B Winiger, E Karner,
K Oliphant (eds)

Digest of European Tort Law

Volume 3:
Essential Cases on Misconduct

DE GRUYTER

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Digest of European Tort Law Vol 3: Essential Cases on Misconduct

Edited by the
Institute for European Tort Law of the Austrian Academy of Sciences and the University of Graz

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Volume 3: Essential Cases on Misconduct

Contributors

Iza Adrych-Brzezińska
Håkan Andersson
Bjarte Askeland
Ewa Bagińska
Marko Baretić
Andrew Bell
Jean-Sébastien Borghetti
Arnaud Campi
Giannino Caruana-Demajo
Nadia Coggiola
Eugenia Dacoronia
Simona Drukteinienė
Bernard Dubuisson
Gregor Dugar
Anton Dulak
Isabelle Durant
Caroline Duret
Andreas Ehlers
Anne Marie Frøseth
Bianca Gardella Tedeschi
Michele Graziadei
Martin Hogg
Jirí Hrádek
Mónika Józon
Thomas Kadner Graziano
Ernst Karner
Julija Kiršienė
Bernhard A Koch
Päivi Korpisaari
Jānis Kubilis
Janno Lahe
Siewert Lindenbergh
Ulrich Magnus
Thomas Malengreau
Miquel Martín-Casals
Franz-Stefan Meissel
Pedro Morgado
Barbara Novak
Ken Oliphant
Solveiga Palevičienė
André Pereira
Stefan Potschka
Eoin Quill
Jaliya Retamozo
Jordi Ribot
Sara Félix Rodrigues
Alessandro P Scarso
Michel Séjean
Kristina Siig
Tambet Tampuu
Luboš Tichý
Kalvis Torgans
Vibe Ulfbeck
Vanessa Wilcox
Bénédict Winiger

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Austrian Academy of Sciences
Institute for European Tort Law
Reichsratsstraße 17/2, A-1010 Vienna
Tel.: +43 1 4277 29651
Fax: +43 1 4277 29670
http://www.etl.oeaw.ac.at
E-Mail: etl@oeaw.ac.at

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Preface

Following the first two volumes of the 'Digest on European Tort Law' series, one on natural causation (2007) and the other on damage (2011), we submit this third volume on the topic of misconduct. As with the first two publications, it remains our aim to analyse in comparative fashion a core concept in the law of tort.

As a starting point for the first volume, we imagined that a European Civil Code might one day be adopted. Such an innovation would presuppose that three elements central to codified law are placed at the judge's disposal: the Code itself, works of legal scholarship and court decisions. The Code would be the outcome of political decisions; but what about the other two elements? It is likely that scholars would rapidly produce commentaries on the Code. It would likely be more difficult, however, for judges to find relevant cases to which to refer in reaching their own decisions. Our collection of cases and commentaries could fill this gap. Judges would have to hand a wide-ranging compilation of national court decisions to provide assistance in their own decision-making.

Perhaps the adoption of a European Civil Code is not on the immediate horizon. However, in the meantime, we hope that this series of books will be helpful in promoting the principled development of national tort laws. We have been gratified to learn that national supreme courts and legislators have already consulted the two previously published titles, no doubt because of the extensive overview of the landscape of European tort law that they offer. They also provide for practising lawyers a rich source of arguments that can be adapted for use in their pleadings. In addition, the books in the series are increasingly referred to in the legal literature and in teaching, in particular in classes on comparative law.

As with the two previous volumes, we composed a questionnaire with the help of representatives of different European legal families. Based on the questionnaire, researchers from 27 different jurisdictions investigated their national jurisprudence and selected, summarised and commented on relevant cases. At the supranational level, a separate report presents an analysis of important decisions of the Court of Justice of the European Union. Another report offers a comparative analysis of particular cases resolved according to the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR). This may prove to be a test for strong and weak points in these two proposals for common European norms. Furthermore, a separate historical report examines the notion of misconduct in former times. Finally, at the end of each section, a comparative report highlights the conceptual similarities and differences between the national judicial traditions under analysis.

Whereas Digest I was focused on the core element of natural causation and Digest II analysed the concept of damage, Digest III addresses – in a third step – one of the most important bases for the imputation of tortious liability, which is here referred to as '*misconduct*'. The term itself may not be immediately familiar, having been chosen as a neutral label that avoids any prejudgement of how the underlying

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concept ought to be classified – some legal systems addressing it under the heading 'fault' (*faute*) or '*culpa*', others under 'wrongfulness' or 'unlawfulness', and the rest highly variably. However, the core idea to which it refers – the *failure to meet a given standard of required conduct* as a basis of tortious liability – ought to be comprehensible, whatever legal system's perspective one applies.

One of the main challenges of Digest III is the large variety of different approaches to misconduct in the jurisdictions included. Whereas a substantial number of European jurisdictions – like Germany, Austria, Switzerland, Spain and the Czech Republic, for example – draw a distinction between the (twin) ideas of 'objective' unlawfulness/wrongfulness and 'subjective' fault, in a range of other legal systems the distinction between wrongfulness and fault is, in contrast, blurred or even entirely unrecognised. This is true in France and Belgium, for example, where the enquiry is focused only on the unitary concept of *faute*, and also in Scandinavian jurisdictions, where the uniform concept of *culpa* is used instead. Similarly, in Common law legal systems, it is not conventional to distinguish between fault and wrongfulness, and it is not even clear how such a distinction might be drawn. To add even more complexity to the problem, even in those countries which do draw a sharp distinction between 'objective' wrongfulness and 'subjective' fault, the approach taken is anything but uniform. On the one hand, as regards wrongfulness, a distinction is sometimes drawn between a focus on the harmful event as such (*Erfolgsunrecht*) and on the human conduct that caused that result (*Verhaltensunrecht*); on the other hand, the question of 'subjective' fault is mostly assessed using an *objective* standard (that of 'the reasonable person'), but also sometimes by applying a genuinely subjective – that is, individualised – standard (taking into account the personal knowledge and capabilities of the individual tortfeasor).

However, despite all of these structural differences, the study also shows that there are very important similarities in the *substantive criteria* for assessing the notion of 'misconduct'. One of the most telling examples is the assessment of the required standard of conduct, where all European countries rely, at least to some degree, on the dangerousness of the activity in question, the foreseeability of the damage and the availability and the costs of precautionary or alternative action (amongst other factors). Hence, the research undertaken in Digest III might not only be helpful in furthering a better mutual understanding of the different concepts of 'misconduct' used across Europe, but may also provide the foundations on which a genuine common core of European tort law can be developed in the future.

The cases in the present book are divided into 16 fundamental categories relating to misconduct. Within each category, the selected facts, decisions and comments are presented in the following manner: each category begins with a historical introduction (1), followed by the 28 country reports (almost all European Union Member States, plus Switzerland and Norway) (2–28), decisions of the European courts (29), solutions of hypothetical cases according to the PETL and the DCFR (30) and finally a comparative report (31).

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This structure allows a reader interested in a specific problem, for example mental disability, to find the relevant information for the various jurisdictions in a single chapter (for mental disability, chapter 10). Readers looking for the cases and solutions of a specific country will find them under the same number within each chapter (for Greece, for example, under number 5). The comparative reports (31) provide a summary of our main findings for the more hurried reader. Cross-references within the book are thus composed of three numbers. The first two are cited at the top of each page and they indicate the basic category and the specific (usually country) report within each category. The third figure refers to the marginal numbers into which each individual report has been sub-divided. For example, 9/3 no 1 indicates physical disability (chapter 9) in Austrian law (country 3) and refers to the facts of the decision 8 Ob 216, 274/80 (beginning at marginal number 1).

We owe our profound thanks to the staff of the Institute for European Tort Law of the Austrian Academy of Sciences and the University of Graz, especially to Dr Vanessa Wilcox, Donna Stockenhuber, MA and Mag Kathrin Karner-Strobach for coordinating the project in Vienna and for preparing the manuscript for publication. Many thanks are also owed to Prof Alessandro Scarso for having invited our group to Bocconi University in autumn 2013 for the launch of the research project and for having assisted the editors with the review of materials produced by the country reporters. Further, we would like to express our gratitude to the Austrian Science Fund (*Fonds zur Förderung der wissenschaftlichen Forschung*) and the Swiss National Science Foundation (*Fonds National Suisse de la Recherche Scientifique*) for their support.

The Editors

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Overview

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Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
AcP	Archiv für die civilistische Praxis
AC	Appeal Cases
AD	Anno Domini
ADC	Anuario de Derecho Civil
AJA	Actualidad Jurídica Aranzadi
AJP/PJA	Aktuelle Juristische Praxis/Pratique Juridique Actuelle
All ER	All England Law Reports
AP	Areios Pagos (Greek Court of Cassation)
App	Corte di Appello
Arch Civ	Archivio civile
ArchN	Archeio Nomologias (Archive of Jurisprudence)
Arch resp civ	Archivio della responsabilità civile
Arm	Armenopoulos
ATF	Arrêt du Tribunal fédéral
BC	Before Christ (Ante Christum natum)
BGBl	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BGR	(Schweizerisches) Bundesgericht
BMJ	Boletím do Ministério de Justiça
BOE	Boletín Oficial del Estado
Bull Ass plén	Bulletin des arrêts de la Cour de cassation
Bull Ass/T Verz	Bulletin des assurances/Tijdschrift voor Verzekeringen
Bull civ	Bulletin des arrêts de la Cour de cassation, chambres criminelles
Bull crim	Bulletin criminel
Cass	Corte di cassazione
Cass	Cour de cassation
Cass Ass plén	Cour de cassation, Assemblée plénière
Cass civ	Cour de cassation, Chambre civile
Cass comm	Cour de cassation, Chambre commerciale
Cass crim	Cour de cassation, Chambre criminelle
Cass mixte	Cour de cassation, Chambre mixte
Cass Pen	Cassazione Penale
Cass SS UU	Corte di cassazione, sezioni unite
CCJC	Cuadernos Civitas de Jurisprudencia Civil
CCM	Council for Mass Media
cf	compare
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
Ch	Law Reports, Chancery Division (3rd Series)
Ch D	Law Reports, Chancery Division (2nd Series)
ChrID	Chronika Idiotikou Dikaiou (Chronicles of Private Law)
CJEU	Court of Justice of the European Union
CJ-STJ	Colectânea de Jurisprudência – Acórdãos do Supremo Tribunal de Justiça

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CLC	Civil Law Cases
CLJ	Cambridge Law Journal
CLP	Commercial Law Practitioner
cmt	comment
Coll	Collatio Legum Mosaicarum et Romanarum
Comm L World Rev	Common Law World Review
CRA/VAV	Circulation, Responsabilité et Assurances/Verkeer, Aansprakelijkheid en Verzekering
CSIH	Scotland Court of Session, Inner House
CSOH	Scotland Court of Session, Outer House
D	Dalloz
D	Dunlop Session Cases
D	(Justinian) Digest
D	Recueil Dalloz
Danno Resp	Danno e responsabilità
DEE	Dikaio Etaireion kai Epicheirisseon
DiDik	Dioikitiki Dikaiossini (Administrative Justice)
Dig	Digest of Justinian
Dir Giust	Diritto e Giustizia
Dir mar	Diritto marittimo
D jur	Recueil Dalloz, section 'jurisprudence'
Dr circ/Verkeersrecht	Droit de la circulation Jurisprudence/Verkeersrecht Jurisprudentie
DRdA	Das Recht der Arbeit
DULJ	Dublin University Law Journal
DzU	Dziennik Ustaw
EAEC	(Treaty Establishing the) European Atomic Energy Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECT	Treaty on the European Community
ECtHR	European Court of Human Rights
EEmpD	Epitheorissi Emporikou Dikaiou (Commercial Law Review)
EEN	Ephimeris Ellinon Nomikon (Journal of Greek Jurists)
Ell Dni	Elliniki Dikaiosini (Greek Justice)
ELR	Education Law Reports
EpSygkD	Epitheorissi Sygkoinoniakou Dikaiou
ERPL	European Review of Private Law
ETL	(Yearbook of) European Tort Law
EU	European Union
EvBl	Evidenzblatt
EWCA Civ	England & Wales Court of Appeal, Civil Division
EWHC Civ	England & Wales High Court, Civil Division
Exch	Exchequer Law Reports
F 2d	Federal Reporter, Second Series (US)
F & F	Foster & Finlayson's Nisi Prius Reports
FED	Forsikringsretlig og Erstatningsretig Domssamling

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F (HL)	Fraser's Court of Session Cases, 5th Series
Foro It	Foro Italiano
GAJC	Grands arrêts de la jurisprudence civile
Gaz Pal	Gazette du Palais
GCC	Greek Civil Code
GCEU	General Court of the European Union
Giur dir ind	Giurisprudenza diritto industriale
Giur It	Giurisprudenza Italiana
Giust Civ	Giustizia civile
GlU(NF)	Glaser-Unger, Sammlung von zivilrechtlichen Entscheidungen des KK Obersten Gerichtshofes (Neue Folge)
GPC	Greek Penal Code
H & C	Hurlstone & Coltman's Exchequer Reports
HAVE/REAS	Haftung und Versicherung/Résponsabilité et Assurances
HE	Hallituksen esitys
HL	House of Lords
HLR	Housing Law Reports
HR	Hoge Raad
Hr	Høyesterett
ÎCCJ	Înalte Curt de Casație și Justiție, High Court of Cassation and Justice
ICR	Industrial Case Reports
IECC	Irish Circuit Court
IEHC	Irish High Court
IESC	Supreme Court of Ireland
ILRM	Irish Law Reports Monthly
ILT	Irish Law Times
ILTR	Irish Law Times Repors
Inst	Institutes
IR	Irish Reports
IR Jur Rep	Irish Jurist Reports
JBl	Juristische Blätter
JCP (éd) G	Juris Classeur Périodique, édition Gallimard
JETL	Journal of European Tort Law
JJ Pol/T Pol	Journal des Juges de Police/Tijdschrift van de Politierechters
J Leg Stud	Journal of Legal Studies (US)
JLMB	Revue de jurisprudence de Liège, Mons et Bruxelles
JT	Journal des tribunaux
JUR	Jurisprudencia Aranzadi-Westlaw
KB	King's Bench
KC	Kodeks cywilny
KKO	Korkein oikeus
LCR	Loi (fédérale) sur la circulation routière
LNA	Ley de Navegación Aérea

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LOA	Law of Obligations Act
LPA	Les Petites Affiches
LQR	Law Quarterly Review
LR	Law Reporter
LRC	Law Reform Commission
LSG	Law Society's Gazette
M	Macphersons' Session Cases
Mass Giur Civ	Massimario giurisprudenza civile
Mass Giur It	Massimario giurisprudenza italiana
Med LR	Medical Law Reports
Med L Rev	Medical Law Review
MEP(s)	Members of the European Parliament
NJ	Nederlandse Jurisprudentie
NJA	Nytt Juridiskt Arkiv
NJCL	Nordic Journal of Commercial Law
NJW	Neue Juristische Wochenschrift
NjW	Nieuw juridisch Weekblad
NoV	Nomiko Vima (Legal Tribune)
Nov dig it	Novissimo digesto italiano
Nuova giur civ comm	Nuova giurisprudenza civile commentata
NZ	Notariatszeitung
Ø	Østre Landsret
ÖAMTC-LSK	ÖAMTC-Leitsatzkartei
OGH	Oberster Gerichtshof
OJ	Official Journal
OJSL	Oxford Journal of Legal Studies
OGH	Oberster Gerichtshof
ÖJZ	Österreichische Juristenzeitung
OLG	Oberlandesgericht
OSA	OrzecznictwoSądówApelacyjnych
OSE	Organismos Sidiridromon Ellados (Hellenic Railways Org)
OSN	Orzecznictwo Sądu Najwyzszego
OSNC	Orzecznictwo Sądu Najwyzszego Izba Cywilna
OSNIC-ZD	Orzecznictwo Sądu Najwyzszego Izba Cywilna – Zbiór Dodatkowy
OSP	Orzecznictwo Sądów Polskich
OSPiKA	Orzecznictwo Sądów Polskich I Komisji Arbitrazowych
Pas	Pasicrisie belge
PEL Liab Dam	Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another
PETL	Principles of European Tort Law
PiM	Prawo i Medycyna
PIQR	Personal Injuries and Quantum Reports
Pol	Juge de police/Politierechter
Pret	Pretura

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QB	Queen's Bench
QRTL	Quarterly Review of Tort Law
R	Rettie's Session Cases (1873 to 1879)
RAP	Revista de Administración Pública
RCA	Responsabilité civile et assurances
RCEEL	Review of Central and East European Law
RCJB	Revue critique de jurisprudence belge
RDBB	Revista de derecho bancario e bursátil
RDC	Revue des contrats
RDC	Revue de droit commercial belge
RDC/TBH	Revue de droit commercial belge/Tijdschrift voor Belgisch Handelrecht
RdW	Recht der Wirtschaft
REAS	Résponsabilité et Assurances
Rep Foro It	Repertorio Foro Italiano
Resp civ prev	Responsabilità civile e previdenza
RGAR	Revue générale des assurances et des responsabilités
RGDC/TBBR	Revue générale de droit civil belge/Tijdschrift voor Belgisch Burgerlijk Recht
RHDI	Revue Hellenique de Droit International
RIDA	Revue Internationale des Droits de l'Antiquité
Riv dir sport	Rivista di diritto sportivo
Riv Pen	Rivista penale
RJ	Repertorio de Jurisprudencia Aranzadi
Rt	Norsk Retstidende
RTD civ	Revue trimestrielle de droit civil
RTR	Road Traffic Reports
RW	Rechtskundig Weekblad
SAP	Sentencia de Audiencia Provincial
SCC	Swiss Civil Code
SC (HL)	Supreme Court (House of Lords)
SCO	Swiss Code of Obligations
SJZ/RSJ	Schweizerische Juristenzeitung/Revue suisse de jurisprudence
SLT	Scots Law Times
SN	Sąd Najwyższy (Polish Supreme Court)
(a)SPC	(old) Swiss Penal Code
SSTS	Sentencias del Tribunal Supremo
StGG	Staatsgrundgesetz
STS	Sentencia del Tribunal Supremo
SZ	Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht
TEC	Treaty Establishing the European Community
TECSC	Treaty Establishing the European Coal and Steel Community
Tex L Rev	Texas Law Review
TFEU	Treaty on the Fuctioning of the European Union
TfK	Tidsskrift for Kriminalret

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TGI	Tribunal de Grande Instance
TLA	Tort Liability Act
TPCL	Efarmoges Astikou Dikaiou (Theory and Practice of Civil Law)
TPR	Tijdschrift voor privaatrecht
TR	Tijdschrift voor Rechtsgeschiedenis
Trib	Tribunale
U	Ugeskrift for Retsvæsen
UKSC	United Kingdom Supreme Court
V	Vestre Landsret
VAV	Verkeer, Aansprakelijkheid en Verzekering
WLR	Weekly Law Reports
ZAS	Zeitschrift für Arbeits- und Sozialrecht
ZBJV/RJB	Zeitschrift des Bernischen Juristenvereins/Revue de Jurisprudence Belge
ZBl	Zentralblatt für die Juristische Praxis
ZEuP	Zeitschrift für Europäisches Privatrecht
ZNR	Zeitschrift für neuere Rechtsgeschichte
ZR	Zivilrecht
ZSS	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung
ZVR	Zeitschrift für Verkehrsrecht

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Questionnaire Structure

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Questionnaire

I. Introduction

This study addresses one of the most important bases for the imposition of tortious liability, which is here called 'misconduct'. The term itself may not be immediately familiar, having been chosen as a neutral label that avoids any prejudgement of how the underlying concept ought to be classified – some legal systems addressing it under the heading 'fault', others under 'wrongfulness' or 'unlawfulness' (see *H Koziol* (ed), Unification of Tort Law: Wrongfulness (1998); *P Widmer* (ed), Unification of Tort Law: Fault (2005)). However, the idea to which it refers – the failure to meet a given standard of required conduct as a basis of tortious liability – ought to be comprehensible, whatever legal system's perspective one applies.

The questionnaire below begins by asking for a general overview as to how the issue of misconduct is addressed in the legal system in question (**Question 1**). It then considers the nature of the misconduct required, in the general run of cases, to establish tortious liability (**Question 2**). The focus subsequently turns to the criteria applied in assessing whether the required standard of conduct has been attained, with consideration of the relevance of statutory and non-statutory norms (**Questions 3–5**). The next group of questions addresses the basic features of that standard, and in particular whether it is objective or subjective, with reference to specific factors that may conceivably affect the standard applied: special skill or expertise, inexperience or lack of skill, disability, age, insanity and incapacity due to drink or drugs or other transient factors (**Questions 6–12**). The following section asks whether different degrees of misconduct are recognised and, if so, what role this plays in establishing liability (**Question 13**). In the final section of the questionnaire, self-defence and other grounds of justification are tackled. In this context an issue is raised which some may regard as fundamental – namely, the right to defend oneself against injurious behaviour *not* constituting misconduct (**Questions 14–15**). Contributors are also free, at the end of their responses, to raise other issues which they consider relevant to the topic (**Question 16**).

II. Questionnaire

A. Overview

1. General Overview

Please set out very briefly (max 2 pages) how your courts deal with the issue of misconduct, addressing the various forms of misconduct that are recognised and the functions that the concept of misconduct performs in your legal system. It may

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be useful to include the text of key Code or statutory provisions, at least in a footnote.

In particular, we would ask you to take the following questions into account, insofar as they are relevant in your jurisdiction:

What is the role of misconduct in establishing liability? Is liability always based on misconduct? If not, what is the relationship between liability based on misconduct and other forms of liability (in particular, strict liability)?

Who has to prove the misconduct? Is the burden of proof ever reversed?

Several European jurisdictions make a distinction between 'wrongfulness' and 'fault'; the former embodying a more objective assessment of the tortfeasor's conduct, the latter a more subjective assessment (see *P Widmer*, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation (Attribution), in: *Widmer*, Fault, 331ff). Is there a clear dividing line between wrongfulness and fault in your system? Is wrongfulness a prerequisite for fault?

Some European systems employ a notion of 'breach of duty' as a precondition of liability. If this is the case in your system, is this a question of wrongfulness, fault or a mixture of both?

All European systems recognise fault as at least one precondition of liability, but what does the fault relate to? (Wrongfulness, causation, 'first' damage, subsequent damage, the whole damage?)

What are the conditions of capacity for tortious liability (in particular, as regards age and mental development)?

Most European systems employ a notion of 'negligence' as a basis of liability. If this is the case in your system, is this a question of wrongfulness, fault or a mixture of both? What yardstick is used to establish whether or not the damaging party acted 'negligently' (an objective standard or a subjective standard reflecting the abilities of the individual tortfeasor)? How is the required standard of care defined?

Which gradations of misconduct are recognised? (intent, *dolus eventualis*, gross and slight negligence, *culpa levissima*, others?)

B. The Nature of the Misconduct Required

2. Forms of Misconduct

What forms of misconduct (wrongfulness, fault, others?) are recognised in your legal system and how (in outline) can they be established?

If wrongfulness is a prerequisite of tortious liability, does it focus on the harmful result as such (*Erfolgsunrecht*) or the human conduct that caused that result (*Verhaltensunrecht*)?

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Examples
Music teacher A gives lessons in his home. B, his neighbour, objects to the noise and complains, but A maintains he has a right to teach students in his home. B consequently decides to retaliate by banging a metal tray and blowing a whistle at times when A is giving a lesson. A and B bring claims against each other.

A case of this nature – where two parties cause harm to each other, but only one is acting unreasonably – might provide a good way of introducing the general approach taken to misconduct in your legal system.

Skier A who is skiing too fast collides with Skier B, who is standing looking downhill in an easily visible position at the edge of a broad slope. Both skiers are injured. What rights of action, if any, do they have against each other in the law of tort?

Although one could argue that each skier has infringed the other's personal integrity in the collision, most systems would hold A liable to B but be reluctant to impose liability on B towards A. However, the reasons why they do not do so may differ, with some systems relying on a lack of wrongfulness and others on a lack of fault. Contributors are requested to think of a case that illustrates the reasoning that would be applied in a case such as the present in order to avoid holding B liable (if that is indeed how the case would be decided). What does the analysis of such a case reveal about the focus of the inquiry – is it on the defendant's conduct alone, or the results of that conduct, or a combination of the two?

C. The Required Standard of Conduct

3. Criteria for Assessment

What factors are relevant in assessing whether the required standard of conduct has been attained and how do they interact? In particular, to what extent does the assessment depend on the degree of foreseeability of injury, the nature of the interest likely to be affected, the anticipated gravity of the harm if it occurs, the cost of taking precautions against the risk, and the value to the community at large of the activity being undertaken?

Address this question both in general (3a) and with reference to the factors specified in additional headings below (3b to 3f), which are based on the specific factors listed in art 4:102(1) of the Principles of European Tort Law (PETL) ('The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance be-

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tween those involved, as well as the availability and the costs of precautionary or alternative methods.' For further guidance see *European Group on Tort Law*, Principles of European Tort Law: Text and Commentary (2005)) It seems likely that the relevant factors operate cumulatively rather than independently, and that specific cases could potentially be considered under more than one heading, but it is hoped that the role of individual factors may nevertheless be illuminated by considering them separately.

In considering the specific criteria, it may be useful to consider *pairs* of cases which, though superficially similar, have different outcomes because of the different weight attached to a particular variable on the facts.

3a. The Criteria and Their Interplay

Provide an illustrative case that shows the range of criteria applied and their interplay. Are the criteria addressed separately and in isolation from each other or as part of a global inquiry? To what extent does the inquiry turn on matters of degree?

Example

While standing on a public road, V is struck by a ball hit out of A's baseball stadium in the course of a game and is injured. It has only occurred six times in the preceding ten years that a ball has been hit out of the ground, and on none of those prior occasions was anyone injured. The fence surrounding the stadium is as high as it practically can be without the undertaking of major rebuilding work. Is A liable for V's injuries?

3b. The Nature and Value of the Protected Interest Involved

Examples

A causes an accident by running into V1's car and V1 consequently misses a business appointment and suffers a loss of profits. Due to the traffic jam resulting from the accident, V2, another driver, also misses a business appointment and suffers a loss of profits. Are V1 and V2 entitled to claim damages for these losses of profit from A?

A damages an electrical cable that supplies facilities operated by V1 and V2, causing a power cut. As a consequence V1 suffers a loss of profits because he has to cease production. Additionally, food stored by V2 in her freezing facility is ruined by thawing. Neither V1 nor V2 owns the cable. Is A liable?

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3c. The Dangerousness of the Activity in Question

Examples

A lawfully digs a hole in a public road and fails to fence it properly. V falls into the hole and is severely injured. Variation: A properly fences the hole but later receives information that vandals have removed the fence. A takes no steps. Consequently, V is injured.

Whilst walking in the street, A accidentally drops the tub of butter he is carrying. He knocks at the door of a near-by house to ask for paper to clear up the mess. Meanwhile, B, carrying a quantity of high explosives, walks along the same street and slips on the butter that has been smeared on the ground as a result of the accident, loses his balance, and drops the explosives, triggering their explosion. V, a passer-by, is injured in the blast. Is V entitled to damages from A and/or B?

V, a 13 year-old pupil in A's cycling school, has a congenital condition which prevents him seeing out of his left eye. While cycling under A's supervision, V is struck in his right eye by a stone sent flying by a passing car, and consequently he loses his sight in that eye too. It is not A's practice to issue protective goggles to all the cyclists in his school, but V argues that he should have made an exception in V's case. Is A liable to V in damages?

3d. The Foreseeability of the Damage

Examples

Oil that is carelessly discharged from a docked ship drifts under a wharf where other ships are being repaired. Molten metal produced by welding operations on the wharf falls onto debris floating in the water and sets it alight, which in turn ignites the oil on the water. The wharf and ships moored there sustain substantial fire damage. Who is liable, the person who carelessly discharged the oil, the person who caused it to catch fire, or nobody?

A toxic waste incinerator on A's land produces emissions that contaminate water percolating under his land; months later and several kilometres away, the contaminated water emerges from a spring on V's land and fatally poisons his cattle who drink from the spring. At the time, the scientific community was not aware that contaminated water might travel so far underground. Is A guilty of misconduct towards V for which he can be held liable in damages?

3e. A Relationship of Proximity or Special Reliance Between Those Involved

Examples

During a climbing tour A comes across V, who has broken his leg and is obviously in need of help. A does not take any steps to help him. As a result V suffers severe

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damage to his health. Is A liable to V? Does it make a difference if A and V are fellow mountaineers who have set out on a climbing tour together?

In anticipation of the anticipated sale of a controlling interest in Listed Company, its auditor, A, provides a report to prospective purchaser V1, stating that Listed Company is in good financial health. Without telling A, V1 shows the report to prospective investor V2, and they each buy large shareholdings in the company. It transpires that Listed Company is in fact in very poor financial health and has to be wound up in insolvency proceedings shortly afterwards. A's audit of its accounts was inadequate. Both V1 and V2 make big losses on the transaction. Is A liable to them in damages?

3f. The Availability and the Costs of Precautionary or Alternative Methods

Examples

A railway company leaves an old carriage on an unused and unfenced siding. The carriage has a ladder on one side. Children from the neighbourhood climb up onto its roof. One child is severely injured when coming into contact with an overhead power line above the carriage. Is the company liable on the basis of misconduct (wrongfulness, fault)? Would it make a difference if there had been a fence or if the company had placed a warning sign in front of the carriage saying: 'Danger! Do not climb into or on top of the carriage.'

3g. Other Relevant Factors

Are there other factors that should be highlighted as relevant to the assessment of whether the required standard of conduct has been attained in the individual case?

4. The Relevance of Statutory Norms

To what extent is the required standard of conduct stipulated expressly by legislation? Does non-compliance with a statutory norm necessarily entail a failure to attain that standard?

Example

On a sunny day A takes his motorboat out on a large lake which he is licensed to use. As it is sunny and there is no one else in view, A exceeds the speed limit imposed by law by a considerable margin. As a consequence, it is impossible for him to avoid an accident when a swimmer V unexpectedly emerges from under the surface, having been practising holding his breath underwater. V sues A. Is A liable on the

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basis of misconduct (wrongfulness, fault), and, if so, what does the misconduct relate to?

5. The Relevance of Non-Statutory Norms

To what extent are non-statutory norms (eg professional standards, codes of conduct, or unwritten common practice) relevant in determining the required standard of conduct? To what extent does a standard of conduct contractually agreed by the defendant with a third party affect the standard imposed by law towards the claimant?

Example

According to the guidelines of the Alpinist Association, whose authority in respect of hillwalking and mountaineering is widely recognised, the area above hiking trails has to be checked annually by the persons having responsibility for them in order to prevent rockfalls. A checks his trail, which runs across a particularly dangerous landscape prone to rock falls, only every second year. Consequently he fails to discover a loose rock, which falls down and injures hiker V. Is A liable?

Would there be a difference if a statutory norm stated that keepers of trails are (generally) only under an obligation to perform checks every two years?

D. An Objective or Subjective Standard?

The following questions address the extent to which the standard applied is 'objective' (ie based on norms of reasonable conduct independent of the characteristics and capacities of the individual defendant) or 'subjective' (ie based on the characteristics and capacities of the individual defendant, rather than an abstract conception of reasonable conduct).

Does your legal system apply an objective or subjective yardstick, or both yardsticks cumulatively, or even follow a mixed approach – for instance, by using an objective standard only in respect of professionals or experts?

Where the person causing harm lacks the necessary – or average – physical or mental capacity due to age, disability, insanity or the like, would your jurisdiction negate wrongfulness and/or fault or neither? If there is no wrongfulness or fault in such a case, under what circumstances, if any, can liability nevertheless arise?

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6. Special Skill or Expertise

If the defendant causes injury in the course of an activity in respect of which he or she possesses special skill or expertise, is this reflected in the standard of conduct required? If so, how? (Please include cases where the defendant holds himself out as having a particular skill or expertise which he does not in fact possess.)

Examples

A, who is a geologist, builds his house on a slope. As a consequence, the slope begins to slide and V's house, which is below that of A, is damaged. On the basis of a normal expert's knowledge, this consequence was unforeseeable to the building authority as well as the building contractors. But A should have realised the danger as he knew about the exceptional ground conditions on account of his research work in this area. V sues A.

A, an experienced first-aider, renders emergency assistance to V, who has collapsed on a public road. There is no one else around who can help. A makes an error that one would not expect from a first-aider of such experience, though it would have been excusable on the part of someone with less first-aid experience. V suffers injury as a result. Can A be held liable?

7. Inexperience or Lack of Skill

If the defendant causes injury in the course of an activity in respect of which he or she lacks experience and therefore skill, is this reflected in the standard of conduct required? If so, how? Is it material whether or not the activity was voluntarily undertaken or undertaken only by reason of unexpected necessity?

Examples

A, a very inexperienced horse-rider, loses control of her animal, which rears up and kicks V, who is injured. A rider with more experience would have had better control. Is A liable for V's injuries?

A, who has no experience at all of giving first aid, renders emergency assistance to V, who has collapsed on a public road. There is no one else around who can help. A makes an error that one would not expect from a qualified first-aider and V suffers injury as a result. Can A be held liable?

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8. Age

Does the required standard of conduct reflect the defendant's age (eg whether the defendant is a child or elderly)? If so, how?

Examples

A and V, both ten-year-old school children, engage in a pretend sword fight using plastic rulers as weapons. A's ruler breaks on impact with V's, and a splinter of plastic enters V's eye and causes injury. Is A's age relevant in deciding whether or not liability arises?

A is elderly and occasionally unsteady on his feet. Whilst doing his weekly shopping for groceries in V's shop, he stumbles and accidentally causes a stack of wine bottles to topple over. The bottles smash, depositing their contents on the floor. Is A liable to V in damages?

9. Physical Disability

If the defendant causes injury which is attributable to his or her disability, is this reflected in the standard of conduct required? If so, how? Is it material whether or not the disability was a pre-existing or foreseeable condition, or sudden and unexpected?

Examples

A sudden and exceptionally strong gust of wind knocks off A's glasses as he is cycling, and before he can react he crashes into V whom, because of his poor eyesight, he simply did not see. Is A liable for V's injuries?

A has a chronic illness but diligently takes his medication, which enables him to participate fully in most aspects of life. His doctor advises that it is safe for him to ride his bicycle, though there remains a very small risk of him suffering an episode and falling unconscious at any time. While riding, A suffers such an episode, suddenly falls unconscious, and crashes into V. Is A liable for V's injuries?

A has to walk to his workplace. Because of his constitutionally slow reactions, he reacts too late when he sees V cyling towards him and causes him to fall.

Variation: A prefers to use his bicycle to get to his workplace. Because constitutionally his reactions are equally slow, he applies the brakes too late and injures V, who is crossing the road ahead of him.

V claims damages from A. Is A liable on the basis of misconduct (wrongfulness, fault)?

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10. Mental Disability

If the defendant has a mental disability, is this reflected in the required standard of conduct? If so, how?

Example

A, a mentally ill person, breaks off the wing mirror of V's car.

a) A is acting carelessly.

b) A is acting with intent and just for fun.

11. Incapacity due to Drugs or Alcohol

Is the defendant's incapacity due to drugs or alcohol reflected in the required standard of conduct? If so, how? Does it make a difference if the defendant was given the drugs or alcohol without his knowledge?

Example

Before going to bed, A wants to drink a bottle of fine wine. But having drunk the contents of the bottle, a friend calls him and asks him to join a party. A decides not to go to bed and drives by car to the party of his friend. Because of his intoxicated state, he causes a serious accident and injures V severely. Is A liable on the basis of misconduct (wrongfulness, fault)?

Would the result be different if A had been drinking in a bar even though he should have been conscious of the fact that afterwards he would drive his car?

12. Incapacity due to Other Transient Factors

A is a young assistant doctor who is on his way home by bicycle after having worked 60 hours without interruption (because the colleague who should have relieved him fell ill) in the emergency ward of a hospital. Shortly before reaching his home, he comes across a traffic accident and, while administering first aid to one of the injured persons, he omits to take a very common measure to stop the bleeding because of his state of extreme fatigue. Can A be held liable for malpractice?

Whilst A is cycling, he is suddenly attacked by a swarm of bees whose presence he had no reason to anticipate. As a reflex reaction, he waves his arms to fend them off and loses control of his bicycle, colliding with V who is injured as a consequence. Is A liable to V in damages?

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E. Degrees of Misconduct

13. Degrees of Misconduct

What degrees of misconduct are recognised in tort law in your legal system? (Intention, *culpa lata*, *culpa levis*, *culpa levissima*, etc) What role does the degree of misconduct play in establishing liability? What other roles does it play, for example in terms of the scope of liability, the amount of compensation awarded, limitation periods or the exercise of rights of recourse in cases of employers' or vicarious liability?

Examples

A cuts the branches of his tree. All around the tree he has put clearly visible warning signs. As he trusts that everybody would see and respect the signs, he does not keep checking for the presence of pedestrians under the tree and a falling branch hurts V who has ignored the warning signs.

A forgets to clean the footpath on his premises. The postman slips and is injured.

Despite warnings from his neighbours, A puts flower pots in an extremely dangerous position outside his windows. Because of a strong gust of wind, one of the pots falls and hurts a passerby.

A practises throwing the javelin at the local athletics stadium. When one of his rivals crosses the sports field, he aims at him and wounds him.

A, who is in a great hurry, does not realise that he is parking his car in front of V's exit. As a result, V is unable to bring his injured dog to the veterinary surgeon in time; the dog bleeds to death. Is A liable? Would there be a difference if A were to obstruct V's exit intentionally?

B, a diva, is engaged by V to sing at Covent Garden for a three-month season and to sing nowhere else during that period. A, the proprietor of Drury Lane, persuades B on the first day of the engagement to sing for him instead. B is not worth suing for damages. Is A liable to V?

Would it make any difference if B was prevented from singing for V as the result of a car accident caused by C?

F. Grounds of Justification

14. Self-Defence and Other Grounds of Justification

What grounds of justification are recognised in your jurisdiction? Do such grounds exclude wrongfulness or fault or both? Can liability arise under a specific regime – for instance, in cases of emergency – even in the absence of wrongfulness and/or fault, or is all tortious liability negated in such cases?

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Examples

A tries to rob B at gun point. B grabs a stick and knocks A down.

A, who is pregnant with her first child, suddenly goes into labour. Her husband, B, drives her in his car to the hospital, breaking the speed limit on sections of the road where he considers it safe to do so, as they are both worried that the baby may come too soon. At a time when B is driving some 10 km/h above the limit, the vehicle skids on an unexpectedly slippery patch of road, and collides with V, who is driving carefully in the other direction. Is B liable for V's injuries?

Two youngsters, A and V, are playing a game in which the loser has to submit to an ordeal, which they agree should be the dropping of a brick onto his foot from a particular height. V loses the game and A inflicts the ordeal on him. The brick breaks a bone in A's foot. Is A liable for this injury?

15. Self-Defence against Non-Misconduct

Is there a right to defend oneself against *injurious behaviour* that does *not* constitute misconduct?

Examples

Nurse A wants to give B an injection, which contains a lethal dose due to the mislabelling of the medicine. Nurse A is not and could not reasonably have been aware of this error. When B realises the danger, he pushes A away slightly injuring her.

A's dog escapes even though A acts as an entirely responsible dog owner and cannot be blamed. The dog tries to bite B, who defends himself by kicking the dog, which is severely hurt by the kick.

G. Other Issues

16. Additional Questions

Do questions arise in your legal system relating to the nature and function of the required standard of conduct which are not addressed by this questionnaire? If so, please provide case examples by way of illustration.

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A. Introduction

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1. General Overview

1. Historical Report

Misconduct in Early Roman Law

Our information concerning the early Roman Law of Delicts is confined to a number of (mostly fragmentarily and indirectly preserved) quotations of the XII Tables in sources from the late Roman Republic and imperial times. Therefore, many questions as to the likely development and the extent of the regulations are disputed and remain highly hypothetical. The statutory regime of the XII Tables (from the middle of the 5th century BC) contained regulations for certain delicts. There was no general rule concerning the responsibility for the causation of damage in the abstract sense, but the law described sanctions for certain types of misconduct. 1

Thus, the law penalised the maiming of a limb (*si membrum rupsit*), the breaking of a bone caused by strokes with the hand or with a club (*manu fustive si os fregit*), the theft of an object which was not detected in the act (*furtum nec manifestum*), or the killing of a person under circumstances in which the stabbing appears to have been rather accidental (*si telum manu fugit magis quam iecit*). A kind of subsidiary general delict of 'wrongful attack' (but without serious bodily injury) against a person was also covered (*si iniuriam faxit*[1]). Certain types of misconduct manifestly reflected magical beliefs such as the harsh punishment for singing an evil song (*malum carmen incantare*), which may have referred to the idea of casting an evil spell on another person or the spoliation of the harvest of another person by casting evil spells (*qui fruges excantassit*). 2

The sanctions for wrongs covered by the XII Tables reflect the evolution of the early law of delicts. We can detect traces of the idea that the wrongdoer was subject to personal revenge by the injured person or his family as he was declared an outcast (*sacer esto*) after committing the most serious offences. As a consequence, anybody could lawfully kill him. Serious bodily injuries such as the maiming of a limb (*membrum rumpere*) allowed for retaliation ('proportionate' vengeance in the sense of the *lex talionis*: an eye for an eye) unless the tortfeasor reached a settlement (*pactio*) with the victim. A thief caught in the act could be seized by the victim; as 3

1 It is disputed among scholars whether the delict was just called *iniuria* (*si iniuriam faxsit*) or 'to wrongfully do something bad to another person' (*si alteri quid iniuria faxsit*). On the early history on *iniuria* see *G Pugliese*, Studi sull' 'iniuria' (1941); *A Völkl*, Die Verfolgung der Körperverletzung im frühen Römischen Recht (1984); *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1050 ff; *M Hagemann*, Iniuria (1998).

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for his punishment he was scourged and assigned for life to the owner of the stolen object.[2] Was he apprehended at night, it was allowed to kill the thief without much ado. A thief who defended himself with a weapon could be killed as well, in this case it was however necessary to alert the public by shouting aloud (*endoplorare*) in order to attract the attention of others and clarify the situation. For certain delicts, the XII Tables prescribed fixed penalties which were due to the victim. A thief who was not caught in the act had to pay twice the value of the stolen object. Breaking a bone led to a fixed penalty of 300 *asses* in the case of an injured free man and 150 *asses* in the case of a slave. In the event of a wrongful attack (*iniuria*) the sum of 25 *asses* was due.

4 The regulation of delicts in the XII Tables concerned situations in which the bad intention of the wrongdoer was typically inherent in the act. However, the norms were generally drafted in an objective manner and it seems that the subjective element of bad intention or fault in general was not addressed. In this sense, most of these delictual rules of early Roman Law can be interpreted as prescribing a kind of strict liability.[3] Yet this does not mean that the subjective element of culpability was completely irrelevant. Quite in line with other legal systems of the Ancient World (Sumeria, Babylon, Hittite and Hellenic Law), most delictual provisions of early Roman law rather seemed to presuppose some kind of intentional guilt without, however, explicitly mentioning this element.[4] In the case of certain delicts, the question of bad intention even must have been crucial, for instance in the case of fraud committed by a patron against his client (*patronus si clienti fraudem fecerit*); the term *fraus* most probably always implied a malicious acting against the *fides* (a term which we can render with 'obligations arising out of a personal relationship according to a standard of public morals' in this context). The obvious lack of bad intention, on the other hand, justified the milder treatment of a person who killed 'rather by accident' (*si telum manu fugit magis quam iecit*) and was therefore allowed to expiate himself by sacrificing a ram.

Misconduct in Classical Roman Law

5 The Classical Roman Law of delicts eventually attributed much more importance to subjective factors. The starting point of this development was that the *lex Aquilia*

2 *Gaius*, Inst 3.189.

3 Cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1005: 'In a way, therefore, one can say that this ancient type of liability was strict' (with regard *membrum rumpere* and *os frangere* which were later covered by the *lex Aquilia*).

4 *DJ Ibbetson*, Wrongs and Responsibility in Pre-Roman Law, Journal of Legal History 25 (2004) 99–127 (113).

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required both in the First Chapter[5] and in the Third Chapter[6] the act to be committed *iniuria*, ie 'against the law'.

The qualification of the act as *iniuria* (which is not to be confounded with the delict *iniuria* as such) comprised two features. The first one was the idea of behaviour which was against the existing law (*iniuria* as unlawfulness or wrongfulness in the objective sense[7]). Generally, any act covered by the First or Third Chapter was presumed to be against the law, unless there existed a specific legal justification which allowed the interference with someone else's property under the specific circumstances (such as legitimate self-defence and a few other accepted grounds for justification). **6**

The second feature of *iniuria* is the idea of fault (*culpa* in a wide sense). *Culpa* involved the idea that the wrongdoer is to be blamed for his unlawful act because he acted either intentionally (*dolus*) or at least with reproachable fault (*culpa* in the narrower sense, eg negligence).[8] It is not clear whether this subjective element of *culpa* as part of the *iniuria*-qualification only evolved over time (as many scholars contend)[9], but in any case it was probably well established in late Republican jurisprudence (cf Quintus Mucius Scaevola, end of the 2nd century BC in D 9.2.31).[10] Yet, a specific distinction between wrongfulness and fault as two separate categories of misconduct is something which can only be found in Justinian law in the first half of the 6th century AD.[11] **7**

The delict *furtum* (theft, embezzlement and other forms of illicit 'meddling' with someone else's movable property) and the delict *iniuria* (wrongful attack against the reputation of a person) also implied a combination of objective unlawful behaviour on the one side and an intentional element on the other side. With *furtum* this subjective element consisted in the 'intention to make a gain from dishonest handling' (*contrectatio fraudulosa lucri faciendi gratia*,[12] that is the intention to commit a *furtum*). In the case of the delict *iniuria*, the objective element consisted in acts such as raising an insulting and abusive clamour against a person (*convicium*) in a way which infringed public morals or indecently approaching a respectable woman and thus damaging her moral reputation (*adtemptata pudicitia*), beating and torturing **8**

5 Which dealt with the active and direct killing (*occidere*) of someone else's slaves or cattle.

6 Which covered damaging someone else's property by burning (*urere*), breaking (*frangere*) or wounding (*rumpere* [in the wide sense of destroying *corrumpere*]).

7 Cf *Ulpian*, D 9.2.5.1: 'Iniuriam autem hic accipere nos oportet … quod non iure factum est, hoc est contra ius'; *Ulpian*, D 47.10.1 pr : '… quod non iure fit, iniuria fieri dicitur'.

8 *Ulpian*, D 9.2.5.1.

9 For a detailed discussion of this aspect see *MF Cursi*, Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano (2002).

10 Cf on this text 3d/1 nos 1–7.

11 Cf 2/1 no 4.

12 *Paul*, D 47.2.1.3.

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someone else's slave (*servum alienum verberare*) or any other act designed to bring another person into disrepute (*ne quid infamandi causa fiat*). The subjective element required for *iniuria* was the intention to insult the victim and thus damage his reputation.[13]

9 A few specific hypotheses of a strict responsibility were systematised in the Justinian Corpus Iuris under the conceptual label of *quasi delictual obligations* (Justinian Institutes 5.4.). These included situations in which a person was liable regardless of his/her own fault such as the responsibility for things which were thrown out of an apartment (*deiectum vel effusum*) or which were dangerously positioned (*positum vel suspensum)*. The judge who heard his own case (*iudex qui litem suam fecerit*) was also included in this group of quasi delicts; according to Gaius D 50.13.6, this seemed to be, however, a case of a fault-related responsibility (*pecasse aliquid intellegitur licet per inprudentiam*), which was nevertheless considered to be outside the range of delictual obligations.

10 To sum up this brief survey of fault as a prerequisite for delictual obligations, it can be stated that (at least since Republican times) delicts in Roman Law – as opposed to the aforementioned quasi delictual obligations – presupposed misconduct in the sense of both wrongfulness and subjectively blameworthy behaviour (fault = *culpa* in the wider sense). Whereas some delicts required intentional fault (such as *dolus* or *animus iniuriandi*), others, including the statutory responsibility according to the First and the Third Chapters of the *lex Aquilia*, which served as the general basis for the compensation of damage, came to be interpreted by jurists as also covering non-intentional fault (*culpa* in the narrower sense, such as negligence, lack of a specific necessary skill, etc).

11 Where fault was a prerequisite for the establishment of a claim, according to the general rules, it had to be proven by the claimant. The question of fault (*culpa* in the wider sense) was only addressed in cases in which wrongfulness was established, thus it can be said that *culpa* presupposed wrongfulness. Somebody acting legitimately was not regarded as acting with fault.[14]

12 Fault was related to the illegitimate act as such and did not have to encompass all negative consequences: if somebody attacked and wounded somebody else's ailing slave, he would be liable under Roman Law also if the slave died because of

13 Some scholars think, however, that the texts referring to such an *animus iniuriandi* were interpolated by Justinian's compilers; in this sense eg *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1060. The recent approach to the sources is more conservative and tends to acknowledge the classical origin of the idea that *iniuria* required an *animus iniuriandi* (cf eg *Ulpian*, D 9.2.5.3 where the lack of an *animus iniuriandi* is given as the reason to deny liability for *iniuria*).

14 Cf *Gaius*, D 50.1.55: 'nullus videtur dolo facere, qui suo iure utitur' (nobody is regarded as acting by fraud who makes use of his right).

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his individual frail condition (and despite the fact that a more robust person would not have been seriously wounded and would not have died).[15] As a general rule, the capacity to be responsible for a delict required a certain age (puberty, 12 years for female and 14 years for male tortfeasors) and the mental capacity to understand the wrongfulness of the conduct. In the case of a tortfeasor who was not a child (*infans*) but had not yet reached the age of puberty (*impubes*, roughly between 7 and 12/14 years), a delictual claim could be brought if he/she was already capable of realising the wrongfulness of his/her conduct (*si sit iam iniuriae capax*).[16]

2. Germany

The German Civil Code (BGB) uses the term *unerlaubte Handlungen* (prohibited acts) for conduct that gives rise to tortious liability.[1] The term covers acts that are wrongful in the sense that already the act as such or at least its effect violates a general norm or rule of law, which exists in order to secure a reasonable order in society, for instance, not to injure another's body. In principle, liability for wrongful acts is only incurred if, in addition, the person committing that act was at fault.[2] However, the term *unerlaubte Handlungen* is also used and understood in the BGB in a wider sense so that it covers acts which as such are perfectly legal but where damage resulting from them nevertheless should be recoverable.[3] For incurring such strict liability the debtor must have created a certain (allowed) risk for which it is fair that he/she is answerable. In a sense these acts may also fall under the term 'misconduct' because they result in damage. Yet, the term 'misconduct' appears to focus rather on conduct that as such is stigmatised as being socially unacceptable. In that sense German law speaks of *Verschulden* (fault which always presupposes the wrongfulness of the act). **1**

The German BGB regards fault as the main pillar of liability. The only example of strict liability in the BGB is the liability of owners of so-called luxury pets which are not held for professional or commercial purposes. If such a pet causes damage, **2**

15 Cf D 9.2.7.5.

16 *Ulpian*, D 9.2.5.2 at 8/1 nos 1–4 below.

1 See the official heading that introduces the chapter on tort law (§§ 823–853 BGB); also some provisions use that term, for instance § 830 (1) sent 1, § 840 (1) or § 842 BGB.

2 See § 823 (1) BGB, the most general provision of German tort law.

3 See *H Brox/W-D Walker*, Besonderes Schuldrecht (38th edn 2014) no 44/1; *C Katzenmeier* in: NomosKommentar zum BGB vol 2/2 (2nd edn 2012) Vor §§ 823 ff no 2; *D Looschelders*, Schuldrecht Besonderer Teil (8th edn 2013) no 1166; however, for instance, *G Wagner* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch vol 5 (6th edn 2013) Vorbemerkungen vor § 823 ff no 1 prefers the term 'Haftungsrecht' (liability law) as overarching denomination.

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the owner/holder is strictly liable (§ 833 sent 1 BGB). Other strict liabilities are regulated by a growing number of special statutes outside the BGB. However partly, the courts raise the standard of care for fault liability to such a level that it comes close to strict liability.

3 In theory the distinction between wrongfulness and fault is quite clear in German law. Wrongfulness is the violation of an objective norm which applies to everybody. Fault is the subjective ability of the individual actor to follow the rules of the general and objective norm. In practice, fault has become increasingly objectivised.[4] It is no longer the personal ability of the individual actor but the ability that is expected of a reasonable person in the same situation. Some authors even doubt the necessity to distinguish between wrongfulness and fault.[5]

4 Nonetheless, the prevailing view distinguishes between wrongfulness and fault and requests for the judgement of wrongfulness that the harmful result must be in conflict with legal norms (theory of *Erfolgsunrecht*); consequently, where damage to protected interests has been caused, wrongfulness is regularly presumed. The presumption can be rebutted if the tortfeasor can prove a defence (for instance, self-defence) that justifies the harmful result. Only in specific cases must the conduct itself also be wrongful (theory of *Verhaltensunrecht*).[6] Examples of such cases are those where the protected interest has less clear contours than the main protected interests, such as bodily integrity and well defined property rights. Such rather vague interests are in particular the general personality right (*allgemeines Persönlichkeitsrecht*) and the right of an established and operating business (*Recht am eingerichteten und ausgeübten Gewerbebetrieb*). Here the wrongfulness of any infringement is not presumed but must be positively established in each case by the claimant.

5 Fault in the most common form of negligence is statutorily defined as the neglect of the care that is necessary and expected in daily life.[7] This is generally understood as meaning that a reasonable person 'in the shoes' of the actor could have foreseen the damage and could have avoided it but the actor did not comply with this standard. The standard is objective which, however, can vary according to the

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4 See for instance *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 114.

5 *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) nos 112, 132, for instance, have deleted separate categories of wrongfulness and of fault and have replaced them by the category 'violation of duty' (*Pflichtverletzung*). However, they added as further categories 'justification' and 'excuse'.

6 Some authors advocate that the theory of 'Verhaltensunrecht' should be generally applied; see in particular *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 106 ff.

7 § 276 (2) BGB: 'Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt außer Acht lässt.' (The semi-official translation recommended by the German Ministry of Justice is as follows: 'A person acts negligently if he fails to exercise reasonable care.').

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situation and also to which profession, trade, group, etc the actor belongs.[8] Insofar the yardstick of diligence differs: for instance, a handicapped person must exercise the care that would be expected of a reasonable person with the same handicap and in the same situation. Also aged people form a certain group of their own and cannot be measured according to the yardstick for younger people. This does not necessarily mean a lower degree of circumspection for them but, on the contrary, even elevated care (when, eg, crossing a busy road) that takes account of any reduced abilities.

Negligence must regularly refer to the damage but is linked likewise to the duty **6** that has to be observed. Intent, the other form of fault, generally refers to the damage, which must be either the direct aim of the tortfeasor or at least accepted by him as the unavoidable consequence of his conduct. Intent thus includes *dolus directus* as well as *dolus eventualis*.

Tortious capacity begins at the age of seven and, with respect to damage caused **7** in traffic accidents, at the age of ten.[9] From that age up to 18, liability depends on the ability to realise the wrongfulness of one's own conduct. It is decisive whether the minor had the insight children of his/her age normally have.[10] This is presumed, but the minor may prove that he/she lacked that insight because of a retarded personal development.[11] Persons who suffer from severe mental incapacity due to mental illnesses that exclude their ability to realise the wrongfulness of their conduct are not held responsible for their culpable behaviour irrespective of their age. The same is true if a person acts in a temporary state of mind which impairs his/her free determination, for instance because of alcohol or drugs, however only if that person did not intentionally or negligently enter into such a state. If a person is not culpable because of these reasons, the German Civil Code nonetheless provides for some kind of liability, namely as far as equity requires indemnification.[12] Such a claim is in particular admissible where the tortfeasor who cannot be held responsible is

8 See also *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 114; *B Dauner-Lieb* in: NomosKommentar zum BGB vol 2/2 (2nd edn 2012) § 276 no 13 f; *C Grüneberg* in: Palandt BGB (73th edn 2014) § 276 no 17.

9 § 828 (1) BGB.

10 BGH NJW 2005, 354; *H Sprau* in: Palandt BGB (73th edn 2014) § 828 no 6; *C Katzenmeier* in: NomosKommentar zum BGB vol 2/2 (2nd edn 2012) § 828 no 8.

11 BGH, ibid.

12 § 829 BGB: 'Duty to compensate loss for equitable reasons. Whosoever bears no responsibility for loss caused in a case specified in §§ 823 to 826 because of the rules in §§ 827 and 828 nonetheless has to compensate the loss – unless compensation can be obtained from a third person who was under a duty to supervise – to the extent that equity requires such compensation under the circumstances, having regard in particular to the entirety of the circumstances of the parties, provided he is not deprived of the means which he requires for reasonable subsistence and the performance of any obligation to pay maintenance.'

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insured and the victim is in need because he/she does not and cannot receive compensation in any other form.[13]

8 The burden of proof lies with the person who claims to have acted in a state of incapacity in the mentioned form.[14] The victim on the contrary must prove that the actor intentionally or negligently entered this state.[15]

9 In German law gradations of misconduct are recognised. Generally, negligence in its simplest and slightest form is sufficient to entail full liability (*Alles-oder-Nichts-Prinzip*). The principle is that the amount of damages is not related to the degree of fault. However, where minors have become liable for enormous damages amounts although they were only slightly negligent, the courts may reduce damages to a proportional measure.[16] Also, the amount of damages for pain and suffering (*Schmerzensgeld*) can be influenced by the degree of fault of the tortfeasor.[17] Further, compensation for pure economic loss regularly requires the tortfeasor's intent.[18] *Dolus eventualis* suffices here whereas neither gross negligence nor so-called conscious negligence is sufficient.

3. Austria

1 According to § 1294 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB), tortious liability is based on wrongfulness and fault.[1] The same is true for contractual liability as in principle the same set of rules is applicable. Consequently, § 1295 (1) ABGB, the general rule of the law of damages, reads: 'Every person is enti-

13 See BGHZ 127, 186.

14 See BGHZ 98, 135; BGHZ 102, 227.

15 See eg LG Freiburg NJW-RR 2001, 1108.

16 See BVerfG NJW 1998, 3557.

17 Generally, the degree of fault has some impact on the amount of damages for pain and suffering only in the case of gross negligence and intent; see eg OLG Saarbrücken NJW 2008, 1166 (1168); OLG Naumburg NJW-RR 2008, 407.

18 See § 826 BGB: 'Whosoever intentionally inflicts loss on another person in a manner that is contrary to good morals has an obligation to compensate the loss.' Where – pursuant to § 823 (2) BGB – liability is based on a violation of provisions of the Criminal Code, which protect the fortune of a person, intent is also required.

1 § 1294 ABGB: 'Damage arises either from another person's unlawful act or omission or from chance. Unlawfully inflicted damage is caused either voluntarily or involuntarily. The voluntary infliction of damage is based either on malicious intent, if the damage is caused knowingly and willingly; or on negligence, if the damage was caused by culpable ignorance, or by a lack of proper care or diligence. Both are to be termed fault.'
Translation of all Austrian provisions by *BC Steininger*, Austria in: K Oliphant/BC Steininger (eds), European Tort Law Basic Texts (2011) 1ff.

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tled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by the breach of a contractual duty or independently of any contract.'

Accordingly, a clear distinction can be made between wrongfulness and fault:[2] **2**
wrongfulness relates to the objective unlawfulness of the tortfeasor's conduct; hence a general standard must be applied in answering the question of which conduct is reasonable. Fault, on the other hand, concerns the tortfeasor's attitude and is based on the personal accusation of a 'blameworthy will'. Thus, fault must be measured by a subjective yardstick taking into account the individual abilities of the defendant.

As law strives to govern human behaviour and only a person can be the ad- **3**
dressee of a legal provision,[3] prevailing doctrine contends that only human conduct and not a mere negative result can be deemed wrongful. Hence, the 'theory of unlawfulness of conduct' (*Verhaltensunrechtslehre*) is dominant:[4] unlawfulness always relates to human conduct and is based on a lack of care. As a basis of liability, the 'theory of unlawfulness established by result' (*Erfolgsunrechtslehre*) is thus rejected. However, a negative result in the latter sense (*Tatbestandsmäßigkeit*) may suffice for establishing a right of self-defence or as a basis of actions for preventive injunctions (*Unterlassungsklagen*) or for removal of interference by reparative injunctions (*Beseitigungsansprüche*).[5]

As a prerequisite of liability, wrongfulness is always based on an objective **4**
breach of a duty of care (*objektive Sorgfaltswidrigkeit*) and assessed according to the whole body of law:[6] firstly, tortious liability in this respect can be based on an infringement of an absolute right such as life, health, freedom or property, with the wrongfulness of the conduct leading up to the violation being assessed by a weighing up of interests (cf 3a/3 no 3). Secondly tortious liability may arise from the violation of a protective statute (*Schutzgesetz*, § 1311 ABGB) and thirdly from wilfully acting contra bonos mores (*sittenwidrige Schädigung*, § 1295 Abs 2 ABGB).

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2 See *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 17 f; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 14.

3 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/3.

4 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 13 f; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/2.

5 See *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/10 ff; *idem*, Basic Questions of Tort Law from a Germanic Perspective (2012) nos 2/4, 7, 11, 15 ff; *E Wagner*, Gesetzliche Unterlassungsansprüche im Zivilrecht (2006) 207 ff.

6 *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 17 f; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4 f.

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In contractual liability wrongfulness is established by the violation of contractual duties.

5 According to a generally accepted definition, persons behave culpably when they should have acted differently and, furthermore, would have been able to do so.[7] As finding fault is considered to be a judgement over the individual tortfeasor, in principle, a subjective yardstick must be applied and, hence, the tortfeasor's personal abilities are decisive.[8] However, the standard degree of attention and diligence is always objectified as §§ 1294 and 1295 ABGB refer to 'due attention and diligence', thus the tortfeasor may not defend himself by stating that he is an inattentive person, who also does not act diligently in respect of their own affairs.[9] Moreover, fault on the part of experts is always assessed in an objective way (§ 1299 ABGB): everyone who carries out activities that require specific knowledge or particular abilities has to take responsibility for possessing such qualities.

6 Mental capacity is a general requirement for fault. Consequently, insane persons or minors under the age of 14 years are, as a rule, not responsible for tortious acts (§ 176 ABGB). If they inflict damage, it is primarily persons who have supervisory duties – such as parents or a guardian – who are liable if they neglect their duties (§ 1309 ABGB). Only if the plaintiff is not able to obtain reparation from the supervisors, may the minor or insane person be subsidiarily liable for an equitable part of the loss (§ 1310 ABGB).

