand, the deterrence consideration was a crucial element in the assessment. The damages were set at NOK 285 million, and there was no reduction in damages. The defendants were found guilty of bombing a house in which three persons were present. It was an organised crime and a premeditated act, initiated by a conflict between two rival motorcycle gangs. The bombing caused the death of one person who happened to be passing. This latter decision obviously had more impact on the 2008 judgment, although both cases from 2004 and 2005 had many apparent factual parallels to the 2008 case, which the Supreme Court also notes in its judgment. 35

6. Hr, 28 October 2008, Rt. 2008, 1354: Assessment of Children's Future Loss

a) Brief Summary of the Facts

The question was whether the rule of standardised assessment of compensation of children's loss was applicable.[13] Pursuant to skl. 3–2a, the assessment 36

[13] See skl. § 3-2a.

of damages shall be standardised if at the time harm occurred ("skadetiden"), the plaintiff was under 16 years of age. The reason for this rule is that there will not normally be a sufficient basis at this stage in the child's life on which to assess the child's educational and occupational development in connection with the assessment of damages.

37 The tort was based on medical malpractice and compensation was claimed for future loss of income and compensation for pain and suffering. When the plaintiff was 12 years old the doctors discovered a tumour in his brain. He underwent surgery and was healthy for a few years. Six years later a tumour was again discovered. The plaintiff again underwent surgery, and the operation caused serious health problems. The parties agreed that the tumour should have been diagnosed at an earlier stage. Because of this and the health problems related to the operations, the harm was finally manifested when the boy was 18 years old.

b) Judgment of the Court

38 The Supreme Court noted that the wording "skadetiden" – "the point in time when the harm occurred" – could be interpreted in different ways. Pursuant to the preparatory works, the legal criterion "skadetiden" means the point in time when the wrongful act caused the harm or when the harm actually took place. The Court placed decisive weight on the wording in the preparatory works, in relation to its interpretation of the provision, and found that a standardised assessment should be applied in this case, even thought the plaintiff was 18 years old at the time of the manifestation of the harm. In addition he was working in his parents' business, which he planned to take over. There was therefore an exceptionally good basis for the assessment of loss in this case. The Court supported, however, this judgment by emphasising that the rule concerning standardised assessment was also justified on efficiency grounds.

c) Commentary

39 It is surprising that the Court places decisive weight on the wording in the preparatory works while at the same time pointing out that the question had neither been sufficiently analysed nor adequately assessed. This is also true in this case where there is an unusually good opportunity to calculate the loss at this young age. The Court does not give a good reason why the solution also should be a standardised assessment in a case that clearly falls outside the intention of the provision. The Court's motivation for choosing this solution seems to be that there are many other cases where the harm will manifest itself several years after the harm is caused. Given that there are so many different and complex factual aspects involved, our opinion is that the question should be the subject of expert analysis, which subsequently might be enshrined in a new provision or a regulation issued pursuant to such a provision.

7. Developments within Personal Injuries

A trend within the field of personal injuries seems to be that EC law is affecting the Norwegian tort law through various channels. The case from the EFTA court (Case 08/07, referred in the report on European Law Developments, see no. 27 ff.) as well as case no. 2 supra are examples. An interesting point is that the interpretation of the Motor Vehicle Insurance Directives indirectly may put constrains on the willingness to reduce the awards because of contributory negligence, see case 2 supra. Norway has for a long time had a stricter regime than for example Sweden when it comes to the reduction of an award due to contributory negligence in personal injury cases. The future will show whether this gap will be closed. 40

An important event in 2008 was the fact that the government of Norway appointed a committee on reforming the assessment of damages in personal injury cases. The task for the committee is to standardise the assessment preferably by taking the Danish Compensatory Act (Erstatningsansvarsloven. Lovbekendtgørelse of 4 September 2002) as a model. The assignment documents also invite other changes. Especially noteworthy is the suggestion to design a new rule on compensation for pain and suffering without any criterion of gross negligence or intent. Such a provision would be a novelty within Norwegian tort law. 41

C. Literature

1. *Morten Kjelland*, Særlig sårbarhet i personskadeerstatningsretten – en analyse av generelle og spesielle årsaksregler (Particular vulnerability within personal injury tort law – an analysis of general and special causality norms) (Gyldendal Akademisk, Oslo 2008)

This book is a monograph on the legal consequences of the fact that a claimant in a tort case is particularly vulnerable. In such cases many jurisdictions hold the view that the defendant must "take the claimant as he finds him". In other words; the defendant must bear the qualified risk stemming from the fact that the claimant is particularly vulnerable. This rule is sometimes called "the thin skull rule" or "the egg shell rule", referring to typical cases within this category. 42

The author produces a thorough analysis of the application of the Norwegian rules on causation in such cases. The focus and the choice of subjects in the book are very much decided by the thin skull theme. However, the author also takes the opportunity to elaborate more generally on Norwegian law on causation within tort law. Chapter 3 gives an account of natural causation within Norwegian tort law which is of general interest. The same goes for chapter 4, where the author discusses a special Norwegian requisite: The natural cause must be "substantial" or "not unsubstantial". In chapter 5 the author concentrates on the question of adequate (proximate) cause in cases where the claimant is particularly vulnerable. The author develops new theories on the sub- 43

ject based on the relevant case law. Noteworthy is the theory on the so-called "PUSS-test", an acronym that refers to Norwegian words: "Påregnelig Ut fra Skadelidtes Sårbarhet" which means "Adequate given the victim's individual vulnerability". Hence the major point of the test is that the question of adequacy must be investigated on the basis of the claimant's special and individual vulnerability. By means of this theory, the author is able to explain why even quite unforeseeable casual developments seen from the defendant's perspective qualify for compensation. The author also presents a new theoretical framework designed for cases of concurring causes, so-called "time-limited" causality. This theoretical figure explains how the plaintiff's vulnerability may in time "replace" a cause that the defendant is liable for. An example is where the plaintiff suffers from constitutive weaknesses in her neck or back. The defendant is only liable for the damage caused by him, not for damage that the plaintiff would have suffered anyway.

44 The mentioned elements of the book are supplemented by a number of other findings, perspectives and elements of new theory within Norwegian tort law. The author is quite traditional in his approach and very loyal to case law. As a result of this approach, the thesis is in no way radical or revolutionary, and it does not challenge the debate on tort law on a level of principles. A possible criticism is that the thesis does not present any deep theoretical critique of current tort law, but rather confirms and explains tort law as we can observe it working in practice. On the other hand, the author presents many new findings on a smaller scale which may be useful to practitioners as well as scholars. The book has good pedagogical qualities, and one should on this point especially mention the many illustrations which are all explained in an extraordinary enlightening way. All in all, the book is a proper piece of academic work which really contributes to the modern scholarly literature on Norwegian tort law.

2. *Asbjørn Kjønstad*, Standardisert utmåling av erstatning til barn som skades før fylte 16 år (Standardised assessment of damages for children who suffer injury before reaching the age of 16), Tidsskrift for Erstatningsrett (TfE) 2008, 5–61

45 This article is a critical analysis of a system of standardised compensation for personal injuries that applies to children under sixteen years of age.[14] This special provision was enacted in 1987 as a consequence of the difficulties in assessing damages covering future loss. Before the age of sixteen it is of course hard to predict which professional career the child would have entered into if the damage had not occurred. One reason behind the standardisation was criticism of decisions that put weight on the gender and birthplace of the child as factors decisive for the size of the award. The rule in § 3-2 a therefore simply states that a child who is 100% medically disabled should be granted a lump sum of 40 G. The unit of G is an important tool for assessing damages under social security and workmen's compensation schemes. G is a certain amount

[14] See skl. § 3-2 a.

of money that is regulated twice a year, presently being a sum of approx. NOK 70,000 (€ 9,000). 40 G is at present NOK 2,810,240 (approx. € 350,000).

46 The author of the article holds that the standardised system leads to under-compensation for children in a manner that was initially not foreseen by the lawmakers. He argues that the level of compensation must be increased to a level that at least corresponds to the average income of industrial workers. Hence Kjønstad suggests a level of 50–55 G (NOK 3,500,000; approx. € 450,000). Kjønstad criticises the standardisation of the assessment of damages also on other points. The lump sum covers both pecuniary and non-pecuniary loss for loss of amenities. The degree of disability will be decisive for both elements, but this may lead to unreasonable results. The author stresses that a person with a high degree of medical disability may function well intellectually and may get a well paid job. Of course such a person will receive a substantially larger income than other disabled persons who have a disability also relating to their intellectual capacity. Kjønstad finds it disturbing that such differences have no consequences on the assessment of the award.

47 The article presents a convincing critique. The author has made a substantial effort in providing a comparison between the standardised system and the ordinary rules which pursue a full, individually assessed compensation. The documented discrepancies are striking and call for a review of the rules. As mentioned in supra no. 41, the Norwegian Ministry of Justice has recently put together a committee given the task of proposing new rules on the standardisation of personal injury awards under Norwegian tort law. The findings in the article may be useful to the committee.

3. *Jan-Ove Færstad/Arnt Skjefstad*, Prisavslag, erstatning og regress – selgers og meglers innbyrdes ansvar (Price reduction, compensation and the right of recourse – loss allocation between agent and vendor), TfE 2008, 149–186

48 This article elaborates on legal solutions in the following situation: A real estate agent provides incorrect information to a purchaser who claims a reduction in the price. One example of this may be that the agent has told the purchaser that the real estate is larger than it is. According to the law, the purchaser may, in such a situation, claim compensation (a reduction in the price) from either the agent or the vendor. This article discusses which party should ultimately bear the "loss" that the price reduction represents. If the purchaser claims a price reduction from the agent and he pays the difference in the price, the vendor will actually gain a profit by a sale based on incorrect information, and receive more money than the market value of the real estate represents. An interesting question is therefore whether the agent has a right of recourse against the vendor. An important part of the problem is that the purchaser, according to Norwegian doctrine, has a non-contractual claim against the agent parallel to a contractual claim against the vendor.

49 The authors elaborate on this question in a thorough and enlightening manner. Various rules on recourse are investigated and discussed. The authors also criticise the Supreme Court practice on the subject. Two cases dealing with these questions are, according to the authors, not entirely consistent.[15] Moreover, the relationship between the cases and the rules on unjust enrichment are discussed. The Norwegian rule on contribution between multiple tortfeasors is also addressed.

50 The authors conclude that it is unsatisfactory that the solution may depend on the buyer's choice of whom to sue. Rules on right of recourse and contribution should be applied in order to reach a sound and fair allocation of loss. The best solution may, however, be to allocate the loss to the agent (his insurer). This may have a preventive effect and one may at the same time be able to protect the expectations of the vendor, who may have good reasons to expect a full price without any reduction based on wrong information from the agent.

4. *Merete Tollefsen*, Pårørandes skadebotvern for reduserte inntektsutsikter på grunn av omsorgsarbeid (A next-of-kin's right to compensation for reduced future income due to unpaid care work), TfE 2007, 298–316

51 In this article the author discusses a special, rather narrow problem concerning assessment of damages: How to assess loss of income for a next-of-kin who gives up his or her career in order to nurse and take care of a severely injured child? It is fairly clear, according to the rule on assessment of personal injury damages enacted in skl. § 3-1, that such a person has a claim against the liable tortfeasor. The question remains, however, of whether the next-of-kin also has a right to full compensation where his or her income is far beyond the average income. Should the award rather be limited to reflect the prices of social services (buying the nursing and caring services) in the market? In other words: Should for example a well paid lawyer have the option to choose to take care of her child full-time, and get compensated for a full-time salary as a lawyer?

52 The author elaborates on the mentioned problem in light of the general doctrine on adequate causation and, based on this and a few court decisions, she finds a number of relevant special factors valuable to the task of assessing damages in this type of cases. One such factor is for example the degree of the injured child's need of care from his parent or other relative. In view of the various factors, the author concludes that the main rule is that a relative does not have a claim for compensation of higher than average salaries. The compensation should be limited to reflect the cost of buying the nursing and caring services.[16] Compensation based on an individual salary should, however, not be entirely excluded, but can only be applicable in certain cases under special circumstances.

[15] Rt. 2005, 870 (reported in Yearbook 2005) and Rt. 2008, 1028, reported as case no. 4 supra.

[16] This opinion contradicts the view taken by another author who has discussed the same problem, *E. Skjerven*, Vern av pårørendes tap etter skadeserstatningsloven, Lov og Rett (Law and Justice, Norwegian periodical on law) 2002, 116 ff.

XX. Poland

Ewa Bagińska

A. Legislation

1. Act of 30 May 2008 on the Revision of the Civil Code, Dziennik Ustaw (Journal of Laws, Dz. U.) 2008, no. 116, item 731 – art. 446 § 4 KC: Non-Pecuniary Damages to Relatives in Wrongful Death Cases

The revision of the Civil Code introduces the long-awaited new ground for compensation of non-pecuniary loss. Pursuant to art. 446 § 4 KC, a court may award the closest members of the family of the deceased an appropriate sum of money as compensation for moral harm. 1

The new paragraph of art. 446 KC creates a claim for compensation for the moral damage arising from the death of a tort victim. The claim belongs to the relatives of the deceased and it does not replace the claim based on art. 446 § 3 KC (for an appropriate indemnity if the victim's death resulted in a considerable worsening of their living standard), which is dependent on the existence of some kind of a pecuniary loss. 2

The change brings about a very significant improvement of the situation of family members and other close relatives in cases of wrongful death, and in particular in traffic accident cases.[1] Until now, when awarding compensation based on art. 446 § 3 KC, the courts have tended to mix pecuniary and non-pecuniary elements of damage[2]. Thus, the new Law not only meets the social expectations, but also facilitates the adjudication of awards for non-pecuniary losses. It remains to be seen whether the scale of the awards will reach the level of the awards in personal injury cases, i.e. where the victim survives. The new Law entered into force on 3 August 2008. 3

[1] As reported in *E. Bagińska*, Poland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 9, this ground for seeking reparation of non-pecuniary loss was admissible under the Code of Obligations of 1933 (pursuant to art. 166 that was based on the Swiss regulation and French jurisprudence), but repealed in the Civil Code of 1964.

[2] See *E. Bagińska/M. Nesterowicz*, Non-Pecuniary Loss under Polish Law, in: W.V.H. Rogers (ed.), Damages for Non-Pecuniary Loss in a Comparative Perspective (2001) 180. See e.g. SN 13 April 2005, IV CK 648/04, Orzecznictwo Sądu Najwyższego (OSN) 3/2006, item 54, reported in *E. Bagińska*, Poland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) no. 22.

B. Cases

1. Trybunał Konstytucyjny (Constitutional Tribunal, TK) 1 April 2008, SK 77/06, OTK 39/3/A/2008: State Liability for a Valid Judgment; Admission of an Action for Rendering a Valid Judgment Unlawful; Unconstitutionality of art. 424[1] § 1 and § 2 of the Code of Civil Procedure

a) Brief Summary of the Facts

4 The claimant filed an action for the violation of the right to due process, alleging that the civil court proceedings exceeded a reasonable time. This action is regulated by the Act of 17 June 2004 on the action for the violation of the right to judicial proceedings within a reasonable time (Dz. U. no. 179, at 1843), which entered into force on 1 September 2004. The regional court dismissed the claim on the grounds that the alleged delay took place before that date. This was an interpretation contrary to the leading case law. Nevertheless, the judicial decision could not be appealed because the Supreme Court has construed the statute as generally not permitting a reassessment of the action on appeal. Therefore, with a view to seeking compensation from the State (for the paid court fee), the claimant filed an action for rendering the judgment which dismissed the due process claim unlawful. This second action, which is within the sole jurisdiction of the Supreme Court, was also rejected. The Court found that a judgment given in the special procedure designed for the protection of due process cannot be regarded as a "judgment concluding proceedings" as required by art. 424[1] § 1 kodeks postępowania cywilnego (Code of Civil Procedure, KPC). The claimant, thus, used her last resort and petitioned to the Constitutional Tribunal for the control of the constitutionality of the procedural provision that limits the possibility of having a judicial decision declared unlawful solely to final decisions. According to the claimant, such a limitation creates a circumvention of the constitutional right to compensation for the illegal conduct of public authorities (art. 77 sec. 1 of the Constitution).

b) Judgment of the Tribunal

5 In a lengthy discussion of arguments the Tribunal points out the following: the necessity of procedural guarantees of the substantive right to compensation for any harm caused by a wrongful conduct of public authorities (art. 77 subs. 1 of the Constitution); the limited number of procedural instances available to citizens (two regular instances in the civil justice system); the delicate and controversial issue of the review of valid court judgments and the liability for unlawful judgments; the protection of the right to due process afforded by art. 6 of the European Convention and the numerous European Court of Human Rights (ECHR) cases decided against the Polish government on that basis.

6 The constitutionalization of the right to compensation of damage incurred due to an illegal exercise of public authority as well as the right to access to court are two fundamental guarantees of legality of State actions. These guarantees

are particularly important as regards both interlocutory decisions that are not reviewable and immediately enforceable reviewable acts.

According art. 417^1 § 2 KC, if the damage has been caused as a result of the rendering of a valid judgment, compensation may be demanded only after having the illegality of the respective judgment declared in proper proceedings. The action based on art. 424^1 § 1 – 424^{12} KPC belongs to this category of proceedings. The Tribunal emphasises that the substantive rule and the procedural provisions are complementary. According to art. 424^1 § 1 and § 2 KPC, an action for rendering a valid judgment unlawful may be commenced under three conditions: 7

- when a final (verba legis: "concluding proceedings") decision issued by a court of the second instance is concerned, or in exceptional cases when a first instance final judicial decision whose unlawfulness stems from the breach of fundamental legal rules or of constitutional rights and freedoms is concerned,
- the rendering of the judgment caused damage to the party, and
- the change or reversal of the decision could not and still cannot be obtained by other means (or if the violation of fundamental rights is at stake – when the party did not make use of other means of reviewing the judgment – art. 424^1 § 2 KPC).

Hence, the procedural provisions narrow the category of judicial acts for which liability may arise to final valid decisions. The Tribunal observes that the meaning of the notion "decision concluding proceedings" has always raised some controversy in doctrine and case law. The Supreme Court has taken the view that, for the purpose of art. 424^1 § 1 KPC which opens the door to State liability, a final court judgment is a judgment that permanently determines the merits of a case. This definition does not include incidental issues decided in interlocutory proceedings or a decision that ends only a part of the proceedings (e.g. an interim order on child custody during divorce proceedings does not conclude this issue on the merits).[3] 8

The Tribunal observes the lack of a uniform interpretation of the provisions of the Act of 17 June 2004 on the action for the violation of due process. The Supreme Court has eventually ruled, but not without hesitation, that a decision regarding the claim for the violation of the right of due process is not appealable.[4] The Tribunal supports this position by pointing to the subsidiary nature of the action which is primarily designed to remedy the victims of a delay in legal proceedings and thus to serve as a guarantee of the right to court. 9

It is important to note that also valid non-final judicial decisions can infringe upon the rights and interests of individuals, thereby causing damage that is 10

[3] See SN 9 June 2006, IV CNP 48/06, Orzecznictwo Sądów Polskich (OSP) 11/2007, item 126, reported in *Bagińska* (fn. 1) no. 62.

[4] See SN Resolution 23 March 2006, III SPZP 3/2005, Orzecznictwo Sądu Najwyższego Izba Pracy (OSNP) 21-22/2006, item 341, which has the binding force of a legal rule.

separate (independent) from the contents of the final judgment and its legality. However, in Polish law not all incidental issues are reviewable during the reassessment of the judgment on the merits and, moreover, there is no special procedure for declaring such judicial decisions unlawful. The lack of the respective procedural instrument prevents individuals from seeking compensation from the State because of the operation of the substantive rules of the Civil Code. As a result, the constitutional right to compensation from the State is divested of its essence. Therefore, art. 77 sec. 1 of the Constitution has been violated.

11 The Tribunal further explains that the peculiar nature of the discussed source of losses calls for the exclusive competence of the judiciary to determine, in a special procedure, the unlawfulness of a valid judicial decision. Therefore, the doctrinal view that the liability for non-final judicial decisions can be based on a more general ground of art. 417 KC (pronouncing the rule of strict liability of public authorities) is not to be accepted. The very function of art. 417^1 § 2 KC is to impose an additional prerequisite of the liability when the alleged loss is imputed to a valid judicial decision.

12 Correspondingly, the right to reparation intertwines with the right to access to courts in pursuit of claims alleging infringement of freedoms or rights. Hence, the questioned procedural rules, by depriving the claimant of the remedy, also violated the right to access to courts (envisaged in art. 77 sec. 2 of the Constitution).

13 Finally, the lack of the possibility of having a non-final judgment declared unlawful creates a discriminatory distinction between the losses which can and cannot be recovered. Hence, only the persons who suffer damage due to the final judicial decision can seek compensation and make use of the procedure that enables them to establish the unlawfulness of the act, while those persons whose damage is due to a non-final decision may neither make use of any procedure for rendering the respective decision unlawful, nor are they eligible for any, not even partial, recovery. The criterion of the final nature of a valid judicial act is not correct. The Tribunal cannot find any substantiation for such a distinction in the constitutional values. Hence, art. 424^1 § 1 and § 2 KPC contravene the principle of equal treatment (art. 32 sec. 1 of the Constitution).

c) Commentary

14 The facts of the case merge two issues regarding the liability for judicial decisions: the problem of remedying the excessive length of a trial and the liability for the content of judicial decisions. The case illustrates how the practice of the Supreme Court, by denying the right to the review of a first instance judgment relating to an ancillary matter, may directly influence the possibility of seeking compensation from the State. The Tribunal does not say that the civil liability for judicial decisions should be unlimited, but it does consider unconstitutional the situation when the State does not have to compensate damage because its act belongs to a certain category.

One should agree with the Tribunal that the enforcement of the constitutional right to compensation from public administration requires the establishment of the rules regarding the liability for unlawful valid judgments in civil and criminal matters. Any legal solution of this issue should take account of fundamental values such as certainty of law, legal safety, and the protection of legitimate expectations. Accordingly, the viability of the claim for compensation should not depend on the interpretation by courts of what is or is not a final judgment. 15

Indeed, the action to remedy the victims of a delay in legal proceedings guarantees a reasonable length of the legal process, but is also capable per se of prolonging it. Therefore, the interpretation of the Supreme Court, supported by the Tribunal, is correct. Moreover, as long as the proceedings have not ended, the party may re-file the action once every twelve months. It should also be underlined that the claimant who has not sought this special remedy during the process is not prevented from suing the State for damages due to the delay on the basis of art. 417 KC after the delivery of a final decision. 16

With respect to judicial wrongs, one should stress the pressure exerted by the human rights standards on domestic rules of public liability.[5] The Convention shifts the accent from the obligations of a State to the subjective right of an injured person and its violation. The practice of the ECtHR illustrates that this particular type of State activity causes a noteworthy number of losses to Polish individuals. 17

2. Sąd Najwyższy (Polish Supreme Court, SN) 22 June 2007, III CNP 37/07, Orzecznictwo Sądów Polskich (OSN) 7–8/2008, item 94: State Liability for a Valid Judgment; the Meaning of Unlawfulness of a Valid Judgment

a) Brief Summary of the Facts

The plaintiff – a public medical service provider – lost a suit against the National Health Fund for the reimbursement of the expenses linked to the mandatory increase in medical personnel salaries, imposed on public medical care establishments by the Act of 1994. The plaintiff then filed an action for rendering the appellate judgment unlawful on the basis of art. 424^1 § 2 KPC. The provider claims that the substantial change in the interpretation of the law by the Supreme Court, that took place in the resolution of 7 judges of 30 March 2006[6], renders the appellate judgment unlawful. It should be mentioned here that the legal grounds for the action are highly disputable and there are several theories applied by the judicature to these peculiar claims of public medical establishments. 18

[5] See *W.V.H. Rogers*, Tort law and human rights: a new experience, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2002 (2003) 35; *R. Drabble/J. Maurici/T. Buley* (eds.), Local Authorities and Human Rights (2004).

[6] OSNC 11/2006, item 177.

b) Judgment of the Court

19 The Supreme Court follows its case law and reiterates that the notion of unlawfulness in the case of judgments should be given a specific interpretation. Thus, a judgment that is unlawful is a judgment that is unquestionably contrary to the principal legal provisions not subject to different interpretation, or contrary to the general standard of using discretion or that was issued as a result of a particularly erroneous interpretation or application of law, which is obvious and does not require thorough legal analysis.[7]

20 The Court of Appeals relied on one of the many substantiated approaches to the compensatory claims brought by the plaintiff. Although the resolution of 2006 followed a different path, the appellate verdict was well-reasoned and within the margin of judicial discretion. The party who had not brought the cassation filed the current action immediately after the issuing of the said resolution in 2006. However, such a modification in the interpretation of law does not make a judgment illegal, let alone in breach of fundamental legal rules (the basis for this action). This conclusion has always been true for the grounds for resumption of proceedings.

c) Commentary

21 The Court follows its restrictive approach to the illegality of the decisions of public authority organs, which also finds the support of the Constitutional Tribunal (TK 1 April 2008 supra no. 1).[8] Doctrinal views are divided and the debate will probably continue. The rational arguments of the Court are hard to contest, albeit they come close to *contra legem*. It may be noted that the scope of public liability is determined not only by the meaning of unlawfulness but also by the requirement of causation and the proof of loss, therefore all three factors should be taken into account in limiting this liability.

3. SN 7 December 2007, III CZP 125/07, OSN 12/2008, item 138: State Liability for Unlawful Regulation

a) Brief Summary of the Facts

22 The regional court asked the Supreme Court a preliminary question regarding State liability for the damage caused by a ministerial regulation of 2003 which was held to contravene the Constitution and traffic law in the judgment of the Constitutional Tribunal of 17 January 2006. The said regulation concerned an excessively high fee for issuing a car identification card. The Tribunal prolonged the date of the abrogation of the regulation for almost six months, i.e. until 1 May 2006. On 29 September 2006 the plaintiff, who had paid the local authority the sum of PLN 500 (€ 125) for the issuance of the document two days after the Tribunal's judgment, filed a claim for the reimbursement of the

[7] See SN 4 January 2007, V CNP 132/06, OSN 11/2007, item 174, reported in *Bagińska* (fn. 1) no. 75.

[8] See e.g. SN 31 March 2006, IV CNP 25/05, OSNC 1/2007, item 17; SN 4 July 2006, V CNP 86/06, OSNC 3/2007, item 47.

cost against the State – the Ministry of Transportation and Infrastructure. The suit was dismissed in 2007.

On appeal, the regional court referred to the Supreme Court the following question: Can the liability for legislative wrong be established in the case where the Constitutional Tribunal adjourns the abrogation of the unconstitutional act? 23

The attorneys for the State Treasury questioned the application of the rules of the Civil Code on strict liability of the State for legislative wrongs. The Regulation of 2003 was issued before 1 September 2004, i.e. the date of entry into force of art. 417^1 § 1 KC. Pursuant to the transitory provisions, the new Law applies to the facts and legal situations occurring after its entry into force. 24

b) Judgment of the Court

The liability for legislative wrongs is based on illegality of an act. Pursuant to art. 417^1 § 1 KC, if the damage has been caused through enactment of a legal act, compensation may be demanded only when in proper proceedings the legal act has been declared void on the ground of its unconstitutionality or non-conformity with an international agreement or a statute. 25

According to the Constitution, legal acts become binding from the date of their publication and not from the date of their issuance. The act of its issuance may not be considered the source of damage in this context because only a published, binding law may exert influence on rights and interests of legal subjects. Until the publication, the act may not be seen as the cause of damage. Hence, contrary to the language of art. 417^1 § 1 KC, the liability for legislative wrong truly means the liability for damage incurred due to the entry into force of a normative act. Typically, a binding legal act is a possible source of loss on a continuous basis during the whole period of its legal force. It should not be seen solely as a one time "event" inflicting the damage. The State can be held liable for any event that in connection with the binding force of a legal act infringes upon protected rights. This interpretation mandates the conclusion that art. 417^1 § 1 KC may apply to the damaging consequences of the unconstitutional regulation issued in 2003 and binding until 1 May 2006. 26

The fundamental question pertains to the influence of the Tribunal's judgment on the legal relations in the case where it chooses to postpone the repealing of an unconstitutional legal act. With respect to this issue, the linguistic interpretation of art. 417^1 § 1 KC would mean that, since the regulation of 2003 was held unconstitutional, the State should be liable for the losses inflicted after 1 September 2004, provided that the other requirements of liability are met. Conversely, however, the Court argues that State liability will not arise in every case of finding the unconstitutionality of a legal act. In some of its decisions the Tribunal explicitly excluded the possibility of suing the State for compensation of losses or for reimbursement of monies paid on the basis of an unconstitutional regulation. Moreover, art. 190 of the Constitution permits the Tribunal to prolong the period in which the respective legal act would still 27

be in force albeit pronounced unconstitutional. This competence has been used by the Tribunal on several occasions, allowing sufficient time for the government and Parliament to undertake a relevant legislative action. Such decisions are always preceded by a careful analysis of constitutional values. However, they inevitably cause a number of problems regarding the consequences of the Tribunal's judgment for the established legal relations as well as for the new relations created and assessed under the unconstitutional, yet not derogated law. The Court argues that in principle all other State organs, including courts, are bound by the later date of abrogation of a given act and until then they have to regard it as having full effect. In exceptional situations, however, the Court might decline to apply a binding, though unconstitutional norm if other values protected by the Constitution or international agreements and the circumstances of the case warrant such a conclusion.

28 A contrary interpretation would be, in the Court's view, "hard to accept" and in breach of art. 190 of the Constitution. It cannot reasonably be argued that in the transitory period public organs should refrain from applying the law because of the threat of strict liability in tort. The fact that an unconstitutional act may remain in force for a given period of time reflects the preference of the legislator for the stability of the legal system. Hence, during this period any conduct of public organs based on such act may not be qualified as unlawful. Correspondingly, the liability for damage due to a legislative wrong is excluded.

c) Commentary

29 So far the problems of legislative wrongs have been dealt with by the Polish courts in a complicated social and historical context. This case, with its simple facts, is free of this burden. Nevertheless, it tackles the most complicated issue in the field of liability for legislative wrongs. On the one hand, the language of art. 417^1 KC is quite explicit: it does not link the liability with the act (effect) of derogating the legal rule from the system, but with the declaration of its unconstitutionality. On the other hand, the rule saying that the publication of the Tribunal's judgment marks the date of the derogation is subject to the exception provided for in art. 190 of the Constitution. Correspondingly, the derogation was postponed in many judgments concerning the rights and interests of the citizens (e.g. with regard to taxation, illegal parking charges, the provision of health care financed from the public health insurance scheme) and the Tribunal was tacit with respect to the possibility of claiming restitution. The question whether the consequences of constitutional judgments apply *ex tunc* or *ex nunc* divides both doctrine and the courts.

30 There are no easy answers in the situation where the Tribunal decides to use its competence from art. 190 of the Constitution. The new rule formulated by the Supreme Court in this case is not absolute and therefore, acceptable. The Supreme Court has confirmed its restrictive interpretation of the generous rules of public liability. In this respect the Court's decision was foreseeable as to its (negative) outcome for the plaintiff. By contrast, the practice of the lower courts is not at all uniform and they are reported to have held to the con-

trary. This case demonstrates that State liability should have been linked more clearly with the retroactive effects of the Tribunal's judgments.

In the foreign systems which accept liability for legislative wrongs, albeit by way of exception and mainly so with regard to acts undertaken in the execution of statutes (in the French, German and Belgian law), reasonable limits to this liability are guaranteed by either the theory of adequate causal relation or the requirement of unusual and special damage or theory of protective norm. The Supreme Court achieves corresponding results, albeit by using different instruments. 31

4. SN 28 February 2007, V CSK 431/06, OSN 1/2008, item 13: State Liability for Bad Conditions of Imprisonment; Burden of Proof

a) Brief Summary of the Facts

The prisoner sued the State for the redress of personal injury and for the violation of personal rights due to the bad conditions while imprisoned. He alleged that during the many years of the deprivation of his liberty, he was detained in overcrowded cells (less than three square metres per person), where not all prisoners had individual beds, and where the sanitary provisions were not separated from the rest of the room. Moreover, the plaintiff claims to have been treated without respect to his dignity. 32

The suit was dismissed by the lower courts. The personal injury allegations were not substantiated. On the evidence, the prisoner broke his heel bone while he was on a temporary release, and later he continued the treatment in the prison hospital, where he refused to undergo an operation and rehabilitation. The courts found no medical malpractice in connection with the services. The heel fracture resulted in 15% disability. No causation between this disability and the detention or the medical treatment in prison was found. 33

The plaintiff was detained in several places. The figures submitted suggest that, at any given time, the cells were overcrowded at the rate between 115%–130%. The courts found, however, that the plaintiff did not prove that the cells he was assigned to were in fact overcrowded and that there was a causal relation between that fact and the state of his health. According to the courts, the conditions of detention were in conformity with the Penal Code (art. 248 § 2 kodeks karny, KK) and the respective Regulation of the Ministry of Justice of 2002. Hence, the plaintiff did not prove the unlawfulness of the conduct of public authorities. Because the claim for damages for non-pecuniary loss was formulated as one claim, but covered two sources of the immaterial damage (thus, two different legal bases), the appellate courts found no ground for the apportionment of the sum for each basis (personal injury and violation of personal rights). As a result, the court dismissed the entire claim. 34

In cassation the plaintiff pointed inter alia to the breach of art. 3 of the European Convention on Human Rights and the violation of art. 24 KC with respect to the burden of proof. 35

b) Judgment of the Court

36 The Court of Appeals erred in dismissing the case. The plaintiff provided the factual ground for his claim for compensation. He sought protection of his dignity and described in detail the circumstances of the violation. The Court should have applied art. 24 and 448 KC and adjudicated the claim.

37 Human dignity is protected by art. 30 of the Constitution. Public authorities, when undertaking repressive means, have a special duty to ensure that the limitations of human rights and dignity do not go beyond what is necessary to achieve the aim of a given measure. It is one of the most fundamental values of democratic society, enshrined in the Constitution (art. 40, 41 sec. 4 and 47) and international conventions, in particular, art. 3 of the European Convention which prohibits in absolute terms torture or inhumane or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour. The Court also refers to art. 8 of the Convention, protecting the privacy and intimacy of inmates.

38 The Court extensively cites the case law of the ECHR regarding inhumane or degrading treatment. It considers that conditions of detention (overcrowding and inadequate facilities for heating, sanitation, sleeping arrangements, food, recreation and contact with the outside world) may sometimes amount to inhumane or degrading treatment. In such a case art. 448 KC provides for the claim for compensation of non-pecuniary loss due to the infringement of personal rights.

39 The Polish legislator harmonised the penal regulations with the European standards by requiring at least three square metres of space per inmate in a multi-party cell and a separate sanitary area. However, under special circumstances and according to a special procedure, the standard of three square metres may be lowered, but for a reasonably limited time only.

40 The burden of proof in the case of a violation of personal rights is shifted. The actor has to prove that his conduct infringing upon someone's rights was lawful. In this case, the plaintiff met his burden of proof by indicating that he served his punishment in overpopulated cells, where sanitary and living conditions were inappropriate. The State did not present any opposing evidence. The fact that the administration of the detention facilities does not maintain any registries and cannot offer precise information with respect to how much time inmates spent in their cells or the extent to which the cells were overcrowded during the detention period may not run against the plaintiff. According to case law, if the conduct of an opposing party makes it impossible or excessively difficult to obtain evidence to meet the burden of proof by the other party, the burden of proving a negative fact shifts to the former. Correspondingly, art. 3 of the European Convention imposes a positive obligation on the State to provide a plausible explanation of the cause of the applicant's injuries.

The Court concludes that if a person is detained in overpopulated facilities which lack a separate sanitary area and a separate bed for every inmate, his dignity and right to privacy have been violated. The State is liable for damages on the basis of art. 24 and 448 KC. The defendant must prove that the overpopulation was compatible with binding norms. 41

c) Commentary

This rather rare case of a successful lawsuit by an inmate merits an extensive report of the judgment. The decisions of the lower courts depict the opposite traditional, yet unacceptable approach in this category of cases. Although the elements of the cause of action based on art. 24 KC are clearly present, the courts nevertheless dismissed the action by manipulating the rules relating to the burden of proof and the assessment of evidence. The Supreme Court's judgment marks a breakthrough in Polish practice, which is to be applauded. This approach is also taken in its later decisions. For example, in the judgment of 28 February 2007[9] the Court reiterated the above line of argument. However, on the facts, it found that the State proved the legality of detaining the plaintiff in an overpopulated cell. In the circumstances of that case, overpopulation of the cells alone was the alleged humiliating condition. Moreover, the plaintiff did not prove that his conditions during detention had aggravated his mental illness or that he had suffered thereby to such an extent as to make an improvement in his condition unlikely. 42

5. SN 19 June 2007, III CZP 54/07, OSN-ZD B/2008, item 36: Cumulative Concurrence of Claims for Compensation of Non-Pecuniary Loss in Cases of Violation of Personal Rights (art. 448 KC)

a) Brief Summary of the Facts

In a case of the infringement of personal rights, the regional court ordered the defendant to publish an apology in the local newspaper, awarded the plaintiff PLN 10,000 (€ 2,500) for moral damage and the same sum to be paid to charity. The Court of Appeals in Gdańsk asked the Supreme Court a preliminary question of whether the concurrence of claims envisaged by art. 448 KC allows for a cumulative award. 43

b) Judgment of the Court

Pursuant to art. 448 KC, in the case of infringement of personal rights, the court may award an injured person an adequate sum as compensation for non-pecuniary loss or, if he so demands, award an appropriate sum for a designated social purpose, irrespective of other means necessary to eliminate the effects of the damage caused. The actual contents of art. 448 KC is a result of a revision in 1996, which excluded intentional fault as a premise of the claim and removed the Polish Red Cross as the only social beneficiary of an award. 44

[9] V CSK 431/06, OSN-ZD C/2008, item 75.

45 Case law has been clearly divided on the issue whether the claimant whose personal rights have been violated may demand only one compensation to be paid, either for his benefit or for the designated social purpose. The Court restates the case law and the arguments used for both sides. Historically, the claim for the benefit of the Red Cross was not considered an indemnity for non-pecuniary loss, but rather a sort of private penalty (sanction), that had to be paid to the mentioned charitable institution. Following the ruling of a full Civil Chamber of the Supreme Court on 8 December 1973[10], the judicature emphasised that compensation paid to the Red Cross played an explicit preventive role, punishing the wrongdoer for his intent (malice) in an interference with personal rights of another. However, the current wording of art. 448 KC permits a conclusion that it regulates one, indivisible claim for redress of non-pecuniary loss. Therefore in some decisions the courts have held that the norm contains an alternative excluding a concurrence of claims. The majority of the doctrine has taken the same position. However, in other decisions the Supreme Court has followed the opposite view.

46 This Court eventually chooses to follow the recent path of the jurisprudence.[11] It answers the preliminary question in the affirmative by giving the following reasons:

47 a) Damages for non-pecuniary loss play first of all a compensatory role, as they purport to make the plaintiff whole. Conversely, the sum awarded to the charitable institution serves as a private (civil) penalty. It is similar to a punitive monetary sanction (nawiązka) imposed by a criminal court which, despite its satisfactory character, is a specific penal means. It aims at penalizing the perpetrator as well as at prevention and deterrence;

48 b) The language interpretation of the word "or", meaning a cumulative choice, is not superseded by the functional and systematic construction of art. 448 KC. The fact that both claims are embraced by one provision and are based on the same premises does not mean that they are identical. The legislator has already permitted two concurrent claims for redress of non-pecuniary loss in art. 445 KC (for personal injury) and in art. 448 KC. They are separate and autonomous.

49 c) Although both claims provide for a pecuniary redress, the means of reparation of moral harm varies, and hence they are not identical claims. The money paid to the injured is a different means of redress than his satisfaction caused by making the wrongdoer pay a sum of money to a charitable institution;

50 d) Art. 448 KC is a "judge law", whose essence is the discretion to assess the claim on the facts. If the claimant wishes to have a part of the damages be paid for his account and another part for a social purpose, it would be against the nature of such regulation to limit this possibility.

[10] OSN 1974, 145.
[11] See SN 17 March 2006, I CSK 81/05, OSP 3/2007, item 30.

c) Commentary

The Court correctly emphasizes the difference in functions and structure between the claims (sanctions) embraced by art. 448 KC. This judgment follows the minority approach, but seemingly a more modern one. In essence, it accepts that an aggrieved party may demand payment of damages for both himself and a social institution, in order to reach full satisfaction. The debate, nevertheless, is not over. This judgment might give rise to some discussion about the need for the introduction of punitive damages. 51

Principally, in adjudication of the damages for the violation of personal rights a court should take into consideration the type of protected interest, the extent of the non-pecuniary loss, the nature of the results of infringement, the financial situation of the liable person, etc.[12] The awards have been rather low, mainly due to the other possible remedies (such as a demand for a newspaper publication of a judgment or a claim for restitution in some other way). Moreover, the sums awarded are usually lower than in personal injury cases. 52

6. SN 29 May 2007, V CSK 76/07, OSN 7-8/2008, item 91: Relationship between Compensation of Non-Pecuniary Loss in Personal Injury and Patient Rights Cases

a) Brief Summary of the Facts

The plaintiff cut his three left fingers off with a saw and seriously injured the fourth one. One of the cut fingers was taken to the defendant hospital, but the surgeon decided that the finger did not meet the medical conditions for being replanted. As to the injured fourth finger, which was still hanging on, the doctor first suggested its re-attachment, but during the treatment of the wound he changed his decision and eventually amputated the finger. The plaintiff did not consent to the amputation and he wanted the finger to be replanted. The defendant hospital was not prepared to perform any microsurgical procedures because of the lack of specialists and equipment. Such procedure is to be performed within 12 hours from the amputation. The surgeon neither sought a second opinion nor considered the possibility of replanting with any of the microsurgery centres. According to an expert witness, the plaintiff had less than a 50% chance of a successful replanting. 53

The lower courts differed in the evaluation of the evidence. The regional court found that the doctor had committed medical malpractice and violated the patient's right to informed consent. Accordingly, it awarded PLN 27,000 (€ 6,750) for pain and suffering (art. 445 KC), but dismissed all the other claims for pecuniary losses. The appellate court found to the contrary, i.e. that there was no medical malpractice, and that in the circumstances of the case the doctor committed no fault. The plaintiff filed for cassation. 54

[12] See *Bagińska/Nesterowicz* (fn. 2) 186.

b) Judgment of the Court

55 The Court focuses on damages for non-pecuniary loss which may be awarded in specific cases only. In this particular case there are two distinct bases for the award: medical malpractice which inflicted pain and suffering (art. 445 KC) and the infringement of a patient's rights (art. 19a of the Medical Care Establishments Act[13], hereafter MCE, in conj. with art. 448 KC).

56 Doctrine has always been divided on the issue of the interpretation of the relationship between art. 19a MCE and art. 445 KC. The Supreme Court chooses to adhere to the view that the discussed causes of actions are separate and independent because of their different scope of protection. Art. 445 KC aims at compensation for pain and suffering due to personal injury and art. 19a MCE protects dignity, privacy and autonomy of a patient, regardless of the diligence and effectiveness of a medical intervention. Art. 19a MCE applies both to contractual and delictual breaches. Hence, the two provisions provide for liability for two different wrongful acts.

57 The Court concludes that because the plaintiff did not claim damages on the basis of art. 19a MCE in conj. with art. 448 KC, the Court of Appeal could not adjudicate such claim due to the procedural restraints (art. 321 KPC, preventing a court from adjudication beyond the plaintiff's demand).

c) Commentary

58 I cannot agree with the outcome of the case. This judgment does not seem to meet the expectation of justice because ultimately the injured plaintiff has been left without compensation. Polish law recognises the concurrence of causes of liability, hence the plaintiff's claim for non-pecuniary loss can be based either on art. 445 KC (personal injury) or on art. 19a sec. 1 MCE. Moreover, the determination of the legal basis for any action belongs to a court, depending on the findings. Conversely, the court is not bound by the legal basis stated by the claimant. On the evidence, the facts demonstrated the violation of the patient's right to informed consent. In my opinion, the trial court was right in finding medical malpractice. The amputation of a finger is a serious and irreversible procedure that substantiates a second opinion.

59 The legal argument concerning the independence of the grounds for damages for non-pecuniary loss is convincing. I agree with the dominant doctrinal opinion that although art. 19a MCE refers to art. 448 KC, the plaintiff need not prove a violation of his personal interest. Art. 19a MCE provides for the explicit situations in which a claim for damages arises, thereby assisting the patient in the establishment of his claim.[14] Nevertheless, art. 448 KC requires that the claimant submits proof of fault of the actor.

[13] Dz. U. no. 91, at 408 with later amendments.

[14] *M. Nesterowicz*, Prawa pacjenta i zadośćuczynienie pieniężne za ich naruszenie w prawie medycznym i cywilnym, Prawo i Medycyna (PiM) 2/2005, 84; *M. Safjan*, Kilka refleksji wokół problematyki zadośćuczynienia pieniężnego z tytułu szkody wyrządzonej pacjentom, PiM 1/2005, 5.

Patients' rights are protected by several regulations. Art. 19a MCE provides for the protection of the rights enumerated in art. 18 and 19 MCE.[15] Nevertheless, the other patients' rights will also fall within the scope of art. 448 KC as the latter is the general ground for seeking compensation for negligent infringement of personal rights and interests. The practical result might depend on a court's approach to the burden of proof that a certain right is a personal right in the meaning of art. 448 KC. So far the practice has not been harmonised. In the judgment of 14 October 2005[16] the Court put emphasis on the possible application of art. 445 KC in the case of a violation of a patient's right to informed consent linked to personal injury. 60

7. SN (panel of 7 judges) 7 February 2008, III CZP 115/07, OSN 9/2008, item 96: Traffic Third Party Insurance Covers a Spouse who is Co-Possessor of the Car

a) Brief Summary of the Facts

The Ombudsman for the Insured (Rzecznik Ubezpieczonych) asks the Supreme Court a preliminary question regarding the scope of civil liability insurance of possessors of vehicles. The Ombudsman points to the significant division of case law. The first view includes in the insurance coverage the driver's relatives who are co-possessors of the car.[17] The opposite view denies coverage with respect to a spouse/passenger who is a co-possessor of the vehicle which caused the injury.[18] 61

The Ombudsman for the Insured observes that the general rule contained in art. 822 KC is pre-empted by the special rules of art. 34, 35 and 38 of the Act on Compulsory Insurance, the Insurance Guarantee Fund and Polish Bureau of Traffic Insurers (2003)[19]. Correspondingly, the liability of the possessor extends to all persons injured. This conclusion is supported by the II and III Insurance Directives. 62

b) Judgment of the Court

The Court first observes that the original version of art. 822 KC[20] had a primary influence on the way the courts responded to the issue of liability of the insurer towards the claims of co-possessors of the vehicle for damage to property or for personal injury. Pursuant to art. 822 KC, which defines a third party insurance, a civil liability insurer undertakes to pay the compensation defined in the contract for injuries caused to third parties each time civil liability attaches to an insured. 63

[15] In addition, in the case of negligent infringement of the patient's right to die with dignity, the court may, at the request of the closest family members, the legal representative or the factual guardian, award an adequate sum of money to a social purpose indicated by them.
[16] III CK 99/05, OSP 6/2008 item 68.
[17] E.g. SN 19 January 2007, III CZP 146/06, OSN 11/2007, item 161.
[18] E.g. SN 15 April 2004, IV CK 232/03, Monitor Prawniczy 6/2005, 856.
[19] Dz. U. no. 124, at 1152 with later amendments.
[20] Modified several times, the last change by Act of 13 April 2007 on the Revision of the Civil Code, Dz. U. no. 82, item 557, which entered into force on 10 August 2007.

64 The question of whether a spouse is a third person was answered in the negative in several decisions which were related to the damage to property suffered by the spouse, when the marital estate was based on common (i.e. indivisible joint) ownership. The same was applied to the claims by partners in a civil partnership. In both situations the exclusion of the insurer's liability was linked with the fact that respective co-possessors could not be held liable towards the other for damage to the common property. In 2004 the Supreme Court extended this interpretation to the situation where personal injuries were suffered by a spouse. Hence, the spouse of the possessor injured in a collision of a car belonging to the marital estate may not be regarded as a third person, but as a co-possessor, whose claims for reparation of damage against the other co-possessor are based on fault.[21]

65 According to the Supreme Court, the answer is conditioned on the interpretation of art. 38 of the Act on Compulsory Insurance. Sec. 1 of this provision excludes the liability of the insurer for the damage to or loss of property, caused by the driver to the possessor of the vehicle; the same applies to the situation where both the damaging and the damaged vehicle is (co-)possessed by the same person. Given the fact that this provision is an exception to the rule, it is to be construed strictly, hence excluding personal injury. Art. 822 KC formulates a general rule, which along with other Civil Code provisions is to be applied in the areas not covered by the Act on Compulsory Insurance[22]. The provisions of the Act reflect the legislative tendency to broaden the protection afforded to the insured and to the injured by compulsory third party insurance.

66 Any person who causes damage while driving a car is liable for fault (art. 415 KC). The establishment of this liability is a sufficient ground for the insurer's liability (art. 35 of the Act). The jurisprudence confirmed the civil liability insurance coverage in a case where the negligent driver was not the possessor, but the injured passenger was a co-possessor of the car (SN 19 January 2007, III CZP 146/06, OSN 11/2007, item 161). The rule of art. 35 of the Act operates regardless of whether the liability may also attach to a (co-)possessor (in principle the liability is strict – art. 436 KC). The Supreme Court emphasises that third party insurance covers civil liability of any person for negligent driving during the period envisaged in the contract. Hence, the general formula of art. 415 KC also covers injuries incurred by one co-possessor due to the fault of the other co-possessor.

67 The Court advances solid arguments to justify the restrictive interpretation of art. 38 of the Act. First and foremost, the language and systematic interpretation calls for the exclusion of personal injury from the scope of this article. Secondly, the close relations between the injured and the tortfeasor should not influence the creation and scope of tort liability. Thirdly, the European Insur-

[21] The court referred to the earlier case of SN 30 January/5 February 1963, 3 CR 111/62, Orzecznictwo Sadów Polskich I Komisji Arbitrazowych (OSPiKA) 13/1964, at 59.

[22] See art. 36 of the Act 22 May 2003 on Compulsory Insurance, the Insurance Guarantee Fund and Polish Bureau of Traffic Insurers, Dz. U. no. 124, at 1152 with later amendments.

ance Directives aim at the broad insurance protection of any passenger, other than the driver, who suffers personal injuries arising from the accident (art. 1 of the Third Insurance Dir. 90/232/EEC) as well as of the family members of every person who is liable for damage covered by the third party insurance policy.

Therefore the answer to the preliminary question is that the civil liability insurance of car possessors covers civil liability of any person who, while driving a car, caused personal injury to anyone, including a passenger who, together with the driver, co-possesses the car. 68

c) Commentary

In Poland the problem of compensating personal injuries stemming from traffic accidents is significant. The reported resolution of the Supreme Court, which had once been denied due to some formal obstacles, has been awaited for a long time. In particular, it improves the situation of seriously injured spouses whose claims for compensation of personal injuries have been widely denied by the insurers. Therefore, the practical significance of the judgment is not to be under-appreciated. It is important for the Court to emphasize that when damage occurs an insurer pays compensation to any injured person each time civil liability attaches to an insured, within the limits of this liability and subject to the contractual ceiling of the coverage. Only by way of an exception is the insurer not obliged to redress the damage to property incurred by the possessor due to the driver's negligent conduct. This proves that the scope of legally protected interests varies. The basic argumentation in the case is worthy of approval, notwithstanding some questionable statements, such as those concerning the inter-spouses' tort immunity, that have met with slight criticism[23]. 69

8. SN 26 January 2006, II CK 372/05, Orzecznictwo Sądów Polskich (OSP) 9/2008, item 96[24]: Breach of Duty by a Bank; Criminal Act of a Third Party; Conditio Sine Qua Non

a) Brief Summary of the Facts

The plaintiff, who is a businessman, was the victim of a kidnapping for ransom. The ransom amount of USD 260,000 was paid to the kidnappers in exchange for his release. Two kidnappers were caught and sentenced, but the money was never found. The plaintiff reimbursed in whole the members of his family who had collected the ransom sum. He is now suing the bank for the equivalent of the sum in Polish złoty, alleging that the latter triggered the kidnapping by sending information on the balance of his current account to his home address although this had been specifically forbidden by a contractual agreement. According to the plaintiff, the bank by sending the balance information (containing the balance of over USD 300,000) made it possible for unauthorized persons to learn about his financial situation and induce the crime. The plaintiff intervened personally in the defendant bank after the first 70

[23] See cmt. by *T. Sokołowski*, Prawo Asekuracyjne 3/2008.
[24] Cmt. by *K. Bączyk-Rozwadowska*, OSP 9/2008.

two letters had been sent to the said address, but the bank continued sending the letters (in a six week period the bank sent fourteen letters).

71 The regional court found no basis for liability in tort, as it was not proven that the information on the account balance was directly transferred from the defendant to the criminals. However, the improper performance of the contractual duty by the defendant (i.e. the very printing of the balance information against the will of its possessor) is causally linked to the plaintiff's loss. Taking into account that the plaintiff was known as a wealthy person, the court reduced the sought amount by about 20%, i.e. by the sum that might have been demanded as a ransom had the kidnappers not had access to the information on the balance of the account. The appellate court dismissed the case for lack of causation. According to its evaluation of the evidence, the kidnappers had not got hold of the letters from the bank. After having seized the plaintiff, they first demanded USD 500,000 and later (allegedly after the plaintiff's brother showed them a letter with his current balance) they lowered the demand. This implies that they must have had information regarding the plaintiff's assets before the bank printed the balance information.

b) Judgment of the Court

72 On the evidence, the plaintiff's claim of the existence of a causal link between his loss and the conduct of the bank is speculative.

73 In case law causation is explained objectively as a link between phenomena and their consequences, and with reference to the criteria that flow from life experience and science. As a first step the courts examine whether a given fact, which is presented as the alleged cause of the damage, is its *conditio sine qua non*. If the answer is affirmative, the courts will then consider whether the given result is a normal consequence of the phenomenon that led to the harm.

74 Pursuant to art. 361 § 1 KC, "the person obliged to pay compensation is liable only for the normal effects of the act or omission from which the damage resulted". A normal consequence of a fact means one which typically occurs in the regular course of events; it is not required that it would always happen.

75 The Supreme Court then applies the *conditio sine qua non* test to the facts of the case and the test proves negative. The loss that is the subject of the claim would have happened even absent the contribution of the bank, because the kidnappers stated that they got hold of the balance information only after they had kidnapped the plaintiff. The Supreme Court confirms the evaluation of the evidence made on appeal.

c) Commentary

76 Under Polish law, the tortfeasor is not responsible for all consequences of his action (inaction), but only for those which, having passed the *conditio sine qua non* test, can be assessed as ordinary. The same applies to liability *ex contractu*. The bank breached its contractual duty not to send information to the plain-

tiff's home address by regular mail. The latter wished to keep that information confidential. It is accepted that banks have to meet higher standards with respect to the duty of confidentiality towards their clients. However, the fact of revealing certain data is not sufficient to establish liability. Negligence must be proven and the alleged loss must be a normal, not unusual, consequence of this fact. In this case, granted that the trial court's version of facts is true, one can still argue that an intervening cause (the criminal act) broke the chain of events. Hence, the final conclusion is correct.

9. SN 28 November 2007, V CSK 282/07, OSNC-ZD 2/2008, item 54: Exoneration from Strict Liability; Construction Industry

a) Brief Summary of the Facts

77 While a high building was being constructed in the middle of a city damage was caused to a building on neighbouring property. The owners sued the construction company for compensation. The defendant moved for dismissal, proving at trial that the heavy works he had carried out underground and in the vicinity of water supplies were performed in accordance with the architectural documentation and the building contract. Moreover, when the defendant found out that the documentation regarding the means of securing the neighbouring real estate was defective, he informed the investor about the damaging consequences of the works. The latter told his contractor to continue.