7 It is commonly acknowledged that fault has merely to relate to the 'initial damage' and not to every consequential loss.[10] Consequently, fault is only decisive for the establishing, but not for the extent of liability.[11] Furthermore, if a *Schutzgesetz* (protective statute, § 1311 ABGB) is violated, fault must merely relate to the breach of the law and not to the harmful result.[12]

8 Generally, the burden of proof lies with the plaintiff who has to prove the tortfeasor's fault (§ 1296 ABGB). However, § 1297 ABGB presumes that every sane person over the age of 14 years has the ability of an average person. It is therefore up to the tortfeasor to rebut this presumption if applicable by showing a lack of such physical or mental capacity; thus, the provision effectively aids the plaintiff in establishing

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7 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/1; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 14.

8 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 15 f.

9 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/35; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 7.

10 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/6.

11 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 13.

12 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 269 ff.

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fault.[13] Furthermore, a reversal of the burden of proof for fault is provided for in cases of contractual liability by § 1298 ABGB, which must be applied in all cases of a special legal relationship (*rechtliche Sonderbeziehung*) such as, for instance, preliminary contractual obligations (eg, in the context of *culpa in contrahendo*).[14]

Under Austrian law, the following gradations of fault are accepted: intent (*dolus* **9**
directus and *dolus eventualis*), gross as well as slight negligence and *culpa levissima* (*entschuldbare Fehlleistung*). Damages for loss of profit are only due in the case of intent and gross negligence (§§ 1323, 1324 ABGB), *culpa levissima* is an important defence in the case of an employee's liability according to the Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*, DHG); in the case of state liability, it is only permissible for the liable state to take a recourse action against its organs if the latter acted with gross negligence or intent (§ 3 (2) Public Liability Act, *Amtshaftungsgesetz*, AHG).

Liability based on fault still constitutes the core of tortious and contractual li- **10**
ability in Austria. However, the ABGB does provide for liability without fault in specific cases, such as liability for damage caused in emergency situations (§ 1306a ABGB), which might exclude fault (*entschuldigender Notstand*) or even wrongfulness (*rechtfertigender Notstand*), by insane persons and minors (§ 1310 ABGB) or the liability of the keepers of a structure or an animal, who are liable irrespective of fault if they fail to take all reasonable measures to prevent damage (§§ 1319, 1320 ABGB). Moreover, a range of specific provisions establish strict liability based on dangerousness and independent of both wrongfulness and fault, for instance the Railway and Motor Vehicle Act (*Eisenbahn- und Kraftfahrzeughaftplichtgesetz*, EKHG). However, it ought to be noted that liability based on fault and strict liability are not completely separate categories but represent the opposite ends of an unbroken chain with a range of intermediary forms.[15]

4. Switzerland

The general provision of liability in the Swiss Code of Obligations (SCO) (art 41 SCO) **1**
requires unlawfulness and fault. These are two independent and cumulative conditions for the reparation of damage. In contrast, certain specific laws (Federal Road

13 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 21; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 16/15; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1297 no 12.

14 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1298 no 1ff; *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 21.

15 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/188ff.

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Traffic Act, Aviation Act, etc) are submitted to so-called strict liability; strict liability includes unlawfulness, but not fault.

2 Unlawfulness is defined by the Supreme Court as a violation of a norm. It may be a written or unwritten, statutory or non-statutory norm (eg professional rules) or a general principle, etc. The Supreme Court distinguishes between unlawfulness of behaviour (*illicéité de comportement*, *Verhaltensunrecht*), where the attention is directed particularly to the behaviour of the author, and unlawfulness of result (*illicéité de résultat*, *Erfolgsunrecht*), where the result of the act is central; unlawfulness of result relates to the violation of fundamental goods such as life, bodily integrity, etc. Unlawfulness of behaviour and of result do not exclude one another, but are complementary and reciprocal.[1] Further legal literature distinguishes between objective and subjective unlawfulness: the former is defined as a break of a legal norm, while the latter means that the author cannot justify his damaging act with a subjective right. Since 1904[2] the Supreme Court has rejected the latter theory several times, but seems to recognise more recently that, in certain cases such as self-defence, it may be applicable.[3]

3 Fault is generally defined as a lack of the diligence expected by the legal order. It expresses a disapprobation addressed personally to the author and means that he/she should and could have acted differently. The SCO mentions fault (art 43 SCO), negligence and imprudence (art 41 SCO). One could say that fault is a general term comprising categories like negligence, imprudence, etc.

4 The evaluation of unlawfulness and fault has to be done in two successive steps. In a first step, the judge establishes model-behaviour (*bonus vir* model) and compares it to the concrete behaviour of the author. If the author's behaviour failed to meet the ad hoc defined standard of conduct, it is considered as unlawful. In a second step, the judge asks the question of whether, in view of the concrete circumstances, it could be expected from the author to meet the *bonus vir* standard. If the answer is yes, the author's behaviour is considered as culpable.

5 In more recent times these two steps have often been confounded, because of the so-called objectivisation of fault. Indeed, in order to better protect the victim, the standards of conduct have become increasingly challenging. As a result, the simple fact that damage occurred has been considered as a demonstration that the author was at fault. This resulted in theoretical confusion between unlawfulness and fault,

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1 See, among others, ATF 132 II 305 (2006) at 2/4 nos 1–10.

2 ATF 30 II 567, 571 c 3b (1904); 32 II 273, 279 c 4 (1906); 32 II 361, 364 c 2, 366 c 3, 370 c 4. (1906); explicitly ATF 82 II 25, 28 c 1 (1956), etc.

3 ATF 115 II 15, 20 c 3 (1989); for the whole see *B Winiger*, Une définition ambivalente et 2000 ans de confusion: illicéité objective et subjective, in: O Guillod/C Müller (eds), Pour un droit équitable, engagé et chaleureux. Mélanges en l'honneur de Pierre Wessner (2011) 265–274.

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although the legislator has made a clear and constant distinction between these two concepts since 1881 (ancient Swiss Code of Obligations).

The proof of the author's behaviour, which may be classified as culpable, has to be brought by the victim. This corresponds to the general rule stated in art 8 Swiss Civil Code (SCC), stating that the party who alleges a fact has to prove it. However, the reversal of the burden of proof is one of the legislator's favoured means to offer a better protection to the victim in specific situations (eg employers', and pet owners', liability, arts 55 and 56 SCO). **6**

Mental capacity is a requirement for fault, as a mentally incapable person could not understand the meaning of his/her acts. However, according to art 19 SCC, if he/she is able to understand his/her actions, even a minor or incapable person is liable for damage inflicted. As there is no fix minimal age, the judge has to decide on a case-by-case basis whether or not a person is capable. **7**

Four degrees of fault are recognised by the Supreme Court: the most important degree is intent (*dolus*); categorically it may be considered as an extreme form of *culpa lata*. The next lower degree is simple fault (*culpa levis*), followed by slight fault (*culpa levissima*). Finally, the Supreme Court also recognises the category of fault (contributory negligence) clearly inferior to 10%; this degree of fault has to be disregarded by the judge.[4] The distinction between these degrees is important, as it was the legislator's intention to assess damages according to the degree of fault (art 43 SCO[5]). However, as a result of the will to better protect the victim, in today's practice even *culpa levissima* often gives way to full reparation. On the contrary, particularly in cases of multiple authors and contributory negligence, the degree of fault is decisive for the apportionment of damages. **8**

5. Greece

The first article (art 914) of the 39th Chapter of the Greek Civil Code[1] (hereinafter GCC) is a general clause on delictual liability.[2] It stipulates one of the broadest sources of obligations: an act which is unlawful and due to fault (*dolus* or negligence), a civil delict. On the fulfilment of the other conditions of the provision, ie **1**

4 ATF 132 III 249, c 3.5 (2006).

5 Article 43 of the Swiss Code of Obligations (SCO):

[1]The court determines the form and extent of the compensation provided for loss or damage incurred, with due regard to the circumstances and the degree of culpability.

1 For a translation of the said chapter in English see *K Oliphant*/*BC Steininger*, European Tort Law: Basic Texts (2011).

2 Article 914 GCC: 'Whosoever unlawfully and culpably causes damage to another is liable for damages.'

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prejudice (injury, detriment, damage) and a causal relation between that act and the prejudice, an obligation on the party responsible to compensate is created.[3] The existence of all elements of art 914 GCC (unlawfulness, fault, damage, causal relationship) have to be proven by the plaintiff.

2 The Greek Court of Cassation, under the influence of Greek literature,[4] has broadened the meaning of the term 'unlawfully' in art 914 GCC, so as to include therein not only the violation of a prohibitory provision of the law, but also the violation of the general duty of providence and care dictated by the principle of good faith. Thus, for the establishment of the unlawful character of an act or omission, it is not essential that a particular provision of law has been violated but behaviour contrary to the general spirit or the principles of the law suffices.[5] It is clear in the Greek legal system that the 'breach of a duty' is a question of wrongfulness and not of fault.

3 By 'fault', which justifies the imputation of blame to a person, the blameworthy psychological attitude of a person towards his/her unlawful behaviour in view of the foreseen or foreseeable 'unlawful' result is understood.[6] Thus, fault relates to wrongfulness and damage; for fault to exist, the detrimental result should be foreseen or foreseeable but the exact anticipation of its extent is not required.[7]

4 According to art 330 GCC, 'negligence', as a form of fault, exists when the tortfeasor has infringed the obligation generally required by every member of society to exercise the care which a reasonable man is capable of taking in the circle of his/her competence, regardless of whether there is a clear legal duty to do so or not. However, given that it is widely accepted nowadays in Greek jurisprudence that the objectively unlawful character of an act also exists when the tortfeasor has acted neg-

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3 *M Stathopoulos/A Karampatzos*, Contract Law in Greece (in English) (2014) no 39.

4 *A Georgiades*, Law of Obligations – General Part (1999) § 60 no 22; *P Kornilakis*, Law of Obligations, Special Part I (2002) § 84 IV 492ff; *M Stathopoulo*s, Law of Obligations, General Part (2004) § 15 no 39ff.

5 See, indicatively, AP (Greek Court of Cassation) 706/2009, published at NOMOS database; 1145/2003, published at NOMOS; 1500/2002 Ell Dni (44) 2003, 420 (summary); 50/2002 NoV 50 (2002) 1701f and 447/2000 NoV 49 (2001) 836f, followed by a very interesting note by *P Doris*, 839f (for a brief summary of the facts and the judgment of the court (in English) in the said cases see *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2009 (2010) 264, no 5f; ETL 2003 (2004) 212, no 18f; ETL 2002 (2003) 231, no 10ff and ETL 2001 (2002) 269, no 8f respectively); 812/1998 EllDni 39 (1998) 1549; 678/1998 NoV 47 (1999) 1416; 1891/1984 EEN 52 (1985) 754. For more jurisprudence see *P Kornilakis*, Law of Obligations, Special Part I (2002) § 84 IV 494 fn 36.

6 See, among others, *A Georgiades*, Law of Obligations – General Part (1999) § 23 no 4; *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 I 2 508ff; *S Koumanis* in: A Georgiades, Short Interpretation of the Civil Code (= Georgiades SEAK) I (2010) 330 no 10; *M Stathopoulos/A Karampatzos*, Contract Law in Greece (in English) (2014) no 251.

7 *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 I 2 509.

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ligently in violation of the general standards of care and prudence (as above described), regardless of whether or not his/her conduct constitutes a violation of a specific rule of law, negligent conduct constitutes, apart from a form of 'fault', 'unlawful' conduct as well. This means that if the person concerned should have foreseen and avoided the violation, he/she acts unlawfully if he/she has not acted accordingly. Thus, the same term, 'negligence', is used for 'unlawful' conduct and for 'fault', as 'should' and 'is able' coincide ('double function of negligence').[8] It is constantly repeated, though, in Greek theory as well as in Greek jurisprudence, that in Greek law, which is based on the fault principle, two distinct conditions – an objective (unlawfulness) and a subjective one (fault) – have to be met, even if they are fulfilled by the same act.[9]

According to Greek law, in order to establish whether or not the damaging party acted 'negligently', an objective standard is used as a yardstick for fault. The capabilities of the average, prudent and conscientious man are regarded as crucial. The deviation of the conduct of the culprit from those capabilities constitutes negligence, even if he/she himself/herself was not able to behave in any other way.[10] 5

Every degree of misconduct, ranging from slight negligence to intent, can give rise to liability. As a principle, liability according to the provisions of the GCC (arts 330, 914, 198 etc) arises even when there is only mere negligence.[11] 6

Articles 915 to 917 GCC explicitly refer to the conditions of capacity for tortious liability as regards age and mental development. 7

No general rule regarding strict liability, comparable to art 914 GCC, is to be found in the GCC. Only as an exception does the GCC introduce strict liability[12] in two cases: in the case of non-domestic animals (art 924 § 1) and in the case of liability for employees (art 922);[13] it also makes liability for fault approximate strict liability by means of reversing the burden of proof, in the case of harm inflicted by a person under supervision (art 923)[14] or by a domestic animal (art 924 8

8 See, indicatively, AP 535/2012 NoV (60) 2012 1969 and 1227/2007 published at NOMOS and ISOKRATIS, the Athens Bar database.

9 See more analytically *M Stathopoulos*/*A Karampatzos*, Contract Law in Greece (in English) (2014) no 256; *I Karakostas*, Law of Torts (2014) 140 ff.

10 See, among others, *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 I 2, 510; *M Stathopoulos*/*A Karampatzos*, Contract Law in Greece (in English) (2014) no 255.

11 *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 I 2, 509; *M Stathopoulos*, Law of Obligations, General Part (2004) § 6, no 52.

12 For the notion of strict liability see, among others, *A Georgiades*, Introductory Remarks to Arts 914–938, in: A Georgiades/M Stathopoulos (eds), Civil Code (1982) nos 21–38.

13 Article 922 GCC: 'Vicarious liability. A master or a person who has appointed another person to perform a function is liable towards a third party for damage unlawfully caused to the latter by his servant or the appointee in the execution of the function.'

14 Article 923 GCC: 'Liability of a person who supervises another person. Whosoever supervises a person under age or a person placed under judicial assistance is liable for the damage that such

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§ 2)[15] or in the case of damage caused by the collapse of buildings or structures (art 925)[16] from natural causes and without the intervention of human force. The supervisor, or as the case may be, the keeper or the owner, are then presumed to be responsible. The duty to make reparation only arises if they do not satisfy the requirements of exculpatory proof under art 923, or art 924 § 2, or art 925 respectively.[17] No-fault liability is also found in special laws,[18] which impose strict liability in certain cases. The most usual basis of justification for these cases is that the activity of the person causing the prejudice constituted a source of risk and, usually, a source from which benefits could be drawn for himself/herself (in which case, it seems even more justifiable that the beneficiary should also shoulder the losses stemming from the same source).[19]

6. France

1 The basic provision on tort law in the French Civil Code (*Code civil*) is art 1240 (former art 1382[1]), which sets out a general liability for fault[2] (*responsabilité pour faute*)

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persons unlawfully cause to a third party unless he proves that he has properly exercised his duty of supervision or that the damage could not have been avoided.
A person who exercises the duty of supervision by virtue of a contract is similarly liable.'

15 Article 924 GCC: 'Liability of the keeper of an animal. The keeper of an animal is liable for damage caused by the animal to a third party.
If the damage was caused by a domestic animal which is used for professional purposes, to guard a house or to nourish its keeper, the keeper is not liable if he proves that he was not at fault with respect to the guarding and the supervision of the animal.'

16 Article 925 GCC: 'Collapse of a building or of any other structure. The owner or possessor of a building or of any other structure attached to the ground is liable for damage caused to a third party due to its total or partial collapse, unless he proves that the collapse was not due to its defective structure or deficient preservation.'

17 *P Christodoulou* in: KD Kerameus/PJ Kozyris (eds), Introduction to Greek Law (in English) (3rd edn 2008) 147. For an analysis of the said arts see *P Kornilakis*, Law of Obligations, Special Part I (2002) §§ 117–119 at 384 ff.

18 For a list in English of these laws up to 1994 and their common features see *E Dacoronia*, Mass Torts: A Greek Approach, RHDI 47 (1994) 94 ff.

19 *M Stathopoulos/A Karampatzos*, Contract Law in Greece (in English) (2014) no 39.

1 The Order no 2016-131 of 10 February 2016, which entered into force on 1 October 2016, changed the numbering of arts 1382 to 1386: they have become arts 1240 to 1244. The provisions' content remains unchanged. This chapter was written before the law of 8 August 2016 (no 2016-1087) 'for the recovery of the biodiversity, nature and its landscapes'. Editorial constraints have not enabled us to insert comments on these new provisions.

2 In the present report, 'fault' will be used as a synonym of the French technical term *faute*, thus conveying all its historical, cultural and technical background. As was instructed in the Question-

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principle: 'every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it'.[3] Article 1241 (former art 1383) further makes clear that the fault that gives rise to liability need not be intentional, but can also consist in a lack of care: 'We are responsible not only for the damage occasioned by our own act, but also by our own negligence or imprudence.'

As the *Code civil* came into force in 1804, strict liability played a very limited role and liability without fault was therefore an exception. Over the years, however, and especially since the end of the 19th century, strict liability in tort has tremendously developed in France. The legislator has created several strict liability regimes designed to cope with particular risks and sources of damage. The most important one in practice is to be found in a 1985 statute, known as *loi Badinter*,[4] that sets an extra strict liability for damage caused in traffic accidents. Case law also played its role and it created another strict liability regime from an ambiguous provision of the *Code civil*, art 1242 al 1 (former art 1384 al 1). Under this so-called *responsabilité du fait des choses* (liability for the actions of things), the keeper of any thing whatsoever, whether it be a movable or immovable, is liable for any damage caused by that thing, regardless of his/her fault. The existence of this regime has a significant impact on general liability for fault, as it makes any discussion on the existence of fault useless, in many circumstances where liability for fault might otherwise apply (and applies exclusively in most other countries). **2**

Fault receives no official definition in French law, neither in the *Code civil* nor in case law. However, the existence of fault is regarded as a question of law, as opposed to a question of fact, by the *Cour de cassation*, France's highest court in civil **3**

naire, the term 'misconduct' is the one chosen to address the subject matter in a generic and neutral way ('*The term [misconduct] itself may not be immediately familiar, having been chosen as a neutral label that avoids any prejudgement of how the underlying concept ought to be classified – some legal systems addressing it under the heading "fault", others under "wrongfulness" or "unlawfulness"*', see the introduction to the Questionnaire). Of course, the use of the English language as a common denominator between different legal systems has its limits: 'fault', in the French report, will not have the same scope as in the English or Spanish reports, which can be confusing. Even though it was suggested that we ought to use the French term *faute* to underline how culturally-specific it was, we found that it was a slippery slope: if we reverted to French every time a concept was culturally specific, we feared there would not be much room for a language shared by all members of the group. After all, if we were to study the notion of 'contract', it would not occur to us, simply because all national reporters use the word 'contract' in their presentations, that it would imply the existence of a unique notion of 'contract' shared by all reported legal systems.

3 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.' In this report, all English translations of *Code civil* provisions are borrowed from the 'Code Civil' in English on the website <Legifrance.gouv.fr> (updated in September 2014, eds: Alain Levasseur, David Grunning and Randy Trahan).

4 After the then French Minister of Justice, Robert Badinter.

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matters.[5] This means that the court, relying on the facts that have been ascertained by lower judges, decides, if asked, whether or not fault existed in any given case. However, in practice, the absence of a definition of fault, coupled with the extreme terseness of the *Cour de cassation*'s decisions, gives the court great leeway when deciding whether or not fault can be found in any given case. It does not have to say what elements it took into account to recognise the existence or the absence of fault and its decisions on that count usually boil down to 'there was fault' or 'there was no fault', without any further precision.

4 This of course makes it quite difficult to say what exactly is fault under French law, and what its elements are. Scholars usually agree, however, that fault can be defined as the violation of a duty.[6] This duty can be set in a statute or regulation but the general opinion is that, under French law, there is also a general duty of care, not to be found in any text, whereby everyone is to act carefully, with a view to avoiding causing damage to others, in each and every circumstance. It is of course for the judge to determine in any given case what the defendant (or claimant, when contributory negligence is discussed)[7] was bound to do under this general duty of care.

5 Fault normally has to be proven by the claimant. The many cases of strict liability make it quite unnecessary to try and soften the liability for fault regime for claimants, by reversing the burden of proof, for example. Besides, since the courts do not have to explain how the facts of the case fit with a definition of fault, they are in practice quite free to recognise the existence of a fault when they consider it equitable to do so, even when it is not clear at all if the defendant violated the general duty of care or any statutory duty.

6 Unlike other legal systems, French law does not regard wrongfulness (*illicéité*) as a distinct condition of liability. Neither the *Code civil* nor case law mentions it. Scholars do speak of wrongfulness (though not that often),[8] but they generally define it as the violation of a duty. Wrongfulness and fault are therefore one and the same thing in French law[9] (at least in the context of liability for fault). Things used to be different until the 1980s. Wrongfulness was then regarded as one of two elements of fault, the second one being the defendant's awareness of what he/she did

5 A case can only be brought before the *Cour de cassation* if the lower court's decision raises a question of law.

6 See, eg, *M Bacache-Gibeili*, Les obligations. La responsabilité civile extracontractuelle (3rd edn 2016) no 143; *P Brun*, Responsabilité civile extracontractuelle (4th edn 2016) no 294; *G Viney/P Jourdain/S Carval*, Les conditions de la responsabilité (4th edn 2013) no 445.

7 Strictly speaking, a claimant does not have a duty not to injure himself, but he is obliged to act carefully under the general duty of care, and any careless conduct may thus qualify as a fault, even if the author of that conduct is himself the victim of it.

8 See *G Marty*, Illicéité et responsabilité, in: Etudes Léon Julliot de la Morandière (1964) 339; *M Puech*, L'illicéité dans la responsabilité civile extracontractuelle (1973).

9 See eg *P Malaurie/L Aynès/P Stoffel-Munck*, Les obligations (8th edn 2016) no 52.

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(often called *imputabilité*). Young children and mentally disabled persons were therefore incapable of being at fault. In 1984, however, the *Cour de cassation* ruled that a child[10] whose act had been objectively careless had been at fault.[11] Since that time, it is undisputed that fault boils down to wrongfulness.[12]

A corollary of this purely objective approach to fault is that fault is normally as- **7**
sessed regardless of the particular capacities of the defendant. The yardstick used to assess fault is a purely objective one. The required standard of care is set according to the capabilities of a reasonable adult person (who even looks very much like a superman at times!), regardless of the actual capabilities of the defendant (or the claimant, in cases of contributory fault).

7. Belgium[1]

Fault is traditionally defined as 'any breach, however slight, whether voluntary or **1**
involuntary, by an act or omission, of a pre-existing standard of behaviour'.[2] In accordance with art 1382 of the Civil Code, which forms the basis for tortious civil liability, alongside damage and the causal relationship, it constitutes one of the three conditions necessary in order to engage a person's tortious liability. Therefore, save in the case of systems which derogate from ordinary law and so-called 'strict liability',[3] when an individual commits a faultless act which causes damage, that is to say when no pre-existing standard of behaviour is infringed upon, he/she cannot be bound to remedy the resulting harm.

The origin of the pre-existing standards, the breach of which gives rise to fault, **2**
can either be found in laws or regulations (whatever the enacting authority might

10 It was a matter of fact in any given case if a child was too young to be aware of his acts, and therefore unable to be at fault.

11 Cass Ass plén, 9 May 1984, *Lemaire*, 80-93.031, Bull ass plén no 2, JCP éd G 1984, II, 20256, note *Jourdain*, D 1984, jur 525, concl *Cabannes*, note *Chabas*, Defrénois 1984, 557, note *Legeais*, GAJC, vol 2 (13th edn 2015) no 217; see 8/6 nos 1–5.

12 See eg the leading treatise on tortious liability: *G Viney*/*P Jourdain*/*S Carval*, Les conditions de la responsabilité (4th edn 2013) no 443.

1 See also *H Cousy*/*D Droshout*, Fault under Belgian Law, in: P Widmer (ed) Unification of Tort Law: Fault (2005) 27–51.

2 Free translation of *J Dabin*/*A Lagasse*, Examen de jurisprudence (1939-1948). La responsabilité délictuelle et quasi-délictuelle, RCJB 1949, 50, no 10.

3 That is to say, the systems in which the presence of fault does not in itself determine whether the liability of the person causing the damage is engaged. An example is the Act of 25 February 1991 on Liability for Defective Products. According to this Act, the producer shall be liable for damage caused by a defective product put into circulation by him, irrespective of whether he was at fault or not.

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be) which impose specific behaviour upon those to whom they are addressed, or in a general duty of care and diligence owed by everyone. In the first case, the fact of the failure to comply with the law is a sufficient basis for the fault, provided that this failure has been committed freely and knowingly.[4] In the second, in the absence of a breach of an expressly formulated standard, the judge must examine the behaviour of the person committing the tort and determine whether an ordinarily prudent and diligent person, the 'reasonably prudent person', placed in the same position at the same time, would also have acted in that way.[5] If the act in question is not one which a reasonably prudent person would have undertaken, it will be considered as fault.

3 The 'reasonably prudent person' figure, or an ordinarily prudent and diligent person, to whom the behaviour of the person committing the fault will be compared, must in principle be assessed objectively, that is to say by disregarding the personal characteristics of the person who caused the damage (age, gender, experience, education, etc).[6] Some modifications to this rule can however be seen in case law, and particularly in that of the Supreme Court (*Cour de cassation*/*Hof van Cassatie*) (see 6/7 and 7/7).

4 Harmful behaviour alone is not sufficient to establish the presence of fault. It is also necessary that the offending act was carried out freely and knowingly. In other words, the person causing the damage must, at the time of the harmful act, have been capable of judgement and of appreciating the harmful consequences of his/her acts. Otherwise, he/she might not be at fault and his/her liability might not be engaged. Therefore, one can say that the existence of fault is not only based on an objective assessment of the defendant's behaviour.

5 It is for the judge to assess the decision-making capacity of the person who caused the damage and to decide whether the defendant acted freely and knowingly without having been subject to external circumstances which left him/her with no free will.[7]

6 A third element can be added to the material and moral elements, that is the foreseeability of the damage. In this way, a person is only liable to a third party provided he/she could reasonably have foreseen that his/her act was likely to cause damage, even though the harm eventually incurred by the victim could not have been specifically identified in advance (see 3c/7). In order to assess the foreseeability of particular conduct, the judge will refer to the standard of conduct of the reasonably prudent person (objective assessment).

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4 Cass, 22 September 1988, Pas 1989 I, 83.

5 Cass, 5 June 2003, Pas 2003, 1125.

6 *RO Dalcq*, Traité de la responsabilité civile, vol 1 (1967) no 262.

7 See for instance: *T Vansweevelt*/*B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 299 f.

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It should be noted that it is not universally agreed that this third element is autonomous, it sometimes being linked to the material and sometimes the moral aspects of the fault. 7

As a rule, it is up to the victim who claims compensation to establish that the three cumulative conditions are met. If so, the defendant will be liable to provide full compensation. In this regard, the degree of severity and whether the fault was committed voluntarily are not very significant, the slightest fault being capable of engaging the liability of the person committing it. The existence of gross negligence or even intentional wrongdoing (eg deceit) plays a role in the implementation of certain systems which derogate from ordinary law.[8] 8

Finally, Belgian law does not recognise the concept of *wrongfulness* as such. Accordingly it cannot be a prerequisite for civil liability. 9

8. The Netherlands[1]

Under Dutch law, liability – in non-contractual situations – is based either on fault (*onrechtmatige daad*, *schuldaansprakelijkheid*) or on a form of strict liability (*risico-aansprakelijkheid*). Fault-based liability for tortious acts is laid down in art 6:162 BW (*Burgerlijk Wetboek*, Civil Code – hereinafter CC): 1

> 1. A person who commits a tortious act, against another person, which can be attributed to him must compensate the damage that the other person has suffered in consequence thereof.
> 2. A violation of a right and an act or omission in violation of a duty imposed by law or by what according to unwritten law has to be regarded as proper social conduct, is to be regarded as a tortious act insofar as there was no justification for it.
> 3. A tortious act can be attributed to the tortfeasor if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles.[2]

Strict liability is based on art 6:169ff CC. Strict liability may be based on either the tortious acts of other individuals, such as children (art 6:169 CC), employees (art 6:170 CC) or agents (art 6:171 CC), or on a relationship to defective objects or dangerous substances, for example defective chattels (art 6:173 CC), defective build- 2

8 An example is art 530 of the Companies Code (*Code des sociétés*/*Wetboek van vennootschappen*), according to which a director or a former director of a company that was declared bankrupt may be held liable for the company's debts, provided that he had acted with serious and manifest fault.

1 This section partly relies on *WH van Boom*, Fault under Dutch Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 167–178.

2 Translation from *K Oliphant*/*BC Steininger* (eds), European Tort Law, Basic Texts (2011).

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ings (art 6:174 CC), animals (art 6:179 CC), defective products (art 6:185 CC) or dangerous or noxious substances (art 6:175ff). Although strict liability does not require fault of the liable person, the tort element may nevertheless be relevant in two respects. Strict liability may, as mentioned, be based on the tortious act of another individual. Furthermore, when strict liability is based on the defectiveness of an object, the test for defectiveness may have characteristics of the test for tortious acts, because it is, for example, considered to be relevant whether or not the owner of the object met the general safety standards.[3]

3 According to the wording of art 6:162 CC, misconduct is to be discerned in *onrechtmatigheid* (unlawfulness[4]) and *toerekenbaarheid* (attribution[5]), in combination called 'fault' (*fout*). Unlawfulness relates to the act itself, the attribution of the act to the person acting. According to the second subsection of art 6:162 CC, there are *three categories of tortious acts*: violations of subjective rights (eg, property and physical inviolability), acts contrary to a statutory duty and acts contrary to what is, according to unwritten law, to be regarded as proper social conduct (*maatschappelijke betamelijkheid*, ie the standard of conduct seemly in society).

4 The third category of unlawfulness (ie acts contrary to what, according to unwritten law, is to be regarded as proper social conduct) is in practice by far the most important. Precisely in this category, however, the question is usually whether a person has met a certain standard of care. In answering this question, the decision on attribution is in practice usually absorbed by the decision on unlawfulness.

5 Acts contrary to a statutory duty and acts contrary to proper social conduct can be conceived as a breach of a duty. In theory a breach of duty should be considered to be a matter of unlawfulness. In the case of a breach of a statutory duty, however, the breach will be attributed according to '*verkeersopvattingen*' (common opinion) as one is supposed to know the law.[6] In the case of a breach of a non-statutory duty (standard of conduct seemly in society), the decision on attribution will be absorbed by the decision on unlawfulness. In practice a clear distinction between unlawfulness and attribution can thus not be made in this respect.

6 According to the third subsection of art 6:162 CC, *attribution* may be based on three alternative grounds (the first of which is the most important): fault (*Schuld*, ie blameworthiness), accountability by virtue of statute, or by virtue of generally ac-

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3 See for instance HR 17 December 2010, ECLI:NL:HR:2010:BN6236, NJ 20012/155 (Hoogheemraadschap de Ronde Venen/Gemeente Wilnis).

4 Also translated as 'unlawfulness'.

5 Also translated as 'imputation'.

6 Parlementaire geschiedenis Nieuw Burgerlijk Wetboek, boek 6 [Parliamentary Proceedings Book 6 Civil Code] (1991) 618.

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cepted principles (*verkeersopvattingen*) (ie, an unwritten source of legal and moral opinion, as it is expressed in case law).[7]

Fault is assessed in relation to the unlawfulness of the act. It does not have to relate to any specific loss that has been suffered as a result thereof.[8] **7**

Liability based on fault as a matter of principle rests on the assumption that the liable person could and should have acted otherwise.[9] In practice these issues are covered by specific rules relating to the attribution of tortious acts committed by children (art 6:164 CC) and persons with disabilities (art 6:165 CC). Tortious acts committed under the influence of a mental *or* physical illness or handicap, are – absent blameworthiness – attributed to the person acting on the basis of art 6:165 CC. Tortious acts of children under the age of 14 are not attributed to them (art 6:164 CC); instead the parents can be held (strictly) liable, provided that the child's act would have resulted in the liability of the child had he/she been older than 13 (ie 14 years or older) (art 6:169 CC). **8**

As mentioned earlier (no 2) the third category of unlawfulness (acting contrary to *maatschappelijke betamelijkheid*) can be considered to be a form of negligence. Strictly speaking, this should be seen as a matter of unlawfulness, but as mentioned (no 3), in this category no distinction is made between unlawfulness and attribution in practice, as a failure to meet the standard of care is considered blameworthy. Under Dutch law, the standard for unlawfulness in the case of 'negligence' seems to be more or less objective, as it is usually related to the category of persons the tortfeasor belongs to. For ordinary people, a normal degree of reasonable care is the standard. In the case of professionals (doctors, lawyers, etc), the standard of care is determined by their professional standards. Thus unlawfulness is assessed in an objective way, but the yardstick to be used differs per 'category' of persons. Furthermore, the general point of view seems to be that others may trust that one has sufficient experience for the activity one performs.[10] Lack of experience is an aspect that will be attributed to the actor on grounds of *verkeersopvattingen*.[11] **9**

As far as attribution of a tortious act is concerned, no distinction is made between degrees of blameworthiness. The degree of blameworthiness is, however, relevant in determining the extent of liability. The gravity of the fault is an aspect of the nature of liability (art 6:98 CC), relevant for the determination of the causal link. **10**

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7 See on imputation based on 'verkeersopvattingen' in relation to unlawfulness *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser Serie 6-IV* (2015) 33, 121.

8 Parlementaire geschiedenis Nieuw burgerlijk wetboek [Parliamentary Proceedings Book 6 Civil Code] (1991) 606, 635; cf *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser 6/IV* (2015) no 103.

9 See eg HR 9 December 1966, NJ 1967, 69.

10 *CC van Dam*, Aansprakelijkheidsrecht (2000) 266.

11 See 1/8 no 6.

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Furthermore, it is relevant for the amount of damages for non-pecuniary loss (art 6:106 CC).

9. Italy

1 In Italian law, the key provision on extra-contractual liability is art 2043 Civil Code. Pursuant to this article, wrongful damage (*danno ingiusto*) caused by negligent or intentional acts must be compensated. Article 2043 Civil Code therefore requires two elements to establish A's extra-contractual liability, namely a subjective element, consisting of negligence, namely lack of due care (*colpa*), or intent to cause damage (*dolo*), and an objective element, that is wrongful damage (*danno ingiusto*), caused by A to V due to acts or omissions.[1]

2 The Civil Code does not explain what constitutes intent to cause damage, nor what amounts to negligence. These notions are set out in the Criminal Code, and sometimes the penal definitions are also cited in civil affairs, or by commentators on the Civil Code, although for many purposes one cannot assume that there is an exact match between these notions across the fields of civil and criminal law. Article 43 of the Criminal Code provides that the offence is intentional when the damaging or dangerous event that is the result of the act or omission was foreseeable and intended by A as a result of his/her own act or omission. According to art 43 of the Criminal Code, negligence is characterised by the fact that, even if the event was foreseeable, the damage was not intended by A, and occurs because of negligence or carelessness or lack of skill and expertise, or failure to comply with laws, regulations, orders or rules. On the basis of this article, a distinction is drawn between generic negligence (*colpa generica*), where there is a violation of the general rules of diligence, prudence, or expertise and skill, and specific negligence (*colpa specifica*), represented by the violation of specific laws, regulations, orders and rules that are enacted to prevent the causation of damage. Negligence in turn can also be divided into gross negligence (*colpa grave*), which is often put for many purposes on the same footing as intent to cause damage,[2] and ordinary negligence (*colpa lieve*).

3 Lack of due care amounting to *colpa* occurs whenever the objective standard of prudent and skilled conduct is violated. A must also be chargeable (*imputabile*), that is his/her conduct must relate to his/her own psychological volitional impulse. Therefore a person of unsound mind cannot be held liable for wrongs, even though for reasons of equity he/she may be called upon, whenever the person legally re-

1 Article 2043 Civil Code: 'Qualunque atto doloso o colposo che causa ad altri un danno ingiusto obbliga colui che ha commesso il fatto a risarcire il danno.'

2 The fine distinction is that between 'dolo eventualis' and gross negligence, which is mostly relevant for criminal law purposes only.

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sponsible for A's conduct has no means to compensate the loss (art 2047 Civil Code). If a minor commits a wrongful act, he/she may or may not have the capacity required to meet liability depending on his/her maturity (art 2046 Civil Code)), but parents, guardians or educational institutions are vicariously liable under the conditions provided by art 2048 Civil Code.

In some cases, intent to cause damage is essential to establish A's liability. One of these cases is the inducement of a breach of contract; another is the pursuit of a civil or a criminal case in bad faith. 4

The wrongful damage (*danno ingiusto*) requirement has a rather intricate history.[3] It was first introduced in the Civil Code of 1942 to make clear that extra-contractual liability is established to compensate wrongful damage only. In the following decades, although allowing some exceptions to the rule, Italian courts generally interpreted the reference to *danno ingiusto* in art 2043 Civil Code as if that norm set out a list of protected interests, consisting of rights protected *erga omnes*, analogous to § 823 BGB. In 1971, and again in 1999, the *Corte di Cassazione* rejected this approach. These decisions followed a wave of criticism advanced by scholars who stressed the open ended, indeterminate nature of the concept of *danno ingiusto* in the Italian Criminal Code.[4] 5

In addition to the general rule of art 2043 on extra-contractual liability, Italian law contains more specific rules that establish cases of liability without fault. These are introduced by some articles of the Civil Code, or in specific statutes, such as the Consumer Code for product liability (arts 114–127). The Civil Code regulates A's liability for things in custody (art 2051), animals (art 2052) the collapse of buildings (art 2053), and motor vehicles (art 2054, first section). These various cases allow V to claim compensation without having to prove A's fault. Under the current interpretation of the law, it will be sufficient to prove the wrongful damage and the causal link between A's acts or omissions and the damage in question. The person who caused the damage may avoid liability by providing the exonerating evidence indicated for each type of activity in the relevant article of the Criminal Code. With respect to liability for dangerous activities, the exonerating evidence consists in the proof of the adoption of all measures that could have avoided the harmful event (art 2050 Civil Code). 6

The Italian Civil Code also regulates cases of liability for another's fault such as an employer's liability for damage committed by employees (art 2049 Civil Code), and the liability of an owner of a motor vehicle for damage caused by its driver 7

3 *M Graziadei*, Liability for Fault in Italian Law: The Development of Legal Doctrine from 1865 to the End of the Twentieth Century, in: N Jansen (ed), The Development and Making of Legal Doctrine (2010).

4 *B Winiger/H Koziol/BA Koch/R Zimmermann* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) General Overview 30.

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(art 2054, second section). Parents and guardians are in a similar position only when they are held liable for damage caused by minors under the age of 18, who can understand the consequences of their actions, and direct their will accordingly, or for people of unsound mind during a lucid interval (art 2048, first section Civil Code).

8 Since the general tort rule of the Italian Civil Code, art 2043, provides for liability only when there is wrongful damage (*danno ingiusto*), there can be no liability whenever a justification or excuse intervenes. In this case A's conduct is not wrongful, and therefore the resulting damage lies where it falls. The main grounds of justification are provided for in art 2044 of the Civil Code, concerning self-defence, and in art 2045 Civil Code, concerning cases of 'state of necessity'; the fulfilment of a duty is regarded as a cause of justification whenever the duty is established by the law.

10. Spain

1 In spite of the fact that the general liability rule laid down in art 1902 of the Spanish Civil Code (CC)[1] does not mention wrongfulness as a requirement, legal scholarship[2] and court decisions[3] treat it as an element of tortious liability that is autonomous and different from fault. The prevailing opinion considers that wrongfulness is connected to the illicitness of the conduct and, in a very loose sense, must be understood as the infringement of the general duty not to harm others (*neminem laedere*).[4] However, case law appears to be watering down wrongfulness as a requirement on

1 Article 1902: 'The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused.' All translations of Spanish and Catalan terms and legal provisions are the authors.

2 See *R de Ángel*, Tratado de responsabilidad civil (1993) 257 and *F Rivero* in: JL Lacruz, Elementos de Derecho Civil II (2013) 441f. Against this position, *F Pantaleón* in: C Paz-Ares/L Díez-Picazo/R Bercovitz/P Salvador, Comentarios del Código Civil II (1993) 1993f. See more recently *MA Parra Lucán* in: C Martínez de Aguirre (ed), Curso de Derecho civil II (2011) 889.

3 Judgment of the Supreme Court [STS]) 29.12.1997 (RJ 1997\9602), pointed out that it is 'the unanimous opinion of legal scholarship and of the courts that to establish tortious liability four requisites are required: (1) a *wrongful action or omission* of the actor, (2) his intent or fault, (3) damage, and (4) a relation of causality between the action or omission and the damage' (emphasis added). See also STS 11.7.2002 (RJ 2002\8247) and 10.12.2008 (RJ 2009\16).

4 'First of all we must proclaim that concerning conduct operating within the field of civil law, one cannot talk about typicity and that on the issue of wrongfulness one can go no further than to the principle of "alterum non laedere"' (STS 29.12.1997 [RJ 1997\9602]). Before, see STS 17.3.1981 (RJ 1981\1009). In legal scholarship see *J Santos Briz*, La responsabilidad civil I (6th edn 1991) 33. Critical opinions regarding this doctrine in *L Díez-Picazo*, Derecho de daños (1999) 292.

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its own, frequently grossly mixing up wrongfulness and fault.[5] In practice, the basic role that wrongfulness plays is to offer a doctrinal seat for the grounds of justification or defences against liability, such as necessity, self-defence,[6] the victim's consent or assumption of risk, and damage caused in the course of exercising a right[7] or complying with a legal duty. Thus, persons who in such situations cause damage in a careless, reckless or even intentional manner cannot be liable because they have a defence.[8]

Both legal scholars and courts define fault or negligence by reference to the **2** standard of care established by art 1104 CC, which provides that: 'The debtor's fault or negligence consists in the omission to exercise the diligence required by the nature of the obligation that corresponds to the circumstances of the persons, the time and the place'. Although this article is systematically included in the regulation of contractual obligations, it is also considered applicable to tortious liability.[9] The provision adds: 'Where the obligation should not express the diligence to be exercised in its performance, the diligence of an orderly *paterfamilias* (*buen padre de familia*) shall be required'.

The standard of care is objective or abstract,[10] as it takes as a point of reference **3** the conduct that the normal or ordinary person would adopt under similar circumstances.[11] At the same time it is also commonly recognised that – in addition to the care due according to personal circumstances and to the circumstances of the time and the place – one must pay attention to 'the sector of trade or to the physical or

5 See, for instance, STS 12.12.1984 (RJ 1984\6039), 16.7.1991 (RJ 1991\5393) and 31.12.1997 (RJ 1997\9195). A number of decisions have denied that wrongfulness is a legal requirement for tortious liability (see STS 2.3.2000 [RJ 2000\1304], 20.6.2001 [RJ 2001\5065] and 11.7.2002 [RJ 2002\8247]). On the different views of the Supreme Court, see *M García-Ripoll*, La antijuridicidad como requisito de la responsabilidad civil, ADC 2013, 1529–1533.

6 STS 28.6.1996 (RJ 1996\4905) and 5.5.2008 (RJ 2008\2947).

7 STS 30.6.1998 (RJ 1998\5286).

8 The absence of specific civil regulation leads to the application of the provisions of the Penal Code (arts 20.4, 5 and 7 Penal Code [CP]) even in cases where liability is not related to a crime or misdemeanor and self-defence, the legitimate exercise of a right or necessity are present (*M Martín-Casals/J Solé*, Comentario al artículo 1902, in: A Domínguez Luelmo (ed), Comentario al Código Civil (2010) 2052). On the applicable regime in the case of necessity see *M García-Ripoll*, Ilicitud, culpa y estado de necesidad (2006). Against the analogic application of the rules of the Penal Code on civil liability for duress, when it cannot be equated to a situation of necessity, see *F Peña López*, La culpabilidad en la responsabilidad civil extracontractual (2002) 400 ff.

9 Instead of many, see STS 15.4.1992 (RJ 1992\3306) and 15.9.1998 (RJ 1998\6742). See also *M Martín-Casals/J Solé*, Comentario al artículo 1902, in: A Domínguez Luelmo (ed), Comentario al Código Civil (2010) 2051.

10 *L Díez-Picazo*, Derecho de daños (1999) 360; *M Yzquierdo Tolsada*, Sistema de responsabilidad civil contractual y extracontractual (2001) 226.

11 *F Peña López* in: F Reglero (ed), Lecciones de responsabilidad civil (2nd edn 2013) 73.

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social background where the conduct takes place to be able to assess whether the agent acted with appropriate care, attention and perseverance and with the necessary reflection to avoid the damage'.[12] Accordingly, in professional or skilled activities, care will be judged 'depending on the type of activity involved and on what can and must be expected from a normally reasonable and sensitive person who belongs to the skilled sphere of the case'.[13]

4 An objective standard of care, in the above-mentioned 'typological' sense, implies that the care of persons who belong to a certain social category that can be generalised will be assessed according to the characteristics, physical and intellectual aptitudes, prudence, etc that are normal in the ordinary person who belongs to the same category.[14] This is the reason why the due standard of care of underage persons is that which conforms to a minor of the same age and who finds himself in a similar situation and also the professional standard applies to professionals. Concerning children, there are no specific regulations governing their liability nor an age limit for the capability of being held liable. Mainly for financial reasons, however, claimants usually address their claims towards the parents or the legal guardians of children only. Therefore, the Supreme Court has had few occasions on which to consider the issue of the direct liability of minors.[15] Some authors mention that this can also be said about groups of persons with diminished physical or mental abilities or powers.[16]

5 Until the middle of the 20th century, Spanish tort law was based almost exclusively on a traditional fault approach.[17] Several decisions marked an evolution that tended to construe art 1902 CC with criteria that departed progressively from the traditional interpretation of fault liability and gave way to a stricter liability approach to fault liability by reversing the burden of proof of fault. Courts applied this reversal of proof to so many different situations, even when there was no special or enhanced risk involved, that by the end of the century the reversal of the burden of

12 STS 3.5.1997 (RJ 1997\3668).

13 When assessing the liability of a physician, 'liability will refer to some special measures that are no other than those derived from "medical duties" – lex artis ad hoc – that surpass the measure or standard of fault delimited by the generic care of a reasonable man' (STS 6.6.1997 [RJ 1997\4610], 23.3.1993 [RJ 1993\2545], 24.11.2005 [RJ 2005\7855], 23.5.2006 [RJ 2006\3535] and 16.4.2007 [RJ 2007\3552]).

14 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864.

15 In these cases it held them liable together with their parents. See *C López Sánchez*, La responsabilidad civil del menor (2001) 260 ff. On both issues, children's liability and the liability of parents and guardians, see 8/10 below.

16 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864. See 9/10 below.

17 *M Martín-Casals/A Ruda*, The development of legal doctrine of fault in Spanish tort law, in: N Jansen (ed), The Development and Making of Legal Doctrine (2010) 183 ff.

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proof of fault had become systematic and was the general rule.[18] Currently,[19] case law rejects any systematic reversal of the burden of proof of fault, which courts now only accept in cases of 'extraordinary risks'.[20]

The wrongdoer is liable regardless of his degree of fault (see art 1089 CC, which speaks about 'any sort of fault or negligence' and art 1093 CC, which speaks about 'fault or negligence' without any further distinctions).[21] Thus courts and legal scholars consider that the wrongdoer is liable in tort even if he/she was only slightly negligent.[22] Moreover, according to case law, 'the degree of fault or of wrongfulness is only relevant in the criminal categorisation of the facts, but not in the amount of damages recoverable, so that the one who commits the damaging event with intent is liable in the same amount of damages as the one who commits it with fault'.[23] **6**

11. Portugal

In principle, liability is based on misconduct; exceptionally there is liability without fault (strict liability) and even without wrongfulness (eg, compensation for damage caused in cases of self-defence or necessity (arts 336 and 339 of the Civil Code)). Ar- **1**

18 For the process followed by the Spanish Supreme Court decisions to reach this outcome see *S Cavanillas Múgica*, La transformación de la responsabilidad civil en la jurisprudencia (1987) 66 ff. For the different devices that were used to reach such a result, see *M Martín-Casals/J Solé Feliu*, Fault under Spanish Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 228–231. Criticising this stance of case law, *L Díez-Picazo*, Derecho de daños (1999) 343 and *F Peña López* in: F Reglero (ed), Lecciones de responsabilidad civil (2nd edn 2013) 547. See also *G Díez-Picazo Giménez/I Arana de la Fuente*, El desbordamiento del Derecho de daños. Jurisprudencia reciente (2009) 31 f.

19 See *JA Xiol Ríos*, Posición actual del Tribunal Supremo ante los pleitos de daños, in: MJ Herrador Guardia (ed), Derecho de daños (2011) 25, 31.

20 STS 2.3.2006 (RJ 2006\5508), 22.2.2007 (RJ 2007\1520), 5.5.2008 (RJ 2008\2947), 16.2.2009 (RJ 2009\1491) and 29.3.2012 (RJ 2012\4063). See also *E Roca Trías*, El riesgo como criterio de imputación subjetiva del daño en la jurisprudencia, InDret 4 (2009) 7 and *M Martín-Casals/J Solé*, Comentario al artículo 1902, in: A Domínguez Luelmo (ed), Comentario al Código Civil (2010) 2052.

21 See *J Castán Tobeñas*, Derecho Civil Español, Común y Foral, vol 4 (13th edn 1986) 956. But see *S Cavanillas Múgica*, La transformación de la responsabilidad civil en la jurisprudencia (1987) 55.

22 According to the principle embodied in the Latin aphorism: *In lege Aquilia levissima culpa venit*. See STS 10.5.1995 (RJ 1995\3633) and 19.2.1998 (RJ 1998\877). This kind of fault 'has been abandoned by the best legal scholarship for being abstruse, difficult to define and for having a value which is more emphatic than dogmatic' (see *F Peña López* in: F Reglero (ed), Lecciones de responsabilidad civil [2nd edn 2013] 75). See also *L Díez-Picazo*, La culpa en la responsabilidad civil extracontractual, ADC 2001, 1009, 1027.

23 STS Criminal Chamber 26.9.1997 (RJ 1997\6366) (denaturalised rape oil case). More recently, see STS 15.10.2012 (RJ 2012\9345). On the issue of application of art 1107 CC to tort liability, see *M Martín-Casals/J Solé*, Fault under Spanish Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 252.

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ticle 483(2) states that strict liability is exceptional and can only be created by statute.

2 In Portugal there is a dividing line between wrongfulness and fault. Portuguese tort law can be considered as following a 'middle road'. It follows the recent tendency to avoid a general and virtually unlimited scope of arts 1382 and 1393 of the French Code Civil,[1] as well as the overly compartmentalised model of the German *Bürgerliches Gesetzbuch* (BGB) and the piecemeal approach of the English law of torts.[2]

3 A 'breach of duty' is a question of wrongfulness. Article 483(1)[3] enounces two types of wrongfulness: (a) a violation of 'rights of another' (*erga omnes* rights); and (b) a violation of legal provisions intended to protect the interests of others ('protective norms'). Moreover, the literature agrees that there is a third type of wrongful behaviour: (c) intentional damage *contra bonos mores* (*gute Sitten*) that is to be found in art 334 (*abuso do direito*). Article 483(1) protects 'rights of another', which include *personality rights*;[4] property rights (including intellectual property) are also protected in tort.

4 Article 483(1) establishes an obligation to compensate for damage caused whenever the 'rights of another' have been unlawfully violated. According to the intent of the authors of the preparatory work on the Civil Code,[5] as well as the academic literature and prevailing jurisprudence, only 'absolute rights' (*erga omnes*) are to be protected by tort law, and that is the traditional solution in Portuguese law. There was some influence from German law and literature in the preliminary work of the current Civil Code, although the formulation of art 483(1) is considerably more open than the corresponding § 823 I of the BGB.[6] Thereinafter, the main academic litera-

1 For an overview of the question in Portugal, see *C von Bar*, The Common European Law of Torts I (1998) 22ff.

2 *W van Gerven/J Lever/P Larrouche/C von Bar/G Viney*, Tort Law – Scope of Protection (1997) 55. This recent trend is also followed by the Dutch, Swiss, Italian and Greek codifications. They take as a 'starting point a general provision founded on sufficiently flexible concepts to adjust to new situations, while at the same time limiting or excluding certain heads of damage.' See also *D Moura*, Da Responsabilidade pré-contratual em Direito Internacional Privado (2001) 188.

3 '(1) Any person who, with intention or negligence, wrongfully breaches the rights of another, or any legal provision intended to protect the interests of others, shall be obliged to compensate the injured party for the damage resulting from the breach.'

4 Article 70 acknowledges the General Personality Right (*Allgemeines Persönlichkeitsrecht*) and arts 71–81 Civil Code provide an extensive protection of personality rights.

5 *A Vaz Serra*, Responsabilidade Civil (Requisitos) [1960] BMJ no 92, 37ff, and no 13, 122; and Responsabilidade de Terceiros no Não-Cumprimento das Obrigações [1959] BMJ no 85, 345ff.

6 See *Sinde Monteiro*, Manuel de Andrade und der Einfluss des BGB auf das Portugiesische Zivilgesetzbuch von 1966, in: E Jayme/HP Mansel (eds), Auf dem Wege zu einem gemeineuropäischen Privatrecht – 100 Jahre BGB und die lusophonen Länder (1977) 41.

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ture and case law state that *relative rights* deserve no protection under tort law.[7] Exceptionally, an action grounded in art 483 and art 334 (abuse of a right, intentional behaviour *contra bonos mores*) may be accepted in an intentional case of *inducement of breach of a contract*.[8] Another possibility may be the existence of *culpa in contrahendo*[9] or other legal instruments, such as, 'contracts whose protective scope extends to certain third parties' (*Verträge mit Schutzwirkung zugunsten Dritter*).

In our legal system we take into consideration two types of fault: wilful misconduct, in which the agent predicts the damage, as granted, necessary or probable, and accepts it or intentionally does not avoid it; and negligence, in which there is a failure of due diligence. The agent does not believe that the harmful *event* will take place – if the agent does not believe that it is going to happen but predicts it as possible, it is a case of conscious negligence; if the agent does not believe that it is going to happen and does not predict it as possible, it is a case of unconscious negligence.[10] 5

Fault is analysed from an objective perspective – the *bonus pater familias* criterion, although taking into consideration the cultural, social and professional environment in which the individual is placed.[11] According to art 487(2) of the Civil Code: 'Fault shall be assessed, in the absence of any other legal criterion, by reference to the diligence expected of a dutiful reasonable man, having regard to the circumstances of every case.' 6

7 See *Sinde Monteiro*, Portugal, in: J Spier (ed), The Limits of Expanding Liability, Eight Cases in a Fundamental Perspective (1998). See also *M Almeida*, A Responsabilidade Civil do Banqueiro perante os Credores da Empresa Financiada (2003) and *M Frada*, O problema e os limites da responsabilidade dos auditores [2002] Direito e Justiça 159–169.

8 See *S Júnior*, Responsabilidade Civil de Terceiro por Lesão de Direito de Crédito (2003). This dissertation deals with the question of the liability of third parties that cause damage to a credit right of another. The traditional Portuguese doctrine advocates that a credit right only has *inter partes* effects, and thus – except in cases of an abuse of a right – a third party may not be held liable for violating it. On the contrary, personality rights, real rights or intellectual property rights are absolute rights, with efficacy *erga omnes* and their violation might be argued against any wrongdoer. The author, however, after a comprehensive analysis of comparative law, argues that Portuguese law should follow the North-American (eg, tort of interference with contractual relations), French and Italian academic literature, which accept, under some circumstances, that a third party might be held liable when breaching a credit right.

9 See *E Silva*, Da Responsabilidade pré-contratual por Violação dos Deveres de Informação (2003).

10 See *A Sá e Mello*, Critérios de apreciação da culpa na responsabilidade civil, Revista da Ordem dos Advogados 49 (1989) vol II, 537; *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 36.

11 For example, if we are evaluating the conduct of a doctor, we need to compare his actions with those that we should expect of an average doctor of his area of practice, and not simply to the conduct that we should expect of an average common man. But beyond that, the criteria are completely abstract. See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009); and *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 576.

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7 Fault relates to the violation of the right or the protected interest (*Verletzung*). In practice this relates to the direct damage; case law does not demand fault regarding subsequent damage; that is an issue of causation. The violation of a right or protected interest only gives rise to tort liability if there is damage.

8 The burden of proof of fault lies on the claimant; in some cases there is a reversal of the burden of proof.

9 Portuguese law does not recognise a specific age from which people may be considered responsible. The law is restricted to establishing that liability requires the capacity to 'understand' and to 'want to' ('imputability' refers to capacity in tort), presuming 'lack of imputability' in minors younger than seven years old and in those 'interdicted' by reason of mental anomaly (art 488[12] of the Civil Code).[13] In general, there is no liability if the person, at the moment of the act, had no 'capacity to understand or to decide', unless he/she negligently put himself in that situation.

10 The graduations of misconduct that are recognised are intent, *dolus eventualis*, gross and slight negligence and *culpa levissima*; however, in practical terms, only the distinction between *dolus* and *slight negligence* is relevant, because in the latter case an equitable reduction can be determined by the court (art 494[14]).

12. England and Wales

1 Wrongfulness is generally, albeit with a degree of imprecision, treated as synonymous with fault in English law. The most general basis of liability is negligence, which refers to the breach of a duty of care recognised by law. It is regarded as a species of *fault*, consisting in the failure to attain the standard of careful conduct expected of a reasonable person in the defendant's position. To that extent, the standard of care may be regarded as an objective standard. It eliminates the so-

12 '(1) A person who for any reason was incapable of understanding or of forming intent when the injurious event occurred, shall not be liable for its consequences, unless he wilfully caused himself to be in that condition, and the condition was temporary.
(2) Persons who are aged less than seven years or are subject to a psychiatric disorder shall be deemed not to bear any liability.'

13 Apart from young people (if considered responsible), those with an obligation to exercise supervision also have a case to answer, and they are, first and foremost, the parents. They are responsible, however, for their own conduct (inadequate supervision); they are not liable if they can show that they fulfilled their duty of supervision or that the damage would have occurred even if they had done so (art 491 of the Civil Code). This is a liability for presumed negligence.

14 'Where liability is based on mere fault, compensation may be fixed equitably at an amount lower than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party as well as the other circumstances of the case justify doing so.'

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called 'personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question'.[1] However, there is an element of subjective adjustment to the standard to reflect the defendant's attributes, eg age (at least, in the case of children and the aged) and mental or physical disability (if any). The duty of care is breached where, having regard to the totality of the risk of (compensable) harm resulting from the defendant's conduct, it was unreasonable for him/her to engage in it or to engage in it in the manner in which he/she did. For these purposes, it is immaterial whether all the risks materialised or not.

2 Though wrongfulness is generally synonymous with fault, there are some concepts of English law which play a distinct role in limiting the circumstances in which carelessly or even intentionally caused harm attracts liability. Chief amongst these is the duty of care, and Howarth has expressly linked the requirement of English law that the defendant should have been subject to a duty of care with the role played by the idea of 'unlawfulness' in some Continental legal systems.[2] The precise nature of the duty of care requirement has been, and continues to be, vigorously debated by English lawyers. Two broad schools of thought may be identified. According to one, the duty of care acts as a 'control mechanism' excluding or limiting liability for carelessly caused harm in particular circumstances, and is not really a 'duty' as that term would normally be understood.[3] The other school denies that the term 'duty' is a misnomer, and portrays the duty of care as constituted by a plurality of specific duties relating to the interference with particular rights or interests in particular circumstances.[4]

3 In torts other than negligence, the misconduct to which liability attaches is defined in different terms. In the tort of private nuisance, it is the unreasonable interference with the claimant's use or enjoyment of his/her land;[5] it is disputed whether this entails fault on the defendant's part or not.[6] In the economic torts (procuring a

1 *Glasgow Corporation v Muir* [1943] AC 448, 458 per Lord Macmillan. See 3d/13 nos 1–7.

2 *D Howarth*, The General Conditions of Unlawfulness, in: AS Hartkamp et al (eds), Towards a European Civil Code (4th edn 2011) 845.

3 See especially *JG Fleming*, Remoteness and Duty: The Control Devices in Liability for Negligence (1953) 31 Canadian Bar Review 471.

4 See especially *N McBride*, Duties of Care – Do they Really Exist? (2004) 24 OJLS 417, criticised by *D Howarth*, Many Duties of Care – Or A Duty of Care? Notes from the Underground (2006) 26 OJLS 449.

5 The leading modern case is *Hunter v Canary Wharf Ltd* [1997] AC 655.

6 For a range of views, see *G Cross*, Does Only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance (1995) 111 LQR 445, *M Lee*, What is Private Nuisance? (2003) 119 LQR 298; *M Lunney/K Oliphant*, Tort Law: Text & Materials (5th edn 2013) 637–639; *A Mullis/K Oliphant*, Torts (4th edn 2011) 264 ff; *J Murphy*, The Law of Nuisance (2010) 2.43–2.48; *D Nolan*, Nuisance, in: K Oliphant (ed), The Law of Tort (3rd edn 2015) § 22.56; *G Williams/B Hepple*, Foundations of the Law of Tort (1984) 123–127. See further 2/12 no 4 below.

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breach of contract, unlawful infliction of loss) negligence is not enough to establish liability and intentional wrongdoing must be proven.[7] In the torts of trespass to land, goods or the person (assault, battery and false imprisonment) the defendant must intentionally[8] commit an act (enter the claimant's land, interfere with his/her possession of goods, touch his/her person, etc) that infringes the claimant's rights in the specified manner, though it is not material whether or not the defendant was aware of the wrongful quality of that act.[9]

4 Strict liability is rare in English law.[10] When it arises, it is based not on fault or any other type of misconduct by the defendant but on some alternative basis, eg the accumulation of dangerous things on one's land, constituting a non-natural use (liability under the rule in *Rylands v Fletcher*[11]) or the supply of a product which causes injury because of a defect in it (product liability).[12]

5 Breach of the required standard of conduct must generally be proved by the claimant. The Latin maxim *res ipsa loquitur* creates an evidential presumption that an accident was attributable to the defendant's fault where, though the accident's cause is unknown, the thing causing the accident was under the defendant's management and the accident was such as, in the ordinary course of things, does not happen if those who have the management of the thing use proper care.[13]

6 Exceptionally, the burden of proof may be reversed. This used to be the case with regard to workplace safety duties phrased in terms of the 'reasonably practicable',[14] but a recent legislative change makes clear that the burden of proof is on the claimant in such cases too.[15]

7 English law does not have a minimum age at which tortious liability can be incurred. Everything turns on an assessment of the defendant's capacity in the circumstances of the case and, where appropriate, whether he/she has attained the applicable standard of care. However, as mentioned in no 1 above, the standard of care may be adjusted to reflect age and mental or physical disability (if any).[16]

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7 The leading modern case is *OBG v Allan* [2008] 1 AC 1, 13 no 4 ff below.

8 There is some authority that a negligent trespass to goods might be actionable but the prevailing view is to the contrary: *S Douglas*, Interference with Goods, in: K Oliphant (ed), The Law of Tort (3rd edn 2015) § 11.135; *M Lunney*, Trespass to Land, in: K Oliphant (ed), The Law of Tort (3rd edn 2015) § 10.4.

9 *A Beever*, The Form of Liability in the Torts of Trespass (2011) Comm L World Rev 378.

10 As to strict liability in English law generally, see *K Oliphant*, The Nature of Tortious Liability, in: K Oliphant (ed), The Law of Tort (3rd edn 2015) § 1.26–1.28.

11 (1866) LR 1 Exch 265, (1868) LR 3 HL 330.

12 Consumer Protection Act 1987, Part I.

13 *Scott v London and St Katherine Docks Co* (1865) 3 H&C 596.

14 *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107.

15 Health and Safety at Work etc Act 1974, sec 47(2), as amended by sec 69 of the Enterprise and Regulatory Reform Act 2013.

16 *Mullin v Richards* [1998] 1 WLR 1304 (see 8/12 nos 1–7 below).

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As regards degrees of fault, the main division in English tort law is between torts of intention and torts of negligence. In the former, intention also embraces recklessness. Negligence is a monolithic concept and does not admit of different degrees.[17] 8

13. Scotland

The Scots law of delict has traditionally rested on the generally applicable principle that reparation to B must be made of harm wrongfully caused by A, this basic principle sometimes being expressed by reference to the maxim *damnum injuria datum* (meaning harm caused wrongfully). It is the wrongfulness element of this principle which may be said broadly to equate to the notion of 'misconduct'. Strict liability, or liability in the absence of wrongful conduct, is a relatively modern exception to the original fault-based law of delict, and has arisen for specific policy reasons. 1

The elements of the modern general action for the reparation of delict are as follows: 2

(a) the party bringing the action (the pursuer) must have suffered some legally relevant harm (*damnum*): harm is usually constituted by some loss (or damage, as it is also styled) suffered by the pursuer (which loss may be personal injury, damage to property, or – in limited circumstances – economic loss), but occasionally the mere infringement of a right or interest can itself constitute harm whether or not any loss is suffered;
(b) the harm must have been caused by some conduct – an act or omission – of the defender's; and
(c) the defender's conduct must have been wrongful, ie to have amounted to a 'wrong' (also styled *injuria*). This is what can, for present purposes, be styled the 'misconduct' portion of the action.

For conduct to be wrongful, it must: 3

(i) have infringed a protected interest or right of the pursuer. There are a number of recognised protected interests in the law, for instance: physical integrity; liberty; economic integrity (to some extent); honour and dignity (to some extent); and
(ii) demonstrate *culpa* (or fault) on the part of the defender: *culpa* may be constituted by either intentional or negligent conduct. Intention may usually be inferred from conduct deliberately undertaken by a party the ordinary consequence of which is harm (as is the case with, for instance, the delict of assault),

17 But cf *D Nolan*, Varying the Standard of Care in Negligence [2013] CLJ 651, admitting this to be the orthodox view, but arguing for gross negligence to play a distinct role in the future.

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though in some cases an examination of the subjective intent of the alleged wrongdoer is required in order to indicate the subjective presence of malicious intent. Negligence is demonstrated by conduct which fails to reach the standard of care that would be expected of a reasonable person in the circumstances of the defender. Fault thus has a predominantly objective characteristic (with some exceptions), though in the context of negligent conduct, the objective assessment takes account of the specific circumstances in which the alleged wrongdoer found him-/herself.

4 Apart from the general delictual action, there are a number of nominate delicts recognised by the law. These require specific types of wrongful conduct to be present in order for liability under them to be triggered. In addition, they also require the presence of harm (damage) and causation.

5 *Culpa* (fault) forms one aspect of the idea of wrongfulness. *Culpa* was traditionally analysed in Scots law as being of different degrees: *dolus* (intention); *culpa lata* (recklessness); and simple *culpa* or *culpa levis* (negligence, as it increasingly came to be styled after *Donoghue v Stevenson*[1]). These distinctions were drawn from Roman law. The distinctive Latin tags are seldom, if at all, encountered in modern cases, where one finds instead reference to intention and negligence, and sometimes to recklessness (which is treated as being equivalent to intention). There is also a continuing tradition of identifying malice as a specific form of wrongful conduct in some cases, defamation being one such, the related delict of 'verbal injury' being another.

6 *Culpa* constituted by intentional conduct (*dolus*) is primarily dealt with by a number of the nominate delicts recognised in Scots law: these concern intentional harm to a person, intentional harm to property, and intentional harm to economic interests.

7 *Culpa* constituted by unintentional conduct (or negligence, as it is usually now called) is dealt with under the general action for the reparation of harm: unlike English law, negligence is *not* a nominate tort or delict in Scotland, it is merely one type of conduct demonstrating fault on the part of the defender. Following *Donoghue v Stevenson,* an analytical change occurred: the courts have largely stopped talking in terms of 'wrongfully caused harm' in actions based upon negligence, and have instead moved to talking in terms of harm caused as a result of a breach of a duty of care owed by a defender to a pursuer. It is this breach of a duty of care which constitutes what might be called 'misconduct' in negligence cases. Despite this change in analysis, there remains periodic references to the component nomenclature of *injuria* and *damnum* in negligence cases, especially in those where one of the two

1 1932 SC (HL) 31, 1932 SLT 317, [1932] AC 562; for discussion of this case, see 13/13 nos 1–6.

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elements may be present but not the other: for instance, it is often remarked in cases concerning the alleged prescription of delictual claims that both elements must be present in order for an actionable delict to have occurred and thus for the beginning of the prescriptive period to have been triggered.

As for the second element of the idea of wrongfulness, the infringement of a protected right or interest, there has already been mentioned the recognised protected interests of physical integrity and liberty. There is an ongoing debate as to whether gathering together some of the nominate delicts protecting honour and dignity (through, for instance, actions of defamation, breach of confidence, seduction, entrapment, and so forth) under a general heading of 'personality rights' might be useful.[2] **8**

In cases where wrongfulness must be shown, it is for the party bringing the action (the pursuer) to demonstrate this on the part of the defender. In some cases, the maxim *res ipsa loquitur* may apply so as to infer wrongfulness in the circumstances. **9**

There is no strict minimum age of delictual responsibility in Scots law. However, a defender who is younger than approximately five years old is unlikely to be considered to have the mental capacity to appreciate the consequences of his/her acts and hence to be capable of acting wrongfully. **10**

14. Ireland

Irish tort law is based on a series of nominate torts with distinct elements; differing types of misconduct can be seen in the actions. The most broad-ranging cause of action is negligence; the duty of care concept controls the existence of an obligation to take reasonable precautions and the standard of care determines whether the defendant's behaviour violated the obligation imposed.[1] In principle the duty is not a misconduct enquiry, but a preliminary step in determining whether there is a possibility of negligence-based liability arising. In practice courts do not always clearly differentiate the two phases and may express the duty in terms of its content, focusing on the behaviour required to satisfy the standard. The standard of care is 'reasonable care in the circumstances' – many of the cases below will demonstrate the elements of this. Negligence is also a behavioural standard in respect of other nominate torts (historically this included the trespass torts, but the current position is uncertain); some examples of defamation, passing off and statutory duties employ a **1**

2 See further *N Whitty*/*R Zimmermann* (eds), Rights of Personality in Scots Law (2009).

1 See *BME McMahon*/*W Binchy*, The Law of Torts (4th edn 2013) ch 6 (duty) & ch 7 (standard); *E Quill*, Torts in Ireland (4th edn 2014) ch 1; *J Tully*, Tort Law in Ireland (2014) ch 2 (duty) & ch 5 (standard).

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negligence standard, though it is not the exclusive behavioural standard for all instances of those torts. Negligence is predominantly determined objectively, but subjective blameworthiness is used for apportionment purposes.

2 Intentional misconduct is actionable in a variety of torts (trespass, some of the economic torts, some statutory duties); fraud is a particular variant of intentional wrongdoing (deceit). Bad faith may be viewed as another variant of intentional wrongdoing (malicious falsehood, misfeasance in public office, abuse of process torts and some aspects of defamation). 'Intentional' wrongdoing ordinarily includes recklessness, but not in respect of the tort of unlawful interference with economic relations.[2]

3 Strict liability arises in limited cases (vicarious liability, non-delegable duties, the *Rylands v Fletcher* principle, some aspects of private nuisance and defamation – the presumption of falsity in defamation can generate strict liability). In the case of imputed liability (vicarious liability and non-delegable duties), the underlying tort may contain a fault element, but the fault of the third party is imputed to the defendant who may be personally without any fault.

4 Some torts involve special standards or hybrids (statutory duties, for example, may be expressed in strict or absolute terms, but limited defences may be provided for). The action for breach of constitutional rights does not have a single behavioural standard, but some element of fault appears to be necessary for an action to arise – the successful cases to date have involved some form of fault, but the possibility of a strict liability violation being recognised in the future cannot be ruled out.

5 Irish law does not generally utilise a concept of unlawfulness distinct from the behavioural standards of the nominate torts;[3] there are two torts – conspiracy and unlawful interference with economic relations – that use unlawful behaviour as a definitional component, but the precise parameters of what qualifies as sufficiently unlawful has not been determined.[4]

6 The standard of proof in civil claims is the balance of probabilities; the party bearing the burden of proof has to demonstrate that what they assert is more likely

2 *Charles O'Neill & Co Ltd v Adidas Sportschuhfabriken Adi Dassler KA* unreported Irish Supreme Court (IESC) 25 March 1992.

3 Unless one considers the duty of care as defining a divide between lawful and unlawful behaviour, so that negligent behaviour without a duty involves fault but is not a tort.

4 For conspiracy, see *Connolly v Loughney* (1952) 87 ILTR 49; *Molloy v Gallagher* [1933] IR 1; *Taylor v Smyth* [1991] 1 IR 142. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 32.93 ff; *E Quill*, Torts in Ireland (4th edn 2014) 296 ff; for interference with economic relations, see *Charles O'Neill & Co Ltd v Adidas Sportschuhfabriken Adi Dassler KA* unreported IESC, 25 March 1992; *Bula Ltd v Tara Mines Ltd (No 2)* [1987] IR 95, at 100 per Murphy J. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 32.53 ff; *E Quill*, Torts in Ireland (4th edn 2014) 291 ff.

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than not to be true.[5] While there is no formal change in the applicable standard, fraud is more difficult to establish than less egregious behaviour and will require strong evidence before an inference will be drawn.[6] The *res ipsa loquitur* doctrine can be used to prove negligence. It is a species of circumstantial evidence, where negligence can be inferred from the fact that the injury occurred; the circumstances must be such that an injury of the type complained of would not normally occur if reasonable care was exercised by the defendant.[7] The principle can also be used to draw an inference of a causal connection between a defendant's negligence and a plaintiff's injury.[8]

15. Malta

'Fault' as a requirement for liability in tort is expressly mentioned in the general clause establishing tortious liability in the Maltese Civil Code. Article 1031 expressly provides that 'every person … shall be liable for the damage which occurs through his own fault'. 'Fault' is then defined as the failure to use 'the prudence, diligence and attention of a *bonus paterfamilias*'.[1] A *bonus paterfamilias* would refrain from those actions (defined broadly to include omissions) which pose a foreseeable danger to the legitimate interests of others. 1

'Wrongfulness' of and by itself, which, in art 1033,[2] is defined as 'an act or omission constituting a breach of the duty imposed by law', is not sufficient for liability: liability for any damage arising from such an act or omission arises only when the person guilty of such wrongfulness acted (or failed to act) 'with or without intent to 2

5 See *O'Reilly Brothers (Quarries) Ltd v Irish Industrial Explosives Ltd* unreported IESC, 27 February 1995; *Best v Wellcome Foundation Ltd* [1993] 3 IR 421.

6 *Banco Ambrosiano SPA v Ansbacher & Company Ltd* [1987] ILRM 669, 702 per Henchy J; *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132, 150 per Hamilton CJ; applied in *Farrell v Dublin Bus* [2010] IEHC 327 per Quirke J.

7 The Irish version of this principle differs from English law, requiring that the defendant must have a superior capacity to prove what occurred – *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629; *Rothwell v MIBI* [2003] IESC 16, [2003] 1 IR 268, noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2003 (2004) 245, nos 18–21. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) (fn 1) ch 9; *E Quill*, Torts in Ireland (4th edn 2014) 453 ff; *J Tully*, Tort Law in Ireland (2014) 109 ff.

8 *Lindsay v Mid-Western Health Board* [1959] IR 245; *Quinn v South Eastern Health Board* [2002] IEHC 43, noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 263, nos 40–44.

1 Article 1032 (1).

2 Article 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.

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injure, voluntarily or through negligence, imprudence or want of attention'.[3] Insofar, therefore, as there may be behaviour which is 'wrongful' – because objectively in breach of a duty imposed by law – but not 'faulty' – because fault in the subject is lacking – it may be said that the Civil Code does indeed distinguish between wrongfulness and fault: wrongfulness is an act or omission which causes damage *contra ius* to a legally relevant interest and there is fault if the agent's behaviour is *non iure*.

3 A 'duty imposed by law' does not necessarily arise from a specific statutory provision: it may arise from circumstances or from the relationship between the parties. Some judgments, reflecting the common law influence on our basically civilian private law, speak of a 'duty of care' in this regard. There is, however, a general duty not to harm interests recognised by law: *neminem lædere*. Going by the wording used in art 1033, a breach of a duty imposed by law or of a duty of care is more akin to wrongfulness than to fault: fault is only an additional, albeit a fundamental, element for liability.

4 There may be situations where a wrongful act or omission, though not attributable to voluntary, negligent, imprudent or careless conduct, and, therefore, not falling short of the standard required of a *bonus paterfamilias*, may still give rise to liability. These situations arise where, in terms of art 1032(2), 'an express provision of law' imposes requirements of prudence, diligence or attention to a higher degree than that of a *bonus paterfamilias*. Liability for *culpa levissima* and strict liability can therefore arise only in cases expressly provided for by law. This notwithstanding, there have been judgments, particularly in cases of industrial accidents, where the court, although using the traditional language of fault-based liability, nevertheless imposed liability which in effect may be considered as 'strict' or, at least, very close to strict. There are also situations (eg in cases of liability of owners of animals,[4] owners of buildings[5] or when *res ipsa loquitur*) where there is a rebuttable presumption of fault and the burden of proof is reversed.

5 A possible example of a statutory requirement for a higher standard may be found in art 1038 of the Civil Code, which provides that whoever undertakes any work or service without having the necessary skill shall be liable for any damage caused due to his/her unskilfulness. The wrongful act – undertaking a task without having the necessary skill, irrespective of the subject's mistaken belief that he/she does have the skill – is sufficient to ground liability without any requirement of

3 Article 1033.

4 Article 1040. The owner of an animal, or any person using an animal during such time as such person is using it, shall be liable for any damage caused by it, whether the animal was under his charge or had strayed or escaped.

5 Article 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.

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proof of negligence in the sense that it is not necessary to show that the work was done without proper care. However, this may also be considered as a particular application of the general rule, since no *bonus pater familias* would undertake a task for which he/she lacks the necessary skill.

Although the *bonus paterfamilias* test is an objective standard – *culpa levis in* **6**
abstracto, and not *in concreto*, (ie assessed by reference to an abstract standard rather than the specific individual) being required for a finding of fault – nevertheless the test does depend to some extent on the condition of the individual agent. At one extreme are children under the age of nine and persons with a mental disorder or other condition which makes them incapable of managing their own affairs, who are not bound to make good the damage caused by them.[6] The same applies for children over the age of nine who have not attained the age of 14, unless it is shown that they acted with a 'mischievous discretion'. At the other extreme are persons, like professionals, who have received training and who are therefore expected to exercise the care of a reasonably competent professional in the exercise of their profession (though not, of course, in other acts of civil life). Ironically, however, the early cases on professional liability found fault only in cases of 'crass' negligence and incompetence.

The degrees of misconduct, or 'faulty wrongfulness', may therefore be classified **7**
as intent (and gross negligence or *culpa lata* which is equivalent to intent), negligence and slight negligence, to which one must add strict liability in cases where causing the harmful result even without any degree of negligence is a ground of liability. Except in the case of children over nine but under 14, where 'mischievous discretion' is a requirement for fault, and in cases of liability for slight negligence, where a slight degree of misconduct is sufficient for liability, and strict liability, the difference between the degrees of misconduct is not relevant for establishing liability but may, in specific cases, be relevant for the purpose of the assessment of damages. In fact, in cases specifically provided for by law[7] a higher amount of damages may be recovered where the tortfeasor acted with intent or with gross negligence.[8]

6 However, unless the injured party can recover the damage from the person having the charge of the minor or of the person of unsound mind, the court may, having regard to the circumstances of the case, and particularly to the means of the party causing the damage and of the injured party, order the damage to be made good, wholly or in part, out of the property of the minor or of the person of unsound mind. See art 1036.

7 Article 1047(2) Civil Code.

8 Thus, whereas art 1047(1) of the Civil Code provides 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 8% a year, art 1047(2) provides that, if the person causing the damage acted maliciously, the court may grant the injured party compensation for any other damage sustained by him.

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16. Denmark

1 In Danish law the basic tort law liability rules are not codified but based on case law. The general principle of liability is the *'culpa standard'* (*culpareglen*) which is said to imply that the tortfeasor must have acted negligently in order to become liable.

2 A basic function of the concept of negligence is to provide for compensation of the injured party to the extent that this is not provided for by insurance or social security law. Another function of the concept of negligence is to provide for deterrence. Thus, although it is difficult to establish empirical evidence on this effect, the negligence standard is believed to provide incentives for correct and reasonable behaviour in society to some extent.[1]

3 Historically, the concept of negligence revolved around the concepts of 'wrongfulness' and 'fault' as two distinct concepts.[2] Moreover, much Danish legal theory has been devoted to an analysis of the concept of 'wrongfulness' (*retstridighed*) and the idea that some acts are unwanted and should be refrained from and that it might be possible to find some common characteristics of these unwanted acts.[3] However, the theory of a common denominator for all wrongful acts was abandoned a long time ago as have the discussions of the concept of wrongfulness in general.

4 Today, legal theory recognises that – in principle – the negligence standard contains both an objective and a subjective element.[4] The objective element is the requirement that the tortfeasor infringed the required standard of conduct. The required standard of conduct may, for instance, be deduced from prescriptive legislation in some areas of life but may also be established in other ways. The objective side of the negligence standard (in earlier times referred to as the requirement of *retstridighed*) may be regarded as the Danish version of the concept of 'wrongfulness'.[5] Today, the term *uforsvarlig* may also be used to cover to the objective side of the negligence standard. The subjective side of the negligence standard focuses on the state of mind of the tortfeasor and contains the requirement that the tortfeasor was aware or should have been aware that he/she was acting wrongfully. The subjective side of the negligence standard is the Danish version of the requirement of 'fault'.

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1 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 51ff.

2 *H Ussing*, Erstatningsret (6th edn 1962) 18 describes this very clearly.

3 In this way, the (negative) concept of wrongfulness has formed a pillar in Danish tort law theory. In contrast, the (positive) concept of a 'duty of care' has had no central role to play.

4 *V Ulfbeck*, Erstatningsretlige Grænseområder (2nd edn 2010) 32.

5 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 71, emphasising that the concept of *retstridighed* is rarely used in this way today. In general, there is not much focus on the concepts of 'wrongfulness' ('retstridighed'/'uforsvarlighed') and 'fault' as independent concepts. Rather, the focus is on the unifying concept of 'negligence' as explained in no 5.

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As a starting point, a basis of liability can only be established if both the objective and the subjective requirements are fulfilled. However, in practice, there seems to have been a development toward placing more emphasis on the objective side of the negligence standard and less on the subjective side of the negligence standard. This has been described as a tendency to 'objectify' the negligence standard.[6] This tendency has blurred the line between the two concepts of 'wrongfulness' and 'fault'. Consequently, these expressions are rarely used by the courts. Instead, the expression 'negligence' (*uagtsomhed*) seems to a large extent to be used as a unifying concept, which comprises both an objective and a subjective element but which places most weight on the objective element.[7] As a consequence, it cannot meaningfully be asked whether the subjective side of the standard relates to the requirement of 'wrongfulness' or the requirement of damage. Furthermore, the tendency to objectify the negligence standard has also blurred the line between *culpa*-based liability and strict liability. **5**

Danish law recognises the concept of negligence in different gradations. These comprise intent, *dolus eventualis*, gross negligence, negligence, slight negligence, and *culpa levissima*. As a starting point, all of these degrees of negligence may form the basis of liability and it is often irrelevant what degree of negligence has been exercised by the tortfeasor. However, the degree of negligence may influence the extent to which proof of other conditions of liability (such as causation) is considered established.[8] The degree of negligence may also be of importance if the injured party is covered by insurance. **6**

As a starting point, anyone, including children, old people and people who are not mentally fully developed, can be held liable under Danish tort law and are subject to the negligence standard just as other people.[9] However, in practice, children under the age of four are rarely considered to have acted negligently. Likewise, both for children and for mentally disabled people, special rules in the Danish Damages Act[10] provide for a reduction of liability.[11] **7**

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6 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 88.

7 Ibid.

8 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 292. As illustrations with regard to the requirement of causation see the cases U 2002.1496 H and U 2002.521 H.

9 As to children, this is stated in the Danish Damages Act sec 24a, para 1, 1st sentence. As to mental disability, the same rule is stated in the Danish Damages Act sec 24b, para 1, 1st sentence. See in general, *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 118 f.

10 Act No 266 of 21 March 2014.

11 Section 24a, para 1, 2nd sentence and sec 24b, para 1, 2nd sentence, establish the same rule with regard to reduction of liability. Thus, the liability of children and mentally disabled people can be reduced if it is found fair, taking into account lack of development of the child/the mental condition of the mentally disabled person, the nature of the tortious act or other circumstances, including in particular the ability of the tortfeasor and the victim respectively to bear the loss and the prospect of

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8 The requirement of negligence is only one of several requirements to establish liability. Thus, in addition to negligence, the requirements of causation and foreseeability as well as the existence of a loss (pecuniary or non-pecuniary) must also be satisfied.

9 Liability is not always based on negligence. Other types of liability are also recognised. These comprise negligence with a reversed burden of proof and strict liability.[12] However, negligence is the general basis of liability. When this general rule applies, negligence has to be proved by the injured party.

10 Negligence as a basis of liability comes into play when no special rules provide otherwise. Special rules may be found in legislation or may be based on case law. Even if special rules provide for a type of liability other than negligence, it is often open to the injured party to choose to base an action on negligence instead of special liability rules (concurrency of actions). This could be beneficial to the injured party if the special liability rules are combined with limitations as to the extent of liability. As a starting point, the plaintiff can choose to base his/her action on negligence as an alternative to a special basis of liability. However, an interpretation of a rule providing for a special basis of liability may lead to the conclusion that an alternative action based on negligence is ruled out.

17. Norway

1 *Culpa* is a very important legal basis for liability in Norwegian tort law. The legal order applies a general rule of *culpa* that is valid in every area of life, and the assessment of *culpa* is often influenced by statutory and non-statutory norms.[1] The *culpa* rule (*skyldregelen*) is strongly linked to the notion of negligence (*uaktsomhet*), which is a concept which indicates that a defendant has failed to meet a required standard of conduct, whereas wrongfulness as such does not play a significant role in modern Norwegian tort law. A decision on whether someone has acted negli-

obtaining coverage for the loss elsewhere. On age, see further below under 8/16. On mental disability, see further below under 10/16.

12 Fault liability with a reversed burden of proof is a basis of liability which the courts apply if they find it justified in the concrete circumstances. Thus, case law does not contain an array of categories of cases in which a reversed burden of proof is applied. However, general rules on fault liability with a reversed burden of proof may be established by statute. Examples are found in the area of transport law. Strict liability has been applied by the Danish courts in cases concerning damage caused by excavation during construction work and in cases concerning damage cause by leakage from publicly owned water supply lines. See further *B Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 177 ff.

1 See the standard textbooks on the subject, *N Nygaard*, Skade og ansvar (6th edn 2007) 172–214 and *P Lødrup*, Lærebok i erstatningsrett (6th edn 2009) 127–189. See also *A Kjønstad*, En modell for culpavurderingen, Tidsskrift for erstatningsrett 2005, 86–120.

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gently is based on an assessment of whether the defendant should have acted differently. The answer to this question is grounded on the nature of the concrete risk of damage, and whether the defendant was encouraged not to create the specific risk or to remove the source of risk. Fault refers to causation in the sense that the difference between what the alleged tortfeasor did and what he/she ought to have done must be the cause of the damage. The decision on whether a person with average skills and intelligence – in the same specific role – should have avoided creating a risk or should have eliminated a certain risk depends on whether alternative actions were available that would effectively have led to risk reduction. The core basis of this assessment is therefore similar to the criteria in the well-known Learned Hand formula, which is based on an assessment of the gravity of the risk compared to the burdens of avoiding the risk.[2] The conduct expected of the potential tortfeasor also depends on what behaviour he/she could have expected from others who were likely to come into contact with the source of risk. The decision must therefore take into account the expected competence and knowledge of both the potential tortfeasor and a potential claimant. These expectations are called *rolleforventning til skadevolder* and *rolleforventning til skadelidte*. Translated into English, the concept of *rolleforventning* means role expectation, and it is used here with reference to people who are in the same position in relation to the source of risk. These expectations are different depending on the expected competence and expected knowledge it is presumed that persons who place themselves in similar positions in relation to the risk will have. The role expectations (*rolleforventning*) of both parties therefore represent a required standard of conduct on both sides, and these standards have to be balanced in an evaluation of who should reasonably bear the consequences of the risk of damage. Not every failure to meet a certain standard is sufficient to result in liability, however. The question of *culpa* could also be one of whether the alleged tortfeasor should have avoided a situation that he/she could not handle.[3]

The *culpa* rule consists of both objective and subjective elements. The subjective **2**
requisite requires that the tortfeasor is blameworthy, because he/she ought to have avoided the risk. Hence certain distinctions must be drawn, however. According to § 1-1 of the Compensatory Damages Act (skl)[4] children and youths under 18 years of age may only be liable to compensate damage if such an obligation seems reasonable in view of their age, development, conduct, financial means and other circumstances. In case law, it is assumed that the age limit is about ten years, and that younger children in general do not have the capacity to be blamed due to their inability to judge moral

2 See *N Nygaard*, Skade og ansvar (6th edn 2007) 188–193 for an analysis of risk, and further 193–202 for an analysis of the burdens of avoidance and the question of the feasibility of an alternative, risk-avoiding act.

3 *N Nygaard*, Skade og ansvar (6th edn 2007) 212f.

4 See *Skadeerstatningsloven*, 26 May 1969 no 13 (skl) § 1-1.

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wrong and their lack of cognitive skills to judge risk of damage. Pursuant to skl § 1-3, the general rule is that mentally disabled persons, persons who lack mental capacity due to a physical condition or drugs and disturbed persons are liable to compensate the damage or injury caused by their actions, provided that such liability is considered reasonable. In practice mentally disabled persons are generally held liable for their wrongful acts, and the rule is used as a legal authority to reduce the amount of damages.

3 *Culpa* is not the only basis for liability under Norwegian tort law, which is linked to misconduct. There are also several bases for liability that must be categorised as strict liability, both codified and uncodified.[5] There is a general uncodified rule on strict liability for dangerous activities or objects if damage is caused by a risk that can be characterised as a *typical* outcome of the existence of the source, and the type of risk in question would be an ongoing risk as long as the activity or object exists. If the risk has these distinctive characteristics, the event that triggers the potential risk must also – from the group of claimants' point of view – seemed to have been an *extraordinary* incident. This kind of liability arose as the result of increasing strictness in the application of the *culpa* rule during the latter part of the Industrial Revolution.[6] In the reasoning justifying liability, some cases have elements of both strict liability and liability based on fault.[7] One example of this is an epileptic prisoner who was placed in a cell with an unprotected source of heat, which led to him suffering burns to the skin (Rt 1972, 1192).

4 The most practical basis for strict liability depending on misconduct is, however, skl § 2-1 regarding employers' liability, which states: an employer is liable for damage or injury caused intentionally or negligently by an employee during the performance of work or functions for the employer if the conduct was not in accordance with the requirements that the claimant could reasonably expect from the activity or service. Such liability does not include damage or injury caused by the fact that the employee exceeded the reasonable limits of his/her duties, considering the nature and scope of the activity and the nature of the working operations or functions of the employee. In general, one does not distinguish between *culpa levis*, *levissima* and *lata*, see 13/17 no 4. However, the existence of gross negligence or intent in itself speaks against liability for the employer, because the nature of such acts often falls outside the scope of employment. Nevertheless, employers have on some occasions also been held liable for intentional damage caused by their employees.[8]

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5 There are, for example, codifications of strict liability for damage caused by motor vehicles (*Bilansvarsloven*, 3 February 1961 § 4), railway trains (*Jernbaneansvarsloven*, 10 June 1977 no 73 § 9) and fun fairs (*Tivoliloven*, 7 June 1991 no 24 § 7).

6 See *N Nygaard*, Skade og ansvar (6th edn 2007) 250.

7 Theorists have labelled this category 'objektivt ansvar for uforsvarlig ordning', which can be translated as 'strict liability for negligent arrangements', see especially *N Nygaard*, Skade og ansvar (6th edn 2007) 275–279 and the Supreme court cases Rt 1991, 1303 and Rt 2000, 388.

8 See for example Rt 2000, 211 and Rt 2008, 765.

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18. Sweden

The main rule for liability in Swedish tort law is the *culpa* rule (but there are also many rules on strict liability). The Swedish Tort Liability Act ch 2, sec 1, states: 'Anyone who intentionally or by negligence causes personal damage or property damage shall be liable to pay compensation for such loss.' The language concerning the concept of misconduct (or *culpa*, negligence, etc) – in Swedish *vårdslöshet* or *vållande* – exhibits a static and simple image, by means of the correct conduct – whereby the non-conformity to this ideal can be categorised as misconduct (ie *culpa*). However, the argumentative way to arrive at this image consists of a broader evaluation of risks and risk allocation, not just the observance of the departure from fixed correct conduct. Instead of being a moralising term to describe a deviation from the already established 'right' action, the *culpa* test can be regarded as a method for balancing the components that speak for and against liability in a concrete situation. In this sense the *culpa* concept embodies a more objective assessment of the complex situation where the tortfeasor's conduct is placed. Especially concerning minors and mentally disabled persons, this objective *culpa* rule will lead to more conclusions of misconduct than a subjective assessment of the individual person's insights and so on. Since the concrete situation with all circumstances as regards the pros and cons is the basis for establishing misconduct (*culpa*), the concept of breach of duty is not a main factor in the Swedish discussion. The Swedish yardstick for deciding whether a person has been negligent or not will be demonstrated below in reference to the Supreme Court case NJA 2011, 454;[1] in short the evaluation deals with the risk of injury, the likely extent of the damage, availability and costs of alternative conduct and the tortfeasor's opportunities to realise the risk. The last factor can be seen as the subjective test, but the main interest concerns the first three objective factors. The legally interesting question is then, whether these factors – and their pros and cons as regards speaking for or against liability – can underpin the conclusions that the person should have chosen another way of behaving; ie that the chosen path can be considered as 'misconduct'.[2] **1**

1 3a/18 nos 1–5.

2 The most recent analysis of the *culpa* concept is *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 61–219. The leading textbooks are *B Bengtsson/E Strömbäck*, Skadeståndslagen (5th edn 2014) 54 ff and *J Hellner/M Radetzki*, Skadeståndsrätt (8th edn 2010) 127 ff. An older but still rewarding analysis is *A Agell*, Samtycke och risktagande (1962) 67 ff.

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19. Finland

1 The role of fault is essential in Finnish tort law. According to ch 2, sec 1 of the Tort Liability Act (TLA): 'A person who deliberately or negligently causes injury or damage to another shall be liable for damages, unless otherwise follows from the provisions of this Act.' So as a starting point, liability in tort requires fault, even though there are exceptions to this main principle. The idea behind this is that the damage could have been avoided if the perpetrator had acted more carefully. In Finnish terminology 'fault' or negligence, as a common concept, includes both intentional (*dolus*) and negligent (*culpa*) conduct.

2 Nowadays such small deviations from appropriate behaviour can be considered 'fault' or negligent in the tort law sense that one might not always talk about 'wrongfulness' when there is negligence at hand. 'Wrongfulness' or moral considerations have not played a remarkable role in the Finnish tort law jurisprudence and there is no discussion on wrongfulness as a requisite of negligence in the Finnish tort law literature.

3 The assessment of when there is fault/negligence may vary according to, for example, whether there are more precise regulations, guidelines or instructions in the field in question.[1] If more precise guidelines are lacking, the court can evaluate negligence by assessing how a careful person would have acted in such a situation, the importance of the violated interest, the extent of the risk of damage, the amount of possible damage, the costs of taking precautionary measures,[2] well-established practice, the nature of both the activities carried out and of the person or entity involved as well as the social utility of the activity.

4 In some fields of action, the standards of behaviour are set so high that to talk of 'fault' is perhaps questionable. In those areas of life where the standards of acceptable behaviour are high, Finnish legal scholars also talk of a 'heightened duty of

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1 See, eg, *M Hemmo*, Suomen vahingonkorvausoikeus (2005) 23–52; *P Tiilikka*, Sananvapaus ja yksilön suoja: Lehtiartikkelin aiheuttaman kärsimyksen korvaaminen (2007) 239–272; *V Hahto*, Tuottamus vahingonkorvausoikeudessa (2008) and *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 79–138 and eg KKO 1989:129 (see 3f/19 nos 1–9), KKO 1992:34, KKO 1992:68, KKO 2001:1, KKO 2003:70 and KKO 2010:28.

2 *M Hemmo*, Suomen vahingonkorvausoikeus (2005) 27. The author refers here to the Principles of the European Tort Law, art 4.102. Its first point reads as follows:
Required standard of conduct
(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.
The severity and likelihood of the damage are also mentioned as assessment criteria in a government bill on criminal negligence (Hallituksen esitys 44/2002, 95; hereinafter: HE 44/2002).

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care'. Such areas are, for example, arranging and organising public events, sporting activities or maintaining and managing shipping lanes, public roads and street maintenance.[3]

Tortious liability has expanded over time, but the importance of the 'fault principle' in tort law has diminished,[4] as the evaluation criteria of 'fault' have become more objective and the notion of risk-sharing has increasingly gained weight.[5] The element of reproach that has traditionally been part of fault has also diminished, because technological developments have given birth to new risks, which, in some cases, have been difficult to predict.[6] **5**

The duty of care obligations have been tightened in some areas – especially in high-risk areas – to such an extent that the difference between negligence and strict liability is very small.[7] That is why the evaluation of 'fault' does not necessarily have to include the notion of blame or at least obvious wrongdoing; rather it can serve as a normative risk-sharing factor.[8] According to Wilhelmsson, the objectification of tort law has occurred in part within the fault principle, meaning that the fault principle itself has been overlooked and its dominant position has remained unchallenged.[9] **6**

Liability in tort can also be based on strict liability. There are no sections or general rules on strict liability in the TLA, but some regulations exist in special laws, such as the Personal Data Act (523/1999; sec 47), the Act on Compensation for Environmental Damage (737/1994; sec 1), the Product Liability Act (694/1990; sec 3) and **7**

3 See *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 118–138 and eg KKO 1992:41, KKO 1997:151 and KKO 2001:1.

4 *H Saxén*, Skadeståndsrätt: Åbo (1975) 15: 'Påståendet att beteendet varit klandervärt behöver däremot inte innebara en moralisk dom, ett etisk ogillande.'; *H Andersson*, Skyddsändamål och adekvans. Om skadeståndsansvarets gränser (1993) 260, 267, 283, 285–287 and 327 f.

5 *H Andersson*, Skyddsändamål och adekvans. Om skadeståndsansvarets gränser (1993) 238 and 286–289. See also *T Wilhelmsson*, Senmodern ansvarrsrätt. Privaträtt som redskap för mikropolitik (2001) 202 f. As *I Englard* (The System Builders: A Critical Appraisal of Modern American Tort Theory, The Journal of Legal Studies 1980, 27, 28) states: 'The traditional concept of fault itself underwent change. The persistent tendency towards distributive aims weakened the idea of moral culpability by objectifying the elements of fault and causation.' The yardstick is objective (that of a reasonable person) instead of subjective.

6 *T Wilhelmsson*, Senmodern ansvarrsrätt: Privaträtt som redskap för mikropolitik (2001) 203.

7 *A Agell*, Samtycke och risktagande. Studier i skadeståndsrätt (1962) 86; *T Wilhelmsson*, Syyllisyys vahingonkorvausoikeudessa – "Tuottamusperiaatteen nousu ja tuho", Oikeus 1986, 115 and *T Wilhelmsson*, Senmodern ansvarrsrätt: Privaträtt som redskap för mikropolitik (2001) 202 f. See also *M Mononen*, Yritysten välinen tuotevastuu (2004) 229 f and 232 f. See KKO 2001:11 where a shopping centre was liable for compensation when a pane of glass that belonged to a wall structure fell on a customer and caused her bodily injury (in 7/19 no 3). The reason for the fall was unknown.

8 *H Andersson*, Skyddsändamål och adekvans: Om skadeståndsansvarets gränser (1993) 327 f.

9 *T Wilhelmsson*, Syyllisyys vahingonkorvausoikeudessa – "Tuottamusperiaatteen nousu ja tuho", Oikeus 1986, 115.

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the Nuclear Liability Act (484/1972; sec 12). Strict liability can also be established in court practice without any special provision in law. For example, a very dangerous activity, such as blasting, leads to strict liability.

8 The basic principle is that if there is fault, the perpetrator of the injurious act has to compensate for the entire damage. However, if the damage is greater than the perpetrator could have foreseen, there are exceptions to the aforementioned principle and liability is reduced. Moreover, if the nature of the damage differs from that which could have been foreseen, the perpetrator is not liable.[10]

9 The burden of proof rests with the claimant regarding the basis of liability and the extent of compensable damage.[11] However, in certain situations – such as heightened liability areas – the burden of proof may rest with the defendant. For example, in the event of an injury, the maintainer of public premises may be required to show that the premises were safe and no negligence occurred. This is based on case law.[12]

10 Negligence is based on conduct, not on the result. Moreover, if there is a special obligation to act, an omission can also lead to liability.[13] There is no age limit for tort law liability. According to ch 1, sec 2, if the injury or damage was caused by a person under 18 years of age, he/she shall be liable for damages to an amount that is deemed reasonable in view of his/her age and maturity, the nature of the act, the financial status of the person causing the injury or damage and the person suffering the same and other circumstances.

11 According to ch 2, sec 3, an insane, retarded or mentally disturbed person shall be liable for damages for injury or damage that he/she caused to an extent that is deemed reasonable in view of his/her condition, the nature of the act, the financial status of the person causing the injury or damage and the person suffering the same and other circumstances. However, a temporary, self-inflicted mental disturbance of the person causing the injury or damage shall not in itself be deemed a reason for reducing his/her liability for damages.

12 Usually even only slight negligence is sufficient to establish liability. However, some exceptions do exist. For example, according to ch 4, sec 1(1), if the negligence of the employee when he/she caused damage in the course of his/her work was merely slight, he/she shall not be rendered liable in damages. In this case only the

10 See closer *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 335–390 and KKO 2003:67 (in 14/19 no 9).

11 See the Code of Judicial Procedure (*Oikeudenkäymiskaari* 4/1734) ch 17, sec 1(1): 'In a civil case the plaintiff shall prove the facts that support the action. If the defendant presents a fact in his or her favour, also he or she shall prove it.' The unofficial translation by the Ministry of Justice can be found here: <http://www.finlex.fi/fi/laki/kaannokset/1734/en17340004.pdf>.

12 Eg KKO 1989:114 and KKO 2001:1.

13 See, eg, KKO 1996:117.

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employer is liable. According to subsec 2 of the paragraph, if the injury or damage was caused deliberately, full damages shall be payable unless it is deemed that there are special reasons for a reduction. What is said above applies when the question concerns the compensation of loss to a victim. Separate provisions apply to the liability for damages owed by an employee towards the employer for injury or damage caused at work. The degree of culpability is of significance also when the question relates to the compensation of mental distress (see ch 5, secs 4a and 6).

20. Estonia

In the Republic of Estonia, most of the provisions of the law of delict are stipulated in the Law of Obligations Act (LOA). General delictual liability (§§ 1043–1050) is built in three stages. As a general rule, objective elements (*objektiver Tatbestand*: the act of the person who causes damage, damage to the rights of the victim, and the causal link between them) are verified in the first stage; the second stage views unlawfulness and the third the fault of the person who causes damage.[1] Hence, unlawfulness on one side and the fault of the person who causes damage on the other are clearly differentiated. According to LOA, unlawfulness is an objective category. § 1045 (1) and (3) and §§ 1046–1049 of LOA establish when the causing of damage is considered to be unlawful (eg causing the death or injury of the victim, the violation of ownership or personality rights, etc). § 1045 (2) (1–4) of LOA establishes the circumstances that rule out the unlawfulness of an act (eg consent or self-defence). In the case of violation of absolute legal rights (eg human life, ownership), unlawfulness is based on the harmful result as such, whereas it is not important whether or not the defendant also violated any obligation. Unlawfulness arises from the wrongfulness of the outcome (*Erfolgsunrecht*). **1**

§ 1043 of LOA states that: 'a person who unlawfully causes damage to another person shall be liable for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law'. § 104 of LOA defines the types of culpability, namely negligence, gross negligence and intent. The fault of a defendant shall be assessed in relation to how the offence was committed, which means that whether the person causing the damage committed the offence intentionally or negligently will be examined. **2**

Within the meaning of § 1043 of LOA, the types of negligence are irrelevant in reference to the emergence of liability based on general delictual liability. § 1050 (1) of LOA stipulates a presumption of culpability of the tortfeasor, which, based on **3**

1 See *P Varul et al*, Võlaõigusseadus III. Kommenteeritud väljaanne [Law of Obligations Act III. Commented edition] (2009) 630.

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legal literature and judicial practice, means presuming negligence, not intent if the plaintiff has proven that the defendant committed an offence.[2]

4 Negligence is assessed in two stages. In the first stage, pursuant to LOA § 104 (3) and (4), an objective assessment is made of whether the tortfeasor observed the obligation to take all the care required (external negligence).

5 In the second stage, pursuant to LOA § 1050 (2), it has to be assessed whether the subjective characteristics of the tortfeasor even enabled him/her to observe the objective standard of care (internal negligence). Namely, § 1050 (2) of LOA establishes that the situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration. In essence, this means that the standard of care required from a person is ultimately established on the basis of the characteristics of the specific person and not those of an average reasonable person.

6 It has to be said that the practical significance of § 1050 (2) of LOA in Estonia has been limited because two important restrictions have been placed on the application of this provision in judicial practice. The first of these restrictions is that § 1050 (2) is only applied to the delictual liability of natural and not legal persons.[3] Secondly, Estonian judicial practice seems to support the restriction according to which the negligence of a tortfeasor is not subjectively assessed in the case of professional delicts (a doctor's liability, for instance).[4]

7 In recent years, Estonian courts have started to implement a delictual liability concept that is based on violation of the general duty to maintain safety, which enables the liability of a person to be based on their failure to act, ie on pure omissions. The issue of whether a violation of a general duty to maintain safety will be assessed on the level of unlawfulness or fault is not completely clear. The Supreme Court has found that duty to maintain safety is more likely to belong to the element of fault.[5]

8 In order to bring a person to justice under the general delictual liability provisions, the person must be capable of fault. § 1052 (1) of LOA states that: 'a person under 14 years of age shall not be liable for damage caused by himself/herself'. In

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2 LOA § 1050 lg 1 provides that: 'Unless otherwise provided by law, a tortfeasor is not liable for the causing of damage if the tortfeasor proves that the tortfeasor is not at fault of causing the damage.'

3 Supreme Court Judgment of 31 May 2007 on case No 3-2-1-54-07. The judgments of the Supreme Court are available in Estonian at: <www.riigikohus.ee>.

4 Supreme Court Judgment of 2 October 2006 on case No 3-2-1-78-06.

5 The Supreme Court has explained in its 20 June 2013 judgment on the case No 3-2-1-73-13 (see 3c/20 nos 1–6) that, since the general duty to maintain safety means duty of care in legal theory according to a generally recognised view, negligence is one of the forms of culpability under LOA § 104 (2), and LOA § 1050 (1) establishes that a person who unlawfully causes damage is presumed culpable, the defendant has the burden of proof in showing that it did not violate the general duty to maintain safety.

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addition to young age, lack of fault capacity may also be caused by a mental condition. § 1052 (2) of LOA provides that: 'a person shall not be liable for damage caused by himself/herself if he/she caused the damage in such a condition that he/she could not understand the meaning of or direct his/her acts. Temporary disorders caused by alcoholic beverages or narcotic or psychotropic substances shall be taken into consideration only in the case where the tortfeasor is in such a situation for a reason other than his/her own fault'. However, a person lacking fault capacity may still be liable under so-called justice or equitable liability.[6]

Besides liability based on fault, which still constitutes the main part of liability, Estonian law also provides for liability without fault such as a strict liability for major sources of danger (§§ 1056-1060) and product liability (§§ 1061–1067). 9

21. Latvia

Article 1635 (para 1) of the Civil Law of Latvia (*Civillikums*, CLL)[1] provides that every breach of a right, that is, every illegal act *per se*, shall give the victim who has suffered harm (also non-pecuniary harm), the right to claim satisfaction from the infringer, insofar as he/she may be held at fault for such act.[2] The norm also applies to 1

6 Namely, LOA § 1052 (3) states that: 'a person who, pursuant to sections (1) or (2) of this provision, is not liable for damage shall nevertheless be liable for damage caused by himself/herself if it would be unjustified with regard to the victim to release the person from liability considering the tortfeasor's age, state of development and mental state, the type of act, the financial situation of the persons concerned, including existing insurance or insurance which such persons could normally be presumed to have, and also other circumstances.'

1 Adopted on 28 January 1937, published by Valdības Vēstnesis, No 41, 20 February 1937. See also: The Civil Law of Latvia. Translation and Terminology Centre 2001, Unofficial translation: <http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Civil_Law.doc>.
The second paragraph of art 1635 CLL provides that a moral injury is physical or mental suffering, which is caused as a result of unlawful acts committed to the non-pecuniary rights or interests of the person who suffered the harm. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury.
The third paragraph of art 1635 CLL provides that if the unlawful acts referred to in section two of this paragraph are criminal offences against a person's life, health, morals, sexual integrity, freedom, honour, dignity or against the family, or minors, it is presumed that the person has suffered moral injury. In other cases moral injury shall be proved by the person who has suffered the harm.
The note at the end of art 1635 CLL provides that the term 'act' is used here in the widest sense, including not only acts, but also the failure to act, that is, omissions.
2 Please note that the unofficial translation of the CLL was prepared with assistance of foreign translators; the authors of the report do not agree that *tiesību aizskārums* (breach of rights) should be translated as 'delict', the term includes breach of contract as well.

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contractual liability. The aim of the CLL is to describe those acts which are a basis for liability in contrast to those which infringe the rights of another but do not fulfil the requirements for civil liability. Damage caused to the property of another may be considered a breach of rights, but does not cause a person to be held liable under tort law if a justification, such as self-defence or another, may be invoked. Therefore, the main objective when seeking a remedy is, first, to ascertain whether the conduct causes harm to another person and, second, whether the act or omission causing the harm is contrary to the required standard of conduct and there is no justification for such conduct. Latvian law does not explicitly contain the term 'wrongfulness'. The term 'illegal act' is used as an equivalent to a 'wrongful act'.

2 The notion of an illegal act as a precondition for tortious liability also includes culpability ('insofar as he/she may be held liable for such act'). A person is liable for an intentional or negligent wrongful act (special rules apply in cases of strict liability). However, determining the wrongfulness of conduct involves an evaluation of illegality. Article 1645 CLL contains a definition of gross negligence[3] and art 1646 a definition of ordinary negligence.[4] In court practice on torts, the degrees of negligence are of little importance as the principle of full compensation for damage is common in all cases and the person is liable for all degrees of negligence. A person may be exempted from liability for an abnormally dangerous activity if the victim (not wrongdoer) acted wilfully or with gross negligence.[5] The degree of negligence is also relevant in cases of contributory negligence.

3 It is clear that intent describes the state of mind of a person. Negligence may be proved by evaluating the illegal act or omission using an objective standard of conduct – one of a reasonable person. Any evaluation of illegality of conduct includes an assessment of whether the person may be held at fault (culpable) for such act.[6] Intent or negligence is not qualified as independent prerequisites of liability. Of course, the legal capacity to be liable for a tort (at least seven years old, having the

3 A person acts with gross negligence if his/her conduct is reckless and careless in the highest degree; or if he/she acts with less care towards the property of another entrusted to him/her than he/she would apply to his/her own property; or if he/she initiates a course of action, the harmfulness and dangerousness of which could not and should not have been unknown to him/her.

4 Ordinary negligence shall be considered to be that lack of care and due diligence as must be observed by any reasonably prudent and careful manager (*bonus pater familias*).

5 *J Kubilis*, Atbildības par paaugstinātas bīstamības avota radītu kaitējumu problemātika un modernizācija [Problems and the Modernisation of Liability for Damage Caused by Ultra Hazardous Activities], Tiesību efektīvas piemērošanas problemātika. Latvijas Universitātes 72. zinātniskās konferences rakstu krājums (Rīga, LU Akadēmiskais apgāds 2014) 199–207.

6 *K Torgāns*, The Concept of Fault in Latvian Contract Law Requires Adjustment: Humanities and Social Sciences Latvia. University of Latvia 2003, No 3, 96; *J Karklins*, Main Modernization Directions of the Latvian Contract Law. Summary of a doctoral thesis for the acquisition of a Doctor's degree in Jurisprudence (Riga 2006); *K Torgāns*, Saistību tiesības [Obligation Law] (Rīga 2014) 171.

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mental or physical ability to understand or control his/her conduct) is of importance.

Tortious liability emerges from a breach of provisions of the law in the broadest sense,[7] not only the provisions set by statutory law, but also the principles of law, the practice of Latvian courts and of the European Court of Human Rights (ECtHR) and soft law is also taken into consideration. Requirements for many activities are set by imperative rules, including instructions, acts of standardisation and safety rules which prescribe or forbid certain conduct. A certificate, a licence or a special qualification is required for many professions; a maximum age limit is set for some specialities (police, judges, etc). Such requirements constitute the basis for an objective standard of conduct although in cases where no strict rule or norm set by the authorities exists, the criteria of a reasonable person and details of the circumstances are taken into account. For the last ten years it has been accepted in court practice that culpability is not a separate prerequisite to qualify an act as illegal. Instead the question of fault (with uncertain definitions) and the question of justifications should be considered. The illegality of conduct involves an assessment of whether or not such conduct is justifiable in the particular set of circumstances. The CLL contains defences based on justifications similar to those provided by art 7:101 of the Principles of European Tort Law (PETL). **4**

European directives on product liability as a kind of strict liability have been implemented into Latvian law. Defences against strict liability similar to art 7:102 of the PETL are provided by legal rules on liability for abnormally dangerous activities. The liability for damage caused by abnormally dangerous activities would also be considered strict and was introduced in the CLL by amendments dated 22 December 1992.[8] Unlawfulness of an act or an omission are not required as a prerequisite of liability in strict liability cases as the liability is based on the outcome and materialisation of a certain risk created by the activity. Generally, liability is imposed if damage was caused to another by the realisation of the risk unless any of the justifications set by law may be invoked. **5**

7 *A Bitāns*, Civiltiesiskā atbildība un tās veidi [Civil Liability and its Types] (Rīga 1997) 177.

8 The second paragraph of art 2347 CLL provides that a person whose activity is associated with increased risk to other persons (transport, undertakings, construction, dangerous substances, etc) shall compensate for losses caused by the source of increased risk, unless the person proves that the damage has been caused by *force majeure*, or by the victim's own intentional act or gross negligence. If an object of increased risk has left the possession of an owner, holder or user, without contributory negligence of the latter, but as a result of unlawful actions of another person, such other person shall be liable for the losses caused. If the possessor (owner, holder, user) has also acted unjustifiably, both may be held liable for the losses caused, taking into account the extent of each person's fault.

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22. Lithuania

1 Unlawfulness, fault, damage and causation are the four prerequisites of delictual liability in Lithuanian law. Unlawfulness is the core of delictual liability, according to legal writings and the case law of Lithuanian courts. Although other elements – damage, causation and fault – are not less important, an inquiry as to the establishment of delictual liability always starts from unlawfulness: if unlawfulness is not present, the inquiry stops at this stage.

2 Article 6.263(1) of the new Civil Code of 2000[1] (CC), which sets out the basic norm of delictual liability, indicates that: 'Every person has a duty to abide by the rules of conduct so as not to cause damage to another by his actions (active actions or omissions)'.[2] However, this rule does not indicate particular bases for liability. The norms of the CC, applicable both to contractual and delictual liability, present the statutory definitions of all elements of liability. It is clear from arts 6.246(1) and 6.248(3) CC that Lithuanian law makes a distinction between 'unlawfulness' and 'fault' both in contractual and delictual liability. Article 6.246(1) CC describes unlawfulness: civil liability shall arise from the non-performance of a statutory or contractual duty (unlawful omission), or from the performance of actions that are prohibited by laws or a contract (unlawful acts), or from violation of the general duty to behave with due care. Though the Lithuanian doctrine and case law has not *expressis verbis* elaborated on the issue of whether unlawfulness is based on the behaviour or on the result, a thorough analysis of the case law enables the conclusion to be drawn that, under a fault-based liability regime, the behaviour of the tortfeasor is relevant. Article 6.248(3) CC provides the following definition of fault: a person shall be deemed to have committed fault where, taking into account the essence of the obligation and other circumstances, he failed to behave with the care and caution necessary in the corresponding conditions. Fault is not a prerequisite of delictual liability in the case of strict liability; however unlawfulness, at least theoretically, is. The concept of unlawfulness shifts to unlawfulness based on result in strict liability cases. Therefore, in strict liability cases, the mere fact of damage infliction is unlawful.

3 Lithuanian law, influenced by Soviet law, embodied a subjective concept of fault identical to the concept in penal law until the 1990s. During the first years of independence, the concept of fault underwent tremendous change and the subjective concept of fault was rapidly abandoned. Nowadays both legal doctrine[3] and

1 Entered into force on 1 July 2001.

2 Authors' translation.

3 *V Mikelėnas et al*, Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I) [Commentary of the Lithuanian Civil Code. Sixth Book. Law of Obligations (I)] (2004) 339; *V Mizaras*, Lietuvos deliktų teisės raidos aktualijos ir tendencijos [Issues and tendencies of devel-

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case law accept that the objective yardstick of *bonus pater familias* is to be used to establish whether or not a tortfeasor acted negligently. Therefore it is currently undisputed that the concept of fault is objective, with several exceptions, which are noted as follows. First, intentional fault, which requires a mental element. Second, in accordance with art 6.275 CC, a person under the age of 14 is never liable for damage inflicted, and, according to arts 6.268(1) and 6.278(1) CC, a person who was mentally incompetent at the time of the conduct causing the legally relevant damage (either declared legally incapable[4] or not) is generally not liable for the damage inflicted. These provisions are apparent remnants of the subjective concept of fault.

4 The cited provisions of arts 6.246(1) and 6.248(3) CC indicate that both unlawfulness and fault are connected with the behaviour of the tortfeasor. As both elements – unlawfulness and fault – embody an objective assessment of the tortfeasor's conduct, the question as to the nexus between them is not an easy one. Some scholars argue that, in the case of a breach of the general duty to behave with due care, unlawfulness is absorbed by fault, while in the case of a breach of a statutory duty, fault and unlawfulness must be examined separately.[5] Others say that since fault is objective, the mere fact of damage presupposes fault, and therefore the tortfeasor may escape liability only on the ground of exoneration.[6] The courts seem to adhere to the first position.[7]

5 According to art 6.248(1) CC, the fault of the debtor[8] is presumed. Authors arguing that unlawfulness is absorbed by fault in the case of a breach of the general duty to behave with due care claim that a presumption of fault means a presumption of unlawfulness.[9] Others say that fault is to be presumed as soon as the victim has

opment of Lithuanian tort law], in: V Mizaras (ed), Šiuolaikinės civilinės teisės raidos tendencijos ir perspektyvos: mokslinių straipsnių rinkinys [Trends and perspectives in the development of contemporary civil law] (2007) 51, 61 ff.

4 After the legislative reform that took place in 2015, persons are recognised mentally incompetent in a particular sphere (spheres) rather than declaring them fully mentally incompetent.

5 *V Mizaras*, Lietuvos deliktų teisės raidos aktualijos ir tendencijos [Issues and tendencies of development of Lithuanian tort law], in: V Mizaras (ed), Šiuolaikinės civilinės teisės raidos tendencijos ir perspektyvos: mokslinių straipsnių rinkinys [Trends and perspectives in the development of contemporary civil law] (2007) 51, 67 ff.

6 *V Mikelėnas et al*, Lietuvos Respublikos Civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė (I) [Commentary of the Lithuanian Civil Code. Sixth Book. Law of Obligations (I)] (2004) 340.

7 2/22 nos 9 and 20.

8 The concept 'debtor' in the CC includes both the contractual debtor and the tortfeasor.

9 *V Mizaras*, Lietuvos deliktų teisės raidos aktualijos ir tendencijos [Issues and tendencies of development of Lithuanian tort law], in: V Mizaras (ed), Šiuolaikinės civilinės teisės raidos tendencijos ir perspektyvos: mokslinių straipsnių rinkinys [Trends and perspectives in the development of contemporary civil law] (2007) 51, 68 ff.

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proved unlawfulness.[10] There is no clear tendency in judicial practice regarding this issue.

6 According to art 6.248(2) CC, there are two categories of fault – intent and negligence. Though not explicitly mentioned in art 6.248 CC, the latter is divided into two sub-categories – gross and simple negligence. The CC contains definitions of neither intent or negligence nor of sub-categories of the latter. The degree of fault is irrelevant to the establishment of liability. However, it plays an important role in some situations, eg, an exemption clause would not be applied to damage caused by intent or gross negligence (art 6.252(1) CC); intent or gross negligence of the victim is required in the framework of strict liability of the owner (keeper) of buildings and other constructions (art 6.266 CC); liability of the owner (keeper) of domestic or wild animals kept captive (art 6.267(1) CC); and liability of the keeper of an object of a higher danger (art 6.270(1) CC), to justify exoneration or reduction of the amount of compensation; etc.

7 The peculiarity of Lithuanian tort law is that, in the mentioned art 6.270(1) CC, it contains a broad rule on strict liability, according to which a keeper of an object of a higher danger is strictly liable for the damage inflicted in the course of operation of such an object. There is no exhaustive list of the objects of a higher danger in the laws. According to case law, the concept is broad enough as to encompass not only 'traditional' objects deserving strict liability, such as motor vehicles, mechanisms, explosives or poisonous substances, but water slides at amusement parks,[11] or a horse ridden during a horse riding session.[12] However, liability based on fault still lies at the core of Lithuanian tort law.

8 As to the conditions of capacity for delictual liability, according to art 2.7 CC, 14 years is a fixed age limit, below which a minor lacks legal capacity. According to art 6.275 CC, under no circumstances may a minor of younger than 14 years old be liable in tort for damage caused.[13] Articles 6.268(1) and 6.278(1) CC provide that

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10 *A Norkūnas*, Kaltė kaip civilinės atsakomybės pagrindas [Fault as the basis of civil liability], Jurisprudencija No 28(20) (2002) 115, 117 ff.

11 *JL v Ergo Lietuva and UAB 'Druskininkų vandentiekis'*, LSC 18 November 2011, case No 3K-3-446/2011, commented by *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: K Oliphant/BC Steininger (eds), European Tort Law (hereinafter: ETL) 2011 (2012) 386, nos 33–42. The rule confirmed in *RG v Ergo Lietuva and UAB 'Druskininkų vandentiekis'*, LSC 13 February 2012, case No 3K-3-13/2012, commented by *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: K Oliphant/BC Steininger (eds), ETL 2012 (2013) 421, nos 37–45.

12 *BD v VšĮ 'Elite mind' and LA*, Vilnius District Court 26 May 2014, case No 2A-686-565/2014. Article 6.267(1) CC was chosen as the ground for the liability of the training centre providing riding lessons. Because domestic and wild animals kept captive are considered as a sub-category 'object of a higher danger', this decision demonstrates the broad understanding of the concept of the object of a higher danger.

13 8/22 no 4.

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a person who was mentally incompetent at the time of conduct causing legally relevant damage (either officially declared legally incapable or not) shall not be held liable, subject to several exceptions.[14] However, according to art 6.268(1) CC, a person who was mentally incompetent at the time of conduct causing legally relevant damage shall not be exempted from liability if the state of incapacity was self-inflicted due to the use of alcohol, narcotics or psychotropic substances, or in any other way.

23. Poland

Polish tort law has the 'general clause model', according to which tortious liability is based upon fault. However, the Polish Civil Code, like other European codes, does not define the term or concept of fault. The general clause is supplemented by a number of separate provisions located in the Civil Code and in other pieces of legislation, which regulate tortious liability in some specific situations. While some of them are also based on fault, others are examples of strict liability or liability based on equity. Article 415 of the Civil Code (*kodeks cywilny*, KC), and before it art 134 of the Code of Obligations of 1933 with exactly the same wording, followed art 1382 of the French *Code Civil*. By virtue of art 415, 'Whoever by his fault caused damage to another, is obliged to repair it.' Indeed there are two very similar general clauses in the Civil Code: one for tortious liability of physical (scil orig. 'kto' – who, anyone) persons (art 415) and one for legal persons (art 416: liability of legal persons for damage caused due to the fault of their 'organs'). **1**

The drafters of both the Civil Code and the Code of Obligations discussed whether the wording of the clause should in fact mention both fault and wrongfulness. The final decision was to follow the French example. However, both academics and the courts agree that two necessary elements are needed to establish fault that leads to liability: an objective element – wrongfulness (*bezprawnosc*)[1] and a subjective element – fault *sensu stricto* (*wina*). There has remained some controversy in the doctrine as to the relation between wrongfulness and fault. The contemporary tendency is to accept that fault is a distinct, subjective and narrower notion and wrongfulness is an independent prerequisite of liability. Most scholars focus on their common function and their relationship to one another, arguing that wrongfulness is a necessary prerequisite of fault. The courts follow the latter approach.[2] **2**

14 10/22 nos 4–5.