78 The lower court rejected the strict liability of the construction enterprise (art. 435 KC). It held that the constructor performed his duties with professional diligence and in compliance with the law. Hence he is exonerated from liability. The appellate court reversed the verdict and awarded the damages. According to this court, a modern construction company, such as the defendant, must autonomously assess the risk of carrying out works in the conditions that do not guarantee full safety even when observing the highest prudence and diligence. The inflicted damage falls within the scope of this building risk and the construction company is liable to compensate third parties regardless of the potential negligence on the part of the investor.

b) Judgment of the Court

79 Anyone who runs his own enterprise or business set into operation by natural forces is liable for any damage to persons and property to whoever caused through the operation of the enterprise or business. This liability is strict which means that, as soon as it is established that the alleged damage is linked to the operation of the defendant's enterprise, the latter is liable regardless of whether he has complied with regulations, professional standards and the requirements of the highest diligence and prudence. There are only three exonerations from this liability: 1) *force majeure*, 2) the exclusive fault of the injured, 3) the exclusive fault of a third person for whom the defendant is not liable.

80 The defence that the investor had provided the contractor with a defective building documentation is not valid. The investor is a third party within the

meaning of art. 435 KC, for whom the contractor is not liable. Only the exclusive fault of a third person for whom the entrepreneur is not liable will be a complete defence. The judicature emphasises that the fault of a third person that exonerates from strict liability is to be understood as the fault being the exclusive cause of the damage. Typically, this requirement is not met by pointing to the defective performance of the building contract. The contractual relations between the parties to the contract, the scope of their duties as well as compliance with construction law regulations are irrelevant. The defendant may be exonerated from strict liability only by submitting evidence of one of the exonerating facts that is the exclusive cause of the damage. The fault of another person that is only one of the causes of the loss might be relevant at most for joint and several liability of this person and the entrepreneur, as well as for a recourse action.

c) Commentary

81 According to some authors, it is sufficient that the plaintiff proves the cause in fact (*conditio sine qua non*) between the operation of the enterprise and the damage.[25] Others argue that there is a presumption of a causal connection between the activity of an enterprise and the damage, which can be rebutted by the proof of an exonerating fact.[26] The dominant view is that an event fulfilling the conditions of an exonerating fact (e.g. *force majeure*, exclusive fault of a third party) exempts the obligee from strict liability and at the same time it defies causation between his activity (the operation of the enterprise) and the sustained damage.[27] The courts agree with this approach and emphasise that any of the three possible exonerating facts must be the exclusive cause of the damage in order to deny liability. Typically, as soon as it is established that the alleged damage is linked to the operation of the defendant's enterprise and the latter submits evidence of the exonerating fact, the courts will also require from him proof that other causes within his sphere are missing (or if any come into play, that they are not in the normal causal connection with the damage). This jurisprudence is rightly confirmed by the reported decision. In 2008 the Supreme Court ruled along this line of argument also with respect to the exclusive fault of the victim as an exoneration from strict liability of an employer producer of dairy products (SN 3 August 2007, I UK 367/06 OSNP 19-20/2008, item 294) and strict liability of a farmer (SN 15 February 2008, I CSK 376/07, OSNC – ZD 4/2008, item 117)[28].

[25] See *M. Safjan* in: K. Pietrzykowski (ed.), Kodeks cywilny. Komentarz (4th ed. 2005) 1233; *T. Dybowski* in: Z. Radwański (ed.), System prawa cywilnego, vol. III, part I (1981) 270.

[26] See *B. Lewaszkiewicz-Petrykowska*, Odpowiedzialność cywilna prowadzącego przedsiebiorstwo wprawiane w ruch przy pomocy sił przyrody (art. 435 KC) (1967) 130.

[27] See *M. Nesterowicz* in: J. Winiarz (ed.), Kodeks cywilny z komentarzem, vol. I (2nd ed. 1988) 428. Cf. *W. Dubis* in: E. Gniewek (ed.), Kodeks cywilny. Komentarz (3rd ed. 2008) 770.

[28] Farming is usually not considered to fall within the scope of art. 435 KC unless the activities conducted on a farm and their effects directly depend on the use of machines set in operation by natural forces (ergo creating a risk).

10. Developments concerning Personal Injury

82 Several judgments published in 2008 illustrate the problem of awarding compensation for moral harm in wrongful death cases (the new art. 446 § 4 KC was not yet applicable). Art. 446 § 3 KC permits a claim for compensation if the victim's death resulted in a considerable worsening of the living standard of his relatives, which is principally dependent on the existence of some kind of a pecuniary loss. In the case decided on 24 October 2007[29] the parents of a car accident victim demanded PLN 2,100,000 (€ 525,000) as the reimbursement of the funeral expenses and compensation. The deceased was a high school student who sometimes earned money during the school holidays. The parents did not work, and their second adult child did not live with them. On evidence, the plaintiffs did not prove their situation had worsened due to the death of their son. Thus, the lower courts awarded only the funeral expenses. The Supreme Court, however, reversed and ruled for the plaintiffs also on the second claim, adhering to the line of case law which permits moral harm to be compensated under art. 446 § 3 KC. It argued that the death of a growing son whose material help in the near future could be counted on by his parents as well as a strong mental shock arising out of the death of the closest person in a dreadful accident leading to deterioration of living conditions and the increase of expenses for medical treatment substantiates the claim for redress of the loss.

83 In the highest verdict ever a widow of a young (34 years old) high profile financier, who died in an accident that happened partially due to his own fault, was awarded PLN 1,5 million (€ 375,000) by the Warsaw Court of Appeals. The couple had been married for one year and the widow demanded PLN 4,3 million (the cap in insurance coverage of personal injuries) for the worsening of her living conditions. The defendant insurer alleged that the widow's living standard had not worsened considerably. On the contrary, she inherited her husband's patrimony and received indemnity from his life insurance policy. Moreover, she herself was a well-paid active professional. The Court of Appeals noted that the compensation cannot be conditional on an average income (in the year of the accident, 1998, it was around PLN 2000 per month = € 500), since the couple belonged to the upper social class (as a finance director the deceased had a monthly gross income of PLN 38,000 = € 9,500). Moreover, the court assumed that the couple would have stayed married for the following 20 years and calculated the loss of the family income during this period. This verdict was reversed and remanded for trial by the Supreme Court in the judgment of 14 March 2007.[30] The Court referred to all circumstances of the case, including the "exterior factors" such as the average living standard in society, and it emphasised that the indemnity based on art. 446 § 3 KC is to be "adequate", therefore it is per se not aimed to fully redress the indirect victims of a tort. The indemnity covers only a considerable worsening of the situation of the relatives. Hence, not all the losses caused due to the victim's death are to be redressed. In particular, the relatives cannot compute the compensation by

[29] IV CSK 192/07, OSN ZD 6/2008, item 86.
[30] I CSK 465/06, OSP 11/2008, item 123, cmt. by *M. Wałachowska*.

a simple reference to the future earnings that the deceased would have had had he not died. Different factors apply to the evaluation of their loss. The court has to take into consideration all the dynamic circumstances that influence the situation of the widow until the date of the adjudication. The award should be an adequate, reasonable compensation. On remand the Court of Appeals awarded PLN 500,000 (€ 125,000) with interest, which made a total of PLN 1 million (€ 250,000). The average awards in similar cases hover around PLN 200,000 (€ 40,000).

84 The above case should be contrasted with the first regional court judgment involving the victims of a building catastrophe during the pigeons' fairs in Katowice in 2006. A widow of the pigeon breeder was denied compensation based on art. 446 § 3 KC as the court concluded that her financial situation (she received a monthly income of PLN 1200 = € 300 as social annuity plus PLN 800 = € 200 as salary) had not been considerably influenced by her husband's death (whose monthly income was around PLN 1400 = € 350)[31]. The cases related to this catastrophe are now coming through the second instance, and since the defendant company's insurance coverage is not sufficient to pay every claimant, the verdicts vary considerably.

85 The level of compensation was also extremely low in the case of a wrongful death due to medical malpractice (the Court of Appeals in Białystok, 27 October 2004[32]). A woman, who was asthmatic, was given a prescription for an injection of an analgesic to be administered at home. She had not been interviewed as to allergic reactions to medications. After the injection she died of an anaphylactic shock. The doctor was held liable for medical malpractice (a therapeutic error). The five-year-old daughter and husband sued for compensation pursuant to art. 446 § 2 and 3 KC. The Court awarded PLN 20,000 (€ 5,000) for the daughter who was one year old when her mother died. The claim for annuity was dismissed. The amount awarded is dramatically low for a child who has lost its parent at the beginning of life. Although this was the amount demanded by the plaintiffs, the court should have taken advantage of the possibility to adjudicate beyond the demand made by the claimant pursuant to art. 321 KPC (now repealed). The annuity for the maintenance of the child was denied as a result of the offset with the social security annuity in the amount of PLN 600 (€ 150) per month (the demand was for PLN 1,000 per month). This is also arguable, as this annuity should reflect the lost personal efforts of the mother in raising and caring of her child.

86 The courts follow the new direction set by the Supreme Court regarding the criteria for awarding non-pecuniary loss for pain and suffering (see the case of SN 10 March 2006, IV CSK 80/05, reported in Yearbook 2007, no. 13–17). The factor of "the current living conditions of an average member of society" is either not taken into account or treated as subsidiary. The first approach is illustrated by the judgment of the Court of Appeal in Poznań, 23 November

[31] *Rzeczpospolita* of 22 November 2007.
[32] I ACa 575/04, PiM 3/2008, 140 cmt. by *M. Nesterowicz*.

2006.[33] The plaintiff, a little girl, contracted a lyme disease followed by serious infections and complications. When she sought medical help after being bitten by the ticks, she was not prescribed antibiotics. After several months of inadequate treatment, a serious skin infection led to a particularly severe condition of the child. Eventually, the necrosis of parts of the skin caused permanent scars and a 50% disability. Her moral harm is grave. The medical malpractice of the hospital was established. At the age of eleven the plaintiff was awarded a monthly annuity of PLN 500 (€ 120), and PLN 150,000 (€ 35,000) for non-pecuniary loss (the demand was for PLN 300,000). On appeal, however, the damages for pain and suffering were raised to PLN 250,000 (€ 62,500) in order to more adequately redress the young girl for the suffering and the existing moral harm. The decision should be approved of.

87 The second approach was taken in a case of a 51-year-old plaintiff who had been hit by a car and incurred serious injuries, resulting in prolonged painful treatment and rehabilitation. The plaintiff was declared 77% disabled, he suffered a complete irreversible loss of working capacity and the loss of sexual functions. The regional court ruled that the plaintiff was entitled to PLN 400,000 (€ 100,000) as damages for non-pecuniary loss, a monthly annuity of PLN 500 (€ 120) and PLN 11, 600 (€ 2,900) for the cost of the personal care and services by the plaintiff's wife and son. The Court of Appeals reduced the compensation for non-pecuniary loss and dismissed the claim for the services rendered by the family members. According to this court, PLN 200,000 (€ 50,000) is sufficient to compensate for his moral damage and meets the requirement of reasonableness. The money awarded in the first instance was grossly disproportionate as it equalled the sum of 30 years of the plaintiff's income or 20 years of an average national income. The Court of Appeals also held that the plaintiff's wife and son did not suffer any pecuniary loss by undertaking the personal care of the plaintiff, hence it denied compensation for their services. On cassation, the Supreme Court (SN 9 November 2007, V CSK 245/07 (OSN-ZD D/2008 item 95) reversed the appellate judgment because the Court of Appeals did not make its own factual findings and misunderstood the relation between the compensatory function and the principle of moderate award for non-pecuniary loss. The Court added that the use of tabular percentage schemes for the degrees of permanent bodily injury in order to settle a claim for non-pecuniary loss is secondary in importance and such assessment is not comprehensive. As to the cost of family care, the Court recalled that if the victim lost his ability to work completely or partially or if his needs have increased (e.g. permanent expenses for treatment or care and assistance by third persons must be borne) or his future perspectives have diminished (e.g. inability to carry out a profession or specialisation), he may demand an appropriate annuity from the person obliged to redress the damage. Any of the conditions, whether alone or concurrent with others, constitutes a sufficient ground for the claim. The annuity for increased needs is generally to cover future expenses. However, if the care and assistance by third persons have already been given during the fourteen months of the plaintiff's treatment, the court must award this compensation as

[33] I ACa 561/06, PiM 2/2008, 140 cmt. by *Nesterowicz*.

outstanding annuity. If any economic loss ensued for the family members, the claim should be awarded on the basis of art. 444 § 1 KC (as loss causally linked with the personal injury). In any event, the determination of the legal basis of a claim is for the court to decide. The defendant must pay compensation in the form of an annuity regardless of any other person's existing commitment to supply the victim with means of maintenance.

C. Literature

1. *M. Balwicka-Szczyrba*, Przedawnienie roszczeń z tytułu odpowiedzialności deliktowej za szkody przyszłe na osobie (Limitation of Claims for Reparation of a Future Damage arising from Personal Injury) (Ars boni et aequi, Poznań 2008)

88 This book is based on a doctoral thesis of the author. Balwicka-Szczyrba presents an array of problems regarding the reparation of future consequences of personal injury. After an attempt to define what a future damage is, she discusses several theoretical and practical problems of different type of future losses. The core chapters of the monograph offer an in-depth analysis of the limitation of tort claims for damages in the light of the Constitution, of the Civil Code and of the Atomic Law. The author also presents the German regulation in this field. The book concludes with some de lege ferenda remarks and a short analysis of the 2007 revision of the Civil Code regarding art. 442 KC.[34]

2. *M. Kaliński*, Szkoda na mieniu i jej naprawienie (Damage to Property and its Reparation) (C.H. Beck, Warsaw 2008)

89 The monograph is a comprehensive analysis of the problems related to property damage and its reparation. The author focuses on Polish law, but his research is in many instances enriched by comparative remarks. The book consists of five chapters. The first, lengthy part embracing the classification of civil liability and discussion of its regimes and premises precedes the chapter on the notion of damage, types and elements of a compensable/non-compensable loss, as well as the objective and subjective theories of damage. Chapter III offers an in-depth analysis of the tools for limitation of the scope of damages: the adequate causation test, statutory and contractual limitations, and contributory conduct. Kaliński concludes that the rules of the Civil Code on damage and its reparation do not need a general modification. Nevertheless, he suggests some slight changes de lege ferenda, inter alia to replace "conduct" with "event" in art. 361 (causation), to adopt one concept of contributory negligence, and to introduce a rule similar to § 249 BGB with respect to costs of restitution payable in advance.

[34] *Bagińska* (fn. 1) no. 1.

3. *K. Ludwichowska*, Odpowiedzialność cywilna i ubezpieczeniowa za wypadki samochodowe (Civil and Insurer's Liability for Traffic Accidents) (TNOiK, Toruń 2008)

90 The book is a doctoral thesis of the author, in which she offers an incisive analysis of theoretical and practical problems of civil liability for traffic accidents and its insurance in Europe. The book consists of three parts. The first one is devoted to the rules of traffic liability in major European jurisdictions (German, French and English) and in Polish law. The second part presents the elements and operation of third party insurance in the mentioned jurisdictions, as well as the process of its harmonisation through the Insurance Directives. The last part of the book covers the jurisdictional and conflict of laws issues. It is concluded with a chapter in which Ludwichowska critically evaluates the operation of the European scheme for compensation of traffic injuries and proposes the introduction of a system of universal compulsory insurance. The author promotes a no-fault compensation system for traffic injuries.

4. *Z. Radwański/A. Olejniczak*, Zobowiązania – część ogólna (The Obligations – General Part) (CH Beck, Warsaw 8th ed. 2008)

91 The eighth edition of this popular treatise and textbook concerning the law of obligations takes account of all recent changes in the field of tort law, as well as the new trends in jurisprudence and doctrine. The chapter on torts is updated with the latest case law on redress of damage caused by public administration, the new regulation concerning prescription and the claim for non-pecuniary loss in wrongful death cases.

5. *M. Szpunar*, Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego (The Liability of a Private Person for Breach of Community Law) (Wolters Kluwer 2008)

92 This is the first monograph relating to the theory, rules and scope of liability of private persons for breach of community law. The major part of the book attempts to analyze the notions of direct effectiveness, direct applicability and enforceability of European Directives in the context of civil liability. The author then presents the ECJ case law regarding private parties' claims for compensation based on violations of European law by other private parties. Szpunar undertakes to examine the premises of liability under Polish law. He is correct to conclude that liability should be based on fault (art. 415 KC).

6. *M. Śliwka*, Prawa pacjenta w prawie polskim na tle prawnoporównawczym (Patients' Rights in Polish Law in a Comparative Perspective) (TNOiK, Toruń 2008)

93 The comparative work of M. Śliwka fills the gap in the Polish legal writing in the area of medical civil law. The author first classifies and defines the contents of patients' rights (on the international, European and national levels), as well as describes their nature and the relationship between these rights and personality interests. He agrees with the theory that patients' rights are civil personal interests that merit an express rule on their protection in order to facilitate the

burden of proof lying on the patient. The author then focuses on selective, but fundamental patients' rights: the right to medical services which correspond to the requirements of medical science, the right to informed consent (with a special chapter devoted to minors and mentally incompetent patients), the right to confidentiality, and finally to the rights of a dying patient, including euthanasia. The thesis closes with a chapter on redress of non-pecuniary loss due to the violations of patient rights.

7. Selected Articles:

94 **Civil liability (punitive damages, contents and role of the principles of justice, functions):** *E. Bagińska*, Rola i ewolucja punitive damages (odszkodowania karnego) w prawie porównawczym, in: Księga jubileuszowa Profesora Tadeusza Smyczyńskiego (TNOiK, Toruń 2008) 511–527; *T. Bukowski*, Klauzule generalne w prawie cywilnym. O konieczności stworzenia katalogu zasad współżycia społecznego, Monitor Prawniczy 24/2008, 1297; *T. Czech,* Zasady współżycia społecznego a odpowiedzialność deliktowa, Państwo i Prawo 12/2008, 39; *J. Kuźmicka-Sulikowska*, Funkcje cywilnej odpowiedzialności odszkodowawczej, Przegląd Sądowy 9/2008, 12.

95 **Particular torts:** *K. Sokołowski,* Effusum vel deiectum (art. 433 kc) a zalanie mieszkania, Przegląd Sądowy 9/2008, 59; *R. Baranek,* Realizacja zasady pełnego odszkodowania w przypadku uszczerbku powstałego w rzeczy używanej, Monitor Prawniczy 3/2008, 126.

96 **Non-pecuniary loss:** *J. Matys,* Przesłanki i funkcje roszczenia o zasądzenie odpowiedniej sumy pieniężnej na cel społeczny z art. 448 kc, Przegląd Sądowy 7-8/2008, 96; *J. Matys,* Charakter prawny roszczenia o zasądzenie odpowiedniej sumy pieniężnej na cel społeczny (art. 448 kc), Monitor Prawniczy 9/2008, 470.

97 **Wrongful death:** *E. Ryś*, Odpowiedzialność cywilna z tytułu śmierci osoby bliskiej, Monitor Prawniczy 24/2008, 1037.

98 **Environmental damage:** *B. Draniewicz*, Odpowiedzialność za szkodę w środowisku w ustawie o zapobieganiu szkodom w środowisku i ich naprawie – wybrane zagadnienia, Monitor Prawniczy 5/2008, 231; *J. Skoczylas*, Odpowiedzialność za szkodę wyrządzoną środowisku – tezy do nowelizacji art. 435 kc, Przegląd Sądowy 7-8/2008, 5; *E. Bagińska*, Economic Loss Caused by GMOs in Poland, in: B.A. Koch (ed.), Economic Loss Caused by Genetically Modified Crops. Liability and Redress for the Adventitious Presence of GMOs in Non-GM Crops (2008) 373.

99 **Medical liability:** *M. Nesterowicz*, Odpowiedzialność cywilna zakładu opieki zdrowotnej za lekarza jako podwładnego, Państwo i Prawo 9/2008, 3; *M. Nesterowicz,* Odmowa poddania się leczeniu przez poszkodowanego jako przyczynienie się do szkody w prawie porównawczym, PiM 2/2008, 5; *M. Nesterowicz* Odpowiedzialność cywilna w związku z zakażeniem HIV i AIDS,

in: Księga jubileuszowa Profesora Tadeusza Smyczyńskiego (TNOiK, Toruń 2008) 139–153; *K. Bączyk–Rozwadowska,* Błąd lekarski w świetle doktryny i orzecznictwa sądowego, PiM 3/2008, 26.

Public liability: *E. Bagińska,* Glosa (note to the judgment) do wyroku SN z 4 sierpnia 2006 r., III CSK 138/05, OSP 3/2008, 176–180; *E. Bagińska/A. Bień-Kacała,* Glosa do uchwały SN z 6 lipca 2006 r. III CZP 37/06, Przegląd Sądowy 10/2008, 128; *E. Gapska,* Odpowiedzialność Skarbu Państwa za bezprawie judykacyjne – wybrane zagadnienia procesowe, Palestra 1-2/2008, 56; *J. Górowski*, Roszczenia odszkodowawcze byłych właścicieli aptek przeciwko Skarbowi Państwa w orzecznictwie sądów, Przegląd Sądowy 5/2008, 5; *R. Trzaskowski*, Odpowiedzialność odszkodowawcza za zaniechanie normatywne, Przegląd Sądowy 1/2008, 5; *J. Zatorska*, Odpowiedzialność odszkodowawcza państwa członkowskiego za działania władzy sądowniczej na przykładzie Polski i Francji, Europejski Przegląd Sądowy 7/2008, 4. 100

Wrongful birth/conception/life: *L. Bosek*, Roszczenia wrongful life i wrongful birth w świetle standardów konstytucyjnych i europejskich, Przegląd Sądowy 1/2008, 32; *D. Korszeń*, Koncepcja prawa podmiotowego przysługującego na podstawie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Przegląd Sądowy 4/2008, 127; *K. Mularski*, Próba analizy koncepcji wrongful life, Studia Prawa Prywatnego 3/2008, 87. 101

Prescription: *A. Józefiak*, Przedawnienie roszczeń deliktowych w świetle art. 442(1) kc, Przegląd Sądowy 4/2008, 65. 102

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XXI. Portugal

André Gonçalo Dias Pereira

A. Legislation

1. Law no. 14/2008, 12 March (Sex Discrimination Act)

1 This Statute transposes into national law Directive 2004/113/EC, of the Council, of 13 December, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

2 A claim for civil liability in case of gender discrimination is expressly regulated (Art. 10): the victim may claim pecuniary and non-pecuniary damages. Non-governmental organizations and other associations have legitimacy to sue for protection of collective interests as well as individual interests of the associated persons. However, in case of harassment, only the person concerned has legitimacy to act in court. Art. 9 provides a facilitation of the burden of proof of discrimination.

3 In the field of insurance contracts and financial services, Art. 6 prohibits a differentiation in the duties of the insured person, due to sex, except if accurate risk assessment based on actuarial data justify it.

2. Decree-Law no. 58/2008, 26 March (Railway Transport Act)

4 This Act regulates railway transport of passengers, luggage, vehicles, animals and other goods. Chapter 5 has rules concerning liability; some of them deserve our attention.

5 Art. 25 provides a general clause of liability of the operator; however Art. 25 (2) *excludes* its liability in case the passenger did not respect her duties, notably when *she had not bought a ticket*. This solution may be criticized and may be judged unconstitutional. If we interpret this norm literally, that would mean that a passenger who did not buy a ticket deserves no compensation, even if the railway accident occurred in case of *intention* or *gross negligence* of the driver or the railway company!

This provision violates the *general principle of law* – with a constitutional rank – that states the right to claim compensation for damage arising from a tort, notably when dealing with personal injury.[1] Moreover the idea that any breach of duties by a passenger excludes compensation is not in accordance with recent trends in the field of strict liability, where nowadays fault of the victim is not taken into account.[2] In my opinion, this norm should be changed in the near future and the courts of law, which also control the constitutionality of the norms, shall not apply it. 6

Art. 28 provides a statutory limitation of damages in case of delay or exclusion of traffic, which are very low, *so low* that, once again, it seems that the legislator may have violated the *essential core* (Art. 18 (3) of the Constitution) of the fundamental right to a *fair compensation*, especially for consumers (Art. 60 (1) of the Constitution). In a similar case the *Acórdão do Tribunal Constitucional* no. 650/2004 decided in favour of the unconstitutionality of the limits of compensation for non-delivery of post.[3] So, for example, for the delay in a railway service over 50km the maximal compensation is € 250. Compensation for the delay in delivering luggage is limited to a maximum of € 100. 7

3. Decree-Law no. 72/2008, 16 April (Insurance Contract Act)

This Act regulates contracts of insurance. It represents a significant milestone in the evolution of the regime applicable to contracts of insurance in Portugal. It is a compilation of norms that were dispersed in different acts, published in very different periods, some of them still from the 19th century, and many of them deriving from EC law. Thus, it aims to consolidate in one single legislative document the law governing contracts of insurance, which had hitherto been spread out, with some overlap, among several legislative documents. It was difficult to interpret the legislation applicable to this type of contract.[4] 8

The two main objectives of this Act are the following: on the one hand, to protect the weaker party in a contractual relationship, which is the policyholder, the insured or the beneficiary. In particular this Act integrates and adapts to the reality of the insurance contract certain consumer protection norms. On the other hand, this Act regulates new types of insurance that have emerged in the last years, such as the group insurance contract and the insurance contract for capitalization purposes. The new insurance contract regime also sought to settle any doubts about the application of the existing regime as well as to 9

[1] See a case with some similarities, although a "stronger case" since it deals with the protection of consumers, who are protected under the Portuguese Constitution, Art. 60 (1): Constitutional Court Decision no. 650/2004 (Diário da República [DR], I.ª Série-A, 23 February 2005) in *A. Pereira*, Portugal, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 486 ff.

[2] See Art. 7:102 (Defences against strict liability) of the Principles of European Tort Law.

[3] See fn. 1.

[4] The new Contract of Insurance Act has put together in a single act and reformed legal provisions applicable to the contract of insurance that were previously dispersed in separate acts, such as the 1888 Commercial Code, Decree-Law no. 94-B/98 of 17 April 1994, Decree-Law no. 176/95 of 26 June 1995 and Decree-Law no. 142/2000 of 15 July 2000.

regulate certain matters where loopholes had been perceived to exist (e.g. the so-called group insurance).

10 Given the financial features of certain contracts of "insurance", the Law does not provide a definition of insurance contracts, opting instead to set out the typical duties inherent to such a contract. This solution allows for jurisprudential and doctrinal development of the concept through the approximation of the "atypical" figures to the duties typically associated with a contract of insurance. The Law also accepts the validity of the so-called claims-made provisions (as opposed to occurrence provisions) in civil liability insurance: in other words, the cover period in civil liability insurance could also be defined by taking into account the date of submission of the claim and not only the date of the occurrence giving rise to liability.[5]

4. Ordinance no. 377/2008, 26 May (Tables of Bodily Harm)

11 Decree-Law no. 352/2007, of 23 October has established a new table of incapacities caused by labour accidents and professional illnesses and Ordinance no. 377/2008, of 26 May, regulates in detail the tables ("Barèmes") of bodily harm. These tables will help the courts in the determination of compensation for non-pecuniary damage, since they provide detailed and accurate determination of the amount of damages for each kind of bodily harm. Nevertheless, these tables have only an *indicative value* and the courts shall decide in each case the amount of damages for non-economic losses. These tables shall be used as indicative for the fair proposal of the insurance company.

12 Concerning pecuniary damages, this Ordinance states that future damage shall only be compensated if the injury does not allow the victim to continue his/her profession or any other. However, even if there is no right to claim future damages, the injured person with a *partial permanent incapacity* has the right to claim the so-called *dano biológico*, that is an offense to physical and psychical integrity. This compensation for *dano biológico* is calculated taking into consideration the age and the degree of incapacity of the victim, and considering the value of the minimal guaranteed income (a social security benefit for those who have no other income).

5. Law no. 31/2008, 17 July (State Liability Act)

13 This statute amends the State Liability Act, of 31 December 2007, regulating the liability of the Portuguese State due to the procedure of formation of public contracts, in accordance with European Community Law. The Portuguese Republic had been condemned by the European Court of Justice[6] for not providing adequate compensation in these cases. The new norm states that "persons damaged due to the violation of a norm during the procedure of formation of

[5] See *P. Romano Martinez/J. Brito/A. Oliveira/L. Torres/M. Ribeiro/J. Morgado/J. Vasques*, Lei do Contrato de Seguro – Anotada (2009).

[6] See: ECJ decision of 14 October 2004 (Case C-275/03) and ECJ decision of 10 January 2008 (Case C-70/06).

(public) contracts are compensated according to the requisites of extra-contractual liability defined by EC Law." This Act, at last, implements Directive 89/665/EEC, of the Council, of 21 December 1989.[7]

6. Decree-Law no. 147/2008, 29 July (Environment Liability Act)

This statute develops the polluter-pays principle contained in the Basic Law of Environment from 1987[8] and implements the European Directive 2004/35/EC of 21 April 2004[9] and Directive 2006/21/EC.[10] The polluter is liable towards the individuals damaged in their basic right to a healthy environment. The Act provides situations of strict liability and cases of liability based on fault. Moreover, it establishes an administrative liability claim for damage caused to the community in general. Concerning this administrative remedy, the Law imposes *preventive duties* and *post ex facto* duties of *reparation*. 14

In case of environmental damage, joint and several liability is the rule, among tortfeasors, as well as directors, managers and administrators of legal persons. There is a relaxation of the rules concerning causation in order to accept proof that the damage was probably caused by a certain behaviour. The operators of enterprises that cause pollution are obliged to obtain financial guarantees in order to ensure the payment of the damages; nonetheless, this requirement is only compulsory after 1 January 2010. 15

7. Decree-Law no. 153/2008, 6 August (Compulsory Civil Liability Motor Vehicle Insurance Act)

This statute introduces some changes to the Compulsory Civil Liability Motor Vehicle Insurance Act, which implemented the 5th Directive on Motor Vehicle Insurance into Portuguese law. The most relevant change concerns the calculation of pecuniary damages: according to the new Law, the claimant's income must be proved by the *victim's tax declaration*, that is, the net income as established for tax purposes as at the date of the accident. With this legal change it will be easier to determine the insurers' risk exposure; on the other hand, the insured persons are also encouraged to comply with their tax obligations. When the victim does not submit a tax return, or does not have a fixed occupation, or if his/her income is less than the minimum monthly guaranteed income, the Court will calculate the damages on the basis of the guaranteed minimum monthly income which is in force on the date on which the loss and damage was sustained (Art. 64 (8)). If the victim is unemployed at the time of 16

[7] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, 33–35.

[8] Law no. 11/1987 of 7 April, amended by Decree-Law no. 224-A/1996 of 26 November and Law no. 13/2002 of 19 February.

[9] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, 56–75.

[10] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, OJ L 102, 11.4.2006, 15–34.

the accident, the Court is required to take into consideration the last three salaries declared for tax purposes, as updated in accordance with the variation of the national consumer prices index, excluding housing, during the years when there was no income, or to take into consideration the monthly figure received by way of unemployment benefit, whatever is more favourable to the victim (Art. 64 (9) (a) and (b)).

17 The scope of this norm is to encourage compliance with tax obligations, to increase the possibilities of agreement between insured and insurer and, in any event, to accelerate the judgment as it facilitates the production of evidence regarding the loss and damage sustained.

8. Decree-Law no. 220/2008, 12 November (Safety against Fire in Buildings)

18 This Act imposes safety duties concerning fires in buildings. The aim of this Act is to put together all the norms that were dispersed throughout the law concerning this practical issue; on the other hand there was a lack of regulation for certain types of buildings. Art. 6 provides substantive regulation concerning liability for fires in buildings.

B. Cases

1. Supreme Court of Justice (Supremo Tribunal de Justiça, STJ), 24 January 2008 (CJ-STJ, I, 62–67): Porsche as Replacement Car?

a) Brief Summary of the Facts

19 The plaintiff, a wealthy entrepreneur, was driving his brand new Porsche Carrera and was involved in a car accident caused by the other driver, on 24 July 2003. The insurance company of the responsible driver immediately assumed the responsibility for the damage. However the insurance company did not offer the plaintiff a replacement vehicle with the same characteristics. He rented a similar car paying € 52,780 for the first three months of rent. During that period he refused to have his damaged car repaired, arguing that he had a right to a new car, because such a car would depreciate in value after being repaired and would not be as safe.

20 The court of first instance and the court of appeal considered that there was fault of the victim during this period, while he was objecting to the repairs, and therefore the replacement costs (€ 52,780) should not be reimbursed.

21 In January 2004, the plaintiff finally agreed to his car being repaired and he rented another Porsche for the amount of € 78,000 for seven months (until the delivery of the repaired car). The court of appeal awarded him compensation for these costs.

The plaintiff appealed to the Supreme Court claiming compensation for the contract costs incurred in renting the two cars. The defendant appealed arguing that also the second car rental contract should not be compensated as these expenses are voluntary and against good faith (Art. 334 *Código Civil – abuse of a right*). 22

b) Judgment of the Court

Concerning the appeal of the plaintiff (€ 52,780 for the first rented vehicle), the Supremo Tribunal de Justiça stated that the decision concerning the fault of the victim is a *matter of fact* and, thus, not to be analysed by the Supreme Court. 23

Concerning the appeal of the defendant (second rented vehicle: € 78,000) the Supreme Court elaborated on this case with interest. The STJ stated that the principle of compensation "in natura" is the basis of the law of damages in Portugal; therefore the STJ decided that the insurance company has a duty to offer a replacement vehicle with the same characteristics as the damaged car. Among other arguments, the Supreme Court emphasised that an expensive car can reflect the success of the entrepreneurial activities of the plaintiff. 24

The Court also considered that it is not an "abuse of a right" to rent such an expensive car, since it fulfils the aim of showing wealth and success that is shown by the car damaged in the traffic accident. The insurance company should have provided a car of the same category. Perhaps it could have been a different, less expensive car, but a luxurious car nevertheless. On the contrary, the insurance company offered no replacement car while the damaged one was being repaired. 25

c) Commentary

The principle of compensation "in natura" is indeed provided in Art. 566 CC and, for the prevalent doctrine, tort law does not aim at *social justice* or *distributive justice*; only *commutative justice*. 26

Therefore, tort law accepts this solution: in ten months of extravagant expenses (renting a Porsche for seven months) an insurance company will have to pay (€ 78,000). In a critical analysis of tort law, one could argue that this amount is higher than compensation for cases of very serious non-pecuniary damage. For example, in the Decision of the *Supremo Tribunal de Justiça* of 29 January 2008, the victim – after a traffic accident – suffered "severe impairments in his vision and intellectual abilities; anxiety, pain and suffering and needs to take drugs to avoid severe pain"; this victim was awarded € 60,000 for non-pecuniary damages. This is just an example of the nature of tort law, which has no scope of social justice or social welfare, much less income redistribution. Such legal aims shall be obtained – if ever – through public and social systems, argues the dominant literature. 27

2. Supreme Court of Justice, 4 March 2008 (CJ-STJ, I, 135–143): Medical Liability, Error of Diagnosis, "Obligation of Result"

a) Brief Summary of the Facts

28 The plaintiff was diagnosed with prostate cancer. The analysis was performed by the defendant, physician pathologist. Afterwards the plaintiff underwent a radical prostatectomy. Before the surgery, the plaintiff was a healthy, well-off entrepreneur, with an active social life and regular sexual life. Due to the surgery, the (predictable) high risk of impotence arose and he also became incontinent. He suffers severe social and psychological trauma, cannot perform his social and professional activities and his family life is extremely hindered.

29 Later it was found out that the diagnosis was wrong! The error was due to a sub-standard analysis by the pathologist. The surgery was not necessary and caused severe damage.

30 The plaintiff claims compensation for pecuniary and non-pecuniary damage, based on the negligence of the pathologist, the defendant, who caused an unnecessary, with severe side-effects, medical intervention. He claims € 400,000 for pain and suffering, plus € 4,500 for pecuniary damages.

31 The first instance awarded compensation of approx. € 100,000, the Court of appeal € 300,000. The defendant (and the co-defendant [the pathologist's wife])[11] appealed.

b) Judgment of the Court

32 Medical liability in this case has a contractual nature, as the rules on service contract apply. The Supreme Court argued that the analysis of the pathology specialist shall be understood as an *obligation of result*. Therefore this physician was considered liable because the result was wrong, as was proved later. The high level of specialisation of laboratory tests requires the certainty of the results. The Court elaborates further and states that medical examinations in the area of biochemistry, radiology and, above all, clinical analysis follow the regime of *obligations of result*. On the contrary, in medical specialities such as internal medicine, surgery, cardiology or gastroenterology, there is only an *obligation of means*. The diagnosis is thus wrongful and also faulty.[12]

33 Portuguese case law accepts compensation of non-pecuniary damage also in case of contractual liability. Moreover, case law also accepts the accumulation of claims – in tort and in contract – so that there is no doubt the patient can claim compensation for non-pecuniary damage.

[11] According to Portuguese matrimonial law, in case of communion of assets the spouse also is, in general, liable for debts arising from the profession of the other spouse – Art. 1691 (1) (b).

[12] The STJ quotes doctrine – of Italian origin – that distinguishes between *complex medical interventions*, whereby the patient has the burden of proof of the fault of the doctor, and *simple interventions*, whereby the patient only has to prove the simple nature of the medical act and the physician has the burden of proving he did not act negligently.

Based on equity and fairness, affirming that severe damage to physical and moral integrity shall not be limited by the amount of compensation case law awards in case of death, the Supreme Court ordered compensation for non-pecuniary damage of € 224,459. 34

c) Commentary

This is an important decision of the Supreme Court, in which the STJ accepted clearly the distinction between obligations of means and obligations of result. It is a distinction with some dogmatic interest: the burden of proof of fault is different. However, I would warn that a general identification of laboratory analysis or pathologist analysis as being included in the concept of obligations of result is not to be accepted. Some of these examinations cannot guarantee a result, in some cases the "reading" of the material depends on the interpretation. Therefore, the court shall obtain reliable information – from medical experts – concerning the question whether the exam was complex or not, in any medical speciality. Any *a priori* definition of medical specialities with "easy" procedures and medical specialities with "complex" procedures cannot be accepted. 35

The Supreme Court has substantially increased the level of compensation for non-pecuniary damage in cases of medical malpractice. Normally they are much lower. In a critical analysis we could compare this case with other cases and try to understand the reason why there are such divergences in case law. The extraordinary compensation for non-pecuniary damage of € 224,459 for a man born in 1939, well-off, of high social status also deserves attention. This amount is higher than many cases of paraplegia, total incapacity and total dependence for the rest of their life of young adults or even children. It was pointed out that this concrete plaintiff had a very active social life, had a successful career as an entrepreneur and had a regular sexual life: all of this is now impossible. This man – who was, in 2008, 69 years old – thus deserves much higher compensation than many other co-citizens with much greater bodily damage and a much longer life expectancy (see infra). 36

Is the judgment related to any special psychological trauma of the victim? Is there any connection with an identification of the judges of the Supreme Court with the unfortunate fate of this man? Is there any unconscious idea of punishing the negligent physician (punitive damages)? Could we argue that since compensation for non-pecuniary damage is not the "price of the pain", it aims at providing a sum of money with which the victim will have the possibility of having other pleasure or contentment? Since that is the ratio of non-pecuniary damages, and knowing that a victim of higher socio-economic status has more refined and exquisite tastes and necessities, therefore more expensive, does he deserve a higher award? 37

We should also point out the divergences among the different instances in calculating non-pecuniary damage, which increased from € 100,000 to € 300,000 in the Court of Appeal and finally € 224,459 in the Supreme Court. This is a 38

good example of the need to create instruments to harmonise this calculation, so that it becomes more predictable.

3. Supreme Court of Justice, 6 May 2008 (CJ-STJ, II, 51–55): Traffic Accident, Loss of Use

a) Brief Summary of the Facts

39 After a traffic accident, the plaintiff could not use his vehicle for several months. He claims among other damages, a compensation for loss of use in the amount of € 1,685 plus € 5 per day until delivery of the repaired vehicle. However, the plaintiff did not prove any concrete loss. It was *not* proved that the plaintiff used the car to go to work, nor that he drove the car 50 km a day, or that he used to drive at week-ends with his family.

40 The Court of Appeal of Porto awarded compensation as petitioned, according to principles of equity. The defendant appealed to the Supreme Court.

b) Judgment of the Court

41 The *Supremo Tribunal de Justiça* argued that the loss of use is a compensable damage. The STJ also accepted that the court may use equity – according to Art. 566 (3) CC – when the determination of the damage is difficult. However in this case there was absolutely *no proof of any concrete damage* for not using the vehicle. Therefore the Supreme Court (first Section) decided not to award any compensation. The contrary – the STJ stated – would not be equity but *mere arbitrariness*.

42 Another possibility discussed by the STJ would be to consider the loss of use as a *non-pecuniary* damage. Even if that were the case, the damage must be serious; so *serious* "that it deserves the protection of the law" (Art. 496 (3)) and that was not the case here. Therefore, the Supreme Court did not award any compensation for loss of use in this case.

c) Commentary

43 This case demonstrates the difficulty of "loss of use". Shall it be calculated in concrete or should an abstract calculation of damage be accepted? The Supreme Court accepts the use of *equity* to determine the amount of damages for loss of use; however, it requires a *minimal proof of concrete damage* by the plaintiff. This solution is to be applauded: *abstract damage* or *damage per se* is not to be accepted, normally, in Portuguese law.

44 We can find a similar decision, in *Supreme Court of Justice, 30 October 2008* (www.dgsi.pt; Process no. 07B2131). In the literature, Paulo Mota Pinto[13] discusses in detail this legal-dogmatic problem and advocates – similarly to the

[13] *P. Mota Pinto*, Dano da Privação do Uso, Estudos de Direito do Consumidor, 8, 2006/7 (but 2008) 229–273, and also in his thesis (equivalent to a *Habilitationsschrift*), Interesse Contratual Negativo e Interesse Contratual Positivo (Coimbra, 2008).

first Section of the Supreme Court of Justice – that the damage of loss of use is a concrete and real privation of use and fruition of the good, not a mere possibility of use.

However, the Supreme Court is not unanimous and other sections hold different opinions. In the decision of the *Supreme Court of Justice, 17 April 2008* (CJ-STJ, II, 31–32) the plaintiff did not prove any concrete damage for not using a replacement car; the plaintiff also did not rent any replacement car. The Supreme Court stated the use or non-use of a thing is part of the power, the "dominium" of the owner and in this case the plaintiff was awarded compensation for loss of use of his vehicle in the amount of € 7,500. 45

Moreover, it is rather interesting to compare the decision we are commenting on, whereby the Supreme Court denied a compensation of € 5 a day to the plaintiff, with the other one, commented supra, whereby the Supremo Tribunal de Justiça awarded compensation to the victim of a car accident who rented a Porsche for € 500 a day. 46

4. Supreme Court of Justice, 10 October 2008 (www.dgsi.pt) (Process no. 07B4692): Unborn – Compensation for Damage? Dancer in a Club – Pecuniary and Non-pecuniary Damages?

a) Brief Summary of the Facts

Due to a car accident, 20-year-old Ms. A was severely injured. She was working in a club as a dancer and host to the clients; she was nine months pregnant and the foetus died. The car that caused the accident was not insured; therefore, she sued the Motor Guarantee Fund (*Fundo de Garantia Automóvel*)[14]. 47

[14] The Motor Guarantee Fund was created in accordance with that set forth by Decree-law no. 408/79, under the terms of Regulative Decree no. 58/79, both from 25 September. Currently, the scope of the Motor Guarantee Fund's intervention and attributions are defined by Decree-law no. 291/2007, of 21 August. The Motor Guarantee Fund guarantees the repair of damage resulting from road accidents that take place in Portugal and due to: A) A vehicle subject to compulsory motor vehicle civil liability insurance, normally parked in Portugal or registered in a country that does not have a national insurance service or has a service that has not joined the Agreement between national insurance services. B) A vehicle subject to compulsory motor vehicle civil liability insurance, without registration plate or with a registration plate that does not correspond or no longer corresponds to the vehicle's registration plate (false license plate). C) A vehicle not subject to compulsory motor vehicle civil liability insurance in reason of the vehicle itself, even if normally parked abroad. D) A vehicle subject to compulsory motor vehicle civil liability insurance, imported from a Member State, for a period of 30 days as of the date of acceptance of delivery by the purchaser, even if the vehicle has not been formally registered in Portugal. The Motor Guarantee Fund provides, up to the minimum capital for the compulsory motor vehicle civil liability insurance, the indemnities that are proven due for: A) Bodily injury, when the responsible party is unknown or does not benefit from a valid and effective insurance or if the insolvency of the insurance company has been declared. B) Material damages, when the responsible party, being known, does not benefit from a valid and effective insurance. C) Material damages when, because the responsible party is unknown, the Fund should provide an indemnity for significant bodily injury or if the causing vehicle, not benefiting from a valid and effective insurance, has been abandoned at the accident site and the police authorities confirm its presence in their police report.

48 The victim claimed compensation for her pecuniary and non-pecuniary damage, including bodily and aesthetical damage, lost profits, non-pecuniary damage she suffered for the loss of her foetus, as well as compensation for the death of the "baby" (the foetus).

49 She suffered several grave physical injuries, e.g., several scars on her body and one of her legs has been shortened. She was unable to work for more than a year; she feels psychological pain; she can no longer work in a club and she suffers 10% partial permanent incapacity.

50 This case deals with very sensitive questions: is there a claim for non-pecuniary damage of the unborn for her "death"? At a different level: is there a claim for pecuniary damage for loss of revenue of a lady who dances and is a host to clients in a night club, notably because of her aesthetical damage?

b) Judgment of the Court

51 The Court of Appeal awarded compensation of € 100,000 for future pecuniary damage (loss of revenue). The Supreme Court considered this amount as reasonable, considering that she received € 25 a day, 6 days a week and that she could have continued that activity for another 20 years[15] and that, after the accident, she will not be able to perform this activity anymore.

52 Concerning non-pecuniary damage of the victim, she was awarded € 10,000 for the loss of her son and € 20,000 for pain and suffering resulting from the physical and psychological damage.

53 The plaintiff also demands compensation for the loss of life of the baby himself,[16] arguing that the baby has legal personality since the conception and that the right to life, proclaimed in Art. 24 of the Portuguese Constitution, imposes the unconstitutionality of Art. 66 of the Civil Code, which states that "legal personality begins with the birth of a living baby".

54 The *Supremo Tribunal de Justiça* vigorously argues against such "metaphysical, ideological and religious conceptions". The STJ states that in a laic Republic, a "pluralistic society, multicultural and constitutionally agnostic, one cannot adopt a conception of human dignity with a metaphysical origin, according to which the human being has spiritual essence since the moment of conception." Therefore there is no right to compensation for the loss of life of a foetus, who died due to a traffic accident.

c) Commentary

55 This decision deals with the important notion of person and legal personality, especially the "hard case" of the legal status of a foetus of nine months. The

[15] Normally – determining loss income – the STJ considers that people work until 65 years of age. In case of a club dancer it is probable that she would only work (in that activity) until she is 40!

[16] See Art. 496 (2) and (3) of Portuguese Civil Code, where the loss of life is compensated in itself, the so-called "death damage". See more information infra no. 66.

clear affirmation of the laic Republic by the (majority of judges) of the Supreme Court deserves our approval and acclamation.

Another interesting topic concerns the lost profits of Ms A, a lady who danced and played host to clients in a night club. The Supreme Court of Justice considered that those are (secondary) pecuniary consequences of the bodily and aesthetical damage she suffered and deserve compensation. However, we must remember that – in future cases – according to Decree-Law no. 153/2008, of 6 August ("New" Compulsory Civil Liability Motor Vehicle Insurance Act), only revenues that are proved by the *victim's tax declaration*, that is, the net income as established for tax purposes as at the date of the accident, will be compensated. 56

5. Lisbon Court of Appeal, 15 May 2008 (CJ, III, 84–88): Lawyer's Liability, "Loss of a Chance"

a) Brief Summary of the Facts

The plaintiff sued his advocate for pecuniary damages (€ 5,166 plus interest). The lawyer was negligent; she did not fulfil her duties of care: she did not appear in court on the day of the trial (!) and she filed an appeal with formal errors, which therefore was immediately rejected. As a consequence the plaintiff, her former client, was condemned to pay € 7,666 (later– due to an agreeement he only had to pay € 4,987 + € 178.57 in court fees). 57

"A lawyer who does not show up in court on the day of the trial and does not even announce his absence to his client, so that the case was lost in first instance; a lawyer who writes an appeal in a wrongful manner and the appeal is immediately rejected: such a lawyer is negligent" – states the court. Therefore the court of first instance awarded *full compensation* of € 5,166 (plus legal interest). The defendant appealed. 58

b) Judgment of the Court

The Court of Appeal of Lisbon stated that the relation between a lawyer and a client is a contractual one. There is an *obligation of means* and not of result: the lawyer shall not be liable only for losing a case; the negligence in studying and conducting the procedure must be proved and that was clearly the case here. 59

However, the concept of *perte de chance* shall be applied, since the court is not sure whether the client would have succeeded or not in his defence or whether or not he would have been condemned to pay a lower amount of damages. What should be compensated – states the Court of Appeal – is the "absence of the possibility of the plaintiff to defend himself and present his arguments in the previous case." 60

According to *equity* (but without mentioning any criteria), the Court of Appeal ordered the defendant (the negligent lawyer) to pay compensation of € 2,000. 61

c) Commentary

62 The concept of "loss of a chance" is an issue of debate among Portuguese civil lawyers. Lawyers' liability provides typical cases of *perte de chance* for those authors who accept this notion.

63 In this case the recklessness of the lawyer is very impressive and one could argue that full compensation would be the best solution.[17]

64 Moreover, the Court does not elaborate on the criteria to justify the amount of damages, which is around 2/5 of the amount demanded by the plaintiff and awarded by the court of first instance. There is not even a calculation of the chance or a mere calculation of probability of success! There is mere *arbitrariness*. This decision – independently of its substantial merits – deserves our disapproval for lack of arguments and discussion in such a controversial theory in Portuguese law.

6. Recent Developments concerning Personal Injury

65 Personal injury litigation arises mainly in the field of traffic accidents. There is a trend towards a slow increase in the awards for non-pecuniary damage.

66 Here we can list the amounts of non-pecuniary damages awarded by the Supreme Court of Justice in 2008 in some cases of *fatal injury*:[18]

- STJ 19.6.2008: € 35,000 ("loss of life") + € 15,000 (widow) + € 10,000 + € 10,000 (2 daughters) = € 70,000.
- STJ 10.7.2008: € 50,000 ("loss of life").
- STJ 27.11.2008: € 60,000 ("loss of life") + € 35,000 x 2 (non-pecuniary damage of each of two parents) = € 130,000.
- STJ 11.12.2008: € 60,000 + € 10,000 x 3 (non-pecuniary damage of the husband and each of two daughters) = € 90,000.

67 In case of severe incapacity, the following sums were awarded by the Supremo Tribunal de Justiça for non-pecuniary losses:

- STJ 29.1.2008: "Severe injuries in his vision and intellectual abilities; anxiety, pain and suffering; needs to take drugs to avoid severe pain." = € 60,000.
- STJ 28.2.2008: "The victim was in a coma for several days; severe injuries; several weeks unconscious, not recognising relatives; etc; hospital-

[17] We could use the idea of the *bewegliche System* (Wilburg), as is proposed by the Principles of European Tort Law: the fault is grotesque, causation is obvious; one could only have doubts concerning damage. This is a case where the relevance of the potential cause is also to be questioned. Even if the tortfeasor (or in this case the debtor) had acted according to the duties of care, the client would have lost the case. But this is accepted only in extraordinary circumstances and the burden of proof lies on the defendant, as proposed by Art. 3:104 PETL. See *P. Mota Pinto*, Interesse Contratual Negativo e Interesse Contratual Positivo (2008) 529 ff.

[18] For an explanation of the three different damages that are possibly awarded in case of death of one person ("death damage", "damage suffered before death" and "damage of close relatives"), see *A. Pereira*, Portuguese Tort law: A Comparison with the Principles of European Tort Law, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 643 ff.

ised several times; absolute incapacity; needs assistance from third person; low mobility; scars; very negative prognosis." = € 125,000.
- STJ 23.10.2008: "Several fractures; surgery, 30 days hospitalised; shortened leg; subsequent surgery; necessary abortion; several subsequent periods of hospitalisation and numerous operations; immense pain and suffering; two years in bed; privation of social contact with the children (one was four months old); etc. Cannot stand longer than 30 minutes; cannot work." = € 180,000.
- STJ 29.10.2008: "17-year-old victim: several scars; shortened legs, severe aesthetical damage; loss of social relations (university, boyfriend, etc.); dozens of operations, dozens of general anaesthesia procedures; needs assistance for daily activities, etc." = € 250,000.

C. Literature

1. *Duarte Nuno Vieira/José Alvarez Quintero*, Aspectos práticos da avaliação do dano corporal em direito civil (Imprensa da Universidade de Coimbra 2008)

This book is a contribution for a practical application of the recent table of evaluation of damage in civil law. This book is useful for professionals in insurance companies, as well as lawyers and judges who deal with cases of liability for bodily damage, especially arising from traffic accidents. The law aims to create a more transparent and fair determination of damages. 68

2. *Gonçalo André Castilho dos Santos*, A Responsabilidade Civil do Intermediário Financeiro Perante o Cliente (Coimbra, Almedina 2008)

This book analyses civil liability of the financial mediator towards her client. Increasingly often there is a so-called democratization in access to the financial markets which increases the need for financial intermediation as a tool for obtaining and investing resources and searching for efficiency in the market as well as protection of the investors/clients. The book considers the implementation of Directive 2004/39/EC[19], which establishes the duties of care of professionals towards their clients. 69

3. State Liability

***Carlos Alberto Fernandes Cadilha*, Regime da Responsabilidade Civil Extracontratual do Estado e Demais Entidades Públicas – Anotado (Coimbra, Almedina 2008).** This book has a detailed commentary of the new Act concerning civil liability of the State and other public entities (Law no. 67/2007, of 31 December). The author is a judge and takes a practical approach. 70

[19] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145, 30.4.2004, 1–44.

71 ***Carla Amado Gomes*, Três Textos sobre a Responsabilidade Civil Extracontratual do Estado e Outros Entes Públicos (Coimbra, Almedina 2008).** This book analyses the new Act concerning civil liability of the State and other public entities (Law no. 67/2007, of 31 December), notably the strict liability of the State and the new "responsibilities" of the administrative courts in applying the new Law.

4. Motor Vehicle Insurance Act (Decree-Law no. 291/2007, 21 August)

72 ***Adriano Garção Soares/Maria José Rangel de Mesquita*, Regime do Sistema do Seguro Obrigatório de Responsabilidade Civil Automóvel – Anotado e Comentado (Coimbra, Almedina 2008)**

73 ***José António de França Pitão*, Seguro de Responsabilidade Civil Resultante da Circulação de Veículos Automóveis – Anotado (Coimbra, Almedina 2008)**

74 ***Arnaldo Filipe da Costa Oliveira*, Seguro Obrigatório de Responsabilidade Civil Automóvel (síntese das alterações de 2007 – DL 291/2007, 21 Agosto) (Coimbra, Almedina 2008)**

5. Medical Liability

75 ***Carla Gonçalves*, A Responsabilidade Civil Médica: Um Problema para Além da Culpa (Coimbra, Coimbra Editora 2008).** This book analyses the cases of no-fault liability in medical practice in Portugal: clinical trials, transplant of organs, product liability, vicarious liability, liability for radiation. Moreover it describes no-fault systems in New Zealand, in Scandinavian countries, and the French dual solution.