1 Polish legal writers are divided as to whether one should refer to one notion of unlawfulness in the law or a plurality of its many types (criminal, civil, public).

2 SN of 24 November 1998, I CKU 87/98, Prokuratura i Prawo 1993, no 3, item 31.

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3 Wrongfulness is linked to legally established norms of behaviour, which can be contained in generally binding laws (not limited to civil law), or in other general norms of a moral or ethical nature (such as general clauses of proper conduct and the principles of community life). While in most cases the general clauses constitute the basis for the determination of wrongfulness when they are part of a specific legal provision, at times they also establish general standards of conduct independent of any legal provision.

4 Polish tort law assesses wrongfulness of conduct solely by reference to that conduct. In this context the result of the conduct – damage – is not taken into consideration. Thus, it is not the damage (injury) but the manner in which it is caused which forms the basis for the determination of wrongfulness.[3] However, in some cases the damaging result can help to establish fault through factual presumptions.

5 Fault is defined as the subjective, blameworthy nature of a person's conduct, blameworthiness concerning foreseeability of consequences and will.[4] It can thus be said that it is an unacceptable mental attitude towards one's own unlawful conduct. Again, it is not the result but only the conduct which is taken into account in any determination of fault. The defendant is held to be 'at fault' because, in the particular circumstances, he/she failed to behave in a way he/she should have, and could have, behaved. According to the prevailing normative theory of fault, the tortfeasor's attitude is judged objectively. The objectivisation of fault brings it closer to unlawfulness, and supports the monist approach to the concept of 'fault'.[5]

6 The standard of care is addressed in art 355 KC and it is common to contractual and tortious liability. A person is obliged to exert the level of care generally required in relations of a given type, and the appropriate level of care of the debtor within the scope of his/her business activity shall be assessed with consideration to the professional nature of that activity. It is normally not the highest possible or the average level of care which is sought in individual cases but rather an optimum level of care in a particular situation. What is generally required in relations of a particular type depends upon a whole array of factors including the general state of the art, vocational principles, the development of science, the type of relation in question, the position and profession of both parties, as well as some external factors, such as the time and place, weather conditions, availability of specialist equipment, etc.

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3 See *E Bagińska/M Tulibacka*, Poland, in: I Boone (ed), International Encyclopaedia for Tort Law (2014) nos 41–49 ff.

4 *W Czachórski*, Zobowiązania. Zarys Wykładu (2002) 203.

5 See *B Lewaszkiewicz-Petrykowska*, Wina jako podstawa odpowiedzialnosci z tytulu czynow niedozwolonych [Fault as a pre-requisite of tortious liability], Studia Prawno-Ekonomiczne 2 (1969) 92 ff.

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The construct of appropriate level of care is a relatively objective one. A court construes a model of appropriate care based on a category of people to whom the wrongdoer belongs, and not based on a particular person in question. 7

Polish civil law does not use the notion of duty of care. There is no positive general obligation to prevent damage or injury to others. However, it must be said that, in the light of the wide scope of the concept of wrongfulness, a distinct concept of duty of care is not necessary. Legal norms and moral and ethical rules contained in general clauses such as the principles of community life establish a wide catalogue of duties. This catalogue is a true counterpart to the general concept of duty of care. 8

Apart from the prerequisite of wrongfulness and fault, two other factors need to be considered. One of them is mental capacity (sanity) of the wrongdoer. Some mental disorders would exclude the possibility of assigning fault to the tortfeasor and, in consequence, would not lead to the establishment of liability. A person who, for whatever reason, is in a state which prevents them from making a conscious or free decision and from expressing their will is not liable for damage caused when in such state (art 425 § 1 KC). 9

Typical circumstances which exclude the tortfeasor's mental capacity include: mental illness, mental retardation, other mental impairments, blindness and other disabilities. 10

There is an exception to the rule stated in art 425 § 1 KC. According to art 425 § 2 KC, a person who has been subjected to a disturbance of mental functions due to the use of intoxicating beverages or other similar substances is obliged to redress the damage, unless the state of disturbance was caused through no fault of his own. In the light of this rule, the degree of the limited state of sanity does not affect the liability of the tortfeasor. 11

Finally, fault can be dependent on the age of the wrongdoer. According to art 426 KC, a minor who has not attainted the age of 13 is not liable for any damage he/she causes. It is well established that this rule excludes liability of minors under 13 years of age solely in situations when liability is based on fault. The justification for such a regulation is a common belief that children under 13 normally lack common sense and the life experience necessary to properly control their behaviour. Accordingly, art 426 KC does not exclude the liability of minors when the liability is strict or based on equity. 12

Notwithstanding the above, it is disputed whether minors over the age of 13 are in principle usually capable of being held liable based on fault or whether that matter should first be subject to the burden of proof which lies with the victim. 13

The burden of proof of fault normally rests upon the injured party (victim) unless stated otherwise.[6] However, the application of legal presumptions leads to a 14

6 According to art 6 KC, the burden of proof relating to a fact rests on the person who attributes legal consequences to that fact.

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reversal of the burden of proof. Moreover, in some specific types of cases, for example medical malpractice cases, courts tend to use different legal constructions that reverse the burden of proof of fault. A typical construction used in court practice is prima facie evidence. Other constructions used by the courts that ease the burden of proof but should not lead to its reversal are factual presumptions.

24. Czech Republic

General Introduction

1 Wrongfulness as a prerequisite for delictual liability had its basis until 2014 in sec 420 or sec 415 Civil Code 1964 (CC), which remained essentially unchanged even after fundamental changes in civil law legislation following the adoption of the new Civil Code with effect from 1 January 2014 (NCC) (secs 2900, 2909, 2910 and 2913 NCC).

2 This general prerequisite was laid down by the CC in sec 420 para 1, with the result that liability arose for damage if the damage was caused by a '*breach of a legal duty*'. This duty also included a duty of prevention, ie a duty to act in a manner which would '*... prevent damage to health, property, nature and the environment*' (sec 415 CC).

3 In order for liability to be established under the current legislation, there has to be a breach of a duty '*laid down by law*', which constitutes an interference with '*erga omnes* right of the victim' (sec 2910 NCC). A person who causes damage by the intentional violation of *good morals* (sec 2909 NCC) or who breaches a contractual duty (sec 2913 para 1 NCC) is equally liable. The duty '*laid down by law*' shall also be understood as a duty to act in a manner that does not unjustifiably damage the freedom, life, health or property of another person (sec 2900 NCC).

4 Legal theory begins with the opinion that the first prerequisite of delictual liability is the existence of a wrongful action, which is an act in violation of law, including acts which violate the interests in sec 415 CC (now sec 2900 NCC). It is not decisive whether the act violates a statute or other legislation or breaches a contract. Breach of contract is considered equivalent to a violation of a statutory duty.[1]

5 Wrongfulness imports an objective standard, and therefore it is not necessary to examine whether the wrongdoer knew that he/she was violating a duty, whether he/she intended to violate the duty, or whether or not he/she intended to cause damage.[2]

1 *J Lazar/J Švestka et al*, Občanské právo hmotné [Substantive Civil Law] (1987) vol I, 474.
2 Ibid, 474.

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Definition of Basic Terms

It can be concluded from the above positions of case law and legal theory that wrongful conduct is not a condition of so-called strict (*objektivní*) liability which, regardless of wrongfulness, is imposed to compensate damage resulting from a legally defined damaging event. The word *objektivní*, which emphasises the lack of a subjective element of the action and wrongfulness, is merely another expression for strict liability. In these cases it is assumed that the action of the liable person was legal but nevertheless damage resulted. This is typically the case of liability for operating activities or related activities as, for example, the rendering of services.[3] 6

a) Relevance of Conduct

Liability based on fault represents so-called liability for conduct (*Verhaltenshaftung*) whereas liability without fault (strict liability) is a case of liability for the result (*Erfolgshaftung*). In the latter case, the relevant fact is the unlawful state, which is the result of a certain defect often independent of the will of the liable person and therefore no link to a certain conduct is required. 7

b) Burden of Proof

The burden of proving all of the elements of delictual liability is borne by the claimant. Therefore, also the existence of wrongful conduct or wrongfulness has to be proven by the victim. In the case of delictual liability, there is no case where there could be a reversal of the burden of proof. 8

The NCC however makes a breakthrough because, in the case of fault, it constructs a 'fiction of fault', which results in a general reversal of the burden of proof[4] in respect of this prerequisite of delictual liability. The previous legal regulation did not contain an explicit regulation thereof, and the presumption of fault was based only on case law. 9

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3 That is the case of secs 420a, 421, 421a, 427 ff CC and secs 2924–2950 NCC. See sec 421a CC: '(1) Any person shall also be liable for damage caused by circumstances which have their origin in the nature of an instrument (equipment) or another thing which he used in performing an obligation. There can be no exemption from such liability. (2) Liability pursuant to subsection (1) also applies to the rendering of health, social, veterinary and other biological services.' and sec 2946 para 1 NCC: 'A person who regularly operates accommodation services shall provide compensation for the damage caused to a thing which a guest brought to the premises reserved for accommodation or the storage of things, or to a thing which was taken there for the guest. This also applies where a thing was taken over for that purpose by the accommodation provider.'

4 Section 2911 NCC.

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10 The burden of proof lies on the respondent (wrongdoer) when he/she wants to exculpate or exempt himself/herself from liability in the case of liability without fault.

c) Wrongfulness and Fault

11 The present concept of delictual liability presupposes a clear distinction between its respective elements. Correspondingly, a clear line can be drawn between wrongfulness and fault. While wrongfulness denotes a violation of a duty imposed by law (or failure to comply with that duty – see 2/24 nos 15–20), ie conflicting with law, fault is generally understood as a state of mind of the liable party towards his/her own (wrongful) conduct as well as to the damage resulting from it (see 6/24 nos 1–25).

12 Fault alone without wrongful conduct is insufficient for establishing liability under the regime of liability based on fault. Therefore, it is possible to speak about the cumulative application of delictual liability elements, where the existence of one, however, does not depend on the existence of another.

d) Breach of a Duty

13 Under sec 420 CC, a duty imposed by law must have been violated in order to qualify as wrongful conduct. The NCC is based on a similar concept, which classifies a violation of a duty imposed by law (sec 2910) as well as a violation of a duty arising from a contract (sec 2913) as wrongful conduct. In exceptional circumstances even conduct intentionally violating *bonos mores* is included (sec 2909).[5]

14 In contrast to this, in the case of strict liability, ie liability without fault, wrongfulness relates to the actual result, in other words to the unlawful nature of the consequences which arise.

e) Delictual Capacity

15 Delictual liability, ie the consequences of tortious conduct, in the majority of cases relates to fault. The wrongdoer must be aware and consequently capable of judging his/her own actions and their consequences. Furthermore, he/she must be in the position of having control of his/her own conduct. Only if these criteria are fulfilled may he/she be held liable for unlawful conduct.

16 It follows from the aforementioned that there are cases when even minors may fulfil the elements of liability. However, their liability must always be assessed with respect to their particular personal abilities. This results from the provisions accord-

5 See 1/24 no 17.

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ing to which a minor is a person who has not yet gained full capacity to act and is liable based on his/her personal abilities (sec 24 NCC). However, full capacity is gained at the age of 18 (sec 30 NCC).

f) Fault

The NCC is based on the concept of liability based on fault, which constitutes a general rule. Only in exceptional cases and if explicitly provided by the Code does strict liability arise. Where fault is presumed, the law requires negligence. The intentional form of fault is provided only in the case of a breach of good morals.[6] In contrast to criminal law and to the Austrian approach, the abilities of the wrongdoer are assessed objectively[7] and not on an individual basis. However, recently a tendency to advocate the more subjective approach has been observed in doctrine.[8] **17**

25. Slovakia

As a result of the social development in the past[1], compensation for damage in civil law is contained in several statutory regulations/codes. The Civil Code (Act 40/1964 Zb as amended) deals with compensation for damage in Part VI , §§ 415-450. Liability defined as general liability for damage applies in all cases, unless special liability applies. The Commercial Code (Act 513/1991 Zb, as amended) deals with compensation for damage in commercial relations, in the part entitled 'Breach of Contractual Obligations and Consequences' (Part X, Title 3, § 373 ff). The obligation to compensate damage also accordingly relates to the damage caused by a breach of a legal obligation (§ 757 of the Commercial Code). Compensation for damage in labour law is dealt with in the Labour Code (Act 311/2001 Zz). **1**

In theory, civil liability for damage is explained as a secondary obligation occurring whenever a primary legal obligation has been breached. This concept, which was formulated already in the 1950s[2] and which was taken over by legal science and **2**

6 Cf sec 2909 NCC, see 1/24 no 3.

7 See *J Lazar/J Švestka et al*, Občanské právo hmotné [Substantive Civil Law] (1987) vol I, 466 f.

8 Cf comments on sec 2911 NCC by *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník – Komentář [Civil Code – Commentary] (2014) 946, 947.

1 Slovakia became a sovereign state after the dissolution of former Czechoslovakia on 1 January 1993. During the existence of the common state and for a long time afterwards (until 31 December 2013) the same or a slightly different Civil Code was applied. Thus, case law based on the previous common legal order still influences jurisprudence and legal practice.

2 *V Knapp*, Některé úvahy o odpovědnosti v občanském právu. Stát a právo I (1956) 66 ff; *Š Luby*, Prevencia a zodpovednosť v občianskom práve, in: Vydavateľstvo slovenskej akadémie vied (1958);

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judicial practice also after the political changes in 1989, generally still prevails nowadays. For general liability for damage to arise, various prerequisites must exist (§ 420 (1)[3] and (3)[4] of the Civil Code). Such prerequisites for liability include: a) a breach of legal obligation, b) resulting damage, c) a causal relationship between the breached legal obligation and the resulting damage and d) fault. The prerequisites under (a)–(c) are objective in nature, and their existence must be proved by the aggrieved person. Fault is a subjective element and its existence in the form of unintentional negligence is presumed by law (§ 420 (3) of the Civil Code). The wrongdoer (defendant) must prove that no damage was caused by him/her. For liability for damage to arise irrespective of fault (so-called objective or strict liability), the existence of unlawfulness is sufficient.

3 The duty to compensate damage, which arises as a result of a breach of a legal obligation, is provided for in § 420 (1) of the Civil Code. Under such circumstances, the wrongful conduct is designated as delinquent, a delictum/delict. Generally, the term delict/delictum refers to a legal obligation which has been breached. In some cases, the term delictum/delict is also used in a broader sense, meaning a breached duty arising from a contractual relation.

4 The prevailing opinion is that conduct is wrongful when it is contrary to an objective right infringing on the subjective right of the aggrieved.[5] Wrongful conduct can be either an act or omission, which is *contra legem* or *fraudem legis*, in cases of a violation of a subjective right (§ 3 of the Civil Code)[6] or conduct which is not consistent with proper morals (§ 424 of the Civil Code).[7] A legal obligation:

a) may be directly stipulated by law or other statutory regulations governing objective rights; there is a conflict whenever a legal rule, whether civil, criminal, or administrative or any other norm has been violated. However, in considering wrongfulness, the legislative purpose of the legal rule is taken into account;
b) may arise from contractual relations (*lex contractus*). The Civil Code makes no distinction between an obligation arising from a legal rule (*ex lege*) or one aris-

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J Švestka, Odpovědnost za škodu podle občanského zákoníku (1st edn 1966); *M Knappová*, Povinnost a odpovědnost v občanském právu (1st edn 1968); *J Macur*, Odpovědnost a zavinění v občanském právu (1st edn 1980).

3 § 420 (1): 'Any person is liable for damage which he caused by breaching a legal obligation.'

4 § 420 (3): 'A person shall be relieved of the said liability if he proves that he did not cause damage.'

5 *K Eliáš et al*, Občanský zákoník – Velký akademický komentář, vol 1 (2008) 795.

6 § 3 (1): 'The exercise of rights and performance of duties arising from civil law relations may not, without legal grounds, encroach upon the rights and justified interests of others, and may not be inconsistent with the principles of proper morals.'

7 § 424: 'Any person who causes damage by an intentional contravention of proper morals shall be liable for the damage.'

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ing from a contract (*ex contractu*), a breach of obligation has equal standing in both cases;[8]

c) consists of the non-observance of the general standard of conduct (in breach of general preventive care under § 415 of the Civil Code[9]). According to this provision, if there is no express legal rule governing the conduct, any conduct or behaviour may be unlawful/wrongful when the person did not act with such care as to avert any damage. However, not every conduct resulting in damage will necessarily be a violation pursuant to § 415 of the Civil Code or considered unlawful.[10]

Wrongfulness does not exist where the conduct is consistent with law; the individual acted in self-defence (§ 418 (2) of the Civil Code) or of necessity (§ 418 (1) of the Civil Code); the individual was fulfilling an obligation imposed by law (§ 3 of the Civil Code), unless in the case of abuse of law or conduct inconsistent with proper morals. In cases of self-help under § 6 of the Civil Code, or in cases where the injured party consented (*volenti non fit injuria*), unlawfulness is excluded. The circumstances excluding unlawfulness must be proved by the wrongdoer. **5**

Fault represents a subjective category, the wrongdoer's mental state in relation to his/her conduct and its consequences,[11] manifested by the unity of the two elements – his/her will and intellect. Law expects that both elements are fulfilled when a person comes of age; for the tortious liability of minors (under the age of 18) and of those suffering from a mental disorder to be established, a special regime has to be applied.[12] **6**

The relationship between unlawfulness and fault may be described as follows: unlawfulness is present when specific conduct (act or omission to act) is compared with the prescribed model (standard) primarily set by a legal norm or a contract, irrespective of the intent or negligence of the actor. On the other hand, the fault of the actor who has caused damage represents a subjective category,[13] resting on the **7**

8 This is the theory of the so-called uniform concept of liability in civil law. See *V Knapp*, Některé úvahy o odpovědnosti v občanském právu, Stát a právo I (1956) 67 f.

9 § 415: 'Everybody is obliged to behave in such a way as to avert damage to health and property and to nature and the living environment.'

10 Cf Judgment of the Supreme Court of the Czech Republic of 25 June 2002, Case No 25 Cdo 1400/2000.

11 There is no civil law theory concerning fault/culpability and in interpreting this subjective element, reference is made to the theory of criminal law.

12 § 422 (1): 'A minor … is liable for damage he causes if he is capable of controlling his own conduct and judging its consequences, while anyone who has a duty to exercise supervision over the person shall be jointly and severally liable with him.'

13 Sometimes the tendency to 'objectify' fault is apparent. See Case No 25 Cdo 2542/2003 under 3a/25 nos 1–4.

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intensity of his/her understanding of the consequences of acting in conflict with the law. Unlawfulness does not always have to be connected with fault. This also means that the term unlawfulness does not have to be interpreted so broadly as to also include the actor's mental state, and *vice versa*, important aspects of the human will, such as acting with the necessary care/attention, prudence and alertness, cannot be separated from the term fault.[14]

26. Croatia

1 Misconduct in Croatian law is often dealt with under the notion of unlawfulness (in Croatian: *protupravnost*). Unlawfulness in civil liability is perceived by Croatian legal theory[1] and jurisprudence[2] as a complex notion consisting of an objective and a subjective element. Unlawfulness in an objective sense is described as behaviour contrary to the legal rules or legal order in general.[3] Unlawfulness in a subjective sense is fault,[4] often described as a tortfeasor's subjective (psychological) attitude towards the wrongful act.[5] Unlawfulness (in an objective sense) is considered a general condition of civil liability which must be met in order to invoke any type of liability, including strict liability,[6] whereas fault is considered a special condition of liability which must be met only in cases of fault-based liability.

2 This dual-component concept of unlawfulness has obviously been influenced by the French notion of *faute*. However, although the Croatian civil liability system was created under considerable influence from the French *Code Civil*, Croatian civil law has obviously departed from its French model and has divided the French concept of *faute* into two separate elements: unlawfulness and fault. Therefore, when unlawfulness is referred to in the course of Croatian law, this term should be understood in the objective sense whereas unlawfulness in a subjective sense or fault is generally treated separately from unlawfulness in an objective sense.

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14 *J Macur*, Odpovědnost a zavinění v občanském právu (1st edn 1980) 152f.

1 *P Klarić/M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 597.

2 Judgments of the County Court in Zagreb No Gžn-1934/10 of 19 October 2010 and No Gžn-2775/10 of 21 December 2010.

3 *P Klarić/M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 597, judgment of the County Court in Zagreb No Gžn-2276/06 of 2 December 2008.

4 *P Klarić/M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 597.

5 Ibid.

6 Judgment of the Supreme Court of the Republic of Croatia (hereinafter: the SCRC) No Rev 503/08-2 of 21 May 2008.

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Generally speaking, there is a clear dividing line between unlawfulness and fault in the sense that unlawfulness denotes an objective violation of a legal norm whereas fault denotes the level of (in)appropriateness of a tortfeasor's subjective behaviour, although, in certain cases heard before Croatian courts, it seems that this dividing line has become somewhat blurred.[7] For example, as will be explained later on in more detail,[8] in some cases Croatian courts hold that a breach of the duty of due care represents unlawfulness although a breach of due care is commonly understood in Croatian tort law doctrine as a yardstick for measuring a tortfeasor's fault and not unlawfulness (in an objective sense). **3**

The Croatian Civil Obligations Act (hereinafter: COA)[9] does not expressly mention unlawfulness as a general condition of civil liability.[10] However, Croatian legal theory[11] and jurisprudence[12] unequivocally propose that unlawfulness represents one of the general conditions of civil liability. Hence, in order for civil liability to arise, unlawfulness must be established.[13] **4**

As is suggested in legal writing[14] and jurisprudence,[15] unlawfulness in principle relates to the wrongful act. Hence, a wrongful act, ie the act which caused the damage, must be unlawful, ie contrary to the legal order. **5**

The burden of proof as to the existence of unlawfulness always lies with the plaintiff,[16] meaning that the plaintiff must prove the facts which are of relevance for establishing the existence of unlawfulness in a particular case. **6**

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7 For more detail see the judgment of the County Court in Zagreb No Pn-6472/00 Gžn-2882/07 of 15 September 2009 in 2/26 nos 14–16 and 5/26 nos 11–19.

8 See Pn-2265/85, Gž-3298/94 of 2 November 1994 in 2/26 nos 9–13.

9 National Gazette of the Republic of Croatia (hereinafter: NG) 35/2005, 41/2008, 125/2011.

10 Article 1045, para 1 of the COA, which contains the general rule on tort liability, reads: '*A person who has caused damage to another person shall compensate for that damage, unless he has proven that the damage did not occur as a result of his own fault.*'

11 See *P Klarić*/*M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 583 f; *Z Stipković*, Protupravnost kao pretpostavka odgovornosti za štetu [Unlawfulness as a Condition of Civil Law Liability] (1991) 84; *V Gorenc*, Komentar Zakona o obveznim odnosima [COA Commentary] (2005) 1610; *I Crnić*, Odštetno pravo [Tort Law] (2008) 4; *B Vizner*, Komentar Zakona o obveznim (obligacionim) odnosima – knjiga druga [COA Commentary – vol 2] (1978) 672.

12 Judgments of the SCRC No Rev 1877/1992-2 of 24 February 1994, No Rev 1306/06-2 of 28 February 2007, No Rev 635/08-2 of 8 September 2009 and No Rev-x 544/12-2 of 19 September 2012.

13 Judgments of the SCRC No Rev-1535/1990-2 of 9 January 1991, No Rev 976/07-2 of 9 January 2008, No Rev 635/08-2 of 8 September 2009 and No Rev-x 544/12-2 of 19 September 2012.

14 See *P Klarić*/*M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 596, 600.

15 Judgments of the SCRC No Rev 3831/1994-2 of 14 February 2001 and No Revr 167/08-2 of 2 April 2008.

16 Judgments of the SCRC No Rev-x 544/12-2 of 19 September 2012, No Revt 30/09-2 of 11 March 2009 and No Rev-x 304/09-2 of 7 July 2009; Judgments of the County Court in Zagreb No Gž 57/87-2 of 27 January 1987 and No Pn-3655/84 Gž-5669/86 of 7 October 1986.

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7 In principle, unlawfulness implies that an act which caused damage violates the legal order.[17] In the first place, an act will be found unlawful if it violates statutory norms.[18] However, according to the case law, an act will be unlawful even if it violates a(n) (administrative) decision based on a statutory norm,[19] internal rules of a tortfeasor's profession,[20] internal rules of a religious order,[21] sport rules,[22] or rules of a (medical) profession.[23] The COA provides for a number of instances where unlawfulness is excluded. These are: justified self-defence and necessity,[24] legitimate self-help,[25] and consent of a victim.[26]

8 With respect to fault-based liability, in addition to general conditions of liability, it further has to be established that the damage sustained is 'imputable' to a tortfeasor, due to the latter's blameworthy behaviour. Therefore, in the case of fault-based liability, the fault of a tortfeasor must be established, as an additional, special condition of liability.

9 Pursuant to art 1049 of the COA, Croatian law recognises two types of faulty behaviour: intentional (*namjera*) and negligent (*nepažnja*). Negligence exists if a person fails to observe required standards of due care. Based on art 10 of the COA, Croa-

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17 Judgments of the County Court in Zagreb No Gžn-1934/10 of 19 October 2010 and No Gžn-2775/10 of 21 December 2010.

18 Judgments of the SCRC No Rev-x 544/12-2 of 19 September 2012 and No Rev 1233/06-2 of 1 February 2007.

19 Judgment of the SCRC No Rev 92/08-2 of 10 September 2009.

20 Judgment of the County Court in Zagreb No Pn-7434/05 Gžn-1606/11 of 19 July 2011.

21 Judgment of the SCRC No Rev-917/1990 of 12 September 1990.

22 Judgment of the County Court in Zagreb No Pn-1122/07 Gžn-3740/08 of 24 May 2011.

23 Judgment of the County Court in Zagreb No Pn-6472/00 Gžn-2882/07 of 15 September 2009. See 2/26 nos 14–16 and 5/26 nos 11–19.

24 See art 1052 of the COA, which reads: '(1) A person who has caused damage to his attacker shall not be liable to redress that damage, unless self-defence is excessive. (2) If a person causes damage in the state of necessity, an injured party may require compensation from a person through whose fault the damage has occurred, or from the persons from whom the damage has been eliminated, but not in excess of the benefit conferred. (3) A person who has suffered damage while eliminating a risk of damage to another person shall have a right to require redress for the damage to which he has been reasonably exposed.'

25 See art 1053 of the COA, which reads: '(1) A person who, in the case of legitimate self-help, inflicts damage on the person who caused the need for self-help shall not be liable to compensate for such damage. (2) Legitimate self-help shall imply a right of every person to eliminate a violation of rights in the case of imminent danger, provided that such protection is necessary and provided that the method of eliminating the violation of rights corresponds to the circumstances in which the danger occurs.'

26 See art 1054 of the COA, which reads: '(1) A person who has allowed, to his own detriment, another person to take certain actions shall not have a right to request from the latter compensation for damage caused by those actions. (2) An injured party's statement of consent to damage caused by an action which is prohibited by the law shall be void.'

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tian civil law recognises three different standards of due care; the standard of a good master of the house, the standard of a good merchant, and the standard of a good expert.[27] In determining whether a tortfeasor acted negligently, his/her behaviour shall be assessed against the behaviour of an abstract person, which means that, as a matter of principle, Croatian law accepts the objective concept of negligence. In Croatian civil law negligence is divided into simple negligence and gross negligence. A person is considered to have acted with simple negligence if they did not employ the standard of care which would be employed by a good master of the house, a good merchant or a good expert, ie a particularly prudent person. A person is considered to have acted with gross negligence if they did not employ even the standard of care which would be employed by any average person.[28]

A distinctive feature of the Croatian civil liability system is the concept of presumed fault. Pursuant to art 1045, para 3 of the COA, simple negligence shall be presumed. Since this is a rebuttable presumption, the burden of proof as to the (non-) existence of simple negligence lies on a tortfeasor. Since the burden of proof regarding the existence of unlawfulness (in an objective sense) lies with a victim while the burden of proof as to the non-existence of fault (unlawfulness in a subjective sense) lies with a tortfeasor, in some cases it might be rather challenging to draw a clear line as to who should prove what or rather who should actually bear the burden of proof. This is particularly true with respect to those cases where the distinction between unlawfulness (in an objective sense) and fault is blurred, eg in cases where the unlawfulness (in an objective sense) consists in a violation of the statutory provision on due care.[29] In such a case the question of whether a victim, in the course of proving unlawfulness, should bear the burden of proof as to the non-existence of due care on the part of a tortfeasor, or whether the non-existence of due care on the part of a tortfeasor, ie fault, should be presumed, in which case it should be left to the tortfeasor to prove that he acted with due care, may arise. However, intentional misconduct and gross negligence are never presumed. Therefore, the burden of

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27 Article 10 of the COA under the heading 'Conduct in the Course of Performing Obligations and Exercising Rights' reads as follows: '(1) In performing their obligations, parties shall act with due care as required in a legal transaction relating to a relevant type of obligations (to exercise the care of a good merchant or a good master of the house). (2) In performing obligations relating to their professional activities, parties to obligations shall act with increased care in accordance with professional rules and practice (to exercise the care of a good expert). (3) In exercising their rights, parties to obligations shall refrain from any action that may hinder the other party's performance of obligations.'

28 *P Klarić*/*M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 598; *M Baretić*, Tort Law, in: T Josipović (ed), Introduction to the Law of Croatia (2014) 171.

29 For more detail see 2/26 nos 9–13 (in connection to the judgment of the County Court in Zagreb No Pn-2265/85, Gž-3298/94 of 2 November 1994).

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proof as to the existence of these two types of faulty behaviour always lies with a victim.

11 A person who has committed a tort and thus inflicted certain damage on another person is to be held liable only if he/she has so-called delictual capacity (*deliktna sposobnost*). In the Croatian tort law system, natural persons over the age of fourteen and who are mentally sane have delictual capacity, ie are accountable or capable of being held liable for their tortious acts or omissions. A person who is under the age of seven cannot be held liable for the committed tort and damage caused thereby under any circumstances. A minor between the ages of seven and fourteen will generally not be held liable for the damage caused, unless his/her capacity to make proper judgements at the moment of damage occurrence has been proved. Hence, the delictual incapacity of minors between seven and fourteen years of age is rebuttably presumed.

27. Slovenia

1 Tortious liability is the duty of the causer of damage to compensate the injured party for damage for which he/she is responsible.[1] This duty is based on the general principle of civil law on the prohibition on causing damage. In accordance with this, everyone is obliged to refrain from behaviour that could cause harm to others (ie, the general clause of unlawfulness, art 10 of the Code of Obligations).[2]

2 A precondition for the existence of tortious liability is the occurrence of damage, but liability to compensate the damage will only arise if other general preconditions of tortious liability are also fulfilled: unlawfulness, a causal link between the behaviour of the causer of the damage and the damage and tortious liability on the basis of the culpability of the causer of the damage.[3] In exceptional cases, when objects and activities that are especially dangerous are concerned, culpability is replaced by the rules of strict liability.[4] If even one of these preconditions is lacking, the damage is no longer damage for which compensation is justified.

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1 *S Cigoj*, Teorija obligacij, Splošni del obligacijskega prava [Theory of obligations, General part of tort law] (1989) 165.

2 Uradni list RS (Official Journal) No 97/2007.

3 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 271ff; *B Novak*, Vzročna zveza, protipravnost in krivda pri odškodninski odgovornosti [Causal link, unlawfulness and fault in tortious liability], Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997, 271, 272ff.

4 With strict responsibility, the law presumes that any damage that occurs in connection with dangerous objects or dangerous activities also derives from them (art 149 of the Code of Obligations). An owner (or operator) can only avoid liability in exceptional cases, if he/she proves that the damage occured because of *force majeure* or the behaviour of the injured party (art 153 Code of Obligations).

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The next stage in investigating tortious liability is establishing a causal link between the behaviour and the damage. 3

In dealing with specific cases, unlawfulness of the behaviour and the damage must be established. In establishing unlawfulness, we must look for a legal standard that can be violated. Any harmful behaviour which is in conflict with law is unlawful, ie, if it violates a legal prohibition or commandment. It is not relevant for tortious liability whether or not this prohibition or commandment is contained in the legal standards of civil law. For the question of unlawfulness, the whole body of law is relevant and not if the prohibition or commandment is expressly contained in civil law. If unlawfulness cannot be established, it is no longer necessary to address the other preconditions of liability.[5] 4

Finally, we ask about culpability or fault. Fault is shown when the damage was caused intentionally or by negligence (art 135 of the Code of Obligations). In principle, the level of fault does not influence the fixing of the level of compensation but it could be important when the damage derives from a criminal act. In tort law we are then bound to the level of fault in relation to the existence of a criminal act, established by a criminal conviction.[6] 5

Intention (*dolus*) is shown when the perpetrator is aware of the consequence and wishes it (direct intention, *dolus directus*) or allows it (is aware of the likely outcome, *dolus eventualis*). Distinguishing the two forms of intent does not have practical importance in civil law since, regarding the *praetio affectionis* (sentimental value), it suffices for allocating damages that the object was destroyed intentionally (thus irrespective of the level of intent, para 4 of art 168 of the Code of Obligations[7]). The different kinds of intent are also not important in other cases when the law speaks of intentionally caused harm (eg para 1 of art 170 and para 3 of art 147 of the Code of Obligations). 6

Slovenian law in principle adheres to the concept of full compensation irrespective of the degree of fault. In relation to the level of (or lack of) due care in behaviour, the following concepts have been developed: gross negligence (*culpa lata*), which means neglecting the care that one would expect from any (average) person; ordinary (slight) negligence (*culpa levis*), which means neglecting the care that is 7

Referring to other reasons does not relieve the owner of a dangerous object of liability. Article 149 of the Code of Obligations is a general clause for strict liability. The Code of Obligations also contains a special rule for strict liability of a car holder (art 154 Code of Obligations).

5 *B Novak*, Vzročna zveza [Causal link], Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997, 273.

6 See also *A Berden*, Vezanost civilnega sodišča na sodbe kazenskega sodišča [How civil courts are bound to the judgments of criminal courts], Pravnik 1975, 83, 87.

7 If an object was destroyed or damaged intentionally, the court may order compensation with regard to the value the object had for the injured party. In Slovenian law the institute of 'praetio affectionis' is a kind of pecuniary damage.

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required of a particularly careful attentive person[8] and negligence that neglects the standard of care normally exercised by a person in the conduct of his/her own affairs (*diligentia quam in suis*). In contrast to the two previous forms of negligence, in which the criterion for the judgement of care was abstract (*culpa in abstracto*) and is assessed in an objective way, the care normally exercised by a person in the conduct of his/her own affairs is based on a specific person (*culpa in concreto*). In this case the individual (physical and intellectual) abilities of the concrete tortfeasor are also relevant. The standard of care normally exercised by a person in the conduct of his/her own affairs is most often used when the causer of the damage and the injured party have a close personal bond; for example, for judgement of the behaviour of a parent or guardian who manages a child's or ward's property for their benefit (para 2 of art 170 of the Code of Obligations).[9]

8 In a tort claim, the plaintiff must show damage, unlawfulness and a causal link, but not the fault of the injurer, because fault is presumed.[10] For the benefit of the injured party, for whom it may in practice be difficult to prove fault, only normal (slight) negligence is presumed. The presumption of fault means a deviation from the principle that those who assert something must also prove it, since in this case it is the defendant who must prove that he/she is not to blame if they wish to avoid tortious liability (*exculpatio*). Because in this case the defendant must show that he/she is not to blame and not the plaintiff that the defendant is to blame, the burden of proof is said to be inverted.

9 Tortious liability for culpable behaviour may only be imposed on a person who is responsible in law. Both age and the capacity to make a judgement are important for recognising responsibility in law.[11] The law derives from the unchallengeable assumption that young persons below the age of seven are not responsible in law and therefore completely non-culpable (para 1 of art 137 of the Code of Obligations). A young person below the age of seven thus cannot be liable for damage that he/she has caused. In the case of young persons who have already reached the age of seven but not yet 14, the law derives from a presumption of not being responsible in law and thus not culpably responsible, but in contrast to the legal arrangement that applies for young persons below the age of seven, the presumption of not being responsible in law of a young person who has already reached seven years of age can be challenged. It must be challenged by the plaintiff ie the injured party (para 2 of

8 *S Cigoj*, Teorija obligacij, Splošni del obligacijskega prava [Theory of obligations, General part of tort law] (1989) 185.

9 See 13/27 nos 1–5 for more.

10 Whoever causes harm to another is bound to recompense for it if he/she does not prove that the damage occurred without his/her fault (presumed fault, para 2 of art 131 Code of Obligations).

11 *G Ristin*, Deliktna sposobnost fizične osebe v civilnem pravu [Responsibility in law of a natural person in civil law], Podjetje in delo 2003, 1769, 1770.

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art 137 of the Code of Obligations). A young person who has already reached the age of 14 is entirely responsible and answerable under the general rules on liability for damage (para 3 of art 137 of the Code of Obligations).

In the case of persons who are fully responsible in law due to their age, there is a presumption, unless proved otherwise, that they are of sound mind and thus also responsible in law. Not being of sound mind at the time the damage was caused must be proved by a defendant (the injurer or his representative), who calls on it. Successful proof that a person who caused damage was not of sound mind at the time of the damage being caused because of mental disturbance, mental health problems or any other cause means that the person is not liable for damages because he/she does not have responsibility in law (para 1 of art 136 of the Code of Obligations). Presumed responsibility in law can also be successfully refuted by a person who proves that he/she caused the damage in a state of prior unsoundness of mind (usually caused by alcohol or drugs), which was not his/her own fault (para 2 of art 136 of the Code of Obligations). In such a case the person who placed the person in a state of prior unsoundness of mind is liable for the damage (para 3 of art 136 of the Code of Obligations). **10**

28. Romania*

In Romania a new Civil Code was enacted in 2009, which by 1 October 2011 replaced the Civil Code in force since 1864. The new Civil Code brings to an end the former dualist system of Romanian private law, based on a Civil Code and a Commercial Code. This turn in approach is also reflected in tort law, where in principle a single regime applies, but the 'professional' quality of the tortfeasor is taken into account when establishing the standard of liability. The new Civil Code was influenced by globalisation and the Europeanisation of private law in search of solutions on the regulatory needs of modern torts.[1] Without fully giving up the centuries-long traditional connections to French private law doctrine and case law, the new Civil Code is the result of various comparative law influences, mostly coming from a mixed legal system – Quebec law.[2] French law was treated by the Romanian codifiers on an **1**

* I am thankful to Judge Diana Ungureanu, trainer at the National Institute of Magistrates, for her research assistance.

1 On the influence of European private law and uniform law on the new Romanian civil law see: *M Józon*, The Influence of European Private Law on the New Romanian Civil Code, ZEuP 3/2012, 568.

2 On the influence of Quebec law on the new Romanian Civil Code see: *M Józon*, Unification of Private Law in Europe and 'Mixed Jurisdictions': A Model for Civil Codes in Central Europe (2014) 1 European Journal of Comparative Law and Governance.

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equal footing with other European solutions in search of Continental best practice in civil law. Thus the Swiss or Italian influences in the new Civil Code are more significant in number and impact than the French.[3] However, it is important to note that, despite these multinational influences, the evolving Romanian legal doctrine continues to consider French case law and legal scholarship almost exclusively when interpreting the provisions of the new Civil Code.[4] As such, even the solutions borrowed from mixed legal systems are *re-continentalised*, once integrated into the body of Romanian private law. Case law on tort under the new Civil Code is still poor. The period of time under assessment is too short and the judgments too few in order to talk of a settled case law under the new tort law provisions. A significant amount of tort litigation is still decided under the old Civil Code since these cases occurred under the old civil law regime. For these reasons in some instances the author can only present cases from lower courts (judgments of courts of first instance and tribunals) under the new Civil Code, whereas in other instances the author refers to cases decided after 2012, but under the provisions of the old Civil Code. The few Romanian court cases presented here reflect current tendencies that may change over time.

2 Traditionally, tort liability is based on the subjective approach in Romania. However, the general provision of the new Civil Code on tort liability, art 1349,[5] seems to change this approach by omitting the word fault (*culpa*). The highest court (*Înalte Curte de Casație și Justiție*, ÎCCJ) confirmed this in a decision issued in 2014 emphasising that: 'Article 1349 no longer states fault as a condition for liability as the old Civil Code did and that the fault of the tortfeasor is presumed from his/her action or inaction infringing a right or legitimate interest of another'.[6] However, since art 1357[7] on liability for one's own acts follows the old approach and lists fault

3 *M Józon*, The Influence of European Private Law on the New Romanian Civil Code, ZEuP 3/2012, 568.

4 For example: *L Pop/IF Popa/SI Vidu*, Curs de Drept Civil (2015); *LR Boilă*, Răspunderea civilă delictuală obiectivă (2nd ed 2014); *LR Boilă*, Răspunderea civilă delictuală obiectivă (2014).

5 New Civil Code, Chapter IV (Civil Liability), Section 1 (General Conditions) art 1349 on torts:
(1) Anyone is obliged to comply with the rules of conduct imposed by law or local usages and to not infringe by actions or inactions the rights and legitimate interests of others.
(2) Whosoever, having discernment, infringes this duty, is liable for all damage and obliged to fully repair such damage.
(3) In cases explicitly provided by law, a person is obliged to repair the damage caused by the acts of another, by goods and animals under its control as well as by the ruins of constructions.
(4) Liability for damage caused by defective products is established by special law.

6 ÎCCJ, Secția a II-a civilă, Decision no 2358, 24 June 2014.

7 New Civil Code, Chapter IV (Civil Liability), Section 3 (Liability for Own Acts) art 1357 on the conditions of liability for own acts:
(1) Whosoever causes damage by an illegal act committed with fault (guilty) is obliged to repair it.
(2) The author of the damage is liable for the slightest fault (*culpa*).

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among the conditions of liability, it is the task of future courts to clarify the relation between the two provisions. The case law preceding the ÎCCJ's decision was not uniform; the courts either considered that the old approach was preserved under art 1349 new Civil Code, or invoked both provisions as a legal basis, while indeed considering fault as a condition of liability, although the very first commentary on the new Civil Code, published in 2013, pleaded in favour of more consideration of wrongfulness in cases of tort liability under art 1357 instead of focusing on the attribution of the illegal act to the tortfeasor.[8] Thus today there is not yet a clear dividing line between wrongfulness and fault in Romania, although, according to case law of the highest court, *culpa* is no longer a prerequisite of liability under art 1349 new Civil Code. A leading tort law scholar warned in 2009 that: 'Fault faces a deep identity crisis' in her book 'Subjective Tort Liability', before the new Civil Code entered into force.[9]

In my opinion, fault remains a prerequisite of liability, with a reversal of the burden of proof, although the highest court did not elaborate on this issue. This line of interpretation follows from the systemic interpretation of the provisions of the new Civil Code on tort liability (arts 16, 1349, 1357 and 1358). However, the wording of the decision that clearly distinguishes the new rule under art 1349 from arts 998 to 999 of the old Civil Code remains more than confusing. The confusion is further aggravated by the inconsequence in terminology in the new Civil Code and the case law, which use the terms negligence (*culpa*), intent (*intenție*), fault (*vinovăție*) synonomously. 3

Article 16 of the new Civil Code mentions two types of misconduct: intention and negligence (*culpa*).[10] The doctrine and case law still use the traditional classification from Roman law: *culpa lata, culpa levis* and *culpa levissima*. Article 1358[11] of the new Civil Code defines fault under a mixed approach, according to which fault is based on objective criteria, where account is also taken of the circumstances in which the damage occurred as well as whether the damage was caused by a professional during the performance of his/her profession. It is argued in the literature that the circumstances and internal qualities of the author of the illegal act, such as 4

8 *LR Boilă* in: FB Baias/E Chelaru/R Constantinovici/I Macovei (eds), Noul Cod Civil. Comentariu pe articole (2013) 1424.

9 *LR Boilă*, Răspunderea civilă delictuală subiectivă (2009) 458.

10 New Civil Code, Chapter III (Interpretation and Effects of the Civil Law) art 16 on fault:
(1) Except as provided otherwise by law, a person is liable only for acts committed with intention or negligence.

11 New Civil Code, Chapter IV (Civil Liability), Section 3 (Liability for Own Acts) art 1358 on the criteria of evaluation of the fault:
In assessing fault, account must be taken of the circumstances outside the control of the tortfeasor in which the damage occurred, as well as of whether the damage was caused by a professional within the framework of his professional activity, if that is the case.

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age, gender, temperament, lack of skills, lack of abilities, cannot be considered when establishing fault; the author will be liable only if it is proved that he/she did not act as diligently as another person would have acted under the same circumstances.[12] Discernment is a prerequisite of liability. According to art 1366 of the new Civil Code, the age limit for capacity for tort liability is 14. However, the new Civil Code introduces a special case of liability of persons without discernment in art 1368[13] which provides for the subsidiary liability of a person without discernment to compensate for the damage caused to another in case the liability of the person who, according to the law, has an obligation to supervise the person without discernment cannot be established. This novelty was labelled in the tort law literature as an atypical form of liability for one's own acts,[14] being considered as 'a first fissure in the granite block of the essentially subjective tort liability'.[15] So far there has been no unanimity in the evolving literature on the issue of whether or not it is justified to impose liability on a minor or on a person who is mentally ill.[16] There are also opinions that plead in favour of the tort liability of persons who, due to their age or their mental health, could not have foreseen and understood the negative consequences of their acts, not having discernment at the time of committing the tort.[17]

5 The general regime of tort liability is duty-based in Romania while misconduct (*fapt juridic ilicit*) consists in the breach of a duty established by law. Romanian courts use the term illegal act for wrongfulness which, however, implies more than an infringement of a mandatory law. An infringement of a legitimate interest[18] as well as the infringement of good morals can also serve as the legal basis of tort liability. The scope of protection of an interest depends on its nature; the higher its

12 *L Pop/IF Popa/SI Vidu*, Curs de Drept Civil (2015) 355 f.

13 Chapter IV (Civil Liability), Section 3 (Liability for Own Acts) art 1368 on subsidiary obligation to compensate the victim:
(1) Lack of discernment does not exonerate an individual from the duty to pay damages to the victim whenever the liability of the person who by law was obliged to supervise the person causing the damage cannot be established.
(2) Damages will be established in an equitable amount, taking into account the material situation of the parties.

14 *LR Boilă*, Răspunderea civilă delictuală obiectivă (2nd edn 2014) 589.

15 *LR Boilă*, Considerații referitoare la răspunderea delictuală a persoanei lipsite de discernământ, reglementată prin art 1368 din actualul Cod Civil, Dreptul 5/2014, 88.

16 *LR Boilă*, Răspunderea civilă delictuală obiectivă (2nd edn 2014) 591.

17 *LR Boilă*, Culpa-eterna doamnă a răspunderii civile delictuale, Revista Româna de Drept Privat 2/2010, 54 f.

18 New Civil Code, Chapter IV (Civil Liability), Section 3 (Liability for Own Acts) art 1359: The author of an unlawful act is obliged to compensate the damage caused also when it results from the infringement of an interest of another, provided that such interest is legitimate, serious and creates the appearance of a subjective right by the manner in which it manifests itself.

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value, the more extensive is its protection. Life, bodily or mental integrity, human dignity and liberty enjoy extensive protection in the new Civil Code.

6 The new Civil Code took over from the old Code the traditional forms of liability based on wrongfulness. Article 1372 of the new Civil Code on liability for minors or for those without legal capacity[19] does not require fault as a condition for the establishment of liability. In these cases, misconduct on the account of minors or persons without legal capacity is required, but it is the parent or tutor who is held liable for their misconduct. The doctrine qualifies this type of liability as objective liability, since it does not depend on the fault of the person liable. According to art 1372(3) of the new Civil Code, an individual with a duty to supervise is relieved from liability only if he/she proves that he/she could not have prevented the harmful event. In the case of parents or guardians, the evidence is deemed to be provided only if they prove that the child's act was the result of a cause other than how it would have been if they had fulfilled their duties arising from the exercise of parental authority. The liability of a principal for its auxiliary's misconduct is another form of objective liability since the misconduct is committed by the auxiliary but the principal is held liable. According to art 1373 of the new Civil Code, the principal is obliged to repair the damage caused by its auxiliaries whenever their acts are committed in connection with the tasks or the purpose of their activity. The principal's liability is considered in the legal doctrine as a form of guarantee for the risk inherent in the activity that the auxiliary performs.[20] Article 1376 new Civil Code on liability for the damage caused by goods, animals or the ruin of a building is explicit in stating that the obligation of compensation is independent of fault. Under art 1375 new Civil Code on liability for damage caused by goods, it is irrelevant whether the good is inherently dangerous, as is argued in the doctrine.[21] Modern torts are usually regulated outside the Civil Code by special laws. Statutes on specific forms of no-fault liability have a specific approach to misconduct such as the liability of judges for judicial errors (art 96 of Law no 303/2004), the liability of public authorities (arts 16 and 19 of Law no 554/2004) for damage caused by unlawful acts or medical liability (arts 642–648 of Law no 95/2006).

19 New Civil Code, Chapter IV (Civil Liability), Section 4 (Liability for Others) art 1372: (1) The one who, by virtue of the law, of a contract or of a court decision is obliged to supervise a minor or a person without legal capacity is responsible for injury caused by them.

20 *LR Boilă*, Răspunderea civilă delictuală obiectivă (2015) 446; *S Neculaescu*, Răspunderea civilă delictuală în noul Cod Civil. Privire Critică, Dreptul 4/2010, 53; *L Pop/IF Popa/SI Vidu*, Curs de Drept Civil (2015) 371.

21 *LR Boilă*, Răspunderea civilă delictuală pentru pagubele cauzate de lucruri și animale, potrivit Codului Civil Român, Dreptul 8/2014, 57.

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29. European Union

1 One of the prime difficulties when presenting the role of misconduct in establishing liability before the European courts is the fact that we are facing not just one, but at least five different kinds of liabilities, whose conditions heavily depend upon the respective bases of these claims.[1]

- First, there is the non-contractual liability of the European Union itself for harm caused by its institutions or servants, as governed by what is now art 340 para 2 TFEU and what was previously art 288 para 2 TEC (and art 215 para 2 TEC even before that).[2] This provision, whose wording has survived the renumbering, foresees an autonomous standard of liability that is 'in accordance with the general provisions common to the laws of the Member States', without going into further detail.[3] While the EU staff's misconduct addressed by this provision has to relate to 'the performance of their duties', no further qualifications are added that would help to assess the conduct with an eye to the triggering of liability.
- Second, the European Union may have to account to its staff as an employer, based on art 270 TFEU (previously art 236 ex 179 TEC).
- Third, Member States themselves may be held liable under the *Francovich* doctrine.[4]
- Fourth, EU law may be enforced indirectly by way of a tort law approach, remedying deficiencies in the implementation of certain acts via direct claims for compensation raised by citizens allegedly harmed.
- Finally, in response to requests for preliminary rulings in particular the CJEU is called upon to interpret EU tort law rules as brought before the national courts, such as the Member States' implementations of the Product Liability Directive or the interaction of national tort law with the Motor Vehicle Liability Insurance Directive(s).

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1 Cf *U Magnus*/*W Wurmnest*, Casebook Europäisches Haftungs- und Schadensrecht (2002) 23.

2 This corresponds to art 188 para 2 EAEC. Cf art 41 para 3 CFREU and art 34 TECSC. See also *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 559, no 14, on the historic differentiation between administrative and legislative acts; cf, eg, Court of First Instance (CFI) 15.4.1997, T-390/94, *Schröder et al v Commission* [1997] ECR II-501.

3 Article 340 para 2 reads: 'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

4 ECJ 19.11.1991, joined cases C-6/90 and C-9/90, *Andrea Francovich et al v Italy* [1991] ECR I-5357; see *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 179 (no 9/16 ff), on the evolution of this doctrine.

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The first two varieties have led to a bulk of case law dealing with an autonomous approach to tort law, whereas the peculiarities of state liability (point 3) and the predominantly domestic aspects of national tort law in the fourth and fifth group are perhaps less apt to serve as a basis for identifying a general ('European') approach towards misconduct. Nevertheless, also in the latter categories, the courts proceed from an autonomous 'European' notion of the technical terms used in order to assess the compatibility of national solutions, which as such may add to the overall picture. Furthermore, the CJEU at least claims to apply the same standards of liability when EU law is breached, irrespective of whether committed by an EU institution or a Member State body.[5] **2**

However, identifying such a 'European' notion is tricky, if only because of linguistic diversity: cases originating in a common law jurisdiction may for that reason alone be addressed by the European courts with a particular preference for the use of English technical terms (as used by the parties' representatives and the referring courts, for example), so that – in the context of this volume's prime theme – the ruling will stress, for example, the duty of care concept much more than it would if the case had come from a Continental European jurisdiction instead,[6] whereas in the latter case the term 'wrongfulness' or 'unlawfulness' might be used more often instead.[7] This does not even consider yet the intricacies of translation when the original language of a case is not English. **3**

While misconduct is a trigger to the aforementioned various types of liability unless specifically excluded by the legislative act concerned (such as the Product Liability Directive), EU courts do not clearly distinguish between the objective and subjective assessment thereof,[8] even though there is a clear emphasis on the former. Unless specifically called for by the legislative act under scrutiny, fault rather plays an indirect role only insofar as it influences the finding of a duty that was breached and – to the extent required – helps to determine whether such breach was 'sufficiently serious' as required.[9] **4**

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5 Starting with the case C-46/93 and C-48/93, *Brasserie du Pêcheur* [1996] ECR I-1029 (below 2/29 nos 1–12); *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 559, no 15.

6 Just cf the language used by the ECJ in *Masdar* (below 3d/29 no 2).

7 Cf also the ECJ's ruling in *Biovilac* (below 3a/29 nos 3–5), where the German law firm representing the claimant had inter alia raised the classic Germanic concept of *Erfolgsunrecht*, which the court had to respond to, without thereby introducing the said concept into Union law.

8 *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) no 9/97, is more straightforward on this point: 'The decisions lack any deeper reflection on the purpose and the material ground for the imposition of a liability upon the Member States and its specific features.'

9 *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 559, nos 4, 38. Cf also *R Reb-*

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5 EU courts initially made a distinction between cases of legislative and administrative wrongdoing, asking for a 'sufficiently serious breach'[10] only in the former case, thereby recognising the discretion legislators typically have which should not be restrained ex post. In the meantime, it seems that the two approaches have been merged in more recent case law, with the focus on the range of discretion – the wider it is, the more 'manifestly and gravely' the institution must have disregarded such boundaries, whereas a breach of EU law where the actor had little or no discretion at all will constitute illegality per se.[11]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

1 Misconduct – understood as the failure to meet a given standard of required conduct as a basis of tortious liability – is in some jurisdictions addressed under the heading 'wrongfulness' or 'unlawfulness' (*Rechtswidrigkeit, illicéité*) on the one hand, and 'fault' (*Verschulden, faute*) on the other, whereas other jurisdictions focus instead on one single key requirement, called 'breach of a duty of care' in some jurisdictions and 'fault' (*faute*) in others.[1]

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hahn, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) no 9/36, who argues that at least in cases where no discretion was to be exercised 'it seems fair and necessary to "fill" the meaning of illegality with elements of fault/carelessness.' See also *idem* no 9/64 ff criticising the notion of 'sufficiently serious breach' as 'not clear at all'.

10 Developed in cases such as ECJ 2.12.1971, 5/71, *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975 (where a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' was required).

11 *P Machnikowski*, The Liability of Public Authorities in the European Union, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 559, no 14 f; *R Rebhahn*, Non-Contractual Liability in Damages of Member States for Breach of Community Law, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) nos 9/6, 9/53; see also the ruling in *Fresh Marine* (below 13/29 nos 1–5).

1 Compare *H Koziol* (ed), Unification of Tort Law: Wrongfulness (1998); *H Koziol*, The Concept of Wrongfulness under the Principles of European Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 552; *H Koziol*, Die "Principles of European Tort Law" der "European Group on Tort Law", ZEuP 2004, 234.

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Solutions

a) Solution According to PETL

The text of the PETL does not employ the terminology 'wrongful', 'wrongfulness', 'unlawful' or 'unlawfulness' in establishing civil liability.[2] Instead, the PETL 'merge wrongfulness with fault'[3] and subsequently focus on the 'most traditional, most widespread and – apparently – most important criterion'[4] required for misconduct to trigger liability: the concept of fault. 2

Three reasons to attribute civil liability for damage appear in the PETL's liability system. Pursuant to art 1:101, the 'basic norm' of the PETL, '(2) Damage may be attributed in particular to the person (a) whose *conduct constituting fault* has caused it; or (b) whose abnormally dangerous activity has caused it; or (c) whose auxiliary has caused it within the scope of his functions.'[5] Among these three grounds attributing civil liability, 'fault' is the primary and preeminent one under the PETL. This point is emphasised by the scope of strict liability under arts 1(101)(2)(b) and 5:101 PETL, which is limited to 'abnormally dangerous activities' which are not 'a matter of common usage', and is thus very narrow. 3

In art 4:101 PETL, fault is defined as an 'intentional or negligent violation of the required standard of conduct'. Pursuant to art 4:102(1) PETL, '[t]he required standard of conduct is that of the reasonable person in the circumstances'. The individual person is required to behave as a 'reasonable person in the circumstances', independently of his/her individual capacities.[6] The PETL thus use an objective (as opposed to a subjective) notion and standard of fault. 4

The attribution of damage based on fault relies on the idea that the tortfeasor is somehow blameworthy for the damage done. It has been said, and rightly so, that if fault-based liability uses an objective standard of care, liability is detached from individual blameworthiness.[7] For those who are incapable of meeting the required 5

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2 The term 'unlawful' is used in the PETL only in art 7:101 (1) dealing with defences against liability. See also *H Koziol*, The Concept of Wrongfulness under the Principles of European Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 552 no 1.

3 PETL – Text and Commentary (2005) art 4:102, no 17 (*P Widmer*).

4 PETL – Text and Commentary (2005) Chapter 4: Liability Based on Fault 64 (*P Widmer*).

5 Emphasis added. For a critical commentary of having lit c) included in art 1:101 PETL, see *F Pantaleón*, Principles of European Tort Law: Basis of Liability and Defences. A critical view "from outside", InDret 3/2005, Working Paper no 299, 2.

6 PETL – Text and Commentary (2005) 65 (*P Widmer*).

7 PETL – Text and Commentary (2005) 65 f (*P Widmer*); *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2010) no 6/83; *H Koziol* in: idem (ed), Unification of Tort Law: Wrongfulness (1998) 130; *P Wessner*, La responsabilité pour faute: une conception non surprenante, des conditions d'application novatrices, HAVE/REAS 2005, 252, 255 speaks of a 'responsabilité pour faute sans faute'. See also *C Müller*, La responsabilité civile extracontractuelle (2003) no 243; *J Esser*/*H-L Weyers*, Schuldrecht, Band II, Besonderer Teil, Teilband 2: Gesetzliche Schuldverhältnisse (8th edn 2000) § 55 III.

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standards, fault-based liability may then come close to strict liability for damage done. However, an objective standard of care is in accordance with the prevailing trend of modern-day European tort law systems. It gives priority to the interests of the victim and facilitates claims in extra-contractual liability. Victims who are not adequately equipped with the means to meet the required standards can, and should, contract liability insurance. Therefore, unlike criminal law, fault in tort law does not necessarily look to blame the individual for causing the damage.

6 This being said, the PETL reserve the possibility in art 4:102 (2) that the objective notion of fault may be tempered in order to avoid an excessive hardship in the evaluation of a person's effective possibilities to behave as the standard would have required, notably by taking into account the age of the tortfeasor. Here again, however, the standard of care that is applied remains objective with respect to the relevant group of tortfeasors. The PETL thus require, for example, that a minor respects the standard of care that can be expected from minors of his/her age, as opposed to looking into his/her particular subjective state of development.[8]

7 Tort law systems that require the criteria of both 'wrongfulness' and 'fault', and which apply an objective standard of care, may face difficulties when it comes to distinguishing wrongfulness from (objectively determined) fault. The test applied to determine wrongfulness and fault may be similar, or even identical, to one another.[9] By focusing exclusively on fault, as opposed to requiring wrongfulness as a separate and additional condition for liability, the PETL avoid such problems and preclude any overlap between the two criteria.

8 In tort law systems in which liability is triggered by the violation of an absolute right and in which a distinction is made between 'wrongfulness' and 'fault' (see notably § 823 (1) of the German BGB), some voices in academic opinion regard the injury of a legally protected interest as such as an indicator for 'wrongfulness' (*Lehre vom Erfolgsunrecht*), others require that the behaviour of the tortfeasor be qualified as wrongful (*Lehre vom Handlungsunrecht*).[10] Article 2:101 PETL establishes, on the one hand, a list of protected interests the violation of which may, in principle, trigger liability; on the other hand, the PETL do not require wrongfulness as a separate condition for liability and focus exclusively on fault instead (see above). For the liability system of the PETL, it may thus be argued that the violation of an interest which is enumerated in art 2:102 (2) or (3) PETL, namely the violation of life, bodily or mental integrity, human dignity, liberty, or property rights, *indicates* 'fault' as

8 For more information, see below, 8/30 nos 1–19.

9 Compare *J Esser/H-L Weyers*, Schuldrecht, Band II, Besonderer Teil, Teilband 2: Gesetzliche Schuldverhältnisse (8th edn 2000) § 55 III.

10 Compare *H Koziol* in: idem (ed), Unification of Tort Law: Wrongfulness (1998) 129; *H Koziol*, The Concept of Wrongfulness under the Principles of European Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2002 (2003) 552, 553ff.