76 ***Paula Lobato Faria/Sara Vera Jardim/João Pereira da Costa*, O novo regime da responsabilidade civil extracontratual do Estado – repercussões no sistema de saúde, Revista Nacional de Saúde Pública, Vol. 26, No. 1 (2008) 89–93.** The new Act on State liability may open the floodgates of liability of public hospitals in several situations, notably: the broader notion of strict liability for "especially dangerous things or activities" (when before strict liability would require an *extraordinarily* dangerous activity or thing, plus an abnormal burden and injuries to specific persons) and the *presumption of fault* in case of behaviour against "standards of conduct".

77 ***Manuel Carneiro da Frada*, A própria vida como um dano? Dimensões civis e constitucionais de uma questão-limite, Revista da Ordem dos Advogados 2008, 215–253.** The author analyses the problems of wrongful life and wrongful birth and defends a clear distinction between the role of tort law – commutative justice – and social security law – distributive justice. According to the author, there is no wrongfulness in the cases of wrongful life.

XXII. Romania

Christian Alunaru and Lucian Bojin

A. Legislation

1. Insurance Supervisory Commission's Norms concerning Compulsory Insurance against Liability for Damage Caused by Motor Vehicle Accidents (7 November 2008, Monitorul Oficial no. 763 of 11 November 2008)

Although they aim primarily to regulate technical and procedural aspects of the insurance activity, nevertheless these Norms contain some provisions that are particularly relevant for liability issues. They also illustrate some tendencies in the field of the compensation of damage. From a practical perspective, the most important change brought by the Norms is the setting of new minimum amounts of cover both for personal injuries and for damage to property. Concerning damage to property which occurs in 2009, art. 24 (2) of the Norms establishes a minimum cover of € 300,000 per claim, whatever the number of victims. For 2010, an increase up to € 500,000 per claim is provided for, whilst for 2011, the minimum cover per claim is envisaged to reach € 750,000. Such increase is mainly due to the implementation of Directive 2005/14/EC,[1] although Romanian amounts are still below the European minimums and are likely to remain this way for the following few years because of the transitional period allowed by the said Directive. Nevertheless, the increase also reflects the constant growth of the compensation amounts paid by Romanian insurers in the last years.[2] On the other hand, concerning personal injuries including compensation for non-pecuniary losses, the minimum amount of cover has been raised to € 1,500,000 for 2009. Further increases are predicted – up to 1

[1] Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles, Official Journal (OJ) L 149, 11.6.2005, 14–21.

[2] According to the data provided by the Insurance Supervisory Commission (Comisia de Supraveghere a Asigurarilor – CSA), the gross amount of compensation paid by insurers in liability for motor vehicle accidents cases grew every year, over the last five years, at a rate between 15% and 25%. See Comisia de Supraveghere a Asigurarilor, 2007 Annual Report on the Activity Performed and the Insurance Market Activity, 63–65, at http://csa-isc.ro/eng/files/csa_report_2007.pdf.

€ 2,500,000 in 2010 and € 3,500,000 in 2011. Besides being, again, a measure meant to implement the aforementioned Directive 2005/14/EC, this increase also responds to the tendency, still timid but nevertheless real, of the Romanian courts to grant ever higher amounts of compensation for personal injuries.

2 Another two provisions of the Norms reflect the growing importance of the courts in the field of tortious liability and insurance against it. First, art. 45 of the Norms inserts an interesting exception to the rule that damage compensation is established, whenever possible, by agreement between the victim and the insurer. Although Act 136/1995 (the general regulation in the field of insurance) recognizes this principle, the Norms provide that a judicial decision is always necessary to determine the amount of compensation for losses due to lack of use of the damaged or destroyed property (except for the case where the victim is a professional carrier). Of course, one might dispute the very legitimacy of such a norm and its conformity with Act 136/1995, the normative force of the latter being obviously superior. Secondly, the Norms include what, to our knowledge, is the first legislative mention of the case-law of ordinary courts as a positive source of law in Romania. Art. 49 stipulates that, when establishing compensation in cases of personal injuries, including wrongful death, compensation for non-pecuniary losses must be established "in accordance with Romanian legislation and case-law". Since there is no legislation relating specifically to non-pecuniary losses (the legislation only refers to the general rules of liability for wrongful acts), this reference must be understood, at least for the moment, as relating only to case-law. It is generally accepted that the criteria for establishing the compensation for non-pecuniary losses and the manner in which they are to be applied are entirely the result of the work of courts in the last two decades. Since in Romania, as in all civil law countries, case-law is not perceived as a formal source of law, the explicit mention by the Norms proves how remarkably important the case-law is in this field and creates interesting perspectives for further system developments.

B. Cases

1. High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no. 1529 of 6 March 2008, *G.C. vs. S.G.S. & A S.R.L.*: Damages for Corporal Injuries

a) Brief Summary of the Facts

3 Plaintiff G.C. filed a suit to the Braşov Tribunal against defendants S.G.S. and company A S.R.L. (a limited liability company) for the amount of € 3,000 pecuniary damages, € 300 a month as periodical civil damages starting on 10 June 2004 and € 350,000 as moral damages. Subsequently, the plaintiff increased the amount of material damages to ROL 300 million (that is, RON 30,000), that of periodical damages to ROL 15 million (that is, RON 1,500) and of moral damages to ROL 14 billion (RON 1,400,000). The illicit conduct for which

damages were requested was the accident caused by the defendant S.G.S. in Hegyeshalom (Hungary), which led to the permanent invalidity of the plaintiff G.C. The defendant's fault was established by the definitive criminal sentence of the local court in Győr, Hungary on 18 June 2004, a sentence which had been recognized by the Braşov Tribunal. The court concluded that the defendant, a professional driver, started the Volvo bus without closing its doors and without making sure that all the passengers had got in or left. Given the situation, the plaintiff fell off the bus, whose rear wheels ran over the plaintiff's left foot, causing her injury that eventually led to the amputation of the leg near the middle third of her thigh.

In the first instance, the Braşov Tribunal, by its civil sentence no. 15/S/2006 rejected the exception raised by the defendant A S.R.L. regarding the lack of passive capacity in the case and admitted in part the civil action of G.C., holding the defendants S.G.S. and A S.R.L. jointly liable to pay the plaintiff the amount of ROL 215,354,000 (RON 21,535.4) and the equivalent of HUF 20,000 in material damages, the amount of ROL 15,000,000 (1,500 RON) starting on 10 June 2004 as periodical civil damages and the amount of ROL 2 billion (RON 200,000) as moral damages. All the parties involved appealed the sentence. The Court of Appeal of Braşov rendered decision no. 273/AP/12 December 2006, by which it admitted the appeals and partly changed the sentence in the first instance, in the sense that it decreased the amount of monthly damages from RON 1,500 to RON 800 and increased the amount of moral damages from RON 200,000 to RON 1,000,000. The other dispositions of the Tribunal's sentence were maintained. The plaintiff and the defendant A S.R.L. filed for review of the decision of the Court of Appeal. 4

b) Judgment of the Court

In the request for review, the plaintiff G.C. asked the High Court of Cassation and Justice to modify the decision under discussion in the sense of awarding moral damages in the amount claimed. The defendant A S.R.L. contended in its own review request that the courts had violated art. 1000 para. 3 of the Civil Code which defines subordination in light of the relation between the corporate entity and its agent, a relation which was not in force at the time of the damaging event. At that time, the defendant S.G.S. was an employee of the company T S.A. (a corporation), the company that performed the respective transport, under the terms of the service agreement concluded with A S.R.L. Accordingly, since the capacity to stand in court as a defendant would incur to the employer of the driver who engaged in the illicit conduct, A S.R.L. cannot be a party in the trial. The High Court dismissed both requests for review. 5

The request of the plaintiff regarded the criticism on the merits of the decision in dispute, a reason which no longer constitutes valid grounds for review after Emergency Order of the Government no. 138/2000 entered into force, together with the abrogation of para. 11 of art. 304 of the Civil Procedure Code. From that time on, the only grounds for review that have been maintained (according to art. 304 of the Civil Procedure Code) regard the unlawfulness of judicial 6

decisions. The difference between the awarded moral damages and the amount requested by the plaintiff is not the result of a lack of legal motivation, of non-compliance or wrongful application of the law within the meaning of art. 304 para. 9 of the Civil Procedure Code. It is, on the contrary, a direct consequence of the interpretation of the evidence and evaluation of the extent of the damage made by the Court of Appeal, as a process of introspection and psychological will of the judges (which led to the increase of moral damages awarded). In other words, quantification of compensation for moral damage based on accurate criteria constitutes a matter of fact and criticism against such operations regard the merits of the decision and therefore do not fall into the category of grounds for review.

7 The dismissal of A S.R.L.'s request for review was motivated in the following manner: The defendant S.G.S. was indeed en employee of T S.A., a company which was a professional carrier in relation to A S.R.L., a capacity arising out of the services agreement concluded between the two. The alleged non-existence of the subordination relation is a purely formal aspect. In reality, subordination does not arise solely out of employment relations or services performed on the basis of specific contracts, but also out of the actual relations at the time of the illicit conduct. Thus, it is essential that at that time the person who engages in the illicit conduct was under the guidance and authority of the person whose responsibility shall be entailed under art. 1000 para. 3 of the Civil Code, irrespective of the fact that the person in question was someone other than the actual employer. This is in fact what the courts concluded in the present case after administering and analyzing a complete set of evidence, which clearly proves that certain relations existed between the parties, relations that were similar to employment. Consequently, the arguments regarding the capacity of A S.R.L. to stand as a defendant in this case were dismissed.

c) Commentary

8 The analyzed decision deals, from a theoretical point of view, with two important problems. First, there is the issue of special conditions for liability of the corporate entity for damaging acts of its agent,[3] which has long been discussed by Romanian civil law doctrine. There would be two such conditions: (a) a relation of subordination and (b) perpetration of the damaging act by the agent within the attributions entrusted to him/her by the corporate entity. In the case beforehand, the High Court of Cassation and Justice dealt solely with the relation of subordination. The observations of the court concur with those already clarified by doctrine. Thus, by relying on case-law in the courts around the country,[4] legal doctrine has concluded that, if at the time of perpetration of the

[3] *I.M. Anghel/Fr. Deak/M. Popa*, Răspunderea civilă (1970) 167–173; *M. Eliescu*, Răspunderea civilă delictuală (1972) 291 ff.; *L. Pop*, Drept civil român. Teoria generală a obligațiilor (2000) 266–273; *C. Stătescu/C. Bîrsan*, Tratat de drept civil. Teoria generală a obligațiilor (2002) 257–264; *I. Dogaru/P. Drăghici*, Bazele dreptului civil. Volumul III. Teoria generală a obligațiilor (2009) 331–336.

[4] Tribunalul Botoşani, Criminal Decision no. 250 of 22 July 1981, Revista Română de Drept 12/1981, 105; Tribunalul Galați, Decision no. 38/1971, Revista Română de Drept 1/1972, 152.

illicit act the employee was carrying out his/her activity within a different company, under the guidance, control and supervision of the latter, then that unity shall be responsible, even though the employee may have a working relation with a different unity. This is due to the fact that there is an implied temporary transfer of the attributions of guidance, supervision and control over the activity of the agent, a transfer which operated from the employer to the unity for which he/she effectively works in performance of a given task.[5]

A second issue that the High Court analyzes might seem, at a first glance, less important, unnoticeable even, due to the dismissal of the plaintiff's request for review and the consequent rejection of the arguments invoked in support of the increase of moral damages. Even though the High Court did not accept the plaintiff's claim regarding the increase of moral damages, from a theoretical point of view, the motivation of its decision refers to several important criteria that must be taken into account when evaluating moral damage in cases when great physical suffering and irreversible infirmity have been caused to persons. That is why we focus on this particular aspect of the decision. When analyzing the increase of the moral damages awarded by the Court of Appeal (even though the amount is not in accordance with the claim of the plaintiff), the High Court considers that "it clearly results from the motivation of the decision under analysis that the instance of appeal has taken into consideration the significant moral damage caused to the plaintiff, consisting of physical and psychological suffering which is difficult to evaluate and also the consequences thereof: the impossibility of living a normal family life, of having children, the difficulties in taking part in the normal events of a person's life, including the significant aesthetic damage and loss of amenity". 9

The determination of the non-patrimonial values whose disregard may cause moral damage was made, both by legislation and by Romanian legal doctrine solely from the point of view of the rights that a human person enjoys. This is due to the fact that non-patrimonial values only enter the legal field if they are protected by the law, that is, only to the extent that they are regarded by law as individual rights. Given the fact that determination and classification of non-patrimonial individual rights can only be made by reference to legal norms, one can easily perceive the importance of the main legal framework which is, to this matter, art. 54 of the Decree no. 31/1954 on natural and legal persons (which is still in force). The legal text (which was adopted in the first years of the communist regime) was justly criticized by doctrine[6] for being restrictive and flawed. It fails to mention important non-patrimonial rights, such as the right to life, physical integrity and health, the right to freedom and also fails to indicate the main ways in which moral damage caused by injury to these values may be manifested. 10

[5] *L.R. Boilă*, Răspunderea civilă delictuală obiectivă (2008) 321.
[6] *I. Albu/V. Ursa*, Răspunderea civilă pentru daunele morale (1979) 72; *Gh. Vîntilă*, Daunele morale. Studiu de doctrină și jurisprudență (2nd ed. 2006) 29.

11 Therefore, the classification of non-patrimonial individual rights which has been embraced by Romanian doctrine[7] is the following: (a) rights which are closely connected to the human person, such as: the right to life and physical integrity, the right to inviolability of the person and his/her domicile, the right to a name, to a pseudonym, to honour and reputation; (b) rights which result from marital and family relations; (c) the rights of authors over their scientific, literary and artistic works; (d) the rights of legal persons, such as the right to a name or the right to reputation, etc.

12 As for the classification of non-patrimonial damage following the criterion of the field of the human personality where the injury was produced, Romanian authors make references to French doctrine:[8] (a) damage caused to physical personality, a category which includes, *stricto sensu*, non-patrimonial damage arising out of physical harm, infirmity or disease and *lato sensu*, the category also comprises aesthetic damage and loss of amenity, loss of youth, etc.; (b) emotional damage which is caused, a category which includes suffering which is psychological in nature, arising out of the death or infirmity of a person to whom we are strongly connected to emotionally, suffering caused by divorce or the unexpected break up of an engagement, etc.; (c) damage caused to social personality, which comprises damage consisting of injury to non-patrimonial values such as: honesty, honour, dignity, reputation, private life, name, pseudonym, etc.

13 Among these, non-patrimonial damage caused by injury to physical integrity or health is analyzed distinctively by both Romanian[9] and French doctrine,[10] under the expression "corporal damage", due to its particular importance, given the set of values which the violated right refers to, as well as their recurrence in case-law. Corporal damage is classified in the following manner: (1) damage consisting of physical or psychological suffering (the compensation owed for such damage is often referred to as *pretium doloris*); (2) aesthetic damage (*pretium pulchritudinis*); (3) loss of amenity; (4) loss of expectation of life; (5) loss of youth (*pretium iuventutis*).

14 Of all these categories, in the decision beforehand, the High Court of Cassation and Justice referred to the first three. Thus, "damage consisting of physical or psychological pain" comprises suffering and pain of a physical or psychological nature or both, which the victim of an illicit act may endure, along with patrimonial damage that may occur. The most common, but also serious damage of this kind is deemed to be physical injury. French literature deals with them as *pretium doloris,*[11] a term which actually designates pecuniary compensation,

[7] *A. Ionaşcu*, La réparation des dommages moraux en droit socialiste roumain, Revue roumaine des sciences sociales, Séries juridiques 1966, no. 2, 208.

[8] *P. Tercier,* Contribution à l'étude du tort moral et de sa réparation en droit suisse (1971) 68.

[9] *Albu/Ursa* (fn. 6) 79; *Vintilă* (fn. 6) 32.

[10] *M. Dubois*, Le pretium doloris (1935) 32; *G. Vinney/B. Marchesinis*, La réparation du dommage corporel. Essai de comparaison des droit anglais et français (1985) 69, both quoted by *Gh. Vintilă*.

[11] *Al. Weill*, Droit civil. Les obligations (1971) 614; *M. Dubois* (fn. 10); *G. Ripert*, Le prix de douleur, Recueil critique Dalloz (D.C.) 1948, Cron. 1.

or in other words, the price that the author of the illicit act owes the victim. Romanian doctrine refers to English law[12] for the expression "pain and suffering" describing physical and psychological pain, an expression which also includes nervous shock, as well as all other consequences of a psychological nature (such as "Angst"). The expression seems to suggest a double category of damage, but in fact, it suggests only that suffering is related to the injury itself or to subsequent surgery. In this case, compensation must be awarded both for the past and for the future, in relation to the seriousness of the harm and the duration of its consequences. One must stress the fact that reparation of moral damage consisting of physical or psychological suffering was allowed in the past both by Romanian case-law and doctrine,[13] with regard to injury caused by an accident or by the death of a close person.

15 Aesthetic damage comprises the sum of harms and injuries by which the physical appearance of a person is spoiled and it regards particularly mutilations, disfigurations or scars caused to the human person, unwanted consequences that these injuries may have on their possibility of affirmation in life, as well as physical suffering that such situations may cause. This variety of corporal damage may constitute an ever inconvenient "handicap" for a certain person, which might generate complexes and anxiety, having as a collateral effect the exclusion of the respective person from social life, stigmatization or marginalization in his/her relation to other people or to the community of which he/she is a part. Once again referring to French doctrine,[14] Romanian authors emphasise the fact that corporal damage also comprises, in addition to various kinds of material damage, "a range of sufferings that are purely moral in their nature, which the victim might experience seeing himself/herself mutilated or disfigured – aesthetic damage". Doctrine also emphasises that this type of aesthetic damage potentially involves the possibility of causing several kinds of material damage, such as in the case of stewards or hotel receptionists, for whom physical harmony is actually a condition for the performance of their profession.[15] Compensation owed for aesthetic damage caused to a person is referred to by French literature as the price of beauty (prix de la beauté) or *pretium pulchritudinis*.[16]

16 The loss of amenity is understood (as in English and French doctrine[17]) as an abridgement of the pleasant elements of human life, particularly those which

[12] See *Vintilă* (fn. 6) 33 f.

[13] *D. Alexandresco*, Explicaţiunea teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi şi cu principalele legislaţiuni străine, tomul al V-lea (1898) 450 f.; *M.B. Cantacuzino*, Elementele dreptului civil (1921) 428–434; *C. Hamangiu*, Codul civil adnotat, vol. II (1925) 476; *I. Rosetti-Bălănescu/Al. Băicoianu*, Drept civil român. Studiu de doctrină şi de jurisprudenţă, vol. II (1943) 88–90; *F. Mihăiescu/S.C. Popescu*, Jurisprudenţa Înaltei Curţi de Casaţie, Secţiunea I şi Secţiunile Unite, în materie civilă, pe anii 1934–1943, 152.

[14] *J. Carbonnier*, Droit civil 4, Presses Universitaires de France 1975, 310.

[15] *G. Marty/P. Raynaud*, Droit civil, tome II, vol. 1, Les obligations (1962) 361; *B. Starck*, Droit civil, Obligations (1972) 62.

[16] *Ph. le Tourneau*, La responsabilité civile (1972) 141.

[17] See also *M. Boar*, Repararea bănească a daunelor morale în dreptul unor state vest-europene, Dreptul 8/1996, 23 ff.

are the result of senses, sexual life and the possibility of normal social relations. This type of corporal damage has also been referred to as "hedonistic damage" (deriving from the Greek word *hedone* – pleasure), on the grounds that it results from "injury brought to life satisfactions and pleasures consisting of the loss of the possibilities of spiritual growth, entertainment and relaxation".[18] It has been stressed that this type of non-patrimonial damage might also be accompanied by significant material damage, which may be evaluated in money and consequently, is likely to be repaired in this manner. Thus, depriving a person who, following an accident cannot walk, of the joy to exercise, to go to the theatre, to take walks or trips, etc. must be regarded as a serious non-patrimonial damage. This damage gives the victim the right to reparation consisting of the acquisition of means to satisfy his/her need of entertainment (such as purchasing audio or video equipment, books, disks, etc.) or of technical means which would allow mobility (for instance, a wheelchair with multiple tasks).

17 It is important to emphasise the fact that reparation of "aesthetic damage" and "losses of amenity" has been upheld by Romanian legal doctrine[19] ever since the 1970s, at the height of the communist era, although the Former Supreme Tribunal of Romania had decided to prohibit pecuniary compensation of moral damage arguing that it was "contrary to the fundamental principles of socialist laws" (guiding decision no. VIII of 29 December 1952, which was compulsory for all Romanian courts). During the same period, the Romanian communist legislature established by means of Decree no. 31/1954 a system of reparation of non-pecuniary losses by non-pecuniary means. The decree is still in force today. The measures that may be taken on a judicial level are the following: cessation of the action that injures non-patrimonial rights and performance by the author of the wrongful act of any measures which are necessary for the re-establishment of the injured right. Non-compliance with the given deadline of the measures indicated by the court is punished by imposition of a fine for every day of delay.

18 The decision of the High Court of Cassation and Justice which we hereby analyze is in accordance with the trends set out by legal doctrine but also by case-law, which were timidly started before 1989 and were subsequently consolidated by the decisions rendered in different cases, some of which are similar to the one under discussion.[20] This new decision establishes, in the context of a ruling rendered by the highest Romanian court, the criteria that need to be

[18] *A. Touleman/J. Moore*, Le préjudice corporel et moral en droit commun (1968) 138.

[19] *V. Pătulea*, Contribuții la studiul răspunderii civile delictuale în cazul prejudiciilor rezultate din vătămarea integrității corporale, Revista Română de Drept 11/1970, 55–57; *Eliescu* (fn. 3) 105–110; *D. Rizeanu*, Câteva propuneri de perfecționare a legislației civile, Studii şi cercetări juridice 1/1973, 113; *M.N. Costin*, Răspunderea civilă şi penală pentru încălcarea regulilor de circulație pe drumurile publice (1978) 210–217; *Albu/Ursa* (fn. 6) 170; *C. Stătescu/C. Bîrsan*, Tratat de drept civil. Teoria generală a obligațiilor (1981) 165.

[20] Curtea Supremă de Justiție, Secția penală, Decizia no. 3030/1995, Buletinul Jurisprudenței, Culegere de decizii pe anul 1995, 225–227. In the aforementioned decision, the victim of a driving accident was caused a permanent invalidity which prevented her from continuing a normal life, as well as aesthetic damage.

taken into account in order to evaluate non-pecuniary damage in cases when great physical suffering and irreversible infirmity have been caused to certain persons.

2. High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no. 1481 of 5 March 2008, *P.Z. vs. Romania*: Damages for Injuries Caused by Unlawful Convictions

a) Brief Summary of the Facts

P.N., an inter-war renowned figure, holding a PhD in law and philosophy, who was also a lawyer and member of the Romanian Parliament, founder and editor of important newspapers and magazines, general director of the famous "Gutenberg" publishing house, author of several works in philosophy, parapsychology and literature, member of the Romanian Writers' Society, was convicted on political grounds in 1957 for crimes specific to the communist Criminal Code. He was sentenced to 25 years of imprisonment for conspiracy against the social order, 15 years of imprisonment for intense activity carried out against the working class and the revolutionary movement and confiscation of all his assets. After the Revolution of 1989, following a motion for annulment declared by the General Attorney of Romania, the High Court of Cassation and Justice rescinded the convictions (Sentence no. 241/16 December 1957 rendered by the II Region Military Tribunal and Decision no. 57/22 February 1958 of the former Supreme Tribunal, Military College) and acquitted the defendant P.N. 19

P.Z., the wife of the deceased P.N., filed a suit against the Romanian State represented by the Ministry of Public Finance, requesting the 5th Civil Section of the Bucharest Tribunal award reparation of the damage suffered from the unlawful conviction of her late husband. The plaintiff specified her claims consisting of compensation for pecuniary and non-pecuniary losses. Pecuniary losses represented the equivalent of her husband's salary during the time of detention, holding as reference the average net salary of March 2006. Moral damages were requested in order to compensate for the suffering that the convicted was forced to put up with during detention and for the professional and personal consequences thereof. When released, the prisoner found it impossible to continue his previous activities – both scientific and literary – since he had no financial means to publish his books. His professional reputation was affected, since he had been arrested for acts which were incompatible with the nature of the profession of a lawyer. The time spent in detention also impacted upon his health, generating physical suffering. By means of the civil Sentence no. 1307/3 November 2006, the Bucharest Tribunal admitted in part the plaintiff's action and obliged the State to pay damages in the amount of RON 350,000 (approx. € 100,000). 20

b) Judgment of the Court

Both parties' appeals were dismissed by the Bucharest Court of Appeal, 4th Civil Section – Decision no. 301/2nd May 2007, and the following contestations were 21

also dismissed by the High Court of Cassation and Justice by order of Decision no. 1481/5th March 2008. We shall hereby analyze the latter decision.

22 One need not focus upon defences brought by the Ministry of Public Finance, which, at all levels of the trial, contended that the wife of the former prisoner had no valid *locus standi*. All these arguments were correctly dismissed on every occasion, in consideration of art. 506 para. 2 of the Criminal Procedure Code, which stipulates the possibility for persons who were financially dependent on the entitled person to continue or to start an action for reparation of damage arising out of unfair convictions, even after the death of the entitled person. These provisions are also in accordance with art. 4 of the Act-Decree no. 118/1990 (referring to the rights of the surviving spouse of a former political prisoner) and with ECHR case-law. The Tribunal's arguments for admission of the action (although only in part) are to be corroborated with the arguments set out by the Court of Appeal and those of the High Court of Cassation and Justice rendered in support of the first instance ruling.

23 The courts held that there had been several unfair convictions, of which the former prisoner was subsequently acquitted, which caused the injured party a moral damage consisting of the harmful effects that resulted from the violation of his right to freedom. This impacted upon his health due to the lack of reasonable conveniences and also upon his social status – honour, reputation – as well as his affective relations – with friends and close ones. All these injuries may be summed up by the expression of moral suffering that was inflicted upon the former prisoner. The deprivation of freedom had several repercussions over the political prisoner's private and professional life, which continued after his release, affecting, due to historical circumstances before 1989, both his family life and his image, as well as his sources of income. Since the conditions of responsibility set out by art. 504 of the Criminal Procedure Code (which provide for the compensation for pecuniary and non-pecuniary losses caused by unfair convictions as well as illegal detention) and by art. 48 para. 3 of the Romanian Constitution (which stipulates that the State shall be responsible for damage caused by judicial errors) were met, the courts concluded that the victim must be fully compensated by the State, which mainly refers to the elimination of all harmful consequences for the purpose of re-establishing, to the extent possible, the victim's prior situation.

24 The courts considered that the equitable satisfaction claimed in the present case was made up of two components: reparation for pecuniary losses and compensation for non-pecuniary losses, with the observation that the latter cannot be separated from pecuniary losses, since they present similar causes. Consequently, the Tribunal established that a global amount of damages would be called for, without distinction between the two types of damage. The upper courts supported this approach. As for the amount of damages, the courts established that, concerning moral damages, the principle of total reparation of the injury may only be interpreted as having an approximate character, given the non-pecuniary nature of this type of injury. On the other hand, one may award the victim an indemnity of a compensatory character, but in reality what must be evaluated is the compensation for the damage and not the damage itself.

The elements taken into account in establishing the amount of the damage consisted of moral, social and professional suffering, the injury to dignity and honour that any unlawful conviction or detention causes and, in particular, the prisoner's scientific and artistic figure. He had been known as a prominent figure in society and as a result of this abusive conviction he was deprived of the possibility to resume his prior activities and to obtain adequate income. The High Court concluded that the legal criteria envisaged by art. 505 para. 1 of the Criminal Procedure Code were duly taken into account: the duration of detention and the consequences of such detention on the prisoner and/or his family. As for pecuniary losses, consisting of the income that P.N. could not further gain as a lawyer, it was not distinctively established, but was subject to a global estimation and was cumulated with moral damages. The High Court explains this approach on the one hand, by the liberal nature of the profession of a lawyer and on the other hand, by the long period of time which had elapsed from the moment of conviction which generated, from an evidential perspective, the impossibility of clearly establishing the income that the victim had obtained before conviction and, consequently, the suffered loss and foregone profit. 25

As for damages for non-pecuniary losses, the High Court rejected the contester's argument concerning the subjective evaluation made by the judge over their amount, since in the absence of any criteria for an objective quantification of such damage, one must abide by the judges' power of appreciation on this matter. Case-law enjoys law-making powers in this field, as it is called upon to rule in situations where legal provisions offer no strict criteria for evaluation of damages. In the field of moral damages, a precise evaluation in money is not possible and therefore the extent of damages is established by approximation, taking into account all factual elements. Following the same reasoning, one cannot uphold the idea of effective damage and profit that was not obtained in the case of moral damages, since the injury refers to the level of human values and of physical and psychological suffering. 26

c) Commentary

In absence of a specific regulation, the issue of compensation for non-pecuniary losses in Romania has generated a vast amount of legal literature,[21] ever since the 1970s (previously, after 1952, legal doctrine had abandoned the mat- 27

[21] *V. Pătulea,* Contribuții la studiul răspunderii civile delictuale în cazul prejudiciilor rezultate din vătămarea integrității corporale, Revista română de drept 11/1970, 55; *Albu/Ursa* (fn. 6); *Ş. Beligrădeanu,* Se cuvine repararea daunelor morale pricinuite unității în cazul grevei nelegal declarate sau continuate?, Dreptul 2/1993, 13–16; *C. Turianu*, Răspunderea civilă pentru daună morală, Dreptul 4/1993, 21; *I. Albu*, Considerații în legătură cu revenirea jurisprudenței române la practica reparării băneşti a daunelor morale, Dreptul 8/1996, 13; *M. Boar*, Metode şi criterii de evaluare a despăgubirilor băneşti pentru daunele morale, Dreptul 10/1996, 42; *I. Albu,* Repararea prejudiciului cauzat prin vătămări corporale (1997); *I. Urs,* Repararea prejudiciului moral în cazul inconştienței totale şi definitive a victimei, Dreptul 5/1997, 30; *M. Boar*, Repararea daunelor morale în cazul unor persoane aflate în stare vegetativă cronică, Dreptul 12/1997, 33; *Gh. Vintilă,* Repararea daunelor morale prin mijloace patrimoniale şi nepatrimoniale (1999); *I. Urs,* Înțelesul noțiunii "prejudiciu de agrement", temei de reparare băneasc a daunelor morale, Dreptul 2/1999, 22; *Vintilă* (fn. 6).

ter of reparation of moral damage, since by the notorious Guiding Decision no. VII of 29 December 1952, the Plenum of the former Supreme Tribunal excluded monetary compensation for non-pecuniary losses, considering it to be contrary to the fundamental principles of socialist society).

28 In the last few years, the special issue of reparation of moral and material damage caused by unlawful convictions, which we also analyzed during the report of the 7th Annual Conference on European Tort Law organised in Vienna by the European Centre of Tort and Insurance Law in March 2008, has become more present both in doctrine and case-law.[22] Since the text of art. 504 of the Criminal Procedure Code – which refers to the reparation by the State of damage caused by illegal convictions – initially used the term "damage" only generically, without drawing any distinction between pecuniary and non-pecuniary losses, awarding damages for non-pecuniary losses was controversial. The task of interpreting this provision fell with the courts, in particular the former Supreme Court of Justice,[23] which rendered a correct reasoning in the sense that any damage (both pecuniary and non-pecuniary) caused by an unlawful conviction or detention must be repaired. Following the modification of Title IV and art. 504–507 by means of Act no. 281/2003, the Criminal Procedure Code expressly mentions "moral damage" arising out of an unjust conviction, thus any controversy is eliminated.[24]

29 This broad interpretation of the notion of "damage", which was confirmed by the legislative changes of 2003, is in accordance with the decisions of the European Court of Human Rights. In application of art. 5 of the European Convention on Human Rights and Fundamental Freedoms, which deals with the right to freedom and security, the European Court was persistent in awarding pecuniary compensation for non-pecuniary losses caused by abusive arrest or unfair conviction.[25] Given the new content of the legal text, the creative role of our Supreme Court focused on other issues, as it is the case with the present decision: establishing principles, criteria and elements that must be borne in mind when establishing compensation for moral damage caused by illegal convictions. Thus, the High Court has correctly stated that one must uphold the discretionary power of the judges regarding the extent of moral damages,

[22] *O. Puie,* Răspunderea autorităților publice şi a persoanelor fizice pentru prejudiciile cauzate în materia contenciosului administrativ, precum şi aspecte privind răspunderea patrimonială a statului pentru prejudiciile cauzate prin erori judiciare, Dreptul 2/2007, 92; *I. Stoica,* Răspunderea magistraților pentru prejudiciile cauzate prin erori judiciare săvârşite în procesele penal, Dreptul 2/2007, 163; *L.R. Boilă,* Răspunderea civilă delictuală obiectivă, Title III, chapter VI – Consideraţii privind fundamentul răspunderii juridice pentru prejudiciile cauzate printr-o eroare judiciară (2008) 395–430; Înalta Curte de Casaţie şi Justiţie. Secţia civilă şi de proprietate intelectuală, Decision no. 2220 of 9 March 2007; Înalta Curte de Casaţie şi Justiţie, Secţia civilă şi de proprietate intelectuală, Decision no. 5292/2004, quoted by *I. Stoica*, Dreptul 2/2007, 167.

[23] Curtea Supremă de Justiţie, Secţia civilă, Decision no. 3633 of 2 November 1999; Curtea Supremă de Justiţie, Secţia civilă, Decision no. 2191 of 15 June 1999, in: *C. Crişu*, Buletinul jurisprudenţei. Culegere de decizii pe anul 1999 (1999) 67–69.

[24] *Vintilă* (fn. 6) 142.

[25] For instance, in the Minelli Affair, in *V. Berger/L.E. Pettiti*, Jurisprudence de la Cour européenne des droits de l'homme (1991) 157–159.

given the absence of any legal criteria on the basis of which an objective quantification of such compensation should be made. The Court also explains that one cannot endorse the idea of effective damage and loss of profit in the case of moral compensation, since the damage refers to human values and physical and psychological suffering.

Although one must appreciate the guiding principles set out in the analyzed judgment, we cannot but criticize the concrete way in which the plaintiff's claims were solved. When analyzing the grounds for review, by means of which the plaintiff claimed higher damages than those awarded by the lower courts, the High Court dismissed them on account of the fact that, among others, the arguments were contradictory. On the one hand, the plaintiff admits that evaluation of damage non-patrimonial in nature clearly presents a certain level of approximation, left to the discretion of the judge while on the other hand, she denies this power of approximation of the Court of Appeal. We cannot agree with this type of reasoning. By analyzing the grounds for review, as set out in the Decision of the High Court, we find that the plaintiff contested a different part of the Court of Appeal's judgment. In fact, she referred to the fact that the "approximation" of the damage which is left to the judge was identical in both first instance and the Court of Appeal judgments, a fact which raises significant suspicions as to the manner of analysis of the non-patrimonial damage, even more so since new evidence regarding the extent of damage was presented in appeal. 30

Therefore, the plaintiff did not deny the right of the Court of Appeal judges to assess the damage themselves. But the fact that they simply took the exact same amount of damages as established by the court of first instance, despite so many subjective, uncertain and approximate elements (many of which were mentioned in the analyzed judgment), despite the new evidence presented, shows that in fact the Court of Appeal made no evaluation of the damage whatsoever. This is an even more serious matter as the request for review may only be admitted on the grounds of illegality expressly stipulated in art. 304 of the Civil Procedure Code, and not for reasons of invalidity. This is expressly emphasized by the High Court and consequently, the judgment of appeal would have been the last opportunity to re-evaluate the damage based on the facts of the case. These procedural aspects regarding the arguments that may serve for review of a judgment in Romania are outside the scope of our present analysis, exceeding the field of tortious liability. But they were all invoked by the High Court in order to explain the dismissal of the request for review and consequently to uphold the judgment rendered by the lower courts. 31

In conclusion, although the principles set out by the High Court with regard to the criteria and the manner of establishment of the moral damage are accurate, dismissal of a part of the plaintiff's claims and the reasons for the dismissal are open to criticism. 32

3. High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no. 2779 of 7 March 2008, *V.M, D.S., V.S. and S.A. vs. The Consumer's Co-operative Society of Bălțești*: Damages for Deprivation of the Right of Use

a) Brief Summary of the Facts

33 Plaintiffs V.M., D.S., V.S. and S.A. initially requested that the Mayor of Păcureni award them damages for the abusive takeover of their land and constructions by the State on the basis of Decree no. 83/1949 for appendage of Act no. 187/1945 on the application of agricultural reform. The request was made by means of a notification drafted on 12 November 2001, in consideration of Act no. 10/2001, which deals with the restitution of real estate which had been abusively taken over by the Romanian State. The Mayor's reply indicated that part of the expropriated construction was owned by the Consumers' Co-operative Society of Bălțești. The plaintiffs then turned to the latter for restitution in kind of the construction. The Co-operative failed to respond to the notification for six years and subsequently issued Order no. 3 of 11 January 2007, which was unfavourable to the plaintiffs.

34 Given the situation, the plaintiffs filed an action against the Consumers' Co-operative Society to the Prahova Tribunal, requesting that the order be annulled and a new order regarding the restitution in kind of the construction be issued. They also asked that the defendant be held to pay the equivalent of the value of the demolished construction, damages consisting of the difference between the value of the construction at the time of the takeover and that at the time of effective restitution. They also requested that the defendant be obliged to pay compensation for the lack of utilization of the expropriated construction during the last three years. The Prahova Tribunal, in its Civil Sentence no. 956/26 June 2007, admitted only part of the plaintiffs' application, annulled the order of the defendant, ordered that it return the remaining constructions to the plaintiffs and pay compensatory damages for the demolished ones. The claim regarding the defendant's obligation to pay compensatory damages for the lack of use of the construction during the last three years was dismissed on the basis of art. 1169 of the Civil Code. The Tribunal motivated its decision relying upon the fact that the plaintiffs had not explained their claim and they had not provided any means of evidence in its support.

35 The plaintiffs appealed the sentence and criticized the dismissal of the claim regarding compensatory damages for deprivation of use of the construction, arguing that the precise value of such use could be established by means of the expert's report that had been submitted during the proceedings. The Ploiești Court of Appeal admitted the plaintiffs' appeal by Decision no. 432 of 22 October 2007 and changed in part the appealed sentence, holding that the defendant pay the plaintiffs RON 24,472.02 as compensation for the three years' deprivation of use of the constructions which had not been demolished. The rest of the provisions of the sentence remained unchanged.

The Consumers' Co-operative Society of Bălțești filed for review of the Decision of the Court of Appeal, invoking grounds of irregularity, on the basis of art. 304 para. 9 of the Civil Procedure Code. The defendant's criticism actually reiterates the motivation of the Prahova Tribunal: the plaintiffs did not explain their claim regarding the deprivation of use, they did not indicate a valid legal basis and they did not bring evidence in support of the elements that could lead to the admittance of such a request. The defendant also brought forth a new issue: that the only legal grounds that could be invoked in support of such claim would be the provisions of art. 998–999 of the Civil Code (regarding tortious liability for one's own acts) and the plaintiffs should have proven the existence of the elements set out in the respective legal text. 36

b) Judgment of the Court

The High Court of Cassation and Justice dismissed the request for review as groundless by its Decision no. 2779 of 7 May 2008. In order to reach this conclusion, the High Court appreciated that the plaintiffs observed the provisions of art. 112 of the Civil Procedure Code regarding the necessary elements of an application. The plaintiffs specified their claim regarding the deprivation of use by clearly showing the three year period which the claim referred to. Also, they specified the relevant legal grounds – provisions of Act no. 10/2001 and art. 998 of the Civil Code, which deal precisely with tortious liability for one's own acts. 37

The High Court concluded that the Court of Appeal had correctly concluded that the plaintiffs had been deprived of a very important attribute of their property right regarding constructions – particularly the exercise of the right of use. The amount of money awarded to the plaintiffs covers the damages owed to them by virtue of the defendant's liability for the occurring harm. In order to give effect to the liability for torts, one must establish whether the general requirements are met. These conditions stipulate as follows: 38

The damage caused to the plaintiffs consists of their deprivation of the exercise of the right of use over the constructions which had not been demolished and which had been abusively taken over by the State. The aforementioned damage was ascertained by means of the expert's report that was submitted during the proceedings. *The illicit conduct* of the defended co-operative society consists of the ongoing possession of the constructions under litigation and exercise upon them of all the attributes of the property right, including the right of use, regardless of the fact that it had been notified of the plaintiffs' requests since 13 December 2001. This was the date when the local Mayor, who had been initially notified, forwarded to the co-operative society the plaintiffs' claims. The unlawful possession of the constructions is corroborated with the lack of any response from the co-operative society for a very long period of time (2001–2007). The defendant's *fault* consists of the fact that it kept possession of the good and it did not reply to the plaintiffs' notification, although it was aware of its obligation to solve the request under the terms and within the period stipulated by art. 25 of Act no. 10/2001. Moreover, the defendant was, 39

or should have been aware of the legal and practical consequences of the possession of the constructions, in spite of the fact that they had been claimed by several persons who brought evidence in support of their position as lawful owners thereof. The lack of a solution given within the legal deadline, among others, prevented the plaintiffs from enjoying property over their good, which they had already been deprived of for a long time. The defendant thus took the risk of retaining a good over which it could not prove that it had either a property right or any other attributes pertaining to this right. *The causal link* between the illicit conduct and the damage is obvious. The defendant's omission to reply to the notification within the legal deadline, corroborated with the retention of the plaintiffs' goods for the aforementioned period of time generated the deprivation of the latter of their right of use over the goods as a significant aspect of the property right, but also of the actual enjoyment of all material benefits which the use of a good may generate (for instance, the possibility to convey the right of use to a third party, in exchange for a certain amount of money).

40 The High Court also states that the damage caused to the plaintiffs by deprivation of their constructions cannot be deemed to have been repaired by restitution of the goods requested on the basis of Act no. 10/2001. This Act provides no remedy for the damage in question, which occurred between the moment of expiry of the deadline for solution of the notification and that of issuance of the order. Given this state of facts, the decision of the Court of Appeal by means of which the plaintiffs were granted remedy for the lack of use of their immovable good is correct. All the elements set out by art. 998–999 of the Civil Code for tortious liability are met. Also, the three year prescription period in which such claims may be submitted was observed.

c) Commentary

41 The above case deals with an important factual issue that is brought about by the application of Act no. 10/2001 on the legal regime of immovable goods abusively taken over by the State between 6 March 1945 and 22 December 1989. The above-mentioned Act intended to finally put an end to the problem of restitution (in kind or by equivalent) of the immovable goods abusively taken over by the communist state.

42 Unfortunately, this Act, as characterized by the President of the Civil Section of the High Court of Cassation and Justice himself,[26] was the result of a "political compromise during a change of power (2000–2001)" and therefore comprises "hybrid, uncorrelated texts and striking infringements of the great principles of law, successive and confusing changes, including for those called to apply it". Moreover, the elaboration of application norms was another negative aspect, since many of them added provisions to the Act. Also, a "massive

[26] Judge Florin Costiniu, President of the Civil and Intellectual Property Section of the High Court of Cassation and Justice, in *F. Costiniu*, Legea nr. 10/2001. Jurisprudența la zi a Înaltei Curți de Casație și Justiție în materia imobilelelor preluate abuziv. Hotărâri ale Curții Europene a Drepturilor Omului în materia proprietății (2nd ed. 2008).

legislative intervention took place in July 2005 including several questionable issues". For the aforementioned reasons, the Act at hand gave rise to vast case-law, including before the European Court of Human Rights, a fact which, in its turn, generated extensive legal jurisprudence on the matter.[27]

When referring particularly to the different types of remedies that the abusively dispossessed owners are entitled to, one must take into account the fact that the law fails to clearly specify certain important aspects. As resulting from the motivation of the High Court of Cassation and Justice itself, the law does not provide solutions for the compensation of former owners for deprivation of their right of use between the moment of expiry of the legal deadline for resolving the notification and the date of the order of restitution. Furthermore, legal doctrine[28] has, in light of the evolution of case-law,[29] dismissed the possibility that the owner be compensated for deprivation of possession between the time of the illegal dispossession and that of the court order of restitution. The aforementioned conclusion is to be drawn from a ruling of the Constitutional Court,[30] which established that art. 2 para. 2 of Act no. 10/2001 was in accordance with constitutional provisions and stated that "Act no. 10/2001 acknowledges that persons entitled to restitution of their immovable goods are legal owners, but the restitution in kind of the immovable and, accordingly, the exercise of property rights are to be granted solely after the property right has been legally recognized, by decision of the administrative authorities or by court sentence. By stipulating that the owner may enjoy his/her rights only for the future, on receipt of the decision of restitution, the authors of the act envisaged a legal framework for the exercise of property rights, establishing certain reasonable limits that would help secure the legal circuit". 43

When analyzing civil liability that arises from the application of Act no. 10/2001, legal doctrine[31] mentions liability of the person who drafts the notification (a type of liability that arises for abuse of right) and not of the holding entity. In this context (of legislation, case-law and legal doctrine), the analyzed decision constitutes a bold solution rendered in favour of the owners, covering for the absence of express provisions in the special Act, providing reparation by resorting to common dispositions in tort law. 44

[27] *I. Adam*, Legea nr. 10/2001. Regimul juridic aplicabil imobilelor preluate abuziv (2001); *E. Chelaru*, Legea nr. 10/2001 privind regimul juridic al imobilelor preluate abuziv în perioada 6 martie 1945-22 decembrie 1989 comentată şi adnotată (2001); *E. Chelaru*, Măsurile reparatorii prevăzute de Legea nr. 10/2001, Dreptul 10/2001, 36; *F.A. Baias/B. Dumitrache/M. Nicolae*, Regimul juridic al imobilelor preluate abuziv. Legea nr. 10/2001 comentată şi adnotată, vol. I and II (2nd rev. ed. 2002); *A. Trăilescu*, Nelegalitatea unor dispoziţii ale Normelor metodologice de aplicare unitară a Legii nr. 10/2001, Dreptul 9/2004, 64; *M. Voicu*, Jurisprudenţă civilă. Legea nr. 10/2001 (2005); *M.L. Belu Magdo*, Sinteză de practică judiciară în materia procedurii de restituire reglementată de Legea nr. 10/2001, Curierul judiciar 7–8/2005, 72.

[28] *G.C. Frenţiu*, Retrocedarea imobilelor preluate abuziv (2007) 278 f.

[29] Tribunalul Bistriţa-Năsăud, Secţia civilă, Sentence no. 528/F/2005, Decision no. 20/A/6.01.2006 Curtea de Apel Cluj, quoted by *G.C. Frenţiu*, 279.

[30] Curtea Constituţională, Decision no. 373 of 4 May 2006, Monitorul Oficial al României no. 454 of 25 May 2006.

[31] *Frentiu* (fn. 29) 305–306.

45 In order to award compensation to the plaintiffs for deprivation of their right of use, the High Court evidently relied upon their arguments, which we already dealt with in the summary of the facts. What is interesting to note, though, is the manner in which the High Court extracts from the Co-operative Society's request of review the correct arguments regarding the legal grounds of the plaintiffs' action in order to arrive at the conclusion that Act no. 10/2001 does not provide any solutions for compensating the plaintiffs for their deprivation of use of the good. Therefore, the legal basis of the claim lies in art. 998–999 of the Civil Code regarding tortious liability for one's own acts.

46 We deem that the High Court's analysis is accurate and innovating. It deals with the elements of civil liability under art. 998–999 of the Civil Code (illicit conduct, damage, causal link between the aforementioned and fault), their application in the case of liability of the holding entity for non-compliance with the deadline for solving the notification by which restitution of the immovable is claimed. The High Court concludes that the co-operative society that takes on the risk of keeping a good over which it cannot justify property rights, thus depriving the real owner of the use of the good, must be held accountable for the equivalent of the deprivation of use. This ruling presents nothing unusual in itself. What is remarkable is the application of this general principle of law to a situation generated within the framework of a special Act which does not deal with this particular aspect.

C. Literature

1. *Lacrima Rodica Boilă*, Objective Tortious Liability (Răspunderea civilă delictuală obiectivă) (C.H. Beck, Bucharest 2008)

47 The book printed by the prominent publishing house C.H. Beck is the first Romanian monograph dealing exclusively with objective civil liability. So far, this type of liability had been discussed either in university textbooks, treatises of general theory of obligations[32] or monographs regarding civil liability in general, tortious liability or certain particular cases of application thereof[33] or in articles regarding particular issues of such liability, published by specialized reviews.[34]

[32] *Pop* (fn. 3); *C. Stătescu/C. Bîrsan*, Drept civil. Teoria generală a obligațiilor (8th ed. 2002); *I. Adam,* Drept civil. Teoria generală a obligațiilor (2004); *I.P. Filipescu/I.A. Filipescu*, Teoria generală a obligațiilor (2004).

[33] *Anghel/Deak/Popa* (fn. 3); *Eliescu*, (fn. 3); *M.N. Costin*, Răspunderea juridică în dreptul românesc (1974); *L. Barac*, Răspunderea și sancțiunea juridică (1997); *I. Lulă*, Contribuții la studiul răspundeii civile delictuale (1997); *E. Lipcanu,* Răspunderea comitentului pentru fapta prepusului (1999); *E. Lupan,* Răspunderea civilă (2003); *S.M. Teodoroiu*, Răspunderea civilă delictuală pentru dauna ecologică (2003); *C. Teleagă,* Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produse defectuase (2005); *M. Jozon,* Răspunderea pentru produse defectuoase în Uniunea Europeană (2007).

[34] *I. Turcu,* Tendițe noi ale practicii judiciare în legătură cu fundamentarea răspunderii civile fără culpă a persoanei lipsite de discernământ, Revista română de drept 2/1980; *L. Pop,* Încercare de sitezâ a evoluției principalelor teorii cu privire la fundamentul răspunderii civile delictuale, Studia Universitatis Babeş-Bolyai, Seria Jurisprudentia no. 2/1986; *I. Lulă*, Garanția, fundamen-

It is therefore the first attempt at summarizing the objective fundamentals of tortious liability.

48 The author notes that for the last few decades there has been a decline in the position of subjective fault as the fundamental basis of civil liability, which was determined by the increase in situations of objective liability regulated by both national and European law. The adoption of a "mosaic" of special rules in certain fields of activity that are characterized by the risk of causing damage has contributed to the emergence of special regimes of civil liability. The emphasis lies on the creative role that case-law has played in adapting legal norms to social reality, such as the extension of the category of reparable damage (for instance, moral damages) and the recognition of legitimacy of certain persons entitled to compensation (the case of children of a concubine who were under the care of the victim).

49 Human society in its entirety is continuously changing and accordingly, the concept of civil liability (whose role was to re-establish the social balance that had been disrupted by damage) has to be refashioned in order to match emerging social needs. From this perspective, Civil Code provisions that established more than two centuries ago the general principle of liability based on the idea of fault have become unfit to the challenges of contemporary society. Together with fault one invokes new grounds for liability, which are objective in nature – such as risk and guarantee. New legal rules that apply to certain special regimes of liability establish these new grounds irrespective of imputability to the conduct of the accountable person, without relying on a general principle of objective liability. In the absence of a synthesis of objective grounds for tortious liability, the monograph under discussion is entirely justified.

50 The study undertaken by Lacrima Rodica Boilă is set to be a plea in favour of the reconstruction of this institution of Romanian civil law, in order to make it more flexible, more dynamic and more efficient and to bring it closer to the interests of those whose rights were injured for the benefit of society and in order to ensure social peace and harmony. The author notes that opinions are contradictory in legal doctrine with regard to objective liability. Some praise the pragmatic character and real support offered to the victim by eliminating the difficult burden of proof regarding the fault of the author of the illegal conduct. Others consider it to be an exaggerated protection of the victim by aggravating the position of the accountable person and criticise the so-called

tul răspunderii civile a comitentului, Dreptul 10-11/1995; *E. Lupan,* Consacrarea caracterului obiectiv al răspunderii juridice pentru poluarea mediului, Analele Universității Oradea, seria Drept, anul III (1995); *I. Bălan*, Răspunderea civilă pentru produse cu defecte în reglementarea Legii nr. 240/2004, Dreptul 12/2004, 52; *J. Goicovici*, Riscul de dezvoltare, Dreptul 6/2005; *T. Bodoaşcă*, Discuţii privind sfera de aplicare a art. 1000 alin 1, (teza întâi) din Codul civil, Dreptul 10/2006; *S. Neculaescu*, Reflecţii privind fundamentul răspunderii civile delictuale, Dreptul 11/2006; *A. Tamba,* Încercare de reconsiderare a calificării răspunderii civile delictuale reglementate prin art. 1002 din Codul civil (ruina edificiului), Dreptul 4/2007; *O. Ungureanu/C. Munteanu*, Propunere *de lege ferenda* privind reglementarea inconvenientelor anormale de vecinătate, Revista română de drept privat 4/2007.

"victim-friendly" trend. The objective substantiation of liability would endanger the idea of social justice which traditionally considers that one may only hold liable the person who is guilty of having caused unsafe consequences by his/her conduct. To this end, the author quotes French doctrine[35] that criticizes the manner in which new orientations regarding objective substantiation of civil liability disregard the harmony and coherence of the rules of civil liability law. It is contended that this approach endangers the principle of legal security, since the persons deemed to be responsible are held to compensate the victim even in the absence of any fault, creating a feeling of great injustice. The elimination of the condition of *culpa* represents, in view of the aforementioned authors, "the strongest factor of destabilization of the law of civil liability".

51 Lately, one can notice an increasing influence of the economic dimension of tortious liability over its reparatory function, which has gained autonomy by entailing the obligation of compensation of the victim in the absence of fault of the responsible person. Contemporary doctrine has stressed the necessity of remodelling the institution of tortious liability by establishing the priority of the compensatory function in the face of decline of the preventive-educational function. A certain penalty imposed on the culpable person is of no relevance considering the re-establishment of the social balance by bringing the victim to his/her previous situation. One may also perceive a certain "socialization" of tortious liability and an increase of the role of insurance in the field of reparation of the injury. However, the author concludes that all the aforementioned cannot constitute a solid argument in order to definitively abandon the preventive-educational function of liability which is so closely connected to human character, to the idea of legal responsibility itself. In certain situations the established or presumed *culpa* is still considered to be the foundation of tortious liability (liability for one's own acts, liability of teachers or artisans for damage caused by their pupils or apprentices).

52 The book first deals with the importance and role of civil liability in the ensemble of legal responsibility, as a premise for the progressive analysis of the most significant trends defined over time with regard to the objective substantiation of responsibility. The disputes between traditional and modern views, unity and diversity, synchronization and incoherence are deemed to be beneficial since they focus on the main purpose, that of compensation of the victim and restoration of the social balance that was disrupted by the illicit conduct.

53 Further on, the author analyzes the application of tortious liability in various fields, in function of the basis taken into account in establishing the obligation of compensation of the victim:

a) *Risk* – liability for damage caused by objects, including liability for damage caused by animals, defective products, ecological damage, nuclear damage as well as ruin of an edifice;

[35] *Ch. Radé*, Plaidoyer en faveur d'une réforme de la responsabilité civile, Recueil Dalloz (D.) no. 33/2003, Doctrine, 2247; *C. Larroumet,* Responsabilité du fait d´autrui principe général, Juris-Classeur civil, Responsabilité civile, art. 1383, fasc. 140; D. 1991, Jurisprudence, 324.

b) *Guarantee* – liability of the company for acts of its agents, liability for damage caused by illegal administrative acts, liability in case of judicial error;
c) *Precautionary principle* – for ecological and nuclear damage, damage caused between neighbours, damage caused by aircrafts and spaceships;
d) *Equity* – referring to jurisprudential trends with respect to tortious liability of a person lacking reason that causes damage to another person.

In the final part, by the conclusions reached, the author presents the current status of objective tortious liability and its perspectives.

54 The work is complex, expanding over 540 pages, structured in 4 titles, of which the longest is title III, dealing with substantiation of objective civil liability in 8 chapters. Each of the chapters presents a particular field of application of objective liability. The analyzed study relies on a large list of sources, both Romanian and foreign. As for the Romanian sources of authority, the author quotes both classic works of civil law at the end of the XIXth century and inter-war – such as D. Alexandresco,[36] M.B. Cantacuzino, M. Djuvara, D. Plastara, C. Hamangiu and N. Georgean,[37] I. Rosetti-Bălănescu, C. Hamangiu and C. Băicoianu,[38] as well as works of post-war authors, all of them well known figures in the field of civil law, in spite of the communist system by which they were forced to abide: Tr. Ionaşcu, A. Ionaşcu, M. Eliescu, C. Stătescu, etc. However, contemporary Romanian doctrine bears the main role as the author refers to monographs, treatises and numerous articles published in law reviews. One can also find references to important contemporary Romanian authors, such as: I. Albu, P. Anca, Gh. Beleiu, Ş. Beligrădeanu, C. Bârsan, D. Chirică, M.N. Costin, Fr. Deak, I. Deleanu, I. Filipescu, E. Lupan, L. Pop, T.R. Popescu, O. Ungureanu, etc. As for foreign sources, which are abundant (almost 90 titles), one can easily notice a distinct orientation towards French authors,[39] two English works,[40] an Italian one[41] and a German one[42] (which is actually a study regarding the theory of State and law), being the only exceptions.

55 Of the novel elements that the study presents, which are categorized by the author herself, we hereby rest upon a few that might shed a new light on the interpretation of objective tortious liability.

[36] *Alexandresco* (fn. 13).
[37] *C. Hamangiu/N. Georgean*, Codul civil adnotat, vol. I–V (1927) (new ed. 2003).
[38] *C. Hamangiu/I. Rosetti-Bălănescu/Al. Băicoianu*, Tratat de drept civil roman, vol. I–III (1929) (new ed. 1998–2002).
[39] One must notice the vast amount of French sources, as 82 titles refer to important authors such as: J. Carbonnier, L. Josserand, C. Larroumet, G. Marty et P. Raynaud, D. Mazeaud, H. Mazeaud, L. Mazeaud, A. Tunc, M. Planiol, G. Ripert, J. Boulanger, B. Starck, H. Roland, L. Boyer, Fr. Terré, Ph. Simler, Y. Lequette, A. Weill, etc.
[40] *G. Eörsi,* Private and governmental liability for the torts of employees and organs, in: International Encyclopedia of Comparative Law, vol XI, chap. 4, no. 45–119; *H.L.A. Hart*, Punishment and Responsability (1968).
[41] *A. Levi*, Teoria generale del diritto (1967).
[42] *G. Haney/R. Wagner*, Grundlagen der Theorie des sozialistischen Staates und Rechts (1965).

56 1. The author characterizes the phase that tortious liability presently crosses (following the era of regulating and sanctioning civil liability, which relied on the foundation of fault and of reparatory responsibility based on the idea of risk) as a new era, that of precaution, which imposes as a general rule of behaviour the obligation of every person to be "responsible for his/her own patrimony and his/her own will".[43] Recognized in the field of environmental law two decades ago, the precautionary principle has become legal reality, being nowadays acknowledged by doctrine as a new foundation of civil liability. It is often characterized as a "legal remedy that punishes those who fail to adopt a behaviour that is appropriate to this existential situation".[44]

57 2. Another current issue is that of liability for defective products. This type of liability may be considered a third type of responsibility which, unlike contractual or tortious liability, has a preventive and advancing character and thus presents specific conditions that are confined to a new field of law: consumer law. In this area, the development risk is a factor that precludes responsibility of the producer for damage caused by defective products when the level of scientific knowledge available at the time of marketing of the product did not allow the tracing of the respective defect.

58 3. Liability of the owner for ruin of an edifice may be analyzed from the point of view of responsibility for the acts of others (such as the architect, builder, tenant, etc.) or as a situation of liability for objects according to art. 1000, para. 1 of the Civil Code, being a type of responsibility which arises from the obligation to guarantee and that of maintaining safety with regard to the construction and maintenance of edifices.

59 4. According to the developments in contemporary doctrine and case-law, the foundation of the liability of a corporate entity is an expression of a legal obligation based on the idea of risk of activity, as a type of direct liability, engaged irrespective of the unlawful conduct of its agent.

60 5. Liability for ecological damage, characterized by variety and complexity, the importance of people's health, goods and of the environment, is founded on the idea of activity risk for damage caused to the environment, in order to provide increased protection to victims.

61 6. In the area of neighbourhood relations, liability for damage is founded on the idea of abnormality of the inconveniences generated by the use of immovables and therefore it may be engaged irrespective of the existence of fault of any kind. In the case of such disturbance, it is of no relevance whether the conduct of the liable persons was culpable or not with regard to the taking of precautionary measures in order to ensure that neighbours are not affected. Their responsibility shall be engaged if one can prove a damage directly caused by the normal use of the neighbouring immovable.

[43] *Teodoroiu* (fn. 33) 84.
[44] *D. Mazeaud*, Responsabilité civile et précaution, Responsabilité civile et Assurances no. 6bis/2001, 72.

7. In the case of damage caused by a person without reason, an efficient solution may be the entailing of responsibility of this person, by appreciating his/her liability from an objective perspective, that regarding the abnormal behaviour that the respective person adopts among people. This interpretation is favourable to the victim who thus enjoys the possibility of turning against the author of the damage in order to obtain reparation within the latter's limits. Concerning the legal guardians of the ill person or of the child, the aforementioned solution presents clear advantages that consist of the possibility of covering the damages directly from the patrimony of the person who caused it, and only lacking this possibility, by resort to the guardian's patrimony. 62

Sanction – reparation – prevention. These three issues are considered to be the elements of tortious liability, illustrating the progressive stage of this legal institution, with a clear tendency towards objectification, still preserving the "nostalgia" of civil fault, as a landmark of human society. The author concludes that, given the conditions of modern society, we are witnessing a transformation of the concept of responsibility, which is gradually drifting away from the sanctioning character, with an ever increasing orientation towards consolidation of the reparatory function and with a prospective vision – that of prevention of major risks that may endanger the existence of the planet itself. 63

2. *O. Ţinca*, Liability of a Trade Union Organization in the Event of Strike (Răspunderea organizaţiei sindicale reprezentative în cazul grevei) Dreptul 8/2008, 110–118

The article follows the recent trend in Romanian doctrine of interest in the liability of the organisers of an illegal strike.[45] The author's starting point is the unanimously accepted premise that liability of the organizers of a strike declared by the courts as illegal is a tortious liability. One must add that in Romania the conditions for starting a strike, its carrying out and consequences are regulated under Act no. 168/1999 regarding settlement of working conflicts. 64

In addition to the rich legal doctrine the author refers to, he also makes a few observations regarding the parties to the conflict of interests during the strike. These are "the company" – that is the legal person that benefits from the work of its employees, and not the manager of the company, with the observation that the legal person exercises its rights and obligations through its organs (ac- 65

[45] *Ş. Beligrădeanu*, Dreptul la grevă şi exercitarea lui, Dreptul 6/1990, 25–27; *Ş. Beligrădeanu*, Legea nr. 15/1991 pentru solutionarea conflictelor de muncă, Dreptul 2-3/1991, 10–11; *Ş. Beligrădeanu*, Se cuvine repararea daunelor morale, pricinuite unităţii în cazul grevei nelegal declarate sau continuate? Dreptul 2/1993, 13–16; *Ş. Beligrădeanu*, Probleme juridice generate de exercitarea dreptului la grevă, Dreptul 6/1995, 9–11; *Ş. Beligrădeanu*, Examen de ansamblu asupra Legii nr. 168/1999 privind solutionarea conflictelor de muncă, Dreptul 1/2000, 13 f.; *Gh. Brehoi/A. Popescu*, Conflictul colectiv de muncă si greva (1991) 104–111; *M.-L. Belu Magda*, Conflictele collective şi individuale de muncă (2001) 41–47; *Al. Ticlea*, Opinii referitoare la răspunderea patrimonială în cazul încetării colective a lucrului, Dreptul 12/2001, 66–73; *Al. Ţiclea*, Tratat de dreptul muncii (2nd ed. 2007) 983 f.; *I.T. Ştefănescu*, Modificările Codului muncii – comentate (2006) 158 f.; *I.T. Ştefănescu*, Tratat de dreptul muncii (2007) 708–715; *A.G. Uluitu*, Greva (2008) 244–255.

cording to art. 35 para. 1 of the Decree no. 31/1954 regarding natural and legal persons). The other party to the conflict of interests during the strike consists of the employees, represented by the representing unions (according to art. 10 of the Act no. 168/1999). Only lacking these unions do the employees choose the persons who should represent them during negotiations.

66 After clarifying this aspect regarding the parties to the conflict, in particular what is to be understood by "organisers" of the strike, the author turns to the presentation of a few situations prescribed by law that engage the liability of these "organisers". Thus, according to art. 57 para. 3 of the Act, the organisers' refusal to perform their obligation to continue the negotiations with the company's management "entails their pecuniary liability for damage caused to the company". Also, according to art. 61 para. 2 of the Law, courts may, upon suspending the strike on grounds of illegality, require that the persons who are liable for generating the strike pay damages. The author emphasizes once again the tortious nature of civil liability of the natural person – organisers in the case of illegal strikes.

67 A particular issue analyzed by the author is whether the court, by declaring a strike illegal, may, upon request of the company, force the representative union that organised the strike to pay damages. Of course, forcing the organisers of the strike to pay damages to the employer is out of the question if the organization of the strike was made in observance of the conditions prescribed by law, even though the latter might have suffered certain damage as a result of the strike due to the failure to accomplish the production contracted with a third party. This is due to the fact that planning and taking part in a strike does not constitute a breach of the employees' working obligations and cannot have any negative consequences upon them.

68 Nonetheless, planning an illegal strike constitutes grounds for civil liability – more precisely, responsibility for the individual acts of the union. The union is not liable (under art. 1000 para. 3 of the Civil Code) for any damage caused by the members of the union, since the latter are not its agents.[46] The will of the legal person is expressed through its organs,[47] therefore the union is responsible for the damage caused during an illegal strike if that particular damage was due to the actions of its organs. In French law, civil liability of the union has also been admitted, based on art. 1382 of the French Civil Code, in cases when the union caused damage to a third party[48] through its organs, such as the general secretary of the union.[49]

69 The author outlines two principles that arise from the case-law of the French Cour de Cassation:

- unions cannot be held liable for damage produced during strikes for the sole reason of having participated in them and

[46] *B. Teyssié*, Droit du travail. Relations collectives (4th ed. 2005) 538.
[47] *L. Pop*, Drept civil român. Teoria generală a obligatiilor (1998) 234.
[48] *M.F. Clavel-Fauquenot/N. Marignier*, Le droit syndical (1999) 57.
[49] *J.E. Ray*, Droit du travail, droit vivant, 2006/2007 (15th new ed. 2006) 578.

- responsibility of the union may only be engaged if the union has effectively taken part in acts of a criminal character or acts that are by no means related to the normal exercise of the right to strike (abduction of the employees, preventing them from working).

The union's responsibility for damage caused by strikers cannot be engaged when the former adopts a passive attitude towards destruction caused by workers on strike. The union shall only be held liable if it has actually taken part, alongside workers, in the damaging actions, offering permanent and unconditional support. In order for the union to be liable, it is not sufficient that a judge rules that the union has initiated and supported the strike, but also that it incited the strikers to take part in an illicit act. Given the fact that the right to strike is an individual right, the union that asks employees to take part in the strike cannot be presumed responsible for the wrongs committed during its course, lacking a connection such as between the corporate body and its agent.[50]

As for liability of the legal persons according to the Romanian system, the will of the organs, which is the will of the legal person itself, entails the possibility of performance of an illicit conduct even within the object of activity of that legal person. Consequently, the attribution of competence principle– which is characteristic to the legal person – is completely unrelated to civil liability.[51] The attribution of competence principle does not pose any limits to the obligation of reparation of a damage caused by an illicit conduct of the legal person.[52] The victim of the damage cannot be deprived of the right to compensation for the damage caused by the legal person on the grounds that, in disobeying the law, the legal person has acted outside its object of activity. 70

A legal strike necessarily involves cessation of the activity; therefore, the union may only be held liable for damage arising out of actions that exceed the normal framework of exercise of the right to strike. Such examples would be: inciting strikers to take over the premises where employees who did not participate in the strike would carry out their activity, preventing the latter from working and thus causing damage to the company. In case the court declares the strike to be illegal since its commencement, the union shall be held liable for all resulting damage to the employer. If the strike was legal up to a certain point and then became illegal (for instance, after its suspension by court order), the planning union shall be responsible within the limits of the subsequent damage. Since we are dealing with tortious civil liability, the organizing union shall be liable for both material and moral damages. 71

Since the entry into force of the provisions regarding legal persons of the Criminal Code (Act no. 278/2006), legal persons are held criminally responsible for crimes committed during the performance of their object of activity, in the interest or on behalf of the legal person (art. 19^1 of the Criminal Code). 72

[50] *A. Mazeaud*, Droit du travail (5th ed. 2006) 276, where the author also refers to a decision of the Cour de Cassation of 21 January 1987.
[51] *P. Anca*, Faptele ilicite, in: T.R. Popescu/P. Anca, Teoria generală a obligatiilor (1968) 181 f.
[52] *Eliescu* (fn. 3) 235.

Since the only exceptions to these dispositions relate to the state and public authorities, one may conclude that unions, who are private legal persons, are also criminally liable for acts that present such character. Along with criminal responsibility, when the illicit conduct has caused damage, civil liability shall also be entailed.

3. *E. Florian*, Discussions on the Liability of Medical Staff for Failure to Fulfil the Duty regarding the Patients' Informed Consent (Discuții în legătură cu răspunderea civilă a personalului medical pentru neîndeplinirea obligației privitoare la consimțământul informat al pacientului) Dreptul 9/2008, 30–47

73 The author's aim is to analyze the obligation of medical staff regarding the patient's informed consent not only from the general point of view of the "democratization" of the medical act, but also from a new perspective, as a source of direct medical liability, that redefines doctor-patient relations. On an introductory note, the author draws attention to the fact that the obligation regarding informed consent given for the purpose of a medical act is closely connected to fundamental human rights and liberties, revolving around the principle of inviolability of the person and its corollary, the right of a person to decide himself/herself (art. 22 and 26 of the Romanian Constitution). The new "partnership" view asserts that the previously informed patient, who is the beneficiary of medical services, authorizes or not the performance of a medical act. This approach is contrary to the traditional "paternalist" perspective of the doctor-patient relationship, according to which the former, owner of medical knowledge and skills, guardian of the interests of the latter, decides on his behalf and in the interests of his well-being. The requirement of the patient's informed consent is an expression of the principle of autonomy of the human person, acknowledging the individual's capacity to decide upon his/her own medical care.[53]

74 Civil liability of the medical staff for damage arising out of non-compliance with the rules regarding the patient's informed consent is expressly dealt with in Romania by art. 642 para. 3 and art. 651 para. 1 of Act no. 95/2006 on the reform in the field of health. Previously, this type of liability had been only vaguely tapped by Act no. 46/2003 regarding patients' rights. These rights, similar to the correlative obligations of the medical staff, have been recognized by the European Convention on the Protection of Human Rights and Human Dignity Towards the Applications of Biology and Medicine, the Convention on Human Rights and Biomedicine, concluded at Oviedo, on 4 April 1997 and the Additional Protocol to the European Convention on Protection of the Human Rights and Human Dignity Towards the Applications of Biology and Medicine, regarding the prohibition of human cloning, adopted in Paris, on 12 January 1998, ratified by Romania by means of Act no. 17/2001.

[53] *J. Cohen*, Patient Autonomy and Social Fairness, Cambridge Quarterly of Healthcare Ethics 9/2000, 391.

The law regarding patients' rights (Act no. 46/2003) stipulated the necessary consent of the patient for any medical intervention – whether diagnostic or therapeutic – such as collection, storage, utilization of all biological products harvested from his body for the purpose of determining a diagnosis or prescribing a treatment; also, scientific research and medical study may involve passive participation of the patient, as a subject of scientific attention, only with his consent (art. 13, 18 and 19). As an exception, if the patient cannot express his will and an emergency medical intervention is necessary, "the medical staff may infer the patient's consent from a prior manifestation of his will" (art. 14); regarding minors, the legal guardian's consent is not necessary in case of emergency (art. 15). 75

The Act regarding health reform (Act no. 95/2006) has reiterated the patient's right to express his will towards any methods of prevention, diagnosis and treatment with potential risks (art. 649, para. 1). The author emphasises the fact that although the patient's right to informed consent is of maximum generality, referring to any type of examination, treatment or other medical act, in light of the aforementioned article, the medical staff's responsibility is not engaged in any circumstances of non-compliance with the obligation regarding informed consent, but only in the case of certain methods of prevention, diagnosis and treatment that pose risks to the patient. Since the notion of "potential risk" (therapeutic *alea*) is not defined by law, identification of medical situations of this kind is left to those bound by this obligation.[54] 76

In order to quantify the potential risk, legal doctrine has turned for criteria to the French correspondent of the Romanian Act no. 95/2006, which is "Loi nr. 2002-303 du mars 2002 relative aux droits des maladies et à la qualité du systeme de santé". The aforementioned law deals with "les risques frequents ou graves normalement previsibles" (art. 1111-2). Between the quantitative, statistical and qualitative criteria, the author considers that the qualitative one – referring to the seriousness of possible known consequences that might influence the patient's decision – should prevail. 77

Concerning the legal force of the patient's informed consent, the author affirms that it does not bind the medical staff to offer aid, such an obligation existing only in emergency situations when the lack of medical assistance might severely and irreversibly endanger the life or health of the patient (art. 652, para. 3). Another opinion refers to the fact that the patient's consent must relate to a therapeutic purpose while the choice of the proper means of achieving this aim lies exclusively with the doctor, who enjoys absolute professional independence. Expressed consent of the patient does not preclude the doctor's responsibility for professional fault (art. 13 of the Medical Deontological Code). 78

The author analyses the object and substance of the obligation of information. We refer particularly to the distinction drawn between the general obligation to inform, which is inherent to any medical intervention and the special ob- 79

[54] Regarding "medical risk", the author quotes: *A.T. Moldovan*, Tratat de drept medical (2002) 416–420; *A.B. Trif*, Responsabilitatea juridică medicală în Romania (2000) 53–61.

ligation to inform, which adds to the first one whenever, given a particular patient and his medical state, the predicted methods of prevention, diagnosis and treatment involve a potential risk. A very important observation made by the author is that whatever the direction set by the risk dynamics, the object of the obligation to inform has to be examined in relation to the moment of origin of the right and of the correlative obligation to inform. It is generally accepted that the evolution of medical science may modify the professional perception on risk: an innovative treatment can "diminish" a risk previously regarded as serious or re-evaluate an "underestimated" risk.

80 Regarding exceptions to the rule of the patient's informed consent, the author first refers to the only exception stipulated by law, namely the emergency situation of the patient deprived of his full mental capacity, when the legal guardian or the closest family member cannot be contacted (art. 651, para. 1 of Act no. 95/2006). There are two objections to be raised against the reference that the law makes to family members. On the one hand, the law does not stipulate the family member's right to substitute the patient's consent and for emergency circumstances art. 14 of Act no. 46/2003 specifies that the medical staff may infer the patient's consent from a previous manifestation of his will. On the other hand, the physician is in the position of not being able to make a decision in accordance with the law since, by informing family members, he disregards the obligation of confidentiality, which is sanctioned under art. 642 para. 3 of Act no. 95/2006.

81 Further on, the author adds to this unique exception prescribed by law two more situations that preclude the responsibility of the medical staff, based on the interpretation of other legal texts. First, there is the case when the patient expressly requests that he should not be informed (a right stipulated under art. 9 of the Act) or when he decides that he should not be informed if the information is likely to cause him suffering (art. 7). Secondly, there is the case when there is a "therapeutic justification for the lack of information" if presenting the reality of the diagnosis would be so traumatizing that the information is likely to cause the patient a greater harm than the intervention itself. The doctor's mission is subordinated to the principle of *primum non nocere*.[55]

82 The author analyses next the fulfilment of the elements of traditional civil liability in the case of lack of information of the patient. With regard to the element of fault, the author stresses that it is presumed by law, since the discussed obligation is an obligation of result (precise obligation) incumbent on the medical staff. With respect to illicit conduct, it is shown that it consists of the non-compliance with the correlative obligation of the patient's right to give his informed consent for any medical act of potential risk. This is more than a simple lack of opposition on the part of the patient; there must be an express and informed manifestation of consent. Lacking this assent, any medical act constitutes an illicit conduct likely to entail responsibility regardless of the liability for regular *malpraxis* acts, that is, for professional fault in exercis-

[55] *M. Bacache-Gibeili*, L'obligation d'information du médecin sur les risques thérapeutiques, Médicine & Droit 2005, issue 70 (January–February 2005) 3–9.

ing medical activity that gives rise to damage for the patient. The question is whether the "crime" of non-information is absolutely autonomous in relation to the main duty of giving medical assistance, whether the breach of the obligation of information in itself, not followed by any medical act, may constitute sufficient grounds for civil liability. Can the physician be held accountable by reason of the fact that the patient has chosen to refuse any medical intervention due to the deficient character of the information transmitted? The law refers to a similar hypothesis: according to art. 13 of the Act no. 46/2003, the patient is entitled to refuse medical intervention, in writing, taking responsibility for his decision the consequences of which have been fully explained to him. However, this is in the author's opinion, a different situation. The law deals with the refusal of a specific medical act and the consequences assumed for that particular medical act, and not those of any alternative medical act in the situation of the respective patient.[56] Regarding damage and the causal relation between the illicit conduct and damage, the author makes several interesting observations. In explaining damage, French doctrine and case-law refer to the theory of "losing a chance" or "the lost chance" ("théorie de la perte de chance"[57]). The starting premise is the occurrence of a therapeutic risk of which the patient has not been informed or, although informed, he was not presented with the medical alternatives to the procedure, capable of eliminating or diminishing the therapeutic risk. Non-compliance with the obligation of information limits the options of the patient who in this way loses the chance of a decision that might be more favourable from a therapeutic point of view. In other words, the theory of the lost chance attributes to the occurring risk the status of damage, being directly linked to the "denial" of the patient's right to choose in full awareness. For example, the lack of information given to the pregnant patient regarding the foetus' malformations deprives the former of the liberty of choosing whether to carry on or interrupt her pregnancy. In evaluating the amount of the damage (which is not to be mistaken for moral or material damage caused by the occurrence of the risk), doctrine has resorted to a type of fictitious reasoning, by estimating the probability of the patient refusing the medical act had he been correctly informed; the higher the probability of refusal, the higher the amount of damages.

The author criticises, for good reasons, this speculative theory which is incompatible with the conditions of civil liability. The damage of a lost chance is by definition hypothetical, whereas civil liability accounts exclusively for the damage which is certain both in its existence and in its amount.[58] According to

[56] Regarding the obligation to inform the patient of consequences and risks of his decision in the case of refusal of the suggested medical act, the author quotes the Decision of 15 November 2005, French Cour de Cassation, Chambre Civile no. I, Bulletin d'information de la Cour de Cassation no. 634 of 15 February 2006, no. 303.

[57] *I. Souplet*, La perte des chances dans le droit de la résponsabilité medicale, Université de Lille II, Faculté des Sciences Juridiques, Politiques et Sociales (2002); *F. Delobre/C. Devlaux*, Une perte de chance de guérision ou de survie, un préjudice imaginaire? Droit médical no. 5/2005,vol. 79, 267–301; *P. Vasilescu*, Notă la Hotărârea nr. 485 din 28 noiembrie 1997 a Curții de Casație Franceză, Studia Universitatis Babes-Bolyai no. 1/2002, 59–70.

[58] In this sense, we quote: *L. Pop*, Romanian Civil Law. General Theory of Obligations (1998) 199; *P. le Tourneau*, Droit Civil. La responsabilité civile (2000) 240.

French case-law, the damage caused by lack of information of the patient appears as occurrence of a therapeutic risk[59] unaccountable for by the medical act performed. But such an interpretation would mean that, *per a contrario*, whenever the respective risk has not occurred, since there is no damage, responsibility shall not be engaged, even though the obligation of information had been completely ignored. On the other hand, there is the situation when damage caused to the patient, apparent in the form of occurrence of a therapeutic risk, is in fact a type of *malpraxis*. In this particular case civil liability based on fault is likely to cover the entirety of the damage caused, including the part virtually owed on the basis of non-compliance with the obligation to inform, therefore rendering liability for lack of information useless.

84 In light of these arguments, the author arrives at a bold conclusion – that the obligation of the medical staff relative to the patient's right to informed consent does not enjoy the legal force of a separate source of civil liability. The author expresses her suspicion that responsibility for the omission to inform the patient might actually represent a means for *therapeutical alea* to be considered damage subject to reparation. This would normally be incompatible with the nature of the main obligation, which is essentially an obligation of diligence and not of result. The author's suspicion lies on corroboration of several legal provisions. For instance, according to Act no. 95/2006, the physical or mental state of the patient following the performance of the medical act are not likely to engage *malpraxis* responsibility if they are owed, among others, to "complications and generally accepted risks of investigation and treatment methods". The same circumstances may, nonetheless, entail responsibility for lack of information of the patient, which constitutes a strict attitude towards medical staff or, as the author puts it, "an illusory reason for civil liability". This is explained by the fact that the same "generally accepted risks" that have precluded professional *malpraxis* responsibility are clearly capable of altering the accuracy of the "medical predictions" communicated to the patient before the carrying out of the medical act.

85 The conclusion of the analyzed article is that direct civil liability of the medical staff for conduct contrary to the patient's right to informed consent, as established by law, is difficult to reconcile with the strict conditions of the notion of civil liability. The content and limits of the obligation of information are insufficiently clear, as well as the exceptions from the rule of informed consent. Consequently, landmarks of the licit or illicit character of the required conduct are, at most, vaguely detectable. The damage and the causal relationship between the former and the illicit conduct lie in uncertainty. The whole legal construction is considered to be unconvincing and its practical efficiency stands disputed.

[59] *Y. Lambert-Faivre*, Droit du dommage corporel – Systèmes d'indemnisation, Précis Dalloz (4th ed. 2000) 680 f.; *P. Coursier*, Bilan et perspectives du droit de la responsabilité médicale en matière civile et administrative, Revue médicale de l'assurance maladie no. 3/2000, 55–63.

XXIII. Slovakia

Anton Dulak

A. Legislation

1. Draft of Legislative Codification Strategy of Private Law

Late in January 2007 the Minister of Justice established a Re-codification Commission which was given the task, in line with the Program Statement of the Government of the Slovak Republic and the Legislative Tasks General Plan for 2006 – 2010, of re-codifying private law and preparing a new Slovak Civil Code. 1

Early in summer of 2008 the Re-codification Commission presented to the general public its "Legislative Codification Strategy of Private Law in the Slovak Republic" (the "Strategy"), the conception of which is based on a monist model with a "social focus".[1] 2

In the area of liability for damage, the proposed legal regulation is to be modernized, with a special regard to harmonization of the national law with the law of the EU Member States. Thus, the new Civil Code should include not only the recognized institutes formerly not distinctively defined (such as e.g. compensation for the damage caused by an animal, an object or the damage caused incidentally), but also clearly bring new ideas and conceptions. The future regulation of civil law is patterned after the Principles of European Tort Law (PETL). 3

The Strategy defines the concept of damage quite broadly as "pecuniary and non-pecuniary detriment to a publicly protected interest", with a higher degree of protection that should apply in cases of damage/injury to life and health, physical and mental integrity, dignity and freedom of individuals. The new Code is expected to contain provisions on the causal relationship, but also departures from causality that may open new opportunities for a flexible use of other factors, such as e.g. predictability of damage. 4

[1] See *D. Dulakova*, Spotrebiteľská zmluva v aktuálnom Občianskom zákonníku a v pripravovanom novom Občianskom zákonníku, in: Ministry of Justice of the Slovak Republic, Legislative Draft of Private Law Codification – the materials from a conference of experts (2008) 241–248.

5 In conformity with PETL, the Strategy includes grounds of liability, mainly liability based on fault. A faulty activity is any activity in violation of the required standard of conduct (see Art. 4:102 PETL). The Code is intended to also include the provisions concerning enterprise liability according to the PETL pattern contained in the Swiss statutory regulations or Restatements III (USA).

6 Priority should be given to monetary damages. The amount of pecuniary damages should be determined in an abstract way by reference to a market value (see Art. 10:201 PETL). For the recovery of non-pecuniary damages, it is proposed to abolish the existing limits on higher compensation for pain and suffering and social hardship as may be determined by the courts.

7 The proposed changes have been accepted by the general public without any substantial objections. The strongest resistance against the provisions concerns the additional power of the courts in determining higher compensation for pain and suffering and social hardship based on individual circumstances of different cases. Objections were made only by the Social Insurance Agency and some representatives of other insurers.

B. Case Law

1. Ruling of the Supreme Court of the Slovak Republic (Case No. (RC) 2 Cdo 292/2006) Reported Cases No. 2/2008: Violation of Duty of Preventive Care and Causal Relationship

a) Brief Summary of the Facts

8 The persons alleging to be husband and wife K made a contract of sublease of a flat on 25 April 1994 with another couple P, the genuine lessors. Having fraudulently obtained the necessary documents, couple P drew up, through an agent (the second defendant), a contract of transfer of rights and duties related to the flat in question with the housing cooperative (the first defendant). For the transfer of rights to the flat they obtained SKK 680,000 (approx. € 22,572) from the claimants.

9 The claimants sought to recover the amount paid as a compensation for pecuniary damage. They argued in their statement of claim that both the first and the second defendants were liable for the damage, because they did not act in a manner by which the damage could have been prevented (§ 415 of the Civil Code).

10 Their claim was granted by the District Court, which, however, awarded damages of only SKK 161,172 (approx. € 5,350) plus interest. The Court reduced the amount of compensation on the grounds that the claimants also contributed to the damage by their own fault (§ 441 of the Civil Code); the claimants should have known that under the circumstances they were required to pay only the balance value of their membership ownership interest and not the so-called market value of their ownership interest, because in this case only the

members' rights and duties and not the transfer ownership rights, were being transferred.

The Regional Court affirmed the decision of the District Court disagreeing, however, with the part of the judgment in which the defendants were ordered to pay SKK 161,172 (approx. € 5,350) plus interest. Contrary to the District Court, the Regional Court held that the defendants' conduct could not be considered a failure to act with due care, unqualified or careless conduct, or in other words a conduct contrary to § 415 of the Civil Code. In addition, the appellate court came to the conclusion that the damage suffered by the claimants who paid SKK 680,000 (approx. € 22,572) to unknown persons (swindlers), was not in a causal relationship with the conduct of the defendants. 11

The claimants filed an appeal to the Supreme Court of the Slovak Republic which dismissed the appeal on the grounds that it was unjustified. 12

b) Judgment of the Court

It is a breach of the duty of care to act in such a manner that will cause harm to another, as defined in § 415 of the Civil Code, when, in the context of a transfer of rights and duties related to a cooperative flat, a duplicate of the contract of a lease of the cooperative flat was made and provided to a person to whom it should not have been provided because such person was neither a lessee nor a person authorized by the lessee. 13

There is a causal relationship between a breach of duty of preventive care and the damage defined by § 415 of the Civil Code, where there is a cause-and-effect relationship between the breached duty of preventive care and the damage caused. 14

One of the attributes of a causal relationship is "proximity" between the cause and its effect, where a cause directly (proximately) precedes the effect and arises from it. Thus, the causal relationship must be direct, immediate and uninterrupted; a mere vicarious relationship is not sufficient. 15

c) Commentary

The claimants sought compensation for the damage allegedly caused by the unlawful conduct of both the first and the second defendants. The claimants argued that the defendants acted in breach of the general duty of preventive care under § 415 of the Civil Code, subject to which a (reasonable) person must act in a manner that will cause no harm to others. The claimants contended that the first defendant acted in breach of due care by failing to be sufficiently diligent in dealing with its administrative duties. The first defendant was at fault by providing a copy of the contract of lease of the flat to a person other than the lessee (or his/her representative) and it was wrong when the first defendant failed to properly ascertain the identity of the person who required the copy of the contract of lease. The unlawful conduct of the second defendant occurred allegedly, inter alia, as a result of the "non-standard" delivery of the materials 16

in support of the transfer of membership rights (personal delivery and not a registered delivery) and by the defendant acting without such entrepreneurial authority.

17 The Supreme Court considered both conditions of liability. The Court ruled that it was a violation of § 415 of the Civil Code to make and provide a copy of the contract to a person other than the lessee or a person not authorized by the lessee. The Supreme Court maintained that the duplicate of a contract of lease was a document that could be misused by a third person, which actually occurred in the given case. In the Supreme Court's opinion, although the duty to provide a copy of the contract only to the lessee is not laid down by law or the by-laws of the cooperative, such a duty is implied by the nature of the matter as such. According to the Supreme Court, the defendant should have carefully ascertained the identity of the person who required a copy of the contract although a "Statement of the Loss of Documents", certified by a public notary was submitted. The Supreme Court believes that the defendant was obligated to consider the correctness and completeness of the documents necessary for such transfer and to make sure that there were no discrepancies between the signatures in the contract (although authenticated by a public notary) by comparing them with the signatures in other documents included in the files related with the flat.

18 As for the proof of a causal relationship, the Supreme Court made reference to the established legal theory, according to which causal nexus is defined as the direct connection between the events (objective circumstances) where one event (cause) results in another event (effect). The cause-and-effect relationship must be direct, proximate and uninterrupted. A causal relationship must be strongly proved; probable standard of proof would be insufficient.

19 According to the Supreme Court, the provision of the copy of the contract from the housing cooperative to swindlers was not the proximate cause of the damage claimed. The existence of a causal relationship in this case would have been established by proving unquestionably that if it were not for the wrong conduct of the first defendant, the claimants would not have paid the amount in question to unknown persons who alleged they were the husband and wife P. The Supreme Court maintained that the further development of events could hardly have been firmly affirmed if the first defendant had acted with due care in ascertaining the identity of the person (identity fraud was not discovered by two public notaries who authenticated the signatures of these persons independently of each other). The Supreme Court held that it could not be firmly assumed how the claimants would have acted if the first defendant had provided them with all available information concerning the flat in question.

2. Ruling of the Supreme Court of the Slovak Republic (Case No. 3 Cdo 136/2007) Reported Cases No. 5/2008: Increased Compensation for Social Hardship

a) Brief Summary of the Facts

In an action before a District Court, the claimant sought a higher compensation amount for social hardship resulting from an occupational disease. The District Court discontinued the proceedings on the grounds that since 1 January 2004 (the effective date of Act No. 461/2003 Z.z. on social insurance) such claims must be determined in the first instance by the Social Insurance Agency. 20

The Regional Court acting as an appellate court affirmed the decision of the District Court adjudicating as the court of first instance. 21

The decision of the appellate court was challenged by the claimant on the grounds that, as a result of discontinued proceedings, the claimant was denied the right to have the case dealt with by the court. 22

The Supreme Court acting as a court of special appeal dealt with the procedural requirements for a special appeal. 23

The Court granted the special appeal and quashed the decision of the Regional Court challenged by the claimant and returned the matter for further proceedings to the District Court. 24

b) Judgment of the Court

The courts have relevant jurisdiction to determine whether to increase compensation for social hardship resulting from an occupational disease under § 5 para. 5 of Act No. 437/2004 Z.z. 25

c) Commentary

Until the end of 2003 claims concerning employers' liability for damage resulting from occupational injury or occupational disease were adjudicated by the courts. This applied to claims for compensation for loss of income, loss of retirement benefits, pain and social hardship, the costs reasonably incurred in relation to medical treatment and material damage. 26

By passing Act No. 461/2003 Z.z. on social insurance, several changes occurred in cases concerning claims for the recovery of damage. The only claim arising from occupational injury or disease governed by the Labour Code remains material damage; other claims are governed by the Social Insurance Act. Under its § 177, the Social Insurance Agency has the sole jurisdiction to decide cases in the first instance. 27

Previous judicial practice (Ruling of the Supreme Court of the Slovak Republic, Case No. 4 Cdo 19/2006), as well as the joint opinion of the Civil College and Administrative College of the Supreme Court (Case No. 2 Cdo 28

9/2006)[2] confirmed the rule according to which the general courts have no jurisdiction to decide cases of employees seeking compensation for damage caused to their health as a result of occupational disease. A later opinion (published in the Collection of Cases of the Supreme Court of the Slovak Republic under No. 27/2006) differed from this practice, maintaining that in claims seeking an increased point based score for social hardship, the Social Insurance Agency has no jurisdiction as provided by a special statutory regulation (§ 5 para. 5 of Act No. 437/2004 Z.z.). Such claims must be determined by the courts.

29 This conclusion has been confirmed by the above ruling of the Supreme Court of the Slovak Republic No. 5/2008. Moreover, a refusal of the power of the courts to decide on such claims would be a denial of justice (*denegatio iustitiae*), which would contradict Art. 46 para. 1 of the Constitution of the Slovak Republic.

3. Ruling of the Supreme Court of the Slovak Republic (Case No. 3 Cdo 255/2005) Collection of Cases No. 32/2008: Compensation for Damage Caused to Health of Persons Deported to Nazi Concentration Camps

a) Brief Summary of the Facts

30 The District Court obligated the defendant to pay to the claimant SKK 2,808,000 (approx. € 93,208.52) plus court costs. The Court based its decision on the fact that, as a result of racial and religious persecution by the governmental authorities, the claimant, a member of a Jewish community, was deported as a 41-day-old baby together with his parents to a labour and deportation camp and kept there by force until 1944. The claimant lived in hiding in fear of the anti-Jewish governmental power until Slovakia became liberated in April 1945. Consequently, the claimant suffers from permanent health disorders, serious orthopedic dysfunctions, practical blindness (of 99%) and is severely handicapped.

31 The District Court considered the claim for compensation under Act No. 305/1999 Z.z. governing claims for compensation for damage caused to health as a result of and in relation to deportation or life in hiding. The basis for the determination of the amount of compensation of the damage was the point score shown in medical expert reports. The value per point was SKK 60 (approx. € 2) as determined by the Court in accordance with Regulation No. 65/1965 Zb. as amended by Regulation No. 19/1999 Z.z. Referring to § 7 para. 3 of the Regulation, the Court, having considered also the relevant circumstances applicable to this case, increased the amount of compensation to twenty-fold of the basic point score. As a result of cruel and inhumane treatment in the labour and deportation camps and hiding before persecution by the repressive authorities of the Slovak State, the Nazi occupation and the absence

[2] At that time a different Opinion concerning the jurisdiction of courts was part of the ruling of the Supreme Court of the Slovak Republic in Case No. 2 Cdo 253/2004.

of fundamental health care, the claimant suffered from serious health disorders from early childhood with permanent damage and lifelong conditions which led to great disadvantages in his life as regards educational and social opportunities.

The Regional Court acting as a court of appeals affirmed the decision of the District Court. 32

The defendant filed an extraordinary appeal against this decision to the Supreme Court. The defendant argued that the courts wrongly applied Regulation No. 19/1999 to determine the damage that arose before the Regulation came into effect. In addition the defendant also argued that the courts wrongly applied § 7 para. 3 of Regulation No. 32/1965 Zb. and thus increased the amount of compensation. According to the defendant, the courts did not respect the purpose of Act No. 305/1999 Z.z. as amended, which was renamed as the Act on "the mitigation of some wrongs caused to persons deported to Nazi concentration camps and internment camps". 33

The Supreme Court dismissed the extraordinary appeal. 34

b) Judgment of the Court

In cases of damage to health caused in relation to deportation to Nazi concentration camps and internment camps under § 3 para. 1 (b) of Act No. 305/1999 Z.z. as amended by Act No. 126/2002 Z.z., the amount of compensation for pain, suffering and social hardship is SKK 60 (approx. € 2) per point as set forth in Regulation No. 32/1965 Zb. as amended by Regulation No. 19/1999 Zb. 35

c) Commentary

Under Act No. 305/1999 Z.z. on the mitigation of some wrongs caused to persons deported to Nazi concentration camps and internment camps as amended by Act No. 126/2002 Z.z. (the "Act"), the eligible persons defined in § 2 have the right to monetary compensation of SKK 3,000 (approx. € 99.60) for each month of deportation and period of hiding (§ 3 para. 1 9(a) of the Act), as well as compensation for the damage to health caused as a result of such deportation and hiding (§ 3 para. 1 (b) of the Act). This judgment rules on a substantial issue which has so far not been addressed by the courts – the basis of compensation for damage caused to health recoverable by eligible persons under § 3 para. 1(b) of Act No. 305/1999 Z.z., and the statutory regulation applicable in such cases. 36

This judgment of the Supreme Court of the Slovak Republic upheld the conclusions of the courts concerning the application of § 444 of the Civil Code and Regulation No. 32/1965 Zb. on compensation for pain and suffering and social hardship. The Supreme Court agreed also with the conclusion that, in determining the amount corresponding to one point of compensation for pain and suffering and social hardship, Regulation No. 32/1965 Zb. as amended by Regulation No. 19/1999 Z.z., applied, because the right to compensation 37

for damage caused to health as provided by Act No. 305/1999 Z.z. applied following the effectiveness of the Act (1 December 1999), when Regulation No. 32/1965 Zb. amended by Regulation No. 19/1999 Z.z. was effective.

C. Literature

1. ***A. Dulak,*** **Náhrada škody v novom Občianskom zákonníku – vybrané problémy (Compensation for damage in the new Civil Code – selected issues), in: Ministry of Justice of the Slovak Republic, Legislative Draft of Private Law Codification – the materials from a conference of experts (Bratislava 2008)**

38 The paper deals with some reasons for changes in the statutory approaches to compensation under the newly drafted Civil Code. Reference is made to the current situation in which unjustified differences still exist in claims for the damages recoverable under the Civil Code, the Commercial Code and the Labour Code. In addition, the author analyses some conceptions established and constructed under the political impact of the former political regime under which priority was given to liability for damage to property (socialist publicly owned property) rather than to the protection of life, health and other human values.

XXIV. Slovenia

Rok Lampe

A. Legislation

1. Preventing Family Violence Act (Official Gazette, no. 16-2008)

This Act defines the concept of domestic violence and the role and functions of state organs, holders of public authorizations, performers of civil services, local self-government bodies and non-governmental organizations in dealing with domestic violence. It also provides measures to protect victims of domestic violence. The prevention of domestic violence, of course, primarily focuses on the area of family law and partly on criminal law. It is worth mentioning in relation to tort law because the Act provides measures for preventing domestic violence as well as measures whose purpose it is to protect personal rights. 1

According to the Act, domestic violence is regarded as acts of a physical, sexual, psychological or violent nature, or economic exploitation, inflicted by one family member on another, or neglect of a family member (the victim), irrespective of age, gender or any other personal circumstance of the victim or the producer of violence. The Act further defines the definition of physical, sexual, psychological and economic violence and neglect. 2

The victim may suggest measures to the court of law in order to prevent future damage. If the producer of violence physically injures the victim, causes damage to her health or in some other way offends her dignity or other personal rights, the court can, following a proposal of the victim, prohibit him, in particular: 3

- from entering the home in which the victim lives;
- from entering a certain area around the home of the victim;
- from approaching the places where the victim is regularly located (workplace, school, kindergarten, etc.);
- from making contact with the victim in any way, including by means of electronic communication;
- from arranging a meeting with the victim.

Such measures could also be taken by the court: 4

- if the producer of violence threatens to hurt the victim or otherwise unlawfully injure her dignity or personal rights;
- if the producer of violence illegally enters the victim's home or in some other way disturbs the peace;
- if the producer of violence unlawfully harasses the victim, for example, by tracking the victim by means of electronic communication;
- if the producer of violence unlawfully harasses the victim by using or publishing any personal information regarding the victim, court records and personal records on the internet.

The court limits the duration of measures from the first paragraph of this article to a maximum of six months. The victim may propose an extension of the measure for up to six months. An appeal to the court against a measure will not suspend the execution of the measure.

2. Protection of Cultural Heritage Act (Official Gazette, no. 12-2008)

5 I primarily mention the Protection of Cultural Heritage Act in the context of the new legislation because it regulates the right to compensation for the devaluation of cultural heritage. The protection of cultural heritage is in the public interest. The public benefit of cultural heritage protection is determined in accordance with the cultural, educational, developmental, symbolic and identifying heritage significant for the country, provinces and municipalities.

6 In doing so, everyone has the right to use cultural heritage as a source of information and knowledge, to enjoy it and contribute to its enrichment. It is also everyone's responsibility to respect the cultural heritage of others. The right of inheritance may be restricted only in the public interest and with the rights of others. In these situations damage can occur. Therefore, the Protection of Cultural Heritage Act provides in art. 41 compensation for the devaluation of an archaeological site.

7 Where there is a devaluation of an archaeological site, the compensation is to be set at an amount at least equal to the value of research that would be necessary for the transfer of the destroyed cultural heritage into archives of archaeological sites.

8 Compensation is required:

- for registered archaeological sites or monuments of national importance on behalf of the Republic of Slovenia by the General Attorney;
- for monuments of local importance for a province or municipality.

9 The court decides the amount of compensation. It belongs to the budget of state, province or municipality that declared a monument.

3. Criminal Code (Official Gazette, no. 55-2008)

10 Aware of the purpose of research which focuses on compensation law, it is nevertheless necessary to highlight that under the continuity of the Supreme Court

of the Republic of Slovenia in civil law, it is also necessary to take account of the achievements of the legal practice of criminal law. This applies particularly to the protection of personality rights. The protection of personality rights – to life, mental, sexual, physical integrity, freedom, privacy and honour and goodwill – has its foundation also in the Criminal Code. In particular, I would like to focus specifically on the rights to privacy and honour or goodwill. These two are normally the most exposed in the media. Slovenian legal practice in the last years has recorded a massive increase in the number of lawsuits against the media. For this purpose it is necessary to point out that in such litigation achievements of criminal dogmatism and criminal practice[1] play a significant role. The Supreme Court has, in the leading case, determined that the (civil) courts, in assessing whether there has been unacceptably harmful behaviour, must use criteria which are governed by compensation law. However, if these criteria are incomplete, the Court is permitted to use criteria which have their origin in the criminal justice field. Especially it is necessary to mention criminal offences (crimes) which infringe on one's privacy and honour and good name. We find them in the 18th Chapter of the Criminal Code (offences against honour and good name) – these are insult, defamation, exposure of personal and family circumstances, accusing another of a criminal offence with the intention of disparaging and injurious accusation.

Insult 11

Art. 158

(1) Whoever insults another shall be punished by a fine or by imprisonment of up to three months.

(2) If the offence under the preceding paragraph has been committed through the press, radio, television or other means of public information or at a public assembly, the perpetrator shall be punished by a fine or by imprisonment of up to six months.

(3) Whoever expresses words offensive to another in a scientific, literary or artistic work, in a serious piece of criticism or in the exercise of an official duty, in the performance of a journalist's profession, in the course of a political or other social activity or in the defence of justified benefits, shall not be punished, provided that the manner of expression or other circumstances indicate that his expression was not meant to be derogatory.

(4) If the injured person has returned the insult, the Court may punish either both parties or only one of them or may remit the punishment.

The second of these offences is defamation on the basis of art. 159. This offence is defined as follows: 12

(1) Whoever asserts or circulates anything untruthful about another person, which is capable of damaging the latter's honour or reputation and which he

[1] Judgment of the Supreme Court VS RS II Ips 402/99, is a typical example of a civil and criminal case of defamation.

knows to be false, shall be punished by a fine or by imprisonment of up to six months.

(2) If the offence under the preceding paragraph has been committed through the press, radio, television or other means of public information or at a public assembly, the perpetrator shall be punished by a fine or by imprisonment of up to one year.

3) If that which has been untruthfully asserted or circulated is of such a nature that it may bring about grave consequences for the damaged person, the perpetrator shall be punished by imprisonment of up to two years.

13 Injurious Accusation

Art. 160

(1) Whoever asserts or circulates anything about another person which is capable of causing damage to the honour or reputation of that person shall be punished by a fine or by imprisonment of up to three months.

(2) If the offence under the preceding paragraph has been committed through the press, radio, television or other means of public information or at a public assembly, the perpetrator shall be punished by a fine or by imprisonment up to six months.

(3) If what has been asserted or circulated is of such a nature that it may bring about grave consequences for the defamed person, the perpetrator shall be punished by a fine or by imprisonment of up to one year.

(4) If the perpetrator proves either the truth of his assertions or that he had reasonable grounds to believe in the truthfulness of what had been asserted or circulated, he shall not be punished for injurious accusation but may be punished either for insult (art. 158) or for reproach of a criminal offence with the intention to disparage (art. 162).

(5) If whoever asserts or circulates for another person that he has committed a criminal offence for which a perpetrator is prosecuted *ex officio*, then the truthfulness that a damaged person has committed a criminal offence may only be proved by means of a final judgment. Other evidence may be allowed only when prosecution or a trial before a Court are not possible or permitted.

(6) If the injurious accusation asserting that the damaged person has committed a criminal offence, for which the perpetrator is prosecuted *ex officio*, has been committed in circumstances under par. 3 art. 158 of the present Code, the perpetrator shall not be punished for injurious accusation even without the existence of a final judgment when he can prove that he had a justified reason to believe in the truthfulness of what he had asserted or circulated.

14 Exposure of Personal and Family Circumstances

Art. 161

(1) Whoever asserts or circulates any matter concerning the personal or family life of another person which is capable of injuring that person's reputation shall be punished by a fine or by imprisonment of up to three months.

(2) If the offence under the preceding paragraph has been committed through the press, radio, television or other means of public information or at a public assembly, the perpetrator shall be punished by a fine or by imprisonment of up to six months.

(3) If what has been asserted or circulated is of such a nature that it brings about grave consequences for the damaged person, the perpetrator shall be punished by a fine or by imprisonment of up to one year.

(4) Except in cases under par. 5 of this article, it shall not be permitted to prove truthfulness or untruthfulness of what was asserted or circulated from the personal or family life of another person.

(5) Whoever asserts or circulates any matter concerning the personal or family life of another person in the exercise of an official duty, political or other social activity, the defence of any right or the protection of justified benefits shall not be punished, provided that the defendant proves either the truthfulness of his assertions or that he had a reasonable ground for believing in the truthfulness of what had been asserted or circulated.

Accusing another of a Criminal Offence with the Intention to Disparage 15

Art. 162

(1) Whoever, with the intention to disparage accuses another person of having committed a criminal offence or having been convicted for the same, or whoever communicates such a fact to a third person with the same intention, shall be punished by a fine or by imprisonment of up to three months.

(2) If the offence under the preceding paragraph has been committed through the press, radio, television or other means of public information or at a public assembly, the perpetrator shall be punished by a fine or by imprisonment of up to six months.

I have to point out that, despite the guidelines (directives) and instructions of the Council of Europe arguing that defamation and invasion of privacy belong in civil law and have no place in the Criminal Code, Slovenian legislature, however, has maintained these torts as criminal offences. In professional publications, I have repeatedly pointed out that "de lege ferenda" is not to protect privacy and good name against the media in criminal law, but only in civil law. However, in the possible assessment of the constitutionality of these provisions, the Constitutional Court will have the last word, although it already ruled in 1999 that these provisions are in accordance with the Constitution.[2] 16

[2] Judgment of the Supreme Court, I-226/95.

17 I would also like to point out a specific offence, which is intended to protect the right to privacy – this is the "Abuse of personal data from article 143 (Abuse of Personal Data)". According to this provision, whoever uses personal data which are handled according to some act (to law), inconsistent with the purpose of collection or without the consent of the person to whom the personal data relate, shall be punished by a fine or imprisonment of up to one year. Consequently whoever breaks into a filing system on a computer in order to acquire personal data for himself or for third persons shall be punished the same (in accordance with the preceding paragraph of the present article).

18 Par. 3 of art. 143 defines that if this crime is committed in such a manner that its effect is public, then the sentence can be stricter and par. 4 prohibits the abuse of identity: Whoever takes over the identity of another person and under his/her name exploits his/her rights, gaining property on his/her account or affects his/her personal dignity, shall be punished by imprisonment from three months to a maximum of three years.

19 If any offence from the preceding paragraphs is committed by an official person through the abuse of an official position or official rights, he shall be punished by imprisonment of up to five years. The prosecution based on the third paragraph of this article shall begin on the proposal.

20 In the case of an infringement of the right to privacy, a right protected in art. 36 of the Constitution of the Republic of Slovenia, Slovenian tort law practice has traditionally allowed the awarding of compensation for material and non-material damage. Art. 143 of the Criminal Code refers to specific laws that govern the collection, storage and disposal of personal information. The general law in this area is the Personal Data Protection Act.

4. Patient Rights Act (Act on Patient Rights, Official Gazette, no. 15-2008)

21 The Patient Rights Act is the second "medical act" from 2008. I mention it mainly because it is directly related to the previously considered area, that is the protection of the right to privacy through the abuse of personal data. As mentioned before, art. 143 of the Criminal Code incriminates abuse of personal data governed by special Acts. One of those special Acts is the Patient Rights Act. Art. 43 of this Act provides the right to privacy and the protection of personal data.

22 Health care providers must always respect patient privacy, particularly a patient's moral, cultural, religious, philosophical or other personal beliefs. While undergoing health care, it must be made possible that only the following are present:

- health care workers and co-workers and medical staff who provide medical treatment or medical care;
- persons that the patient wishes to be present, if appropriate and feasible according to the nature of the medical intervention or medical treatment;
- persons who have the right to consent to medical treatment or medical care when a patient is unable to decide himself and if it is appropriate

and feasible according to the nature of the medical intervention or medical treatment;
- other persons, if so provided by law.

Persons whose presence is necessary for the purpose of health education may be present only with the prior consent of the patient. Consent may also be given by persons who have the right to consent to medical treatment or medical care when a patient is unable to decide himself. 23

The determination of the persons from the second paragraph of this article and the consent from the previous paragraph shall be provided in a form that is required to consent to specific medical treatment or medical care. The patient has the right to request any other appropriate and reasonable measures to protect his privacy in health care. 24

According to art. 44, the patient has a right to protection of personal data, which includes the right to confidentiality of personal information including information regarding visits to medical staff and other details about his treatment. 25

Concerning patient health information and other personal information, health care workers and co-workers should act in accordance with the principle of confidentiality and regulations that govern the protection of personal data. 26

The use or other processing of information relating to the health of the patient and other personal data for the purpose of treatment is permissible even on the basis of patient consent or the consent of the persons who have the right to consent to medical treatment or medical care when a patient is unable to decide himself. The use or other processing of information relating to the health of the patient and other personal data outside of health care is allowed only with the patient's consent or the consent of the persons who have the right to give consent to medical treatment or medical care when a patient is unable to decide himself. After the patient's death, consent can be given by his close family members unless the patient expressly prohibited this in writing. 27

Regardless of provisions from the previous paragraph, the use of information relating to the health of the patient and other personal data outside of health care is specified by law. Consent for use and other processing of personal data from the third and fourth paragraphs of this article shall not be required: 28

- if, for the purposes of epidemiological and other research, education, medical publications, or other purposes, the identity of the patient cannot be ascertained;
- if for the purpose of monitoring the quality and safety of health care, the identity of the patient cannot be ascertained;
- when the application of health status is required by law;
- when data are transmitted to another health care professional for the needs of treatment;
- when the law provides otherwise.