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defined in art 4:102 (in the sense of the doctrine of *Erfolgsunrecht*). Alternatively, misconduct may be established by showing a violation of the required standard of care (in the sense of the doctrine of *Verhaltensunrecht*).[11]

9 Regarding burden of proof, the PETL are based on the general principle that each party must prove the facts relative to his/her claim. The person bringing a claim in tort is thus required to prove the facts relevant in establishing the conditions of liability, including the alleged fault of the tortfeasor.[12] However, pursuant to art 4:201(1), '[t]he burden of proving fault may be reversed in light of the gravity of the danger presented by the activity'. Article 4:202 (Enterprise Liability) contains a further presumption of fault applicable to a person pursuing a lasting enterprise for economic or professional purposes in regards to damage done by auxiliaries or technical equipment.[13]

10 When it comes to determining whether particular conduct corresponds to the required standard or whether, conversely, it constitutes fault (in other words, whether it represents a breach of the duty to conduct oneself as required), art 4:102(1) PETL provides a list of criteria such as 'the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it out, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods'.

11 A somewhat concealed reference to fault may ultimately be found in art 3:201 (a) PETL, where the 'foreseeability of the damage to a reasonable person' is mentioned as a criterion in determining the scope of liability.[14]

12 As we have seen above, the underlying benchmark for determining fault is the conduct of a 'reasonable person in the circumstances'. Unlike most national tort law codifications, the PETL do not contain provisions fixing age limits or other explicit exemptions from liability for minors, nor do they provide for immunity from liability for persons lacking capacity. However, pursuant to art 4:102(2), the required standard for determining fault 'may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it'. Article 4:102(2) thus adopts a flexible approach that allows deviation

11 In this sense *H Koziol* in: idem (ed), Unification of Tort Law: Wrongfulness (1998) 130 f; *H Koziol*, The Concept of Wrongfulness under the Principles of European Tort Law, in: H Koziol/B Steininger (eds), European Tort Law 2002 (2003) 552, 554 ff.

12 Compare PETL – Text and Commentary (2005) art 4:201, no 1 (*P Widmer*). See also (arguably a more restrictive interpretation) PETL – Text and Commentary (2005) art 2:105, no 1 (*U Magnus*): procedural questions are 'clearly outside' the scope of the PETL.

13 Regarding proof of damage, the PETL contain a specific rule in art 2:105. For the reasoning behind this provision, see PETL – Text and Commentary (2005) art 2:105, no 1 ff (*U Magnus*).

14 PETL – Text and Commentary (2005) art 4:101, no 9 (*P Widmer*).

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from the required objective standard, based on certain individual, subjective (in-) capacities.[15]

13 Regarding degrees of misconduct, art 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct'. For the tortfeasor to be liable, he must thus have at least acted with negligence. Degrees of misconduct may come into play when defining the scope of protection under art 2:102(5) PETL. According to this provision, '[t]he scope of protection may also be affected by the nature of liability, so that an interest may receive more extensive protection against intentional harm than in other cases'.[16] Pursuant to art 2:102(4), protection against pure economic loss may be more extensive in cases in which 'the actor is aware of the fact that he will cause damage', that is, if he acts at least with *dolus eventualis*.[17] Otherwise, in attributing liability, the PETL do not use different degrees of fault, such as distinguishing between gross negligence, ordinary negligence, and *culpa levissima*.

14 Last but not least, a fault committed by the victim itself may play a role when it comes to determining the extent of liability and the amount of compensation. Article 8:101 (Contributory conduct or activity of the victim) PETL provides: '(1) Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor'.

15 With respect to compensation for non-pecuniary damage under the PETL,[18] the essential factor is the seriousness of the infringement of the victim's rights. According to the second sentence of art 10:301(2) PETL, '[t]he degree of the tortfeasor's fault is to be taken into account only where it significantly contributes to the grievance of the victim', that is, 'only insofar as it makes the situation of the victim worse'.[19]

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15 Compare PETL – Text and Commentary (2005) art 4:102, no 14 ff (*P Widmer*).

16 The analysis in the following chapters 1/30 to 15/30 will show that this may be the case with respect to damages for pure economic loss, but arguably hardly anywhere else.

17 For more information, see PETL – Text and Commentary (2005) art 4:101, no 6 ff (*P Widmer*).

18 In (albeit very) exceptional situations, compensation may be due under the PETL for non-pecuniary harm flowing from damage to property, compare art 10:301(1) PETL providing damages for non-pecuniary harm 'in particular' (that is, not exclusively) for situations in which the victim suffered injury to his health, human dignity, liberty, or other personality rights. Compare PETL – Text and Commentary (2005) art 10:301, nos 6 and 7 (*H Rogers*).

19 PETL – Text and Commentary (2005) art 4:101, no 15 (*P Widmer*).

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b) Solution According to the DCFR

16 Like the PETL, the DCFR does not employ the terminology of 'wrongfulness' or 'unlawfulness' in establishing extra-contractual liability.[20] Article VI–1:101, the basic rule for extra-contractual liability under the DCFR, the conditions of which must be fulfilled in any claim for damages,[21] provides: '(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage *intentionally or negligently* or is *otherwise accountable* for the causation of the damage'.[22]

17 Pursuant to art VI–1:101(2) DCFR, 'where a person has *not* caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides'.[23] This paragraph refers more specifically to the rules in Chapter 3 Section 2 of the DCFR (Accountability without intention or negligence). Chapter 3 Section 2 provides rules on accountability for damage caused by employees and representatives (art VI–3:201), the unsafe state of an immovable (art VI–3:202), animals (art VI–3:203), defective products (art VI–3:204), motor vehicles (art VI–3:205), and dangerous substances or emissions (art VI–3:206), and concludes with provisions on 'Other accountability for the causation of legally relevant damage' (art VI–3:207) and 'Abandonment' (art VI–3:208). These rules have in common that they all apply regardless of intention or negligence of the person alleged to be liable. Pursuant to the DCFR, a person is thus liable either for damage caused intentionally or negligently or – under specific circumstances – without any negligence.

18 The DCFR defines intention in art VI–3:101 and negligence in art VI–3:102. According to the latter provision, negligence is 'conduct which either (a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage; or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case".

19 Like the PETL, the DCFR thus uses an objective standard of care.[24]

20 Regarding the burden of proof, the basic rule for extra-contractual liability in art VI–1:101 DCFR presupposes 'that the injured person has to set out, and if need

20 Remarkably, the terms 'wrongful' and 'unlawful' are not used at all in Book VI of the DCFR.

21 Compare *C v Bar/E Clive* (eds), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), Full Edition, vol 4 (2009) art VI – Comments, B (3086).

22 Emphasis added.

23 Emphasis added.

24 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

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be, prove the requirements which have to be satisfied if there is to be a right to reparation'.[25]

21 Unlike art 4:102(1) PETL, the text of the DCFR does not provide a list of indicative factors to take into account when deciding whether a particular act achieves the required standard or whether fault can be established. According to the authors of the DCFR, establishing a 'conclusive list of deciding factors [is in this respect] impossible. … The question of what reasonably careful conduct means under the circumstances of each individual case is', according to the drafters of the DCFR, 'affected by several factors which are beyond conclusive enumeration' in black letter rules.[26] The official commentary, however, mentions some criteria that may be taken into consideration when determining the required standard of conduct (such as the costs and benefits of preventive measures, whether there was a particularly close relationship between the person acting and the injured party, whether the relevant risk was known or whether it arose for the first time, for example).[27]

22 While the general underlying benchmark for determining fault is the conduct of 'a reasonably careful person in the circumstances of the case', liability of persons under the age of 18 is covered by art VI–3:103. According to para (1) of this provision, a 'person under 18 years of age is [in principle] accountable … only in so far as that person does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case'. Pursuant to para (2) of the same provision, a 'person under seven years of age is not accountable for causing damage intentionally or negligently' at all.[28]

23 Unlike the PETL and most national codifications of tort law, the DCFR contains a particular rule defining 'intention' under art VI–3:101. The reason for this is that, under the DCFR, the fact that damage was caused by an *intentional* act may be taken into consideration in attributing liability or in defining the amount of damages and, thus, marginally different rules exist depending on whether the damage arose from an intentional or a negligent act.[29]

24 Article VI–2:101(3) DCFR states, for example, that '[i]n considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability'. It follows that liability may be established here under the DCFR for damage done intentionally where it would not have been had the damage been caused by negligence alone. The official com-

25 *C v Bar/E Clive*, DCFR, art VI–1:101, Comment A (p 3086).
26 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406 f).
27 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3407).
28 For details, see below, 8/30 nos 1–17.
29 Compare *C v Bar/E Clive*, DCFR, art VI–3:101, Comment A (p 3389 f).

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mentary provides the illustration of someone who intentionally encourages someone else to not perform his contractual obligations vis-à-vis a third party.[30]

According to art VI–5:401 DCFR, '(1) Liability for causing legally relevant damage intentionally cannot be excluded or restricted' and '(2) Liability for causing legally relevant damage as a result of a profound failure to take such care as is manifestly required in the circumstances cannot be excluded or restricted: (a) in respect of personal injury (including fatal injury); or (b) if the exclusion or restriction is otherwise illegal or contrary to good faith and fair dealing'. A further example in which degrees of misconduct may be taken into account is art VI–5:102(1) DCFR (Contributory fault and accountability), according to which, '[w]here the fault of the person suffering the damage contributes to the occurrence or extent of legally relevant damage, reparation is to be reduced according to the degree of such fault'.[31] 25

30 *C v Bar/E Clive*, DCFR, art VI–2:101, Comment E (p 3146) with reference to art VI– 2:211 DCFR and providing further examples.

31 A last (albeit very specific) case is to be found in art VI–5:103 DCFR according to which '[l]egally relevant damage caused unintentionally in the course of committing a criminal offence to another person participating or otherwise collaborating in the offence does not give rise to a right to reparation if this would be contrary to public policy'.

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B. The Nature of the Misconduct Required

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2. Forms of Misconduct

1. Historical Report

Ulpian (Mela, Proculus) D 9.2.11 pr

Facts

A barber set up his seat in a place where people played ball and shaved a slave. While in the act of shaving, the barber's hand got hit by a ball so that he cut the slave's throat. **1**

Decision

Proculus[1] decided that it was the barber's fault and that he should be liable. Ulpian[2] pointed out that this should only be the case if it was a place where people customarily played ball, but that it could also be argued that it was the victim's fault if he chose to be shaven by a barber who set up his business in a dangerous spot. **2**

Comments

As a general rule, a claim under the *lex Aquilia* could only arise if an act fell within the scope of one of its chapters, most importantly chapters one and three, and if it was committed *iniuria*.[3] The situations covered included the killing of a slave or cattle (*occidere*) and the damaging of someone else's property by burning (*urere*), breaking (*frangere*) or wounding (*rumpere*). In early Roman law, these delicts were interpreted so narrowly that they covered only acts that would typically be intentional.[4] For example, *occidere* meant only the direct and active killing of a slave or cattle. And indeed, the killing of a slave with a sword or strangling him to death with bare hands would typically be an intentional act.[5] The necessary qualification of the act as *iniuria* could hardly ever have been problematic in such situations and **3**

1 First name not known, middle of the 1st century AD.

2 Domitius Ulpianus, died 223 AD.

3 Cf *Ulpian*, D 9,2,5,1: 'Iniuriam autem hic accipere nos oportet … quod non iure factum est, hoc est contra ius'; Ulpian D. 47,10,1 pr: 'quod non iure fit, iniuria fieri dicitur.'

4 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1005.

5 Cf the examples given by *Ulpian* in D 9.2.7.1: 'Occisum autem accipere debemus, sive gladio sive etiam fuste vel alio telo vel manibus (si forte strangulavit eum) vel calce petiit vel capite vel qualiter qualiter.'

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therefore did not need to be further addressed in detail. Only under exceptional circumstances, such as self-defence or necessity, could the injurer escape liability. In this simple system, the damaging party who committed an act within the scope of the *lex Aquilia* was in principle liable, unless he could invoke a specific right justifying his act. In this sense, the rules of early Roman law can be interpreted as prescribing a kind of strict liability that primarily focused on the result of an act (death, damage to property). Although they paid regard only to objective requirements, the delicts were of a nature that made it unlikely that the tortfeasor caused the damage without intention.[6]

4 In the course of time, however, the requirements of delictual liability evolved towards a more sophisticated system. This evolution was probably closely linked with an increasingly wide interpretation of the situations covered by the *lex Aquilia*.[7] Not only were the existing delicts interpreted more liberally by the Roman jurists,[8] in addition analogous actions (*actiones in factum*) were granted by the praetor in cases of indirect killing or damaging.[9] At this stage, the *lex Aquilia* was applicable to all kinds of situations that could no longer be said to indicate intentional behaviour on the tortfeasor's part.[10] Therefore, in late Republican jurisprudence, the criterion of *culpa*, which allowed a more subtle and flexible approach, was well established.[11] Its exact meaning was and still is much disputed among scholars.[12] According to the prevailing view, it expressed conduct which could be considered as a matter of re-

6 *R Robaye*, Remarques sur le concept de faute dans l'interpretation classique de la lex Aquilia, RIDA 38 (1991) 333, 339; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1005.

7 *N Jansen*, Die Struktur des Haftungsrechts (2003) 254 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1005 f.

8 Eventually, *rumpere* was interpreted as *corrumpere* and comprised all forms of damaging property not already covered by the first chapter; cf *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 16 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 983 ff.

9 Cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 993 ff.

10 Cf as an example *Paulus*, D 9.2.30.3 and on this text 3a/1 nos 1–6.

11 Cf *Quintus Mucius Scaevola*, end of the 2nd century BC in D 9.2.31 (3d/1 nos 1–7).

12 Cf *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 201 ff; *R Robaye*, RIDA 38 (1991) 333 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 116 ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 252 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1004 ff; *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969); *P Paschalidis*, What did iniuria in the *lex Aquilia* actually mean? RIDA 55 (2008) 321 ff; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 83 ff; *B Beinart*, The relationship of iniuria and culpa in the lex Aquilia, in: Studi in onore di Vincenzo Arangio-Ruiz (1953) vol I, 279 ff.

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proach on the part of the individual.[13] It was probably developed within the element *iniuria*.[14] Thus, the modern distinction between wrongfulness and fault as two separate elements cannot be found in the classical Roman sources. Its foundations were laid by Justinian.[15]

In the present case, the barber doubtlessly committed *occidere*. The jurist **5** Ulpian started by invoking the general principle formulated by Mela[16], that the person who acted with *culpa* should be liable. He then cited Proculus that *culpa* was with the barber. However, he went on to make an important distinction: in his opinion, the barber only acted with *culpa* if he shaved in a place where people customarily played ball or that was much frequented. The reasoning seemed to be that only if the barber positioned his chair in a dangerous spot could he have foreseen the incident.[17] Finally, Ulpian added that one could also consider that the person who entrusted himself to the barber should blame himself.[18]

The decision illustrates the casuistic approach of the Roman jurists. They did **6** not try to subsume a case under a general, abstract formula. Rather, the question raised in each case was whether the damaging party behaved as he/she should have behaved.[19] This depended on the specific circumstances of each case and tended to be evaluated from an objective point of view, especially by way of comparing the injurer's behaviour to that of a diligent man of his profession.[20] The damaging party was not liable in cases of *vis maior*.[21] Thus, by making *culpa* the decisive criterion upon which liability was based, the ex post perspective of early Roman law was re-

13 *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 202; *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 141ff, 156ff; although in some texts *culpa* also has the narrower meaning of 'negligence'.

14 Cf *MF Cursi*, Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno aquiliano (2002).

15 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1007; cf Inst 4.3.2ff.

16 Fabius Mela, second half of the 1st century BC.

17 Cf *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 216.

18 On this aspect of contributory negligence cf *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 235ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1010ff.

19 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1008; *R Robaye*, RIDA 38 (1991) 333, 379; *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 205.

20 Cf the formula of *Quintus Mucius* in D 9.2.31: 'culpam autem esse, quod cum a diligente provideri poterit, non esset provisum' and on this text 3d/1 nos 1–7.

21 For example *Ulpian* (Alfenus) D 9.2.29.4: A ship was subject to such forces that it could no longer be steered. Subsequently, it sank another vessel coming towards it. Ulpian cited the decision of Alfenus that the captain should not incur liability.

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placed with an ex ante perspective putting more emphasis on the injurer's conduct.[22]

7 In conclusion, the Roman jurists' conception of misconduct (*iniuria*) included both wrongfulness and fault (*culpa*) without distinguishing them neatly. Whereas early Roman law focused on the result, the development of the criterion of *culpa* shifted the focus to the injurer's conduct.

2. Germany

OLG München (Court of Appeal) 26 August 1999, 19 U 2221/99

r + s (Recht und Schaden) 2000, 415

Facts

1 The claimant was injured by the motorboat of the defendant when he swam in the open sea in order to reach an island not far from the coast. The island was used for sun-bathing and swimmers regularly swam there from the coast. The motorboat was travelling at a relatively fast speed (38 km/h). The claimant demanded compensation of his damage.

Decision

2 The defendant was held liable. The court stated that prima facie the driver of a motorboat is at fault if he injures a swimmer in an area where swimmers must be expected. The defendant may in principle, but on the facts could not, rebut the prima facie presumption of fault. The court further denied any contributory negligence of the claimant who was not obliged to wear a warning balloon or continuously watch out for motorboats. Given the speed of the motorboat, so the court reasoned, the claimant would in any case have had little chance to escape the collision.

Comments

3 For motorboats thus far no strict liability exists in Germany. Liability therefore depends on damage being caused in a wrongful and faulty way. Where, as here, bodily harm has been caused, wrongfulness is presumed (*Erfolgsunrecht*).[1] The actor has

22 *B Winiger*, Verantwortung, Reversibilität und Verschulden (2013) 63.

1 The courts and the majority of writers support the principle that a violation of absolutely protected rights generally indicates the wrongfulness of the violation; see eg BGH NJW 1992, 2014; *H Sprau* in: Palandt BGB (73th edn 2014) § 823 no 24 ff; *C Katzenmeier* in: NomosKommentar zum

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the burden of rebutting this presumption and proving a justifying defence, for instance self-defence.[2] Nothing of that kind could be advanced here. For fault to be established, the actor must have neglected the reasonable care necessary in the circumstances.[3] In areas where people commonly swim, a motorboat must be expected to reduce its speed and watch out for swimmers. On the high seas the contrary would apply. German law has thus adopted an objective standard for negligence, the most common form of fault.

Contributory negligence (§ 254 BGB) is a defence that is very often raised. It can reduce or even exclude a claim irrespective of whether or not the claim is based on fault or strict liability. **4**

Bundesgerichtshof (Federal Supreme Court) 19 April 2005, X ZR 15/04

NJW 2005, 2766

Facts

The claimant was a company which provided services to racecourses for horses. Its director was also a member of the board of directors of the first defendant, a club that owned a racecourse. During his board membership, the director concluded a contract between the club and his company which was very detrimental to the club and very advantageous for the company. Moreover, the company's invoices were overpriced. After other board members, the further defendants, had discovered these facts, they removed the director from the board, declared the contract void and threatened to publish the contract and the invoices in a journal for racing clubs. The company claimed damages for – among other reasons – violation of its right of an established and operating business and of the general personality right which the director had assigned to the claiming company. **5**

Decision

The Federal Supreme Court confirmed the decisions of the lower courts, which had rejected the claim. The Federal Court held that the threat as such was an intervention affecting the right of an established and operating business as well as the personality right of the director. However, the mere intervention did not indicate its wrongfulness because the affected rights were 'frame rights' (*Rahmenrechte*) for which wrongfulness must be positively established. Where conflicting constitu- **6**

BGB vol 2/2 (2nd edn 2012) § 823 no 7; differently *G Wagner* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch vol 5 (6th edn 2013) § 823 no 4 ff.

2 See the references in the preceding footnote.

3 The standard is defined in this way in § 276 (2) BGB.

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tional rights – freedom of expression versus personality right and property right – are concerned, this requires a careful balancing process. After weighing the freedom of expression against the affected rights, the court held that the threat was not wrongful but justified. True facts can be freely reported (and also threatened to be reported) in particular if they merely concern the social (not the private or the intimate) sphere of the attacked person and as long as they are not made public in an unacceptably critical form (*Schmähkritik*). The latter exclusively aims at the defamation and degradation of the attacked person. This was not the case here.

Comments

7 The decision confirms that the general personality right and the right of an established and operating business are mere frame rights or *Rahmenrechte*. Here, for a damages claim to be successful, the positive establishment of a wrongful violation is required and the claimant has the burden of proving the facts that reveal wrongfulness. The courts insofar follow the theory of *Verhaltensunrecht*: the infringement of a right as such does not indicate its unlawfulness. This is in contrast to a violation of the traditional absolute rights, such as bodily integrity or property, where the violation raises a presumption of wrongfulness (*Erfolgsunrecht*) which the tortfeasor may however rebut. In particular where different constitutional rights conflict with respect to the frame rights, determining the lawfulness or unlawfulness of the conduct in question requires an often difficult process of weighing interests.

3. Austria

Oberster Gerichtshof (Supreme Court) 25 May 1994, 3 Ob 501/94

EvBl 1995/1

Facts

1 The claimant, an electric power company, intended to build a power plant and therefore engaged a firm to develop the claimant's properties. The defendants were members of a local protest group which was against the building of the power plant and decided to hinder the development work. On arriving at the building site, they tried to keep the workers from bringing their machines into service or using their construction vehicles by preventing them from getting into the vehicles and also sitting on the vehicles. This happened over a period of two days, with the defendants trying to receive an official authorisation for their action based on the right of free assembly. This was denied by the authorities, which ordered the dissolution of the protest. The claimant paid the firm he had engaged for the loss caused by the delay and sought compensation for this from the defendants.

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Decision

The Supreme Court allowed the claim, while holding that the defendants were only liable if they had acted unlawfully and culpably. The trespass on the claimant's premises constituted an infringement of the claimant's absolute right to property, which, however, only indicates wrongful conduct. A final assessment of unlawfulness requires a weighing up of all interests. The defendants invoked the constitutional rights to freedom of assembly and freedom of speech as established in arts 12 and 13 Basic Law on the General Rights of Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger*, StGG) and arts 11 and 10 European Convention on Human Rights (*Europäische Menschenrechtskonvention*, EMRK). Nevertheless, the right to freedom of assembly only protects peaceful assemblies and not those which infringe absolute rights of third parties. Thus, this constitutional right was to be disregarded as far as the weighing up of interests was concerned. Other grounds in favour of the defendants were not discernible. The right to freedom of speech was not relevant either as it is not applicable upon the exertion of constraint. **2**

Comments

Under Austrian law, far-reaching protection is granted to so-called absolute rights, which include in particular personality rights, rights in rem and intellectual property rights. Such rights are clearly definable and obvious and therefore must be respected by everybody. However, according to the 'theory of unlawfulness of conduct' (*Verhaltensunrechtslehre*), which is dominant in Austria,[1] the infringement of such rights in itself is not wrongful, as wrongfulness always relates to certain behaviour: legal rules can only be infringed by the behaviour of legal subjects, as they alone are the addressees of such rules[2] (see 1/3 no 3). Unlike in the 'theory of unlawfulness established by result' (*Erfolgsunrechtslehre*), which is rejected by prevailing academic opinion and established case law, the negative result hence does not suffice to establish wrongfulness but can only indicate it. It is therefore necessary to weigh up all involved interests comprehensively to determine whether the conduct leading up to a violation of an absolute right is actually wrongful in the individual case.[3] In deciding this question, several factors must be taken into account:[4] these **3**

1 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 13 f; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/2.

2 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/3.

3 OGH 5 Ob 73/88 = SZ 61/270; 4 Ob 524/92 = ZVR 1992/177; 3 Ob 501/94 = JBl 1995, 658 *D Karollus-Bruner*; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4; *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 ff.

4 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/28 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4.

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include the value of the endangered right, how severe the impending damage is, the degree of danger, the interests of the parties involved and whether a person could, within the bounds of reasonableness, be expected to act differently (see 3a/3 no 3). As the decision reported above demonstrates, constitutional rights such as freedom of speech or freedom of assembly also have to be taken into account in this process and one should also bear in mind that countervailing interests are usually at issue.[5] Consequently, if an infringement of personality rights is at stake, conflicting personality rights – for example, the right of privacy on the one hand and freedom of speech on the other – often have to be balanced.[6] Moreover, it should be noted that absolute rights also vary greatly in the degree of their obviousness and how clearly their content is delineated,[7] as is evident if you compare the quite distinct right of bodily integrity with the much more blurred right to privacy. Whereas core absolute rights such as life, health or freedom deserve the most protection, the protection afforded to less clearly defined and less obvious absolute rights is minor and is often granted only against quite specific behaviour. If a legal position is not obvious and not clearly defined, for example pure economic loss, general protection is out of the question. Consequently, damages for pure economic loss are granted only by way of exception in tortious liability cases (see 3b/3 nos 3 and 5).

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 11 April 2006
ATF 132 II 305

Facts

1 As in other European countries, the 'mad cow' disease developed progressively in Switzerland. As a consequence, prices for beef fell. A group of farmers filed a claim against the Swiss Confederation alleging that different omissions (lack of information and useful measures, etc) from the government had caused the price fall. In a later state of the procedure, the question asked to the Supreme Court was limited to the unlawfulness of the governmental acts and omissions (excluding causality and damage).

5 Cf *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/14 ff.

6 See *E Karner*, Menschenrechte und der Schutz der Persönlichkeit im Zivilrecht, ÖJZ 2013, 906 ff with further references.

7 On these criteria *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 ff; *idem*, Basic Questions nos 6/15 ff, 6/50; cf also art 2:102 PETL.

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Decision

After a detailed analysis of the claimants' allegations, the Supreme Court decided that none of the omissions of which the government was accused were unlawful and dismissed the farmers' claim. 2

In its decision, the Supreme Court confirms a distinction made in several previous cases: on the one hand, the violation of an absolute right, such as life, human health or property. In these cases, unlawfulness is immediately realised (*Erfolgsunrecht*), independently of the author's specific behaviour. On the other hand, the violation of another interest of the victim, such as his/her (purely economic) patrimony. In these cases, the author has transgressed a norm of behaviour aiming to protect the damaged good of the victim (*Verhaltensunrecht*). Consequently, purely patrimonial damage is only considered as unlawful if a norm of behaviour interdicts A's act and if the norm's purpose is to protect the damaged good. 3

In casu, the court adds a specific explanation: if the unlawfulness concerns a juridical act, such as an administrative decision or a judgment, the government is only liable if an important norm defining a governmental duty (*devoir de fonction*) was violated. 4

Comments

In the present case, the TF confirmed a distinction made – according to Swiss doctrine – between two kinds of unlawfulness. 5

The first, 'unlawfulness of result'[1] (*Erfolgsunrecht, illicéité de résultat*), supposes the violation of an absolute right which must be respected by everyone[2] (*erga omnes*) such as life, physical and psychic integrity, personality, real rights[3] or intellectual property rights.[4] The direct and indirect damage of the victim has to be repaired, while damage suffered by third persons (*Reflexschaden*) is in principle not 6

1 See for instance ATF 139 IV 137, 141 c 4.2 (2013); ATF 135 V 373, 376 c 2.4 (2009); ATF 132 II 305, 318 c 4.1 (2006); ATF 119 II 127, 128 c 3 (1993).

2 *C Müller*, La responsabilité civile extracontractuelle (2013) 56, no 159; *F Werro*, La responsabilité civile (2nd edn 2011) 95, no 305; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 35.

3 The Swiss academic literature seems to diverge on 'possession'. See *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 452; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 37 who considers possession as an absolute right, contra *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 156, no 692; *C Müller*, La responsabilité civile extracontractuelle (2013) 56, no 159 who do not admit it as an absolute right.

4 ATF 133 III 323, 329 ff c 5.1 (2007); *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 159, no 693; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 41 no 75; *C Müller*, La responsabilité civile extracontractuelle (2013) 56, no 159.

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repairable.[5] According to the doctrine, unlawfulness of result was historically influenced by the German rule, § 823 I BGB[6]. In reality, it is based on Roman law.[7]

7 The second, 'unlawfulness of behaviour'[8] (*Verhaltensunrecht, illicéité de comportement*), requires the violation of a specific rule of protection (*Schutzzwecklehre, norme protectrice spécifique*)[9] which can be written or unwritten and which stems from private, public or criminal law.[10]

8 Some scholars stress that the two forms of unlawfulness can coexist in one and the same case.[11]

9 The main consequence of this distinction lies in the fact that a pure economic loss can only be considered as unlawful if it breaks a specific rule of protection.[12] Actually, purely economic interests are not considered – in Swiss law – as an absolute right.[13]

10 This distinction is criticised by some authors[14], who think that the 'unlawfulness of result theory' should be abandoned because it does not apply in the case of an omission and because each time an absolute right is violated, the unlawfulness lies in the fact that the author's *behaviour* transgressed a specific rule of protection.[15]

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5 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 74 ff.

6 *F Werro*, La responsabilité civile (2nd edn 2011) 95, no 307.

7 *B Winiger*, Das andauernde Flüstern des Aquilius. Verhaltens- und Erfolgsunrecht im schweizerischen Obligationenrecht, ZNR 35/2013 no 1/2, 12–20.

8 See for instance ATF 136 II 187 (2010).

9 *C Müller*, La responsabilité civile extracontractuelle (2013) 57, no 162; *F Werro*, La responsabilité civile (2nd edn 2011) 96, no 308; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 38b.

10 *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 41 no 76.

11 *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 452. For critics of this distinction see mainly *W Portmann*, Erfolgsunrecht oder Verhaltensunrecht? Zugleich ein Beitrag zur Abgrenzung von Widerrechtlichtkeit und Verschulden im Haftpflichtrecht, SJZ/RSJ 93/1997, 273 ff and *C Müller*, La responsabilité civile extracontractuelle (2013) 57, no 160.

12 See also ATF 133 III 121 (2007) at 6/4 nos 10–21.

13 *C Müller*, La responsabilité civile extracontractuelle (2013) 58, no 163; *F Werro*, La responsabilité civile (2nd edn 2011) 94, no 301.

14 See mainly *W Portmann*, Erfolgsunrecht oder Verhaltensunrecht? Zugleich ein Beitrag zur Abgrenzung von Widerrechtlichtkeit und Verschulden im Haftpflichtrecht, SJZ/RSJ 93/1997, 273 ff.

15 *C Müller*, La responsabilité civile extracontractuelle (2013) 57, no 160.

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Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 28 February 1989
ATF 115 II 15

Facts

A1, an unable adult, is assisted by a legal guardian (*Vormund*) A2. The legal guardianship was made public according to the civil law dispositions. 11

A1 concludes two contracts with V and buys goods for about CHF 700,000 (approx € 580,000). 12

The bills remain unpaid. V files an action against A2 for approx CHF 400,000 (approx € 330,000). He argues that A2 had not sufficiently supervised A1's activities and that the contracts would not have been concluded if A2 had fulfilled his duties as a guardian. 13

Decision

A claim was filed directly to the Supreme Court. It concluded that A2 had no duty to act and V's claim was rejected. 14

The Supreme Court recalls the distinction between objective and subjective unlawfulness. According to the Supreme Court and the dominant academic literature, art 41 of the Swiss Code of Obligations (SCO) (general clause in tort law) is based on objective unlawfulness. This theory holds that damage is unlawful if it violates a general legal duty by violating an absolute right (*Erfolgsunrecht*, *illicéité de résultat*) or a protective norm (*Verhaltensunrecht*, *illicéité de comportement*). The unlawfulness consists in an objective violation of a norm. 15

On the contrary, the subjective theory is based on the idea of authorisation and, in principle, considers each damaging act as unlawful, except if the author can justify it with a subjective right. The two theories are based on two definitions of unlawfulness given by the Roman juris consult Ulpian.[16] Basically, according to the objective theory, everything is authorised, except if it is forbidden by law, while the subjective theory states that everything is forbidden, except if one has a subjective right to act.[17] 16

If an absolute right has been infringed, the two theories lead to the same solution. But in cases of pure economic loss without an infringement of an objective norm, theoretically they may lead to different results: pursuant to the objective theory, the act would not be considered as unlawful und consequently, the author 17

16 *Ulpianus*, Digest 9.2.5.1.

17 The subjective theory was notably developed in the 16th century by *H Donellus*, Opera omnia. Commentariorum de iure civili tomus quartus, Lucae 1764, vol XV, ch XXVII, 3, 225 (reprint Goldbach 1997).

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would not be liable; on the contrary, pursuant to the subjective theory, one could say that the author cannot justify his act and, thus, has to repair the damage.

18 The court explains further that, for omissions, such as in the present case, unlawfulness supposes a violation of a legal duty to act. If no such duty has been infringed, under both the subjective and objective theory, the behaviour will not be considered as unlawful; such duties are generally determined only by objective law (*objektives Recht*, *droit objectif*).

19 The main duty of the legal guardian is to protect his pupil's person and interests. The guardian acts unlawfully if he violates a norm protecting the pupil. Beside this, he has to directly protect third persons such as family members, notably if their safety is at danger because of the pupil. Further, he has to safeguard the economic interests of other third persons. These interests are secondary compared to those of the pupil and protective measures have to be taken only in the case of a significant threat.

20 As the legal guardianship is made public in accordance with legal norms, the guardian can suppose that third persons are aware of the guardianship and the incapacity of the pupil. He has to intervene only if there are strong indications that economic interests of third persons are endangered.

Comments

21 Firstly, it has to be reminded that the dispositions in the Swiss Civil Code (SCC) on the protection of adults (art 360 ff SCC) have been revised in the meantime. However, this does not affect the Supreme Court's considerations on unlawfulness.

22 This case reminds us that two theories of unlawfulness exist in Swiss law. On the one hand, the theory of objective unlawfulness, which is supported by the Swiss Supreme Court[18] and the major part of the academic literature. It is based on the principle that a damaging act is considered unlawful only if it violates (by an action or omission) an absolute right (*Erfolgsunrecht, illicéité de résultat*) or a protective norm (*Verhaltensunrecht, illicéité de comportement*)[19]. This first theory can be illustrated by the Roman law principle of acting against a rule, *agere contra ius*.[20]

23 On the other hand, the theory of subjective unlawfulness is based on the principle that each damaging act is considered unlawful, except if it can be justified by a

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18 See for instance ATF 112 II 118, 127 f c 5e (1986).

19 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 33c ff; *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 155 f, no 670 ff; *F Werro*, La responsabilité civile (2nd edn 2011) 93, no 297 ff; *C Müller*, La responsabilité civile extracontractuelle (2013) 56, no 158; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 41 no 74 ff.

20 *Ulpianus*, Digest 9.2.5.1.

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subjective right[21] such as rights bestowed by the Civil Code or other norms of the Swiss legal order, eg self-defence, state of necessity, etc. It can be explained with the Latin behavioural rule *neminem laedere*[22] or with the Roman law principle of acting without authorisation, *agere sine iure*.

5. Greece

Efeteio Chanion (Chania Court of Appeal) 446/2005
Published at ISOKRATIS

Facts

During the general assembly of the department of the University of Crete, which would decide whether V would continue working for the University, an Assistant Professor, a member of the general assembly, expressed the view that V did not properly perform her obligations towards the University and enumerated the reasons which justified her point of view. Based on this negative recommendation, the general assembly voted in favour of the cessation of every working relation with V due to the latter's incompetence. Following this, V filed an action against the Assistant Professor alleging that the latter's declarations constituted defamation against her and that, as a consequence, her personality right was violated and therefore she sought damages. 1

Decision

The court held that the defendant had the right as a member of the academic community and of the general assembly to express her opinion, that the defendant proceeded to a presentation of facts about V's professional incompetence without any characterisations or implications that could reveal contempt for her and that the presentation of the facts was justified by the legitimate interest in the proper functioning of the department. Consequently, it rejected V's action. In analysing the conditions which have to be met for tortious liability to arise, the court mentioned that the unlawfulness of an act is judged by its outcome. According to the court, conduct contrary to a provision of law does not suffice; the violation of a provision 2

21 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 33e; *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 156, no 677 ff; *F Werro*, La responsabilité civile (2nd edn 2011) 94, no 300; *C Müller*, La responsabilité civile extracontractuelle (2013) 60, no 171; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 41 no 73.

22 *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 156, no 678.

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that establishes a right or protects a certain interest of the person who sustained the damage is required.

Comments

3 It is questioned in Greek theory if liability is based on the conduct of the tortfeasor (ie the tortfeasor is liable because his conduct was contrary to a rule of law or to the requirements of the legal order in general) or on the outcome of his conduct (ie the culprit is liable because his conduct had as an outcome, the violation of a right or of a legally protected interest of another person). According to the prevailing view,[1] shared by the presented case, unlawfulness is judged from the outcome of the conduct, as what is important in order to establish civil liability is conduct that leads to the violation of a right or of a legally protected interest. It has been argued, though,[2] that unlawfulness should or can[3] be judged from the behaviour of the tortfeasor. It must be said, however, that the two approaches, despite their differences, usually arrive at the same practical results.[4]

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 20 January 1993[1]
91-16.610, Bull civ II, no 27

Facts

1 Skiers A and V collided at the intersection of two tracks. V sought compensation from A for the injuries he had suffered. The appellate court granted the claim, on the ground that there was no way of knowing which skier had run into the other, but that A was coming from above and should have given way to V, while no fault could be asserted on V's side. The case was brought before the *Cour de cassation*.

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1 *P Filios*, Law of Obligations, Special Part, Vol II/2 (7th edn 2011) § 164 α, p 300; *V Vathrakokoilis*, Detailed Interpretation – Jurisprudence of the Civil Code, Vol A (3rd edn 1994) art 914, p 1206; Athens Court of Appeal 4351/2002 EllDni 2003, 200, 3114/1977 NoV 26 [1978], 235, Thessaloniki Court of Appeal 326/1971 Arm 25 [1971] 515.

2 *A Georgiades*, Law of Obligations – General Part (1999) § 60 no 27; *G Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 914, no 23.

3 *M Stathopoulo*s, Law of Obligations, General Part (2004) § 15 no 49.

4 *M Stathopoulo*s, Law of Obligations, General Part (2004) § 15 no 54.

1 All the decisions presented here can be found on the French law official website Legifrance: <http://www.legifrance.gouv.fr/initRechJuriJudi.do>. An easy way to find them is to key in the claim number in any research engine, between inverted comas. In this case, '10-30.439' or '10-30439' leads directly to the commented ruling.

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Decision

The *Cour de cassation* confirmed the appellate court's decision. It ruled that since it had been found that A and not V had been at fault, A was the only party responsible for the accident and therefore had to pay damages to V. 2

Comments

This case illustrates how fault is the only recognised form of misconduct under French law. Since V was not at fault, no misconduct could be found against him and he could not be liable for the accident on the basis of art 1382 of the *Code civil* (now art 1240). Admittedly, A was not claiming damages against V and the courts only had to decide on A's liability towards V and V's potential comparative fault. The logic would have been the same if V's liability towards A had been at stake, however, since no fault could be proven against A, the latter could not be liable to V on the basis of art 1382 (now art 1240). 3

Liability for misconduct is therefore always based on fault in French law. Since wrongfulness is seen as one and the same thing as fault, and defined as the violation of a duty, there can be no liability based on wrongfulness that would be distinct from liability based on fault. French law knows no such concept as wrongfulness based on the result of the action, as German law does for example (*Erfolgsunrecht*). 4

Of course, to say that there can be no liability for misconduct which is not based on fault does not mean that liability is necessarily based on fault/misconduct. Typically, in the case of collisions between skiers, plaintiffs will very often base their claim not on liability for fault (art 1382 of the *Code civil*, now art 1240), but on strict liability for the acts of things (art 1384, al 1, of the *Code civil*, now art 1242, al 1)), arguing that the other skier was strictly liable for damage caused by his skis.[2] 5

7. Belgium

Cour d'appel (Court of Appeal) Brussels, 17 February 1999
RGAR 2000, 13274

Facts

An accident occurred between a speeding vehicle, whose driver (A) was driving carelessly, and a pedestrian (V), when the latter attempted to cross the road. 1

2 See eg Cass civ 1, 16 October 2013, 12-17.909.

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Decision

2 The Court of Appeal found that, but for the two faults committed by A (speeding and carelessness), the accident would not have occurred in the way that it did. The driver was therefore considered to be responsible for the accident.

3 At the same time, the Court of Appeal considered that V committed a negligent act which was a contributory cause of his damage from the moment he failed to take sufficient account of the approaching vehicle, that he did not show the required prudence in crossing the road when a car, only a relatively short distance away, was approaching and that he could not have assessed the speed of that vehicle accurately. The court therefore held that liability should be shared between the two parties.

Comments

4 This decision allows us to demonstrate the two origins of fault explained in 1/7 above. A, by driving faster than the speed limit, was ignorant of a legal standard which imposed particular behaviour upon him (namely the obligation upon any road user to limit his driving speed on the road on the basis of road signs), which constituted a fault if the ignorance was committed freely and consciously, and if the driver could reasonably foresee that there was a risk of damage occurring. As this fault resulted in harm, it obliged the person causing it to make reparation and rendered him subject to civil liability.

5 As regards V, the Court of Appeal also held that he was at fault, not on the basis of a breach of a legal standard, but rather on the basis that he did not comply with a general standard of care. By not taking into account the vehicle travelling towards him, the pedestrian demonstrated negligence and did not behave as a reasonably prudent person would have done in the same circumstances. It is useful to note that in reality, in the case described, the Court of Appeal made reference to the violation of art 42.4.4 of the Highway Code in determining the existence of fault (*Code de la route*/*Wegcode*). However, that article suggests that the pedestrian should demonstrate prudence, in certain locations, before beginning to cross the road, which only serves to repeat the general duty of care and diligence.[1]

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1 On contributory negligence, see *H Cousy*/*D Droshout*, Contributory Negligence under Belgian Law, in: U Magnus/M Martín-Casals (eds), Unification of Tort Law: Fault (2004) 25–46. In circumstances similar to those of the commented case, the specific regime provided for in art 29*bis* of the Act of 21 November 1989 relating to mandatory insurance for liability in automotive vehicle matters should normally have been applied, considering the victim was a pedestrian (and, more generally, was not the driver of an automotive vehicle). According to this provision, in the case of a traffic accident involving a motor vehicle, damage sustained by the victim resulting from bodily injuries or death is to be compensated by the insurer who insured against the liability of the owner, driver or

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Tribunal de Grande Instance (Court of First Instance) Liège, 30 April 2010
JLMB 2011, 274

Facts

A skier (A) who was skiing downhill and who had no control of either his direction or speed, collided with another skier (V) who was further down the mountain. 6

Decision

The court considered that A, because he was skiing downhill, should have chosen a route and adapted his speed in a way which ensured the safety of V, who had priority. The court held that the rules relating to the control of one's direction and the priority of a skier further down the mountain are not only common sense, but also displayed in ski resorts, brochures and on signs at the bottom of the pistes, and, therefore that A was certainly negligent in the sense of art 1382 of the Civil Code. 7

Comments

When the act of one person causes damage to another, he/she will only be held responsible, and therefore obliged to pay compensation, if it is shown that he/she was at fault. In the absence of fault, the resulting harm alone does not in itself mean that the person who caused the damage is liable. This decision confirmed that as only A is liable, due to his reckless behaviour, notwithstanding the fact that the impact which occurred at the time of the collision in all probability caused harm to both parties. In this case, A must bear responsibility for the damage alone. 8

That being said, had the court considered that, due to his position and/or carelessness, V was at fault, because he had not reacted as a reasonably prudent and diligent person would have done in the same circumstances, it would then have been able, after having decided that such fault had a causal connection with the harm, to conclude that both skiers had been contributorily negligent, which would have resulted in V having to bear responsibility for part of his damage and that he should have to compensate A proportionately. Once again, the judge focused only on the behaviour of the person who caused the harm, and not on the resulting damage. 9

holder of the motor vehicle. The contributory negligence of the victim may not be invoked unless it had been committed intentionally. In the commented case, art 29*bis* was, however, not invoked.

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 9 December 1994, ECLI:NL:HR:1994:ZC1576

NJ 1996/403 (Werink/Hudepohl)

Facts

1 Four young men were walking in a forest. One kicked a branch without the aim of hurting anyone. The branch catapulted back into the eye of the person walking behind him.

Decision

2 The court reasoned that not just the mere possibility of an accident, as the materialisation of a danger inherent to certain behaviour, makes that behaviour unlawful. Behaviour creating a danger is only unlawful when the measure of probability of an accident (the suffering of an injury by someone else) as a result of that behaviour is so great that the actor had – according to standards of care – to refrain from that behaviour. The court decided against liability.

Comments

3 This case illustrates that, in order to decide whether certain behaviour is tortious, the mere fact that it results in an injury is not decisive.[1] An additional test should be applied: was the probability of an injury so great that the actor should have refrained from that behaviour?

Hoge Raad (Dutch Supreme Court) 7 April 2006, ECLI:NL:HR:2006:AU6934

NJ 2006/244 (Der Bildtpollen/Miedema)

Facts

4 A farmer stored onions in a storage hall. The onions appeared to be affected by mould. The farmer sued a company that had dumped a load of onions alongside a dike close to the storage hall, stating that those onions had affected his.

1 Cf Parlementaire geschiedenis Nieuw Burgerlijk Wetboek, boek 6 [Parliamentary Proceedings Book 6 Civil Code] (1991) 614.

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Decision

The court reasoned that, in order to answer the question whether certain behaviour is contrary to the standard of conduct seemly in society (*maatschappelijke betamelijkheid*), attention should be paid not only to the chance that harm will result, but also to the nature of the act, the nature and gravity of possible harm and the difficulty of taking precautionary measures.[2] Not just the mere possibility of harm, as the materialisation of a danger inherent to certain behaviour, makes that behaviour tortious. Behaviour creating a danger is only tortious when the probability of harm as a result of that behaviour is so great that the actor had – according to generally recognised standards of care – to refrain from that behaviour. The standard of conduct seemly in society does not require that the defendant, without knowledge or having to know of the risk of mould spreading, had to inform himself about the possible risks of leaving onions on the dike. 5

Comments

This case illustrates that, not only in the case of personal injury, does the mere fact that an act result in harm not make the act tortious.[3] An additional test should be applied: was the probability of the harm so great that the actor should have refrained from that behaviour? 6

9. Italy

Corte di Cassazione, Sezione Lavoro (Court of Cassation, Employment Division)
17 December 2014 no 26590
<www.iusexplorer.it>

Facts

A company did not provide the necessary protection to clear asbestos dust from its working environment. As a result, one of the employees was then affected by pleural mesothelioma and died. The heirs' took action to obtain compensation from the company. 1

2 Cf HR 5 November 1965, NJ 1966/136 (Kelderluik) at 3a/8 nos 1–4.

3 Also HR 7 April 2006, ECLI:NL:HR:2006:AU6934, NJ 2006/244 (Der Bildtpollen/Miedema). Cf Parlementaire geschiedenis Nieuw Burgerlijk Wetboek, boek 6 (Parliamentary Proceedings Book 6 Civil Code) (1991) 614.

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Decision

2 The *Corte di Cassazione* held the employer liable for the losses suffered by the worker, as he (the employer) did not comply with the obligation stated in art 2087 of the Civil Code, which requires employers to provide a healthy working environment.

3 According to the *Corte di Cassazione*, the responsibility of the employer under art 2087 of the Civil Code is not limited to the violation of common practice or technical rules that are already in existence and tested, but must be considered as intended to sanction, also in view of the worker's constitutional guarantees, any failure by an employer to ensure that all possible measures and precautions are in place to preserve the psychological and physical health and well-being of the worker at the workplace, taking into account the actual circumstances of the company and the employer's capacity to become acquainted with and investigate the existence of risk factors at a particular given moment (see Cass no 644/2005, Cass no 2491/2008 and Cass no 15156/2011). For this reason the employer's lack of awareness of the danger posed by asbestos fibres does not absolve him of liability. According to the court, lack of expertise, which includes lack of awareness of the necessary technical and scientific knowledge, is one of the parameters for measuring negligence and it cannot be resolved by absolving the employer of liability. Since, in the view of the court, the dangers of asbestos fibres were well known at the time, so that the use of materials containing them was subject to special precautions, irrespective of the concentration of fibres, a specific assessment was therefore required for the adoption of suitable measures to reduce the innate risk of using materials containing asbestos, in relation to the final regulation stated in art 2087 Civil Code and in art 21 of Presidential Decree No 303 of 19 March 1956, where it is established that in work normally causing the formation of dust of any kind, the employer must adopt suitable measures to prevent or reduce, as far as possible, its development and distribution in the working environment, adding that 'the measures to be adopted for that purpose must take into account the nature of the dust and its concentration'; that is, they must be adequate for the level of hazard of the dust. The court considered that the employer did not comply with these requirements deriving both from the established negligence of the employer and a violation of the legal provisions; it confirmed the judgment of the appeal court and ordered the company to pay damages.

Comments

4 For comments see 2/9 nos 7–9 below.

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Corte di Cassazione (Court of Cassation) 8 January 1982 no 76
Foro It 1982, I, 393; Giust Civ 1982, I, 607

Facts

A1 sold a property to V. V had to register the purchase to make the deed of purchase and title deed effective *erga omnes*. Before V registered it, A1 sold the same property to A2, who proceeded with registration immediately. According to art 2644 of the Civil Code, the purchaser who registers first acquires the right of ownership. It is clear from the facts of the case that the second purchaser knew of the first disposal of the same property and that he quickly registered it to deprive the first purchaser of ownership. The first purchaser, V, took action against both the vendor, A1 and the second purchaser, A2, to claim compensation. 5

Decision

The *Corte di Cassazione* referred to previous decisions holding that A2 is liable whenever there is a prior malicious arrangement between the second purchaser and the vendor, as this requirement is necessary in particular for the recovery action (*actio Pauliana*) regulated by art 2901 of the Civil Code. According to the court, a broader concept than a malicious prior arrangement should, however, be accepted if A2 is pursuing a personal profit notwithstanding the fact that, in order to obtain it, he intentionally causes wrongful damage to others. In such a case, notwithstanding the provision of the Criminal Code that recognises ownership being with the person who registers it first, A2's intent to deprive the purchase made by V of its effects, which had already taken place legitimately, by using the legal mechanism of registration, was to be sanctioned by holding A2 liable for such damage. 6

Comments

As a general rule, in Italian law, A's liability is established when a loss that is wrongful (*danno ingiusto*) is linked with a continuous causal link to A's negligent or intentional conduct. 7

In the first judgment referred to in 2/9 nos 1–3, one of the many cases of liability for asbestos damage that have been decided in recent years, the lack of due care is identified with the failure to have and to apply knowledge that the employer ought to have had in order to preserve health and safety at the workplace, according to art 2087 Civil Code and the Presidential Decree No 303/1956. 8

The second case in 2/9 no 5–6, shows that the same action, that is the registration of the second purchase, would not trigger liability if it were carried out without the knowledge that it would adversely affect the rights of another person. Therefore, the malicious nature of A2's conduct was determinative of liability under the cir- 9

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cumstances, because the damage caused was not to be compensated unless it was wilfully produced.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 27 April 1998
RJ 1998\3262

Facts

1 V sued the owner of a ski resort A1 and its insurer A2 for injuries suffered when, trying to avoid a child who suddenly crossed his path, he fell and collided with a 10 cm thick pole placed next to the ski slope to hold the net separating the track from a ravine. The claim was dismissed in both instances.

Decision

2 The appeal was rejected because it had been proven that the claimant's conduct was reckless when skiing down a slope intended for children or beginners without adapting his speed to the situation on the track. As shown by the force of the collision, the claimant had not adapted his speed to the situation in which he was carrying out the activity. He did not take into account the unpredictable manoeuvring or reactions that one can expect from children, in spite of the fact that he had seen a child who had crossed his path and forced him to make an abrupt manoeuvre due to the speed he was travelling at.

Comments

3 Normally, the causation of damage is attributed exclusively to one party and courts do not mention the unlawful or wrongful conduct of the other. In cases including conflicting interests, wrongfulness is usually mentioned when referring to grounds of justification such as self-defence, when assessing a possible abuse of rights[1] or contributory negligence. For this reason, the example chosen concerns contributory negligence. Fault and wrongfulness are two distinct and autonomous conditions of liability. Both elements must come together in order to establish liability, but each of them has its particular traits and scope. Fault refers to the personal aptitude of the tortfeasor to understand what damaging others means, to his/her tortious capacity and, accordingly, to his/her ability to be held liable for the wrongful act. Wrongfulness, by contrast, is usually connected to the illicitness of the conduct and

1 See 14/10 no 10 below.

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relates to the objective infringement of a legal norm, which, generally, is considered to be the general norm that forbids inflicting damage on others (*alterum non laedere*).[2]

The reference to the wrongfulness of the harm can also be made to demarcate the interests that are protected by tort rules.[3] This case illustrates, however, that the reasoning of the courts is not carried out on the basis that each party has caused wrongful harm, but it shows that courts take account of other elements that are relevant to establishing liability. 4

12. England and Wales

Christie v Davey, High Court (Chancery Division) 10 December 1892

[1893] 1 Ch D 316

Facts

The claimants, a couple, lived in a semi-detached house that immediately adjoined the defendant's. They had occupied their property for three years. Both Mrs Christie and her daughter took private pupils at home (the lessons lasted over 17 hours/week). They also played music privately for their own enjoyment, occasionally hosted music parties and engaged in practice. Additionally, Mrs Christie's son, who worked during the day and only came home late, played the cello between 22:00 and 23:00 and sometimes beyond. When another musician, a medallist of the Academy of Music, came to reside in the claimants' house, the defendant wrote a letter complaining about the 'dreadful scrapings on a violin' and 'vocal shrieks' which he said he at first mistook for the howling of a dog. In retaliation, the defendant took to hammering on the party-wall, beating on trays, whistling and imitating what was played in the claimants' house. The claimants alleged that this conduct constituted an actionable nuisance and sought to restrain him via an injunction. The defendant counter-claimed. 1

Decision

The court found that the noises made by the defendant were deliberate and malicious and their only purpose was to annoy his neighbours. The defendant's conduct 2

2 See 1/10 fn 4 above and corresponding text.

3 Thus, *JM Busto Lago*, La antijuridicidad del daño (1998) 58. Taking this view, Spanish courts have denied, for instance, the right to be compensated for the alteration of the landscape (eg by the construction of a rail infrastructure: STS 31.5 2007 [RJ 2007\3431]; commented on by *A Ruda*, CCJC 76 [2008] 171–193).

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thus constituted a nuisance and the court therefore gave the claimants the relief sought. It dismissed the defendant's counter-claim. North J held that the giving of music lessons was a perfectly legitimate activity through which the claimant and her daughter earned their living; the former was a skilful musician, the latter had a good music degree and the visitor who joined the family was a medallist of the Academy of Music. Similarly, there were no grounds to complain about the evening entertainment and occasional parties. This was especially so since the defendant had not previously complained in the three years the claimants had lived on the premises. By way of guidance for the future, however, North J suggested *obiter* that the claimants' son should limit his playing to 23:00 or as soon as possible thereafter.

Comments

3 In this case, the rival parties suffered comparable degrees of interference with the use and enjoyment of their land, but the defendant's reprehensible motive meant that the interference for which he was responsible was a nuisance while the claimants incurred no liability for what was a legitimate use of their property. The decision demonstrates that the unreasonableness of the interference caused by an activity may arise from the fault with which the activity is conducted. Such fault may take the form of malice (the desire to harm), as here, or simple carelessness in the sense of a failure to exercise reasonable skill and care to avoid the interference.[1] The case at hand considered liability in private nuisance, but the same underlying principle no doubt operates in other fields of tortious liability too.

4 The precise role played by fault in private nuisance has attracted vigorous discussion amongst English lawyers without any clear consensus emerging. Some commentators incline to the view that fault is entailed by a finding that the interference was unreasonable and hence gave rise to liability.[2] Others consider liability in private nuisance to be strict, it being no defence to an action in private nuisance that the defendant took reasonable steps to keep the interference to a minimum.[3]

1 Cf *Harrison v Southwark and Vauxhall Water Co* [1891] 2 Ch 409, 413 f (Vaughan Williams J).

2 Eg *A Mullis/K Oliphant*, Torts (4th edn 2011) 264 f.

3 Eg *G Cross*, Does Only the Careless Polluter Pay? A Fresh Examination of the Nature of Private Nuisance (1995) 111 LQR 445. But cf *A Mullis/K Oliphant* Torts (4th edn 2011) 264 f, discussing *Rapier v London Tramways* [1893] 2 Ch 588.

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13. Scotland

Crofter Hand Woven Harris Tweed Co Ltd & others v Veitch and another, House of Lords, 15 December 1941

1942 SC (HL) 1, [1942] AC 435

Facts

Two trade union officials instructed dock labourers at Stornoway to refuse to handle consignments of cloth sent to, or despatched by, certain manufacturers of tweed on the island who used imported cloth rather than cloth manufactured on the island's spinning mills. The dock labourers, without being coerced and without committing any breach of contract, followed these instructions. The manufacturers affected by the embargo (the appellants in this appeal) sought an interdict (injunction) against the trade union officials (the respondents in the appeal) on the ground that these officials and some of the millowners on the island had illegally conspired together to interfere with and damage the affected manufacturers in their legitimate right to trade. **1**

Decision

The House of Lords *affirmed* the decision of the Inner House of the Court of Session refusing the interdict, *and held* that, while the respondents, in combination with each other and with some of the millowners, had interfered with the appellants' trade, their action was not illegal, because the predominant intention of the respondents was the furtherance of the legitimate interests of the trade union and of the millowners[1] and not the injury of the petitioners, and that the method adopted – persuading the dock labourers not to handle the petitioners' goods – was not *per se* illegal, as what they were being asked to do was not (on the facts) a breach of contract by the dockworkers,[2] the workers not having been asked by their employers to handle the cloth. **2**

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1 The evidence was that the underlying intention of the trade union officials was to force producers to come to an agreement on the sale price of tweed and on the exclusive use of island spun yarn (this was noted in the judgment of the Court of Session: see the judgment of Lord Jamieson at first instance in the case, 1940 SC 140 at 146): this was held to constitute the pursuit of legitimate interests.

2 For confirmation of this, see, for instance, the speech of Lord Wright, at 26: 'In refusing to handle the goods they [the dockworkers] did not commit any breach of contract with anyone; they were merely exercising their own rights.' Similarly, in the Inner House of the Court of Session, Lord Aichison commented (1940 SC at 153) that 'the dockers were under no obligation to handle the goods' of the appellants. No further information is given in the judgments about this issue, so it is unclear why the dockers appear to have had the liberty to refuse to handle certain goods without this putting them in breach of their contracts of employment.

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Comments

3 In Scots law, the delict of conspiracy to injure (also a tort in English law, see 13/12 nos 7–8) makes for an interesting initial case study of wrongfulness.

4 Generally speaking, if A and B conspire together with the intention of harming C, then A and B are liable in delict for any harm caused to C as a result of such conspiracy. Conspiracy may take one of two forms: (a) lawful means conspiracy, this concerning cases where, although the means used by the conspirators to effect the harm would not be actionable if carried out by one person alone, it is made so by virtue of a conspiracy the predominant intention of which is to inflict harm; or (b) unlawful means conspiracy, this concerning cases where the means used by the conspirators to effect the harm *either* would be actionable if carried out by one person alone *or* involves a crime or breach of statute which does not provide a civil remedy for breach.[3] In either case, harm must have been caused, but the factors which in total constitute the 'wrongful' element of each of the two cases differ.

5 The present case was clearly not one of unlawful means conspiracy: in such cases, a component of the 'wrongfulness' element of the delict consists in committing some illegal act, and no such illegal acts had occurred. That being so, the delict of conspiracy could only have been committed by the respondents if their conduct fell within the class of lawful means conspiracy. In such cases the wrongfulness does not lie in the nature of the act done, but in the fact that the parties have combined together with the predominant intention of effecting harm. It may seem odd that two or more people can be held liable in delict for doing something which would not be delictual if done by one party alone, but the reason for this was explained in the present case by Lord Wright as follows:

> 'The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides.'[4]

6 So, one person may intentionally seek to damage another's business – that is the nature of competition – but a conspiracy to do so between two or more parties is considered to render the intention to inflict economic harm on another wrongful. That may not be an entirely satisfactory rule, given that, for instance, a large company might exert a more oppressive and harmful effect on a competitor than a combination of small traders,[5] but it remains the justification for the delict of conspiracy.

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3 For a useful summary of the law, see *J Thomson*, Delictual Liability (4th edn 2009).

4 1942 SC (HL) 1, 23.

5 A point made by Lord Wright in his speech, at 28 ('the power of a big corporation or trader may be greater than that of a large number of smaller fry in the trade').

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The case also contains some helpful comments on the elements required for delictual actions (other than in cases of strict liability) in Scots law, those elements finding expression in the maxim *damnum injuria datum*. Lord Simon LC commented: 7

> '"injury" is limited to actionable wrong, while "damage", in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not ... if A is damaged by the action of B, A nevertheless has no remedy against B, if B's act is lawful in itself and is carried out without employing unlawful means. In such a case A has to endure *damnum absque injuria*.'[6]

This is a useful reminder that both *damnum* and *injuria* are required for an action in delict, and that *injuria* is constituted by an actionable wrong; *damnum absque injuria* (loss in the absence of wrongful conduct) is irrelevant in law. 8

14. Ireland

Boyle v Holcroft, High Court, Chancery Division, 22 March 1905

[1905] 1 IR 245

Facts

B held fishing rights in respect of a river running through a farm; H was the tenant. H had a barbed wire fence erected along a 130 yard stretch of the riverbank, next to a salmon pool. The fence was located at a distance from the river that varied between 9 inches at its closest and 4 feet at its maximum. This effectively precluded anyone from fishing at that location. B sought an injunction to restrain interference with his rights. H claimed the fence was necessary for the proper management of the farm. 1

Decision

Barton J held that the erection of the fence was not for the purpose of proper farm management, but was done in bad faith to obstruct the exercise of fishing rights and he granted an injunction. He indicated that had the fencing been for genuine farm management purposes, no liability would attach and the holder of fishing rights would have to accept the resulting constraints on the exercise of his rights. 2

6 Lord Simon, at 6 f.

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Comments

3 This action was one for private nuisance, a tort requiring unreasonable interference with the plaintiff's rights in the ownership or occupation of land. This may appear to use a negligence standard, but it differs from negligence in how it addresses the question of 'reasonableness'. Whereas the negligence enquiry focuses on the defendant's behaviour based on what he/she ought reasonably to have anticipated at the time of acting, nuisance is focused on the reasonableness of the plaintiff's expectations in light of the effects of the defendant's activities. Thus, private nuisance is neither a purely fault-based tort nor one of strict liability – there may be fault in some cases, but it is not a general prerequisite; thus conduct can be deemed wrongful based on its impact on the plaintiff.[1] The range of application of private nuisance is narrower than negligence, as it only applies between neighbouring properties where behaviour on one property affects the rights of the neighbouring occupier.