29 Personal data processed in accordance with the third, fourth and fifth paragraphs of this article shall be adequate and appropriate to the purposes for which they are collected and further processed. The patient has the right to determine who may have access to his medical records and the persons to whom access to his medical records is prohibited if it is not contrary to law. Therefore, the abuse of personal data which is covered by the Patient Rights Act is on the one hand a criminal act and on the other it is a civil tort. However, for these violations, it is within the law of torts that the possibility of a civil penalty is given – compensation.

B. Cases

1. Judgment of the Supreme Court II Ips 53/2006, 27.3.2008: Mental Pain; Personality Rights – Right to Respect for Family Life

a) Brief Summary of the Facts

30 The defendant's tortious action, according to the final decision of the criminal court which considered her guilty of abducting a minor on the basis of par. 1 art. 200 of the Criminal Code, was that, since 10 September 1995, as the mother of minor D.R., she prevented the father (the plaintiff) from having contact with the child. This was not disputed. The actual findings show that the plaintiff was prevented from seeing his child for three years. Therefore one must ask whether the defendant's conduct caused injury to the plaintiff in the previously described form of mental pain.

b) Judgment of the court

31 This claim has its basis in the provision of art. 200 of the Act on Obligational Relations. The plaintiff's right to have contact with his child is his personal right which is enshrined in the provisions of art. 106 of the Marriage and Family Relations Act. It is a parental right which is, according to the Constitution of the Republic of Slovenia, a basic human right and fundamental freedom (art. 53 and 54). The European Convention on Human Rights and Fundamental Freedoms in art. 8 also specifically identifies the right to family life. An infringement of this right to personal and family life, in addition to other conditions for the formation of civil torts, leads to the liability of the tortfeasor to pay compensation. It is a legally recognized harm whose actual existence and extent is a matter of actual findings.

32 The main issue of the Supreme Court judgment is the degree and duration of mental suffering, which determine the amount of damage. Regarding mental pain due to a violation of the right to personal and family life, the court did not seek the opinion of a medical expert. To this extent, the review unduly relied on the position expressed in the decision opr. No. II Ips 4/2004.

This case examined the various manifestations of damage which is reflected in the injured party's medical condition and his limited social activities. The violations of the personal rights of the plaintiff did not result in such manifestations and for this reason it was possible to base the decision on compensation for the damage caused on art. 200 ZOR and similar cases of judicial practice. It is noted that the defendant made it impossible for the plaintiff to have contact with his minor daughter from 24 June 1994 until 19 May 1997, that is for three years. 33

Due to the lack of contact over this time period, even after the contact was resumed, the plaintiff still felt the effects of the lack of contact as his relationship to his daughter was disturbed and the girl expressed resistance. In the contested case, which included the definition of mental pain that is contained in the case of the court of first instance, compensation of SIT 2,700,000 (€ 11,266.90) was awarded. Due to the lack of judicial practice in determining compensation for such damage, a comparison with compensation due to a violation of personality rights in cases of unjustified detention was made. Such comparison is appropriate, but is not the only possibility. In this direction revision provides a comparison to the mental pain of losing a child. Such comparison is only relevant, since it is possible to agree with the interpretation adopted in the contested judgments that, when assessing the amount of compensation in that case, other goals were pursued because of the other protected good and purpose of compensation. The complaint alleging that the plaintiff pursued his property interests remained at the level of a generalized claim that is inconsistent with the established facts of mental pain and its appearances. However, the Review Court found that compensation of SIT 2,700,000 (€ 11,267) was too high considering the fact that after, three years circumstances have relatively normalized. The comparison with other, similar cases from judicial practice indicates that any compensation higher than the amount of € 8,500, which the court awarded, would (also) be too high according to the established facts. Therefore, the Supreme Court proceeded under the provisions of par. 1 art. 380 ZPP and changed the disproved court decision by reducing the amount of compensation that the defendant had to pay to the plaintiff to € 8,500. 34

c) Commentary

The right to have contact with one's child is a personality right, which is based on the provision of art. 106 of the Marriage and Family Relations Act. It is a parental right, which is also contained in the Constitution of the Republic of Slovenia as one of the human rights and fundamental freedoms (art. 53 and 54). Also the European Convention on Human Rights and Fundamental Freedoms in its art. 8 specifically identifies the right to family life. 35

An infringement of this right to personal and family life leads, in addition to other conditions for the formation of civil torts, to liability of the perpetrator. It is a legally recognized damage whose actual existence and extent is a matter of actual findings. 36

2. Judgment of the Supreme Court II Ips 38/2006, 13.3.2008: Personal Injury; Traffic Accident

a) Brief Summary of the Facts

37 The actual findings of the court of first instance which have undergone the test of the Court of Appeal are that the plaintiff as a car mechanic injured himself on 23 February 2001 while repairing a truck at the home of the owner M. While setting the brake pressure while the engine was running, one of the four airbags in the raised vehicle exploded. There was no connection between the adjusting of the brake pressure and the airbags. As a result of the airbag exploding, the plaintiff's eardrum was damaged and this led to partial loss of hearing.

38 The plaintiff claimed damages from the insurance company where the vehicle that he was repairing was compulsorily insured. The court, in accordance with art. 15 of the Compulsory Traffic Insurance Act (ZOZP), concluded that the insurance company is responsible only for damage that its owner causes to third persons when using the vehicle. The Supreme Court notes that the lower courts correctly interpreted the concept of use of the vehicle in accordance with art. 15 ZOZP and correctly concluded that the injury is not related to such use. Consequently they reasonably rejected the defence claim. Typical usage of a vehicle means that a vehicle is used for driving or for a specified ride. The purpose of mandatory vehicle insurance is to cover damage caused by the regular and normal use of the vehicle in traffic, since this represents an increased risk. A damage event which occurs while a vehicle is being repaired at the owner's home is not connected in any way with the essential function of the vehicle which is to transport persons in traffic. Any repairs to the vehicle do not represent the normal usage of the vehicle in accordance with art. 15 of ZOZP, although the engine is necessarily running while the repairs are being carried out due to the nature of the repairs. Therefore, the view that repairs also constitute "use" is mistaken and it is also unfounded to appeal on the basis of completely different cases of legal practice.

b) Judgment of the Court

39 The court of first instance rejected the defence request for compensation in the amount of SIT 1,346,724 (€ 5,619.78) with legal default interest and litigation costs. The claim was dismissed because the plaintiff claimed from the insurer of the vehicle whose policies only cover damage that is caused to a third person when using the vehicle. In this case, the vehicle was being repaired and not in traffic, so there was no "use" of the vehicle in accordance with art. 15 ZOZP.[3]

40 The court of second instance dismissed the plaintiff's appeal and confirmed the first decision.

41 The plaintiff appealed against the ruling of the court of second instance. The plaintiff introduces "all the revision reasons" and in revision insists in his

[3] Zakon o varnosti na javnih smučiščih (Official Gazzette), no. 70/94.

claim that there was a "use" of the vehicle and therefore the responsibility of the insurance company for the damage is given.

c) Commentary

The use of a vehicle in accordance with art. 15 ZOZP refers to a typical case of a traffic situation while driving or as a result of driving. The repair of a stationary vehicle at the owner's home does not constitute the use of the vehicle. 42

3. Judgment of the Supreme Court Case II Ips 137/2007, 28.2.2008: Personal Injury; Skiing

a) Brief Summary of the Facts

The courts concluded that the plaintiff was injured while skiing at the ski resort, "Rudno polje" on 29 January 1992 and suffered transverse spiral fractures of both bones of the right leg. At the time of the accident, the ski resort did not have an operating permit and use of the facility was intended only for use by members of the police and territorial defence forces. However, despite this fact, the defendant sold ski tickets to other persons, including the plaintiff. Since the operator allowed the public access to the ski resort, the courts correctly concluded that it was obliged to provide safety measures in accordance with the then existing Act on Safety on Ski Slopes (ZVJS).[4] The courts found that the plaintiff fell on the lower section of the ski resort at the edge of a small forest where the snow was not compact. The Court discovered that the plaintiff fell at a part of the ski piste which was 2m within snow that was not compact and about 5m from compact snow. The claims of the plaintiff that she was acting correctly when she left the area where snow was not compact at the edges of the ski run, on the route under the ski lift and nearby woods, are irrelevant. Prior to falling, the plaintiff had been skiing outside the ski run and over snow that was not compact. However the fall happened when the plaintiff was already skiing on the lower ski run. The defendant did not act in accordance with the provisions of ZVJS because the ski run had not been adequately prepared and because there were no signs indicating this. In accordance with par. 1 of art. 9 ZVJS, ski runs must be prepared in such a way that there are no dangerous parts. The defendant should at least have indicated by means of signs that the snow on the slope where the plaintiff fell was covered with snow which had not been prepared, in accordance with par. 2 and 3 of art. 9 ZVJS. Because the defendant failed to fulfil this duty, as demanded in art. 9 ZVJS, the court correctly concluded that the operator was liable (par. 1 art. 154 in connection with art. 158 of the Code on Obligations). 43

b) Judgment of the court

The courts correctly decided that the plaintiff contributed to her injury due to a violation of par. 2 of art. 21 Act on Safety on Ski Slopes. She could have noticed patches of snow which were not compact because they were clearly visible on the ski run. Such patches of snow could also have been expected by the 44

[4] Official Gazzette, no. 16/77 and 42/86.

plaintiff as, prior to the fall, she had been skiing on a higher run with areas of snow which had not been prepared. The fact that she was skiing at unadjusted speed before the fall does not justify the conclusion that she is responsible for more than 40% of the damage incurred (art. 192 in connection with art. 205 of the Code on Obligations). Therefore the courts correctly decided that the defendant is liable to pay 60% of the compensation assessed for non-material damage. Upon examination of its own motion, the Supreme Court also found that the compensation for the plaintiff's non-material damage was correctly given by the lower courts in accordance with art. 200 and 203 of the Code on Obligations.

c) Commentary

45 A section of the ski run was not regulated by the defendant in accordance with the provisions of the Act on Safety of Ski Slopes since it left some unprepared snow in the middle of the ski run and failed to put up signs indicating this. In accordance with par. 1 art. 9 ZVJS, ski runs must be prepared in such a way that there are no dangerous parts.

4. Judgment of the Supreme Court II Ips 761/2005, 31.1.2008: Personal Injury; Individualisation of Compensation

a) Brief Summary of the Facts

46 The plaintiff was in a car accident on 24 December 1997. She suffered a break of the third lumbar vertebra, a broken wrist, fracture of (third and fourth) bone of the foot, dislocation of the fifth toe on her right foot, fracture of the left cheekbone and left upper jaw, wounds on the upper left eyelid, left forearm and on her right leg and concussion. A detailed account of the extent of all forms of non-material injury were contained on the sixth to eleventh page of the judgment of the court of first instance and on the third to fifth page of the Appeal Court's judgment and therefore, were not re-summarized. The courts properly awarded a higher amount of non-material damages to the plaintiff, comparing her injuries to similar types of damage and by taking into account the relationships between minor and major damage. She was awarded SIT 3,500,000 (€ 14,605.24) in compensation for physical pain and inconvenience of treatment, for secondary fear SIT 500,000 (€ 2,086.46), for the mental pain due to decrease of life activities SIT 7,500,000 (€ 31,296.95) and for mental pain SIT 1 million (€ 4,172.93). The total amount of compensation of SIT 12,500,000 (€ 52,161.58), taking into account the situation at the time of the first judgment, is equal to 78 average net salaries. This amount was decided at the discretion of the Supreme Court which also increased the plaintiff's claim for non-material damage.

b) Judgment of the court

47 The court of first instance ruled that the defendant must pay the plaintiff compensation for material and non-material damage in the total amount of € 12,500 (SIT 3,104,996) with legal interest for default and that it has to refund her litigation costs together with interest for default. Further claims for compensation

of non-material damage in the amount of € 20,000 (SIT 5 million) and other interest for default were dismissed as unfounded.

The Court of Appeal partially upheld the plaintiff's appeal and partly changed the judgment of the court of first instance regarding default interest on the awarded amount of compensation for non-material injury. In other parts the Court dismissed the appeal and in the contested part confirmed the ruling of the court of first instance. The Court decided that the plaintiff shall bear her own costs of appeal. 48

The plaintiff, because of the mistaken use of substantive law, filed a revision relating to that part of the Court of Appeal judgments which denied her request for further payment of compensation for non-material damage in the amount of SIT 5 million plus default interest. She claims that the courts correctly identified the actual situation, but insufficiently evaluated the established facts and therefore awarded her significantly insufficient compensation. In revision she comprehensively summarised the findings of all three legal experts and her statements at the hearing. She claimed that the courts should, having regard to these facts and applying material law, grant her all the compensation that she claimed i.e. for the physical pain and inconvenience during treatment SIT 5 million, SIT 1 million for fear, for the mental pain due to decrease of life activities SIT 10 million and for mental pain SIT 1,500,000. She suggested that the Supreme Court change the Court of Appeal ruling so that it awards her compensation for further damage in the amount of SIT 5 million plus default interest and all litigation costs. 49

c) Commentary

In assessing damages for the non-material injury of the plaintiff, the Court of first instance and the Court of Appeal adequately took into account the criteria provided in art. 200 and 203 of the Act on Obligations, which is in this case used in accordance with art. 1060 of the Code on Obligations. 50

The basic principles for the assessment of damages for non-material injury are the principle of individualisation which requires the establishment of a fair monetary compensation depending on the intensity and duration of physical and mental pain, fear and respect of all the circumstances, which are reflected in the individual. 51

5. Judgment of the Supreme Court II Ips 545/2005, 31.1.2008: Compensation for Infection

a) Brief Summary of the Facts

The plaintiff was employed from 1978 until 1987 as a worker at the first defendant's gas station. In the action he claimed that in this period he was infected with the hepatitis C virus which made him chronically sick. Due to his illness, the plaintiff suffered and is still suffering from non-material damage (physical pain, mental pain because of reduced life activity and fear) and property dam- 52

age (loss of income due to inability to work). The first defendant is the plaintiff's employer because the plaintiff became infected when he was working for her, and furthermore, because she failed to show the plaintiff the results of medical examinations which were carried out in 1983 and in 1986. The second defendant is the health centre where the plaintiff's doctor was employed. This doctor had received the results of the medical examinations but did not inform the plaintiff of them. As a result the plaintiff did not receive suitable treatment and the disease progressed in a manner that would not have occurred had the plaintiff been aware of the results and had received treatment for hepatitis C. The plaintiff claimed € 80,000 (SIT 20 million) as compensation for non-material damage, € 120,000 (SIT 29,558,000) compensation for material damage incurred since the filing of the lawsuit, and a monthly payment of € 8,000 (SIT 170,000), with default interest in case of late payment.

b) Judgment of the Court

53 The court of first instance dismissed the claim and the court of second instance confirmed this court decision. The plaintiff appealed to the Supreme Court, claiming absolute violation of procedural rules. The plaintiff claimed that the appeal court violated procedural rules as it did not take into account his appeal claims: the first defendant did not present the results of the medical examinations to the plaintiff while the second defendant sent the results only to the first defendant. The plaintiff also argued violation of substantial law, because there is a connection between hepatitis C and diabetes; that numerous employees who worked for the first defendant were infected with hepatitis C; that the plaintiff became infected from a specific person and that the court of second instance did not address all (obviously some of the other in revision unsubstantiated) of the plaintiff's appeal claims.

54 The plaintiff claims: 1) The first defendant was responsible for him becoming infected with the hepatitis C virus and 2) the failure to notify the plaintiff about the results of liver tests in the period 1983 to 1986 resulted in a lack of medical treatment for which responsibility attaches to both defendants.

55 Without a causal connection between injurious behaviour and damage there is no responsibility of the tortfeasor for damages (par. 1 art. 154 of the Act on Obligational Relations, in accordance with art. 1060 of the Code on Obligations). There could be other reasons why the damage arose. Therefore, the law has to address the question of which natural causes are so important that they should be considered as a result of certain damaging consequences. Because of the possibility that a harmful consequence is caused by several natural causes which are not all equally significant, the law had to distinguish between natural and legal connection. Namely, not every natural cause is legally decisive, but the opposite is true, there is no causality without natural causality.

56 The lower courts found that the plaintiff was diagnosed in 2000 with hepatitis C virus and in 2001 he was diagnosed with chronic hepatitis C. The plaintiff was infected with hepatitis C through the hepatitis C virus, which can be trans-

mitted only through blood to blood. Therefore alternative causation – social interaction which could lead to infection – is excluded.

57 Without contact with the hepatitis C virus there is no disease from which the plaintiff suffers meaning that the infection is a necessary cause of the disease. Because of this, the plaintiff's infection with the hepatitis C virus is regarded as a legally relevant cause of the plaintiff's injury (physical pain, mental pain, fear and loss of income). The first defendant could be liable for damage that arises from the infection only if it could be shown that the infection occurred at work or because the plaintiff worked for the defendant. That was not conclusively proven by the court of first instance, and the appellate court accepted this as correct. This, however, precluded the assessment of the existence of a legally relevant causal link between the plaintiff being employed by the first defendant and the infection and the disease caused by the infection.

58 The subject of the review test is correctness of the lower court's conclusion that there is no relevant causal link between the omission to show the plaintiff the results of his medical examinations while he worked for the first defendant (from 1983 to 1986) and the damage due to failure to start treatment.

59 This assessment is based on the findings that at periodic medical examinations of workers who worked for the first defendant from 1983 to 1986 the plaintiff was found to have problems with his liver, but not that he was infected with the hepatitis C virus, since this virus was still not known. The hepatitis C virus was first discovered in 1989. In Slovenia it has only been possible to diagnose this virus since 1993 with relatively successfully treatment being possible since the beginning of 2000. A more successful method of treatment has been possible since 2002 so the plaintiff, who started treatment in 2000, did not "lose" the treatment. The plaintiff received no treatment from 1983 to 1986 because the disease and its agent were not known at this time. It was also not found that the deviations in the plaintiff's liver function tests, which could have had several causes, were the result of him being infected with hepatitis C.

60 When the injury stems from a disease which is caused by a virus which cannot be attributed to any of the defendants, an omission of the treatment may be a legally relevant cause only if the disease could have been diagnosed and successfully treated.

61 Since in this particular case treatment based on the plaintiff's diagnosis from 1983 to 1986 was not possible, failure to treat cannot be a legally relevant cause for his injuries. Therefore, the court of first instance did not have to examine whether the alleged omissions of the defendants contained elements of illegality as a criterion to establish liability.

62 According to material law, the disproved court decision is correct. It was also found that there had been no procedural violation as the plaintiff claimed. The court replied to all appeal claims that were relevant to the formal and substantive examination of the court of first instance judgments i.e. the fact that the

second defendant sent results only to the first defendant and not to the plaintiff, the link between the hepatitis C virus and chronic hepatitis C, the number of infected workers and the claim that the plaintiff had been infected by a specific person. The last claim is also incorrect: in the complaint against the court of first instance judgment and in the proceedings before it, no mention was made of a specific person who had infected the plaintiff. The Supreme Court also found that the court of appeal had not violated procedural rules based on the 8th point par. 2 of art. 339 of the Act on Civil Procedure.

c) Commentary

63 When an injury stems from a disease which is caused by a virus which cannot be attributed to any of the defendants, an omission of treatment may be a legally relevant cause only if the disease could have been diagnosed and successfully treated.

6. Judgment of the Supreme Court Case II Ips 760/2005, 31.1.2008: Personal Injury; Martial Arts

a) Brief Summary of the Facts

64 The court of first instance held that the plaintiff was injured at work. During the course of practical training in martial arts, the plaintiff warmed-up by playing basketball with his co-workers. During the game he fell on another player and injured his right arm and his wrist. The court of first instance awarded the plaintiff compensation for non-material damage in the amount of SIT 2,170,240.70 (€ 9,056.25).

b) Judgment of the Court

65 The court of second instance upheld the defendant's appeals and changed the overturned ruling of the court of first instance. The Court decided that playing basketball is not a hazardous activity.

66 Against the court of second instance judgment, the plaintiff filed revision, claiming a breach of civil procedure provisions and incorrect use of substantive law. In revision the plaintiff asserted that, in his opinion, the present case concerns strict liability due to increased risk. The plaintiff had to participate in the ball game. The plaintiff and his co-workers are not athletes who professionally play basketball. They were playing by the rules as they knew them and there was no judge who would stop the game if it were played incorrectly. There were no breaks in order to calm the game. Only the trainer could warn the players about the mistakes they were making. The plaintiff and other players did not have appropriate shoes for playing on the asphalt court, which was an additional factor in terms of threats to the recreational players.

c) Commentary

67 As regards the application of substantive law, the Supreme Court initially notes the strict liability of the first defendant as a basis for compensation of the non-

material damage which occurred as a result of playing a recreational basketball game in the framework of official duties. The Act on Obligational Relations, whose rules applied on the day of the (loss) event, in its art. 154 provides two bases for liability. They are culpable or subjective liability and strict liability. In the Slovenian legal system subjective liability is the rule, and strict liability the exception. The rule of strict liability applies only when the law specifically chooses. The plaintiff refers to art. 173 ZOR, arguing that his injury stems from playing basketball as a hazardous activity.

The Supreme Court agrees with the position of the Court of Appeal that playing basketball in the circumstances found by the court of first instance is not a hazardous activity. Dangerous activities, considering all the circumstance of the case, are those where there is an unusually high possibility that damage occurs to other persons or their property and in the normal course of events one can expect that such damage will not be minor. The position in Slovenian legal practice is that "normal" recreational sports do not have such a dangerous potential to be considered as dangerous activities (compare II Ips 691/96: basketball; II Ips 84/2003: football; II Ips 717/2003: football; II Ips 719/2003: football; II Ips 208/2003: handball; II Ips 467/98: judo). The plaintiff did not say that there were any actions that would be considered unusual on a basketball court. With a normal degree of care taken by all participants during the game, injuries can still occur. 68

Therefore the Supreme Court concludes that it was correctly decided that the defendant is not strictly liable for the plaintiff's injury and because of this the plaintiff's claim against the defendant is reasonably rejected. 69

7. Judgment of the Supreme Court II Ips 1003/2007, 17.1.2008: Personal Injury

a) Brief Summary of the Facts

The plaintiff suffered an injury to his left leg due after the defendant had hit him in the face. The question arose whether someone can suffer damage to his leg due to the fact that he was punched in the face. The plaintiff allegedly fell after the punch and injured his leg. 70

b) Judgment of the court

The first instance court awarded the plaintiff damages of € 12,000. The Court of Appeal dismissed the defendant's appeal against the decision and confirmed the decision, but the court partly upheld his appeal against the ruling and partly changed it by dismissing the request for reimbursement of property damage in the amount of € 150 (SIT 30,000). The court dismissed the appeal and confirmed the court of first instance judgment. 71

c) Commentary

Since the defendant punched the plaintiff in the face causing him to fall and hurt his leg, a causal link between the illegal conduct (punch in the face) and 72

the injury which the plaintiff suffered (as a result of the punch in the face) due to the fall is definitely given.

73 It is clear that the consequences of a punch in the face can be of such a physical nature. The typical consequences of such an illegal act are abrasions, bruises, injuries to buttocks, elbows, dislocation of shoulders but an ankle injury would be very unusual, extraordinary and unexpected – the triple fracture of the leg was completely unexplained. Therefore, the finding that there is a causal link (also in terms of the theory on suitable causality), is unfounded.

C. Literature

1. *R. Lampe et al.*, Media Law (Planet GV, Ljubljana 2008)

74 "Media Law" is a first attempt in Slovenian legal literature to frame various aspects of media law in one book. The book includes the following chapters:

- freedom of expression,
- legal protections of personality rights against mass media,
- organisational provisions on media enterprises,
- copyright in media law,
- case study on various aspects of media law,
- analysis of the decisions brought by the Slovenian Journalist Tribunal,
- analysis of the decisions brought by the Slovenian Advertising Tribunal.

Interesting from a tort law perspective is the second chapter, where the author focuses on practical case law on defamation and privacy violations by mass media.

XXV. Spain

Jordi Ribot and Albert Ruda[1]

A. Legislation

1. Road Traffic Liability Insurance

A new regulation on compulsory road traffic liability insurance was passed in 2008[2] to supplement Act 21/2007, which was enacted last year to implement the Fifth Directive on road traffic liability insurance.[3] The new regulation repealed the former one, in force since 2001, and its most important development is the so-called "compensation rule" of insurance coverage. With it the government intends "to overcome the dual system of insurance, compulsory and voluntary, which exists at present". The compensation rule appears in Art. 10 and allows the coverage for personal injuries to be used to compensate for damage to property above the maximum amount specified by Act 21/2007 for this type of damage. Since the maximum coverage for personal injury and death resulting from road traffic accidents is very high[4], such a rule allows insurers to sell a single type of liability insurance covering both personal injuries and damage to property, thereby pushing up the prices of compulsory insurance and making the market for voluntary insurance redundant.[5] In any event, there is one area where voluntary (first party) insurance is still needed: as the Supreme Court confirmed again in 2008, injuries or death of the driver of the car who caused the accident are outside the coverage of the compulsory road traffic (liability) insurance.[6] 1

[1] The authors wish to express their indebtedness to the Spanish Ministry of Science and Technology for the award of the FFI2008-00647 R&D grant for the project "The Principles of European Tort Law, beyond the so-called 'Common Frame of Reference' (CFR). Towards a new stage in the approximation of Tort Law in Europe", within the framework of which this paper has been drafted. The project is directed by Prof. Dr Miquel Martín-Casals.

[2] Royal Decree 1507/2008, of 12 September (Boletín Oficial del Estado, Official Gazette [BOE] no. 222, 13.9.2008).

[3] On this see *J.Ribot/A. Ruda*, Spain, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 543–545.

[4] Ibid., 544.

[5] On this question see *Ribot/Ruda* (fn. 3) 545.

[6] STS 3.11.2008 (La Ley 2008, 1023). For the purposes of compulsory road traffic liability insurance, the Court has laid down doctrine on the concept of "fact of the road traffic" (Art. 1). According to STS 2.12.2008 (La Ley 2008, 1116), this concept is applicable to damage to property

2 In this matter, however, the most important issue is how to amend the legal scheme of tariffication of personal injury resulting from road traffic accidents. This reform was already announced before the enactment of Act 21/2007, but it is still pending. So far, no draft has been made public. Nevertheless, it is very likely that some official proposal will see the light before the end of 2009 because the Ministry of Finance and the insurance industry and other stakeholders are working together with the aim of drafting the guidelines for future regulation.

2. Environmental Liability

3 Last year the Spanish Government passed the Regulation which develops the Environmental Liability Act 2007.[7] According to the latter, public authorities have the power to oblige the operator who causes environmental damage – i.e., damage to certain natural resources – to restore it and to prevent further damage from being caused.[8] In contrast to the Environmental Liability Directive, the Act lays down the obligation for the operator of an activity included in Annex III to the Act to provide security to cover any liabilities derived from the application of the same (Art. 24). However, as is well known, economic assessment of environmental damage is a thorny issue[9] and insurers usually argue that there is too little experience – if at all – to make environmental liability insurable. For this reason, the Regulation aims at providing a homogeneous and effective assessment method for calculating the environmental risk in connection with the securities governed by the Act (Art. 41 ff.). This method follows Rule UNE 150.008 on Analysis and Evaluation of Environmental Risk – a technical rule approved by the Spanish Society of Normalization and Certification (AENOR). However, the use of other equivalent rules is also allowed on an explicit basis (Art. 34).[10] The operator will therefore have to submit an

caused to third parties by a bus that ignited while parked during a rest for passengers to have dinner. The Court held that the fire was due to a malfunction of the engine that was aggravated during the trip. Accordingly, it considers that the claim was within the scope of compulsory road traffic liability insurance. On this topic, see *M. Martín-Casals/J. Ribot/J. Solé*, Spain, in: B.A. Koch/H. Koziol (eds.), Unification of Tort Liability: Strict Liability (2002) 296 f.

[7] *Real Decreto 2090/2008, de 22 de diciembre, por el que se aprueba el Reglamento de desarrollo parcial de la Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental* (BOE no. 308, 23 December 2008).

[8] See *Ribot/Ruda* (fn. 3) 541 ff. See also *P. López Toledo*, La nueva Ley 26/2007, de 23 de octubre, de responsabilidad medioambiental, Actualidad Administrativa 2008, 252 ff.; *G. Yanguas Montero/N. Blánquez Alonso*, La nueva responsabilidad medioambiental, Revista de Derecho Urbanístico y Medio Ambiente 2008, 101 ff.; *M. Castroviejo Bolívar*, Régimen de prevención de daños derivados de los residuos de minas y canteras y su restauración, Revista General de Derecho Europeo 2008, no. 17, 1 ff. With regard to the permit and the development risk defences, see *A.J. Quesada Sánchez*, Autorización administrativa y riesgos del desarrollo en la Ley de responsabilidad medioambiental: una transposición polémica, Responsabilidad Civil Circulación y Seguro (RC) 2008, no. 3, 6 ff.

[9] Among others see *E. Castellano/J.M. Rábade/I. Lorente/M. Cabrerizo/C. Martín/I. Picazo/E. Arocena/I. Nogales*, Valoración y reparación de los daños al medio ambiente en España, Ecosostenible 2008, 19 ff.

[10] It has been observed that UNE 150.008 does not provide for precise assessment tools. See *S. Simón Quintana*, Análisis del futuro desarrollo reglamentario de la Ley de Responsabilidad Ambiental (II), Ecosostenible 2008, 27 ff., 31.

analysis of environmental risk to a verification procedure (Art. 45). Since this may be very costly, in particular to small or atomized industries, the Regulation allows for the possibility that environmental risk analysis by area of activities (so-called *análisis sectoriales*) to be followed (Art. 35). The financial securities provided by the operators in other Member States of the European Union will be recognized according to the Regulation, provided that they are equivalent to those regulated by it (Additional Disposition no. 5). This may raise some doubts as to their equivalence, since the scope of application of the national transpositions of the Directive may differ substantially, e.g. as to the natural resources covered by the liability regime.

Apart from this, the Regulation creates the Technical Commission of Prevention and Compensation of Environmental Damage (*Comisión técnica de prevención y reparación de daños medioambientales*, Art. 3), which depends on the Ministry of Environment. This public organ will be devoted to technical cooperation between the Public Administration of the State and the Autonomous Communities in Spain, the exchange of information and counselling on the prevention and compensation of environmental damage. It should be borne in mind that most Autonomous Communities have assumed competences in connection with environmental protection.[11] Therefore, cooperation is sorely needed in this field, in particular in the case of damage affecting resources located in different Communities or damage to resources owned by the Spanish State. 4

The operator has the obligation to provide information on a series of aspects laid down in the Regulation to determine the magnitude of damage, including the pollution focus and the causal agent, but also the cartography and the geology of the terrain affected, among other more or less realistic requirements (Art. 6). The operator will have to describe the causal agent according to a classification established by the Regulation (Art. 8 and 9) and identify the natural resources and services affected by damage (Art. 10), as well as to quantify damage, i.e. determine the degree of exposure of the resources or services to the causal agent (Art. 11).[12] It must be borne in mind that the Environmental Liability Act establishes that the causal link will be presumed provided that the facility is capable of causing damage (Art. 3.1 par. 2), whereas case law shifts the burden of proof of fault to the defendant operator (e.g. STS 29.10.2008 [RJ 2008, 5801]). The Regulation provides several criteria for establishing whether damage has a significant character (Art. 15 ff.) and the so-called basic state of the resource or service (Art. 19). It also develops the statutory provisions 5

[11] For instance, the Regional Parliament of Galicia passed the Act on tax on environmental damage caused by certain uses and exploitation of mass of flowing water weeds. See *Ley 15/2008, de 19 de diciembre, del impuesto sobre el daño medioambiental causado por determinados usos y aprovechamientos del agua embalsada* (Diario Oficial de Galicia no. 251, 29 December 2008).

[12] As regards quantification of damage to waters belonging to the Public Administration, see the criteria laid down by *Orden MAM/85/2008, de 16 de enero, por la que se establecen los criterios técnicos para la valoración de los daños al dominio público hidráulico y las normas sobre toma de muestras y análisis de vertidos de aguas residuales* (BOE no. 25, 29 January 2008).

on the restoration of damage (Art. 20 ff.) and lays down the content (Art. 25) and the execution rules (Art. 28) of the restoration project to be submitted by the liable operator. In general, the new Regulation brings more precision into the environmental liability regime, which aims at making the polluter pay,[13] although due to its complexity new doubts as to its interpretation and practical application will probably arise in the near future.[14]

B. Cases

1. Sentencia del Tribunal Supremo (Supreme Court Decision, STS) 9.10.2008, RJ 2008, 6042: Auditor's Liability

a) Brief Summary of the Facts

6 *Manuel V.M.*, auditor associated with *Price Waterhouse Auditores S.A.*, verified and certified the accounts of the broker agency *XM Patrimonios* in 1993. The accounts and the audit report, which did not contain any qualification, were submitted to the *Comisión Nacional del Mercado de Valores* (National Commission of Securities Exchange Market [hereafter CNMV])[15] on 4 May 1994. Although the auditor's report was entirely positive, in fact the administrator of the agency diverted the customers' funds to cover losses in derivatives investments made abroad. In particular, he falsely reported that the money obtained from the sale of some assets had been reinvested on their behalf in equally safe investments. The money had been transferred instead to corporations controlled by the administrator of the broker agency. In June 1995 he reported the financial hole in the agency to the CNMV and to a criminal court in Barcelona. The CNMV ordered the intervention of the agency and the suspension of its activities. Some of the investors whose funds were lost sued *Price Waterhouse* and *Manuel V.M.* They argued that if the hole had been detected during the audit and the mismanagement been recorded in the audit report, the CNMV would have acted immediately and prevented the misappropriation of their assets. *Lepanto SA* claimed over € 8 million, while the other two claimants asked for compensation for losses amounting to almost € 2.5 million. The court of first instance acquitted the auditor and the audit firm on the basis of the expert opinion that the audit report had been carried out properly and that the fraud could not have been detected. The appeal of the claimants was upheld by the Provincial Court of Barcelona, which held *Price Waterhouse* and *Manuel V.F.* solidarily liable and awarded the claimants damages amounting to the value of the assets lost.[16] The auditing firm and the auditor appealed to the Supreme Court.

[13] See now *Á.G. Chueca Sancho,* "Quien contamina, paga" en el Derecho de la Unión Europea, Revista de Derecho de la Unión Europea 2008, 183 ff.

[14] As *S. Simón Quintana,* Análisis del futuro desarrollo reglamentario de la Ley de Responsabilidad Ambiental (III), Ecosostenible 2009, 31 ff., 33, has observed.

[15] Special agency created by Act on Securities Exchange Market 1988 (*Ley 24/1988, de 28 de julio, del Mercado de Valores* [hereafter, LMV]) (BOE no. 181, 29.7.1988).

[16] SAP Barcelona 31.7.2000 (Westlaw Jurisprudencia [JUR] 2000, 306843).

b) Judgment of the Court

The trial court acted reasonably by not granting decisive value to the expert witness' statements with regard to the correctness of the auditor's work. It is not unreasonable to conclude that the defendants acted negligently when they omitted to review the money flows between the broker agency and several companies related with its administrator. In fact, according to the law, the accounts of these companies had to be audited in conjunction with the accounts of the broker agency. Moreover, the ruling is right in that the number of consultation letters sent to the agency's customers was far too low and that no explanation was provided to justify why the auditor did not contact the claimants, who invested huge amounts of money in the agency. 7

The purpose of legal auditing, as well as the publication of the audit report when this is legally required, is to contribute to the proper functioning of the market providing reliable information on the financial situation of audited companies. The beneficiaries of the protection offered by the regulation of auditors' activities are not only the company audited or its managers, but also third parties who have a relation with it. Therefore, the auditor may be liable to such third parties provided that the requirements for a tort claim under the general rules of the Civil Code are met. 8

The trial court attributed the harm to the auditor and the auditing firm under the assumption that a careful execution of their duties would have allowed them to notice the irregularities concealing the fraud committed by the administrator. However, the auditor was not held liable on the grounds of the claimants' reliance upon the audit report. The conviction was based instead upon the assumption that, having done a negative audit report or including reservations in it, the claimants would have been warned by the probable reaction of the CNMV.[17] At this point, however, the appeal lodged by the defendants must be accepted. In this case, the cause of the harm upon which the trial court based the conviction goes far beyond the scope of protection of the rules infringed by the auditor. Given the circumstances, the Provincial Court has taken legal causation too far by attributing the harm to *Price Waterhouse* and *Manuel V.M.* as ultimate guarantors of transparency in the information on the financial accounting of the agency audited. 9

c) Commentary

This is the first decision of the Supreme Court concerning auditors' liability. A few days after this decision, the Court issued another ruling, this one about the liability of *Ernst & Young* for the damage suffered by several members of a cooperative that went bankrupt, although it was audited by the defendant without any qualification.[18] 10

[17] The trial court assumed that there was an "indisputable causal link" to the extent that "the evolution of the investments of the actors would not have occurred if an intervention by the CNMV had taken place in view of the audit, which should have had an unfavourable result".

[18] See below Case no. 2.

11 In the case under comment, the Supreme Court deals with the problem as one of causation so as to free the auditor from liability. This involves theoretical as well as practical consequences. Firstly, the Court flatly rejects the opinion that the auditor is only liable vis-à-vis the audited company, which is the addressee of the audit report. In fact, the defendants raised this argument to deny the claimants' standing, but the Provincial Court rejected it on the basis that the purpose of the duty to audit the annual accounts is protection of reliance in the market, particularly when the audited companies seek financing or when they operate as brokers in the stock market. The Supreme Court confirmed this approach, already expressly laid down in Art. 1.1 Audit Act 1988[19], which defines auditing as "the activity of review and verification of accounting documents, *provided that it aims at releasing a report able to produce effect vis-à-vis third parties*".[20] Secondly, it is worth noting that the Supreme Court also confirmed the view of the Provincial Court on the negligence of the auditing firm. None of the expert witnesses, however, concluded that the auditor had breached the standards of auditing when assessing the accounts of the broker agency and all of them agreed that the defendants could not have noticed the fraud.[21]

12 The Supreme Court insists, however, that the auditor's liability towards customers of the company audited requires compliance with the requirements of the Civil Code. Apparently, the 2002 amendment of Art. 11 LAC had the same purpose.[22] Accordingly, in addition to the damage and the fault of the auditor, a causal relationship between one and the other must be established. The causal relationship to which the Supreme Court refers is not the "physical causation" but the "legal or objective attribution".[23] The Court holds then that the cause of the harm suffered by investors in *XM Patrimonios* is "beyond the scope of protection" of the rules governing the duties of legal auditors. By certifying the accounts, the auditor guarantees that they accurately reflect the situation of the company. However, the damage suffered *in the circumstances of the case* is outside the protection intended by the rules that had been violated because these rules seek to avoid the adverse effects that investors may suffer by relying on the audit report. The auditor will only be liable (but may be liable) for damage to third parties who conform their conduct to the contents of the audit report. The

[19] *Ley 19/1988, de 12 de julio, de Auditoría de Cuentas* (Auditors' Act [BOE no. 169, 15.7.1988 [LAC]).

[20] Emphasis added.

[21] In addition, in striking contrast to other scandals that came out later on, in the case of *XM Patrimonios* the competent authorities opened a procedure against *Price Waterhouse* but closed it without imposing any fine on the auditor or on the auditing firm.

[22] Art. 11.1 LAC: "The auditors are liable for the damage arising from the breach of their obligations *according to the general rules of private law*, taking into account the specificities laid down in this article" (emphasis added). These specificities are connected with the rule that "when the auditing activity is performed by an auditor who belongs to an auditing firm, both the auditor who signed the audit report and the auditing firm shall be held solidarily liable" (Art. 11.2 LAC).

[23] On development of case law on this topic see *Ribot/Ruda* (fn. 3) 563 f. A critical approach of the doctrinal foundations of this line of thought may be seen in *M. Garcia-Ripoll Montijano*, Imputación objetiva, causa próxima y alcance de los daños indemnizables (2008) (on this book, see below C no. 5).

auditor and the auditing firm would have been liable had the funds been transferred to the agency after relying on the absence of qualifications in the audit report or if the claimants had stopped their operations after gaining knowledge of the mismanagement of their assets thanks to a proper audit report. The claimants, however, candidly acknowledged that the audit report did not influence their behaviour at all. This is why they argued that if the audit report had been properly drafted, it would have prompted the immediate intervention of the agency, thereby preventing them from trusting their funds to *XM Patrimonios*. Besides that, the Supreme Court decision also underlines that the claim was never based on a possible breach of the auditor's duty to report the fraudulent mismanagement to the CNMV, since they negligently failed to detect it.

13 Furthermore, the Supreme Court recalls the Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms[24], where it specifically states that they should not be liable beyond their current contribution to the loss suffered by the claimant. This idea, however, is not further developed, nor in any way connected with the circumstances of the case that the Supreme Court considers essential. In fact, the Supreme Court does not raise the issue of the auditor's contribution to the damage because it attributes it to the manager of the agency only. The decision subsequently issued by the Supreme Court, however, confirms that even intentional mismanagement of third parties[25] does not automatically exclude the potential liability of the auditors for not having noticed the fraud, provided that the correctly done audit would have prevented the harm suffered by the claimants. The European Commission has precisely this type of case in mind – and in general all those in which the auditor is jointly and severally liable with the company's directors and officers – when it seeks to implement measures to limit the liability of auditors. Note how, just when the first stakes are set towards a limited liability of auditors at the European level, the Spanish Supreme Court ratifies the foundations of the unlimited legal liability of auditors to the company audited and to third parties.

14 Finally, another rhetorical device used to frame the decision of acquittal is the reference to the functions of the CNMV. The Court recalls that it is charged with the task of supervising the activities of securities' dealers and brokers. Apparently it seems as if the Supreme Court is pointing to the potential liability of the CNMV in this sort of case. This route, however, has been explored before in a number of cases concerning the collapse of several broker agencies during the nineties.[26] The claimants were investors who blamed the CNMV

[24] Official Journal of the European Union (OJEU) L 162/39, 21.6.2008.

[25] As regards *XM Patrimonios*, its administrator and main shareholder were convicted to a prison sentence for misappropriation by STS Criminal Chamber 14.5.1999.

[26] The cases involved the broker agencies *AVA* and *Gescartera*. Their bankruptcy triggered losses to hundreds of minor investors and a number of institutional investors. An amendment of Art. 77 LMV created the *Fondo de Garantía de Inversiones* (Investment Guarantee Fund [FOGAIN]) in 1998. All companies and agencies authorised to intermediate in secondary markets in Spain must adhere to FOGAIN, which is now regulated by the Royal Decree 948/2001, of 3 August (BOE no. 186, 4.8.2001). The fund covered up to € 20,000 if a broker agency cannot pay back the funds transferred to it for performing investment services or to keep them for administration

for not stopping the mismanagement that eventually ruined the agency and caused their loss. The lower courts, however, have always freed the State from liability and consider the conduct of the CNMV appropriate and proportionate.[27] In 2008, the issue reached the Supreme Court. It stated that the functions of supervision of the CNMV, as well as the powers to ask for information, to impose fines and to intervene in the company do not determine that it should be automatically liable in case of fraud or mismanagement of the directors of agencies.[28] In addition, in connection with the CNMV's legal duty to act as soon as there are reports or indications that irregularities occur, the view held by the Supreme Court is also quite restrictive. Against the argument that a swift and decisive action would have prevented investors from losing the funds they transferred to brokers who went bankrupt, the Supreme Court has declared that, to make the State responsible for negligent performance of the functions and powers conferred on the CNMV, one must know in the first place whether the existence of a legal duty to act stemmed from the circumstances of the case or not. In particular, whether the case justified carrying out an inspection of all the documentation or requesting certain documents only. Besides that, it is also doubtful whether the CNMV could and should inspect the premises of the agency or not, or whether it ought to step in without delay. The Supreme Court has concluded that under current legislation the CNMV does not have absolute powers of inspection and intervention. Accordingly, there was no legal duty to act by suspending the activities of the company at the first sign of mismanagement, even if in the course of the investigation the serious problems that led to the bankruptcy are confirmed. In addition, the Court holds that it is unreasonable to take harsh measures without first checking whether the suspicions are well grounded and after having given to the managers the opportunity to explain the situation and to rectify unacceptable procedures. If not for other reasons, because a premature decision may cause panic in the market and punish both agencies and customers unreasonably. This criterion also applies to the duty to make the signs of mismanagement that had been detected public, since "it would be unreasonable to deny that the exercise of the proper role of the CNMV involves some degree of discretion".[29]

purposes. Currently, FOGAIN guarantees that any investor will receive the equivalent of the monetary value of his or her credit against a bankrupt agency up to € 100,000 (Royal Decree [RD] 1642/2008, of 10 October [BOE no. 246, 11.10.2008]). According to Art. 7 RD 948/2001, any right that the investors held against the agency is legally transferred to FOGAIN for the amount that the latter had paid to them as compensation.

[27] A summary of the doctrine applied so far by lower courts can be found in the decision of the *Audiencia Nacional* (hereafter SAN) 23.4.2008 (JUR 2008, 225258).

[28] STS Administrative Chamber 16.5.2008 (RJ 2008, 2756; commented upon by *A. Carrasco Perera*, Actualidad Jurídica Aranzadi 762/2008): "At any rate, the CNMV cannot be deemed guarantor of the legality and prudence of all the decisions that all securities dealers may take, and even less a guarantor that the customers of these agencies will not suffer economic loss as a result of illegal or reckless decisions of their managers".

[29] The dissenting opinion raised by one of the magistrates held, however, that the State should be liable because the CNMV delayed the decision to step in too much. He pointed to the fact that the mismanagement was noticed in January 1997 but the procedure against the agency was not opened until February 1998. Moreover, some of the irregular practices, like investing funds on behalf of the customers without having permission to do so, were unveiled by an audit report delivered in 1997.

It appears that this doctrine is in accordance with the decision reached in the judgment under comment, since it confirms that there was no guarantee that the audit report of *XM Patrimonios*, despite being unfavourable and having expressed qualifications, would have triggered the immediate reaction of the CNMV, as both the claimants and the trial court contended. 15

2. STS 14.10.2008, RJ 2008, 6913: Auditors' Liability

a) Brief Summary of the Facts

The cooperative *Promoción Social de Vivienda* (Promotion of Social Housing, *PSV*) was established in the late 1980s by a major Spanish trade union (UGT) with the aim of developing land for affordable housing in different parts of Spain. Because of mismanagement on the part of its key executives, who fraudulently diverted funds to their private business, the cooperative went bankrupt in 1993. All projects were halted, the cooperative's assets were frozen and the members of the cooperative lost the funds they had delivered to acquire a dwelling. Only after a long and costly process of negotiation with creditors of the cooperative they were able to have the houses they were promised. However, they had to pay additional sums to restart the work and the final prices were substantially higher because of the delay. Over 700 victims of the insolvency of *PSV* brought suits against the auditor, the auditing firm *Ernst & Young* and their liability insurer *Allianz*, for the negligent omission to notice the irregular behaviour of the cooperative's managers when it was audited in 1991 and 1992. The claimants sought compensation for the additional sums they were forced to pay to have their houses finished. The court of first instance held for the claimants but its judgment was appealed before the Provincial Court of Madrid and revoked.[30] Although this Court confirmed that the auditor had breached the standard rules of auditing when he verified and certified the annual accounts of *PSV*, it freed the defendants from any liability because no causal relationship could be established between the defendants' negligence and the insolvency of *PSV*, which was deemed a direct consequence of the mismanagement of its executives. The claimants brought an appeal before the Supreme Court arguing that the Provincial Court had infringed Art. 11 LAC, on liability of auditors, and Art. 1902 CC, the general clause of extra-contractual liability. 16

b) Judgment of the Court

On the first ground of appeal, the appellants say that the trial court denied that the auditing firm could incur civil liability to third parties because it had already been fined by the competent administrative body. The trial court did not do such a thing. Otherwise, the appeal should have been upheld. Instead, it acquitted the defendants because of a lack of causal connection between the damage and the fault attributed to the auditor. 17

With regard to this lack of causal relationship, it is based upon the intentional conduct of a third party. The appeal stresses that the claim did not attribute the 18

[30] SAP Madrid 22.7.2002.

sole or even the main cause of damage to the auditor, but that his negligence contributed to causing it. By not detecting the accounting fraud that was taking place, the members of the cooperative were prevented from taking steps to protect their interests in time. The Supreme Court points out the distinction between factual causation and legal causation and insists that only the second provides the grounds for attributing liability. It then stresses that the guarantee given by the auditor, especially when a law requires the audit, is very important to the other party in the auditing contract, i.e. the cooperative society, but also to the individuals that were partners of it, as well as to the general public. As a result, it is clear that the violation of the rules of auditing was not the main cause of the crisis of *PSV* but contributed to the harm suffered by the members of the cooperative, who were deprived of information about the true financial situation of the cooperative. Keeping in mind the professional character of auditing services, the purpose of the legal rules that require the audit report to be carried out according to very demanding standards is precisely that of allowing the shareholders to have enough and reliable information before approving the annual accounts. A fair reasoning about what could have happened leads to the conclusion that if the members of the cooperative had had the right information, they would not have approved the accounts presented by the administrator because he was leading the cooperative to ruin. This early reaction, in all probability, would have been more effective than the subsequent renewal of terms and prices that they had to accept in order to complete their houses. The damage suffered by the members of the cooperative is thus to be attributed to the auditor. He is solidarily liable with the auditing firm to which he belongs and with the liability insurer.

c) Commentary

19 Relating this ruling to the one annotated above, although they share some elements and arguments, they are different in that here the victims are members of the legal entity audited by the defendants, not third parties fully alien to it. Accordingly, the reasoning of the decision can be explained by recalling the personal nature of a cooperative society. This is also a crucial aspect in order to bring more consistency to the argument about how the claimants hypothetically would have had reacted if they had known of the irregularities committed by the managers of the cooperative. In fact, one of the key elements of the criminal proceedings brought against them was that the managers did not administrate the assets of each promotion separately as was required by the cooperative's bylaws, but operated them instead by using connected accounts that eventually allowed the illegal transfers of funds. This was also a crucial point in the administrative procedure brought against the auditors. The probability that if an adverse audit report, or at least that a report containing qualifications related to the behaviour of the administrator had been known to the partners, they would have reacted, thus seems greater in this case than in other situations (e.g. anonymous investments in audited companies, claims by suppliers of goods or services, employees).

20 The increased likelihood of the claimants' reaction leads the Supreme Court to the conclusion that the damage could have been avoided or at least minimized. Not much more is said to make that reasoning clearer. It is assumed that this

was true at the time the accounts were certified by the auditor, but the ruling does not venture to describe what could have happened taking into account, for example, the opportunities that the bylaws or the cooperative's internal organization provided to any member who had decided to reject the social accounts. It does not provide any information about whether the situation that the managers concealed and the auditor did not notice was irreversible or not. The ruling assumes, but does not strive to demonstrate, that an earlier action of the members of the cooperative would have prevented its bankruptcy, or at least would have minimised its impact on the claimants' interests. Apparently, the defendants did not challenge the reasonableness of these assumptions and evidence supporting their view was not mentioned in the judgment either.

21 The final outcome of this lawsuit is that the auditor and the auditing firm, as well as the insurer, are held solidarily liable. However, the claim blamed the defendants for having contributed to causing a damage that was directly attributable to the managers' misbehaviour. The Supreme Court does not even mention the possibility that the defendants could be liable only to the extent of their contribution to the harm suffered by the claimants. The case is instead governed entirely by the criterion according to which whoever intentionally caused the harm and who negligently took no action to avoid it is to be held solidarily liable. It is highly significant that, unlike the earlier ruling, the Supreme Court does not refer in this one to the European Commission's recommendation on the limitation of the liability of auditors. This particular case raises the question addressed by the recommendation; that is, whether the auditors' liability towards third parties should in any way be limited when the responsibility for the collapse of businesses and enterprises, with harm to third parties, lies mainly with the managers of the companies audited.

22 *Ernst & Young* has announced an appeal to the Constitutional Court. The terms of the judgment under comment make it unlikely that it will even be admitted. From press releases we know that when the judgment of first instance was rendered, in 1998, the damages awarded amounted to € 1,970,000. The legal interest may now reach another € 2 million and the additional costs for the completion of work are yet to be determined upon execution. These sums, however, are only a fraction of the damage related to the *PSV* case.[31] An avalanche of new actions is to be ruled out, in all likelihood, because of prescription. Other actions under way will reach the Supreme Court sooner or later, and will confront the clear and demanding doctrine set out in the ruling under comment.[32] If the Spanish leg-

[31] This case left more than 19,000 victims and the criminal prosecution of the managers ended with their criminal conviction. Civil liabilities amounted to € 78,300,000. The union *UGT* was held subsidiarily liable (SAN 16.7.2001 [PROV 2001, 205441]) but was eventually acquitted by STS Criminal Chamber 9.10.2003 (RJ 2003, 7233).

[32] *Ernst & Young* received more bad news in 2008. STS Administrative Chamber 18.3.2008 (RJ 2008, 2339) confirmed the fine imposed upon the firm by the *Instituto de Contabilidad y Auditoría de Cuentas* on the basis of the defective verification and certification of *PSV's* annual accounts for 1992. The fine amounted to € 313,252 and is to be added to another fine of € 428,481 paid in 2004 for defective certification of *PSV*'s annual accounts for 1991. This sanction was confirmed by STS Administrative Chamber 27.10.2004 (RJ 2004, 7775).

islator takes the steps recommended by the European Commission, however, future cases should be decided in a different manner.

3. STS Administrative Chamber 13.10.2008, RJ 2008, 7142: Acoustic Pollution

a) Brief Summary of the Facts

23 Several residents of the town of Ciudad Santo Domingo, close to the Barajas Airport in Madrid, filed a claim in tort against the Ministry of Public Works and the Spanish Airports (AENA) for damage caused by noise pollution coming from the airplane traffic during the day as well as during the night. The claimants were allegedly suffering a violation of their fundamental right to life, physical and moral integrity as well as privacy at domicile (pursuant to the Spanish Constitution, Art. 15 and 18.1 and 2). Thousands of airplanes flew over the homes of the claimants all through the year, at intervals of around 3 minutes and usually exceeding the maximum levels of noise established by applicable regulations, in spite of the fact that there was an alternative air route. They also argued that the fact that the planes were loaded with fuel put their lives and physical integrity at risk and affected their right to health.

b) Judgment of the Court

24 According to the Court, the mere possibility that accidents may happen due to the flight of planes over the claimants' homes does not imply that their right to life has been violated. It was not proved by them that there were fuel leaks over their homes or that the pollution caused by the planes reached a level so high that it actually threatened their lives. However, as regards noise, it is well established case law that acoustic pollution may amount to a violation of the right to privacy at domicile, pursuant to the decisions of the ECHR as followed by both the Spanish Constitutional Court and the Supreme Court. It would be unduly formalistic to require the claimants to bring evidence of noise saturation in the area where they live, since this is already known by the defendant Public Administrations. The flight of the planes at a low altitude has been prolonged enough and the maximum noise levels have been repeatedly exceeded. The Public Administration itself expressed that if new tracks were open at the airport, the frequency of air traffic over the claimants' homes would diminish. The disturbance caused by noise affecting the claimants' homes is sufficient – due to its level, nature and duration – to cause nuisance beyond the acceptable limits. Therefore, it must be declared that the claimants suffered a violation of their fundamental right to privacy at their domicile and the defendants are obliged to remedy the situation. As regards compensation, the claimants did not detail the expenses incurred to prevent noise from affecting them or to diminish its effects. The only reference provided by them is ECHR case law. In particular, the criterion laid down by the decision in the *Moreno Gómez v. Spain* case, which is the most recent of the decisions referred to by the claimants, should be followed. In that decision, the ECHR awarded € 3,005 to each claimant, in addition to a sum equivalent to the cost of installing double glazing in the windows of the claimants' homes. Taking the years passed since that

decision into account and the disturbances suffered by the claimants, they are entitled to receive € 6,000 compensation each.

c) Commentary

This is not the first decision dealing with damage caused by noise pollution. In our previous reports we explained that case law had expanded the protection of the domicile provided by the Constitution (Art. 18) to protecting victims of nuisance of this kind.[33] As usual, the claim in this case was filed against public bodies. However, this case is new in the sense that the claim is filed because of noise produced by air traffic. In previous cases, the victims of acoustic pollution had succeeded in claiming that the inactivity of public authorities with regard to noise produced by private parties – such as the owners of bars or restaurants – had caused them damage. As a rule, the victim is entitled to obtain compensation from the authorities for non-pecuniary loss (as in the case against the municipality of Vélez-Málaga, decided by STS Administrative Chamber 2.6.2008 [RJ 2008, 5470]).[34] Moreover, the noise is usually caused by a licensed activity – the so-called permit defence is not accepted by case law (e.g. STS Administrative Chamber 22.1.2008 [RJ 2008, 169] in a case of damage by radioactive pollution) – but there are also cases where the noise is caused by unauthorised activities (as STS Administrative Chamber 25.3.2008 [RJ 2008, 2351]). As regards proof of damage, courts are not very demanding and, generally speaking, proof of noise paves the way for proof of damage. However, it is required for the court to specify which damage is being compensated for and at least indicate the criteria to assess it on an economic basis at a later stage (as STS 8.5.2008 [RJ 2008, 2962] states). An accepted criterion is the price of renting an apartment of similar characteristics to the one affected (STS 2.6.2008 referred to above). 25

In the case under comment, it is an activity operated by the Public Administration itself which directly causes damage.[35] As in previous cases, compensation is awarded although it is not proved that the victims suffer any specific illness derived from exposure to high or prolonged noise levels. They are granted protection not because of environmental reasons but indirectly through the protection of their domicile, since the established maximum noise levels had been exceeded repeatedly.[36] Whether some of the victims actually came to the 26

[33] See *J. Ribot/A. Ruda*, Spain, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2003 (2004) 396 ff. and *J. Ribot*, Spain, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) 542 ff.

[34] On compensation of victims of damage as a result of exposure to asbestos fibres see *A. Azagra Malo*, Placas pleurales, angustia e incremento del riesgo, InDret 2008, 1 ff., and *id*., Compensación de las víctimas del amianto en España, Gerencia de riesgos y seguros 2009, no. 102, 56 ff.

[35] On the conditions under which air traffic is carried out see now *M. Uriarte Ricote*, La contaminación acústica de la aviación civil (2008), in particular 117 f.

[36] On ECHR case law see now *L. Martín-Retortillo Baquer*, Jurisprudencia ambiental reciente del Tribunal Europeo de Derechos Humanos, InDret 2008, 1 ff. and *J.J. Herrera del Rey*, La defensa jurídica contra la contaminación acústica (2009). See also *T. Requena López*, Seis tesis sobre el ruido y la responsabilidad patrimonial, Aletheia 2008, 19 ff.

nuisance is not discussed, although as a matter of fact this would not be a defence under Spanish law.[37] Also the court does not suggest – in contrast with the well-known *Hatton and others v. the UK* case – that the claimants could have moved to a different place. Compensation is awarded without the need to prove that the value of the homes of the claimants had diminished. The fact that there may be noise coming from different sources is disregarded, since the excess of noise had been well established.[38] Moreover, the fact that there is a public interest in air traffic does not prevent the victims – as the Supreme Court has already stated in other cases – from claiming compensation for damage caused to them (STS 12.6.2008 [RJ 2007, 4690] in a case of pollution by fluoride emissions). In fact, AENA even challenged the present decision at a later stage arguing that it was void because its outcome was "overtly unreasonable", but the Supreme Court confirmed its previous ruling and once again found for the claimants (Auto TS 14.1.2009 [still unreported]). As regards damage assessment, it is not carried out by reference to the cost of renting an alternative apartment but by reference to the damages award in the *Moreno* case. This may entail that victims of similar damage may receive substantially different sums in compensation for it. So, for instance, it may be estimated that the victims of noise coming from night time bars in the Vélez-Málaga case referred to above will receive € 12,020 per year (i.e. around € 200,000 each),[39] whereas in the case under comment the sum per year is less than half this amount.

4. STS Administrative Chamber 7.7.2008, RJ 2008, 6872: Loss of a Chance

a) Brief Summary of the Facts[40]

27 Mr. Valentín suffered a decompression accident while he was diving in Cullera (Valencia) and was promptly transferred to a public hospital, first in Cullera and then to another hospital in Valencia. Since the hospital in Valencia lacked a hyperbaric chamber which was required for his treatment, he had to be transferred to another hospital in Barcelona. Health authorities could have transported the patient in a helicopter equipped as an ambulance, but they chose to transport him by ambulance. When it was finally possible to treat him at the hospital in Barcelona, more than ten hours had elapsed since the time of the accident. After 37 days in hospital he was discharged, suffering, among other sequelae, paraplegia which meant that he was forced to use a wheelchair. The diver brought an administrative claim against the Health Department of

[37] Nevertheless, contributory negligence may exclude liability, as in the case of damage to crops caused by the salinity of the water provided by the defendant. The victim should have known – as a professional in agriculture – that the water provided was inadequate for the kind of crops at stake (STS Administrative Chamber 7.3.1008 [RJ 2008, 1751]).

[38] Similarly, in a case of pollution of a river, the defendant does not escape liability because of the mere circumstance that there were other sources of toxic substances polluting the waters (STS Criminal Chamber 8.4.2008 [RJ 2008, 1852]).

[39] According to the estimation by *J.R. Rodríguez Carbajo*, La respuesta más contundente en la historia judicial española a la pasividad de los Ayuntamientos ante los ruidos excesivos, Actualidad Administrativa 2008, no. 18.

[40] The summary by *M. Martín-Casals/J. Ribot Igualada* in the Spanish report to the Digest of European Tort Law (forthcoming) is followed here.

the *Generalitat* of Valencia seeking an award of € 621,133.21 for the damage resulting from the accident – which was dismissed – and then an appeal before the Administrative Chamber of the Superior Court of Valencia. The High Court of Justice of Valencia confirmed the administrative decision considering that the claimant had not proven the causal link between the injuries he had suffered and the behaviour of the health authorities since – according to the reports issued by medical experts – it could not be ascertained whether the injuries were the result of the delay in the treatment or not.

b) Judgment of the Court

28 The undue delay in the transfer deprived the claimant of the opportunity to obtain treatment in the best possible conditions and, consequently, this prevented him from escaping the sequelae that he now suffered. In other words, the claimant had suffered wrongful damage that he did not have a duty to endure, consisting in the fact that if the health care services of Valencia had acted with due care, by transferring him immediately to Barcelona by helicopter – something which was possible – and not by road, he would have enjoyed the chance of obtaining a different result, one that was more favourable for his health and, in short, more favourable for his life. The deprivation of these expectations, known in our case law as a *pérdida de oportunidad* (loss of chance), amounts to wrongful damage since, although uncertainty about result is something inseparable from the practice of medicine (a characteristic that explains why a right to be cured does not exist), citizens must have the guarantee that they are, at least, going to be treated with due care by applying all the means and instruments that medical science makes available to health care authorities. For this reason it is immaterial, as expert witnesses declare, that recompression in a hyperbaric chamber does not guarantee a 100% recovery of those who suffer decompression accidents, given that 28.5% of those treated within the first six hours nevertheless suffer permanent impairments. In any case Mr. Valentín was deprived of the opportunity of joining the 71.5% of those who suffer injuries but, when treated in time, recover in full. Accordingly, he does not claim compensation for the injury that he has in fact suffered as a result of the decompression accident, but only for the mere possibility that if such a delay had not occurred, he could have obtained a more favourable result. For these reasons, he is not compensated for hypothetical detriment – in contradiction to Art. 139. 2 of the Act 30/1992, which requires damage that is "effective, individualised and that can be economically evaluated" – but for real, true and effective damage consisting in being deprived of the opportunity of escaping the physical sequelae that he currently suffers. For these reasons, and taking into account the age of the victim when the accident happened, his profession, and the nature of the sequelae resulting from this loss of chance, the court considers that the sum of € 90,000 is an appropriate amount.

c) Commentary

29 As is well known, the doctrine of the loss of a chance (or *perte d'une chance*) has been applied by the courts in several European countries in cases of so-called uncertain causation or where the victim has lost an opportunity to obtain

some kind of gain or advantage.[41] Since recent times this doctrine has also been applied by the Spanish Supreme Court in several scenarios, including not only medical malpractice but also liability of some professionals such as lawyers and solicitors (*procuradores*).[42] In the case under comment, medical malpractice had an impact on the possibility of the victim recovering from already existing damage. As a matter of fact, it was uncertain – at least to a partial extent – whether the victim would have recovered from the decompression accident had he been transported by helicopter instead of by ambulance to the hospital in Barcelona. Obviously, the accident was not caused by the defendant Public Administration, but, in choosing a slower means of transportation from one hospital to the other, it prevented the victim from having the opportunity to recover fully from the health problems derived from the accident. In other contexts, the claim for damage consisting in the loss of a chance has been dismissed because the victim could not prove the probability of obtaining a gain (e.g. see STS 28.2.2008 [RJ 2008, 4035] which dismisses a claim against an allegedly negligent solicitor on the basis that the loss of a chance was purely hypothetical and it could reasonably be considered that winning the trial would have been impossible at any rate; similarly see STS 27.7.2006 [RJ 2006, 6548]).

30 In contrast to some other previous decisions of the Supreme Court, the concept of loss of a chance does not refer to the probability of obtaining some economic gain or even to non-pecuniary loss derived from the feeling of frustration due to not being able to have a trial – which perhaps the claimant could have won but for the negligent behaviour of the defendant legal professional. In the present case, the technical concept of loss of a chance is correctly used, since the probability of recovering did not depend on a decision by the victim but refers to the loss of an aleatory advantage, referred in this particular case to the recovery of the health of the claimant.[43] The mere fact that the chance of fully recovering may be small – around one against three in the present case – does not prevent the victim from obtaining compensation in proportion to such probability. The court takes into account that it was necessary to provide adequate treatment in consideration of the serious condition of the victim and that this should have been done in the fastest possible way (in line with previous case law, e.g. STS 25.9.1999 [RJ 1999, 7275]). It should also be borne in mind that liability of public bodies under Spanish law is strict, so there is no place for discussion as to whether not having provided a helicopter ambulance amounted to a negligent behaviour or not.

[41] See now *M. Martín-Casals*, Some Introductory and Comparative Remarks to the Decision of the Swiss Federal Court BGE/ATF 133 III 462 and to the "Loss of Chance" Doctrine, European Review of Private Law (ERPL) 2008, 1043 ff.

[42] See *J. Solé Feliu*, The Reception of the Loss of a Chance Doctrine in Spanish Case-Law, ERPL 2008, 1105 ff. and *J. Siso Martín*, La tesis de la pérdida de la oportunidad médica (I), Actualidad del Derecho Sanitario 2008, 764 ff.

[43] See *A. Ruda*, Spain, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 446 ff. with further references. A contrary opinion is held now by *C.I. Asúa González*, Pérdida de oportunidad en la responsabilidad sanitaria (2008) 98 ff.

5. Developments concerning Personal Injury

In 2008 the developments in this matter were centred on two areas, which are nonetheless very important for the legal practice of personal injury litigation: civil liability for accidents at work and the application of the legal tariffication scheme for personal injury resulting from traffic accidents. 31

With regard to liability for accidents at work, there is a gradual convergence of opinions of the Civil and the Social Chambers of the Supreme Court. This convergence appears, firstly, a propos of the jurisdiction on employer's liability for occupational accidents and diseases. Secondly, the legal tariffication scheme for personal injury resulting from traffic accidents is used by both chambers to assess damages in situations other than traffic accidents, including personal injury arising from accidents and occupational diseases. Finally, they seem to have reached agreement, in principle, to deduct the amount of social benefits accruing as a result of accident or disease from the damages award that should be paid by the tortfeasor. 32

The noteworthy STS 15.1.2008,[44] issued by the Civil Chamber in full, has set the criteria to be used by this Chamber as regards the (lack of) competence in liability claims for personal injuries and death suffered at the workplace or as a result of occupational diseases. After years of confrontation with the Social Chamber on this issue, the approach taken this year by the Civil Chamber makes the competence dependent upon whether the damage is attributed to a breach of the labour contract or to a behaviour completely unrelated to this contract. The competence belongs to the social jurisdiction if the claim is that the defendant broke a legal or conventional rule that aimed at specifying the employers' safety obligations vis-à-vis their workers, which are part and parcel of the legal contents of the labour contract (see Art. 5 d) and 19 of the Workers' Statute and 14 and 42 of the Act 31/1995, on prevention of occupational risks).[45] This approach has nevertheless earned criticism from some commentators, who say it is extremely formalistic and makes the rules of competence dependent upon the legal provisions quoted in the claim as violated.[46] At any rate, as happens in the case dealt with by the ruling, many claims are addressed not only against the employer but also against third parties not bound by contract with the claimant. This leaves the doors of the civil courts open to many suits that should be dealt with by social courts.[47] 33

[44] RJ 2008, 1394. Commented on by *B. Gutiérrez-Solar Calvo*, Relaciones Laborales 10/2008, 603–616.

[45] This criterion was confirmed later on in cases in which the only defendant was the employer. See STS 16.4.2008 (RJ 2008, 5771), 4.6.2008 (RJ 2008, 4237 y 4238) and 17.11.2008 (RJ 2008, 6930). The rule is also consistent with the requirements stipulated for applying the special limitation period laid down in Art. 59 Workers' Statute (see STS 5.1.2008 [La Ley 2008, 17679).

[46] *C. Gómez Ligüerre*, Responsabilidad por accidente de trabajo, infracción de normas laborales y jurisdicción competente. Comentario a la STS, 1ª, 15.1.2008, InDret 4 (2008) at 10 (www.indret.com).

[47] In this sense, see *F. Pérez de los Cobos Orihuel*, La jurisdicción competente para conocer de la responsabilidad civil derivada de accidente de trabajo: el principio del fin de un desencuentro,

34 Two basic reasons explain the propensity of many claimants to bring their claims before the civil courts. Firstly, until very recently the civil courts were very keen on using tools such as the reversal of the burden of proof of fault or a poorly defined responsibility for risk to ease the path to make employers liable.[48] The social courts are much more demanding in this regard.[49] Moreover, the damages awarded in *civil* suits tended to be higher than those awarded by the social courts.[50]

35 For some time now, however, it seems that the approach of the two jurisdictions, at least with respect to the Supreme Court, are tending to meet.

36 On the one hand, the Civil Chamber is now tougher than in the past as regards the proof of the wrongful conduct of the employer and the causal link between this and the damage suffered by the claimants. STS 7.1.2008[51], for instance, is but one example of this change of attitude, as applied against the relatives of a deceased worker who fell from the garbage truck where he was working.[52] The ruling starts by recalling that since 2005 the Civil Chamber of the Supreme Court has refused to apply a presumption of fault to any business activity whatsoever. It also adds that the so-called doctrine of risk cannot be applied systematically. Accordingly, in the case at issue the Supreme Court must confirm the view of the trial court, which was based upon the fact that the claimants did not prove any infringement attributable to the employer, be it a supposed lack of training of the victim or the negligent operation of the truck during the service.[53]

37 Moreover, the Civil Chamber has not only reaffirmed the constitutionality but also the appropriateness of applying the legal tariffication scheme for personal injury resulting from traffic accidents to cases other than traffic accidents. The doctrine today is that the legal tariffication scheme "can uniformly fill the role of assessing the damage that must be compensated, which in itself belongs to the sovereignty of the courts, thereby giving full effect to the [principle of equality] insofar as it provides equal treatment to compensation of injuries

Diario La Ley, 3.3.2008, 6895, 2. See also *Gómez Ligüerre*, InDret 4 (2008) 12 f. and *Gutiérrez-Solar Calvo*, Relaciones Laborales 10/2008, 613 f.

[48] See *Ribot* (fn. 33) 549 f., and more ref. therein. See also *G. Díez-Picazo*, Los daños derivados de accidentes de trabajo: una gran paradoja, Revista de Derecho patrimonial 19 (2007) 25–43, at 40.

[49] See STS Social 30.9.1997 (RJ 1997, 6853) and 20.7.2000 (RJ 2000, 6754). Cf. *J. Domingo Monforte*/*A. Peiró Abásolo*, La responsabilidad civil derivada de los accidentes de trabajo, Revista de Responsabilidad Civil, Circulación y Seguro (RRCCS) 2 (2008) 6–22.

[50] In great part because the social courts automatically deducted social benefits accorded to workers injured as a result of an accident from the amount of compensation awarded to them (among many others see STS Social 22.10.2002 [RJ 2003, 504]). Cf. *J.L. Lechuga Sancho*, El quantum indemnizatorio por accidentes de trabajo, Actualidad Jurídica Aranzadi (AJA) 745 (2008) 1–3.

[51] RJ 2008, 203.

[52] See also STS 23.5.2008 (RJ 2008, 3169) and 16.7.2008 (RJ 2008, 4716). The latter concerned the claimant's fall onto the lines in a railway station.

[53] Unsurprisingly, the situation is causing some perplexity among the legal profession. To some extent most lawyers were used to decades of case law of "objectivisation" of civil liability. For instance see *J.A. Badillo*, La doctrina del riesgo en sus justos límites, RRCCS (2009) 45, 5.

arising from traffic accidents and to those flowing from other causes".[54] By so doing, the Civil Chamber aligns itself with the other chambers of the Supreme Court, which tend to view the legal tariffication scheme for personal injury resulting from traffic accidents as a general tool to be applied to any case involving injury or death. In fact, it is not the optional use of the scheme for guidance that is suggested but a much more compelling approach. It has already been said that the judge must follow the scheme in cases other than traffic accidents because "when it comes to non-pecuniary losses, the system established by the legislature enjoys greater legitimacy than the assessment made by the discretion of the courts, which risks infringing the principles of equal treatment and legal security,… the generic calls for the discrete judicial assessment of damages and the fair balancing of the circumstances of the case are not always a guarantee of accuracy nor of uniformity of compensation". Moreover, while the determination of the compensation award by using the scheme does not require full motivation of the amounts because the rationality of the decision derives from the decision of the legislature,[55] if a court wishes to depart from the system it should provide enough grounds for the decision and point to what exceptional circumstances or elements omitted by the scheme warrant the decision to reduce or to increase the compensation provided for in it.[56] As a logical consequence of this approach, the ruling in which "an inexplicable or clear disproportion between what should have been paid according to the legal scheme and the compensation eventually awarded" may be reviewed on appeal.[57]

This doctrine is praised by the specialised literature. Some authors note, however, that despite the proven utility of the legal scheme of tariffication a widespread use of it "requires a significant technical improvement".[58] Until the reform is carried out[59] a call is nevertheless made in favour of its general application to all cases of personal injury and death. It is also encouraged that the application is done with flexibility, allowing a certain judicial leeway to overcome its gaps or *lacunae*.[60] Accordingly, the judge should be able, in exceptional cases, to supplement the legal scheme, motivating his or her decision upon criteria of proportionality and equity derived from the rules laid down by 38

[54] STS 2.7.2008 (RJ 2008, 4276). STS 10.2.2006 (RJ 2006, 674) admitted the possibility of reviewing the judgment of the trial court that had awarded an amount in damages lower than the compensation accorded by the legal tariffication scheme, although a defect in the appeal prevented the Court from doing so. Previously, the Supreme Court stood against using the scheme even as guidance only. See STS 20.6.2003 (RJ 2003, 4250); commented upon by *A. Luna Yerga/S. Ramos González*, InDret 1 (2004) (www.indret.com).

[55] Assessing the damage by means of the legal scheme "is a decision that entails implicitly that no proof has been afforded about any data justifying a higher amount, and does not require, therefore, additional grounds to justify it" (STS Criminal Chamber 13.2.2004 [RJ 2004, 2015]).

[56] "If the judge decides to disagree at any point with the legal scheme, he must provide the reasons for acting in this way, because the tariffication of the damage is subject to rules that cannot be set aside without further explanation of the reasons that lead to certain conclusions" (STS Social 17.7.2007 [RJ 2007, 8303]).

[57] STS 9.12.2008 (RJ 2008, 6976).

[58] *L.F. Reglero Campos*, in: Tratado de Responsabilidad Civil (5th ed 2008) 459.

[59] See *Ribot/Ruda* (fn. 3) 546.

[60] *Reglero* (fn. 58) 487.

the legal scheme for usual cases.[61] In these exceptional cases, the courts ought to justify clearly why the scheme is not applied. The grounds could be that the damage at stake "is not covered by the scheme" or that under the circumstances the scheme "leads to a clearly iniquitous solution".[62]

39 Despite a certain rapprochement of the doctrinal and judicial criteria, the practice of the courts still provides many examples of both a sealed application of the scheme – which precludes compensation for concepts that are not explicitly recognised in it[63] – and its application as guidance only, in which the judicial reasoning is built upon the scheme with regard to the heads of damage, but the judge is not bound when assessing the amount of damages or applying the correction factors laid down by the legal scheme.[64] In addition, differences of opinion remain as regards which rule to apply to determine the points of each injury or of permanent sequel[65] and what value is set to the result thus obtained. Two rulings of the Civil Chamber ratified in 2008[66] the doctrine of STS 17.4.2007,[67] according to which the courts must use the table in force at the time of the accident to assess the medico-legal permanent injuries and sequel, whereas to assess the value of each point and the compensation derived thereof the relevant time is the moment of the final determination of the consequences of the accident, which is the date of discharge from medical treatment.[68] The

[61] *M. Medina Crespo*, Análisis crítico de la estricta jurisprudencia civil sobre la valoración del daño corporal (2005–2007), in: J.A. Xiol Ríos, Jurisprudencia civil (2005–2007): Análisis crítico (2008) 129. See also *M. Medina Crespo*, Los daños morales complementarios. Consideraciones doctrinales, RRCCS 1 (2003) 4–21, at 13–15.

[62] *Medina* (fn. 61) 129. See also *Reglero* (fn. 58) 458 f.

[63] STS 7.5.2008 (RJ 2008, 2952) denies the damages award claimed by the victim of a hunting accident for the non-pecuniary losses related to the period of time in which he was waiting for a second surgical intervention but was able to restart his working activities. The Court stated that "in the legal tariffication scheme, applied by analogy by the trial court, the compensable non-pecuniary losses are limited to those linked with other compensable losses, like temporary incapacity". See the criticism raised against such a restrictive approach by *M. Medina Crespo*, Sobre el resarcimiento de los días interoperatorios de baja, en un supuesto de lesiones con secuelas, Revista Española de Seguros (RES) 133/134 (2008)181–188.

[64] The Social Chamber of the Supreme Court, for instance, holds the opinion that one may rule out a strict application of the legal tariffication scheme in cases other than road traffic accidents in which the tortfeasor acted with fault: "Bearing in mind that the application of the tariffication scheme is not compulsory, the Court may award compensation for loss of income higher than that laid down by the scheme, provided that such a loss had been proved by the claimant" (STS Social 17.7.2007 [RJ 2007, 8303]). See the criticism raised against such a flexible system in the application of the tariffication scheme in the area of accidents in the workplace by *J. Seco García-Valdecasas*, RC del empresario derivada de un accidente laboral, RRCCS (2008) 44, 17–36, at 35.

[65] The problem arose when Table VI of the scheme ("Classification and assessment of sequelae") was amended in 2003 by Act 34/2003, of 4 November. See *Ribot/Ruda* (fn. 33) 387. On the practical effects of the amendments see *A. Luna Yerga/S. Ramos González*, Accidentes de circulación más baratos para el causante y más caros para la víctima. Modificación de los baremos por la Ley 34/2003, InDret 1 (2004) (www.indret.com).

[66] STS 10.7.2008 (RJ 2008, 3355) and 23.7.2008 (RJ 2008, 4619).

[67] RJ 2007, 3360 and 3359.

[68] The amount of damage results from the actualisation of the score attributed to the permanent injuries according with the monetary value of each point in the year immediately before the discharge of the victim (STS 10.7.2008 [RJ 2008, 3355]).

Social Chamber of the Supreme Court considers instead that the award of damages is a debt of value (*deuda de valor*) and that its amount should therefore be estimated according to the rules in force at the time of the first judgment on the issue.[69] On the other hand, State liability rules in force stipulate that the damage is always assessed at the time of the injury, whereas the amount of compensation must be updated according to the CPI at the date of the final decision of the proceedings (see Art. 141.3 LRJAP).[70]

Finally, another topic under which the positions of the civil courts and the social courts seem to be brought closer together is the deductibility of any sum received or recognised by the Social Security System or by similar organs from the amount of damages due by the defendant tortfeasor to the victim 40

Until a few years ago, the Civil Chamber stood for the independence between the civil claims arising from an accident and any social benefits derived thereof. The Court thus made it possible for the victims to claim full damage compensation from the tortfeasor in spite of being eligible for the social benefits arising from the accident.[71] In recent times, the Civil Chamber seems willing to rectify and to accept some kind of set off between the damages award and the amounts to be received as social benefits. This has been explicitly acknowledged by STS 24.7.2008.[72] The decision dealt with an accident caused by lack of security measures and highlighted the hesitations of case law to reach the conclusion that "regarding the concurrence of actions… [the economic benefits] come from the very same source". It is therefore not acceptable for victims to "increase their assets beyond the damage suffered" because "the purpose of damages is not to enrich but to repair", so accumulation is only possible when social benefits arising from the accident do not reach the level of full compensation for damage or compensation is provided for a damage other than the one claimed for in the tort action.[73] In any event, the decision ends with an appeal to the legislator and states the court's willingness to arrive at "the desired coordination" between the different sets of rules and the different judicial orders called to decide this sort of case. 41

Indeed, the Social Chamber has proposed specific criteria on how to calculate the deduction of benefits in cases of accidents. STS 17.7.2007[74] has declared that any deduction of amounts paid or granted to the victim requires damages awards to be specified by concepts. As a result, it rejects the automatic 42

[69] STS 17.7.2007 (RJ 2007, 8303).

[70] This criterion is the one preferred by specialised legal writing when suggesting changes to be introduced in the legal scheme of tariffication. Cf. *M. Medina Crespo*, Bases concretas para una reforma conservadora del sistema legal valorativo, RES 131 (2007) 272–294, at 273.

[71] See *M.P. García Rubio/J. Lete/F. Gómez Abelleira/C. Ferreiro*, Spain, in: U. Magnus (ed.), The Impact of Social Security in Tort Law (2003) no. 26.

[72] RJ 2008, 4626.

[73] As a result, the decision deducted from the damages awarded to the claimant and his relatives all sums paid by the Social Security Scheme and by a private insurance specially bought for workmen on construction sites.

[74] RJ 2007, 8303.

set off between the capital-cost of the social benefits for permanent incapacity to work[75] and the amounts requested by the victim or that result from the application of the tariffication scheme. Such a procedure may even lead to a negative result and give the (wrong) impression that the claimant is going to be enriched at the expense of the tortfeasor.[76] In fact, the Court stressed that one advantage of the application of the legal tariffication scheme as guidance only is that, despite its severe technical flaws, it reveals that compensation for personal injury includes not only the patrimonial damage resulting from it, but also other parameters. Automatically deducting benefits from damages entails the obvious risk of deducting amounts corresponding to concepts of a different nature. So the social benefits accorded to victims who seek to replace loss of income resulting from the accident will be set off only against the amounts that the legal scheme of tariffication awards for the same concept. And even in that case one must be careful: a) although the loss of income may be entirely covered by the social benefits, there is still room for a claim seeking compensation for proven expenses and for the non-pecuniary loss related to the injuries (normally to be assessed according to the legal tariffication scheme) and b) the loss of income may be covered only in part by the social benefits, because the victim's payments to the Social Security System were below his/her real wage or because the allowances granted cover only part of the salary lost, on the (unreal) assumption that after the accident the victim could have developed some lucrative activity. Besides that, all amounts claimed for concepts other than loss of income cannot be deducted and must be compensated for according to the legal tariffication scheme.[77]

43 Moreover, none of the Chambers of the Supreme Court accepts any kind of set off regarding the sums the victim received as *recargo de prestaciones* (supplement to benefits), an additional amount for which the employer is personally liable if the competent administrative authority issues a declaration that an accident happened because of the infringement of the legal provisions on safety at the workplace.[78]

[75] This is the amount that social insurance must keep apart to guarantee the payment of future allowances due to the victim.

[76] See STS Social 9.2.2005 and 24.7.2006.

[77] STS Social 17.7.2007 (RJ 2007, 8303). See also the preliminary decision of the Social Chamber 17.7.2008 (La Ley 2008, 148433). It must be borne in mind that the first decision quoted said that courts may set the legal scheme aside if it does not guarantee full compensation for damage caused by the fault of the defendant.

[78] STS Social 2.11.2000 (RJ 2000, 9686) and 14.2.2001 (RJ 2001, 2521) declared the supplement to benefits non-deductible because of its punitive character. It must be noted, however, that some authors recall that this supplement originated in the employer's liability for fault when the legislation in force guaranteed immunity from workers' claims. Once the immunity rule was repealed this specific ground of liability lost its original goal and its elimination is suggested (*A. Desdentado Bonete*, Responsabilidades por los accidentes de trabajo: prestaciones de la Seguridad Social, recargo e indemnización civil adicional, in: N. Pumar, La responsabilidad laboral del empresario: siniestralidad laboral (2007) 59–77 at 75). As regards the punitive character of the supplement to benefits see *B. Fernández Gregoraci*, Recargo de las prestaciones de la Seguridad Social: un supuesto específico de "punitive damages", Anuario de Derecho Civil (ADC) 61 (2008)113–146 (see below section C).

The model that is being articulated by Spanish case law consists of a deduction from the compensation to be paid by the defendant tortfeasor of the amount of benefits paid or granted to the claimant. As a result, Social Security, some specific institution that cooperate with the Social Security System or the employer, depending upon the type of benefits granted to the victim, take upon a portion of the costs of the damage caused by the liable person, basically the loss of income resulting from death and personal injuries. In addition, a victim's claims to cover medical expenses are unusual because she or he is offered free access to treatment services with the national health system. 44

Spanish law lacks a general rule allowing for reimbursement action against the tortfeasor for social benefits paid to the victim of a tort. *Vis-à-vis the employer* such a claim cannot take place, since social insurance, in whatever form, is a kind of liability insurance and therefore it is his or her liability that is covered. *As regards other tortfeasors*, economic benefits may not be claimed either. The courts require a legal provision in this regard and such a rule exists as to health costs only.[79] This scheme assumes that the Spanish providers of public social benefits are to bear a cost that is part of damage for which the tortfeasor should bear responsibility in full. Moreover, it is not easy to understand that the reimbursement of medical costs is accepted whereas the cost of benefits for disability or death must be borne by the Social Security System or by other providers. This paradoxical situation becomes evident when claims for reimbursement are filed by foreign institutions against insurers for damage their affiliates suffered in Spain. The Supreme Court has here dismissed the argument of the defendants, who contended that Spanish law only requires the repayment of the health costs to the victim, but not of other benefits granted to him or her. Quoting case law of the ECJ[80], the Supreme Court declared that the governing law on this issue is the law of the Member State to which the claimant belongs, not the law that determines who is liable for the damage.[81] 45

[79] See Art. 127.3 General Act on Social Security 1994, 82 General Act on Health 1985 and 83 Insurance Contract Act 1980. Hence, actions from private health insurers are relatively frequent and there is a framework agreement governing the reimbursement of health costs incurred by the national health system when providing services to victims of industrial accidents or other insured events such as traffic accidents.

[80] ECJ C-428/92, *Deutsche Angestellten-Krankenkasse v. Lærerstandens Brandforsikring G/S* [1994] ECR I-2259 par. 2 and C-397/96, *Caisse de pension des employés privés v. D. Kordel, R. Kordel and Frankfurter Allianz Versicherungs AG* [1999] ECR I-5959.

[81] STS 30.4.2008 (RJ 2008, 1839; commented on by *P. Benítez Pizarro*, RRCCS 2008, 46–51) (applying Art. 93 Council Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ L 149, 5.7.1971, 2–50). See also STS 4.12.2008, applying a similar provision enclosed in a convention between Spain and Switzerland on Social Security allowances. More recently, the same rule is to be found in Art. 85 Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, 1–123 and Art. 19 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, 40–49.

C. Literature

1. *European Group on Tort Law*, Principios de Derecho Europeo de la Responsabilidad Civil (Thomson Aranzadi, 2008)

46 As we explained in our previous report, the Spanish Supreme Court has started quoting the Principles of European Tort Law (PETL) in several decisions.[82] In 2008 two more decisions make reference to the PETL. The first one (STS 24.11.2008 [RJ 2008, 6061]) holds an underground company liable for damage suffered by a passenger as a result of an aggression by a third party, due to a failure in the duty of surveillance of the underground's facilities and refers to Art. 8:107 PETL on "performance entrusted to another". However this is clearly a typing error since this Article does not actually belong to the PETL but to the Principles on European Contract Law. The second decision refers to previous Supreme Court decisions also quoting the PETL and, quoting them once again – but without referring to any specific Article – dismisses a claim in tort for damage suffered by inhalation of gases of a toxic product, on the basis of contributory negligence (STS 21.11.2008 [La Ley 184737/2008]).[83] Probably this use of the Principles by case law will now be eased by the translation of the text of the Principles and its authoritative Commentary into Spanish.[84] The work has been carried out by a group of scholars from different Spanish Universities under the coordination of the Spanish member of the Group and member of its Drafting Committee, Prof. Miquel Martín-Casals. In addition to the translations of the Principles into Catalan and Spanish – already included in the original edition by Springer – it includes new translations into the Basque and Galician languages.

2. *L.F. Reglero Campos* (ed.), Tratado de responsabilidad civil (Thomson Aranzadi, 4th ed. 2008)

47 The Treaty on Tort Law is the most important work by Prof. Reglero Campos, who died – aged 55 – in April last year as a result of an accident while he was doing potholing and caving in the mountainous area of Cuenca. Prof. Reglero started working in an insurance company when he was 19 and obtained a History degree and afterwards a Law degree. When he was 33 he resigned from his job and joined the University, where he wrote a Doctoral Thesis on tort liability deriving from motor vehicle accidents under the direction of Prof. R. Bercovitz. A tireless worker and a prolific author, he became the leading specialist in this particular field of tort law and eventually edited the best treaty on tort law presently on the market. Prof. Reglero died when its 4th edition was

[82] *Ribot/Ruda* (fn. 3) 554.

[83] In the lower courts, at least nine decisions refer to the PETL. In chronological order: AP Badajoz 21.12.2008 (JUR 2008, 89806), AP Pontevedra 21.2.2008 (JUR 2008, 154433), AP Huelva 17.3.2008 (JUR 2008, 226907), AP Ciudad Real 14.4.2008 (JUR 2008, 332201), AP Pontevedra 24.4.2008 (JUR 2008, 323053), AP Asturias 29.5.2008 (JUR 2008, 330262), AP Asturias 27.9.2008 (JUR 2008, 49512), AP Asturias 19.10.2008 (JUR 2008, 41147), and AP Guipúzcoa 21.12.2008 (JUR 2008, 704).

[84] See a short book review (although the author may not have fully understood the Principles) by *M. Medina Alcoz,* Actualidad Jurídica Aranzadi 23 October 2008, no. 761.

almost finished. Tragically enough, the week after his death he was expected to assess – as a member of a Commission – a Doctoral Thesis on sport and liability.[85] The *Tratado* will for many years be the best tribute to the memory of this highly respected tort lawyer.

3. *A. Ruda*, El daño ecológico puro. La responsabilidad civil por el deterioro del medio ambiente, con especial atención a la Ley 26/2007, de 23 de octubre, de responsabilidad medioambiental (Thomson Aranzadi, 2008)

48 Over the last few years there have been several serious cases of damage to the environment caused by pollution in Spain. In general terms, the existing liability regimes do not quite cover – or cover only to a limited extent – damage to the environment as such, also called pure ecological damage. However, there are many formidable hurdles when we try to fit this kind of damage into the traditional moulds of nuisance or general liability rules. This book – written by one of the authors of this report – focuses on the shortcomings of the existing liability regimes from a comparative point of view and analyzes some proposals to make the polluters pay for damage to the environment. Special attention is paid to the Environmental Liability Act 2007, which differs on certain points from the regime established by the Environmental Liability Directive – e.g. the Spanish act lays down a statutory presumption of the causal link[86] and also establishes the duty to provide compulsory insurance or equivalent financial security – but still does not seem to solve all the problems posed by pure ecological damage. The book, which analyses case law and places the Environmental Liability Act in the broader context of tort law, is the result of a comparative work submitted as a Doctoral Thesis – supervised by Prof. M. Martín-Casals (Girona) – which received the "Francisco de Asís Sancho Rebullida" award for the best Doctoral Thesis on a private law subject in Spain, among other prizes.[87]

4. *P. Salvador Coderch/F. Gómez Pomar* (eds.), Tratado de responsabilidad civil del fabricante (Thomson Civitas, 2008)

49 Although there are already several good books on product liability as a whole, this massive treaty – more than 1,000 pages long – is definitely the most far –

[85] On this subject see also *F. de la Torre Cid*, Derecho y deporte. Particular referencia a los accidentes deportivos: responsabilidad civil y riesgos en el deporte, La Ley 2009, no. 7081 and *P. Muñoz Sendo*, La responsabilidad civil en el ámbito deportivo, on the same issue.

[86] By the same author also see Comentario a la Sentencia de 31 de mayo de 2007, CCJC 2008, 153 ff. and Comentario a la Sentencia de 2 de noviembre de 2007, CCJC 2008, 1119 ff. See also his report to the Common Core project, Spain, in: *M. Hinteregger* (ed.), Environmental Liability and Ecological Damage in European Law (2008) 151 ff. and *M. Martín-Casals/A. Ruda*, Spain, in: B.A. Koch (ed.), Economic Loss Caused by Genetically Modified Crops. Liability and Redress for the Adventitious Presence of GMOs in Non-GM Crops (2008) 443 ff.

[87] Also see the book reviews by *M.P. García Rubio*, Legal Today 1 September 2008 and *A. Cabanillas Sánchez*, ADC 2008-IV (forthcoming). On the author see the short CV at the end of this volume. Also see *B. Lozano Cutanda* (ed.), Comentarios a la Ley de responsabilidad medioambiental (2008), which is actually more a collection of papers on the Environmental Liability Act – mostly authored by lawyers or public officials – than a systematic commentary of the same.

reaching, comprehensive and detailed ever published in Spain. The result of the prolonged work of a large group of scholars of the University Pompeu Fabra (Barcelona), it deals with almost every imaginable aspect of this subject. In spite of its collective authorship, the unity of style and methodology adopted in the several chapters and the internal coherence of the volume is remarkable. The book, which finds an enviable balance between clarity and analytical depth, focuses mainly on Spanish tort. Nevertheless, extensive information on foreign legal systems – mainly those of the US and Germany – and references to case law of the ECJ also abound. The authors have not tried to conceal their obvious taste for economic analysis, which some readers may find superfluous or unnecessary, but it is actually kept within reasonable limits. The volume starts with a chapter on the historical evolution of this area of law;[88] followed by the so-called general principles of the producer's liability; the concept of product; the product's defects; the liable parties; solidary liability, intervention of a third party and contributory negligence; causation and its proof, proof of the defect and damage; defenses;[89] compensable damage; liability caps; exclusion or limitation of liability clauses; the statute of limitations; the relationship with other liability regimes; insurance, and the temporal scope of the application of the liability regimes. It includes several Annexes with the text of the relevant statutory regime and EC Directives, as well as a Guide to case law with telegraphic abstracts of hundreds of court decisions on the subject.[90] For those who still think that legal research can only be carried out on an individual basis, this outstanding publication should be evidence that proves that the contrary is true and that joining multiple efforts under a wise baton – or two of them, in this case – may give rise to extraordinary results which could never have been achieved by one sole author. In summary, although the book is rather expensive, it is excellent both in its reach and depth, it is really value for money and constitutes an invaluable source of information – not to be missed by any practitioner or academic interested in this field.

5. *M. García-Ripoll Montijano*, Imputación objetiva, causa próxima y alcance de los daños indemnizables (Comares, 2008)

50 The German doctrine of the scope of application (*objektive Zurechnung*) was first adhered to by Spanish scholarship on tort law two decades ago.[91] Although it was soon followed by the criminal law courts, the Private Law Chamber of

[88] On the 2007 statutory reform, see also *M. Martín-Casals/J. Solé Feliu*, ¿Refundir o legislar? Algunos problemas de la regulación de la responsabilidad por productos y servicios defectuosos en el texto refundido de la LGDCU, Revista de Derecho Privado (RDP) 2008, 79 ff. and *S. Cavanillas Múgica*, El Real Decreto Legislativo 1/2007 por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, Aranzadi Civil 2008, no. 1, 15 ff.

[89] See also *P. Salvador Coderch/A. Rubí Puig*, Riesgos de desarrollo y demarcación judicial de la buena ciencia, ADC 2008, 5 ff. and *J.M. Álvarez-Cienfuegos Fernández*, Legítima expectativa de seguridad vs. Riesgos de desarrollo, Revista de responsabilidad civil, circulación y seguro (RC) 2008, no. 11, 36 ff.

[90] The Guide can also be found in InDret (www.indret.com).

[91] See the seminal work by *F. Pantaleón Prieto*, Causalidad e imputación objetiva: criterios de imputación, in: Asociación de Profesores de Derecho Civil (ed.), Centenario del Código Civil II (1990) 1561 ff.

the Supreme Court took considerably longer and did not make use of it until quite recently.[92] In general terms, its application has contributed to clarifying the doctrine of case law, which previously tended to mix the problems of natural causation with those of legal causation in a rather confusing way.[93] For this reason, one could expect legal scholarship to applaud this improvement instead of criticizing case law for having taken such a step. However, it could also be argued that the blind or mechanical importation of doctrines developed within criminal law in tort law ignores the fact that the latter is governed by its own principles, which, in certain aspects, may substantially differ from those of criminal law. Well aware of this risk, the author of the present volume – who is particularly skeptical as regards these kinds of doctrinal transplants or loans from criminal law[94] – puts the usual criteria of the scope of application doctrine – such as *Regressverbot*, etc. – to a careful test. After having summarized their origin and evolution from Hegel's work to the present day – thereby displaying knowledge of criminal law literature unfamiliar to a tort lawyer, but without falling into mere erudition – he suggests that in reality Spanish tort law does not need to resort to such a foreign doctrine. Instead, the problems usually dealt with through its application – which actually obey the particular features of German criminal law, the author suggests – could be solved by other means, such as through the application of the doctrine of state of necessity or on the basis of the lack of wrongfulness of the tortfeasor's conduct. Undoubtedly a good read, it will be interesting to see what impact this book will have on Spanish case law and, if so, when it will take place.

6. *R. Verdera Server*, La responsabilidad civil del notario (Thomson Civitas, 2008)

Over recent years increasing attention has been paid to the liability of pro- 51
fessionals in tort, mainly with regard to physicians, builders, architects and lawyers. However, comparatively little attention has been devoted to the liability of notaries. This book focuses on this issue from the point of view of both contract and tort law. The legal analysis starts from the description of the notary as both a public official and an entrepreneur, who may be held liable for his own acts or the acts of others. The author presents empirical data showing that the number of liability claims against notaries has been increasing recently – mainly due to the inappropriate behaviour of the notary's employees with regard to money entrusted to the notary by his clients – and suggests that it will probably expand even more in the future. The book systematizes case law – including many decisions of the General Direction on Land Registries and Notaries – and contains an extensive annex – around 220 pages long, almost half of the book – with abstracts of the decisions quoted elsewhere in the volume.

[92] See our previous report, *Ribot/Ruda* (fn. 3) 563. See also *R. de Ángel Yágüez,* Última jurisprudencia civil sobre imputación objetiva y en torno a la probabilidad cualificada, Práctica Derecho de daños 2008, no. 56, 5 ff.

[93] See *J. Ribot/A. Ruda*, Spain, in: B. Winiger/H. Koziol/B.A. Koch/R. Zimmermann (eds.), Essential Cases on Natural Causation (2007) 43.

[94] On a similar vein, but with regard to the state of necessity, see his previous book *M. García-Ripoll Montijano*, Ilicitud, culpa y estado de necesidad (2006).

7. *B. Fernández Gregoraci*, Recargo de las prestaciones de la Seguridad Social: un supuesto específico de "punitive damages", Anuario de Derecho Civil 61 (2008) 113–146

52 More often than needed, Spanish legal scholars discover instances of damages awards that seem to merit the adjective "punitive". One of these cases is the "supplement to benefits" (*recargo de prestaciones*), an additional amount for which the employer is personally liable if an accident occurred in the workplace as a result of an infringement of safety regulations. The punitive character is based upon the uninsurability of the employer's liability and the fact that it supplements both social benefits and any additional sum awarded to the victim.[95] *Fernández Gregoraci* refutes this approach brilliantly. To do so, she brings together the historical origins and the function of the "supplement to benefits" and compares its features with the American punitive damages. The outcome of this exercise is that most features of the latter do not match with the "supplement to benefits" and that, accordingly, it does not provide any bases upon which to build the argument allowing punitive damages into Spanish tort law.

8. *S. Nasarre*, Spain (Wolters Kluwer, 2008)

53 Any initiative to bring knowledge of Spanish tort law to a wider international audience should be saluted as an important step. Dr Sergio Nasarre, Associate Professor at the University *Rovira i Virgili* in Tarragona – who has published extensively on mortgage securitisation – has managed to write an overview of it as a supplement to the corresponding series of the *International Encyclopaedia of Laws* edited by Blanpain and Colucci. The book is divided into six different parts ("Liability for One's Own Acts", "Liability for Acts of Others", "Forms of Strict Liability", "Defences and Exception Clauses", "Causation" and "Remedies") preceded by a "General Introduction", which includes an extensive explanation of the historical background and of the Spanish legal system, although one may wonder whether it should have been better located elsewhere. In broad terms, the book achieves the goal it pursues: introducing foreign readers to Spanish law and tort law. Notwithstanding its reasonable length (just 242 pages), it is full of quotations of statutory provisions and case law as well as of references to scholars' opinions. The information delivered ranges from great detail in some issues to general outlines in most of them. Special attention is paid to some specific instances of liability. The selection of topics, however, seems random and leads to an imbalance between different sections of the book. Professional negligence, for instance, is dealt with extensively, but the information provided is too general to be relevant. Conversely, very specific issues, with far less practical importance, are dealt with in much more detail (e.g. interference with contractual relations, organization and practice of sports, damage related to information society services). The general rules of tort law lack a thoughtful elaboration and almost no reference is made to the recent case law of the Supreme Court on causation, professional liability or damage flowing from hazardous activities. Finally, some concepts

[95] The amount of "supplement to benefits" is never deducted. See above no. 43.

coming from other jurisdictions are tackled, which do not match the way Spanish lawyers handle the issues at stake (e.g. duty of care, equitable limitation of damages, damage). Perhaps this is due to the need to follow the framework of the general book which is supplemented. Unfortunately, the book thereby offers an unreliable impression of the position of Spanish law on these issues.

XXVI. Sweden

Håkan Andersson

A. Introduction

1 As always, an everlasting flow of interesting – and maybe not so very interesting – tort law cases occurred in the year 2008. In this article, focus will be put on just four cases, namely cases that give some input to the legal issue concerning tort law borders. Therefore, the title – or subheading – of this article should read "*Borderlines of Protected Interests in Tort Law*".

B. Legislation

2 There was no new legislation of particular comparative interest in 2008.

C. Cases

1. Supreme Court, Högsta domstolen, 6 February 2008, [2008] Nytt Juridiskt Arkiv (NJA) 100: Borderlines Concerning the State's Right to a Recourse Claim against a Tortfeasor

a) Brief Summary of the Facts

3 Salmonella had spread over a large number of farms, all of which had purchased contaminated feed from a specific producer. The Agriculture Authority ordered (according to the Animal Disease Act) farmers to slaughter their pigs. With the application of the Animal Disease Act, the Authority paid a sum equivalent to € 85 million in compensation for the costs and losses due to this extensive slaughter. The State claimed that the feed producer should pay this sum to the State, because the producer had caused the damage due to the emergency slaughter. The fundamental issue was whether the State had a right of recourse or if the expenses should be seen as having been incurred in the public interest, and therefore not recoverable.

b) Judgment of the Court

The Supreme Court emphasised that control of salmonella is a State matter, but that the compensation provisions regarding victim farmers cannot mean that the State in principle is obliged to cover all costs that the farmers incur because of the Authority's intervention. The rules in the Animal Disease Act are "to be regarded as public law in favour of individuals". According to the Court, compensation for salmonella control may be seen as in the public interest, and therefore a task that the State has taken upon itself. The Court referred to previous cases, whereby a "general principle" was stated that the costs of measures that authorities are required to perform may be considered to be of such nature that they are not, without specific legal ground, to be recoverable. 4

This principle regards tort claims. According to the Court however, similar considerations are to be made regarding the possibility for the State to make recovery claims when the State has made payments to the direct victims (in this case the farmers). Therefore, the State was denied a right to recovery for the payments to the farmers. 5

c) Commentary

There is a general principle that a variety of public spending will stay on the State, even in cases when there is a liable individual. The activities in question can in some sense be regarded as protection of public interests, and therefore the costs should stay on the part of the State – even in cases where claims otherwise could have been directed against a tortfeasor. And since there were no transfers of the farmers' claims against the producer to the State, the State could not be in a better position than in cases where the State has had direct damage. 6

When the Supreme Court decided that compensation issues regarding the salmonella control could be seen as "in the public interest", this can be read as a tendency to extend the area of what can be considered as public interests. To combat the spread of diseases that can affect the public is undoubtedly a public interest, but the Court indicates that also the compensation arrangements for such actions is a general interest, although this is a support for the individual farmers who the actions dealt with (i.e. the demands upon them to slaughter their farm animals). The interesting point is however, that in judicial interpretations of security interests, etc., there is a tendency that the term fairly seldom entails restrictive readings. Thus, in future cases maybe the Court can reach the conclusion that the State has a right to tort or recourse claims if the actions or expenditure are related to measures that are of a different nature than the protection of public interest. However, a relatively broad interpretation can be expected regarding what will be considered as a public interest. 7

2. Supreme Court, Högsta domstolen, 2 September 2008, [2008] NJA, 861: Borderlines Regarding Unlawful Conditions on the Victim's Side in Tort Law

a) Brief Summary of the Facts

8 The thief A committed burglary and stole a sum equivalent to € 15,000 from B's apartment. B sued him for the damages. A admitted the offense but denied the tort law claim, because the claimant's money had not been honestly earned; by this A meant that B had received the resources through drug sales.

b) Judgment of the Court

9 The Supreme Court stated that theft of cash is to be seen as property damage (i.e. not as pure economic loss). Furthermore, the Court noted that restrictions in the victim's right to compensation might be applicable in criminal situations, for example when someone has suffered damage in connection to committing a crime. Nevertheless, the Court did not formulate a general exception, since problems of this kind can occur in many different situations. The issue regards which claims at all are to be considered worthy of protection from the legal system; claims contrary to law or morality are in some cases not considered to be of such nature, and have therefore not been possible to enforce in court – the principle goes under the name of "pactum turpe". According to the Court, this principle cannot be regarded as limited to illegal or unethical agreements, but may also be relevant for unfair non-contractual claims.

10 The Court argues that society's interest in the first place may be considered satisfied by forfeiture rules, but occasionally the criminal procedure against A and B did not lead to forfeiture, so the Supreme Court was unable to decide on such action. The issue was if the Court could pave the way for the same effect by rejection or dismissal of B's civil action. However, the Supreme Court did not choose such a solution to the dilemma: "A restriction on the right to damages can, from the public point of view, not be seen as an alternative or complement to forfeiture, where forfeiture does not take place or cannot take place." Therefore, the drug dealer B won the case, and the thief A was held liable for the damage.

c) Commentary

11 "Pactum turpe" is a recognised principle, but as this case shows, no general rule can be upheld that the law should always ignore an action where "unethical" circumstances appear. In this case, it will not be possible to justify the outcome with the scope of protection of the specific law of action – i.e. the victims of thefts are of course protected by the criminal law's ban on theft. From a victim perspective, an explicit evaluation of circumstances can be made regarding unlawful acts which do not constitute contributory negligence, but so to speak place the tortfeasor outside the circle of those who are worthy of protection. Just as it could not be a general principle that all claims based on dishonest situations are denied legal protection, an opposite principle – based on this judgment – cannot be formulated that courts should completely ignore

the unethical content of claims. In brief, the following scenarios can be outlined, by which one can see the reason for or against compensation claims in adjacent situations.

(1) *Claims to achieve positive unlawful effect*. The most obvious cases of non-compensation are those where the plaintiff directly intends to achieve a certain illegal or unethical effect. Accessories to a crime cannot go to court to have their spoils divided, neither as a property claim nor as a tort claim. Nor can such claims be accepted, which refers to the replacement of criminal goals; it is not a protected interest of an injured person to get compensation for the deprived opportunities for his continued criminal activity. Likewise, a thief cannot have a claim regarding the stolen property. Since he is not the owner of the stolen goods, his legal property has not suffered any loss – you cannot legally lose something you do not have any right to (as Bob Dylan poetically writes in "Like a Rolling Stone": "If you got nothing, you got nothing to lose"). In the current case however, B's claim did not aim at such a "direct" unethical effect. B's claim was, for example, neither directed against drug buyers to receive payment for the supply, nor to recover the value of a drug batch that he himself had stolen, etc. B was legally the owner of the money that admittedly "indirectly" had an unethical "background". The difference is that B did not require from the legal system direct help with this acquisition, but only with the restoration of owned property, which in turn was acquired through unauthorized transactions. As the Romans said, "Money does not smell" ("Pecunia non olet"). 12

(2) *Claims to avoid negative impact of the unlawful act*. Unlike situation (1) with a desired positive effect, situation (2) is about a person who has been engaged in an unlawful act and has had to suffer legal negative consequences. For a long time, it has been established in case law that when several persons are jointly and severally liable, the one who pays the victim has a right to recovery from the others. Compared with situation (1) no "profit" is achieved, only a distribution of the consequences for every person involved. 13

(3) *Claims from a criminal for damage incurred during the performance of the crime*. Sometimes you can read in the tabloid press that thieves falling over in broken staircases – or otherwise injuring themselves at the burglary scene – can address claims against the crime victim (the owner of the house where the burglary has taken place, etc.). However, this is only a myth. In Swedish tort theory, it is considered valid that qualified unauthorized visitors lose their right to damages. Instead of a general principle of a criminal's absence of all legal rights, we should seek an argumentation concerning the victim's – i.e. in this case the claimant in a tort law case – own position in the specific party relationship. The reason for the criminal's loss of compensation is precisely that he in some sense has done injustice to the crime victim; therefore, he has put himself outside the scope of protection in tort law regarding claims directed against the latter. 14

15 (4) *Claims from other (less qualified) unauthorized visitors for damage incurred during the unauthorized activity*. Less persuasive argumentation for excluding the protection occurs when the unauthorized visitor is not engaged in such qualified unlawful matters as in situation (3). When evaluating intruders who are children, another and more moderate yardstick can be used. Even adults, who without malice enter areas not intended for the public, are not completely excluded from a tort claim.