4 This case demonstrates the need to balance competing interests in private nuisance claims, which requires an element of give and take between neighbours holding equal rights. The lawful activities of each right holder place constraints on the other – neither party can complain of the ordinary exercise of the other's rights, but can complain in respect of their abuse. The malicious intent converted otherwise lawful behaviour into unlawful behaviour because of its adverse effect on the plaintiff's proprietary right. Malice will not make behaviour unlawful if the plaintiff has no right which is adversely affected, even if he is disturbed by the malicious behaviour.[2]

5 *Cronin v Connor*[3] engages in a similar balancing exercise in a trespass claim (but in a case where there was no malicious purpose). In this instance the defendant land owner's cattle damaged turf cut by a person holding turbary rights (a *profit à prendre* – a type of servitude) and the court had to determine which of the two parties bore the obligation to protect the turf from the cattle. Kenny J held that placing the obligation to fence on the holder of the turbary right would be unreasonable and it would be fairer to place the burden of fencing on the owner of the land, so that his use (cattle grazing) would not unreasonably harm the value of the servitude.

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1 See also *Halpin v Tara Mines Ltd* [1976-7] ILRM 28 (3a/14 nos 12–16 below).

2 *Scott v Goulding Properties Ltd* [1973] IR 200; apart from the very limited concept of ancient lights, there is no right to light; so the malicious erection of a structure throwing shade on a neighbour would not be a nuisance.

3 [1913] 2 IR 119.

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Quinn v Kennedy Brothers Ltd, High Court, 4 March 1994
Unreported

Facts

The plaintiff was injured in a collision when cycling around the defendants' parked van, which left an unduly narrow space to pass.[4] The plaintiff and his friend cycled abreast around the van, while a third cyclist was approaching from the opposite direction with undue haste. **6**

Decision

It was held by Barron J that the conduct of the three cyclists broke the causal connection between the bad parking and the injury, so no liability arose. **7**

Comments

The decision demonstrates that creating a passive obstruction may generate liability; in respect of misconduct, two discrete issues arise. First, is the defendant's behaviour a breach of duty towards the plaintiff? In this case the defendant did breach a duty by parking badly and creating an unreasonable hazard for other road users. If the parking was better and no unreasonable hazard was generated, it would not be possible to impose liability on the defendant. Secondly, even if the defendant has beached a duty toward the plaintiff, it must also be shown that this was the legally responsible cause of the ensuing injury. In this case, the behaviour of the plaintiff and the other cyclist was considered to break the necessary causal connection. Not all wrongful behaviour by the plaintiff or a third party will amount to an intervening cause – principles of contributory negligence and concurrent wrongdoing may also be used to allocate responsibility. **8**

In the case of a direct collision between a moving person or vehicle and a static one, the person creating the static hazard can only be at fault if they have behaved unreasonably in generating the hazard (which will depend on the foreseeability of the collision and the availability of a reasonable means of avoiding it).[5] If there has **9**

4 In breach of Regulation 26(1) of the Road Traffic (General By-Laws) 1964 (SI No 294/1964).

5 There are few decisions involving such collisions; see eg *New Ireland Assurance plc v Donnellan* unreported IECC, 27 January 2003, noted in *R Byrne/W Binchy*, Annual Review of Irish Law 2003 (2004) 563f. Here, the driver of the stationary car had behaved reasonably in coming to a sudden halt moments before the collision, so all the responsibility fell on the driver of the moving vehicle. *Connolly v South of Ireland Asphalt Co* [1977] IR 99 applies the same reasoning in a case pleaded in

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been negligence in creating the static hazard, liability will depend on how the behaviour of the moving person is characterised; if it meets the criteria for a *novus actus interveniens*, then no liability will attach to the first person; if it does not satisfy the criteria, then contributory negligence will be attributed to the second person and liability will be apportioned between them on the basis of the relative blameworthiness of their conduct.

15. Malta

Gasan Insurance Agency Limited v Mario Agius (Civil Court, First Hall – Prim'Awla tal-Qorti Ċivili) 10 November 2000, Writ no 901/1996

Not reported

Facts

1 A street close to a school (the 'school street') was regularly closed to traffic at certain hours during school days, while children were entering and leaving school. During those hours another street, which normally was a one-way street, was opened for two-way traffic. To indicate this, temporary signs were placed at both ends of the one-way street: one to override the no-entry sign and the other to warn drivers of the possibility of oncoming traffic. These temporary signs were removed when the school street was open, and the other street therefore reverted to being a one-way street.

2 The defendant entered the one-way street in the proper direction when it was not open to oncoming traffic and when, therefore, the temporary signs were not in place. He parked his car in the one-way street and left. He returned when the street was opened to two-way traffic but, since he did not pass near the temporary signs, which, at this time, were in place, he was not aware of this. He pulled out and, believing that he was in a one-way street, he did not keep to the left (ie the proper) side of the road. At that point the plaintiff, who was driving in the opposite direction, appeared on the scene. The two drivers did not see each other in time because of a bend, and the cars collided.

3 The plaintiff sued for damages, claiming that the defendant was at fault for not keeping to the proper side of the road; the defendant claimed that the fault lay with the plaintiff, who ought to have exercised extra caution under the circumstances. He too sued for damages.

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both negligence and public nuisance (no responsibility attached to the stationary victim on the facts).

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Decision

The court held that neither party was at fault. The plaintiff was making an authorised use of the street and he was keeping to the proper side. The defendant was not on the proper side but his failure to realise that a usually one-way street was at that time open to two-way traffic was not attributable to negligence on his part. The claim was therefore dismissed and each party was to pay its own costs. The judgment was not appealed. 4

Comments

Both parties caused harm to each other and the defendant can also be said to have acted objectively wrongfully because he was on the wrong side of what was, at that time, a two-way street. What determined the judgment was the fact that there was no subjective fault because there was no negligence. The maxim that ignorance of the law is no excuse could not have reasonably been invoked in this case. It would of course have been different had proper permanent signage been in place. 5

16. Denmark

Vestre Landsret (Western Court of Appeal) 13 August 1956

U 1956.1085 V (the objective side of the negligence standard [Wrongfulness])

Facts

The case concerned a worker, V, at a bacon factory who was unexpectedly hit in the head by a pig trotter thrown through the room by a colleague, A, working at the same table. A wanted to throw the pig trotter into a box which was situated behind V, and in so doing V was injured. V sued A claiming damages for his personal injury. 1

Decision

The court found that A was not liable. The reason for this was that the chosen method of operating (throwing the pig trotter) entailed so remote possibilities for causing damage that A's act could not be considered wrongful (*uforsvarlig*). 2

Comments

The case can be seen as an illustration of the fact that the concept of misconduct includes the concept of wrongfulness. Thus, the court based its decision on the fact that – in an objective sense – A's act was not wrongful. In contrast, the court did not consider A's state of mind when tossing the pig trotter through the room (the subjec- 3

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tive side of the misconduct standard). It was not necessary to ask this question since A's act was not in an objective sense wrongful.

Vestre Landsret (Western Court of Appeal) 28 November 1988

U 1989.284 V (the objective side of the negligence standard [wrongfulness])

Facts

4 A car was damaged when it hit a container, which was placed at the side of the road. It was night-time, dark and rainy. There were no lights on the container although this was required by law. The car owner sued the owner of the container claiming damages.

Decision

5 The court found that the owner of the container was liable since it had not been equipped with lights in accordance with requirements found in relevant legislation.

Comments

6 No special rules of strict liability apply in this area of the law so the case was decided on the basis of the negligence standard. The decision is based on the finding that the owner of the container had failed to ensure that the container was properly equipped with lights. This was sufficient to establish liability. It is worth noting that the court did not consider the state of mind of the tortfeasor. The case illustrates the tendency to 'objectify' the negligence standard and the fact that no explicit distinction is made between the concepts of 'fault' and 'wrongfulness'.[1]

Højesteret (Supreme Court) 15 April 1953

U 1953.519 H (the subjective side of the negligence standard [fault])

Facts

7 A pine tree placed on a slope close to a public road fell during a heavy storm and hit a car whereby it caused damage to the car and injured the person in the car. An investigation showed that the reason why the tree fell was that the root network had been too weak compared to the size of the tree and that for a long time there had been a danger that the tree would fall. The car owner, V, sued the public entity, A, responsible for the roads and surrounding areas claiming damages.

1 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 88.

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Decision

The court acquitted A. The reason for this was that it would have been impossible for A to detect the problem. This would only have been possible for a forestry professional but not for A's ordinary employees. **8**

Comments

The case shows that fault can be part of the concept of negligence. Thus, the court found it decisive that A would not have been able to detect the problem of the weak root system. The question as to whether A acted wrongfully was not addressed in the decision. It is superfluous since liability cannot be imposed in the absence of fault. It is doubtful whether the case can be considered typical of today's understanding of the concept of negligence. Thus, as explained in the introduction,[2] in today's concept of misconduct in Danish law, the objective and the subjective side of the concept seem to have merged into one standard that tends to be more objective than subjective. Consequently, had the case been decided today, it does not seem unlikely that a court would have found that the public entity was under a duty to meet professional standards in securing the safety of roads. **9**

17. Norway

Stavanger byrett (Stavanger District Court) 26 January 1976
RG 1976, 457

Facts

Three boys aged between 13 and 14 were throwing gravel at each other in the course of a game they were playing on a road. One of the boys hit another in the eye with a stone and, as a consequence, the latter became blind in his left eye. The boy was assessed to be 20% occupationally disabled and he claimed compensation for the loss of future income from the tortfeasor's parents. **1**

Decision

The court noted that all three boys had participated in the game with the same enthusiasm, spirit and degree of participation. Moreover, the court found it proved that the participants' intention was to keep the activity at a minimum risk, and hence only hit each other's legs. The court did not find proved that the alleged tortfeasor had thrown a stone towards the claimant while he had his face directed towards him, and stressed **2**

2 See 1/16 no 4.

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that the alleged tortfeasor had not acted negligently regarding this type of misconduct. However, the court pointed to the fact that the activity had been very dangerous, and that it must have been obvious that the game would become increasingly dangerous as the participants hit each other and became more eager to get revenge. The nature of the activity is such that the intensity increases and that it gets increasingly out of control. As a consequence, the boys ought to have understood that it would be dangerous to continue the game. When the stone was thrown, the game was at its most dangerous, and the court pointed out that a boy of 14 years and 8 months was expected to have the cognitive skills to understand the nature of the risk in this situation. The court therefore found the boy liable in damages.

3 As for the claimant, the court stated that he had acted negligently in the same manner as the tortfeasor at the time of the accident. He was 13 years and 6 months old. His misconduct was to continue playing the high-risk game when he ought to have understood that the game had become very dangerous. He should have stopped and not continued participating when the game reached a dangerous level.

4 The compensation was reduced by 50% due to the claimant's contributory negligence.

Comments

5 The earlier doctrinal discussions of the concept of *culpa* and negligence were based on an approach linked to wrongfulness.[1] In Norwegian tort law this concept has traditionally been defined as 'not in accordance with the law'. In the early twentieth century, theorists believed that a formula could be arrived at for drawing the dividing line between lawful and wrongful conduct within tort law and the application of the *culpa* norm. This initiated a far-reaching Nordic debate on wrongfulness (*rettstridslæren*).[2] As we see from the case above, this stance is no longer valid. The controversy in theory ultimately culminated in a common stance that wrongfulness has no conceptual value in itself. It is the term given to the result of a concrete assessment. Distinguishing between these concepts or equivalent concepts is not necessary in order to decide whether or not liability can be established.

6 Only some theorists still adhere to the older doctrine.[3] The concepts of negligence, wrongfulness and fault are all subsumed under the notion of *culpa* men-

1 Cf the dichotomy between conduct-based and result-based wrongfulness in Basic Questions I, no 6/15.

2 A survey of the debate is given in *N Nygaard*, Skade og ansvar (6th edn 2007) 173. F Stang, A Ross and W Lundstedt, all leading theorists in the respective Scandinavian countries at the time were prominent participants.

3 See, for example, *V Hagstrøm*, Culpanormen (1985) 37 f and *N Nygaard*, Skade og ansvar (6th edn 2007) 172 f.

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tioned above, and the case above shows that the assessment of misconduct must be based on a very concrete decision, which enables us to differentiate between different forms of misconduct even in the risk situation which established the source of risk of damage. This differentiation is especially important where the potential tortfeasor and the potential claimant created the risk together, their causal contribution has the same nature and it is more or less a coincidence which of the parties was ultimately harmed. The flexible approach enables us to apply the requirements in the *culpa* rule more precisely. The question of whether the alleged tortfeasor ought to have acted differently is based on the last point in time when he/she could have acted differently to avoid the harm.

18. Sweden

Högsta domstolen (Supreme Court) 16 October 1996

NJA 1996, 564

Facts

A professional horse trainer took care of a horse. The horse managed to open the door to his horsebox a little, whereupon it hit its head on the girder. This caused the door to be lifted from its hinges with the result that the door got caught around the horse's neck. The horse became scared and ran out of the box to the open space outside the stable, where it fell with the door around its head, which led to injuries. The owner of the horse sued the trainer. 1

Decision

The trainer was considered negligent since he had not ensured that a lock, which could not be opened by a horse, had been affixed to the door. Apropos the risks, the court stated: 'The risk assessment shall not only focus on the harm that actually occurred, but instead relate to the risk of injuries of the same kind.' This risk assessment did not focus on whether the trainer had anticipated the 'combination of circumstances that in this case led to the damage', but rather on the issue of whether he had created 'a risk for the horse to get out of the box and thereupon or later be harmed'. The actual damage occurred due to a series of coincidental circumstances, but the court nevertheless found the trainer liable for the negligence he had shown when not equipping the door with a sufficiently secure lock. 2

Comments

This case clearly demonstrates that the nature of the relevant misconduct in Swedish tort law deals with the so-called *Verhaltensunrecht*, rather than *Erfolgsunrecht*. 3

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The focus of the risk evaluation concerns the issue of whether the human conduct is safe enough, not if the specific result as such is foreseeable, etc. Although the facts of the case are examined concretely, the risk of consequences insofar is abstract in that it deals with the damage potential of the conduct, not the actual damage or actual causal sequence. When evaluating the human conduct in this case, it was considered as a risk that the horse somehow could get out of the box and that it somehow could get hurt. The risks involved in the negligence test did not consider the individual steps that led to the individual harmful result. In short, the evaluation of misconduct deals with conduct – and the risk potential which the conduct creates – not with the injuries which were actually caused.[1]

19. Finland

Korkein oikeus (Supreme Court) KKO 2005:105, 29.9.2005

<http://www.finlex.fi>

Facts

1 The holder of the patent for a garden rake (*Fiskars Oyj Abp*, subsequently A) sent a letter to retailers of a competing product, alleging that the rakes sold by the latter infringed its patent. For this reason the company demanded the immediate cessation of the infringement, ie, the sale of the rakes. It also threatened the retailers with a lawsuit for compensation. The position of A was based on the opinion of a private patent office. After receipt of the letter, the retailers withdrew the rakes from sale, and unsold items were either destroyed or sent back to the importer and distributor of the competing product (*Rediva Oy*, subsequently V). Later, the court found that the competing product did not infringe A's patent. V consequently sued A for damages for the economic loss caused by A having negligently sent the letter of claim.

Decision

2 The Supreme Court found that while the purpose of the letter was acceptable as such, the patent holder's conduct was inappropriate in view of the situation as a whole. A is a large company, and the letter was signed by the head of its legal department. Thus, the small retailers who received the letter understandably assumed that the claim that A's patent had been infringed was correct. However, the grounds for the retail ban demanded in the letter proved to be false. In other respects the letter was not false or misleading, but the letter was written in a hostile style and in-

1 For an analysis of the case, see *A Agell* in: J Hellner et al (eds), Festskrift till Ulf K Nordenson (1999) 6 ff, 10 ff.

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cluded harsh and absolute statements on the penalties which the recipients should be prepared to pay. Although the sales ban demanded in the letter was not legally binding, taking into account that the recipients of the letter were small companies, the content and the tone of the letter and the market position of A, the retailers of the rakes could have gained a false impression of the infringement and its implications, as well as their own position regarding involvement in the violation. A must have understood the likelihood of the retailers withdrawing the product from sale after receiving the letter. According to ch 5, sec 1 TLA, compensation for pure economic loss in a case like this requires especially compelling grounds for compensation. The Supreme Court ruled that such grounds existed and found A liable to pay compensation, returning the case to the district court for the quantification of the damage.

Comments

Finnish tort law has a very restrictive attitude towards compensating pure economic losses. Negligence is not sufficient and some special conditions also have to be fulfilled.[1] This is a difficult case, as the district court and court of appeal found no negligence. It is an example of how difficult the evaluation of negligence and 'especially compelling grounds' can be. The Supreme Court emphasised the fact that the alleged patent infringement had not been proven when the letter was sent and that it was sent not only to the importer and distributor but also to small retailers who had no ability to evaluate the consequences of the continued sale of the rakes. These elements, especially the strict prohibition in the letter that was sent to small retailers who could not evaluate its correctness and who were afraid of the possible consequences, made A's business behaviour unfair and was negligent. 3

Korkein oikeus (Supreme Court) KKO 1983 II 187, 28.12.1983

<http://www.finlex.fi>

Facts

After a company had terminated an employee's contract of employment, a local trade union published a notification in a newspaper, announcing a boycott of the company. Another local trade union supported the boycott by distributing leaflets to homes and workplaces. The purpose of the boycott was, among other things, to put pressure on the employer to pay the severance pay demanded by the employee. Dur- 4

1 See *M Hemmo*, Vahingonkorvausoikeuden oppikirja (2002); *P Tiilikka*, Julkaistun verkoviestin sisällön aiheuttaman vahingon korvaamisesta, Defensor Legis 4/2009, 606–630 and *L Sisula-Tulokas*, Ren ekonomisk skada (2012).

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ing the termination of contract negotiations, the employer had agreed to pay a lower amount of compensation for the employee. The company claimed compensation from the trade union because the boycott had caused it an economic loss.

Decision

5 The Supreme Court stated that Finland allows freedom of contract, which includes the freedom to choose whether or not to conclude contracts and the freedom to choose a contractual partner. Moreover, individuals are free to express their opinions regarding their choice of contractual partner. However, the basis for such an opinion must not be erroneous, incoherent or unlawfully discriminatory. In this case the local trade union had hampered the employer's business, contrary to good practice, by addressing a number of actions against the employer because of a dispute between the employer and one of its employees, even though the latter had had access to legal remedies to rectify his complaint.

6 Because of the employer's fault when terminating the employment contract, the particularly weighty reasons required by ch 5, sec 1 of the TLA as a condition for compensation were not deemed to be present; the trade union was not ordered to pay compensation for the pure economic loss caused by the boycott (split decision 1-2-1-1).

Comments

7 According to ch 5, sec 1 of the Finnish TLA, pure economic loss (that is, economic loss that arises without any connection to personal injury or damage to property) is compensated only if it was caused by an act that is punishable by law or in the exercise of public authority or in other cases where there are especially weighty reasons to compensate the damage.[2] In this case the court found misconduct on the part of the trade union when it tried to obstruct the employer's business by means of a boycott. However, there were no especially weighty reasons to compensate the damage because the injured party had also acted in a blameworthy fashion. This case is an example of how the misconduct of an injured party can affect liability.

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2 Normally unlawfulness does not play a special role in Finnish tort law practice, but when the question concerns the compensation of pure economic loss or mental distress, the punishability of the act is one factor that can lead to the establishment of liability. See *M Hemmo*, Vahingonkorvausoikeuden oppikirja (2002), *P Tiilikka*, Sananvapaus ja yksilön suoja. Lehtiartikkelin aiheuttaman kärsimyksen korvaaminen (2007); *P Tiilikka*, Julkaistun verkoviestin sisällön aiheuttaman vahingon korvaamisesta, Defensor Legis 4/2009, 606–630 and *P Tiilikka*, Rangaistavaksi säädetty teko kärsimyskorvauksen perusteena, Lakimies 5/2011, 933–956 and *L Sisula-Tulokas*, Sveda, värk och annat lidande (1995) and *L Sisula-Tulokas*, Ren ekonomisk skada (2012).

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20. Estonia

Riigikohus (Supreme Court) 31 May 2007[1]
Civil Matter No 3-2-1-54-07

Facts

The plaintiff was injured due to the falling of a barrier in a multi-storey car park of a shopping centre that belonged to the defendant and he requested compensation for non-pecuniary damage in the amount of € 3,195 from the defendant. The defendant found that the plaintiff's contact with the barrier became possible only as a result of activities of the plaintiff himself since the plaintiff was walking on a driveway that was meant for cars, not pedestrians. The sensors of the barrier were adjusted to the movement of vehicles, not humans. The county court dismissed the action and the circuit court did not amend the decision of the county court. The courts found that, even if the plaintiff received an injury as a result of the falling of the barrier, the damage was caused as a result of the plaintiff's own conduct. **1**

Decision

The Supreme Court annulled the decision of the circuit court and sent the case back to the same circuit court for a new hearing. The Supreme Court reproached the courts for not verifying the preconditions of the possible liability of the defendant in a manner prescribed by substantive law. Although the county court stated the preconditions for delictual liability in its decision, it did not give a clear judgment on whether any of these preconditions of liability existed. The Supreme Court explained that the presence of injuries and the causing of such injuries by the acts of the defendant (which may also be an omission) provides grounds to consider the activity of the defendant unlawful according to § 1045 (1) 2) of LOA, which stipulates that the causing of damage is unlawful when it causes bodily injury or damage to the health of the victim. Since the claims of the plaintiff enabled the conduct of the defendant to be considered unlawful under the above provision, the view of the county court that the defendant's liability is excluded because the defendant did not violate the law by the fact that it installed a barrier in the car park is irrelevant and errant. The view of the courts that the injury may have been caused by the acts of the plaintiff himself was not in compliance with the circumstances established by the courts because the courts did not ascertain the plaintiff's intention to injure himself. It remains unclear whether the county court even assessed the fault of the defendant. The possible contributory negligence of the plaintiff in causing himself **2**

1 The decisions of the county courts and circuit courts are available in Estonian at: <www.riigiteataja.ee>.

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an injury and the subsequent damage shall be taken into consideration in determining the amount of compensation for non-pecuniary damage.

3 The Supreme Court also explained that, in verifying the existence of general delictual liability, the element of fault is the last prerequisite to be examined for the establishment of delictual liability, that is, before assessing the issue of fault, the causing of damage by the defendant and the unlawfulness of the defendant's act shall have been established. If the defendant caused a bodily injury to the plaintiff, it can presumably be considered an unlawful act under LOA § 1045 (1) 2). Since, according to § 1050 (1) of LOA, the defendant's fault is presumed, the defendant shall be released from liability when he can prove that he was not negligent, that is, he did everything reasonable to prevent damaging the plaintiff. The subjective circumstances in the assessment of fault established under LOA § 1050 (2) can be taken into consideration only for defendants who are natural persons according to the meaning of this provision.

Comments

4 This case indicates the position of the Supreme Court that courts shall clearly distinguish the elements of general delictual liability – causing of damage, unlawfulness of the act that caused damage, and fault – and verify them in a strict order. The judgment of the Supreme Court also indicates a differentiation between *Erfolgsunrecht* and *Verhaltensunrecht*: if a bodily injury has been caused to the victim, the causing of damage is automatically deemed unlawful. In the case of such a violation of a legal right, unlawfulness is based on the harmful result as such, whereas the human conduct which caused this result is of no importance.[2] Attention should also be paid to the view of the Supreme Court that a plaintiff's negligence in itself cannot rule out negligence of the defendant but may affect the amount of compensation awarded against it.

Riigikohus (Supreme Court) 13 April 2011

Civil Matter No 3-2-1-11-11

Facts

5 A shed caught fire on a plot of land belonging to the defendant. The fire spread to land owned by the plaintiff and set alight the home of the plaintiff. As compensation for damage, the plaintiff requested the defendant compensate the expenses incurred to restore the house. The plaintiff found that the defendant violated § 3 (3) of the

2 See *P Varul et al*, Võlaõigusseadus III. Kommenteeritud väljaanne [Law of Obligations Act III. Commented edition] (2009) 641f.

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Building Act (BA), which stipulates that the spontaneous spreading of fire and smoke within construction work and the spreading of fire to neighbouring construction works must be prevented. The plaintiff based his claim on § 1045 (1) 7) of LOA, according to which causing damage is unlawful when it was caused by behaviour which violates a duty arising from law. The defendant contested the claim, finding that the plaintiff violated building requirements with his home because it was partially built in a building exclusion area. The defendant also sought the application of § 1050 (2) of LOA by claiming that he has been deaf since childhood and he is maintaining three small children (two of them with special needs) and a fourth child is about to be born soon. The county court satisfied the action. The county court found that the act of the defendant was unlawful and he did not prove that he was not at fault in causing damage. The circuit court annulled the decision of the county court and sent the case back for review to the same county court. The circuit court found that the county court had not acted correctly (ie breached the procedural law) in assessing the extent of the damage.

Decision

The Supreme Court annulled the decision of the circuit court and sent the case back for review to the same circuit court. Among other things, the Supreme Court explained that the acts of the defendant could be qualified on two different legal grounds. The act may be unlawful by reference to a violation of an ownership interest held by the plaintiff. In this case, it is assessed whether the defendant was externally and internally negligent in damaging the property of the plaintiff. The act may also be unlawful due to a violation of a provision protecting the plaintiff (in this case, BA § 3 (3)). In this case, the culpability of the tortfeasor in causing the damage is assessed vis-à-vis a violation of a provision defending the plaintiff. Moreover the Supreme Court also stressed that internal fault could not be assessed in this case until the cause of the fire had been determined and also assessed what the defendant should have done as an average reasonable person acting diligently to prevent fire and its spread to the immovable property of the plaintiff (external negligence). The defendant could be freed from the obligation to compensate for the damage under § 1050 (2) of LOA if he could prove that the statement on external negligence was not fair towards him, taking into consideration the circumstances of this case and the characteristics of his personality (internal negligence). 6

Comments

This case is a good example of how unlawfulness and fault as elements of delictual liability are distinguished in the law of Estonia. It also shows that the unlawfulness of an act may emerge from an alternative source. Pursuant to the Estonian law of delict, the act that caused damage is unlawful pursuant to LOA § 1045 (1) 5) only due 7

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to the harmful consequence – a violation of a right of ownership (*Erfolgsunrecht*). The Supreme Court agreed and explained that in order to implement this provision, the plaintiff must prove only a violation of the right of ownership, which, in this case, is damage to a thing belonging to him by a fire that started on the defendant's land. The plaintiff did not need to additionally prove that the defendant had violated § 3 (3) of BA or any other provision. However, the plaintiff could alternatively seek the application of § 1045 (1) 7) and (3) of LOA, according to which unlawfulness can result from a violation of protective statutes.

Harju Maakohus (Harju County Court) 12 January 2012
Civil Matter No 2-11-6289

Facts

8 According to the statement of claim, the defendant attacked the plaintiff at school during a break on two different days and caused various bodily injuries to the plaintiff. The plaintiff sought compensation for non-pecuniary damage from the defendant.

Decision

9 The county court satisfied the action. The county court found it established that the defendant caused the injuries to the plaintiff at the time and place as stated in the statement of claim. By so doing, the court deemed the primary preconditions of delictual liability of the defendant – consisting of the act of the defendant, harmful consequence to the plaintiff (in this case, bodily injury), and a causal link between the act of the defendant and the injury of the plaintiff – proven. The county court found that since the behaviour of which the defendant was accused in this case lay in an act (not omission) and the acts of the defendant directly caused a violation of legal rights (ie the physical and mental well-being of another person) stated in § 1045 (1) 2) of LOA, the acts of the defendant in themselves shall be deemed unlawful (the so-called theory of unlawfulness of a consequence). Therefore, the court found it unnecessary to verify other circumstances in order to determine the unlawfulness of the activity of the defendant, including a possible violation of provisions with a protective purpose. The county court found the defendant at fault in causing the damage. At the time of performance of the acts that caused damage to the plaintiff, the defendant was 15 years old, thus capable of fault pursuant to § 1052 (1) of LOA. The method used to cause damage (hitting) to the plaintiff by the defendant indicates that the defendant caused the damage to the plaintiff intentionally (at least by indirect intention).

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Comments

In deciding this case, the county court observed the positions taken in legal theory and the judicial practice of the Supreme Court for the establishment of the elements of liability based on general delictual liability. Since causing bodily injuries as a result is presumed to establish unlawfulness under § 1045 (1) 2) of LOA, the county court was correct to state that there is no need to assess whether the defendant violated any other provisions (mainly provisions with a protective purpose within the meaning of § 1045 (1) 7) of LOA) in order to establish the unlawfulness of the defendant's act. The county court also provided a justified assessment of the fault capacity of the defendant. This means that, for example, if the defendant had been 13 years old, his act would have been unlawful according to § 1045 (1) 2) of LOA, but he could not have been found culpable of causing bodily injury to the plaintiff and he would be freed from liability due to his non-capacity for fault for damage under § 1052 (1) of LOA. The county court also stated correctly that, since the defendant caused the bodily injuries to the plaintiff intentionally, he is culpable under § 1050 (1) of LOA and there is no reason to assess the subjective characteristics of the defendant according to § 1050 (2) of LOA. There was no question in this case as to whether the defendant could have been freed from liability on the grounds of causing the bodily injuries in a state of self-defence and therefore, the county court did not have to assess whether the unlawfulness of the defendant's act was excluded under § 1045 (2) 3) of LOA. Absent unlawfulness, the county court should not have assessed whether the defendant was at fault in causing the bodily injuries. 10

21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-296/2008, 10 September 2008

Unpublished

Facts

The claimant was renting apartment No 10 in a house where a defendant was renting apartment No 14, just above the claimant. On 10 October 2006 the claimant came home and discovered that water had been leaking down the ceiling onto the floor; the walls and the belongings of the claimant were drenched in water. Afterwards it was confirmed that the origin of the leakage was a radiator in the apartment occupied by the defendant as its valve had not been closed properly. The claimant alleged that the water had caused her damage as a consequence of the defendant's misconduct. 1

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Decision

2 The court of first instance satisfied the claim in full. The court of appeals satisfied the claim almost in full. The court argued that the testing of the heating system under pressure before the heating season had been publicly announced, ie, on the radio and in a local newspaper and there were posters on the staircase door urging residents to be at home that day. In addition, after an investigation of the circumstances, it was discovered that indeed the water was leaking from the radiator of apartment No 14 occupied by the defendant and after the taps were closed the leakage stopped. The defendant had not reported any defects or problems with the radiators or requested a postponement of the testing of the heating, nor did the defendant comply with the terms of the lease agreement imposing on the defendant a duty to monitor the state of the radiator's valves. Hence, the defendant was found liable on the basis of the general obligation to compensate damage one has unlawfully caused (arts 1775, 1779 of the CLL). The Senate of the Supreme Court of Latvia upheld the decision of the court of appeals indicating that it is not the task of the Senate of the Supreme Court to assess the factual circumstances and the decision of the lower instance court clearly serves to ascertain that all the preconditions for liability were proved. It emerges from the reasoning of the court of appeals that indeed the defendant failed to report any damage of the radiator, did not ensure that the valves were hermetically sealed and it was clearly demonstrated that the water originated from the radiator in the defendant's apartment. Thus, the defendant failed to exercise due care and to comply with the necessary standard of conduct, with the result that damage was caused to the claimant.

Comments

3 In addition to presenting a routine case where a breach of another person's rights was caused by an omission on the defendant's part, which is another typical form of misconduct recognised by Latvian courts, the case indicates an interesting issue of parallel breaches of duties arising from the law and a lease agreement. It may be of little importance from a theoretical point of view whether a duty to check and monitor the condition of radiator valves was imposed under an agreement entered into between the owner of the premises and the defendant as such a duty most probably serves to protect the interests of the former rather than the property or well-being of third parties. Hence, the court focused on the evaluation of the standard of conduct in general in the given set of circumstances, arriving at the conclusion that it was both possible and required of the defendant to monitor the radiator valves and thus prevent damage from occurring. The contractual stipulations, although violated, may not have constituted the unlawfulness of the defendant's conduct and probably was an *obiter dictum* argument used by the court to stress the duty of safekeeping as the case would have had the same outcome in the absence of the agreement obliging the defendant to monitor the radiator valves. This case therefore is an example

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where a negligent breach of duty to monitor and maintain a safe state of real estate constitutes misconduct on the part of the defendant.

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-637/2012, 17 October 2012

<http://at.gov.lv/files/uploads/files/637-skc-2012.doc>

Facts

In the news website <www.apollo.lv> owned by company L, an article entitled 'Rich Notorious Judge' was published on 12 February 2007 by two journalists and company B. The article contained false information on how the judge acquired property and received a mortgage loan, thereby amounting to an infringement of his honour and dignity. 4

The named judge (the claimant) brought an action against company L, company B and the two journalists (the defendants) claiming a withdrawal of the false statement and compensation for non-pecuniary harm caused by an infringement of his honour and dignity. The claimant argued that the article included deliberate and misleading allegations that he acquired an apartment in a resort city near Riga, borrowing money equal to approximately 60 times his annual salary, settling the debt very quickly afterwards and thus the acquisition of the apartment was suspicious. 5

Decision

The court of first instance satisfied the claim partly, ordering company L to withdraw the false statements made in the article regarding the mortgage loans within a week and awarding compensation for non-pecuniary loss in the amount of € 12,241 to the claimant. The court of appeals also held company B partially liable. When the case was reviewed, the question of what constitutes a journalist's misconduct was addressed. The court rejected the defendant's argument that journalists' statements, containing information of public interest cannot be considered unlawful, even if it subsequently turns out to be false, although collected in good faith. The court found that journalists are required to verify the truth of information and, in the case at hand, the journalists acted negligently, failing to examine the information relating to the mortgage loans, which is publicly available in the entries of the Land Register. Thus, their conduct violated art 7(5) of the Law on the Press and Other Mass Media. 6

The Senate of the Supreme Court found that the legal reasoning of the second instance court was sound, but the decision was, however, reversed as the decision lacked justification of the substantial difference in the amount of compensation for non-pecuniary harm to be paid by the defendants L and B. 7

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Comments

8 Generally, an illegal act as a precondition of liability under Latvian law also involves an assessment of justifications, which could remotely resemble an assessment of fault, which is referred to in art 1635 of the CLL using the following wording: 'insofar as he/she may be held at fault for such act'. The unlawfulness of the conduct can be proved by indicating a particular regulation and a mere reference to the non-compliance with a standard of conduct may be insufficient. The presented case also indicates that the assessment of the conduct may be connected to an evaluation of the principles of law, possible negligence and non-compliance with the standards of journalism.

9 In defamation (libel) claims, where a person's rights to honour and dignity are concerned, there is often a collision of two fundamental principles: the right to freedom of expression and journalistic independence, on the one hand, and protection of a person's honour and dignity, preventing false defamatory statements concerning a person from being published, on the other hand. In this context, distinguishing between a statement and a journalist's opinion is of particular importance.[1] Freedom of speech does not mean that the person who intends to provide statements is entitled to publish any information without its prior verification. Journalists, when collecting information and preparing an article, are required to act in good faith, as well as to comply with the required standards of journalism. In order to recognise their actions as illegal, it is sufficient to demonstrate negligence or carelessness on their part. When reviewing such cases, the courts in Latvia also take into consideration the jurisprudence of the ECtHR. In the decision of the Senate it was indicated that the decision of the second instance court did not contradict the view expressed by ECtHR decision of 20 May 1999 (*Bladet Tromsø and Stensaas v Norway*), namely that journalists cannot be held liable if, at the time the false information is published, the journalist could have reasonably relied on the official information and acted in good faith. In the presented case the journalists, however, were negligent in not checking publicly available information. In a number of other cases of a similar nature, extensive reasoning is devoted to the issue of distinguishing between fact and opinion of a person by referring to ECtHR decisions, such as *Prager and Oberschlick v Austria*, *De Haes and Gijsels v Belgium*, *Tammer v Estonia and others*.[2]

1 Case law compilation on civil matters concerning violations of a person's honour and dignity. Available at: <http://at.gov.lv/files/uploads/files/docs/summaries/2004/Apkopojums_Gods_un_ciena.doc>.

2 Ibid, 8–13.

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22. Lithuania

UAB 'Baldenis' v UAB DK 'PZU Lietuva', 3 March 2008

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-153/2008; <http://www.lat.lt>

Facts

The case was initiated by the plaintiff whose car was damaged in a traffic accident against the defendant civil liability insurance company UAB DK 'PZU Lietuva'. The defendant refused to pay the insurance benefit to the plaintiff, arguing that its insured had not been at fault for the harmful event. 1

The collision of the plaintiff's car with the passenger bus happened a few minutes after the bus driver, driving the bus belonging to the passenger transportation company 'Kautra', had struck a drunken pedestrian who was walking in the dark along the roadside without a safety reflector. The driver stopped the bus after the collision, turned on his hazard lights and the lights inside the bus and disembarked in order to take the emergency sign out of the luggage compartment. A part of the left back corner of the bus (about 70 cm) remained protruding into the opposite lane. The car of the plaintiff, driven by its employee in the lane of oncoming traffic, bumped into the bus just when the driver of the bus was extracting the emergency sign. 2

The penal case against the bus driver was terminated for lack of fault: in the penal case it was proved that the driver had not breached the Road Traffic Rules (hereinafter, RTR), because he could not have noticed the pedestrian and avoided the bump and, because of the lack of time after the first accident, he was not able to fulfil the requirement of the RTR to place the emergency sign behind the vehicle. According to the defendant, neither the bus driver nor the passenger transportation company 'Kautra' were responsible for the damage to the plaintiff's car. 3

The court of first instance granted the claim. The court stated that, although the fault of the bus driver in the penal procedure had not been established, he acted with fault in civil law terms because he had not been careful enough. 4

On appeal, the decision was annulled by the district court. The district court found that the driver of the car was at fault herself since she breached art 173 RTR, which requires a driver who has noticed an obstruction or experienced a danger to safe driving, to slow down, to stop or to pass the obstruction without hazard to other drivers. The court held that the bus driver was not at fault since it was not proven in the case that he had had enough time to place an emergency sign behind the vehicle in the period after the collision with the pedestrian and before the second event. 5

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Decision

6 The Lithuanian Supreme Court reversed, and ordered a retrial. It found that both courts had erred concerning the unlawfulness and fault of both the driver of the bus and the car. The court stated that, according to art 6.246(1) CC, unlawfulness shall be established if the person had a legal duty and objectively breached that duty. The question of whether or not the duty could have been fulfilled is a question of fault, not of unlawfulness. The Law on Road Traffic Safety indicates that, in the event of a motor vehicle accident, the participants in the accident must stop immediately and mark the spot of the accident according to the procedure set in the RTR (art 23(1)). Article 8(3)(3) of the same Law obliges the participant to observe all the necessary cautionary measures, not to endanger other traffic participants, other persons or the property thereof and the environment, and not to interfere with traffic. According to the court, the latter norm obliges the driver to decide what measures are necessary in the particular situation so as not to create a hazard and not to interfere with traffic when a vehicle is stationary after an accident. The driver must take all appropriate measures, and if he has not taken all available measures, he acted unlawfully. The facts of the case show that the bus driver came to a standstill at the side of the road and created an obstacle for those travelling in the opposite lane; he did not mark the obstacle taking all possible measures in his own lane and did not highlight the part of the vehicle which was protruding into the opposite lane at all. According to the Lithuanian Supreme Court, the mentioned facts have to be analysed in order to decide on the question of unlawfulness. However, the district court analysed the question of fault solely. In addition, the district court's conclusions on the absence of fault are rather superficial. The district court stated that the bus driver was not at fault because he did not have enough time to place the emergency sign as required by the RTR. However, the court should have examined the cited norms of the Law on Road Traffic Safety, the general duty to behave with due care set out in art 6.246(1) CC and the duty to abide by the rules of conduct so as not to cause damage to another by his actions set out in art 6.263(1) CC. Since the fault of the tortfeasor is presumed according to art 6.248(1) CC, he can exonerate himself by proving that he exercised all due care in order to avoid the damage.

7 The Lithuanian Supreme Court also noted that, according to art 173 RTR, a driver who notices an obstruction must slow down, come to a standstill or pass the obstruction without creating a hazard for other drivers. Any driver who hits an obstruction is at fault if he could have noticed it in a timely fashion.

8 As the lower instance courts had not examined the issues of unlawfulness, damage and causation, the Lithuanian Supreme Court ordered a retrial at the first instance court.

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Comments

The case reflects the fact that, although the CC makes a distinction between the two prerequisites of civil liability – 'unlawfulness' and 'fault' –[1] in practice the courts struggle to set the demarcation line between them since both employ an objective assessment of the tortfeasor's conduct. The case shows that, at least in the case of liability for breach of a statutory duty, fault and unlawfulness have to be examined separately.[2] According to the Lithuanian Supreme Court, unlawfulness is to be established if the tortfeasor objectively breached a particular rule. As can be understood from the guidelines presented by the Lithuanian Supreme Court, if a person blocks a road and does not remove an obstruction or, if this is impossible, fails to highlight the danger and warn other road traffic users by all means available, he acted unlawfully. However, a *bonus pater familias* standard is to be applied in order to establish if he was at fault. As the fault is presumed, the tortfeasor might escape liability by proving that his conduct corresponded to that of a *bonus pater familias*, who could not have removed the obstruction or, in case of the impossibility of doing so, could not have highlighted the obstruction and otherwise warned other road traffic users. Although not stated explicitly, it seems that the Lithuanian Supreme Court considered the acts of the car driver, who bumped into the protruding bus, unlawful since she breached art 173 RTR. However, she might not have been at fault if it was proven that a *bonus pater familias* in her situation could not have noticed the obstruction in a timely manner. **9**

The case also clearly reflects the fact that both the concepts of unlawfulness and fault focus on the human conduct that caused the harmful result.[3] **10**

GP, SP and DP v the Republic of Lithuania, 29 November 2012

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-539/2012; <http://www.lat.lt>

Facts

A nine-year-old child lost a limb when she stepped on a small bottle which exploded. Her parents claimed compensation for pecuniary and non-pecuniary dam- **11**

1 The liability of a keeper of an object of higher danger, according to art 6.270(1) CC, is strict. However, according to art 6.270(5) CC, the damage incurred by the keepers of an object of higher danger in the interaction of such objects is to be compensated in accordance with the general provisions, ie general delictual liability provisions requiring fault shall be applied.

2 For the scholars' opinion on the issue see above, 1/22 no 4.

3 1/22 no 2.

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age on her behalf and on their own behalf from the Lithuanian state, since it was the owner of the land where the incident happened.[4]

12 The unfortunate accident happened when the girl went on a school trip. One of the places visited on the trip was Kaunas Fort I, a site of historical interest, and formerly a military base which, in 2005, together with the surrounding area of 7.58 ha, was declared a site of national heritage protected by the state. The site was included in the Register of Cultural Property. However, it had not been adapted for public viewing, and it was not included in the list of places suitable for sightseeing. The state did not allocate any means to look after the area; even garbage collection was organised only occasionally and was done by volunteers. However the state did not take the necessary steps to restrict access to the area or warn against possible dangers. Despite the absence of state efforts to attract tourists and visitors to the site, their numbers grew, including tours led by qualified and approved tourist guides.

13 The incident at issue happened when, on her way back to the bus after a tour on the site, the girl stepped on a small dark bottle lying on a pile of sand, which exploded, blowing off her foot. The damage to her leg was so severe that subsequently the surgeons also decided to remove a part of her shin.

14 After the incident the police reported that at the place of the incident, approximately 6–8 metres away from the fortress, and under the arches of the facade of the building, they found several piles of sand, a pile of construction debris, drums filled with sand with marks most likely caused by shots from firing weapons and a plastic bottle wrapped in tape with marks of a burner, and at several locations they also found powder of different colours, which the bomb disposal experts warned against touching for danger of explosion.

15 The Vilnius district court partly satisfied the claim. The court decided that the factual circumstances of the claim did not allow the application of strict liability under art 6.266 CC, which regulates compensation for damage caused by buildings or other installations, including roads.[5] The court applied general liability rules, concluding that the state acted as a careless and negligent owner of property of public interest in failing to meet the general duties of an owner to look after his property, that is, its conduct was wrongful.

16 The appeal mostly focused on the sums of compensation awarded. The panel agreed with the findings of the court of first instance that the state did not act as a

4 The case was commented in *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 421, nos 79–95.

5 Article 6.271 CC which regulates state liability for the damage caused by state institutions exercising their public functions was not applied either since the current case raised an issue of state liability as the owner of Kaunas Fort I, where the event giving rise to the damage occurred, was the state. In cases of this nature, the state is regarded as a private person – an owner – and the question of its liability should be decided on the basis of general tort law rules.

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bonus pater familias, and also confirmed the finding that the causal link between the damage in the case at issue and the wrongful omission was sufficient to establish liability. However, it reduced the compensation awarded.[6]

The case was referred by the claimants to the Lithuanian Supreme Court. 17

Decision

The Lithuanian Supreme Court upheld the decisions of the court of first instance 18
and the Court of Appeal on the finding of liability for negligent behaviour on the part of the state, that is, that the conduct of the state did not meet the expected standard of conduct of a *bonus pater familias*.

The court stated that art 6.263(1) and art 6.263(2) CC,[7] applicable to tort liability, 19
together with art 6.246(1) CC, applicable to both contractual and tortious liability, provide that a person is liable for the breach of the general duty to act with due care. According to the court, art 6.248(3) CC, defining that a person shall be deemed to have committed fault where, taking into account the essence of the obligation and other circumstances, he failed to behave with the care and caution necessary in the corresponding situation, in the case of a breach of the general duty to behave with due care, links unlawfulness and fault so that unlawfulness is absorbed by fault. Therefore the breach of a *bonus pater familias* standard infers both fault and unlawfulness.

Comments

The case demonstrates that the duty to act positively in Lithuanian case law is inter- 20
preted very broadly. Generally a tortfeasor has to exercise due care towards society at large. Moreover, the case confirms our earlier observation that the distinction between 'unlawfulness' and 'fault' provided for by the CC is rather theoretical in the case of liability for the breach of the general duty to act with due care.[8] The case reflects scholars' opinion that unlawfulness is absorbed by fault in the case of a breach of the general duty to behave with due care.[9] The case also shows that the issue of unlawfulness/fault focuses on the conduct (omission) that caused the harmful result.

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6 On the issue of compensation see *Selelionytė-Drukteinienė/Šaltinytė*, Lithuania, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) nos 85, 87–91.

7 Article 6.263(2) reads: Any damage to person and property and, in the cases established by the law, non-pecuniary damage must be fully compensated by the liable person.

8 1/22 no 4.

9 Ibid.

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23. Poland

Sąd Najwyższy (Supreme Court) 3 March 1956, 166/56
OSP 7-8/1959, item 197

Facts

1 Two men engaged in illegal fishing in a river by creating an electric circuit. They put a wire mesh into the water and while one man (A) stood on the bank holding the cable linking the mesh with a high voltage power line, the other (V's father) stood on the other side of the river gripping the mesh. V's father got electrocuted almost instantly. A tried to help but it was too late and in any event he first jumped in the water, and only after having felt the electric wave, did he jump out and disconnect the cable.

2 A was sentenced by a criminal court for the theft of electricity and for violation of fishery rights. V sued A for compensation arising from the wrongful death of V's father. The Regional Court established that there was no causal link between the delayed disconnection of the cables and the death of V's father as the latter had been electrocuted and died instantly. The court held that A was liable for negligently contributing to the death of his companion with whom he went fishing with the help of electricity, which caused the death.

3 On appeal the district court filed a preliminary question to the Supreme Court asking whether a child (descendent) can claim damages from a person who, together with the child's deceased father, undertook an illegal and dangerous activity, during which the father was killed.

Decision

4 The Supreme Court approached the case from the causation perspective. It held that the very act of incurring damage does not create a duty to repair it, unless the cause of the damage may be ascribed to someone and the law provides a basis for their liability. Liability for one's own acts (art 134 Code of Obligations) requires a proof of fault. In this case A's conduct may be considered faulty because he was held guilty of criminal offences and any wrongful conduct, in particular conduct that is contrary to law, constitutes fault.

5 Then, applying the Russian law based theory of necessary causative conditions[1] the court found that there was no causation and hence no liability.

1 Now abandoned, as the theory of adequate causation prevails (art 361 § 1 KC).

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Comments

This case is important and well known to Polish civil lawyers not for important dicta, but – on the contrary – for the errors in the decision and the correct solution given in the commentary by Adam Szpunar.[2] In the commented case, A's fault consisted in creating a dangerous situation that resulted in the electrocution of V's father. The latter, on the other hand, assumed the risk of the activity, which would lead to the conclusion of no liability (*volenti non fit iniuria*). **6**

Szpunar rightly explained that the criminal nature of the conduct consisted in a breach of public law norms imposing the duty to protect public property and fishing rights. Hence, the conduct of both V's father and A could not be considered unlawful in the meaning of the general clause of liability for fault. Following German jurisprudence, Szpunar recalled the concept of 'conditional unlawfulness' (*bezprawnosc wzgledna*), which can be translated into the 'doctrine of protective purpose of a provision'.[3] Accordingly, wrongfulness in the context of tortious liability is not any conduct contrary to law. The obligation to repair damage only arises if the norm breached was aimed at protecting the victim against the type of damage actually caused, and only if the victim belongs to the group of persons whom the norm was intended to protect. Now the majority of scholars seem to accept this concept,[4] albeit it remains dogmatically controversial.[5] Further, even the opponents attempt to limit the scope of liability through instruments such as adequate causation (what the 'normal' consequences of the particular unlawful conduct can be). **7**

In many typical tortious liability situations, such as personal injuries or damage to property, the rights are protected by norms establishing unconditional rights. In these situations, a breach of a right is automatically unlawful, unless one of the conditions excluding unlawfulness is present. Nevertheless, the concept of conditional unlawfulness is increasingly present in judicial decisions involving the liability of public authorities.[6] **8**

2 I omit the question of causation, which was also wrongfully decided, as the activity and the death were both in *sine qua non* and in an adequate causal relation.

3 Rooted in Ehrenzweig's 'Normzwecktheorie'.

4 The views are examined by *P Machnikowski* in: A Olejniczak (ed), System Prawa Prywatnego: Prawo Zobowiazan. Czesc Ogolna, Vol 6 (2009) 379.

5 Among others *E Bagińska*, Odpowiedzialnosc odszkodowawcza za wykonywanie wladzy publicznej (Warszawa 2006) 397–401; *M Safjan*, Problematyka tzw. bezprawności względnej oraz związku przyczynowego na tle odpowiedzialności za niezgodne z prawem akty normatywne, [w:] Księga pamiątkowa Profesora Maksymiliana Pazdana (Kraków 2005) 1326 f.

6 SN of 27 April 2001, III CZP 5/01, OSNC 2001, no 11, item 161, SN of 14 January 2005, III CKN 193/04, OSP 2006, 7-8, item 89.

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Sąd Najwyższy (Supreme Court) 2 December 2003, III CK 430/03 (Wrongfulness)

OSP 2/2005, item 21

Facts

9 V went to a discotheque run by the defendants As (a civil partnership). An unidentified person attacked him and during the fight he was hit in the face with a glass. None of the three security guards who were working that night in the club reacted to the incident. The guards neither pursued the attacker nor did they call the emergency services. As established at trial, As decided on the number of the security guards to be on duty individually for each night, dependent on the anticipated number of guests. In the four-floor club, the guests could move around with their drinks served in glasses. The employees had a duty to collect glasses from all rooms. They neither wore uniform clothing, nor any badges, which would have enabled them to be distinguished from the guests. V claimed compensation for serious personal injuries.

10 As raised the argument that there was no legal rule that imposed a duty to behave in a certain manner in the said type of business.

11 The district court ruled in favour of V on the basis of art 415 KC, finding that As, acting as professionals, negligently breached a duty to secure safety in the club. As were also liable on the ground of art 429 KC (applicable to independent contractors) as they wrongly chose the guards, who were not professionally trained to protect people or property. This decision was affirmed on appeal.

Decision

12 On cassation As contested wrongfulness, fault and causation. With regard to the scope of wrongfulness, the Supreme Court observed that an owner of a club, a discotheque, or a restaurant has a duty to undertake all necessary means to prevent the risk of damage to people's life and health. Particular obligations do not need to be written in the legal provisions, they can stem from life experience and common sense. Wrongfulness is defined broadly and includes conduct contrary to moral principles (principles of community life). In this case, wrongfulness was properly concluded from the following violations: the lack of an adequate number of properly trained security guards, the fact that they were not recognisable, freedom to carry glasses around the club, the lack of a camera monitoring system. All these elements, justified by life experience and the professional nature of As' activity, led the court to establish wrongfulness and fault in their conduct.

13 Moreover, the general duty not to cause damage to anyone (*neminem laedere rule*) requires that all necessary action be taken in order to avoid damage to persons or things. Failure to do so can be wrongful, depending on the concrete circumstances. Because the As' conduct was assessed pursuant to the professional standard (art 355 § 2 KC), on the facts, negligent omission was evident. Article 429 KC

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does not apply in this case, because the contractor in charge of maintaining the club's safety was not the direct wrongdoer.

Comments

This is a tort case under Polish law because the guests of the club were not in privity of contract with the owners and also because personal injury followed from a third party's attack. The plaintiff's claims were all based on art 415 KC which is a basic provision for tortious liability. 14

The broad definition of wrongfulness reflected in this case has had a long tradition in Polish civil law. The results of the conduct (grave injury) in a hidden way played a role in establishing the duty to provide safety, rooted in common sense and moral norms. 15

On the facts, the negligence of the defendant would justify his liability for damage even if the attacker were identified. The duty of professionals who run this type of business is broad and includes ensuring the protection of guests against third persons' aggression. In an upmarket expensive club it is expected that a high level of safety will be ensured. However, not all cases of someone else's aggression will result in the liability of a professional. 16

Sąd Okręgowy we Wrocławiu (Regional Court in Wrocław) 20 September 1999 IC 708/96, affd CA 1 June 2000 I A Ca 323/00

[2001] PiM 9, 115

Facts

V, a 22-year-old woman, had heart surgery in 1983. Afterwards she experienced discomfort connected with her heart and was examined and tested by the same medical clinic (A) several times. These examinations never disclosed any information about the presence of any foreign objects in her heart. Two needles were discovered in V's heart by a routine X-ray taken in 1996, which was followed by two other invasive procedures aiming to precisely identify the location thereof. At present, a cyst has grown around one, but the other poses a danger to the patient. According to cardiologists, the removal of the needles creates too high a risk for V and she has now to live with them. V demanded compensation for non-pecuniary loss resulting from the stress she has been suffering and the constant threat to her life. V may not be diagnosed with any modern medical device involving electro-magnetic fields because it would endanger her life. A raised the defence of the prescription of the claims and argued that there was no actual need to remove the needles. 17

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Decision

18 The court established that leaving the needles in the patient's heart during surgery denotes the hospital's negligence in the form of 'organisational' fault. Hence, the hospital is liable in tort. The evidence clearly showed that the surgical team had not counted the used needles after the operation, which amounts to a breach of ordinary care and caution. The doctors must have discovered the metal objects in V's heart well before 1996, but they failed to inform her. The court pointed out that V may have reasonable fear of the possibility of negative consequences appearing in the future, which had led to permanent mental trauma.

19 The court held that the doctrine of abuse of rights may be applied to A's plea of limitation of action because for 13 years A had maintained that there was no negative outcome of V's heart surgery and that her discomfort and throbbing were not linked to the operation.

Comments

20 As there was no civil contract between the patient and the public hospital (the surgery was financed by the National Health Found), the case is not a contract case but a tort case under Polish law.

21 The case is an example of a flagrant medical error, although V could not establish (due to the long time that had lapsed since the incident) which concrete surgeon(s) could be ascribed fault. To assist victims, Polish courts have widely accepted the French doctrine of *faute anonyme* of an unidentified worker or public servant. It has been developed and applied regularly in medical malpractice cases.[7] Hence, in order to hold a hospital liable for personal injury, it is irrelevant who among the physicians or nurses caused it as long as the injury is causally linked with a breach of professional duties and has occurred in the course of the performance of a medical service. In this case, anonymous fault was implied by the court from the damaging result by way of a factual presumption. This concept has also been used in vicarious liability cases to establish the fault of a servant (art 430 KC) and in state liability cases for the fault of an unidentified functionary.

22 This concept of anonymous fault should be distinguished from 'organisational' fault, although the two are sometimes equated. Organisational fault consists in defects and/or deficiencies in the operation of a legal person, stemming from bad management and a sum of omissions that led to the infliction of damage.

23 Both of the above concepts operate under tort law rules. *La faute anonyme* is considered not a true fault, but a form of wrongfulness. The courts reduced the fault requirement to its objective element – wrongfulness by accepting the anonymous

7 See *M Sośniak*, Cywilna odpowiedzialnosc lekarza (2nd edn 1977) 143. SN 21 November 1974 [1975] OSPiKA at 108; SN 17 April 1974 [1974] OSPiKA at 207, finding the state liable for damages.

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fault concept. The defendant cannot raise any defence relating to age or mental incapacity of persons involved in the tasks (services) that caused the loss. The case law has accepted that evidence of an 'anonymous fault' or organisational fault of a Sate unit was sufficient to hold the State Treasury liable. After the legislator changed the prerequisites of public authority liability into unlawfulness, the concept no longer plays a role in the field of public authority liability. The two have in fact a wide overlapping area.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 15 June 2011
25 Cdo 2382/2010

Facts

In March 2004, the claimant underwent sterilisation in a hospital after the birth of her second child in order to prevent further pregnancies because of previous health problems during the birth of the first child. In November 2004, the claimant experienced health problems, and she believed that she was pregnant again. This suspicion was confirmed by an ultrasound examination. However, in December 2004 a spontaneous abortion occurred and immediately afterwards her health deteriorated. It was necessary to perform curettage, followed by surgery to treat varicose veins, and due to her generally negative mental condition, the claimant required professional psychiatric help and was treated with anti-depressants. **1**

The court of first instance concluded that the first prerequisite for the establishment of liability for damage under sec 420 CC, namely breach of a legal obligation, was not proven in the proceedings. It was proven by two expert opinions submitted in the proceedings that the respondent, during the sterilisation and the subsequent treatment of the claimant, had acted *lege artis* (ie to established standards). However, the court awarded damages for aggravation of social position, based on the application of good morals pursuant to sec 3 CC[1] and principle of justice. **2**

The court of second instance refuted the claim completely as, in its opinion, a claim for damages could not be established under sec 3 CC and no other provision on damages applies as no conditions for liability were met in this case. **3**

1 Cf sec 3 CC: '(1) The exercise of right and performance of duties (obligations) arising from civil relationships may not, without legal grounds, interfere with the right and justified interests of others, and may not be inconsistent with morality. (2) Individuals and legal entities, state authorities (agencies) and local administrative authorities (bodies) shall see to it that rights arising from civil relationships are not endangered or violated, and that any possible dispute between the parties is settled primarily by their agreement.'

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Decision

4 Liability for damage caused by a faulty medical procedure shall be governed by the provisions of sec 420 para 1 CC, under which a prerequisite for liability is a breach of a legal obligation (unlawful act), ie conduct that is in conflict with the law, as well as damage, a causal link between the infringement and the damage caused by the wrongdoer and presumed fault.

5 A breach of a legal duty is meant objectively as a conflict between how a natural or legal person actually acted (or omitted to act) and how he/she should have acted in order to meet his/her obligations and the medical treatment according to *lege artis*.

Comments

6 The regulation of liability for damage is based predominantly (ie except for cases of strict liability) on the principle that anybody who is at fault for breaching his legal duty shall be obliged to compensate the damage. If the injured party proves other prerequisites for the establishment of the wrongdoer's liability, the fault of the wrongdoer shall be presumed, even if only in the form of negligence.

7 The concept of delictual liability presupposes a clear distinction between its respective elements. Correspondingly, a clear line can be drawn between wrongfulness and fault. While wrongfulness denotes a violation of a duty imposed by law (or failure to comply with that duty), fault is generally understood as a state of mind of the liable party towards his/her own (wrongful) conduct as well as to the damage resulting from it.

8 Under the NCC, fault is based on a violation of the required standard of care,[2] which is stipulated in sec 2912 NCC and is established as objective behaviour that can reasonably be expected of a person of average abilities in private relationships. The standard of care of an average person, which is a rebuttable presumption, is nevertheless irrelevant when the wrongdoer demonstrates special knowledge, skill or diligence, or undertakes a business in which that special knowledge, skill or diligence is required. If he/she fails to apply these abilities, his/her conduct shall be deemed negligent.

9 After a long time, tortious liability has therefore been re-established on an objective standard of behaviour that is required of the average reasonable person in the position of the wrongdoer.

10 The standard of care was fulfilled in the given case as the claimant acted *lege artis*. However, despite this fact, the wrongful result, which should have been prevented by the medical treatment, occurred. Thus, it may be inferred that the crite-

2 See sec 2912 para 2 NCC.

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rion of the standard duty of care, in case of its breach, includes both wrongfulness and fault.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 25 February 2003

25 Cdo 618/2001

Facts

While crossing a small wooden bridge on a hiking path in a forest valley, a log in the bridge broke so that both legs of the claimant went down into the gap and, as a consequence, the claimant broke her left ankle. The injury required repeated operations and hospitalisation and finally she was found to be a permanent invalid. 11

The court of first instance concluded that the respondent properly fulfilled its duty of prevention pursuant to sec 415 CC because, together with the forest management company, maintenance and repairs of paths had been carried out, also on the bridge, to an extent adequate to the particular conditions (forest terrain, influence of the forces of nature, the length of paths). The bridge had been repaired a few months before the accident happened and a quality check immediately after the accident did not show improper maintenance. 12

Also, in the opinion of the appellate court, the respondent did not breach its duty resulting from sec 415 CC because it sufficiently fulfilled all duties, ie the path was checked and the bridge, which had been repaired, was subsequently in very good condition. The responsibility for prevention does not mean that it can be guaranteed that no damage will ever occur. 13

Decision

The Supreme Court confirmed the opinion of both courts. It concluded that the responsibility for prevention, as set forth in sec 415 CC, obliges everyone to prevent others from incurring damage. For an owner or manager, this responsibility means that they shall use and administer their property in such a way that they do not cause an injury to anybody. This duty also includes the obligation to take all reasonable measures to limit the possibility of damage to health, property or other values. Should a danger exist or should there be a true threat, all measures to avert the occurrence of damage must be taken and this occurred in the present case. 14

Comments

The principle of prevention is one of the leading principles of Czech civil law. The concept of prevention in civil law was and is also subsidiary to other private law codes, in particular to sec 384 of the Commercial Code and sec 170 of the Labour 15

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Code. Pursuant to the current legislation, after the adoption of the NCC, the principle of prevention, as regulated in the NCC, is subsidiary to the principle in what was the Labour Code as commercial law has been abolished by merging the previous laws into a uniform Civil Code.