16 (5) *Claims for damages, which meet the objection that previous illegality – which does not relate to the current injury situation – has occurred on the part of the claimant*. As a separate category, we can finally, in this non-exhaustive inventory, take the situation in the present case. In situation (1), we have seen more "direct" claims to achieve illegal or unethical effects. The claim is more "indirectly" improper if it only intends to restore an already – although unlawful – established position. Above was mentioned that a thief should not be able to bring claims for damages resulting from loss of stolen goods, because he is not the owner and therefore has not suffered any loss. The existence of competing claims can be a supporting argument against such a claim. However, beyond the typical acquisitive, misappropriation and fraud cases, etc. – when there is a direct victim – fortunes can be built up in many other unauthorized manners. However, how would it look if a tortfeasor, who has damaged the family goods, could invoke that the claimant's property was acquired illegally during the Thirty Years War? There is probably some truth in Proudhon's famous opinion "All property is theft" – but that is no excuse for the one who today causes damage to the property in question. Somewhere we will have to establish a borderline, where positions thus established will be recognized – and where tort law thus provides protection against damage, etc. When forfeiture or ownership rights can no longer be legally enforced, a practical arrangement is that the holder of the property is recognised. Therefore, from the Court's decision, we can also deduce that when forfeiture is not carried out, that does not mean that someone else – a criminal – can freely take over the right to confiscate the property. That would be establishing mob rules – i.e. the opposite of noble (European) tort law principles.

3. Supreme Court, Högsta domstolen, 1 October 2008, [2008] NJA, 915: Borderlines Regarding Discrimination Damages

a) Brief Summary of the Facts

17 A group of young men of foreign origin were refused entry to a restaurant, while several of their peers with typical Swedish appearance got in. The particularity of the case was that the two groups – those who here are called "foreigners" and "Swedes" – carried out a planned investigation (a so-called "situation testing") of the existence of discrimination in the restaurant industry. For this purpose, they documented the diversity of responses. The principle issue in the Supreme Court was if it was relevant for the compensation claim that this was an investigation situation, not an ordinary visit.

b) Judgment of the Court

Since the "foreign" men had been treated differently to the "Swedish" men, it was a direct discrimination situation. However, in evaluating the compensation sum, the Court took into account that the entrance test was part of a comprehensive testing action. The Supreme Court applied a rule concerning adjustment of damages in the Discrimination Act to reach a lower sum. The Court discussed the risk that public support for the legislation could be countered if it were perceived as a means for individuals to enrich themselves by a planned and systematic process; this risk would be particularly evident if the compensation sum exceeded what in itself can be regarded as adequate compensation for the humiliation which the violation brought. "Notwithstanding that the purpose of the study was the enhancement of society and not pecuniary enrichment, it is under such circumstances not appropriate that they receive full compensation for the discrimination they have endured." Earlier case law had established a compensation sum equivalent to € 1,500; according to the mentioned circumstances, the Court lowered the compensation in this case to a sum equivalent to € 500. 18

c) Commentary

Discrimination cases are nowadays a well-established typified situation in Swedish tort law. The interesting thing about this new case is the differentiation of the compensation sum. Instead of having just one standard sum for cases when a person – due to his or her race, sex, sexual orientation, etc. – is denied entry to a restaurant, this case shows possibilities regarding how to evaluate the harm. 19

The Court's argumentation concerning the risk for reversal of public support for the legislation is interesting – and at the same time questionable. In tort law, we are accustomed to the argument of prevention, and here we see another aspect of people's approach to law. Prevention of the more conspicuous defensive kind is here replaced by an abstract risk that prevention would decline as a result of lack of respect for the law. Instead of being used as a compensation raising argument, it thus becomes an argument for adjustment of the compensation sum. To some extent however, the Court can be criticized for not really taking responsibility for its own conclusion about the purpose of the present investigation. It is as if the Supreme Court – after having found the non-pecuniary, community-enhancing purpose behind the action – surrenders to the perception of action that the less enlightened public might have. 20

Well, this little critical sting against a justification detail should not obscure that the verdict is a very important, and in my opinion correct, one. The Supreme Court clarifies that it will not be a mouthpiece for popular will which may wish to mute the legal criteria in the discrimination area. Politicians and interest groups tend to see an increase in the amounts of compensation – and thus the abolition of borderlines – as unproblematic while the courts have an important task in clarifying that different cases can have different legal solutions. 21

4. Supreme Court, Högsta domstolen, 22 December 2008, [2008] NJA, 1177: Borderlines Regarding the Relevance of Fiscal Impact for the Determination of Damages

a) Brief Summary of the Facts

22 A woman was injured in a car accident; the injury forced her to finish her duties at the EU Commission in Brussels. Since EU officials pay tax on their EU income to the European Communities, she was exempt from national (Swedish) taxes on her salary. The tax rate for an EU official was 6.5%, and the issue of the case was therefore, whether she would be compensated for the lost tax benefit, since she had to pay common Swedish tax for the damage compensation (and Swedish taxes are indeed high). The victim claimed that the damages should be determined in a manner that she received the same net amount (after tax) that she would have received if the injury had not occurred; the insurer claimed a calculation of the damages based on the gross income (before taxes).

b) Judgment of the Court

23 The Supreme Court stated the general rule that the calculation should be based on gross income, i.e. income without tax deductions. "Exceptions from this principle must however be made in cases where, due to special circumstances, the result otherwise would in a significant way displace the fundamental starting point for settlement of damages that the victim should be placed in the same financial situation as if the injury had not occurred."

24 Below in the analysis will be stressed – as elements (1) and (2) – the two phrases in the quote (1) "special circumstances" and (2) "significant". The expressions will be referred to as a (1) "fact qualifier" and a (2) "impact qualifier." When the Court concretized the exceptions, it was mentioned that the victim's favourable tax rate was (1) "an ingredient of the Swedish law and Swedish tax rules". The Court further mentioned that the economic consequences for the woman, (2) "were not marginal but very substantial". Thereby, the Court reached the conclusion: "When calculating her income loss, it must be taken into account that she, as an employee at the EU Commission, without the damage would have been fiscally in a more advantageous position." Therefore, the compensation sum had to be calculated including the loss of favourable tax rate.

c) Commentary

25 A starting point for the relationship between tort law and tax law is that one primarily determines the compensation which the victim is entitled to under tort law, after which that sum will be taxed under the rules established for the benefit, etc. which the compensation is intended to make up for. For example, compensation for loss of income is taxed as income, while non-pecuniary compensation is not taxed at all. However, as the Court stated, there can be exceptions. The reason for such exceptions can be analysed as a (1) "fact qualifier" and a (2) "impact qualifier".

With *(1) the fact qualifier* – i.e. "*special circumstances*" – one can assess different situations which warrant that tax consequences are relevant for the tort law issue. One can see this as a "qualitative legal" theme – in comparison with (2) which can be seen as a "quantitative economic" theme. Thus, the legal valuation in (1) concerns the purpose of the applicable tax rules, including their interaction with tort law. It seems that tax purposes, which directly aim to influence the labour market, can be taken into account when the damage exactly consists of loss of earning capacity. Rules that cannot be said to have such a purpose – or tax rules that deliberately aim to give some tax effects on benefits, etc. – should not be able to constitute the "special circumstances" which are relevant for factor (1). If different individual circumstances on the victim's side – which do not have a link to the labour situation and tax reasons for such situations – after the accident result in various tax consequences, they would not be argumentatively able to qualify under the requirement of "special circumstances". So in this case, we can conclude that it is one of the protected interests in the Swedish legal system to give some executives within the EU a work-related tax benefit – it is not only an indirect effect of a stay abroad. 26

With *(2) the impact qualifier* – i.e. "*significant*" – one can evaluate the severity, for the individual if tort law is neutral to the tax consequences. The theme for evaluation is thereby of a "quantitative economic" kind. To specify an exact amount when the difference exceeds the significant marginal is impossible, but the case gives us an indication that the calculation concerns the individual tortfeasor's situation. An element as "significant" can never be fixed at a certain sum, but must just relate to the relationship between two alternative lines. For example, € 1,000 per year in increased tax can be noteworthy for low-income groups, but not for a person who has an income of several million per year. The message is in any case not to open the tort law compensation machinery without qualifications regarding the tax effect in the individual case. 27

Those who are resident and working abroad are normally taxed in the other country and then, the tax is normally – if not always – lower than in Sweden. If such a person after a personal injury decides to move back to Sweden, and here receives damage compensation, is thus the actual situation the same as for the EU-staff in the case from the Supreme Court? The answer should be no! The general rule regarding tort law's neutrality to tax effects should apparently not be challenged by any exception in this case. The (1) fact qualifier cannot be effectively applied, since there are no "special circumstances" in Swedish law to take into account; it is on the contrary, the intended effect, that persons living in Sweden will actually have the world's highest taxes. So if there are no specific protecting tax purposes regarding a certain kind of labour situation, the main rule applies – i.e. Swedish taxes have full impact in Sweden, and tort law does nothing to prevent such consequences. 28

5. Most Recent Development Concerning Personal Injury

Actually, no specific trends of comparative interest regarding personal injuries can be observed in Swedish case law. As has been reported in previous Year- 29

books, some cases concerning wrongful deaths have occurred, and thereby argumentative styles of various kind can be analyzed – but from a practitioner's point of view, the cases do not open up for specific exotic lines diverting from the common European principles. The Supreme Court very seldom sets new trends as regards compensation sums for non-pecuniary loss. Maybe the explanation for the few cases of personal injuries claims is the long established system of joint professional bodies which deal with such cases and publish specified standard tables regarding non-pecuniary losses.

D. Literature

1. *Mia Carlsson*, Arbetsskada – Samspelet mellan skadestånd och andra ersättningsordningar (Occupational Damage – Interaction between Tort Law and other Compensation Schemes) (Jure Förlag, Stockholm 2008)

30 With this doctoral dissertation, the author gives a systematic and detailed account of the problem of compensation for work-related injuries. Such damage compensation is to be found at several different levels of the total legal system connected to compensation. Tort law, private insurance law, insurances based on collective agreements between employers and trade unions, public insurances covering occupational damages as well as different areas of the social security system are all connected in a vast and complex structure. The book handles this system in a jurisprudential way with a method which combines both a systematic overview approach and a meticulous examination of the separate details of importance for those persons who in different ways have been injured in connection with their employment. An important feature of the combination between details and totality is the analysis of the so-called "interdependence" between the different compensation systems. Since work-related injuries can be compensated according to different schemes – and since these schemes are related to each other so that compensation from one system requires that another system first has been used, and since the requirements and compensation levels, etc. are continuously transformed – the systematic and practical consequences of both contents and changes in other parts of the system are brought to attention. The Swedish – or Nordic – model is nowadays confronted with an increasing international influence; therefore it is often discussed how our system could, or should, be coordinated or harmonized with the Europeanization which is taking place in the European Union. Themes of interest in this debate – which are described and discussed in the book – are, for example, individual respective collective solutions and the social dimension of the law, especially regarding the personal injury schemes. The author has succeeded in giving a comprehensive depiction of the complex combination of tort law, private insurance law, social security and collective bargaining. Among the issues could be mentioned a broad cover of the concept of damage, causation, burden of proof and different forms of compensation. The purpose of the author is that the method – concerning balancing details and totality

as well as analysing the interdependence between the different compensation systems – should contribute to the discourse in a concrete and informative way and thus give inspiration to both critical and constructive proposals regarding the present and the future of this field of private and public law. It can be certified that the mission is accomplished.

2. Articles

Articles were published in various journals. Among them can be mentioned a critical examination of the usage of aggravated damages by *Mårten Schultz* in Svensk juristtidning (SvJT), 37–56. Also, the author of this Yearbook report, *Håkan Andersson*, wrote articles about all new tort and insurance law cases at the website-Journal >www.pointlex.se<. 31

XXVII. Switzerland

Peter Loser[1]

A. Legislation

1. Draft Revision of Swiss Tort Law Buried

1 The comprehensive revision of Swiss tort law, leading to an expert draft in the year 2000,[2] has been suspended for several years.[3] Now the Swiss Federal government (*Federal Council, Bundesrat*) has decided to definitively abandon the project of a comprehensive revision and standardisation of tort law.[4] According to the government's view, the idea behind a comprehensive revision and standardisation of tort law was mainly brought forward by academics. Legal practitioners, however, do not resent the fact that principles of tort law are often not regulated systematically in the form of statutes but have been determined by jurisdiction and politics is not interested in questions of systematics but rather in solutions to actual problems in society.

2. Partial Revision of Limitation in Tort Law

2 In contrast, a partial revision of Swiss tort law has been proposed to provide new rules concerning limitation.[5] With an extension of statutory periods of limitation in tort law, the Federal Council aims to ensure that victims are able to claim compensation also in the event of long term damage. The unsatisfactory situation regarding long term damage, e.g. in respect to health problems after working with asbestos, calls for an extension of the statutory period of absolute limitation of ten years after the wrongful act. But also the one year statutory period of relative limitation, within which the victim must claim damages, is generally judged as too short. Beyond that, there are further questions in regard to the statutory periods of limitation which need to be clarified in the course of a partial revision of tort law.

[1] I would like to thank Evelyne Suter, lic iur. HSG, Rechtsanwältin, for her assistance with the translation of the report.

[2] Swiss Report in the Yearbook 2002: *P. Loser*, Switzerland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2002 (2003) no. 1 ff.

[3] Compare the Swiss Report in the Yearbook 2004: *P. Loser*, Switzerland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) no. 1 ff.

[4] Medienmitteilug EJPD (Press Release FDJP) of 21.01.2009 (at http://www.bj.admin.ch).

[5] Ibid.

As a next step, a draft including a report will be prepared within the federal administration, expected to be open for political parties and further interest groups for public consultation by the end of 2009 (*Vernehmlassung*). Not until then will the Federal Council prepare and submit a final draft to parliament. 3

With its revision of the law concerning limitation, Switzerland follows a general trend in legal policy, which was addressed in detail in the 2007 Yearbook.[6] In my opinion, not only the statutory period of absolute limitation in respect of long term damage but also the short statutory period of relative limitation is questioned rightly; with only one year, the latter is completely unsatisfactory. However, the restriction of the revision to tort law will allow only part of the problems to be solved. The relation in which limitation of tortious claims exists to limitation of contractual claims in particular needs to be clarified. Coordination is necessary especially for cases where several individuals are liable for the same damage but on different legal grounds. With that, the question arises whether a revision and harmonisation of limitation rules would not be necessary in the law of obligations as a whole.[7] Such revision could be guided by the model of the Principles of European Contract Law (Chapter 14). 4

3. New Liability in Transport Law – Revision of Railway Liability

The foregoing of a comprehensive revision of Swiss tort law allows reform projects hitherto suspended to be implemented. For the necessity for harmonisation has now disappeared. In this spirit, it is planned to abolish the Statute on Railway Liability of 1905 in effect today and to replace this with liability provisions in the Railway Statute.[8] Liability for railways will be rendered more strict with regard to legal redress and material injury and will be aligned with other liability provisions. Under the new provisions, legal redress may also be considered if the liable person is not at fault. In addition, strict liability shall apply not only to personal injury but also to damage of property. 5

4. Liability of Dog Owners

Several fatal accidents involving dog bites have sparked a call for legal measures against dangerous dogs in Switzerland. In the course of the discussion, it has been demanded among others to render dog owners' liability more strict. With a stricter liability, the Swiss Federal government aims to better protect the public from the dangers of dogs – in Switzerland, there are roughly 3,000 incidents a year involving dog bites – and at the same time to reinforce the 6

[6] Compare *R. Zimmermann/J. Kleinschmidt*, Prescription: General Framework and Special Problems Concerning Damages Claims, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) 28 ff.

[7] Compare *P. Loser*, Kritische Überlegungen zur Reform des privaten Haftpflichtrechts – Haftung aus Treu und Glauben, Verursachung und Verjährung, Schweizerische Juristenzeitung (SJZ) 2003, vol. II, 127, 197 ff.

[8] Railway Statute of 20 December 1957. Draft Revision published in Schweizerisches Bundesblatt (BBl) 2007, 4490 ff.

risk awareness of owners and their sense of responsibility.[9] The new, more strict liability will be embodied in the Code of Obligations. The existing possibility in effective law to exculpate oneself by providing proof of care will be eliminated. Additionally, mandatory insurance will be required to ensure that victims of dog bites will actually be compensated.

7 The Federal Council rightly refused the original proposal to render liability more strict only with regard to so-called "dangerous dogs". The strict liability as it is now proposed for all dogs, though, might be seen as a discrimination of dog owners compared to owners of other animals. But dogs are the animals encountered most often in publicly accessible locations. Furthermore, it would be difficult to determine clear criteria for dangerousness.

B. Cases

1. Schweizerisches Bundesgericht (Swiss Federal Court), 10 July 2008, Bundesgerichtsentscheid (Decision of the Federal Court, BGE) 134/2008 III 534:[10] Attorney's Knowledge of Court Practice (in Tort Law)

a) Brief Summary of the Facts

8 A client filed an action against his attorney, accusing his attorney of having failed – in the course of negotiations with the liability insurance company in the year 2000 – to claim a household loss suffered by the client. For that reason, the client claims to have received an insufficient insurance payment. The client demands from the attorney compensation for the loss resulting from the breach of the attorney's duty of care.

b) Judgment of the Court

9 According to the decision of the Federal Court, it cannot be expected from an attorney that he has knowledge of all court decisions accessible on the internet or published in a journal. The standard regarding an attorney's knowledge is the publication in the official compilation of Federal Court decisions (*Amtliche Sammlung der Bundesgerichtsentscheide*), which contains decisions of fundamental importance. The Federal Court's new judicature was not published in the official compilation until the year 2003. Therefore, the attorney may not be reproached for not having claimed from the insurance in the year 2000 a household loss suffered by his client, even though some lower court decisions and several published articles had already indicated this possibility at the time.

[9] Medienmitteilug EJPD (Press Release FDJP) of 14.12.2009 (at http://www.bj.admin.ch).

[10] Also at: http://www.bger.ch/jurisdiction-recht. Compare *F. Bohnet*, Kenntnisse des Anwalts bezüglich Rechtsprechung – es zählt einzig die Veröffentlichung in der Amtlichen Sammlung, SJZ 2009, 12 ff.

c) Commentary

The decision contains two statements. On the one hand, the attorney does not have to invoke court practice that has not yet been absorbed and confirmed by the Federal Court. On the other hand, the attorney also does not have to know of Federal Court decisions as long as they have not been published in the official compilation. On this second issue, the Federal Court is very lenient with attorneys. Research with search engines in the internet is not required of the attorney in order to comply with his duty of care. 10

2. Schweizerisches Bundesgericht, 12 November 2007, BGE 134 III 59:[11] Fine not Considered as Loss

a) Brief Summary of the Facts

A public limited company made excessive deductions for depreciation on two luxury cars in its tax declaration. The luxury cars were then taken over by the sole shareholder into his private assets at a minimal price. The tax authorities did not accept this procedure and charged a retrospective tax on the income. In addition, they imposed a fine on the company and the sole shareholder for deliberate false statements in their tax declaration. Consequently, the company and its sole shareholder claimed the fine as damage from the tax consultant who had suggested this course of action. 11

b) Judgment of the Court

The Federal Court confirmed its jurisdiction, according to which, penal sanctions, monetary fines included, are of a strictly personal nature and thus not a loss entitling an individual to compensation. This is also the case with fines within criminal prosecution for tax offences if the fine has been imposed on the offender for his own fault. 12

c) Commentary

The judgment impacts various areas. Not only does it apply to liability with regard to fines resulting from bad advice, but it also excludes liability with regard to fines for offences discovered due to a violation of secrecy committed in breach of a duty. Moreover, contractual duties of indemnification, e.g. towards a company's executive organs, prove to be ineffective if they are also meant to cover the fine imposed on the executive organ because illegal instructions by the company were followed. 13

With a view to the legal system, the decision is correct: Penal law conclusively determines that the offender shall suffer a detriment and civil law must not prevent this purpose of punishment by offering a possibility for compensation. The practice of the courts, however, is not customer-friendly, and it might lead 14

[11] Also at: http://www.bger.ch/jurisdiction-recht. Compare *T. Koller*, Entscheidungen – Strafsteuern, Bussen und Geldstrafen als privatrechtlich nicht ersatzfähiger Schaden – ein weiteres Beispiel für die enge Verzahnung zweier rechtlicher Subsysteme, Aktuelle Juristische Praxis (AJP) 2008, 1295 ff.

tax consultants to apply insufficient care. Furthermore, with regard to fines due to violation of tax regulations, it is not always clear if and to what extent the fine is based on personal fault or if it is more generic and based on the result of the violation.

3. Schweizerisches Bundesgericht, 13 June 2008, BGE 134 III 529:[12] No Liability for Negligent Violations of the Statute Combating Money Laundering (*Geldwäschereigesetz*)

a) Brief Summary of the Facts

15 The claimant is a company in Uruguay. B is a proxy of the claimant. Without permission of the claimant, B transferred USD 4 million from the claimant's account with a bank in Uruguay to his own account with a bank in Zurich. In several transfers, B used half of the funds from the account with the bank in Zurich for his own purposes. These funds remain lost today.

16 The claimant argues that the bank in Zurich violated provisions in the Statute Combating Money Laundering, namely that the bank had not blocked B's account despite indications that the funds had a criminal origin. It claims compensation for the loss resulting from the violation of the Statute Combating Money Laundering.

b) Judgment of the Court

17 The loss of the claimant is a pure economic loss. According to the principles of Swiss tort law, such loss must be compensated in case of negligence only if the bank has violated a protective provision.

18 In legal science, it is disputed whether the provisions of the Statute Combating Money Laundering are intended to protect clients from losses caused by behaviour such as in this case. The Federal Court denies this. The Statute Combating Money Laundering aims to complement the Penal Code and to prevent criminal funds from entering the ordinary circulation of money. The provisions of the Statute Combating Money Laundering therefore are intended to protect the integrity of the Swiss financial servicing system. However, they are not meant to protect individual pecuniary interests. As a consequence, the bank is not liable.

c) Commentary

19 For the second time, the Federal Court has passed an important judgment on the matter of money laundering and unlawfulness. In the first decision (BGE 133 III 323), presented in the 2007 Yearbook, the Court stated more precisely that the mental element of a penal provision, i.e. usually wrongful intent, must also be fulfilled to establish civil liability.[13] In that case, the Court did not

[12] Also at: http://www.bger.ch/jurisdiction-recht.

[13] Compare *P. Loser*, Switzerland, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 15 ff.

answer the question of whether civil liability may also result from a violation of the Statute Combating Money Laundering, which also prohibits offences committed by negligence. The second decision now answers this question in the negative (BGE 134 III 529).

Thus, the risk for banks to become liable for clients' losses as the result of a negligent violation of provisions concerning money laundering has been eliminated. Clients' assets are protected solely by the provisions concerning money laundering contained in the Penal Code. These penal provisions, however, require wrongful intent and mere negligence is not sufficient. 20

4. Schweizerisches Bundesgericht, 31 March 2008, BGE 4A_520/2007:[14] Liability for Creating a Nuisance

a) Brief Summary of the Facts

The claimant, a child of merely 12 years, had the opportunity to accompany A who was transporting logs. On the way back, A wanted to load a cargo of logs on the truck with his crane and bring them to a saw mill. Before the loading, A had asked the claimant to move out of the danger zone, the claimant doing so. After a while, A temporarily stopped his operations to move the truck for a few metres to load the last logs. During this time, A had no visual contact with the claimant anymore. The latter was seated on a stack of logs on the ground. However, the stack was not stable. One log slipped and trapped the claimant, who has been paralysed since. 21

b) Judgment of the Court

According to the Federal Court, whoever creates or maintains a hazardous situation has to take the necessary measures to prevent losses. This so-called nuisance principle (*Gefahrensatz*) allows, in the case of injury of absolutely legally protected interests, unlawfulness to be determined and particularly applies to neglect. In contrast, the nuisance principle may not be invoked in cases of pure economic loss. In these cases, a specific protective provision is required. 22

In the present case, the Federal Court assumed that A had created a nuisance. He therefore had the duty to take measures for the claimant's protection. These measures were insufficient and thus constituted a wrongful act. As the claimant was only a child of merely 12 years, he could not be blamed for personal negligence. The action was therefore approved. 23

c) Commentary

The decision is interesting not so much because of its result but rather because of its dogmatic justification. The Federal Court has confirmed the traditional concept of unlawfulness. That concept limits compensation of pure economic loss. Compensation for such losses still requires the breach of a protective provision. Such protective provision principally has to be stipulated in the law and 24

[14] Also at: http://www.bger.ch/jurisdiction-recht.

cannot be determined autonomously by the court. The Federal Court thus continues to disregard the so-called "new" concept of unlawfulness, influenced by Anglo-American case law and based on the existence of a duty of care. According to the new concept, it is primarily the judge who determines whether a wrongful act was committed.

5. Schweizerisches Bundesgericht, 1 October 2007, BGE 4A_235/2007:[15] No Liability for an Icy Ski Lift Trail

a) Brief Summary of the Facts

25 The claimant used a ski lift operated by company Y., leading to ski slopes all marked as so-called black pistes and thus difficult slopes. He let himself be pulled up on a t-bar by himself. On a steep slope the claimant slipped to the right because of the icy ground, fell and continued to slip towards the valley. He collided with other skiers on the next t-bar and suffered severe injuries.

b) Judgment of the Court

26 The courts denied any liability of Y, regardless of whether contractual liability, liability based on tort law or occupiers' liability would have to be considered. The risk of slipping back from a t-bar on a steep section on a slope is part of the risks commonly known and necessarily linked with the use of a ski lift on steep terrain. The risk does not only exist if the ground is icy. These risks are inherent to skiing and principally have to be borne by the user of a ski lift. A violation of the safety obligation may only be assumed if actual obstacles are not eliminated.

c) Commentary

27 The Federal Court, according to previous practice in Swiss law, has drawn a close line for safety measures. There are two criteria that apply to the relevance of possible risks. A first barrier is reasonableness. Safety measures may only be demanded if they are appropriate for the company and thus are in reasonable relation to safety needs. A second barrier is self-responsibility. Someone deciding to take part in snow sports shall bear the risks connected with it. Also, someone misjudging their abilities or the weather has to take responsibility for themselves. The court thus applies the concept of a responsible citizen.

28 The Federal Court has set the standard for one's own caution rather high. This is not necessarily imperative, especially as ski lifts are commercial businesses. With regard to business contacts, the same requirements as with incidental accidents should not apply. In the present case, though, the decision may be justified by arguing that the ski lift in question leads only to black and thus difficult slopes. At the bottom station, a warning sign was posted, pointing out the risks of this area: "Warning – only for good skiers".

[15] Also at: http://www.bger.ch/jurisdiction-recht. German translation of the decision in: Die Praxis 2008, no. 63, 418 ff.

6. Schweizerisches Bundesgericht, 13 June 2007, BGE 133/2007 III 462:[16] Statutory Period of Limitation for Liability based on Reliance (*Vertrauenshaftung*)

a) Brief Summary of the Facts

The claimant is a business manufacturing measuring instruments and has been the main sponsor of soccer club D. since 2000. In view of financial difficulties, the club's license to play during the season 2002/2003 was at risk. The claimant therefore promised at the end of the year 2001, that it would pay the club's debts at least up to the 2002/2003 season and would take care of obtaining a license. The claimant based its decision on statements and documents received by the club's chief financial officer as well as by the club's auditor. These two assured the claimant that the club's debts amounted to CHF 500,000 (€ 310,000) at the most. In reality, the debts amounted to CHF 1,800,000 (€ 1,100,000). Pursuant to their guarantee of payment, the claimant had to pay CHF 1,200,000 (€ 750,000). It claims compensation from the club's chief financial officer and auditor. 29

b) Judgment of the Court

For its claims, the claimant invoked the ordinary rule of liability in tort law as well as the legal concept of liability based on reliance (*Vertrauenshaftung*), developed in the practice of the courts.[17] The courts have limited the examination of liability to the question of whether the claims had already become statute-barred, as the claimant had not initiated legal proceedings until two years after gaining knowledge of the loss. The claims on the grounds of common tort law already clearly had become statute-barred, for the statutory period is only one year (art. 60 Swiss Code of Obligations). There is no statutory regulation of liability based on reliance. The Federal Court, contrary to the predominant view in legal science, did not apply the statutory period of ten years for obligations in general (art. 127 Swiss Code of Obligations), but the short statutory period of one year for obligations based on tort law. With that, the action had to be dismissed. 30

c) Commentary

The application of tort law's short statutory period of limitation on claims on the grounds of liability based on reliance is not convincing. The statutory period of one year is very short and tailored to incidental contacts such as accidents. Liability based on reliance, on the other hand, affects persons operating in the context of contracts, e.g. by providing information for the conclusion of a contract. For these cases, the common statutory period of ten years, applying to all obligations outside of tort law, is more suitable. The argument of law and order, brought forward by the Federal Court, is not opposed to that. 31

[16] Also at: http://www.bger.ch/jurisdiction-recht. Compare *P. Loser*, Entscheidbesprechung Vertrauenshaftung – Verjährung, recht 2009 (to be published).

[17] For a general overview of the concept of liability based on reliance see the Swiss Report in the 2002 Yearbook: *Loser* (fn. 2) no. 32 ff., 57 ff.; *P. Loser*, Die Vertrauenshaftung im schweizerischen Schuldrecht (2006) no. 1369 ff. (English summary).

32 However, something positive may be taken from this decision, as it increases pressure to revise the provisions concerning limitation and to extend the short statutory period of limitation in tort law. In that respect, work has already been taken up (see supra no. 2–4 ff.).

7. Trends regarding Personal Injury

a) Loss of a Chance

33 As reported in the 2007 Yearbook, the Swiss Federal Court in a case of 13 June 2007 (BGE 133 III/2007 III 462) dismissed the theory of loss of a chance for Swiss law.[18] The actual case dealt with impeded chances for healing due to a medical mistake. The Court's arguments, though, were generally critical of that legal concept. The Court repudiated the reasoning that recognised loss of a chance in itself as a pecuniary loss because of the provisional nature of chance. According to the Court, the calculation of damages in Swiss law is based on the net position of assets and liabilities at two particular points in time. An actual chance lost does not show up as an actual asset, nor does a probable but not realised chance constitute a hypothetical asset the "injured party" might have had at their disposal without the incident.

34 This decision has, to some extent, encountered severe criticism by legal science.[19] A particular point of criticism is that the repudiation by the Federal Court was too global. The discussion in Swiss law has not been concluded yet. A more differentiated judgment is expected.

35 Possibly, one would need to distinguish between cases concerning loss of profits due to a lost competition (e.g. architects competing for a project) or to lost legal proceedings and cases regarding lost chances of survival or medical chances in respect to medical interventions concerning legally protected physical interests. When determining lost profits, the Federal Court in some cases as a result has taken into account probability, as future developments are uncertain.[20] In contrast, with regard to physical impairments, not only the loss in itself is uncertain but even the cause of the injury. Also, claims arising from a contract and from tort law would have to be separated. The content of contractual claims in principle may be determined arbitrarily, so that it may also include – be it by explicit or by implied agreement – enabling a mere chance. Finally, the discussion has to take into consideration that Swiss law in contrast to other jurisdictions and to the Principles of European Tort Law does not grant compensation in cases of alternative causes.

[18] *Loser* (fn. 13) no. 26 ff.

[19] Compare the reports (*C. Müller*, *T. Kadner Graziano*, *H. Landolt*) on this issue in Zeitschrift für Haftung und Versicherung (HAVE) 2008, 55 ff.

[20] See for example Swiss Federal Court, No. 4C.234/2006, of 16 February 2007 (at: http://www.bger.ch/jurisdiction-recht).

b) Household Loss

For several years now,[21] compensation for household loss has been granted, even if assets have not actually been affected at all. Moreover, no actual loss needs to be proven, but an abstract calculation of loss is sufficient. 36

The reason for determining the loss in an abstract manner and irrespectively of the actual additional costs lies in the fact that calling in an outside person to work in the private surroundings of a household does not always seem reasonable. In these cases, the damage is usually compensated with additional work free of charge, be it by the injured themselves or by other members of the family or the household. 37

In two more recent decisions, the Federal Court has specified the abstract calculation.[22] It applies to all three factors determining household loss: (1) to the calculation of hours the claimant would have worked in the household without the injury: particularly, it is irrelevant whether pets or a garden are taken care of; (2) to the limitation of the ability to work, resulting from the injury; (3) to the determination of the salary for the work that cannot be done anymore due to the injury. 38

c) Splitting the Compensation Claim between Injured and Insurer

In the case of personal fault, the injured under the rules of tort law has no right to claim compensation from the injuring party for the entire loss. Still, the injured in the end regularly receives pecuniary benefits in the amount of his entire loss. For, in addition to the benefits from his personal accident insurance (*Unfallversicherung*), he may claim the remainder from the injuring party. The insurer, on the other hand, can claim only part of its granted benefits for recovery from the injuring party. 39

In this respect, the injured compared to the accident insurance has a privilege concerning the liability claim: a so-called prior claim to the quota (preferential quota of damages; *Quotenvorrecht*). This prior claim has now been laid down in law.[23] In the course of the current revision of the provisions regarding personal accident insurance, this privilege is now being questioned, particularly as it is not known in neighbouring countries. In the discussion it is proposed to introduce a privilege for the insurance. 40

[21] See for example Swiss Federal Court, BGE 127 III 403, 131 III 360, 369 ff., 132 III 321.

[22] Swiss Federal Court, No. 4A_19/2008, of 1 April 2008; Swiss Federal Court, No. 4A_98/2008, of 8 May 2008 (at: http://www.bger.ch/jurisdiction-recht); compare *V. Pribnow*, HAVE 2008, 241 ff.

[23] Art. 73 of the Statute on General Provisions in Social Insurance Law (Bundesgesetz über den Allgemeinen Teil des Sozialversicherungsrechts) of 6 October 2000 (SR 830.1).

C. Literature

1. *Heinz Rey*, Ausservertragliches Haftpflichtrecht (translated: Swiss Tort Law) (4th ed., Schulthess Juristische Medien AG, Zürich 2008)

41 A new edition of a classic book on Swiss tort law. The book was originally written as a textbook for students. Therefore, it is still published in the large format of DIN-A4, but it has grown in terms of content and length and is also used by practitioners today.

42 The book follows, to a large extent, the traditional concept of Swiss tort law but it also describes the debate on the diverging doctrine and the development of jurisprudence. Particularly from an international point of view, it is therefore a qualified source allowing one to quickly read up on the state of opinions regarding a question concerning liability in Swiss law.

2. *Christine Chappuis/Bénédict Winiger*, Les causes du dommage (translated: Causes of injury) (Schulthess Juristische Medien AG, Zürich 2007)

43 The volume comprises the reports of a convention on the subject of causes of injury. Among other topics, particularly the difficulties of compensation for cervical lesions and the possibility of loss of a chance, are discussed.

3. *Martina Fuchs*, Die Haftung des Familienhaupts nach Art. 333 Abs. 1 ZGB (translated: Liability of the head of the family or household) (Schulthess Juristische Medien AG, Zürich 2007)

44 According to the special provision of art. 333 sec. 1 Swiss Civil Code (ZGB), the head of the family (or household) is liable for the damage caused by a minor or mentally ill member of the "family". The structures of society and families, however, have changed essentially over the last 100 years. The classic role allocation hardly exists anymore. Today, there are new forms of co-habitation, arising from patchwork families and a combination of family and work. The author examines how these new forms – e.g. day-care, supervised lunchtime, divorced fathers, unmarried couples – are dealt with in tort law.

XXVIII. European Union

Dagmar Hinghofer-Szalkay and Bernhard A. Koch

A. Legislation

1. Motor Vehicle Liability Insurance

On 27 February 2008, the Commission published the "Proposal for a Directive of the European Parliament and of the Council 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"[1] intending to merge all five existing Motor Insurance Directives[2] into one new codified text. The new consolidated Directive will only bring formal amendments as are necessary for the codification process itself, as no change to the substance of the existing Directives was intended. 1

On 29 May the European Economic and Social Committee issued an opinion endorsing the proposed text.[3] An accelerated procedure was applied to expedite the legislative process, and by mid-summer a Consultative Working Party, composed of representatives from the Commission, the Council, and the Parliament, reached consensus on the new text with very minor modifications of 2

[1] COM(2008) 98 final, 27.2.2008, Official Journal (OJ) C 202, 8.8.2008, 8.

[2] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the 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 (First Motor Insurance Directive) (OJ) L 103, 2.5.1972, 1–4; Council Directive 84/5/ECC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Second Motor Insurance Directive) OJ L 8, 11.1.1984, 17–20; Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Third Motor Insurance Directive) OJ L 129, 19.5.1990, 33–35; Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth Motor Insurance Directive) OJ L 181, 20.7.2000, 65–74; Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/ECC, 84/5/ECC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles (Fifth Motor Insurance Directive) OJ L 149, 11.6.2005, 14–21.

[3] OJ C 224, 30.8.2008, 39.

the original Commission draft.[4] Parliament formally approved of the proposal on 21 October.[5] The new Directive will enter into effect 20 days after its publication in the Official Journal.

2. Auditors' Liability

3 On 5 June 2008 the Commission published the "Commission Recommendation concerning the limitation of the civil liability of statutory auditors and audit firms".[6] This was the last of three steps foreseen in Art. 31 of Directive 2006/43/EC[7], which requires the Commission to "present a report on the impact of the current national liability rules for the carrying out of statutory audits on European capital markets and on the insurance conditions for statutory auditors and audit firms, including an objective analysis of the limitations of financial liability",[8] to carry out – where appropriate – a public consultation,[9] and finally, on the basis of this input, "submit recommendations to the Member States".

4 In its recommendation, the Commission states that – except for cases of intentional breach of duty of care (such as collusion with the management in cases of corporate fraud) – the liability of auditors should be limited in order to preserve the supply of auditing services, since "unlimited joint and several liability may deter audit firms and networks from entering the international audit market for listed companies in the Community".[10] The Commission, however, did not dare to impose a uniform system of limitation, but instead decided to leave it up to the Member States to provide for specific measures with this goal. Certain methods for limitation were considered, though, of which one or more may be chosen by the individual Member State. Such possibilities

[4] Report on the proposal for a Directive of the European Parliament and of the Council 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: ANNEX: Opinion of the Consultative Working Party of the Legal Services of the European Parliament, the Council and the Commission, 19.8.2008, A6-0380/2008, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2008-0380+0+NOT+XML+V0//EN.

[5] European Parliament legislative resolution of 21 October 2008 on the proposal for a Directive of the European Parliament and of the Council 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, 9.10.2008, TA-PROV(2008)0480, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0480+0+DOC+XML+V0//EN.

[6] C(2008) 2274 final, OJ L 162, 21.6.2008, 39–40.

[7] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ L 157, 9.6.2006, 87–107.

[8] Available at http://ec.europa.eu/internal_market/auditing/docs/liability/auditors-final-report_en.pdf.

[9] Launched in January 2007: http://ec.europa.eu/internal_market/auditing/docs/liability/consultation-paper_en.pdf, including two annexes (http://ec.europa.eu/internal_market/auditing/docs/liability/consultation_annex1_en.pdf; http://ec.europa.eu/internal_market/auditing/docs/liability/consultation_annex2_en.pdf). The outcome of the consultation is summarized in http://ec.europa.eu/internal_market/auditing/docs/liability/summary_report_en.pdf.

[10] Recital 3 of the Preamble to the Recommendation.

include capping the maximum amount of compensation, introducing a formula on how to calculate the amount to be compensated, providing for liability up to the amount of the actual contribution of the loss only, or offering the possibility to agree upon a limitation of liability with the company to be audited.[11]

B. Cases

1. ECJ 5 June 2008 – C-164/07, *Wood v. Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* [2008] ECR I-4143

a) Brief Summary of the Facts

In the case at hand a student of French nationality had died in a road traffic accident in Australia. Her surviving family brought a claim before the Compensation Board for Victims of Crime in Nantes administering the French Guarantee Fund, seeking compensation for their pecuniary and non-pecuniary losses. 5

The Board awarded compensation to all family members except for the father of the victim, stating that due to the latter's British nationality he failed to meet the criteria laid down in the respective provision of the French Code of Criminal Procedure. Art. 706-3 Code de procédure pénale[12] restricts compensation to French citizens and only extends it to citizens of one of the Member States of the European Economic Community or lawful residents in France if the crime was committed on French territory, which was not the case here. 6

The claimant argued that this denial of compensation on the sole ground of his nationality constituted discrimination within the meaning of Art. 12 ECT and brought an action against the Guarantee Fund before the Compensation Board of the Tribunal de grande instance in Nantes. The latter asked the ECJ for a preliminary ruling on whether the afore-mentioned Art. 706-3 Code de procédure pénale was compatible with community law, and, more specifically, with the general principle of non-discrimination as set out in said Art. 12 ECT. 7

b) Judgment of the Court

The ECJ first stated that the claimant could avail himself of the protection against discrimination granted by the ECT, having worked in France for more than 20 years in the exercise of his right of freedom of movement as a worker. 8

[11] Sec. 5 of the Recommendation.

[12] "Any person who has suffered harm caused by intentional or unintentional acts which constitute the actus reus of an offence may obtain full compensation for the damage deriving from offences against the person if certain conditions are met": … [Those conditions being:] The person injured is a French national; or if this is not the case, the acts were committed on the national territory and the person injured is either a citizen of one of the Member States of the European Economic Community or, subject to the provisions of international treaties and agreements, lawfully resident in France on the day of the offence or of the application.

9 The Court reaffirmed that "comparable situations must not be treated differently and that different situations must not be treated in the same way".[13] The only difference between the claimant's situation and that of his partner (the crime victim's mother), who had been granted compensation, was the nationality, with the claimant being a British national and his partner French. This clearly constituted direct discrimination,[14] so the father, Mr. Woods, was deemed eligible to also receive payments out of the French crime victims' compensation fund.

c) Commentary

10 The area of compensation for victims of crimes committed outside the territory of a Member State has not been harmonised. Art. 17 of the Council Directive on Compensation to Crime Victims[15] states that Member States are free to introduce and maintain more favourable provisions for the benefit of victims of crime and also to introduce or retain provisions referring to the compensation of crimes committed outside their territory. The ECJ nevertheless clarifies that also within those optional provisions residents may not be discriminated against. Nevertheless, Advocate General Kokott, referring to ECJ case law on social security benefits, argued that granting applicants the same rights as citizens may depend upon a genuine link between the applicant and the state that is supposed to grant compensation, such as the accident occurring on state territory or the applicant being qualified as a resident in this state. The latter requirement was easily fulfilled by the father, Mr. Woods, in the instant case, however, in light of his long and permanent presence and work in France. Between the lines one may infer, however, that the Advocate General would treat applicants who did not yet have equally strong ties with France differently in light of the latter's "legitimate aim" to restrict the payment of voluntary benefits.[16] However, relying solely on nationality and disregarding such further elements as the duration of stay in France or the place of the applicant's residence was also deemed discriminatory by the Advocate General.[17]

2. ECJ 24 June 2008 – C-188/07, *Mesquer v. Total* [2008] ECR I-4501

a) Brief Summary of the Facts

11 On 12 December 1999 the oil tanker Erika, flying the Maltese flag, sank in the Bay of Biscay, spilling part of her cargo and oil at sea and causing serious environmental damage to the French coastline. The tanker had been chartered by Total International Ltd, which had bought the oil from what is now Total France SA.

[13] Para. 13 of the decision, citing ECJ 2.10.2003, C-148/02, *Garcia Avello v. Belgium*, [2003] European Court Reports (ECR) I-11613, para. 31.
[14] Para. 15 of the decision.
[15] Council Directive 2004/80/EC of 29 April 2004 relating to the compensation to crime victims, OJ L 261, 6.8.2004, 15–18, as discussed by *B.A. Koch*, European Union, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2004 (2005) no. 24 ff.
[16] Para. 48 f. of the Advocate General's opinion.
[17] Para. 53 f. of the Advocate General's opinion.

After a French criminal court had held the charterer of the ship liable for the catastrophe in January 2008, Total France SA paid the French state almost € 154 million in compensation, taking into account sums already paid out by the International Oil Pollution Compensation Fund.[18] While the French Republic consequently withdrew its civil actions, the municipality of Mesquer continued to pursue its case against Total filed almost eight years before, seeking redress for the € 70,000 the municipality had invested in cleaning up its coastline after the oil spill. The municipality built its claims on the argument that the oil constituted waste within the meaning of Art. L 541-2 of the Code de l'environnement, which implements the 1975 European Community Waste Directive[19] and requires polluters to dispose of waste or to pay for its disposal. 12

After being turned down by the lower courts, Mesquer brought its case before the French Supreme Court, which referred the matter to the ECJ for a preliminary ruling. The key questions that the ECJ had to resolve were: 13

(1) whether heavy fuel oil in itself or mixed with water and sediment can constitute "waste" within the meaning of the 1975 European Community Waste Directive, and 14

(2) whether the producer of the heavy fuel oil (Total France SA) and/or the seller and carrier (Total International Ltd) should be regarded as the producer and/or holder of waste within the meaning of the Directive, even though at the time when the oil became waste, it was being transported by a third party. 15

b) Judgment of the Court

The ECJ started with denying that the oil could be considered waste per se while still aboard, as Total had intended to sell rather than discard it as is required by the Directive's definition of waste in Art. 1.[20] However, the ECJ confirmed that once the oil had been spilled and subsequently mixed with water and sediment, this new blend could no longer be exploited or marketed without prior processing, even if such were technically possible (which the Court deemed "very uncertain or even hypothetical"[21]). As Total was no longer in control of this oil cocktail, the latter had thereby turned into "waste" within the meaning of the Directive.[22] 16

[18] Adopted at Brussels on 18 December 1971, as amended by the Protocol signed in London on 27 November 1992, OJ L 78, 16.3.2004, 40–49.

[19] Council Directive 75/442/EEC, of 15 July 1975, OJ L 194, 25.7.1975, 39–41. Codification of the provisions by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ L 114, 27.4.2006, 9–21.

[20] Art. 1 (a) reads: For the purposes of this Directive "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard. Annex I refers to materials spilled, lost or having undergone other mishap, including any materials, equipment, etc.

[21] Para. 59 of the decision.

[22] Para. 63 of the decision.

17 The court stated that a shipowner carrying hydrocarbons was in fact in possession of them immediately before they became waste and can therefore be regarded as a "holder" within the meaning of the Directive.[23] Regarding the defendants, the court stated that one or more previous holders may also have to bear the disposal costs jointly. The remaining question was whether Total International Ltd may also be regarded as a (previous) "holder" of the waste and could therefore be held liable for the costs of disposing of it. Furthermore, the court had to establish whether the producer of the spilled oil (Total France SA) may also be responsible for bearing the cost of disposing of what is then waste.

18 The court answered both questions affirmatively in light of the polluter pays principle embodied in the Directive. Total International as seller-charterer may well have contributed to the risk that the pollution caused by the shipwreck occurred, especially so if it failed to prevent the incident. The choice of the wrong ship may constitute such conduct triggering liability.[24]

19 The court also took into account the fact that oil spills fell under the International Convention on Civil Liability for Oil Pollution Damage,[25] and that the afore-mentioned International Oil Pollution Compensation Fund[26] was created specifically to cover such losses.[27] However, unlike the Environmental Liability Directive,[28] which explicitly excludes cases falling under other international liability regimes, the Waste Directive has no equivalent exclusion clause.[29] Therefore, it could very well apply to losses where the international oil pollution regime failed due to limitations either in substance, with respect to the quantum, or where the Fund's resources were exhausted, as in the instant case.[30]

20 If the national law of a Member State prevents costs from being borne by the shipowner and/or the charterer, even though they are to be regarded as "holders" within the meaning of the Directive, national law will then have to offer a possibility to hold the producer of the product from which the waste came liable, as long as it had contributed to the risk that the pollution caused by the shipwreck would occur.[31]

[23] Para. 74 of the decision. Art. 15 of the Directive and the corresponding French rule hold the holder of waste strictly liable for the costs of disposing of it. Art. 15 reads: In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by the holder who has waste handled by a waste collector or by an undertaking as referred to in Art. 9, and/or the previous holders or the producer of the product from which the waste came.

[24] Para. 89 of the decision.

[25] Adopted at Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 November 1992, OJ L 78, 16.3.2004, 32–39.

[26] Adopted at Brussels on 18 December 1971, as amended by the Protocol signed in London on 27 November 1992, OJ L 78, 16.3.2004, 40–49.

[27] Para. 89 of the decision.

[28] 2004/35/CE of 21 April 2004, OJ L 143, 30.4.2004, 56–75.

[29] Para. 87 f. of the decision.

[30] Para. 82 of the decision.

[31] Para. 89 of the decision.

c) Commentary

The French Supreme Court acted upon the ECJ ruling by quashing the decision of the lower court, arguing that Total can indeed be considered a previous holder of waste and that it had contributed to the risk that the pollution occurred.[32] 21

While the ruling of the ECJ in this case may seem to expand the options for those incurring environmental damage due to oil spills, in practice the Waste Directive and the national statutory regimes implementing it may not be called upon too often, since the limits of the International Oil Pollution Compensation Fund have been significantly increased in the meantime: While it was limited by SDR 135 million (or about € 150 million) for cases before 2003 (and therefore for the Erika incident), it now covers more than five times more, up to SDR 750 million.[33] This would have covered the clean-up costs in the Erika case, so there would have been no need to seek compensation via an alternative path even though it has now been confirmed as a possible solution by the ECJ. 22

3. ECJ 16 October 2008 – C-452/06, *Synthon BV v. Licensing Authority of the Department of Health*

a) Brief Summary of the Facts

The Danish Medicines Agency authorised Varox, a product by Synthon BV, on the basis of the latter's abridged application in accordance with Art. 10 Directive 2001/83[34], which requires that the medicinal product is "essentially similar" to a reference product already authorised within the Community and marketed in the state where the application is filed. Synthon subsequently applied for authorisation of Varox in the United Kingdom, now relying upon the product's authorisation in Denmark. The British Licensing Authority denied the application, however, arguing that Varox and the product referred to before the Danish authorities were not "essentially similar". A second application by Synthon based on Art. 28 of Directive 2001/83[35] was equally unsuccessful, and Synthon therefore challenged the decision before the Queen's Bench Division of the High Court, which in turn asked the ECJ for a preliminary ruling (essentially) on whether a Member State is obliged to recognize the authorization of a medicinal product already granted by another Member State in an abridged procedure. 23

[32] Cass. civ. 3e, 17 December 2008, decision no. 1317. As the cour de cassation could only send the case back down, the final decision in this matter is still pending.

[33] Para. 7 f. of the decision referring to The Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, OJ L 78, 16.3.2004, 24–31.

[34] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28.11.2001, 67–128.

[35] Art. 28 in relevant part provides that the holder of an authorisation in one Member State shall submit a dossier identical to the one used there to the competent authorities of another Member State where he seeks recognition. "Save in the exceptional case provided for in Article 29(1), each Member State shall recognise the marketing authorisation granted by the reference Member State within 90 days of receipt of the application and the assessment report. …"

b) Judgment of the Court

24 The court answered this question in the affirmative and stated that Art. 28 and 29 may not be deprived of their meaning.[36] Therefore the United Kingdom may not question Denmark's ruling on the similarity of the product and may not carry out a fresh assessment. Only if there was a risk to public health as stated in Art. 29(1)[37] of the Directive may a Member State refuse to accept an application already granted in another Member State.[38] Since this was not the case here, the United Kingdom was in breach of Art. 28 of Directive 2001/83.

25 Furthermore (and interesting for our purposes here), the ECJ held that this breach triggers state liability.[39] Referring to earlier case law such as *Brasserie du Pêcheur and Factortame*,[40] the Court repeated "that such a breach is established where it implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities".[41] Since the court held that Art. 28 of Directive 2001/83 confers "only a very limited discretion in relation to the reasons for which that Member State is entitled to refuse to recognise the marketing authorisation", the mere breach as such of said provision suffices to establish a "sufficiently serious breach of Community law".

c) Commentary

26 The case continues the line of established case law regarding state liability for breaches of Community law. It affirms that the lower the degree of discretion a Member State has under a provision of Community law, the more likely the mere breach of that rule can suffice to trigger state liability.

4. EFTA Court 20 June 2008 – E-8/07, *Nguyen v. Norway* [2008] EFTA Ct. Rep. 224

a) Brief Summary of the Facts

27 The plaintiff had lost her husband and two children in a road traffic accident caused by an intoxicated driver. The Halden District Court sentenced the driver to one year and six months in prison and additionally held him liable to com-

[36] Para. 31 f. of the decision.

[37] "Where a Member State considers that there are grounds for supposing that the marketing authorisation of the medicinal product concerned may present a risk to public health, it shall forthwith inform the applicant, the reference Member State which granted the initial authorisation, any other Member States concerned by the application and the [European] Agency [for the Evaluation of Medicinal Products]. The Member State shall state its reasons in detail and shall indicate what action may be necessary to correct any defect in the application."

[38] Para. 28 f. of the decision.

[39] Para. 43 of the decision.

[40] ECJ 5.3.1996, joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029.

[41] Para. 37 of the decision.

pensate the equivalent of € 48,000 as redress for the widow's non-pecuniary loss resulting from the accident. "Redress" (*oppreisnad*) within the meaning of this award is compensation for pain and suffering, requiring qualified fault on the side of the tortfeasor.

The driver never paid such damages, however, and the plaintiff also unsuccessfully turned to the insurance company for compensation, since *oppreisnad* is explicitly excluded from compulsory insurance cover under Norwegian law.[42] 28

The widow filed a lawsuit before the Oslo District Court against the Norwegian state, claiming that the Motor Vehicle Liability Insurance Directives[43] had not been properly implemented by Norwegian law, and that it was contrary to the Directives to exclude compensation for non-pecuniary loss from insurance coverage. With the scope of the Directives extending also to the EEA, she argued that the breach was sufficiently serious to trigger state liability when taking into account the case law of the EFTA Court. The Oslo District Court brought the matter before the EFTA Court requesting an advisory opinion. 29

b) Judgment of the Court

Regarding the implementation of the Motor Vehicle Liability Insurance Directives,[44] the EFTA Court held that these do not harmonize national rules of civil liability, and that Member States are free to determine the rules of civil liability. Nevertheless, by stating that "EEA states must exercise their power… in compliance with EEA law" and that national provisions cannot "deprive the Directives of their effectiveness"[45] the court affirms an indirect impact on substantive tort law. Therefore the court held that "EEA States must ensure that civil liability arising under domestic law is covered by insurance which complies with the provisions of the Directives …".[46] 30

Furthermore the EFTA Court took a look at the wording in the first three Directives and elaborated that Art. 1(2) of the first Directive – defining the concept of "injured party"– refers to "any loss or injury caused by vehicles", and that Art. 1(1) of the second Directive and Art. 1 of the third Directive – defining what shall be subject to compulsory insurance – refers to "personal injuries". Even though there is no reference to non-pecuniary damages, the court con- 31

[42] Art. 6 of the Norwegian Automobile Liability Act (lov 3. februar 1961 om ansvar for skade som motorvogner gjer – bilansvarslova) expressly provides that the victim's direct claim against the insurance carrier does not include compensation (redress) for non-economic injury (*oppreisnad*).

[43] Council Directive 72/166/EEC, the second Council Directive 84/5/ECC, the third Council Directive 90/232/EEC, Directive 2000/26/EC of the European Parliament and of the Council and Directive 2005/14/EEC of the European Parliament and of the Council.

[44] See also supra no. 1 and the references in fn. 2.

[45] Para. 24 of the decision, citing ECJ 30.6.2005, C-537/03, *Candolin v. Vahinkovakuutusosakeyhtiö Pohjola* [2005] ECR I-5745; on this case see *B.A. Koch*, European Union, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) no. 15 ff.