16 Therefore, the extent to which the judicature interprets the duty of prevention pursuant to sec 415 CC is of great importance. In accordance with the case law of Czech courts, this concept shall not be understood as a principle having only a preventive-educational character, but mainly as a principle that represents a certain applicable norm, which is subject to sanction if breached.[3] The sanction results from the general provision of the Civil Code, sec 420 CC, ie from a breach of legal provisions based on fault, whereas it shall be emphasised that negligence is presumed pursuant to Czech legislation.

17 As the ruling of the Supreme Court shows, determining in general the kind of conduct required by an individual in any particular situation is a complicated task. The general rule based on sec 415 CC states that everybody is obliged to behave in such a way that no damage to health, property, nature and the environment occurs, but this provision is generalised to the extent that this could be required of every possible kind of behaviour. By virtue of this fact, the case law concluded that sec 415 shall be interpreted in accordance with the Roman rule of *diligens pater familias* or the English *standard duty of care*.

18 Under the NCC, this approach has been strengthened by an explicit provision on negligence which directly relates to the issue of fault. Under sec 2912, if the wrongdoer does not act in such a manner as could reasonably be expected of a person of average abilities in private relationships, it shall be deemed that he/she acted carelessly. Moreover, if the wrongdoer possesses specific knowledge, ability or diligence or if he/she undertakes to carry out an activity for which specific knowledge, ability or diligence is required, and does not make use of this specific ability, it shall be deemed that he/she acted carelessly. Thus, the general duty of care is strongly objective although, in the case of some persons, this objective point of view is rather narrow with respect to the expected skills of a specific group of persons.

19 The Supreme Court rejected the claim and refused to compensate the claimant's damage to health. The reasoning of the ruling shows that the respondent had not breached any obligation and thus did not act wrongfully. Therefore, although an adequate causal link between the maintenance of the bridge and the injury could be found, the respondent could not be held liable for the injury. The duty of prevention is thus not an absolute obligation, and it is not possible to ensure that no damage will occur.

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3 *M Pokorný/J Salač* in: O Jehlička/J Švestka/M Škárová, Občanský zákoník – Komentář [Civil Code – Commentary] (8th edn 2003) sec 415.

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The present case is not, of course, the first case in which the court decided on the duty of prevention: many cases concerning the same issue can be mentioned, eg cases on the duties of the owner of a pavement,[4] on the obligations of the owner of an animal,[5] or on the duty of a landowner to take care of his land.[6] **20**

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 25 November 2008, Case No 25 Cdo 3234/2006

<http://kraken.slv.cz/25Cdo3234/2006>

Facts

The claimant sought compensation for damage (€ 25,000) caused to his immovable property resulting from water leaking from the water supply system, which had broken down. He claimed compensation from the defendants, the original tenants in the building, whose lease had been terminated. The District Court denied the claim because the claimant failed to prove that the defendants had acted unlawfully. The Regional Court, acting as an appellate court, affirmed the decision of the court of first instance. The claimant filed a review appeal against this decision. The Supreme Court of the Czech Republic concluded that the appellate review was unfounded. **1**

Decision

The conclusion that there was a breach of the duty of preventive care under § 415[1] of the Civil Code cannot be arrived at without determining the activities of the defendants upon which the breach could be based. Unless the fundamental requirements/elements for establishing liability for damage exist, no compensation for damage may be claimed because the defendants' activities that caused the damage have not been established. **2**

4 See R 36/1988.

5 See R 5/1981.

6 See R 9/1992, NS 25 Cdo 2471/2000.

1 § 415: 'Everybody is obliged to behave in such a way as to avert damage to health and property and to nature and the living environment.'

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Comments

3 The claimant sought compensation for damage by reference to the provisions of § 415 of the Civil Code, arguing that the defendants were obligated to undertake extensive repairs, and if, as a result of their omission to do so, they caused water to leak, they failed to act in such a way as to avert damage to property. Both the court of first instance and the court of second instance agreed with the conclusion that, after their lease terminated, the defendants did not have as extensive duties as their duties in relation to the use of the property. However, they still had the duties set forth in § 415 of the Civil Code. In the opinion of the courts, the claimant failed to establish any conduct or omission on the part of the defendants that could cause leakage of water at the time when they had access to the building. According to the judicial decision, based merely on the fact that the water leakage occurred, it cannot be assumed that the defendants caused damage or that they neglected to fulfill a mandatory duty of care. The court's decision stressed that the mere realisation of damage to property cannot be understood as unlawful if there is no evidence of unlawful conduct on the part of the defendants.

Okresní soud Nitra (Nitra Regional Court) Case No 3Cob/133/2007

Published in *K Nemcová*/*P Vojtko* (eds), Judikatúra vo veciach náhrady škody [Case law in matters of compensation for damage] (2011) 23

Facts

4 The claimant performed some repair work on the defendant's vehicle. Thereafter, the test drive showed that the water pump was leaking. The defendant informed the claimant about this defect, recommended that the water pump be exchanged, but also told him that it was possible to drive for 50 or even 500 km with such a defect. After several kilometres, however, the vehicle became immobile. The claimant claimed compensation for the damage, which, in his view, was caused by the defendant's breach of duty of preventive care arising under § 415 of the Civil Code.[2]

Decision

5 The duty of preventive care, generally defined in § 415 of the Civil Code, must apply to a specific content in each case, ie what the defendant had to perform, disregard or suffer in order to prevent the occurrence of damage. It is not possible to qualify every case of damage as conduct contrary to § 415 of the Civil Code.

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2 According to the theory of 'uniformity of civil law liability', there is no difference between contractual and non-contractual liability; § 415 has to be applied to both situations. See 1/25.

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Comments

According to the claimant, the defendant breached his duty of preventive care when he failed to stress the extent of the damage that could be caused to the vehicle. The claimant contested that the defendant should not have allowed the further operation of the vehicle without having the water pump repaired or renewed. The court denied the claim, concluding that the information drawing attention to potential damage together with an offer to remove the defect indicate compliance with the duty of preventive care. The court maintained that if the claimant knew about the defect of the vehicle and was aware that it could fail to function within a relatively short, but unpredictable, period of time, it was solely upon the claimant to decide how to proceed. The court stressed that causing damage could not be qualified as conduct contrary to the law (§ 415 of the Civil Code). 6

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 28 August 2013, Case No 25 Cdo 695/2012

<http//kraken.slv.cz/25Cdo695/2012>

Facts

The District Court ordered a clinic to pay compensation for the harm caused to the claimant who underwent hip joint replacement surgery at the clinic. After surgery, damage to the claimant's thigh nerve materialised, which caused a slight decrease in the mobility of the claimant's leg. Despite the fact that expert witnesses concluded that the doctors had followed *lege artis* procedures, the court refused to accept this view, maintaining that their opinion was not supported by precisely defined procedures. According to the court, in the interest of the duty general of preventive care, a surgeon should choose the procedures that may represent risks of which the patient has to be informed in advance. The court held the defendant was liable for the damage because the duty under § 415 of the Civil Code was not fulfilled. 7

The appellate court affirmed the judgment of the court of first instance, stating among others that the inability of expert witnesses to determine the decisive cause of the damage to the claimant's health should not place a burden upon the injured party. The defendant challenged the judgment by filing an appellate review, the grounds of which were admitted by the Supreme Court. 8

Decision

In considering whether the methods used by the doctors were *lege artis medecinae*, ie in accordance with the rules of the art of medicine, the primary question was whether a direct duty had been breached. If the surgical procedures followed by the doctors were assessed as *lege artis*, it would be possible to consider a breach of duties arising under § 415 of the Civil Code only if the actual circumstances in the given 9

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case required the use of additional procedures or special measures beyond the prescribed or usual treatment that could prevent or reduce the harm to health for which compensation was claimed, but such additional treatment was not provided. It is not possible to conclude that, in performing the surgery, the doctors breached a legal duty without evidence that the harm resulted from their conduct or omission. The same also applies in cases of breach of the duty of preventive care.

Comments

10 In the appellate review, the defendant raised the so-called issue of principal legal importance as to whether liability for damage to the patient's health could also be inferred even when it was established that *lege artis* medical care was provided. The claimant stated that the expert witnesses indicated three causes that could have led to her health condition, none of which mentioned any fault on the part of the defendant. The defendant also stated that the expert report showed that after surgery her condition improved considerably and that without the surgery her condition would gradually have deteriorated and she would have become fully disabled.

11 The Supreme Court, relying on the arguments used in its previous decision (Decision of 31 January 2013, in Case No 25 Cdo 2381/2012), held that, from the mere fact that the nerve was apparently damaged during surgery, it was not possible to imply that the doctors had neglected their duties, including the duty of preventive care. The damage was not the result of the mere fact that the nerve had been damaged but it could have been the result of the conduct or an omission on the part of the defendant, which possibly led to the nerve damage. Both the court of first instance and the appellate court had erred when determining that the defendant's conduct was in accordance with *lege artis*, reasoning, at the same time, that the duty of preventive care was breached, however without specifying how (an act or an omission) or without indicating what would have been the correct or careful conduct so that harmful results could be avoided.

26. Croatia

Presuda Vrhovnog suda Republike Hrvatske (Judgment of the Supreme Court of the Republic of Croatia) No Rev-1698/1996-2 of 31 May 2000
<www.vsrh.hr>

Facts

1 V was standing on the edge of the road, leaning on his bicycle when A hit him with his car. V sued A's insurer for personal injuries thereby sustained.

2 The court of first instance partially accepted V's claim but dismissed A's claim that V partially (to the extent of 10%) contributed to his own damage by unlawfully

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standing at the edge of the road with his bicycle. The court of second instance affirmed the first instance judgment.

Decision

The SCRC quashed both first instance and second instance judgments in respect of their establishment of the victim's contribution to his own damage. The SCRC first established that there was nothing unlawful in the victim's behaviour since there is no law which prohibits individuals from leaning against a bicycle at the very edge of a road on which bicycles are allowed. Hence, according to the SCRC, V's conduct was not unlawful. Second, the SCRC argued that, even if V's conduct could be considered unlawful, the facts of the case suggested that the damage exclusively resulted from A's improper conduct and therefore any contribution by V to his own damage should be excluded. 3

Comments

Although this case primarily involved the victim's contributory negligence, it is illustrative also from the perspective of unlawfulness because, in order to attach contributory negligence to the victim, the courts first have to establish whether the victim violated certain legal rules. Hence, even in cases of contributory negligence, the question of unlawfulness will arise and will be assessed in accordance with the same criteria as in the case of a tortfeasor's liability. 4

With regard to the treatment of unlawfulness in the Croatian tort law system, this judgment of the SCRC is illustrative in many respects. 5

First, as is evident from this judgment, unlawfulness is perceived as a violation of a legal norm, embedded, in the first place, in a statutory provision. Hence, if a certain act or omission does not violate any legal norm, no liability can be attached to a person who performed that act or omission. 6

Second, unlawfulness is assessed with respect to the conduct of a person. Hence, only human actions have the capacity to be assessed as unlawful. 7

Third, unlawfulness is only one of several conditions which have to be met in order for tortious liability to arise. Hence, as clearly demonstrated in the case at hand, even if a person committed an unlawful act, ie an act which violates a legal norm, there will be no liability attached to that person if his/her unlawful act does not stand in a legally relevant causal relationship with the damage, hence if that unlawful act has not caused the damage. 8

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Judgment of the County Court in Zagreb No Pn-2265/85, Gž-3298/94 of 2 November 1994

Unreported

Facts

9 V built a house without the necessary permits and the competent public bodies decided that V's house should be torn down. A competent public body undertook the task of tearing down V's house and after the task was accomplished, V sued a public body for damage sustained due to demolition of his house. The court of first instance accepted V's claim and awarded him damages.

Decision

10 The County Court in Zagreb, acting as an appellate court, remanded the case to the court of first instance. In its judgment, the County Court in Zagreb particularly dealt with the issue of unlawfulness. As a starting point, the court recalled that the tearing down of V's house was ordered by competent bodies and therefore ruled that the action of tearing down V's house as such could not have been assessed as unlawful. However, the court also determined that the action of tearing down V's house could be assessed as unlawful if it could be proven that a competent public body which performed it had not acted with due care in the course of demolishing V's house. The County Court in Zagreb explained that the law generally requires parties in legal relations to act with due care so that even the demolition of a house must be undertaken with due care in order to save as much building material as possible for possible reuse. Since the court of first instance failed to take this into account, the County Court in Zagreb remanded the case for re-examination.

Comments

11 In the case at hand the County Court in Zagreb established that a generally lawful act can nevertheless be assessed as unlawful if the person who performs that act fails to observe the standard of due care in the course of performance. Such a decision obviously touches upon the sensitive issue of the relationship between unlawfulness and fault. Although, generally speaking, unlawfulness in an objective sense, and fault, as unlawfulness in a subjective sense, are perceived as two distinct conditions of liability which should be assessed separately, the line that separates these two conditions, as is evident from this case, can be easily blurred.

12 As a matter of principle, one could argue that, by assessing whether a person acted with due care, that person's negligence, ie fault and not the unlawfulness of that person's conduct, is established. And yet the County Court in Zagreb determined that the unlawfulness of a competent public body's actions should depend upon a determination as to whether that public body acted with due care in the

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course of executing its actions. Such a position of the County Court is not the result of that court confusing unlawfulness (in an objective sense) with fault. In fact, in reaching such a positon, the County Court in Zagreb employed very interesting and undeniably appealing logic. The court departed from an understanding that unlawfulness means acting in violation of a legal norm. It continued by stating that the law requires from parties in legal relations to act with due care. Consequently, a party who does not observe the standard of due care in its actions violates a legal (ie statutory) norm, and hence, acts unlawfully.

It stems therefrom that, in certain cases, a clear line between unlawfulness and fault could hardly be drawn. Since the law imposes upon parties in legal relations a duty to act with due care, the non-observance of that standard by a party will render that party's actions unlawful. Hence, as is evident from this case, the standard of due care can simultaneously be employed in determining the unlawfulness of a person's conduct and that person's negligence, which in Croatian law is generally assessed against objective criteria, meaning that the appropriateness of the tortfeasor's behaviour is assessed against the behaviour of an abstract person.[1] **13**

Judgment of the County Court in Zagreb No Pn-6472/00 Gžn-2882/07 of 15 September 2009

Unreported

Facts

V sued a hospital for compensation of damage sustained in the course of surgery when he was infected with the hepatitis C virus. The court of first instance dismissed the claim. In the course of proceedings the court found no irregularities in the hospital's actions: first, the hospital had not collected and processed the blood transfused to A, but instead had used the blood collected and processed by an authorised entity. Moreover, at the time of transfusion there was no statutory obligation to test donated blood for hepatitis C. Based on these findings, the court of first instance reasoned that there was no unlawfulness in the hospital's actions. **14**

Decision

The County Court in Zagreb upheld the first instance decision. The County Court found no liability in the hospital's actions since, according to it, medical institutions could be held liable for unwanted results of otherwise legitimate and commonly-accepted medical treatment only on the basis of fault-based liability and in this particular case, there was no fault on the side of the hospital. The County Court in Za- **15**

1 See 1/26 no 9.

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greb continued by explaining that in this particular case the hospital had acted completely in accordance with the rules of the medical profession when it transfused the blood acquired from an authorised authority (Institute for Blood Transfusions). For these reasons, the County Court in Zagreb found no liability on the side of the hospital notwithstanding the fact that V contracted the hepatitis C virus in the course of medical treatment. Finally, the County Court noted that many forms of medical treatment may pose certain risks to a patient's health but if such treatment is accepted within the medical profession, hospitals cannot be held liable on the basis of strict, but only on the basis of fault-based liability.

Comments

16 This case clearly suggests that the so-called *neminem laedere* principle, embedded in the COA,[2] does not play a decisive role in determining whether a tortfeasor acted unlawfully. According to the *neminem laedere* principle, provided in art 8 of the COA, everybody is obliged to refrain from causing damage to others. Inclusion of the *neminem laedere* principle in the statutory rules may suggest that any infliction of damage should *per se* be treated as unlawful, since causing damage violates the *neminem laedere* rule in art 8 of the COA. Legal literature in Croatia, however, does not support such an approach,[3] and the decision in the case at hand clearly resonates with the position taken in legal literature. According to the County Court, the mere fact that V sustained damage to his health is not sufficient to hold the hospital liable for such damage. As noted by the County Court, although numerous types of medical treatment do pose certain risks to patients' health, making use of such treatment will not render medical institutions liable for damage thereby caused if the treatment is accepted by the medical profession. In other words, the mere infliction of damage does not suffice for the imposition of liability. In addition, it must be established that the damage was caused by conduct that violates certain statutory or non-statutory rules which regulate how people should behave in certain situations.

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2 Article 8 of the COA reads as follows:
Prohibition from Causing Damage
Article 8
Each party is obliged to refrain from taking any action that may cause damage to the other party.

3 See *Z Stipković*, Protupravnost kao pretpostavka odgovornosti za štetu [Unlawfulness as a Condition of Civil Law Liability] (1991) 63 f; *M Baretić*, Tort Law, in: T Josipović (ed), Introduction to the Law of Croatia (2014) 169 f.

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 1129/2008, 16 February 2012

<http://sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113043603/>
(7 March 2015)

Facts

Another skier collided with the plaintiff, who was travelling up the ski slope on a ski tow, and injured him. The damage event occurred because the causer of the accident had fallen and slid down from the piste into the path of the ski tow, colliding with the plaintiff. The plaintiff demanded compensation for damage from the causer of the accident and the management of the ski slope. The courts of first and second instance established tortious liability based on the fault of the ski slope management on the grounds of its failure to take due care for the safety of skiers, since the management should have ensured adequate separation between the piste and the ski tows. In the judgment of the courts of first and second instance, the ski slope management, as a proficient expert, should have separated the piste and the ski tow in a suitable way; for example, with safety netting, marker ribbon or a belt of non-compacted snow. **1**

Decision

The judgment of the Supreme Court is interesting in the part in which the court judges the existence of the preconditions for tortious liability of the ski slope management. In the view of the Supreme Court, the Safety on Ski Slopes Act[1] does not prescribe such a responsibility for the management of a ski slope, and similarly such a responsibility does not derive from the rules of the profession or custom. In the case in question, in the opinion of the Supreme Court, it is essential that the omission of a visual separation of the piste and ski tow cannot be relevant, since the lower courts did not establish that visibility on the ski slope was not good or that the damage event occurred because it was not evident where the piste ends and the ski tow starts. The management of the ski slope cannot therefore be reproached for non-fulfilment of the obligation for careful behaviour. The Supreme Court concluded that the management of the ski slope did not behave unlawfully or culpably so rejected the damages claim against it. **2**

1 Uradni list RS (Official Journal) No 110/2002–17/2008.

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Comments

3 The preconditions for the existence of tortious liability under the Code of Obligations are unlawfulness, a causal link between the behaviour of the causer of damage and the damage and tortious liability on the basis of the fault of the causer of damage. These preconditions must be fulfilled cumulatively or there is no tortious liability.[2] Although Slovenian law differentiates between unlawfulness and fault, theory establishes that its differentiation is not entirely clear.[3] The distinction between unlawfulness and fault is in Slovenian law so difficult because fault is also measured in an objective way. In this case the Supreme Court highlighted that the distinction between unlawfulness and fault is difficult in the case of negligent omissions of responsible behaviour. Anyone who does not take the care expected of an abstract person of defined average attributes is considered to have behaved negligently. We ask: how would a reasonable and careful person behave in the causer's position? When there is a specific abstract criterion for the judgement of a person's behaviour, it is a judgement that is required of a person, not just a criterion for assessing fault, but also a criterion for judging unlawfulness. The judgement that it is a violation of the rules of behaviour (judgement of unlawfulness) actually also means that the causer did not behave as was expected of him/her in the given situation (judgement of fault).

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 244/2011, 28 August 2014

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113071115/> (25 February 2015)

Facts

4 The plaintiff was involved as a passenger in a traffic accident caused by the driver of the car in a state of intoxication. The plaintiff suffered serious physical injury in the accident, because of which he claimed compensation for pecuniary and non-pecuniary loss. The defendant referred in the civil case for compensation to the plaintiff's 50% contribution to the damage; 25% because the plaintiff travelled with an intoxicated driver and 25% because the plaintiff was not wearing a seatbelt in the car. The courts of first and second instance assessed the plaintiff's contribution at 35%, namely 25% because of driving with an intoxicated driver and 10% for not wearing a seatbelt.

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2 More on the preconditions of damage liability in 1/27.

3 *B Novak*, Vzročna zveza protipravnost in krivda pri odškodninski odgovornosti [Causal link, unlawfulness and fault in tortious liability], Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997, 271, 279.

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Decision

The Supreme Court confirmed the judgments of the first and second instance courts, according to which, the plaintiff had to share responsibility for the injuries that occurred because he was travelling with a seriously intoxicated driver. The decision of an injured party to travel with an intoxicated driver is among the behaviour of an injured party that, under para 3 art 153 of the Code of Obligations, has as a consequence partial relief of liability of the owner of the motor vehicle. The Supreme Court therefore confirmed the first and second instance judgments that the plaintiff's contribution to the injuries amounted to 25%. The Supreme Court did not deal in the judgment with the plaintiff's 10% contribution because he was not wearing a seatbelt because the plaintiff did not dispute this contribution on the appeal to the Supreme Court. 5

Comments

In the above case, the damage that occurred was causally linked to the unlawful behaviour of both the driver, who was driving when intoxicated, and the passenger, who travelled with an intoxicated driver and also failed to wear a seatbelt. 6

The driver of a car[4] is strictly liable for injuries caused to a passenger (para 2 of art 131 of the Code of Obligations), since a car is a dangerous object. The driver, as an operator of a dangerous object, can be partially relieved of strict damage liability if the injured party contributed to the occurrence of the damage (para 3 of art 153 of the Code of Obligations). The Supreme Court has established court practice in this matter, which assesses the contribution of an injured party at 25% in cases of travelling with an intoxicated driver.[5] The court judged this contribution to the occurrence of the damage on the basis of the care of an averagely careful person (actually on the basis of a fault), since it noted that an averagely careful person can be expected to judge whether driving with an intoxicated driver is safe. 7

The contributory negligence of the injured party was also crucial for judging the case II Ips 610/2005, 24 January 2008,[6] in which the Supreme Court assessed the contribution of an injured party who was lying intoxicated on an unlit urban street when he was run over by a drunken driver, who was driving too fast. The contribution of the injured party in this case was one third because the court judged that the strict liability of the driver was reduced by a proportion corresponding to the contri- 8

4 The driver was also the keeper of the car.

5 See judgment of the Supreme Court II Ips 596/2006, 10 January 2008; judgment of the Supreme Court II Ips 467/2002, 27 November 2003; judgment of the Supreme Court II Ips 105/2002, 7 November 2002; decision of the Supreme Court II Ips 596/2005, 21 February 2008, <http://www.sodisce.si/vsrs/odlocitve> (25 February 2015).

6 <http://www.sodisce.si/vsrs/odlocitve/13079/> (25 February 2015).

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bution (the share of fault: the injured party's contribution in this case constituted behaviour that did not correspond to the objective criterion of the care of an averagely careful person) of the injured party.[7]

28. Romania

Înalta Curte de Casație și Justiție[1] (High Court of Cassation and Justice)
Civil Section II, Decision No 2358 of 24 June 2014
<http://www.scj.ro>

Facts

1 The county council of Arad transferred land into the property of the state with the aim of using it for the construction of a highway. Because of this change in ownership and use of the land for construction purposes, the airport of Arad became inoperable by 70% because the highway construction company (the National Company of Highways and Road or NCHR) did not construct fences around the works. The airport sued the NCHR for damages.

Decisions

2 The ÎCCJ established that the damage claimed by the airport was the consequence of the highway construction initiated and implemented by the NCHR, which is liable under the general provision on tort liability. The court stated explicitly that the new general regime of tort liability introduced by art 1349(1) new Civil Code 'no longer requires fault as a condition of liability as the old Civil Code did, since the fault of the tortfeasor is presumed from his/her action or inaction infringing a right or legitimate interest of another'. The court emphasised that the word fault is absent from the text of the general rule on tort liability.

Comments

3 This is a landmark decision for the future evolution of tort liability under the new Civil Code. From the highest court's reasoning, one can conclude that, in the new Civil Code, tort liability is founded on misconduct/an unlawful act (wrongfulness)

7 *N Plavšak*, 131. člen Obligacijskega zakonika (OZ) [Article 131 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 735.

1 Înalta Curte de Casație și Justitie (ÎCCJ).

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and not on the subjective attitude of the tortfeasor towards his acts and deeds. Before this judgment, the new tort law doctrine did not consider the difference in wording between the old and new provisions and took as a given the continuity with the old approach, although the leading commentary on the new Civil Code issued in 2013 had signalled to the legal profession that the new provision does not refer to the fault of the tortfeasor as a condition of liability.[2] However, the legal literature published after this judgment did not react to the highest court's interpretation of art 1349 new Civil Code. In addition, the question of when to apply the general provisions of art 1349 new Civil Code and when those of art 1357 new Civil Code on liability for one's own acts remains unclear in the light of the evolving tort law regime. Fault seems to be a superfluous element of the new evolving tort regime and is treated cautiously by doctrine and case law. Tort law doctrine continues to treat together, without any distinction, arts 1349 and 1357 of the new Civil Code as concerning the conditions of liability: unlawful act, damage, fault, causal relation between the illegal act and the damage.[3] This generalist approach does not promote specific solutions under the new tort law regime. The same approach can be found in lower court judgments issued in 2013 and 2014. In these decisions, the judges consider jointly arts 1349 and 1357 of the new Civil Code as legal bases of the tort suit when they discuss whether or not the conditions of liability in the specific case exist and they establish *fault* from a joint interpretation of the two provisions. One cannot yet report on new court decisions (even at the level of lower courts) issued in line with the highest court's approach.

Curtea de Apel București (Court of Appeal of Bucharest) Decision No 72A of 18 March 2013

<http://www.jurisprudenta.com>

Facts

During the local election campaign of 2012, in the village of Fundeni, written information was distributed in the village, informing the inhabitants about facts and acts committed by the mayor in previous years. The mayor affected by these statements sued the opposition party in court, claiming that this information negatively affected his public reputation and public life. 4

2 *LR Boilă* in: FB Baias/E Chelaru/R Constantinovici/I Macovei (eds), Noul Cod Civil. Comentariu pe articole (2013) 1408.

3 *L Pop/I-Fl Popa/S-I Vidu* (eds), Curs de drept civil. Obligații (2015) 329.

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Decision

5 The Court of Appeal of Bucharest began its reasoning by establishing that, in this case, the provisions of arts 1349 and 1357 of the new Civil Code are applicable, with the remark that 'these provisions do not differ essentially from the rules on tort liability of the former Civil Code concerning the conditions and principles for awarding material or immaterial damages'. The court continued by finding that misconduct (the illegal act) of the defendant was lacking in this case since a public personality such as a mayor is exposed to public opinion as regards his conduct and because the facts mentioned in the written information were true. The court found that the content of the information shared with the inhabitants of Fundeni was a manifestation of the freedom of expression in compliance with the rules of democracy, which, even if shocking for the mayor, aimed to inform the local community about his achievements as mayor (a public personality). Thus the editing and distribution of such information cannot be considered illegal in order to imply tort liability governed under arts 1349–1357 of the new Civil Code. Therefore the court considered that, absent wrongfulness, it is pointless to analyse the fulfilment of other conditions of tort liability (fault, harm caused to public image, dignity, and public life, and the causal relation between the harm and the fault of the tortfeasor).

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice)
Civil Section I, Decision No 2891 of 28 October 2014
<http://www.scj.ro>

Facts

6 The plaintiff, who was abusively exposed to a procedure aimed at depriving him of legal capacity, claimed civil law damages from the defendants who initiated the procedure against him. The defendants reasoned the initiation of the procedure by arguing that the plaintiff suffers from a mental illness. The defendants did so in reaction to the high numbers of civil law suits (seven) and criminal suits initiated by the plaintiff against them, who also committed other unusual deeds aimed to disturb their peace and home. However, the legal-medical expert opinion established that the plaintiff was not suffering from any psychiatric illness and the defendants confessed to the court that they initiated the procedure in order to prevent the plaintiff from filing further civil law and criminal law suits against them. Further, they admitted that the relationship between the two families was highly tense.

Decision

7 The ÎCCJ established that using a procedural instrument in an abusive manner and in bad faith, with the aim of depriving a person of exercising his legal rights, constitutes an unlawful act and the victim is entitled to moral damages for the harm

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caused to his reputation, dignity and public image by the declarations related to his mental health. On this occasion, the court also clarified that art 723(2) of the Civil Procedural Law does not exclude the application of tort liability for damage caused by the abusive use of procedural rights.

Comments

Before the new Civil Code, there was no legal definition in tort law of the abuse of rights, this field being governed by case law. Now art 15 of the new Civil Code establishes that: 'No right can be exercised to injure or defraud another or in an excessive and unreasonable manner, contrary to good faith.'[4] This definition was criticised in recent legal literature for adopting the so-called 'subjective doctrine' in tort liability.[5] Additionally, art 1353 of the new Civil Code stipulates that: 'Whosoever causes injury through the proper exercise of his rights is not obliged to pay compensation, unless that right is exercised abusively.' Other authors consider that an abuse of rights, as an illegal act giving raise to damages, is a manifestation of wrongfulness, and wrongfulness demands compensation when it causes damage; thus tort liability for damage caused by an abuse of rights is a form of objective liability.[6] **8**

29. European Union

European Court of Justice, 5 March 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[1]

Facts

Germany's prohibition on importing beer containing additives was held incompatible with Community law by the ECJ.[2] Brasserie du Pêcheur was one of the producers who were prevented from exporting beer to Germany while the ban was in force and therefore sued for compensation of the economic loss incurred. The German BGH submitted several questions to the ECJ for a preliminary ruling, focusing inter alia on the requirements under which a Member State may be held liable for its own leg- **1**

4 This provision was imported into the new Civil Code from the Code Civil of Quebec (art 7).

5 *VS Neculaescu*, Ambiguitățile teoriei abuzului de drept, Dreptul 3/2011 81.

6 *RL Boilă*, Răspunderea civilă delictuală obiectivă (2nd edn 2014) 250–255.

1 This case was already presented with a different focus in *B Winiger et al* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 6/28. Because of the fundamental importance of this ruling, its actual language will be quoted extensively below.

2 ECJ 12.3.1987, 178/84, *Commission v Germany* [1987] ECR 1227.

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islation if incompatible with Community law, in particular whether national law may insist on fault as a prerequisite of such liability.

2 The claimants in the second case complained of a British registration requirement which effectively prevented claimants from fishing with certain boats. Parts of that registration system were held contrary to Community law. Before addressing which types of losses were compensable,[3] the Divisional Court also asked the ECJ under which conditions a Member State may be held liable for an infringement of Community law by legislation.

Decision

3 The ECJ repeated by way of reference to its *Francovich* ruling[4] that 'the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law' (para 20). This is not only true in case of a Member State's failure to (properly) implement a directive as in *Francovich*, but also if Community law directly confers a right upon individuals which is impeded by national legislation.

4 Proceeding from the rule of non-contractual liability of the Community contained in art 215 ECT at the time (now art 340 TFEU), the court concluded that there was a 'general principle familiar to the legal systems of the Member States that an *unlawful* act or omission gives rise to an obligation to make good the damage caused' (para 29, emphasis added). The state shall be liable irrespective of whether the breach of Community law originated in its legislature, judiciary or executive.

5 While it is therefore clear that states can be held liable under Community law, the conditions thereof 'depend on the nature of the breach of Community law giving rise to the loss and damage', which has to be assessed with an eye to the 'full effectiveness of Community rules and the effective protection of the rights which they confer' (para 38f). On the one hand, the 'general principles common to the laws of the Member States' have to be considered, on the other due regard is to be had not only to the margin of discretion granted to the Member States in implementing and applying Community law, but also to the 'complexity of the situations to be regulated' and to the 'difficulties in the application or interpretation of the texts' (para 42f). If the discretion granted to the national legislator is very wide, liability can only arise if 'the institution concerned has *manifestly and gravely disregarded the limits* on the exercise of its powers' (para 45, emphasis added).

6 In the instant case, both the German as well as the UK legislature were held to have had a wide discretion. Therefore, these Member States can only be held liable

3 See *B Winiger et al* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 6/28.

4 Above 1/29 fn 4.

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if the rule of Community law concerned was intended to confer rights upon individuals, if the breach was 'sufficiently serious', and if there was a direct causal link between such breach and the damage complained of (para 51). A breach of Community law was as serious as required if the institution concerned 'manifestly and gravely disregarded the limits on its discretion' (para 55).

Factors to be considered when establishing liability include inter alia 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, *whether the infringement and the damage caused was intentional or involuntary*, whether any *error of law was excusable or inexcusable*, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law' (para 56, emphasis added). 7

As far as the German case was concerned (the issue was not addressed in the English case), the court inter alia held that 'it would be difficult to regard the breach ... as an *excusable error*' in light of the manifest incompatibility of the national rules with Community law (para 59, emphasis added). 8

Finally, the ECJ had to respond to the question whether liability can be made dependent upon fault. The court first admitted that 'the concept of fault does not have the same content in the various legal systems' (para 76). However, 'certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious'. Apart from that overlap of relevant factors in assessing fault on the one hand and a 'sufficiently serious breach' on the other, fault cannot become a separate and distinct requirement of liability (para 77 ff): 'Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.' (para 79). 9

Comments

This is one of the prime precedents of Member State liability for breach of EU law, making repeated use of terminology which under national tort law would be used in the context of assessing fault. However, the court makes clear that fault as such is not a separate and distinct requirement, but can only be considered in the context of determining whether the breach of EU law was 'sufficiently serious' in order to trigger liability. 10

Therefore, the standard of (mis)conduct remains to be a primarily objective one, requiring a breach of EU law as a trigger for liability, though irrespective of which branch of government committed such breach. In order to strike a balance between the need for safeguarding an adequate margin of discretion to those making and applying the law in compliance with the EU legal order, the bar when the latter is infringed upon can be raised or lowered, depending upon how much flexibility 11

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Member States retain under EU law. The wider the margin of discretion is, the more serious the breach must be.[5]

12 This is also where fault comes into play, at least indirectly: in the case of wide discretion, a breach of Community law (and therefore wrongfulness) only leads to liability if the actors 'manifestly and gravely' ignored the already very generous boundaries: not only do they have to have been aware of such limits, but also exceeded them without excuse. The former is particularly (though not necessarily) true if those acting on behalf of the Member State breached EU law intentionally, the latter relates to the obviousness of the limits it poses, which in turn is influenced not only by the black letter language of EU law, but also, for example, by communication and other information originating from EU institutions that could be understood as a justification of the conduct which objectively nevertheless constituted a breach of EU law. While liability is still based upon a (mere) breach of EU law and therefore wrongfulness, excluding certain 'less serious' breaches by looking at the actual conduct of Member State actors in the circumstances of the case effectively adds a somewhat subjective component to the overall assessment of the misconduct which could be considered a fault element.

Court of First Instance, 17 December 1998

T-203/96, Embassy Limousines & Services v Parliament [1998] ECR II-4239[6]

Facts

13 The applicant had submitted a tender for a framework contract for the transport of MEPs. Parliament's competent staff members led the applicant to believe that it would be awarded the contract, which was ultimately not the case, as the tendering procedure was annulled. In the meantime, relying on the encouraging statements by Parliament officials and in light of the short time period left until the prospective starting date of the contract, the applicant made substantial investments in preparation of the services to be tendered. After the contract was ultimately awarded to a competitor, in the reopened procedure, which had also been entrusted with the services tendered in the interim, the applicant claimed compensation for such futile expenses based on several grounds, including non-contractual liability of the Parliament for two distinct reasons: first, the applicant claimed that Parliament had

5 Cf also the court's ruling in *Dillenkofer* (presented below 14/29 nos 1–6) where it made clear that missing a fixed deadline constitutes a serious breach per se, irrespective of fault. See also the summary of the current test in *Fresh Marine* (below 13/29 no 2).

6 This case was already presented with a different focus in *B Winiger et al* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 9/28.

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infringed Directive 92/50,[7] the legal regime governing such tendering procedures. Second, the applicant alleged unlawful conduct of the Parliament during the procedure and pointed to the fact that it felt led to believe it was the 'successful candidate' (an expression actually used by a committee on procurements), which triggered the substantial preparatory investments, compensation for which it now claimed.

Decision

As regards the first line of reasoning alleging the infringement of Directive 92/50, **14** the court concluded that this was unfounded. It pointed to the 'broad discretion' the Parliament had under the said instrument to make its choice under the tendering procedure, including the freedom to annul it and therefore not to award a contract at all (as foreseen by art 12 para 2 Directive 92/50[8]). The court saw 'no evidence to show that the Parliament, in considering that none of the tenders received was totally satisfactory, has committed a *grave and manifest error*' (para 60, emphasis added). 'Since the annulment of the contested invitation to tender was *not unlawful*' (para 61, emphasis added), the Community could not be held liable on that ground.

The applicant was more successful on the second ground of non-contractual li- **15** ability raised, however, which the court referred to as a 'breach of the principle of the protection of legitimate expectations' (para 73). It pointed to the fact that prior to the date envisaged for the start of the contract, both the Parliament and the applicant believed that the latter would actually start to perform the services tendered from that day onward. While the applicant was not expressly asked to start preparing such performance, it still 'acted in a reasonable and realistic way in order to satisfy the requirements expressed by the Parliament' (para 79). Parliament could not escape liability by arguing that its staff members simply erred when communicating with the applicant and thereby encouraging it to make investments in reliance on such hopes raised. The court held that a 'simple error of information about the interpretation of certain provisions … is not comparable to a situation in which the Parliament induced in its intended co-contracting party the certainty of winning a contract and, in addition, encouraged that party to make irreversible investments' (para 80). Furthermore, the Parliament should have informed the applicant 'without

7 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24.7.1992, 1–24.

8 Under the said provision, it merely sufficed to 'inform candidates or tenderers who so request in writing of the grounds on which [the contracting authority] decided not to award a contract in respect of which a prior call for competition was made, or to recommence the procedure'. It was undisputed that such information had indeed been given to the applicant in due time after a decision to that end was made.

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any delay' about the progress of the procedure, in particular in light of the reversal of its original opinion. The court concluded that 'it is not necessary to determine whether the officials of the Parliament acted in a way that was *excusable*. As the contracting body in the procedure for the award of contracts, the Parliament is obliged to show a coherent and consistent attitude towards its tenderers. The interventions of various administrative and political bodies within the Parliament cannot therefore justify the failure to comply with its obligations to the applicant. It follows that the *Parliament has committed a fault* which gives rise to non-contractual liability on the part of the Community' (para 87 f, emphasis added).

Comments

16 This case is typical of the rather relaxed attitude of the European courts towards the use of tort law language. Under the heading 'Unlawful conduct of the Parliament during the tendering procedure', the CFI concludes that Parliament 'has committed a fault', without specifying how the one relates to the other. In particular, there is no word on the subjective assessment of the conduct that the Parliament's staff showed here vis-à-vis the applicant and which caused the damage for which the Parliament was ultimately held liable. There is also no indication how Parliament officials could have 'acted in a way that was excusable' as cited above. One has to settle with the conclusion that a breach of the principle of the protection of legitimate expectations per se triggers liability, while the qualification of said expectations as legitimate may leave a backdoor open for fault arguments.

17 As far as the breach of Directive 92/50 is concerned, the court confirmed that acting under the broad discretion provided by such an instrument will only trigger liability if such conduct constituted a 'grave and manifest error', therefore only in extreme cases where the boundaries set have clearly been exceeded.

Court of Justice of the European Union, 30 September 2010

C-314/09, Stadt Graz v Strabag AG et al [2010] ECR I-8769[9]

Facts

18 In 1998, the city of Graz ran an EU-wide invitation to tender for the manufacture and supply of bituminous hot mix asphalt. Performance was scheduled to begin on 1 March 1999. The best bidder, Held & Frank Bau GmbH (in the following: HFB) had attached a letter to its tender which informed the contracting authority that its asphalt mixing plant, which was essential for the performance of the contract, would

9 This case was already presented by *BA Koch* in: H Koziol/BC Steininger (eds), European Tort Law 2010 (2011) 626, nos 36–41.

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be operational only from 17 May 1999 onwards. The second-best bidders (the claimants in the instant action) initiated review proceedings before the competent authority of the province of Styria, which by a decision of 10 June 1999, dismissed the action. Four days later, the city of Graz awarded the contract to HFB.

The review decision was annulled by the Administrative Court on 9 October 2002 on the ground that HFB's tender did not conform to the specifications of the tender. The successor to the Styrian review commission subsequently held the award of the contract to HFB unlawful. **19**

The claimants then sued the city of Graz for damages amounting to € 300,000, arguing that HFB's tender should have been excluded as defective. According to the claimants, the decision of 10 June 1999 could not serve as an excuse for the contracting authority. The latter argued, however, that it had been bound by this decision, even if it later turned out that it had been unlawful, which as such could not be imputed to the city of Graz, as it claimed, but to the province of Styria to whom the commission was attributable. **20**

The Austrian Supreme Court, which was ultimately concerned with the case on appeal, was in doubt as to whether the applicable rule of the Styrian Act on public procurement was in conformity with Directive 89/665 that it should have transposed.[10] That Directive provides in its core that decisions by contracting authorities shall be 'reviewed effectively' (art 1 para 1), and such review shall inter alia allow authorities to 'award damages to persons harmed by an infringement' (art 2 para 1 lit c). While the Directive itself is silent on this point, the Styrian law made the tenderer's right to damages conditional on a finding that the contracting authority was at fault when awarding the contract. While such a restriction had already been declared unlawful by the ECJ in earlier cases,[11] the special twist in this case was that Austrian law provided for a reversal of the burden of proof. The Austrian Supreme Court therefore asked the CJEU for a preliminary ruling on the question whether the fault requirement was only incompatible with EU law if it was for the claimant to prove it, or whether this was even true if fault was presumed, though with the remaining possibility that the defendant can exculpate himself. **21**

10 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, at the time as amended by Council Directive 92/50/EEC of 18 June 1992, OJ L 209, 24.7.1992, 1–24.

11 ECJ 14.10.2004, C-275/03, *Commission v Portugal* (not published in the ECR); ECJ 10.1.2008, C-70/06, *Commission v Portugal* [2008] ECR I-1. See also the follow-up decision GCEU 29.3.2011, T-33/09, *Portugal v Commission* [2011] ECR II-1429.

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Decision

22 The CJEU was of the latter opinion. It held that restricting access to compensation by requiring that the defendant was at fault is 'contrary to the wording, context and objective of the provisions of Directive 89/665', even if fault is presumed, since the defendant may still go free if exculpation were successful. In the instant case, the latter was indeed not unlikely since the impact of the review authority's decision of 10 June 1999 might well be considered a suitable argument for the defendant city to rebut the presumption of fault (cf para 41f of the decision). The fault requirement was considered as an obstacle to the effectiveness and rapidity of remedies as foreseen by the Directive and further emphasised by its preamble.

Comments

23 This ruling is a necessary follow-up to earlier cases against Portugal[12] where the court had already held that Member States must not add a requirement of fault when implementing Community law that only requires wrongfulness, since such further (subjective) prerequisites would effectively restrict (if not in most cases even exclude) access to compensation. In the instant case, the court further made clear that Member States must not add *any* fault requirement, even if fault were presumed by the contested norm, as this still allows for a potential exculpation by the defendant. While a reversal of the burden of proving fault shifts such liability into the grey zone between (classic) fault and no-fault liability,[13] it is still to be distinguished from a liability regime that is triggered by a mere breach of EU law as such. If the language of a directive to be implemented therefore merely speaks of an 'infringement' (as was the case with art 2 para 1 lit c Directive 89/665 here), any further – albeit indirect – subjective assessment of the infringer's conduct is an inadmissible deviation from that directive.

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12 See the cases cited in the previous footnote.

13 Cf, eg, *BA Koch*/*H Koziol*, Comparative Conclusions, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 395, (432ff); and *P Widmer*, Comparative Report on Fault as a Basis of Liability and Criterion of Imputation (Attribution), in: P Widmer (ed), Unification of Tort Law: Fault (2005) 331 (356f: '[T]he reversal of the burden of proof regarding fault is … an improper or "cold" way of metamorphosing fault based liability into strict liability …').

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30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Skier A is skiing too fast and collides with skier B, who at the time of collision is stationary at the very side of the slope, facing downhill. Both skiers are injured. What rights of action, if any, do they have against each other in the law of tort? **1**

Variation 1: What if skier B had been standing in a place where he ought to have realised that there was a risk of collision.[1] **2**

Variation 2: What if both skiers suffered injuries in the collision but neither the position of the skiers before the accident nor the cause of the collision could be established.[2] **3**

Solutions

a) Solution According to PETL

In the collision, both skiers suffered injury to their bodily integrity, as protected by art 2:101(1) PETL. According to art 1:101(1), the PETL's 'basic norm', '(1) [a] person to whom damage to another is legally attributed is liable to compensate that damage. (2) Damage may be attributed in particular to the person (a) whose *conduct constituting fault* has caused it …'.[3] Fault is the 'intentional or negligent violation of the required standard of conduct', pursuant to art 4:101 PETL. **4**

In the above scenario, A was skiing 'too fast' and hereby violated his duty not to put other skiers' bodily integrity at peril. B is therefore liable for his 'conduct constituting fault'. **5**

In *Variation 1*, it could be argued that in the collision each skier infringed the other's personal integrity, and that *both* of them violated the required standard of conduct (A by skiing too fast and B by standing at a place where he ought to have realised that there was a danger of collision). Thus, it would be possible to regard both of them as tortfeasors and hold them respectively liable for the injury suffered by the other skier. **6**

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1 Inspired by the Swiss case: BGR/Tribunal fédéral (Federal Supreme Court of Justice) 7.2.1956, ATF 82 II 25; see also the French case: Cass civ 2 (Supreme Court, Civil Division) 20 January 1993, 91-16.610, Bull civ II, no 27, below 2/6 nos 1–5 with comments by *J-S Borghetti*/*M Séjean*.

2 For numerous references to ski collision cases similar to the above scenario and variations, see *T Kadner Graziano*, JETL 2016, 1ff.

3 Emphasis added.

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7 The claims of the skiers would, however, be reduced in line with their respective contributory negligence.[4] The PETL reach this solution on the basis of arts 1:101(1) (Basis Norm), 1:101(2)(a), 2:101, 2:102(1), 2:102(2) (Protected Interests), 4:101 and 4:102(1) (Liability Based on Fault) and 8:101 (Contributory Conduct of Activity of the Victim).

8 In *Variation 2*, neither the position of the skiers before the accident nor the cause of the collision can be established. The PETL attribute liability 'to the person (a) whose conduct constituting fault has caused it', arts 1:101 (2)(a), 4:101ff. The burden of proving fault lies in principle with the person claiming compensation.[5] If, as in Variation 2, the victim cannot prove the other skier's fault, liability cannot be attributed to the other skier and the claim will, in principle, fail under the PETL.[6]

9 Another outcome could only be reached in *Variation 2* if art 4:201 PETL were applied for the benefit of the claimants respectively. According to this provision, '(1) The burden of proving fault 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.'

10 Injuries to health suffered in ski accidents are often serious. In some countries, the number of person injured in ski accidents almost equals the number of persons injured in road traffic accidents.[7] Providing evidence and proving fault of the other party is notoriously difficult in cases of ski collisions. When the traditional standards of fault-based liability and rules on the burden of proof are applied, many claims in collision cases fail. It may thus very well be considered to apply art 4:201 PETL to ski collision cases, and reverse the burden of proof for the benefit of the respective claimant.[8]

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4 For references, see *T Kadner Graziano*, JETL 2016, 1ff.

5 Compare PETL – Text and Commentary (2005) art 4:201, no 1 (*P Widmer*).

6 This solution differs from the one that would ultimately be reached in French law, cf below 2/6 no 5 with comments by *J-S Borghetti*/*M Séjean*, or eg in Italian law which would apply a presumption of fault, pursuant to art 19(1) of the Italian Law no 363/2003 of 24 December 2003. It states: 'Nel caso di scontro tra sciatori, si presume, fino a prova contraria, che ciascuno di essi abbia concorso ugualmente a produrre gli eventuali danni'.
('In the case of a collision between skiers, it is presumed, until evidence to the contrary is provided, that both skiers are equally responsible for any injury caused.') For a comprehensive comparative overview with references, see *T Kadner Graziano*, JETL 2016, 1ff.

7 Figures and references in *T Kadner Graziano*, JETL 2016, 1, 3f.

8 For the arguments for, and the benefits of, such an approach, see *T Kadner Graziano*, JETL 2016, 1, 20ff.

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b) Solution According to the DCFR

Like the PETL, the DCFR does not employ the terminology of 'wrongfulness' or 'unlawfulness' in establishing extra-contractual liability. Article VI–1:101, the basic rule for extra-contractual liability under the DCFR, provides: '(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage *intentionally or negligently* ...'.[9] According to art VI–3:102 DCFR, negligence is 'conduct which either (a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage; or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. **11**

An analysis of the above under the appropriate provisions of the DCFR would be very similar to that under the PETL. Skier A would be liable for having violated the duty not to put other skiers at risk, resulting in B's damage. **12**

In *Variation 1*, the skiers would be respectively liable for the damage suffered by the other skier. Given that both were at fault, their claims would be reduced in line with their respective contributory negligence pursuant to art VI–5:102 DCFR.[10] **13**

In *Variation 2*, neither the position of the skiers before the accident nor the cause of the collision could be established. The basic rule for extra-contractual liability in art VI–1:101 DCFR presupposes 'that the injured person has to set out, and if need be, prove the requirements which have to be satisfied if there is to be a right to reparation'.[11] If, as in Variation 2, the victim cannot prove the other skier's fault, liability cannot be attributed to the other skier and the claim will fail under the DCFR. **14**

31. Comparative Report

General Remarks

For the question on the forms of misconduct, reports have been provided by all of the jurisdictions except Portugal. They have demonstrated that a large variety of different misconduct devices are deployed across the jurisdictions reporting. The most common, however, are the (twin) ideas of 'objective' unlawfulness/wrongful- **1**

9 Emphasis added.

10 Article VI–5:102 (Contributory fault and accountability) DCFR provides '(1) Where the fault of the person suffering the damage contributes to the occurrence or extent of legally relevant damage, reparation is to be reduced according to the degree of such fault'.

11 *C v Bar/E Clive*, DCFR, art VI–1:101, Comment A (p 3086).

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ness and 'subjective' fault.[1] Of those, as regards unlawfulness, a distinction is sometimes drawn between a focus on the harmful event as such (*Erfolgsunrecht*) and on the human conduct that caused that result (*Verhaltensunrecht*),[2] whilst other systems concentrate only on the harmful conduct (*Verhaltensunrecht*).[3] It is also important to note that the question of 'subjective' fault is assessed by an objective standard ('the reasonable person') in the majority of the legal systems,[4] as well as in the DCFR and PETL.[5] The same is also true of the Roman law.[6] It is only in a few jurisdictions that a genuinely subjective, ie individual, standard is relied upon;[7] the question to be asked is then whether the concrete actor can be reproached given his/her personal knowledge and capabilities.

2 By contrast, in a range of legal systems the distinction between wrongfulness and fault is blurred,[8] or else entirely unrecognised. Thus in France and Belgium, for example, the enquiry is focused only on the unitary concept of fault (*faute*).[9] Some of the Scandinavian jurisdictions are also comparable, using the concept of 'culpa' instead.[10] A singular, concrete evaluation in the context of the case is thereby preferred to the individual objective and subjective elements seen elsewhere.[11] This is in some respects similar to the position historically, with the Roman jurists developing a singular *culpa* concept, probably out of the wrongfulness criterion of *iniuria* as non-intentional harms began to be considered.[12] The DCFR and PETL likewise do not distinguish terminologically between wrongfulness and fault.[13] In practice, however, the PETL do proceed on the basis of *Erfolgsunrecht* insofar as they focus on interferences with protected interests (art 2:102f PETL), and on the other hand deploy a concept of *Verhaltensunrecht* (an objective conduct violation), in setting the standard of care (art 4:01f PETL).[14]

3 In the modern context, account must also be taken of the European 'seriousness' criterion, whereby there can only be liability for breach of European norms if

1 See eg Germany (2/2 no 3); Austria (2/3 no 2); Spain (2/10 no 3); Estonia (2/20 nos 3f, 7); Lithuania (2/22 no 9f); Czech Republic (2/24 no 6ff); Croatia (2/26 no 11ff); Slovenia (2/27 no 3).

2 See Germany (2/2 nos 3, 7); Switzerland (2/4 nos 15, 22).

3 Explicitly Austria (2/3 no 3); see further the Netherlands (2/8 nos 3, 6); Italy (2/9 no 7ff).

4 See eg Germany (2/2 no 3); Denmark (2/16 nos 6, 9); Lithuania (2/22 nos 9, 18f); Czech Republic (2/24 nos 8f, 18); Croatia (2/26 no 13); Slovenia (2/27 no 3).

5 See PETL/DCFR (1/30 nos 4ff, 19).

6 Historical Report (2/1 no 6).

7 See especially Austria (1/3 no 5).

8 See below no 8ff.

9 France (2/6 no 3f); Belgium (2/7 nos 4f, 8f).

10 Norway (2/17 no 5f); Sweden (1/18 no 1).

11 See Norway (2/17 no 6).

12 Historical Report (2/1 no 3f).

13 PETL/DCFR (1/30 nos 2, 7, 16).

14 Cf PETL/DCFR (1/30 no 8 with further references).

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that breach (representing unlawfulness) is sufficiently serious, judged against criteria which in part overlap with fault ideas.[15] However, the ECJ has made clear that fault as such is not a separate and distinctive requirement, hence the addition of a fault element beyond a sufficiently serious breach of an EU norm has been ruled inappropriate.[16] Despite this, the attraction of the fault concept, critical in the national jurisdictions, manifests in the use of fault terminology at the European level and the room left for fault-like ideas to operate.[17]

Wrongfulness

Wrongfulness is the objective element of misconduct in the systems which make use of it. However, there are minority views which develop a so-called 'subjective' concept of wrongfulness, whereby conduct causing damage is unlawful unless supported by a subjective right to do the same.[18] As regards the distinction between wrongfulness based on conduct or result, generally speaking it is the conduct-centred approach which seems to predominate in the reports:[19] wrongfulness is generally represented by conduct (*Verhaltensunrecht*) which infringes legal rules.[20] However, there are key examples where a result is the focus of wrongfulness (*Erfolgsunrecht*), as for example in Germany or Switzerland where an absolute right of the claimant – such as life, human health or property – has been infringed (though this is not the case for other rights).[21] Following this principle, wrongfulness is presumed and the actor bears the burden of rebutting this presumption and proving a justificatory defence, for instance self-defence.[22] This produces a much stronger focus on result than in eg Austria, where an infringement of absolute rights only serves as an indication of wrongfulness, which must be positively established by the claimant on the basis of the conduct involved.[23] It is important to emphasise, though, that even in Germany and Switzerland, the doctrine of *Erfolgsunrecht* is

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15 European Union (2/29 nos 5 ff, 10 ff, 14 ff).

16 European Union (2/29 nos 9 ff, 21 ff).

17 See European Union (2/29 nos 7 ff, 16).

18 Switzerland (2/4 no 22 f).

19 Austria (2/3 no 3); the Netherlands (2/8 nos 3, 6); Italy (2/9 no 7 ff); Spain (2/10 no 3); Lithuania (2/22 nos 10, 20); Slovakia (2/25 nos 3, 11); Croatia (2/26 nos 7, 16); see also Sweden (2/18 no 3) regarding the concept of 'culpa'.

20 Explicitly Austria (2/3 no 3); regarding specific protective rules see also Switzerland (2/4 no 7).

21 Germany (2/2 nos 3, 7); Switzerland (2/4 nos 3, 5 f). See also Greece (2/5 no 3): according to the prevailing view, unlawfulness is generally judged using the outcome of the conduct; Estonia (2/20 nos 4, 7 and 10): personal injury/violation of a right of ownership establishes unlawfulness; Poland (2/23 no 8).

22 Germany (2/2 nos 3, 7); Estonia (2/20 no 10).

23 Austria (2/3 no 3).

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only applicable where an interference with 'traditional absolute rights' is concerned.[24] Accordingly, it is stressed in the German report that the *Verhaltensunrecht* doctrine is instead determinative where the injury involved is to mere 'framework rights' (*Rahmenrechte*) – including, for example, personality rights; given the relative lack of definitional clarity from which these legal interests suffer, a thorough balancing process is always required in order to establish wrongfulness.[25] Jurisdictions which focus purely on fault or on a more general *culpa* of course have no concept of *Erfolgsunrecht*,[26] and various others do not generally recognise unlawfulness established by result.[27]

5 The norms relevant for establishing wrongfulness can be very varied[28] and often include prohibitions against interferences with forms of rights, or against very specific acts or omissions.[29] In those cases where there are no applicable specific rules, it is often noted – as in Germany with the 'framework rights'[30] – that the concept of wrongfulness entails an evaluation of the importance of the affected interests to the legal system, as recognised explicitly in a balancing exercise discussed in the Austrian and Irish reports. In Austria, establishing wrongfulness on the facts (based on conduct) requires a balancing of all of the interests at stake. These include the value of the endangered right, the severity of the impending damage, the degree of danger, the interests of the parties involved and whether a person could, within the bounds of reasonableness, be expected to act differently.[31] The PETL provide for the same in respect of the required standard of care (art 4:101(1) PETL).[32] In Ireland, competition between interests and its importance for unlawfulness are highlighted exemplarily in private nuisance and trespass.[33]

6 As regards wrongfulness, it may be said that developmental trends seem to tend away from result to focus on conduct. This is not only apparent from the examples above,[34] but is also arguably true of Common law development, as is especially evi-

24 Germany (2/2 nos 5 ff, 7); Switzerland (2/4 no 6 f).

25 Germany (2/2 nos 5 ff, 7).

26 France (2/6 no 4); Belgium (2/7 no 8 f); Norway (2/17 no 5 f); Sweden (2/18 no 3).

27 See eg the Netherlands (2/8 nos 3, 6); Italy (2/9 no 7 ff); Lithuania (2/22 nos 10, 20); Slovakia (2/25 nos 3, 11); Croatia (2/26 nos 7, 16).

28 Cf eg Spain (2/10 no 3): general principle of 'alterum non laedere'; Poland (2/23 no 12): 'principles of community life'.

29 For the relevance of statutory and non-statutory rules, see Comparative Report (4/31 no 1 ff and 5/31 no 1 ff).

30 Germany (2/2 nos 5 ff, 7).

31 Austria (2/3 no 3); see also the Netherlands (2/8 no 5).

32 See PETL/DCFR (3a/30 no 2 ff).

33 Ireland (2/14 no 3 ff).

34 See above no 4 f.

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dent in the modern pre-eminence of the conduct-focused tort of negligence.[35] The tort of private nuisance also exemplifies this developmental trend. There traditional views focus on the effect on the claimant, but increasingly there is overlap with negligence and concern for the defendant's conduct.[36] It is also interesting in that respect that even the development of the Roman law was defined by such a shift in focus from the harmful result to the injurer's conduct.[37]

Fault

Fault, where deployed, is seen as the 'subjective' element of misconduct and is gen- **7**
erally established by analysing the relevant conduct against that which could reasonably have been expected of a person in the defendant's position. Whether the actor's conduct can also be reproached on a genuinely subjective basis – ie by reference to his/her individual knowledge and capabilities – only forms part of the assessment in a few jurisdictions.[38] The ethical legal question of whether the concrete actor is personally culpable thus, unfortunately, fades entirely into the background. Almost all of the legal systems, as well as the DCFR and PETL,[39] rely instead on a generally objective standard ('the reasonable person'),[40] aside from accounting exceptional considerations such as the age of the actor[41] or any psychological illness.[42] This makes it more difficult to trace the boundary between fault and wrongfulness.[43] It must also be noted that in several cases fault is presumed[44] and that such a presumption is sometimes not rebuttable,[45] creating intermediate spaces between pure fault and no-fault liabilities.

A review of the jurisdiction reports shows that the line between fault and wrong- **8**
fulness is or can become blurred; a fact expressly acknowledged by several report-

35 See eg Ireland (2/14 no 8 f); England and Wales (1/12 nos 1 f, 3). Older torts like trespass and nuisance deal more in effects, but with uncertain involvement from conduct ideas – see England and Wales (ibid and 2/12 no 3 f); Ireland (2/14 no 3). On the historical development, see generally *D Ibbetson*, A Historical Introduction to the Law of Obligations (1999) 169 ff, 184 ff.

36 Cf England and Wales (2/12 no 2 ff); Ireland (2/14 no 3 f).

37 Historical Report (2/1 no 7).

38 See especially Austria (1/3 no 5).

39 See PETL/DCFR (1/30 nos 4 ff, 19).

40 See eg Germany (2/2 no 3); Denmark (2/16 nos 6, 9); Lithuania (2/22 nos 9, 18 f); Czech Republic (2/24 nos 8 f, 18); Croatia (2/26 no 13); Slovenia (2/27 no 3).

41 See Comparative Report (8/31 no 1 ff).

42 See Comparative report (10/31 no 1 ff).

43 Lithuania (2/22 nos 9, 20).

44 Estonia (2/20 no 3); Lithuania (2/22 nos 6, 9); Czech Republic (2/24 no 6).

45 Czech Republic (2/24 nos 8, 18): where the wrongdoer demonstrates special knowledge, skill or diligence, or operates a business in which special knowledge, skill or diligence is required.