[46] Para. 25 of the decision, citing ECJ 19.4.2007, C-356/05, *Farrell v. Whitty* [2007] ECR I-3067, para. 33; on this case see *B.A. Koch*, European Union, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 44 ff. Furthermore citing ECJ 14.9.2000, C-348/98, *Ferreira v. Companhia de Seguros Mundial Confiança SA* [2000] ECR I-6711, para. 29.

cluded that non-pecuniary loss is nevertheless addressed.[47] The court further held that Art. 3(1) of the first Directive, which requires each Member State to take all appropriate measures to ensure that civil liability, in respect to the use of vehicles normally based in its territory, is covered by insurance, has to be read in conjunction with Art. 1(1) and 1(2) of the second Directive and Art. 1 of the third Directive. Compensation for pain and suffering must consequently be covered by motor vehicle liability insurance and is therefore to be compensated according to the Directives.[48]

32 Regarding the question of whether the state can be held liable for having maintained an exclusion of non-pecuniary damages, the court discussed whether the state's behaviour constituted a sufficiently serious breach of EEA law. Referring to previous EEA case law[49] laying down the conditions of state liability, the EFTA Court stated that a breach of EEA law is sufficiently serious if – despite settled case law clarifying which conduct is to be considered a breach of EEA law – a Member State persistently upholds this conduct.[50] The court referred to the ruling of the ECJ in *Ferreira*[51] and concluded that Member States must ensure that civil liability arising under their domestic law is covered by insurance which complies with the provisions of the Directives.[52] The EFTA Court concluded that this case law imposes a duty on states to provide cover for all civil liability arising under national law.[53] The fact that Norway had maintained such an exclusion in sec. 6 of its Automobile Liability Act despite ECJ case law clarifying the scope of the Motor Vehicle Liability Insurance Directives was deemed to be a sufficiently serious breach of EEA law triggering state liability.[54]

c) Commentary

33 It may be doubted whether it already constitutes a "sufficiently serious breach of Community law" if a Member State (here: of the EEA, but in light of the corresponding legal background also of the EU) fails to extend compulsory insurance cover to non-pecuniary loss, thereby merely taking regard of and paying tribute to its own national tort law, which undoubtedly remains unaffected by the Motor Vehicle Liability Insurance Directives. The EFTA Court's reference to ECJ case law does not help us further here: The ECJ has so far only required Member States to provide for insurance cover for civil liability in compliance with the provisions of said Directives, and it is clearly questionable whether their wording including references to "any loss or injury caused by vehicles" and "personal injuries" can lead to the conclusion that non-pecuniary loss falls within the scope of these Directives.[55]

[47] Para. 26 of the decision.
[48] Para. 27 of the decision.
[49] EFTA Court E-9/97, *Sveinbjörnsdóttir v. Iceland* [1998] EFTA Ct. Rep. 95, para. 62–69 and E-4/01, *Karlsson v. The Icelandic State* [2002] EFTA Ct. Rep. 240, para. 25 and 37–48.
[50] Para. 31 ff.
[51] ECJ 14.9.2000, C-348/98, *Ferreira* [2000] ECR I-6711, para. 29.
[52] Para. 34.
[53] Para. 34.
[54] Para. 36 of the decision.
[55] See also *B.A. Koch*'s commentary to *Candolin* (fn. 45).

The Norwegian Ministry of Justice will act upon this advisory opinion by deleting the exclusion of non-pecuniary loss in the Automobile Liability Act, while at the same time preserving the requirement that compensation for such losses will continue to be paid only under the special conditions laid down in Norwegian tort law.[56] Thereby, Norway has elegantly parried the attack by the EFTA Court on its national law of delict. 34

[56] See http://www.regjeringen.no/nb/dep/jd/dok/regpubl/otprp/2008-2009/otprp-nr-28-2008-2009-.html?id=540861.

XXIX. Comparative Remarks

Ken Oliphant*

A. Introduction

1 This year's voyage through the endlessly fascinating landscape of European Tort Law has disclosed much to interest, stimulate and provoke. As a memento of the trip, I have recorded some "snapshots" of developments of particular note, and sought – where possible – to place them in the context of themes that have emerged over previous years. For those who prefer to start at the end, and read back to front, these remarks also serve as an introduction to (some of) the most notable landmarks described in the preceding chapters of this Yearbook.

B. A Dozen Snapshots of European Tort Law

1. Non-pecuniary Loss

2 The increased recoverability of non-pecuniary loss has been called "the number one trend pushing tort law changes these past years", resulting in an expanded class of potential claimants.[1] Code-based restrictions on liability for non-pecuniary loss have been relaxed in recent years in many systems,[2] and neither the Principles of European Tort Law (PETL) (art. 10:301) nor the Draft Common Frame of Reference (DCFR) (art. VI.-2:101) contains any particular limitation in this area. Seen in this context, the approach of the new "alternative" Austrian tort law draft[3] – whereby compensation for non-pecuniary loss is limited to cases of express statutory authorisation[4] – seems unduly conservative.

* Thanks to Stuart David Wallace for assistance with the footnotes.

1 *B.A. Koch*, Comparative Overview, YB 2005, 602 (no. 29). In addition to the developments discussed in the text, see also E – 8/07, *Nguyen v Norway*, 20.06.08, noted by *D. Hinghofer-Szalkay/B.A. Koch*, European Union (supra 647), no. 27 ff., in which the EFTA Court ruled that compulsory motor insurance cannot exclude compensation in respect of civil liability for non-pecuniary loss.

2 E.g., in Germany, by the amendment of § 253 BGB.

3 *R. Reischauer/K. Spielbüchler/R. Welser* (eds.), Reform des Schadenersatzrechts III: Vorschläge eines Arbeitskreises (2008), noted by *B.C. Steininger*, Austria (supra 108), no. 2 ff.

4 *B.C. Steininger*, Austria (supra 108), no. 14.

In the last few years, several important national supreme court decisions have re-assessed the basis of compensation for non-pecuniary loss in national systems, particularly in Eastern Europe, where courts of the communist era frequently declined to provide monetary compensation for non-pecuniary loss as this would be inconsistent with the principles of socialist society.[5] In the post-communist world, there has consequently been a need to establish the basis of recovery for non-pecuniary loss from first principles. This Yearbook highlights an important recent development in this regard in Romania, where a timid retreat from the former exclusionary rule had already begun prior to 1989, and was consolidated by later decisions. A decision in 2008 now definitively establishes the criteria to be addressed in determining non-pecuniary loss in a case of personal injury, recognizing the following categories: pain and suffering, aesthetic damage, loss of amenity, loss of expectation of life, and loss of childhood.[6] A similarly fundamental reassessment is suggested in the Draft of the New Hungarian Civil Code that, at the time of writing, was under consideration in the Hungarian Parliament: the category of non-pecuniary damage is to be abolished and replaced by direct compensation for pain and suffering for wrongful interference with basic personality rights. The proposal is said to avoid the conceptual incoherence of speaking of damage as a prerequisite of compensation for a loss that cannot be valued in money terms.[7] 3

Going somewhat against the expansive trend highlighted above, or at least putting a brake on it, is a decision last year of the Joint Divisions of the Italian *Corte Suprema di Cassazione*[8] which brought a much-needed clarification of the concept of "non-patrimonial damage", making clear that the phrases *danno biologico* (personal injury), *danno esistenziale* (loss of the amenities of life) and *danno moral* (pain and suffering) do not indicate distinct sub-categories of non-patrimonial damage, but merely *the features* that non-patrimonial damage can possess. An award of damages for personal injury (*danno biologico*) encompasses any proven impairment of the victim's amenities of life, and there can therefore be no separate award in respect of *danno esistenziale*. Crucially, it is not every minor impact on the victim's well-being that warrants compensation, but only interference that meets a minimum level of gravity. The Court expressly criticizes the less rigorous approach taken in recent first-instance decisions, which have awarded compensation for *danno esistenziale* for a bad haircut and the inability to watch a football match because of a power black-out. 4

2. Bereavement and Distress

A particular focus of the expansive trend with regards to non-pecuniary loss has been compensation for bereavement experienced in consequence of the death of a relative, and, in some systems, distress and other mental effects 5

[5] As described by *C. Alunaru/L. Bojin*, Romania (supra 541), no. 17.
[6] High Court of Cass. and J. 06.03.08, noted by *C. Alunaru/L. Bojin*, Romania (supra 541), no. 3 ff.
[7] Draft New Civil Code, noted by *A. Menyhárd*, Hungary (supra 343), no. 5.
[8] Cass. 26972/11.11.08, noted by *E. Navarretta/E. Bargelli*, Italy (supra 385), no.2 ff.

(short of an injury to health) arising from a relative's personal injury. Both PETL and the DCFR would allow compensation for a close relative's mental distress falling short of a recognised medical condition in fatal and non-fatal cases alike, provided (in the case of PETL) that the non-fatal injury is "very serious",[9] even though most national systems stop short of recognising the relative's claim in non-fatal cases.[10]

6 The expansive trend continued in 2008, at least as regards bereavement. In Poland, an Act of 30 May 2008 revised the Civil Code so as to recognize the death of a close family member as a new ground for the award of damages for non-pecuniary loss.[11] But naturally not every system yet treats compensation of bereavement as a matter of course. In Estonia, it was emphasised this year that liability to the relatives is restricted to "exceptional circumstances", though it may be noted that these may warrant compensation in cases of not only death but also serious non-fatal injury.[12] The "alternative" Austrian draft is conspicuously restrictive in this context, reflecting its notably conservative approach to compensation for non-pecuniary loss in general: the drafters considered that there should be no compensation even for bereavement consequent on a close relative's death.[13] This is clearly out of step with general European trends.

3. Pure Economic Loss

7 Pure economic loss remains an elusive concept. In some systems, it is a wholly unexceptional type of loss, as illustrated this year by decisions from France[14] and Malta.[15] But others – perhaps the majority – attach special restrictions to its recoverability. In these countries, there appears to be increasing congruence in the patterns of reasoning and conceptual mechanisms employed to restrict and channel liability, if not always in results.

8 The principles projects reflect this to some extent. PETL provides, for example, that the protection of pure economic interests may be more limited in scope than interests in the person and property, but liability may be justified by reference to (inter alia) the proximity between the parties.[16] This term, "proximity", may be traced back to the decision of the English House of Lords in the case of *Caparo Industries plc v Dickman*[17] in 1990, where it was stated that relevant factors included the purpose of the transaction – and, in particular,

[9] PETL art. 10:301(1); DCFR VI.-2:202.
[10] PETL art. 10:301 comm. no. 5.
[11] Act of 30.05.08, noted by *E. Bagińska*, Poland (supra 499), no. 1 ff.
[12] Supreme Court 09.04.08, noted by *J. Lahe/I. Kull*, Estonia (supra 240), no. 17 ff.
[13] *B.C. Steininger*, Austria (supra 108), no. 14.
[14] Cass. Ass. Plen. 09.05.08, noted by *O. Moréteau*, France (supra 264), no. 38 ff.
[15] Court of Appeal 17.10.08, noted by *G. Caruana Demajo/L. Quintano/D. Zammit*, Malta (supra 435) no. 39 ff.
[16] Art. 2: 102(4). The DCFR position is more subtle. It does not use the terminology of "pure economic loss" but prescribes a number of situations in which loss of any kind is "legally relevant damage", and are evidently relevant in the present context, e.g. loss upon reliance on incorrect advice or information (VI.-2: 207).
[17] [1990] 2 AC 605.

whether it was intended to benefit persons in the claimant's position – and the reasonableness of the claimant's reliance.

The approach of other national supreme courts seems rather similar. Last year courts in Norway (explicitly) and Denmark (implicitly) attached importance to a purchaser of land's justifiable reliance upon information provided in connection with the sale, in circumstances where the information proved incorrect and the purchaser suffered loss. In the Norwegian case,[18] the Supreme Court found a surveyor liable for incorrect information supplied to the vendor of a property and then relayed to the purchaser. The purchaser suffered loss through reasonable reliance on the information, and the surveyor must or ought to have known that the purchaser would rely on the information in deciding whether or not to proceed with the transaction. The purchaser therefore fell within the group of proximate recipients. The same considerations also seem to underlie a decision last year of a Danish court, in which a real estate broker was found liable for loss resulting from a misrepresentation in his sales prospectus.[19] 9

Two decisions by the Spanish Supreme Court provide further support for this analysis. Last October, the Court considered for the first time the question of auditors' liability – in two separate cases. The context was the failure to detect and protect against fraud. In the first case, the Court considered that the purpose of the legal rules that require the auditing of companies and the publication of the audit report is to contribute to the proper functioning of the financial markets, and the intended beneficiaries are not only the audited company itself and its directors but also third parties who have dealings with it. However, the facts of the case went beyond the rules' protective purpose because this was not a case of reliance upon the audit report at all, but a case where the claimants alleged that *correct* information would have brought the fraud to the attention of the supervisory authorities, who would have intervened immediately and prevented the misappropriation of the claimants' assets. There was no intent to protect against loss in such circumstances, and so no liability.[20] 10

In the second case before the Court, just days later, the Court reached the opposite conclusion on liability where the claimants were not investors in the audited company from outside, but the shareholders. The purpose of the legal rules requiring the audit included the provision to the shareholders of enough reliable information as to enable them to assess the accuracy of the annual accounts. The auditor, his firm and the liability insurer were therefore liable (in solidum) for the loss suffered by the shareholders.[21] 11

Another recent case that may be mentioned here is a decision of the Austrian *Oberster Gerichtshof* (OGH) in a claim for financial loss (legal expenses) aris- 12

[18] Supreme Court 28.08.08, noted by *A. Anfinsen/B. Askeland*, Norway (supra 484), no. 25 ff.
[19] Court of Appeal 08.05.08, noted by *S. Bergenser*, Denmark (supra 206), no. 2 ff.
[20] STS 09.10.08, noted by *J. Ribot/A. Ruda*, Spain (supra 597) no.6 ff.
[21] STS 14.10.08, noted by *J. Ribot/A. Ruda*, Spain (supra 597) no.16 ff.

ing out of the claimant's wrongful prosecution for insurance fraud on the basis of charges proffered by his insurance company. The company was acting on the advice of the expert it appointed to review the claimant's insurance claim for repair of his motorcar. The expert erroneously concluded that the claim covered work that had not in fact been done. When the truth emerged, the claimant was acquitted of the criminal charges. His action for damages against the expert, however, was rejected by the OGH as the facts of the case did not fit within the exceptional circumstances in which an expert will be liable for pure economic loss. The claimant did not rely on the expert's report; nor was the report prepared to further the claimant's interests. On the contrary, the interests of the insurance company commissioning the report and the claimant were clearly opposed.[22]

13 Though the legal basis was somewhat different, there is also some similarity with last year's decision of the Swiss Federal Court that national anti-money laundering legislation was not a protective provision intended to protect individual pecuniary interests, giving rise to a claim for pure economic loss if there should be negligent violation, but a statute designed to complement the Penal Code and thereby protect the integrity of the Swiss financial services sector.[23]

14 These decisions amply illustrate the restrictive approach taken to pure economic loss in a wide range of European systems, and the similar mechanisms adopted in determining whether liability should exceptionally be imposed.

4. Personality Rights

15 The increasing protection given across Europe to personality rights has been noted in these pages before.[24] This trend appears to have gathered pace in recent years. The English House of Lords, for example, first recognised a right to informational privacy in 2004.[25] Last year, the Irish High Court added to the growing support for the horizontal application (i.e. against private persons) of the right to privacy in the Irish Constitution.[26] And the Czech Supreme Court recognised that one's private sphere might be violated by the publication of a photograph of a close relative, in that case, the claimants' deceased son whose charred remains were depicted following a traffic accident.[27]

16 As is well known, the European Court of Human Rights (ECtHR) has played a large role in extending the boundaries of protection – most notably in the *Von*

[22] OGH 10.07.08, noted by *B.C. Steininger*, Austria (supra 108), no. 48 ff. Steininger raises the intriguing question whether the loss in the case was in fact purely economic, arguing that it might be better to have seen it as consequential on the violation of the claimant's absolutely protected right to his honour and reputation.

[23] Federal Court 13.06.08, noted by *P. Loser*, Switzerland (supra 636), no. 15 ff.

[24] *B.A. Koch*, Comparative Overview, YB 2005, 602 (no. 18 ff.).

[25] *Campbell v MGN* [2004] UKHL 22, noted by *K. Oliphant*, England and Wales, YB 2004, 239 (no. 24 ff.).

[26] *Herrity v Associated Newspapers (Ireland) Ltd*, [2008] IEHC 249, noted by *E. Quill*, Ireland (supra 364), no. 9 ff..

[27] Supreme Court 31.08.08, noted by *J. Hrádek*, Czech Republic (supra 180), no. 101 ff.

Hannover case[28] – and changing the terms on which the debate is conducted. In Germany, where private law protection of privacy has a long and distinguished history, the German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) and the *Bundesgerichtshof* (BGH) have confirmed that the "intricate"[29] established approach to the balancing of privacy with press freedom and freedom of artistic expression is to be put aside and replaced with a direct balancing of the competing interests under art. 8 and art. 10 of the ECHR. The same trend may also be seen in other jurisdictions in recent years, including England and Norway.[30] One also sees the analysis in terms of Convention rights being worked into provisions of national tort law in the French *Cour de Cassation*'s adoption of a balance of interests approach, weighing the claimant's corporate personality rights with the art. 10 ECHR right to freedom of expression, in applying the general liability for fault under art. 1382 *Code civil*.[31]

5. Reproductive Torts

The reproductive torts is the collective name given to the specific questions of liability for wrongful conception, wrongful birth and wrongful life. The field thereby denoted is one of the most rapidly developing in all of tort law. A wide range of different national solutions has already emerged, and further comparative analysis has a particularly useful role to play. 17

In my comparative remarks two years ago, I noted a growing consensus that claims by the parents of a child born after an unwanted conception should be allowed to some extent, though the nature of their damage – and the damages recoverable – was a matter of some dispute.[32] One country where uncertainty apparently reigned was Austria – the full story may be found in successive volumes of this Yearbook[33] – but a decision of the OGH last year sought to set matters straight.[34] There was no inconsistency, it said, between decisions of different panels of the Court, because a distinction had to be made between a healthy child and a disabled child born as a result of negligence by the family planning services. The birth of a healthy child cannot be counted as damage; the birth of a disabled child, we are left to conclude, may. In her country report, Barbara Steininger criticises the case heavily for side-stepping the basic question whether and to what extent maintenance costs for an unplanned child are compensable. Experience in the United Kingdom suggests, however, that the 18

[28] *Von Hannover v Germany*, no. 59320/00, 24.06.04, noted by *J. Fedtke*, Germany, YB 2004, 300 (no. 11 ff.).

[29] BVerfG 26.02.08, noted by *F. Wagner-von Papp/J. Fedtke*, Germany (supra 285), no. 20 ff.; BGH 24.06.08, noted by *F. Wagner-von Papp/J. Fedtke*, Germany (supra 285), no. 28 ff.

[30] See, e.g., *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, noted by *K. Oliphant*, England and Wales, YB 2006, 153 (no. 37 ff.); Supreme Court 07.05.07, noted by *B. Askeland*, Norway YB 2007, 440 (no. 4 ff.).

[31] Cass. 1 Civ. 08.04.08, noted by *O. Moréteau*, France (supra 264), no. 44 ff.

[32] *K. Oliphant*, Comparative Remarks, YB 2006, 499 (no. 10 ff.).

[33] See especially OGH 23.10.03, noted by *B.C. Steininger*, Austria, YB 2003, 33 (no. 63 ff.), OGH 07.03.06, noted by *B.C. Steininger*, Austria, YB 2006, 68 (no. 5 ff.), and OGH 11.12.07, noted by *B.C. Steininger*, Austria, YB 2007, 134 (no. 61 ff.)

[34] OGH 07.08.08, noted by *B.C. Steininger*, Austria (supra 108), no. 55 ff.

distinction may have some merit, at least if one restricts compensation where a disabled child is born to the *extra* costs attributable to the disability, and not the full costs of maintenance and upbringing.[35] Which approach represents the European "norm" I do not know, and would suggest that there is a pressing need for further comparative research in this area.[36]

19 It is well known that the issues raised by wrongful life claims – where the action is brought by a child born disabled rather than by the parent(s) – are very different and much more troubling. The child is forced to say, in effect, "My life is so bad that it is not worth living." Famously, the French *Cour de Cassation* allowed such a claim in its *Perruche* decision – only to be promptly reversed by the legislator.[37] Nevertheless, other national supreme courts proceeded to allow wrongful life claims: in Hungary, the Netherlands, and Spain.[38] However, the Hungarian Supreme Court last year overturned its previous practice in a unifying resolution.[39] In his country report, Attila Menyhárd notes that "the obvious deviation" from the trend in other European legal systems was one reason inducing the Court to change its mind.[40] Hungary therefore now lines up alongside the majority of European systems (including Austria, England, France, Germany, Italy and Portugal[41]) in rejecting claims of wrongful life. The influence of comparative tort law here is clearly apparent.

6. Factual Causation

20 In previous years, the Yearbook has contained ample evidence of the willingness of the courts in different countries to adopt innovative new solutions to problems thrown up by the uncertainties inherent in modern medicine and modern science. Two years ago,[42] I noted how both the Dutch and the English courts had adopted the approach of proportional liability – favoured by PETL[43] – even when a possible cause of the damage (as PETL puts it) lies within the victim's sphere.[44] These developments may be placed alongside the longer-established Austrian theory of potential causation, though this year saw a puz-

[35] As in *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, noted by *K. Oliphant*, England and Wales, YB 2001, 131 (no. 47 ff.).

[36] For a beginning, see *H. Koziol/B.C. Steininger* Schadenersatz bei ungeplanter Geburt eines Kindes, RZ 2008, 138, noted by *B.C. Steininger*, Austria (supra 108), no. 84 ff.

[37] Cass. Ass. Plen.17.11.00 (*Perruche*), reversed by Law of 04.03.02, noted by *P. Brun*, France, YB 2002, 179 (no. 9 ff.). For a comparative analysis, see *A. Morris/S. Saintier*, To be or not to be: Is that the Question? Wrongful life and Misconceptions, (2003) 11 Medical Law Review 167.

[38] EBH 2005/1206, noted by *A. Menyhárd*, Hungary, YB 2005, 332 (no. 9 ff.); Hoge Raad 18.03.05, noted by *M. Faure/T. Hartlief*, The Netherlands, YB 2005, 414 (no. 15 ff.); STS 18.05.06, noted by *A. Ruda*, Spain, YB 2006, 429 (no. 31 ff.).

[39] Supreme Court 12.03.08, noted by *A. Menyhárd*, Hungary (supra 343), no.11 ff.

[40] *A. Menyhárd*, Hungary (supra 343), no. 14.

[41] See *M. Martín-Casals* (ed.) Children in Tort Law. Part II: Children as Victims (2007) 279 f.

[42] *K. Oliphant*, Comparative Remarks, YB 2006, 499 (no. 18 ff.), referring to Hoge Raad 31.03.06, noted by *M.G. Faure/T. Hartlief*, The Netherlands, YB 2006, 338 (no. 22 ff.) and *Barker v Corus plc* [2006] UKHL 20, noted by *K. Oliphant*, England and Wales, YB 2006, 153 (no. 20 ff.).

[43] Art. 3:103, 105 and 106.

[44] Art. 3:106.

zling failure to apply it – and recourse instead to the reversal of the burden of proof – in a case of uncertain causation in the medical context.[45] It may be added that the new "alternative" Austrian tort law draft – whose conservatism has already been noted – would reverse the current practice of awarding proportional damages in cases of causal uncertainty where one possible cause lies within the victim's sphere.[46]

21 Another approach is to re-classify the relevant damage in terms of a lost chance (e.g. the chance of recovery from a medical condition). I wrote last year of the Swiss Federal Court's *opposition* to the concept in a decision in 2007.[47] This was the subject of a very interesting comparative case note in the present year's *European Review of Private Law*, introduced by Miquel Martín-Casals.[48] In the very same issue appears an excellent article, Loss of chance in European Private Law, in which Thomas Kadner Graziano summarises the current state of play on loss of chance in Europe: in at least 12 European legal orders (including Austria, Germany and all Scandinavian systems) the concept of loss of chance is still unknown or has been rejected; in France and the Netherlands the loss of chance analysis is well-established and applies in many fact situations; in other countries, loss of chance is the approach only in a subset of cases (as in England and Wales) or only in a modified form (as has been the case in Spain, where the lost chance was considered an immaterial injury in itself).[49] But a decision of the Spanish Supreme Court is said to have "correctly used" the loss of chance analysis, applying a percentage discount to the "full" damages award, where there was a delay in the availability of a decompression chamber following a diving accident and the diver was subsequently left paraplegic.[50]

22 In this context, we should also note last year's decision of the Belgian Supreme Court (concerning the loss of the claimant's horse after negligent treatment by its vet) which heralds the renewed acceptance of the loss of chance approach in Belgium,[51] and – in the context of negligent legal advice – the award of loss of chance damages last year in Portugal.[52]

23 These developments raise difficult issues of consistency and equity – not forgetting that one must be equitable to defendants too, and their insurers, and not just claimants. Of course, it must also be acknowledged that the adoption in so many systems of these diverse innovations – to which we may add evidential techniques such as the use of presumptions[53] and reversal of the burden

[45] OGH 29.01.08, noted by *B.C. Steininger*, Austria (supra 108), no. 20 ff.
[46] As noted by *B.C. Steininger*, Austria (supra 108), no. 8.
[47] *K. Oliphant*, Comparative Remarks, YB 2007, 617 (no. 22), referring to Federal Court 13.06.07, noted by *P. Loser*, Switzerland, YB 2007, 586 (no. 26 ff.).
[48] *M. Martín-Casals et al.*, 13 June 2007 BGE 133 III 462, Perte d'une chance (case note), (2008) 16 ERPL 1043. I should declare that I contributed the note on English law.
[49] (2008) 16 ERPL 1009, especially at 1023 ff.
[50] STS 07.07.08, noted by *J. Ribot/A. Ruda*, Spain (supra 597), no. 27 ff.
[51] Cass. 05.06.08, noted by *I. Durant*, Belgium (supra 145), no. 31 ff.
[52] Court of Appeal 15.05.08, noted by *A. Pereira*, Portugal (supra 526), no. 57 ff.
[53] See Cass. 22.05.08, noted by *O. Moréteau*, France (supra 264), no. 24 ff.

of proof[54] – indicates a common perception that something is deficient in the traditional approach to factual causation in cases of causal uncertainty. But the practical difficulties that ensue, and the debatable justice of the solutions, demonstrate that still more comparative work is required in this area.

7. Contributory Conduct

24 In what ways can the claimant's contributory conduct reduce or eliminate the defendant's liability? A notable trend here is towards apportionment of responsibility between claimant and defendant, where the defendant's responsibility may previously have been denied altogether.[55]

25 In the context of road traffic accidents, the ECJ's decision in *Candolin v Pohjola*[56] casts a large and indeterminate shadow. It interpreted the EU Motor Insurance Directives as impacting on the principles of compensation and liability laws, and preventing the exclusion of compensation to injured passengers who knew or should have known that their driver was drunk (a proposition now incorporated in the amended Directives[57]). More broadly, the decision subjects national laws on contributory fault to a test of proportionality. Such, at any rate, was the interpretation last year of the Norwegian Supreme Court.[58] The lower courts had applied a deduction of 60% of the damages in a case where the passenger knew the driver was heavily intoxicated by alcohol. The Supreme Court found that this was disproportionate, especially in view of the claimant's age (18 at the time of the accident), and substituted a reduction of 40%. This may well presage a Europe-wide trend towards lower reductions for contributory fault in motor cases, not just in claims by passengers injured by drunken drivers.[59]

26 The claimant's post-accident conduct is another factor that may increase his loss and therefore the quantum of damages. Two remarkable cases last year from England and Wales can be highlighted. In *Corr v IBC*,[60] the claimant's husband committed suicide because of post-traumatic depression resulting from a serious workplace accident six years before. The defendant admitted liability for the initial accident, and the deceased's initial injuries, but disputed liability in the widow's claim for loss of financial dependency. The House of Lords ruled that the defendant's fault was the proximate cause of the suicide

[54] See OGH 29.01.08, noted by *B.C. Steininger*, Austria (supra 108), no. 20 ff.
[55] But cf. Cass. 13.03.08, noted by *O. Moréteau*, France (supra 264), no. 27 ff.
[56] Case C-537/03, [2005] ECR I-5745, noted by *B.A. Koch*, European Union, YB 2005, 593 (no. 15 ff.). For the implications of the case in a different context, see E – 8/07, *Nguyen v Norway*, 20.06.08, noted by *D. Hinghofer-Szalkay/B.A. Koch*, European Union (supra 647), no. 27 ff.
[57] Directive 2005/14/EC, noted by *B.A. Koch*, European Union, YB 2005, 593 (no. 6).
[58] Supreme Court 03.04.08, noted by *A.M. Anfinsen/B. Askeland,* Norway (supra 484), no. 16 ff.
[59] But cf. the 40% deduction made in the case of a careless pedestrian in Ireland last year (*Davis v Jordan* [2008] IEHC 200, noted by *Eoin Quill*, Ireland (supra 364), no. 25 ff.) and the 70% deduction made in respect of fault by the claimant driver in a Latvian case (Senate of the Supreme Court 09.01.08, noted by *A. Bitāns*, Latvia (supra 401), no. 20 ff.), though the loss in that case was property damage and the national legislation on compulsory insurance was not yet in force.
[60] [2008] UKHL 13, noted by *K. Oliphant,* England and Wales (supra 213), no. 14 ff.

and the consequential loss to the dependants. The defendant was therefore liable for loss of dependency. There was some divergence of opinion between the Law Lords as to whether a deduction would have been appropriate for contributory negligence but the point was ultimately left undecided as the issue had not been properly argued in the lower courts. The point therefore remains open – and controversial.

Secondly, in *Gray v Thames Trains*,[61] the claimant suffered severe post-traumatic stress after being involved in a major rail crash, and consequently underwent a significant personality change. Almost two years after the crash, he stabbed a stranger to death in the street following an altercation. He pleaded guilty to manslaughter by reason of diminished responsibility and was indefinitely detained under the mental health legislation. The defendants admitted responsibility for the train crash, and the claimant's initial injuries, but disputed liability for the claimant's loss of earnings following hospitalization. The first-instance court found that the claim was barred on grounds of public policy, but the Court of Appeal allowed an appeal. The claim for loss of earnings was not so closely connected with the criminal conduct as to warrant its total exclusion. The case was remitted to the High Court to determine the issue of contributory fault in the light of the medical and other evidence.[62] 27

Both cases indicate a willingness to extend the limits of the defendant's responsibility in an individual case, so long as there can be a flexible apportionment of liability in the light of the claimant's contributory fault. 28

Finally, the claimant's contributory conduct may raise the question whether there has been a failure to take reasonable steps in mitigation of the loss. In a case before the Dutch *Hoge Raad*, the question was whether the victim of a traffic accident could return to her pre-accident employment as a nurse, working part-time rather than full-time because of the injuries she suffered, or whether she was required to mitigate her loss by seeking alternative *full-time* employment.[63] The *Hoge Raad* accepted there was no such requirement in her case, but this appears not to be an absolute rule. In each case, the court should consider the victim's age, her education, the nature and duration of her work before the accident, and her capacity to perform other work. 29

Similar questions were raised in Portugal in a case before the *Supremo Tribunal*.[64] The claimant, a well-to-do entrepreneur, suffered damage to his brand new Porsche in a car accident caused by the other driver. The claimant wanted another new Porsche and refused to have the damaged car repaired, arguing it could never be restored to its former condition and value. He rented a similar vehicle for three months, at a cost of over € 50,000. After three months, he 30

[61] [2008] EWCA Civ 713, noted by *K. Oliphant,* England and Wales (supra 213), no. 20.
[62] The House of Lords has granted leave to appeal.
[63] 14.12.2007, noted by *M. Faure/T. Hartlief*, The Netherlands (supra 461), no. 36. For technical reasons, the *Hoge Raad* itself expressed no opinion on the merits of the appeal, but simply upheld the court of appeal decision.
[64] Supreme Court 24.01.08, noted by *A. Pereira*, Portugal (supra 526), no. 19 ff.

relented and allowed the damaged car to be repaired. This took seven more months, during which he rented another Porsche at a cost of € 78,000. Could he recover the costs of the two rentals? For the first period, the court of first instance considered the claimant was at fault and rejected that portion of the claim. The *Supremo* declined to interfere with that decision as it was on a matter of fact. For the second rental period, the *Supremo* ruled that the defendant's insurance company had to offer a replacement vehicle with the same characteristics as that which was damaged, following the principle of compensation "in natura". It noted that an expensive car had the purpose of showing the success of the claimant's entrepreneurial activities. It was not an "abuse of right" to rent a car performing that function. The insurance company could have offered a less expensive car in the same category, but on the facts it had never offered any replacement at all.

31 These decisions show that case-by-case adjudication prevails where the issue of contributory conduct is raised. The applicable principles are flexible and open-textured, leaving much to be decided through interpretation on specific facts. It seems generally to be accepted that this trade-off of certainty for flexibility meets the need for individual justice, which explains further why increasing recourse to apportionment has been accompanied by a judicial trend to extend the scope of responsibility for the consequences of tortious conduct.

8. Damages for Personal Injury

32 An innovation in this year's Yearbook is that each country reporter was asked to provide a review of developments in personal injury law in a separate section of their report. A particular (but not exclusive) focus is the award of damages. My colleague Bernhard A. Koch, delivering these comparative remarks three years ago, highlighted the trend towards higher awards.[65] Most of the evidence suggests that the trend is still upwards, particularly in Eastern Europe,[66] but also elsewhere.[67] A number of factors may be highlighted, including changes in the methods for the capitalization of future economic losses, an increase in the recourse actions open to public health providers and state benefit agencies, and the growth in levels of real income. This naturally increases the levels of compensation for loss of earnings. It also increases compensation awarded for the cost of medical care, as care costs reflect the incomes earned by carers. And growth in real income may also have an indirect effect on compensation for non-pecuniary loss because, in many systems, damages for non-pecuniary loss are explicitly linked to "the current living conditions of an average member of society." This was once considered a factor that moderated the level of awards for non-pecuniary loss,[68] but with improving living standards and increasing

[65] *B.A. Koch*, Comparative Overview, YB 2005, 602 (no. 29).
[66] See, e.g., *C. Alunaru/L. Bojin*, Romania (supra 541), no. 1.
[67] See *K. Oliphant*, England and Wales (supra 213), no. 50.
[68] See, e.g., the Polish Supreme Court decisions SN 30.01.04, noted by *E. Bagińska*, Poland, YB 2005, 457 (no. 16 ff.) and SN 10.03.06, noted by *E. Bagińska*, Poland, YB 2007, 451 (no. 13 ff.). In both cases, the Court declined to be bound by average living standards if this would frustrate the compensatory function of damages for moral harm.

living costs it may now be expected to drive up overall compensation costs. This is perhaps to be seen in decisions in 2008.[69] Of course, disparities remain. In Bulgaria, the trend towards increasing compensation applies only in cases of death, and awards for non-fatal injury remain small. One striking illustration is a decision reported this year, where there was an award of only € 4,000 in a case of 100% disability resulting from paralysis and amputation.[70]

33 As this example shows, the trend towards higher awards is not apparent everywhere and several countries have now introduced indicative tables or guidelines for the calculation of damages or, more narrowly, non-pecuniary loss, or special procedural mechanisms with the intention of counteracting further unrestrained rises. New or revised tables were reported last year in England, Finland and Portugal,[71] and a project to establish a new standardised system for assessing damages in personal injury cases was commenced in Norway.[72] Such approaches are not entirely free from controversy, as this Yearbook testifies, by reference to constitutional challenges to their adoption in the Czech Republic and Spain.

34 In the Czech Republic, the Constitutional Court rejected a challenge to the established system of compensating for pain and suffering and aggravation of social position under a points scale established by Decree, the points value in a particular case being assessed objectively by a medical expert. A Prague District Court considered this approach undignified and thus contrary to the principles of democratic society. The Constitutional Court rejected the complaint on technical grounds – there can be no constitutional challenge to a decree as opposed to (for example) the Code itself – but affirmed the constitutionality of the points system. Nevertheless, the Court accepted that a court may depart from the scale and award higher damages if there are extraordinary circumstances.[73] Broadly the same outcome resulted from the constitutional challenge in Spain. The *Tribunal Supremo* affirmed the constitutionality and indeed desirability of extending the application of the statutory tariffs for death and personal injury from road traffic accidents to other contexts.[74] If a court wishes to depart from the statutory tariff, it must justify this by reference to exceptional circumstances or heads of damage omitted by the statutory scheme. This pair of cases demonstrates the constitutional challenges that can arise if objective injury valuations are inflexibly applied, and the desirability of allowing courts a discretion to depart from standardized amounts in exceptional cases.

[69] See, e.g., the cases discussed by *V. Tokushev*, Bulgaria (supra 170), no. 24 ff. and *E. Bagińska*, Poland (supra 499), no. 82 ff., and the "moderate upward tendency" in non-pecuniary damages for medical malpractice noted by *A. Menyhárd*, Hungary (supra 343), no. 18.

[70] Sofia CC 02.12.08, noted by *V. Tokushev*, Bulgaria (supra 170), no. 37 ff. An extra factor in this case was that the tort had occurred in 1992, and the Court sought to be consistent with compensation standards prevailing at that time.

[71] See *K. Oliphant*, England and Wales (supra 213), no. 52, *S. Hakalehto-Wainio*, Finland (supra 256), no. 3 ff., and *A. Pereira*, Portugal (supra 526), no. 11 (noting Ordinance 377/26.05.08). For evidence of the impact of the Personal Injury Assessment Board in Ireland, see *E. Quill*, Ireland (supra 364), no. 24.

[72] *A. Anfinsen/B. Askeland*, Norway (supra 484), no. 41.

[73] Constitutional Court 16.10.07, noted by *J. Hrádek*, Czech Republic (supra 180), no. 29 ff.

[74] *J. Ribot/A. Ruda*, Spain (supra 597), no. 32 ff.

9. State Liability

35 State liability has been a matter of considerable recent legislative activity, especially (but not only) in the former communist states of Eastern Europe. New legislation has been noted in previous Yearbooks in Estonia (2001), Belgium and Slovakia (both 2003), Lithuania and Poland (2004), and Latvia (2005).[75] But the European Tort Law project, as it may be called, has yet to deal properly with the issue of state liability. Neither PETL nor the DCFR incorporates specific principles on the topic, the commentary to the former admitting to a concern that specific incorporation might interfere with the operation of principles of administrative law.[76] However, a degree of harmonisation is already apparent, the source being principles of European Community tort law as developed by the European Court of Justice (ECJ).[77]

36 I noted last year[78] how the Polish Supreme Court, considering state liability for unlawful court judgments, expressly relied on the ECJ's jurisprudence on the liability of Member States for breach of EC law, with particular reference to the Court's judgment in *Köbler v Austria*.[79] It is said that the decision brings Polish law on state liability into line with EC law.[80] In an interesting parallel development, the English Law Commission last year published a Consultation Paper on *Administrative Redress*,[81] recommending that the liability of public bodies for "truly public" acts or omissions should be limited by a new requirement of "serious fault", which it explicitly links with the ECJ's *Francovich* jurisprudence. The basic idea – put very crudely – is that state liability should be a general principle (not limited to particular and rather arbitrary duty situations, as at present) but that the hurdle the claimant must overcome to establish state liability should be higher than before (serious fault, not mere negligence). The proposal has attracted some hostile criticism in the UK but, if adopted, would certainly give considerable momentum to a soft harmonisation of European state liability laws.

[75] Estonia: State Liability Act of 02.05.01, noted by *I. Kull*, Estonia, YB 2004, 248 (no. 8 ff.). Belgium: Act of 10.02.03, noted by *I. Durant*, Belgium, YB 2003, 59 (no. 1 ff.). Slovakia: Act of 28.10.03, noted by *A. Dulak*, Slovakia, YB 2003, 351 (no. 7 ff.). Lithuania: Act no. 55-1888, noted by *H.Gebartas/M. Laučienė*, Lithuania, YB 2004, 405 (no. 10). Poland: Revision of Civil Code 17.06.04, noted by *E. Bagińska*, Poland, YB 2004, 462 (no. 1 ff.). Latvia: Law of 17.06.05, noted by *A. Bitāns*, Latvia, YB 2005 (no. 1 ff.).

[76] PETL Commentary to Chapter 6, no. 7.

[77] See this year C–452/06, *Synthon BV v Licensing Authority of the Department of Health*, 16.10.08, noted by *D. Hinghofer-Szalkay/B.A. Koch*, European Union (supra 647), no. 23 ff. and, in the EFTA Court, E–8/07, *Nguyen v Norway*, 20.06.08, noted by *D. Hinghofer-Szalkay/B.A. Koch*, European Union (supra 647), no. 27 ff.

[78] *K. Oliphant*, Comparative Remarks, YB 2007, 617 (no. 3), referring to the Polish Supreme Court's decision of 04.01.07, noted by *E. Bagińska*, Poland, YB 2007, 451 (no. 75 ff.).

[79] C–224/01, *Köbler v. Austria* [2003] ECR I-10239.

[80] *E. Bagińska*, Poland, YB 2007, 451 (no. 78).

[81] Law Commission (England and Wales), *Administrative Redress; Public Bodies and the Citizen*, Consultation Paper No. 187 (1980), noted by *K. Oliphant*, England and Wales (supra 213), no. 1 ff.

10. Time Limits (Prescription)

Limitation of actions (extinctive prescription) has been a focal point for national developments in previous Yearbooks.[82] Even so, 2008 will go down as a year of particularly notable developments in this field. Pride of place must go to the new French Law Reforming Civil Prescription.[83] This introduces major changes. The default limitation period is reduced from 30 years to five years. A special ten-year period applies to actions for the compensation of personal injury, with a special 20-year period for damage caused by torture, acts of barbarism, sexual violence or assaults on minors. The commencement date is when the victim knew or ought to have known of the facts giving rise to the claim, or, in the case of bodily injury (including bodily injury caused by torture, etc., to which the special 20-year period applies), from the consolidation (i.e. stabilization) of the initial or aggravated damage. There is a "long-stop" period of 20 years from the date of accrual of the right to sue, except for bodily injury and other specified cases. New provisions govern the suspension of prescription and, according to some accounts, give the courts a broader discretion. All distinctions between tort and contract are abandoned. In his report, Oliver Moréteau comments that the reform simplifies a long-neglected and complicated area of French law, and favours the convergence of legal systems.[84] 37

Legislative amendment of the law of limitation is also on the cards in Switzerland, where a reform proposal aims to address the currently unsatisfactory treatment of damage with a long latency period.[85] An absolute limitation of ten years after the wrongful act now applies. The "relative" limitation period of one year is also generally considered too short, and it certainly falls below the normal range of prescription periods found in national and international regimes.[86] 38

The law of limitation of actions was also addressed last year in leading decisions of courts in England and Wales, Greece and Italy.[87] The English House of Lords heard a conjoined appeal of several cases relating to the application of prescription periods to claims of sexual abuse, and gave valuable guidance to assist in the resolution of such cases in future. In the most immediately striking case, the claimant had been the victim of an attempted rape in 1988, for 39

[82] See *B.A. Koch*, Comparative Remarks, YB 2002, 512 (no. 51 ff.) and *K. Oliphant*, Comparative Remarks, YB 2006, 499 (no. 36). Note also the new Polish law of limitation of actions introduced by Revision of the Civil Code 16.02.07, noted by *E. Bagińska*, Poland, YB 2007, 451 (no. 1 ff.).

[83] Law no. 2009-561 of 17.6.2008, noted by *O. Moréteau*, France (supra 264), no. 1 ff.

[84] *O. Moréteau*, France (supra 264), no. 1 and 3. In relation to convergence, he particularly highlights the abandonment of distinctions between contract and tort (no. 6) and the introduction of a test of constructive knowledge in establishing the commencement date for prescription purposes, in contrast with the purely subjective approach of the Catala *Avant-projet* (no. 8).

[85] Noted by *P. Loser*, Switzerland (supra 636), no. 2 ff.

[86] See *R. Zimmermann/J. Kleinschmidt*, Prescription: General Framework and Special Problems Concerning Damages Claims, YB 2007, 26 (no. 4), noting a trend towards periods of between two and five years, and apparent international agreement that three years is most appropriate.

[87] For other decisions raising questions of limitation of actions, see *B.C. Steininger*, Austria (supra 108), no. 44 ff., *I. Durant*, Belgium (supra 145), no. 25 ff., and *V. Tokushev*, Bulgaria (supra 170), no. 46 ff.

which her attacker (the defendant) was convicted and imprisoned. She did not proceed against him at this time in the civil courts. In 2004, while on day release from gaol, the defendant bought a lottery ticket and won the jackpot of £7 million (€ 8 million). Hearing of this, the claimant shortly afterwards brought an action for damages in respect of the 1988 assault. The immediate obstacle to such a claim was the decision of the House of Lords in *Stubbings v Webb*,[88] which applied a non-extendable limitation period of six years to intentional assaults; the general period applying to personal injury, by contrast, is three years but may be extended in the court's discretion. In last year's decision, *A v Hoare*,[89] the House of Lords accepted that this was anomalous and decided to depart from its earlier decision. The claimant was later given permission to bring her claim out of time.

40 In Greece, a cluster of cases before the Supreme Court raised issues relating to prescription.[90] One especially interesting question addressed, eliciting a divergence of approaches in the Court, was the determination of the commencement date in cases of continuing damage caused by omission.[91] On one approach, the claim arises once only and time runs from the first omission to act;[92] on the other approach, the damage persists for as long as the defendant unlawfully fails to put matters rights, and the prescription period runs from the moment the person who sustains the damage has full knowledge of it.[93] In her report, Eugenia Dacoronia finds the latter approach more convincing, noting that this view is also shared by Greek scholars.[94]

41 Another Greek case[95] may be compared with one of this year's decisions from Italy.[96] In both, the question was the longer prescription period employed where the tort also constitutes a criminal offence. A common issue was whether this longer time limit applied even where there was no criminal prosecution. Both Greek and Italian courts concluded that the commission of the criminal act was enough to trigger the longer period, even if no criminal prosecution ensued. The underlying theory seems to be that a criminal offence is no less an offence even if it is not prosecuted.

42 The other Italian case on prescription concerned the claimant's infection with hepatitis C as a result of the transfusion of contaminated blood.[97] The claimant discovered she was ill in 1990, but only knew for certain in 1996 that her condition was caused by the infected blood transfusion. The Supreme Court

[88] [1992] AC 498.
[89] [2008] UKHL 6, noted by *K. Oliphant*, England and Wales (supra 213), no. 41 ff.
[90] *E. Dacoronia*, Greece (supra 324), no. 27 ff.
[91] See also *F. Fusco*, Commencement of the Prescription Period in Case of Damage Caused due to Omissions, YB 2007, 79.
[92] Areios Pagos 951/7.5.2008.
[93] Areios Pagos 1024/19.5.2008.
[94] *E. Dacoronia*, Greece (supra 324), no. 41.
[95] Areios Pagos 1546/3.7.2008.
[96] Cass. 27337/18.11.2008, noted by *E. Navarretta/E. Bargelli*, Italy (supra 385), no. 60 ff.
[97] Cass. 583/11.1.2008, noted by *E. Navarretta/E. Bargelli*, Italy (supra 385), no. 32 ff.

ruled that time began to run against her only when she knew, or ought reasonably to have known, both that she was ill and that the illness could be ascribed to the defendant, the Health Ministry. By requiring knowledge of the source of the danger, and the defendant's responsibility for it, the Court went beyond its previous decisions, introduced further flexibility in the interest of victims, and brought Italian law closer into line with the law in other European systems.

11. Eastern Europe

43 The post-communistic states of Eastern Europe have faced particular challenges in rendering their national tort laws for the modern democratic world. Previous Yearbook reports have testified to recurring issues faced in consequence of the past, for example, claims arising out of wrongful imprisonment[98] or the wrongful expropriation of property by the state[99] during the communist era. Many of these states have introduced or are seeking to introduce new Civil Codes. This series of Yearbooks has highlighted, for example, the new Codes introduced in Slovenia, Estonia, and Lithuania,[100] and the ongoing codification efforts in the Czech Republic, Slovakia and Hungary, the latter now in sight of the finishing line: the closing vote on a Bill submitted to Parliament in 2008 was scheduled for June 2009.[101] All these states have faced the question whether and to what extent to return to past models, and how to respond to the state of the art in the rest of Europe and beyond. Of particular note to us is the role explicitly played by the European Group's *Principles of European Tort Law* in the Slovakian reform project, which we are told is "patterned after the Principles of European Tort Law."[102]

44 Because these states have been able to start with what is, to a large extent, a clean canvas, they are exceptionally well positioned to play a leading role on the European stage in the progressive development of tort law across the continent.[103]

12. Transnational Legal Orders

45 Primary and Secondary EC legislation, the European Convention on Human Rights, and the jurisprudence of European courts in Luxembourg and Strasbourg, have played a major role in recent years in bringing together the tort law of different national systems, even in areas transcending their *de iure* application.

[98] See, e.g., *E. Bagińska*, Poland, YB 2002, 329 (no. 14 ff.) and *C. Alunaru/L. Bojin*, Romania (supra 541), no. 19 ff.

[99] See, e.g., *E. Bagińska*, Poland, YB 2006, 373 (no. 13 ff.).

[100] *R. Lampe*, Slovenia, YB 2002, 364 (no. 1 ff.); *I. Kull*, Estonia, YB 2004, 248 (no. 1 ff.); *H. Gebartas/M. Laučienė*, Lithuania, YB 2004, 405 (no. 1).

[101] *J. Hrádek*, Czech Republic, YB 2005, 186 (no. 1 ff.); *A. Dulak*, Slovakia (supra 571), no. 1 ff.; *A. Menyhárd*, Hungary (supra 343), no. 1 ff.

[102] *A. Dulak*, Slovakia (supra 571), no. 3.

[103] But note the criticism that the Hungarian reform makes no real attempt to find solutions to problems on the basis of a comprehensive comparative analysis: *A. Menyhárd*, Hungary (supra 343), no. 4.

46 As noted already, the Polish Supreme Court last year, considering state liability for unlawful court judgments, expressly relied on the ECJ's jurisprudence on the liability of Member States for breach of EC law. The case is a very good illustration of how principles of EC tort law can exert a harmonising influence even beyond areas strictly susceptible to the jurisdiction of the ECJ.[104] This year, English cases demonstrated how the same principles can infiltrate even routine personal injury practice.[105] Further evidence of the ECJ's influence can be derived from the proposal of the English Law Commission on *Administrative Redress*, also modelled on the Luxembourg Court's approach.[106]

47 In considering the impact of EC tort law on national law, we should note that it is not just rules establishing individual causes of action that are in question. There may also be an impact on other rules of national tort law, for example, defences to liability. In this context, I must highlight again the decision of the ECJ in *Candolin v Pohjola* (considered above).[107]

48 At first sight, it may seem surprising to posit the same harmonising influence on tort law for the ECHR, as the idea that this establishes a system of tort law is still controversial, both because its compensatory goals are (correctly) seen as subsidiary to its role in the protection of fundamental rights, and because there appears to some critics to be very little "system" in the approach to just satisfaction claims under art. 41 ECHR. Personally I consider that criticism unwarranted, and this also seems to be the view of national courts in a number of systems, as there has been occasional but nonetheless significant recourse to the Convention to support the judicial developments of new principles of tort law. Indeed it has been observed in Sweden that "[t]he European Convention has become a natural part of national tort law."[108] Here, and in several other countries, the jurisprudence of the European Court of Human Rights has had an expressly acknowledged impact on the award of compensation for non-pecuniary loss, in particular, inducing national courts to extend its availability in such areas as bereavement following the loss of a family member,[109] and non-pecuniary loss suffered by a corporation.[110]

49 In other countries – for example, England (as highlighted by case-law in 2008)[111] – the extent of the Convention's influence on general tort law is difficult to assess, as there is at one and the same time both an explicit recognition of Convention rights, and an express channelling of relevant claims to specific

[104] No. 36 above.
[105] *K. Oliphant*, England and Wales (supra 213), no. 56.
[106] No. 36 above.
[107] No. 25 above.
[108] *H. Andersson*, Sweden, YB 2007, 572 (no. 26).
[109] See, e.g., Lithuanian Supreme Court 26.09.07, noted by *H. Gabartas/G. Bžozeckaitė*, Lithuania, YB 2007, 400 (no. 17 ff.) and Prešov District Court 18.10.06, noted by *A. Dulak*, Slovakia, YB 2007, 521 (no. 20 ff.).
[110] Cass. 12429/04.06.07, noted by *E. Navarretta/E. Bargelli*, Italy, YB 2007, 373 (no. 20 ff.).
[111] *Van Colle v Police and Chief Constable of Hertfordshire* [2008] UKHL 50, noted by *K. Oliphant*, England and Wales (supra 213), no. 21 ff.

human rights procedures so as to insulate general tort law against the influence – apparently perceived as corrupting – of Convention principles.

C. Conclusions

That completes my snapshot overview of European Tort Law 2008. But I cannot conclude without referring to the continued contribution to scholarship in this field of the collaborating entities that organise this Yearbook – the European Centre of Tort and Insurance Law (ECTIL) and the Institute for European Tort Law (ETL). Last year saw two new publications in the series Tort and Insurance Law, jointly published by ECTIL and ETL: Tort Law of the European Community, edited by Helmut Koziol and Reiner Schulze,[112] and Economic Loss Caused by Genetically Modified Organisms, edited by Bernhard A. Koch,[113] the latter containing the results of comparative research sponsored by the European Commission. Additionally, as I have recorded in previous volumes, the Yearbook "family" of country reporters continues to make its own personal mark, for example, through monographs published last year by Suvianna Hakalehto-Wainio, on the tort liability of public authorities in Finland,[114] and A. Ruda, on ecological damage in Spain.[115] Needless to say, both publications make extensive use of the literature on European tort law. 50

Naturally we must not overlook European tort law scholarship that does not have a connection with Vienna, for example, the new titles on tort law that have appeared in the series The Common Core of European Private Law.[116] Of particular note is the publication in 2008 of the Draft Common Frame of Reference,[117] whose chapter on Non-contractual Liability Arising out of Damage Caused to Another will provide plentiful opportunities for comparison and debate when considered alongside the European Group's previous contribution in the area.[118] 51

European tort law truly is a great market place of ideas, in which Yearbook reporters, and authors and researchers engaged in other ECTIL/ETL projects, continue to contribute to the full, alongside distinguished counterparts elsewhere. 52

[112] *H. Koziol/R. Schulze* (eds.), Tort Law of the European Community (2008), Tort and Insurance Law, vol. 23.

[113] *B.A. Koch* (ed.), Economic Loss Caused by Genetically Modified Organisms: Liability and Redress for the Adventitious Presence of GMOs in non-GM Crops (2008), Tort and Insurance Law, vol. 24.

[114] *S. Hakalehto-Wainio*, Finland (supra 256), no. 32.

[115] *J. Ribot/A. Ruda*, Spain (supra 597), no. 48.

[116] *M. Hinteregger* (ed.), Environmental Liability and Ecological Damage in European Law (2008); *J. Cartwright/M. Hesselink* (eds.), Precontractual Liability in European Private Law (2008). Both titles are reviewed by *K. Oliphant*, England and Wales (supra 213), no. 60 and 158.

[117] *Study Group on a European Civil Code/Research Group on EC Private Law* Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference: Outline Edition (2008). The Full Edition is scheduled for the second half of 2009.

[118] *European Group on Tort Law*, Principles of European Tort Law: Text and Commentary (2005).

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EUROPEAN TORT LAW BLOG

Recently we have added a new feature to our homepages, namely an **ECTIL/ETL blog** and we would like to invite you to send us information which could be posted.

Perhaps there is an upcoming event which you would like to publicize, you have discovered links which could be useful to others or you have written an article which you would like to present.

If so, just send us an English summary and we will add this to our blog.

www.europeantortlaw.net