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ers.[46] Substantively, such a melding of the ideas of wrongfulness and fault appears, for example, where the legal duty owed is not one directed at specific conduct or a specific result, but is instead a general duty to take care.[47] In terms of how misconduct is understood, moreover, a number of jurisdictions do not in any event recognise, or else at least do not hold strongly to, a strict division.[48] Several report instances where a court has either disregarded or confused the separation, or noted its difficulties.[49] A telling example, demonstrating a significant lack of clarity on fault, is given by Romania – art 1349(1) of the New Civil Code omits the fault requirement; the High Court of Cassation and Justice discusses fault as if it is presumed; and lower courts and doctrine seem to continue to read in a positive fault requirement from the older law.[50]

9 As regards the Common Law, it is not conventional to distinguish between wrongfulness and fault, and it is not even clear how such a distinction would be drawn. A clear example is the pivotal tort of negligence, where the very organising concepts always necessitate the confusion: liability attaches to a breach of duty necessarily established by proof of faulty conduct.[51] Though ideas which can be equated to wrongfulness and fault are more clearly distinct in several other torts,[52] lawful means conspiracy[53] or certain instances of private nuisance[54] similarly rely on fault determining whether conduct is 'wrongful'. Private nuisance, in particular, is a problematic tort, with the exact relevance of fault uncertain. In England and Wales, it has proved critical in some cases but not others, without any clarity emerging.[55]

10 Overall, it may thus be said that a large number of difficulties arise in delineating the boundary line between wrongfulness and fault. As already mentioned above, this is especially true in those cases where both wrongfulness and fault are assessed in an objective way.[56] A clear distinction can, however, be achieved where

46 Denmark (2/16 nos 3, 6, 9); Croatia (2/26 no 11 ff); cf also Norway (2/17 no 5): 'wrongfulness has no conceptual value in itself'.

47 Explicitly Lithuania (2/22 no 19 f).

48 See eg Denmark (2/16 nos 4–6, 9); Norway (2/17 no 5 f).

49 Eg Lithuania (2/22 no 9); Croatia (2/26 no 9 ff); Slovenia (2/27 no 1 ff).

50 Romania (2/28 no 1 ff).

51 Eg Ireland (2/14 no 8). Cf England and Wales (1/12 no 1 ff): wrongfulness is generally treated as synonymous with fault – devices such as the duty of care serve to further delimit the liability instead; Ireland (1/14 no 1).

52 Eg unlawful means conspiracy, see Scotland (2/13 no 4 f) or the tort of intentionally causing loss by unlawful means, see *Peel*/*Goudkamp* (eds), Winfield & Jolowicz on Tort (19th edn 2014) no 19-019 ff.

53 Scotland (2/13 no 4 ff).

54 England and Wales (2/12 no 3 f); Ireland (2/14 no 4).

55 England and Wales (2/12 no 3 f); cf Ireland (2/14 no 3).

56 See explicitly Slovenia (2/27 no 3).

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fault – as in Austria[57] – is actually assessed using a subjective standard set by reference to the individual actor, or else where the distinction is drawn between event-based wrongfulness (*Erfolgsunrecht*) and (objective) fault.

57 Austria (1/3 no 5).

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C. The Required Standard of Conduct

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3. Criteria for Assessment

3a. The Criteria and Their Interplay

1. Historical Report

Paulus, D 9.2.30.3

Facts

The defendant set fire to his stubble field in order to scorch it. The fire spread to the neighbour's field and burnt his crop. **1**

Hypothesis 1: It was a windy day.

Hypothesis 2: The defendant did not oversee the fire.

Hypothesis 3: The defendant took all the necessary precautionary measures and a sudden gust of wind made the fire spread.

Decision

Paulus[1] imposed liability on the defendant in hypotheses 1 and 2, but not in hypothesis 3. **2**

Comments

The present case illustrates the casuistic approach of the Roman jurists in establishing *culpa* as an element of *iniuria*. Although they did not refer to a standardised formula for *culpa*, a whole range of criteria appears in the extensive collection of cases. Among those were negligence[2], inexperience[3], weakness[4], foreseeability[5], the dangerousness of the activity[6], the availability of precautionary measures[7] and the injured party's conduct[8]. **3**

Taking these criteria into account, Paulus distinguished between the three hypotheses. First, he considered whether the defendant set his field on fire on a windy **4**

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1 Iulius Paulus, 1st half of the 3rd century AD.

2 Cf *Paulus*, D 9.2.31 (3d/1 nos 1–7 below).

3 Cf *Ulpian*, D 9.2.7.8; *Gaius*, D 9.2.8 pr and D 9.2.8.1 (7/1 no 1f below); *Ulpian*, D 9.2.27.29 and D 19.2.13.5 (7/1 nos 3–7 below).

4 Cf *Gaius*, D 9.2.8.1 (9/1 nos 1–5 below).

5 Cf *Paulus*, D 9.2.31 (3d/1 nos 1–7 below).

6 Cf *Paulus*, D 9.2.28 pr (3c/1 nos 1–6 below); Ulpian D 9.2.11 pr.

7 Cf *Ulpian*, D 9.2.27.9 (3f/1 nos 1–4 below).

8 *Ulpian* (*Mela*), D 9.2.11 pr; cf *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 235 ff.

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day. And indeed, on windy days it is much more dangerous to scorch a field and foreseeable that the fire might spread to the neighbour's field. Therefore, Paulus considered the defendant's conduct as negligent. In the second hypothesis, Paulus made it plain that the availability and adoption of precautionary measures played an important role in establishing liability. He required the defendant to oversee the fire properly, ie applying the standard of care which was objectively called for. If the defendant failed to do that, he incurred liability even on a windless day. Only under the condition that he took all the necessary precautionary measures could the defendant avoid liability. Thus, Paulus considered it an unavoidable accident if the person oversaw the fire and a sudden, unforeseeable gust of wind (*vis maior*) made the fire spread.

5 Although the Roman jurists tended to assess *culpa* from an objective perspective, this does not mean that the jurists did not consider subjective features at all. In fact, subjective features could contribute to establishing as well as to precluding liability. Thus, even in a situation of self-defence, injuring somebody intentionally could trigger liability.[9] On the other hand, children under the age of seven (*infantes*) and the mentally disturbed (*furiosi*) were not liable under the *lex Aquilia*.[10] The liability of an injurer below the age of puberty (*impubes*) depended on his/her individual mental capacities.

6 In short, in order to assess the complex notion of *culpa* (in the wide sense) as a part of *iniuria*, Roman jurists applied a range of both objective and subjective criteria.

2. Germany

Bundesgerichtshof (Federal Supreme Court) 21 March 1955, III ZR 115/53

NJW 1955, 788 = BGHZ 17, 69

Facts

1 The defendant was a public notary who, in 1943, had certified a will in which the claimant, who was not a legal heir of the testator, was bequeathed as heir. However, because the notary failed to sign the document, it was, therefore, invalid and, as a result, the legal heirs inherited the estate. The claimant sued for compensation of his pecuniary loss. The notary explained his failure to sign with the fact that, during the certification of the will, there had been a bomb alarm. The testator had hastily left the office and also the notary had run to the air raid shelter. Upset by the raid

9 *Alfenus*, D 9.2.52.1 (14/1 nos 1–6 below).

10 *Ulpian*, D 9.2.5.2 at 8/1 nos 1–4 below.

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and due to his advanced age (71), he later did not check his signature but gave the document to his secretary who sealed and stored it.

Decision

The Federal Supreme Court held the public notary negligent and therefore liable under § 839 BGB in combination with the Notary Regulation. Neither the situation nor the – wrong – opinion that the document was correctly signed nor the age of the notary was accepted as grounds of excuse. On the contrary, the court stressed that a person who, like a public notary, is obliged to act particularly carefully must be aware that in dramatic situations mistakes can occur; this is sufficient reason to subsequently check – when the situation has calmed down – whether tasks performed under somewhat chaotic circumstances are in order. The failure to do so was negligent. **2**

Comments

The decision, which is still cited as a leading case on negligence,[1] shows that even in difficult situations a high standard of circumspection and foresight is requested. Personal shortcomings or deficits are not accepted; and if there is the possibility to later check possible mistakes and correct or remedy them, the defendant must use this opportunity. Otherwise he/she will be liable for negligence. Particularly difficult is the task of being aware of possible errors although one's personal recollection is that everything was in order. The court demands a kind of professional distrust against one's own acts and not only for notaries but for other professionals too. **3**

3. Austria

Oberster Gerichtshof (Supreme Court) 6 December 1990, 7 Ob 674/90
JBl 1992, 44

Facts

The claimant and the defendant used the same riding arena to warm up before a show jumping tournament. The defendant lost control of his horse, which suddenly bolted, could not be stopped immediately and kicked the claimant who was close by and severely injured. **1**

1 See eg *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 276 no 15.

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Decision

2 The Supreme Court dismissed the case. It stated that the entitlement to damages resulting from sports injuries conforms to the general rules of tort law (§§ 1293 ff, 1325 ABGB), thus requiring causal, unlawful and culpable behaviour of the defendant. The infringement of an absolute right – such as the right to physical integrity – is only an indication of wrongful conduct, the assessment of which requires that all interests be weighed up. Therefore, it is recognised by the courts that acts or omissions in the course of sports, which injure other competitors or endanger their physical safety, are only unlawful if they go beyond the typical dangers of the sport in question and increase the natural risks. As riding involves animals whose movements even skilled riders cannot always control, the claimant exposed himself to a typical and foreseeable danger. Since the defendant could not have prevented the horse's behaviour, he did not act unlawfully and was therefore not liable.

Comments

3 According to the 'theory of unlawfulness of conduct' (*Verhaltensunrechtslehre*), unlawfulness always relates to human conduct and not to a mere negative result (see 1/3 no 3 and 2/3 no 3). Accordingly, the mere infringement of so-called absolute rights such as life, health, freedom, rights in rem and intellectual property rights, which are protected against everybody, only indicates wrongfulness. Consequently, in each case it is necessary to weigh up interests in order to assess whether the conduct which led to the harmful result is to be deemed unlawful or not.[1] To this end, in particular the rank of the protected interest, the dangerousness of the activity, the reasonableness of an alternative course of behaviour and the general interest in freedom of action must be taken into account.[2] Accordingly, in the case of sport accidents, the dangerousness of the given sport, the level of training and professionalism of the athletes, the purpose of the sports activity (competition or training) and the positive aspects of practising sport in general as well as the issue of risk assumption must be considered.[3] Injuring other competitors is therefore only unlawful if the

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1 OGH 5 Ob 73/88 = SZ 61/270; 4 Ob 524/92 = ZVR 1992/177; 3 Ob 501/94 = JBl 1995, 658 *D Karollus-Bruner*; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4; *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 ff.

2 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/28 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4.

3 See 1 Ob 606/87 = JBl 1988, 114: ice hockey; 6 Ob 76/05b = JBl 2006, 249 *Resch*: ice skating; 2 Ob 109/03y = JBl 2005, 313: judo; 2 Ob 68/82 = ZVR 1984/92: motorsports; 2 Ob 42/95 = SZ 68/141: sailing regatta; 7 Ob 674/90 = JBl 1992, 44: show jumping; 3 Ob 309/97f = JBl 1998, 450: skiing; 2 Ob 571/94 = JBl 1996, 786 *Sprung*: soccer; 5 Ob 540/78 = SZ 51/89: tennis; 3 Ob 91/06p = ZVR 2007/147 *C Huber*: volleyball.

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risks taken exceed the typical dangers of the sport in question and if a violation of the sporting rules is neither typical nor only slight.[4] Interestingly, the Austrian Supreme Court has extended these quite specific criteria to 'playful activities' such as the amicable scuffle of two adults[5] or therapeutic role playing,[6] which both led to serious injuries of the participants.

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 28 November 2003
ATF 130 IV 7

Facts

At 3 am V was being pulled while on his skateboard by his friend X who was riding his motorbike. V fell and remained motionless on the road. An ambulance took V and X to the local hospital. A, who had been on duty without a break for 20 hours, received information from the ambulance personnel stating that V had no exterior lesions, but was intoxicated. X indicated falsely that he had been walking and had pushed V, who fell but that he did not lose consciousness and did not (or only slightly) hurt his head on the road. He also concealed the fact that V had not been responsive after the accident. 1

A failed to consult a surgeon, did not proceed to further examine V nor organised a survey of V in the hospital. At 5 am A released V, who was picked up and taken home by his girlfriend. At 9 am the following day, the rescue services brought V, who was unconscious, back to the hospital, from where he was flown to the University Hospital in Zurich because of severe brain damage. V became disabled. 2

The cantonal penal court declared A guilty of negligent aggravated assault (*schwere Körperverletzung*) and ordered him to pay a fine of CHF 2,000 (€ 1,700). 3

A filed an appeal to the Supreme Penal Court. 4

Decision

The Supreme Penal Court rejected A's appeal. 5

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4 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1297 no 8; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/38 f.

5 OGH 2 Ob 207/00f = ZVR 2001/95; 6 Ob 220/04b = JBl 2005, 380.

6 OGH 3 Ob 221/02z = ZVR 2004/45.

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6 The Supreme Court confirmed that V's injury had to be qualified as grave (*schwere Körperverletzung*) in the sense of art 125 of the old Swiss Penal Code (aSPC),[1] as it had threatened V's life.

7 The court reiterated the definition of negligence, which arises when an individual violates a duty of prudence by not or not sufficiently considering the consequences of his/her behaviour. A person is negligent (*sorgfaltswidrig*) if at the moment of the act he/she could or should have been aware, on the basis of his/her knowledge and capacities, of the danger for the victim and if he/she has acted in a manner beyond the acceptable limits of risk (old art 18 al 3 aSPC) (new art 12 al 3 of the Swiss Penal Code [SPC]).[2] The question is whether the result was foreseeable in the light of the ordinary course of events and the general experience of life (adequacy). Adequacy can be denied only in the case of very exceptional circumstances, such as contributory negligence or unexpected material defect, etc. Further in order to be condemned in penal proceedings, the final result also has to have been avoidable.

8 In medical cases, a doctor has to conform to the *lex artis* and has to do everything he/she can to heal a patient and to avoid everything that could cause damage. He/she is liable for all violations of his/her duty of care. These (civil law) principles also apply in penal law. The Supreme Court also stated that doctors are only liable for acts which breach the generally admitted standard of knowledge.[3]

9 The Supreme Court rejected A's view, according to which the cantonal court had defined a too severe standard for emergency departments. It considered that, in the concrete situation, there was no particular time pressure and that A should not have

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1 Article 125 of the old Swiss Penal Code (aSPC):
Assault through negligence
[1]Any person who causes injury to the person or the health of another through negligence is liable on complaint to a custodial sentence or to a monetary penalty.
[2]If the injury is serious, the offender is prosecuted ex officio.

2 Article 12 of the Swiss Penal Code (SPC):
Intention and negligence
Definitions
[1]Unless the law expressly provides otherwise, a person is only liable to prosecution for a felony or misdemeanour if he commits it wilfully.
[2]A person commits a felony or misdemeanour wilfully if he carries out the act in the knowledge of what he is doing and in accordance with his will. A person acts wilfully as soon as he regards the realisation of the act as being possible and accepts this.
[3]A person commits a felony or misdemeanour through negligence if he fails to consider or disregards the consequences of his conduct due to a culpable lack of care. A lack of care is culpable if the person fails to exercise the care that is incumbent on him in the circumstances and commensurate with his personal capabilities.

3 On physicians' responsibility, see also our analysis concerning cases ATF 133 III 121 (2007) at 6/4 nos 10–21 and ATF 108 II 59 (1982) at 5/4 nos 10–12 and references cited.

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trusted the (false) statements made by X concerning the sequence of the accident events. In particular, he should not have believed that V's head had not or only slightly touched the ground and he should not have attributed V's unusual behaviour (tottering, vomiting, etc) exclusively to the alcohol he had consumed. He should also have listened to an experienced hospital nurse, who had expressed her doubts about allowing V to go home. He should have placed V under medical observation.

Comments

Although the present case was decided by the Penal Supreme Court, the judges explicitly referred to civil law and literature. They successively applied a large number of tort law concepts and highlighted their interplay. **10**

Article 41 of the Swiss Code of Obligations (SCO) mentions negligence and imprudence, while art 43 SCO mentions fault. This raises the question of the link between these three terms. Academic literature does not distinguish them clearly (see also 1/4 nos 3–8). One could say that fault can be considered, as in Roman law, as the central term containing the notions of negligence, imprudence and other close expressions.[4] These three terms have to be clearly distinguished from unlawfulness; unlawfulness refers to the violation of a norm. **11**

Secondly, negligence is – also since Roman law – directly connected with foreseeability. A person has to determine *ex ante* the effects of his/her behaviour and to adapt it if damage for other persons could result according to the general experience of life and the ordinary course of events.[5] **12**

Thirdly, negligence is closely linked to the capacities and knowledge of an individual. For example, an expert is subject to a higher standard of conduct than an average professional.[6] **13**

Fourthly – in the example of the medical profession – a link exists between the standard of conduct and the professional duty. The professional standard of conduct consists in a certain number of generally accepted rules established within a profession.[7] This standard is imposed upon various professionals; as it has a normative character, it has to be considered as a specific rule of law (professional rules). **14**

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4 On Roman law, see mainly *Paulus*, Digest 9.2.31 commented by *JP Dunand/B Schmidlin/B Winiger*, Droit privé romain II (2012) 203 ff.

5 ATF 30 IV 7, 10 c 3.2 (1904). On the criterion of foreseeability, see our analysis of ATF 116 II 422 (1990) and references cited; also ATF 88 II 430, 434 c 1 (1962).

6 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 172; contra *C Chappuis/F Werro*, La responsabilité civile: à la croisée des chemins, in: SJV Schweizerischer Juristentag (2003, Heft 3) 329. See also our analysis of ATF 133 III 121 (2007) at 6/4 nos 17–21 and references cited.

7 On examples of deontological principles established by the medical sciences, see our analysis of ATF 108 II 59 (1982) at 5/4 nos 10–12 and references cited.

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Consequently, a violation of the standard and of the duty generated by it is considered as unlawful. Once unlawfulness is established, a judge, in a second step, has to examine whether this violation also constitutes fault (or negligence or imprudence, etc).

15 Finally, it is noteworthy that the doctor had worked for 20 hours without interruption, but that he had not used this fact as an argument. The reason for this (reasonable) choice could lie in the fact that our judges and the academic literature tend to reject subjective elements such as fatigue.[8] This is one consequence, among others, of the so-called 'objectivisation' of fault.

5. Greece

Areios Pagos (Greek Court of Cassation) 1335/2011

ChrID IB/2012, 658, followed by remarks by *KA Christakakou*

Facts

1 A, 37 years of age and obese (weighing 160 kg), suffered from intense backache. A doctor prescribed Cronassial, a solution for injection, for 20 days. A few days after he started to take the medicine, A presented symptoms of numbness of his upper limbs which quickly became paralysed. An electromyography showed that A had developed Guillain-Barré syndrome which caused him irreversible paresis with muscular atrophy of his upper limbs as well as sensory and gait abnormalities which were due to the side effects of the Cronassial he had taken. This medicine was available in Greece from 1990 to 1994 with the approval of the National Organisation for Drugs (EOF). A filed a suit against the importer and distributor of the drug claiming monetary compensation for his moral harm because the instructions for use included with the drug were not clear.

Decision

2 The court awarded A € 70,000 as compensation for moral harm, holding that a general principle of law is to be deduced from the combination of art 5 § 1 of the Greek Constitution[1] and arts 288, 281, 297, 298 and 914 GCC, according to which not only is

8 However, we demonstrated that over fatigue was considered as an aggravated fault concerning the liability of a driver. See ATF 91 II 218 (1965) and references cited.

1 Article 5 § 1 of the Greek Constitution: 'All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and good morals.'

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any act or omission that contravenes a specific rule of law unlawful but also any act or omission that contravenes the more general spirit of the legal order that imposes the obligation not to go beyond its limits when acting is unlawful. The fact that EOF did not object to the distribution of the drug on the Greek market does not exclude the liability of the producer and distributor of the drug on the basis of the provisions of ordinary law because of the unclear instructions for use contained in the drug packaging.

Comments

As mentioned above, it is constantly repeated in Greek theory and jurisprudence **3** that an act that violates the general duties of providence and care dictated by the principle of good faith, an act which contravenes the more general spirit of the legal order that imposes the obligation not to go beyond its limits when acting, is also 'unlawful'. Therefore, whosoever does not take the appropriate measures in order to avoid the risk of provoking a detriment to the goods of other persons may be liable to compensate the damage caused.

Specific factors as those listed in art 4:102(1) of the Principles of European Tort **4** Law (dangerousness of the activity, foreseeability of the damage, relationship of proximity, etc) are not enumerated in Greek theory or jurisprudence for the assessment of the required standard of conduct; what is, however, always mentioned is that the requirements in general of 'good faith', which is understood according to arts 200, 281 and 288 GCC[2] as the uprightness in transactions displayed by a prudent and upright person, should be met. This is so because the determination of the specific factors which are to be taken into consideration, either cumulatively or independently in order to specify the required conduct dictated by 'good faith', the violation of which constitutes an 'unlawful' act,[3] is left to the wide discretion of the judge when deciding whether a particular conduct is 'unlawful'. The specific factors that play a crucial role, such as the dangerousness of the activity or the foreseeability of the damage, cannot be included in an exhaustive list and depend on the particularities of each case.

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2 Article 200 GCC: 'Construction of contracts. Contracts are construed in accordance with good faith, taking account of business usage.'
Article 281 GCC: 'Abuse of right. The exercise of a right is prohibited when it manifestly exceeds the limits dictated by good faith, or good morals, or the social or economic purpose of the right.'
Article 288 GCC: 'The debtor is bound to perform in accordance with the requirements of good faith, also taking into consideration business usage.'

3 See, among others, *M Stathopoulo*s, § 15 no 39 ff. For the notion of 'good faith' see, among others, *A Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 288, no 2.

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5 In environmental law, however, it is mentioned in doctrine that factors to be taken into consideration for the determination of the safety and providence measures that have to be taken in order to avoid environmental damage are: (a) the extent of the peril of the work or activity; (b) the potential offender's capability to avoid the danger, in combination with the cost involved in the taking of measures; as well as (c) the need to protect the injured party.[4]

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 20 January 1993
91-15.081, Bull civ II, no 26

Facts

1 François, a minor, was ice-skating when he fell, slid, and bumped into Ms Walther, who fell and was injured. The lower court adjudged that François was liable under art 1382 (now art 1240), and ruled that 'on an ice-rink, a minor should be careful and shrewd and avoid the other users of the ice-rink'. The case was then brought before the *Cour de cassation*.

Decision

2 The *Cour de cassation* quashed the lower judges' decision under art 1382 (now art 1240), on the ground that: '*in ruling on such grounds, without classifying François's fault, nor characterising a failure to comply with the rules of ice-skating, while it found that it was after falling and involuntarily sliding that François had bumped into Ms Walther, the appellate court gave no legal basis for its decision*'.

Comments

3 It is extremely difficult to tell what the criteria for assessment of the required standard of conduct are under French law.[1] Neither the *Code civil* nor any other statute gives any criteria. Surprising though that may seem, case law offers very little help either. In research we conducted on more than 100 selected cases, this is the only judgment where the *Cour de cassation* quashed a lower court decision and yet indicated what criteria ought to be met in this specific case, in order to classify the exis-

4 *I Karakostas*, Environmental Law (2nd edn 2006) 472; *I Karakostas*, Greek & European Environmental Law (in English) (2008) 185 f.

1 See *J Bell/S Boyron/S Whittaker*, Principles of French Law (2nd edn 2008) 364–368.

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tence of fault. There are very few decisions indeed where the *Cour de cassation* quashes a decision because the lower court should not have classified an action as a fault. In other words, it is not in the *Cour de cassation's* case law that we are likely to find any systematic criteria for fault, even in the case of a bodily injury.

The first reason for this lies in the style of the *Cour de cassation*'s decisions.[2] The court usually offers a purely formal justification for its decisions, and does not give the reasoning which underlies them. When the existence of a *faute* in the sense of art 1382 (now art 1240) of the *Code civil* is at stake, the *Cour de cassation's* decision and explicit motivation more often than not boil down to 'the appellate court was right/wrong in finding fault'. When the lower court's decision is quashed, all discussion of the facts is set aside: facts are not verified by the *Cour de cassation*, and more often than not, the case is referred '*back to a court of the same level as the one whose decision has been overturned, or to the same court with different judges*'.[3] Since the classification of fault relies predominantly on the merits of the case, the *Cour de cassation* will leave it to the re-trial court (*juridiction de renvoi*) to classify the existence of a fault. **4**

However, when the *Cour de cassation* approves an appellate court of having found fault, it will normally mention the reasons put forward by the latter for so doing. This will give some indications about the criteria which *lower* courts use to assess the required standard of conduct. Yet, one should not overestimate the value of these indications. First of all, the fact that the *Cour de cassation* considers that such or such element *could* be taken into account to assess fault does not necessarily mean that it *has* to be. The first role of the *Cour de cassation* is to make sure that the law has not been violated, and the court is very often reluctant to do more than it is bound to do: it can therefore say that the law was not violated in any given case, without meaning that this was the only way to apply the law. **5**

Admittedly, the *Cour de cassation* will sometimes be more explicit and suggest that the criterion put forward by the lower court was the right one to apply in the case under scrutiny. This happens rather seldomly, however. Besides, this does not mean that this criterion should be applied in *all* cases. **6**

Another consequence of the *Cour de cassation's* role and of the style of its decisions is that the court will never weigh several criteria against one another. At best, it will say that a lower court was right to apply criterion X, but there will never be a court's decision in which several criteria are reviewed and discussed. It is therefore not possible to find a decision which gives a fair account of the main criteria that can be used to assess misconduct, and of the interplay between them. **7**

2 See *Cour de cassation*, The Role of the Court of Cassation, available in English and in French on the website of the *Cour de cassation* <http://courdecassation.fr/>.

3 *Cour de cassation*, The Role of the Court of Cassation, <http://courdecassation.fr/> 10.

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8 Lower courts themselves appear not to be very explicit when it comes to justifying the finding of fault. Very often, they will be content with saying that the defendant acted unreasonably or reasonably, without much further precision. And scholars themselves are not very interested in the criteria used for a finding of fault. There have been famous debates about fault among French scholars,[4] but not on the various factors which might help assess if a conduct was reasonable. It has always been taken for granted that being at fault basically means not having acted correctly, but the criteria of correct conduct have never been clearly established.[5] It is indeed interesting to notice how French textbooks devote comparatively little space to *faute*, compared to other notions of tort law.[6]

9 A reason for what might seem a rather surprising situation is that the existence of fault in the context of French law is nowadays seen as rather secondary, almost an excuse for granting compensation. This is so because most defendants have insurance. The courts, which are generally rather plaintiff-oriented, tend to regard the finding of fault and making the defendant liable as quite unproblematic, as soon as the latter does not have to pay the damages with his own money. That this is a correct view is of course debatable,[7] but the fact remains that French lawyers tend to be somewhat disinterested in fault itself; their concern is whether the plaintiff should be granted compensation, and if they think that this should be the case, then they will be prompt to recognise the existence of fault, without attaching that much importance to the circumstances of the case. The *Cour de cassation* itself is prone to adopt this approach (though not officially, of course), and quite a number of its decisions bear witness to this very instrumental concept of fault.[8]

10 It is therefore extremely difficult to say what the criteria of fault are under French law. At least, it is not possible to list these criteria and to indicate their respective weight. Yet, from the great number of decisions that deal with fault, some

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4 Especially on the issue as to whether a person unaware of what he was doing could be at fault; see *G Viney/P Jourdain/S Carval*, Les conditions de la responsabilité (4th edn 2013) no 441ff.

5 This is implicitly confirmed by the draft reform project of civil liability law, which was published by the French Government in April 2016. Its art 1242 provides: '*Constitue une faute la violation d'une règle de conduite imposée par la loi ou le manquement au devoir général de prudence ou de diligence*' ('Fault includes the violation of a rule of conduct imposed by legislation or regulation or failure to conform to a general duty of care and diligence'; translation by A Levasseur and D Gruning of a similar provision contained in an earlier reform project, published in *P Catala* (ed), L'art de la traduction [2011]).

6 For example, one of the main and most renowned textbooks on the law of obligations, *F Terré/P Simler/Y Lequette*, Les obligations (11th edn 2013), devotes hardly ten pages to *faute* (776–785), and nearly 20 to *fait de la chose*, which is the source of the liability for the deed of things' regime (809–828).

7 See *JS Borghetti*, The Culture of Tort Law in France (3) JETL 2012, 158.

8 See, eg, Cass civ 2, 18 May 2000, 98-12.802, Bull civ II, no 85. See also 3b/6 nos 1–3.

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indications may be gathered about the criteria which French judges apparently most willingly take into account, even if they will normally not be explicit about it.

7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 5 June 2003

Pas 2003, 1125

For facts and decision see 7/7 nos 1–4. 1

Comments

Under Belgian law, in order to establish whether or not a fault was committed depends on the sole question of whether the defendant behaved as a reasonably prudent person in the same circumstances. Depending on the situation, the judge will, for instance, take into consideration the dangerousness of the defendant's conduct or the costs of preventive actions. Any of the criteria listed hereinafter is in itself a necessary condition for the assessment of fault. The judge decides by reference to the standard conduct of the *bonus pater familias* (ie the reasonably prudent person). Consequently, there is no hierarchy between the criteria used to decide whether a defendant's conduct constitutes fault and there is no case law illustrating the relationship between those criteria. The Supreme Court (*Cour de cassation/Hof van Cassatie*) carries out an *a posteriori* marginal control of the criteria used by the trial judge however. It checks whether they are consistent with an objective assessment of fault. 2

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 5 November 1965, ECLI:NL:HR:1965:AB7079

NJ 1966/136 (Kelderluik)

Facts

An employee of Coca Cola delivered goods to a cafe in Amsterdam. While storing beverages in the cellar, he left the trapdoor open. A visitor, on his way to the toilet, fell into the cellar and severely hurt his left leg. 1

Decision

The question whether and to what extent it can be required of a person who creates a situation that is dangerous for others, if they do not sufficiently pay attention and 2

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take sufficient care, that he considers the possibility that this attention and care will not be taken into account and that he takes precautionary measures, can only be answered in the light of all the circumstances of the specific case. In answering this question, attention should be paid not only to the probability of others not paying sufficient attention and taking sufficient care, but also to the extent of the chance that an accident could result from this, to the severity of the consequences that may result thereof, and to the difficulty of taking precautionary measures. Coca Cola was held liable for the injury of the visitor.

Comments

3 In practice, the criterion of the 'standard of conduct seemly in society' (art 6:162, end of sec 2, CC) is to be applied. This broad and flexible standard is to be applied to an infinite number of types of situations. In case law this standard has more or less been specified for various category of actions: creating a hazardous situation, professional services, nuisance, unlawful publications, etc.

4 This is still the leading case on the components of the standard of care in situations where someone creates a hazardous situation or leaves such a situation unattended to.[1] The components (the probability of inattentiveness of others, the extent of the risk of an accident, the severity of possible consequences and the difficulty of precautionary actions) are presented not as conditions or as criteria, but as considerations or points of view.[2] A judge has to weigh these factors in each specific case. The result of the interplay of these factors is decisive.[3]

Hoge Raad (Dutch Supreme Court) 18 January 2008

NJ 2008/274 with comment *EJ Dommering* (Van Gasteren/Hemelrijk)

Facts

5 A Dutch movie producer presented his killing of a Jewish person during World War II as an act of resistance. A reporter placed a very critical 'Open letter to the *Hoge Raad*' about this presentation on the Internet. The movie producer sued the reporter for damages.

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1 In the case of a sporting situation, the degree of required care is lower, because players may expect a certain inattentiveness of their fellow players (HR 28 June 1991, NJ 1992, 622 with comment CJH Brunner; Natrappen).

2 *CC van Dam*, Aansprakelijkheidsrecht (2000) 175. *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser Serie 6-IV* (2015) no 58.

3 *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser 6-IV* (2015) no 58.

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Decision

In this case two fundamental rights collided: on the part of Hemelrijk, the reporter, the right to freedom of expression and on the part of Van Gasteren, the movie producer, the right to protection of honour and privacy. The answer to the question of which of these rights in this case was more worthy of protection had to be found by balancing all the circumstances of the case. The reporter was not held liable. 6

Comments

The question as to whether a publication is tortious must, according to this case and earlier cases, be answered by a balancing of two fundamental rights. The answer depends on the specific circumstances of the case. In earlier cases, the *Hoge Raad* had mentioned as relevant circumstances: the nature of the published information, the gravity of the expected consequences for the subject of the publication, the severity of the abuse that is exposed, the amount to which a suspicion is supported by facts, the manner in which the suspicion is presented, as well as the probability that the information would have become public without this publication.[4] 7

9. Italy

Corte di Cassazione (Court of Cassation) 19 November 1999, no 12819

<www.iusexplorer.it>

Facts

A pregnant woman went to hospital to give birth. The gynaecologist, who had treated her from the early months of her pregnancy, prescribed oxytocin by telephone, did not examine the patient either before or after the drug was administered and arrived at the delivery room more than ten hours after the oxytocin was administered. The foetus was removed using forceps ten hours after labour was induced with oxytocin, causing permanent irreparable damage to the nervous system of the newborn baby. 1

Decision

The assessment during the criminal proceedings found the doctor to be professionally incompetent, as, this not being a natural birth, he omitted to carry out any medical examination over a period of 11 hours, abandoning his patient to the care of 2

4 See for example HR 24 June 1983, NJ 1984, 801 (Gemeenteraadslid) and HR 7 March 1985, NJ 1986, 437 (Herrenberg).

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an obstetrician, despite her state of health requiring constant monitoring to consider the possible options available in this case, for example a caesarean section. As the doctor did not adhere to the rules of normal prudence, not to mention his particular professional duties, the *Corte di Cassazione* ruled that the judgment that held the doctor liable was well founded.

Comments

3 As a general rule, provided that the damage caused is wrongful, negligence, ie lack of due care, is sufficient to establish A's liability in Italy. The definition of negligence is not found in the Civil Code but in the Criminal Code, which defines it in art 43 as 'negligence, carelessness, lack of expertise or violation of the mandatory rules of law'. Article 1176 of the Civil Code makes clear that the level of diligence which is required must be determined in relation to the diligence of the average person (*diligenza del buon padre di famiglia*), or with respect to the average diligence required in a particular type of activity. Thus the diligence of the average person, but also the diligence of the average professional, the average tenant, the average teacher and so on exist.[1]

4 To establish that A's conduct is negligent, the criteria discussed in the following subheadings are relevant for the court. Note, however, that in Italy the dangerousness of A's activity will trigger the application of art 2050 Civil Code (liability for dangerous activities, see 3c/9 below), which introduces a distinct strict liability rule to govern cases that in some other countries would rather be discussed as cases of negligence. The nature of the protected interest comes into consideration less frequently, although it has some weight, especially if it is a constitutionally protected right such as the right to health.

5 In this case, the conduct of the doctor is compared with the conduct of a man of normal prudence and a doctor of normal prudence, to ascertain his liability, which is affirmed because he did not provide 'standard' care to a woman giving birth.

1 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 18. Note, however, that, according to art 2236 Civil Code, professionals such as architects, engineers and doctors, are exonerated from liability if the performance of their obligations involves the solution of a technical problem of special difficulty, whenever their conduct does not amount to gross negligence.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 11 October 2006
RJ 2006\9001

Facts

After having lunch with their families and coach at A1's restaurant, the players of a junior football team aged 14 were given golf clubs by A1's employees to play minigolf in the nearby facilities owned by A1. When one of these children, A2, was intending to hit the ball, he inadvertently hit his playing partner V, who was presumably crouching. As a result of the blow, V suffered serious personal injury and his parents brought a claim against A2's parents and A1. The claim against A2's parents was dismissed at first instance and the claim against A1 was dismissed on appeal. V's parents appealed on cassation only against A1's acquittal, but the appeal was dismissed. 1

Decision

The Supreme Court emphasised that the Court of Appeal had focused on the condition of fault in this case. In order to assess the required standard of conduct, it had taken into account the circumstances of the case – related to the persons involved, and the time and place – and especially the activity when the events took place. The Supreme Court considered that this approach was totally correct. The Court of Appeal had paid attention to all the aspects that could lead to requiring preventive or monitoring conduct, and the Supreme Court found no negligence on the part of the restaurant. Thus, the minigolf facilities and equipment were in perfect condition. The hazard associated with a minigolf club which was to be used for the practice of that recreational activity was irrelevant. The employees could reasonably hand over minigolf clubs to players aged 14 and players of that age could use them in that activity without the presence or supervision of adults. It made no sense to affirm that it was foreseeable that the minigolf club could be used, during the performance of this activity, to strike the ball. It was common knowledge that the practice of minigolf required no special information, and in any case, it was irrelevant to the question of legal causation. Finally, the possibility of misuse or improper or inappropriate use of a minigolf club, like many other objects in human activities, did not, in the circumstances and considering 'the persons, time and place', require supervision by the restaurant such that its omission would involve negligence giving rise to liability in tort. 2

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Comments

3 Since in this case the claimants did not appeal the decision dismissing the liability of the parents of the child who struck the blow with the minigolf club, the Supreme Court could consider neither their potential liability nor the potential liability of the child causing the harm.[1] In line with prevailing case law (see 1/10 above), the judgment rejects holding the restaurant liable on the grounds of the risk created by its recreational activity. The judgment considers that applying the so-called quasi-objective liability (*responsabilidad cuasi objetiva*), ie, fault liability with a reversal of the burden of proof, is not reasonable in this case. It holds that '[t]his sort of liability, with its various nuances and versions, requires in any case the existence of a risk of certain importance, and this risk is lacking in this case. No common experience allows holding that handing over minigolf clubs to 14-year-old boys, with capacity according to their age, to practise such a recreational activity constitutes or gives rise to a hazardous situation.'[2] The decision illustrates that several elements are taken into account to establish the defendant's fault, but also the watering down of the difference between wrongfulness/fault already mentioned.[3]

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 10 October 1995

RJ 1995\7186

Facts

4 V, a nine-year-old child, slipped away, during recess at the defendants' school, from the row in which he was standing. Along with a classmate of the same age, he ran to the farthest side of a courtyard, where there was no supervision and where a disused metal structure for basketball was placed. V clung to the basket and, on trying to do a somersault, he fell, fracturing the base of his skull. At first instance, the director of the school, the school itself and the public authorities in charge of the school were held liable for V's death. The Court of Appeal, however, decided in favour of all defendants. By contrast, on cassation, the Supreme Court finally decided in favour of the claimant and held that all defendants were liable.

Decision

5 In tort law fault does not consist in omitting to follow inexcusable rules, but in not acting according to the diligence required under the circumstances of the particular

1 See 8/10 below.

2 On the evolution of the case law regarding the application of the fault requirement laid down in art 1902 CC, see 1/10 fn 19 f above, and corresponding text.

3 See 1/10 fn 3–7 above and corresponding text.

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case, of the persons, time and place. It is certain that circumstances incumbent on a school for children of tender age require utmost care to avoid damage they may suffer, even as a result of conduct specific to childhood, which, therefore, might be reckless. In this case, the absence of that diligence is evident if one takes into account that, during recess, there was neither effective control of the pupils' access to the 'court below' nor sufficient monitoring of the games played there. In addition, it was known that in this courtyard there was a metal frame, useless for its original purpose for basketball, from which children used to hang, using it as a swing with the danger that this involved. The persons in charge of supervising the children's games should have known this fact, unless one accepts considerable neglect as regards these activities.

Comments

Although only in general terms, this judgment did take into account a number of factors to conclude that the actions of the defendants had been negligent. In particular, it took into account the risk involved in keeping a device abandoned in the courtyard, when it was unusable and should have been removed and that it was known or should have been known to the defendants that children gathered there to play taking excessive risks. Implicitly, therefore, the judgment considered that reasonable measures to prevent such dangerous games had not been adopted and that these measures could and should have been taken. As often happens, however, the court found that not all reasonable precautions had been adopted, but did not specifically clarify to which measures it referred.[4] **6**

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 29 November 2005 (Salvador da Costa)

Facts

V was hit by a hockey disc while watching a hockey game in the stands from the field of sports club A. The disc hit the crossbar of the goal, changing direction towards the spectators in the stands, hitting V in the face, causing her serious injuries. The spectator areas only had protective nets at the two ends of the hockey field, behind the goals, in accordance with the requirements of the sports regulations in **1**

4 For a critical comment see *F Peña* in: F Reglero (ed), Lecciones de responsabilidad civil (2nd edn 2013) 74.

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place at the time of the injury. V sought compensation from the sports club A, the host of the event, for the damage suffered.

Decision

2 The Supreme Court of Justice decided that, as it was in the interest of the club (the owner of the stadium) that the sporting event was hosted in its stadium, it was the party responsible for ensuring that the necessary safety measures were taken. In this way, if the club had omitted to take such precautions, it was liable, therefore being obliged to pay damages. Article 486 of the Civil Code states: 'Mere omissions shall give rise to an obligation to make reparation for the damage where, regardless of any other legal requirements, there was a duty, by law or by virtue of a legal act, to take the action which was not taken.'

3 The fact that the sporting regulations were met does not relieve the sports club of the obligation to ensure the safety of the spectators with broader measures than those set by the safety regulations if it was foreseeable that these were not sufficient. In this case, being common knowledge that a hockey disc's configuration is propitious to ricochet upon impact, it was reasonably foreseeable that a disc could hit the stands if not protected by nets, or other kinds of barriers.

4 The court decided that the sports club was liable, in terms of minor negligence, for omitting to implement safety measures, therefore ordering it to pay damages to the plaintiff (arts 483(1)[1] and 486 of the Civil Code).

Comments

5 The court assessed the obligation to pay damages based on non-contractual liability which is particularly important in discussing the requirements of wrongfulness and fault.

6 The concepts of wrongfulness and fault have, in the terms of art 483(1) of the Civil Code, different meanings and functions. Wrongfulness is an objective assessment of the behaviour to see if there has been a violation of values defended by law.[2] Fault is intended as an assessment of the agent's behaviour and is regarded as a

1 '(1) Any person who, with intention or negligence, wrongfully breaches the rights of another, or any legal provision intended to protect the interests of others, shall be obliged to compensate the injured party for the damage resulting from the breach.'

2 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 579; *A Sá e Mello*, Critérios de apreciação da culpa na responsabilidade civil, Revista da Ordem dos Advogados 49 (1989) vol II, 533; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 585ff; *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 45; *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 467.

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form of ethical and legal censure on the action or omission of the individual in question.

In the case at hand we find wrongfulness in the violation of V's right to physical integrity, which is a personality right (art 70(1) of the Civil Code[3]), and this right is protected by specific damages and remedies in art 70(2).[4] In the case at hand there was conscious negligence of the sports club because it was able to predict the danger of the activity and possible damage (as a consequence of the rebound of the hockey disc) and was aware of its duty to prevent any harm caused by the game, but it failed to predict the rebound of the hockey disc to that part of the spectator area, ie the club did not believe in the materialisation of that fact. **7**

The sports club was liable, despite the fact that the regulations were met, because the case centred on the issue of whether there were sufficient safety measures in place. The minimum standards set by those regulations have to be fulfilled, but compliance does not relieve the host of the sports event of its duty to ensure the safety of spectators.[5] **8**

12. England and Wales

Bolton v Stone, House of Lords, 10 May 1951

[1951] AC 850

Facts

The appellants were trustees of a field where cricket had been played for about 90 years. No ball was proved to have struck anyone on the road near the ground until the respondent, Miss Stone, was hit and injured by a ball hit out of the ground while standing on the highway outside her house. Although the exact number was unknown, it was accepted that balls had been hit out of the ground into the road on very rare occasions: six were proved in 28 years. The cricket field, at the point at which the ball left it, was protected by a fence seven feet (approx 2.13 metres) high but the upward slope of the ground was such that the top of the fence was some 17 feet (approx 5.18 metres) above the cricket pitch. The distance from the striker of **1**

3 'The law protects individuals against any unlawful interference, threat of harm to their physical or moral personality.'

4 '*Regardless of the liability that might take place*, threatened or offended persons may require arrangements appropriate to the circumstances of the case, in order to prevent the consummation of the threat or mitigate the effects of the offence already committed.' See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 562.

5 See *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 47, clearly stating that the regulations only relieve one from the burden of ensuring safety if they are so exhausting that nothing more can be done to ensure the safety of the event.

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the ball to the fence was about 78 yards (approx 71.32 metres). Miss Stone argued that the appellants were negligent or guilty of creating a nuisance in failing to take sufficient precautions to prevent the escape of cricket balls from the ground. In her submission it was enough that a ball had been driven into the road even once. A repetition at some point should have been anticipated and this in turn should have alerted the appellants to the possible risk of injury.

Decision

2 The House of Lords unanimously found for the appellants. Negligence requires a reasonable possibility of injury being caused. On the facts, this risk was not one that a reasonable man should have anticipated or guarded against. While the appellants knew that balls had been hit out of the ground into the road, this had happened very rarely. The House of Lords emphasised that the road was not greatly frequented and no previous accident had occurred. The appellants were thus acquitted of negligence and nuisance was not established.

Comments

3 The decision touches on a range of criteria relevant in assessing whether the required standard of conduct has been attained: in particular, the reasonable foreseeability of the injury (see 3d/12 below),[1] the anticipated gravity of the harm (see 3c/12 below) – which entails a consideration of the nature of the interest likely to be affected (see 3b/12 below), the availability and the cost of precautionary or alternative methods and the value to the community at large of the activity being undertaken (see 3f/12 below). The factors, which operate conjunctively, were famously encapsulated by the American judge, Learned Hand J, in *United States v Carroll Touring Co*[2] in what came to be known as the 'Learned Hand formula': if the probability of something eventuating is P, the injury resulting, L, and the burden of adequate precautions, B, liability depends upon whether B is less than L multiplied by P: that is, whether B < PL. Although never cited in English courts, the formula is considered by many scholars to establish a useful framework for analysis.[3]

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1 Cf *Miller v Jackson* [1977] QB 966 (see 3d/12 nos 1–5 below) where the defendants were found liable in both negligence and nuisance (Lord Denning dissenting).

2 (1947) 159 F 2d 169, 173.

3 See eg *M Lunney/K Oliphant*, Tort Law: Text and Materials (5th edn 2013) 163. The use of the formula has been championed, in North America in particular, by scholars in the law and economics movement: see eg *R Posner*, A Theory of Negligence (1972) 1 J Leg Stud 29. For sceptical analysis, see *MD Green*, Negligence = Economic Efficiency: Doubts > (1997) 75 Tex L Rev 1605; *RW Wright*, Hand, Posner, and the Myth of the 'Hand Formula' (2003) 4 Theoretical Inquiries in Law 145.

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On the facts of *Bolton v Stone*, having regard specifically to the availability of precautions, the House of Lords took consideration of the lower court judge's finding that the ground was large enough to be safe for all practical purposes and that the fence could not safely have been raised any higher. One sure measure would have been to stop playing cricket altogether. However, this was implicitly considered disproportionate to the remote possibility of injury occurring and would have entailed a detriment to the community of cricket spectators and players. **4**

Bolton v Stone was distinguished in another cricket case, *Miller v Jackson*,[4] where the likelihood of balls being hit out of the ground was significantly higher (see 3d/12 nos 1–5 below). It may be observed that cricket grounds are not of uniform size and may have slopes or other features that affect the likelihood of balls being hit from the ground. Such features may also impact upon the precautions that it is reasonably open to the cricket club to take. **5**

It is important to bear in mind that the relevant factors are variables that are considered in the round in their relation to each other, not distinct hurdles that the claimant must overcome. However, for the purposes of exposition, it is generally considered useful to highlight different aspects of the global inquiry in turn, and this is the approach taken in perhaps all textbooks and reference works currently available,[5] as well as in the present volume. **6**

13. Scotland

Brisco v Secretary of State for Scotland, Court of Session (Inner House), 18 October 1996

1997 SC 14

Facts

The pursuer, a prison officer, was taking part in a simulated riot situation as part of a prison service training exercise. During the simulated riot, a heavy fencepost was dropped on to the officer, resulting in him sustaining an injury to his foot. He claimed damages from his employer in delict,[1] the Secretary of State for Scotland, **1**

4 [1977] QB 966.

5 See eg Clerk & Lindsell on Torts (21st edn 2014) 8–143ff; *WE Peel/J Goudkamp*, Winfield and Jolowicz on Tort (19th edn 2014) § 6-006ff; *J Murphy/C Witting*, Street on Torts (13th edn 2012) 110ff; *A Mullis/K Oliphant*, Torts (4th edn 2011) 111f.

1 Cases of personal injuries sustained by employees while working are usually raised in Scotland as delictual rather than contractual actions, the injured party having a choice as to which type of claim to raise.

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arguing that the dropping of heavy items in the simulated riot condition was not reasonably required for training officers on how to conduct themselves in a riot. The Secretary of State argued that, while the injury sustained by the pursuer was foreseeable, the magnitude of the risk of its occurring was small and, given the clothing worn by the officers, that the risk of serious injury being sustained was remote. At first instance, the judge agreed with the defender's arguments, and dismissed the claim. The officer appealed this decision.

Decision

2 The appeal court (the Inner House of the Court of Session) dismissed the appeal, holding that: (a) it was the duty of an employer, in considering whether precautions should be taken against a foreseeable risk materialising, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening, and the possible seriousness of the consequences if an accident did happen and, on the other hand, the difficulty, expense, and any other disadvantage of taking the precaution; (b) that an appeal court should be slow to disturb the findings of a judge or tribunal of first instance responsible for determining the facts; (c) that all the evidence relating to an assessment of the magnitude of the risk that the officer would sustain the serious injury which he in fact sustained did not provide any ground for disturbing the court of first instance's view that such a risk was very slight; and (d) that balancing that risk against the need to provide realistic training, there was no failure on the employer's part to exercise reasonable care.

Comments

3 The decision is a good example of the range of issues which courts may have to weigh in the balance in deciding whether or not the required standard of care has been met in the specific circumstances of a case. In its judgment, the Inner House made reference to comments of Lord Reid in the case of *Morris v West Hartlepool Steam Navigation Co Ltd*[2] in which his Lordship had narrated matters which may be relevant to such a balancing exercise. Lord Reid had said that:

> 'Apart from cases where he may be able to rely on existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.'[3]

2 [1956] AC 552.

3 [1956] AC 552, 574.

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Though Lord Reid suggested that the context of such an exercise related to the possible breach by an employer of its duty of care, his remarks have in fact been taken in later cases to apply more generally to cases of alleged negligence in delict. Numerous cases exist in which each of these various considerations have, on the facts, taken on a specific prominence. 4

In the modern age, even where an existing practice exists, one would universally expect employers to undertake regular risk assessments of the risks to which their employees might be subjected in the performance of their employment duties, and to do so within the context of the balancing approach suggested by Lord Reid above. A court of first instance, asked to assess what precautions, if any, should have been taken against the occurrence of a certain risk, will also have to undertake the same balancing exercise. In this case, the appeal court held that the judge at first instance had 'adopted the correct approach of weighing the magnitude of the risk of injury to members of the section and the possible seriousness of the consequences of an accident against the disadvantage of not providing realistic training'. 5

14. Ireland

Fitzsimons v Telecom Éireann, High Court, 31 July 1990

[1991] 1 IR 536

Facts

The plaintiff's husband was killed when trying to clear a fallen telephone cable from a road during a storm. The cable had looped over a 10kv electrical power line, situated above it. The cable had come to ground at some time prior to 1 pm on a Saturday afternoon; the fatal accident occurred at approximately 7 pm the next day. The plaintiff instituted a fatal injuries claim under sec 48 of the Civil Liability Act 1961 against both the phone company and the electricity company.[1] Three breaches of duty were alleged: firstly, that both companies had failed to ensure that sufficient precautions were taken to address the hazards arising out of the proximity of the two sets of lines; secondly, the phone company did not take timely measures to make its line safe once it became aware that the line was damaged; and, finally, the electricity company did not have a sufficient cut-out system on the line involved in the accident. 1

1 Telecom Éireann was the national universal service provider for telecommunications and the Electricity Supply Board (ESB) was the national electricity utility; both were semi-state companies operating monopolies at this time.

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Decision

2 Barron J in the IEHC held both defendants liable, apportioning 70% responsibility to the telephone company and 30% responsibility to the electricity company. Both were in breach of duty in not co-ordinating their safety efforts in areas of overlap between the two sets of lines; the phone company's failure to respond in a timely fashion was a breach of duty, amounting to a *novus actus interveniens* with respect to the shortcomings in the prior safety precautions. The ESB's failure to have a system for swifter response to emergency situations (thereby allowing the hazard to remain for two hours after it became aware of it) was deemed to be a contributing factor and a breach of duty. The judge held that there was no contributory negligence on the part of the plaintiff.

3 In addressing the standard of care, Barron J noted the general principle was to exercise reasonable care in respect of foreseeable risks. In respect of the incident, the question was not whether the precise sequence of events could have been anticipated, but whether the general type of hazard was known to the parties – erratic behaviour by fallen cables and a heightened risk in areas of overlap between power and phone lines were both factors known to both companies. While the likelihood of injury was a relevant factor (and the unusual nature of this case meant that the likelihood of this particular injury in this particular way was low), it was a known class of risk and also had to be examined in light of the seriousness of the level of injury that could ensue – the more serious the threatened injury, the greater the level of precaution that must be taken.[2]

4 In looking at the precautions generally taken in areas of overlap between lines, Barron J was influenced by an internal set of safety instructions at the phone company, calling for close co-operation with the ESB on safety issues (particularly at local engineers' level); this seems not to have been implemented in practice, with each company taking its own safety precautions (the general habit established was whichever company erected its lines second carried the responsibility to reduce the risk by implementing safety measures on its lines). Barron J noted that a greater level of safety could have been attained by having both companies take precautions in liaison with each other. He also noted that prior to 1959 phone lines were always placed underground at crossing points, but since then it was only done when certain additional criteria were fulfilled; at no point did he suggest returning to underground cabling at all crossing points.

5 In respect of the ESB, he noted that there were two principal types of safety systems for automatic cutting of power upon detection of problems; as between them he could not say that the preference for one over the other was necessarily negligent. On the system chosen, an automatic switch cuts out all power lines in the area

2 Relying on *McNamara v Electricity Supply Board* [1975] IR 1, 14 per Walsh J.

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until an engineer can isolate the problem and restore the non-problematic lines; this in turn depends upon the availability of an engineer to restore power to those cut off. In the absence of a switch (as was the case here), the problem line remains live until attended to by an engineer. While not mandating any particular staffing levels, Barron J felt that the two-hour delay in respect of an emergency was unreasonably long.

Comments

The decision highlights the main factors involved in assessing negligence; magnitude of risk; social utility of conduct, the burden of prevention and any special factors particular to the circumstances of the case.[3] Magnitude of risk is comprised of both the likelihood of injury occurring and the gravity of the potential injury; neither is determinative in isolation, it is the degree of risk appraised in light of the combined elements that governs the need for precautions; the relationship between magnitude of harm and level of precaution is a direct ratio – as risk rises, the level of precaution must also rise proportionately. **6**

The questions of underground cabling and cut out switches raise issues of both cost and social utility. Burying cables underground, rather than putting them on poles, would add to the time and cost of repairs should any fault develop in the phone lines; the costs would not simply be those borne by the phone company in conducting repairs, but would also include the collateral cost to customers deprived of the service – such costs embracing both economic and social impact – and also, possibly, disruption to road users or property owners at the site of repairs. This point was not directly addressed in the decision, but can be readily inferred from the fact that Barron J did not even consider a return to the burying of cables as a viable means of dealing with the risks posed by overlaps, but focused his attention on greater co-operation between the companies and an intensifying of the types of precautions they were actually taking (such as shortening of distances between poles and added insulation on cables). **7**

Barron J did directly address the issues of cost and utility in respect of cut out systems. Such systems were technically feasible, but continuity of customer supply was favoured over higher safety precautions. He noted that continuity of supply had safety implications in some circumstances (such as hospitals and traffic lights). While some latitude had to be given to the ESB in balancing risk and burdens, a two-hour delay in responding to the hazard was too great. The decision demonstrates that, despite the use of well-articulated and elaborated criteria, a somewhat intuitive judgement still has to be reached on their application to the facts. **8**

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3 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) ch 7; *E Quill*, Torts in Ireland (4th edn 2014) 68 ff; *J Tully*, Tort Law in Ireland (2014) ch 5.

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9 Cost-benefit factors must be looked at in light of the magnitude of risk, but again there is no definitive priority between them other than the general requirement that any cost or disruption imposed on the defendants or third parties affected by the defendants' activities must be proportionate to the degree of risk reduction attained.

10 On the question of particular circumstances, two issues arise in the case. First, the hazard of crossing points was unique to the companies involved and differed from the hazards generated by either company on their own and so had to be addressed as a distinct issue by them; while this was interlinked with the magnitude of harm aspect of the case, it also adds a different dimension to the fault enquiry. The increased risk could be addressed by increased precautions by each company acting alone, but the unique nature of the problem called for a joint response. A second feature was the special expertise of the parties involved, making the standard that of the reasonable expert.

11 The case also raises the question of the self-responsibility of plaintiffs; this factor can be examined at a variety of stages in the claim – as a factor in determining the existence of a duty of care; as a factor in determining the standard of care; as a question of causation; or as a defence. The general preference is to examine the issue under contributory negligence (as was done here);[4] it should also be noted that assumption of risk has a very narrowly constrained scope in Ireland.[5] No fault was attributed to the deceased on the facts and his behaviour was measured by the standard of an ordinary individual with no specialised knowledge; it was accepted that, as it was the phone line rather than the power line that was down, the severity of the risk was not easily appreciated (despite the fact that the cable was sizzling and had caused a fire).

Halpin v Tara Mines Ltd, High Court, 16 February 1976

[1976-7] ILRM 28

Facts

12 The plaintiffs claimed that the defendant's prospecting activities generated sufficient noise and vibrations to cause nuisances by way of interference with their use

4 Self-responsibility is expressly included as a relevant factor in respect of the standard of care owed by occupiers of premises to visitors under sec 3 of the Occupiers' Liability Act 1995 (ie it is relevant to the fault enquiry); this does not preclude it being considered as a contributory negligence issue – *Allen v Trabolgen Holiday Centre Ltd* [2010] IEHC 129.

5 Section 34(1)(b) Civil Liability Act 1961. This provision requires the use of contributory negligence instead of the common law defence of *volenti non fit injuria*. A full defence is permitted where a plaintiff waives his or her legal rights, but it is narrowly construed by the courts and rarely successfully invoked, see *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 20.68 ff; *E Quill*, Torts in Ireland (4th edn 2014) 446 ff; *J Tully*, Tort Law in Ireland (2014) 341 ff.

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and enjoyment of their properties and physical damage to those properties (cracks in the walls). The plaintiffs claimed damages and also sought an injunction to restrain the defendant's activities.

Decision

Gannon J awarded damages for the interference with use and enjoyment of property, but the claim for physical damage was not sufficiently proved. Prior to the conclusion of the trial of the action, the defendant had sufficiently modified the manner in which the prospecting was conducted to significantly reduce the impact on the plaintiffs, so an injunction was refused. 13

Gannon J held that the essence of private nuisance is causing or permitting unreasonable interference with a neighbour's property. In cases of physical damage, the plaintiff only has to show that the defendant's activity caused the damage; liability is strict and neither the exercise of reasonable care nor questions of social utility can protect the defendant from liability. The question of whether the interference is ongoing is relevant to the suitability of an injunction or damages as a remedy. In cases of interference with use and enjoyment, the plaintiff 'must show sensible personal discomfort, including injurious affection of the nerves or senses of such a nature as would materially diminish the comfort and enjoyment of, or cause annoyance to, a reasonable man accustomed to living in the same locality.' In determining this, relevant factors include the magnitude of the intrusion (including severity, frequency and duration) and the locality in which the incidents occur.[6] Gannon J also acknowledged that intermittent and unpredictable interference can be more discomfiting than regular and predictable disturbances. 14

Comments

The judgment identifies the distinction between the two principal types of interference in private nuisance claims and the main criteria for their determination. In cases alleging physical harm, the central condition of liability is the magnitude of the interference; once the threshold of non-trivial physical damage is passed, then no questions of unreasonable costs on the defendant or social utility can relieve the defendant of responsibility. One is a wrongdoer on a strict liability basis for physi- 15

6 Gannon J's approached to both types of harm is supported by the IESC decision in *Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629. Where material harm is caused by a pure omission, rather than actively generating a risk, a negligence standard applies – *Grennan v O'Flaherty & Ryan* [2010] IEHC 157; *Larkin v Joosub* [2006] IEHC 51, [2007] 1 IR 521; *Harrington Confectioners Ltd v Cork City* Council [2005] IEHC 227 *Vitalograph (Ireland) Ltd v Ennis UDC & Clare County Council* unreported IEHC, 23 April 1997.

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cally damaging neighbouring property. Ancillary factors such as the scale of the activity, its duration, frequency and intensity have a bearing on the appropriate remedy – an injunction or damages.[7]

16 In cases of alleged interference with use and enjoyment, there is a balancing of the respective interests of the parties; apart from the factors identified in the judgment, other cases have noted that the burden of prevention that a finding of nuisance would impose on the defendant, the social utility of the defendant's activity and/or malice on the part of the defendant may also be relevant.[8] There is no determinative set of priorities between the relevant factors. While the balancing exercise is closer to a negligence enquiry (and many cases do demonstrate negligent behaviour by defendants), liability is not conditioned upon proof of negligence; consequently, like all nuisances, misconduct is conceived in terms of violating the plaintiff's rights, rather than as 'fault', but a wider range of factors are relevant to determining 'violation' in respect of interference with use and enjoyment than in respect of physical damage.

Weir-Rogers v The SF Trust Ltd, Supreme Court, 21 January 2005

[2005] IESC 2, [2005] 1 IR 47, [2005] 1 ILRM 471

Facts

17 The plaintiff fell from a cliff on land owned by the defendant and suffered severe personal injuries. She had been sitting near the edge, on a patch of grass near a sloped gravelly area leading to the edge. As she rose to leave, she slid down the slope and over the edge of the cliff. She alleged two breaches of the duty owed to her as a recreational user under sec 4 the Occupiers' Liability Act 1995: firstly, that the area should have been fenced off to restrict pedestrian access; and, secondly, that a warning notice should have been in place to alert people of the danger. The IEHC rejected the first argument, but found in favour of the plaintiff in respect of the second. The defendant appealed.

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7 Social utility may be a factor in determining the appropriateness of an injunction, though the majority of the IESC disregarded it in *Bellew v Cement Ltd* [1948] IR 61. The burden on the defendant is also relevant to the exercise of discretion in respect of the appropriate remedy, see *O'Kane v Campbell* [1985] IR 115 and *Molumby v Kearns* [1999] IEHC 86.

8 See *Mullin v Hynes* unreported IESC, 13 November 1972; *New Imperial and Windsor Hotel Co Ltd v Johnson* [1912] 1 IR 327 (utility); *Boyle v Holcroft* (2/14 nos 1–5) (malice); see *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 24.32 ff; *E Quill*, Torts in Ireland (4th edn 2014) 219 ff; *J Tully*, Tort Law in Ireland (2014) 233 ff.

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Decision

The IESC upheld the appeal and dismissed the plaintiff's claim. The obligation to provide warning signs at every dangerous point along such cliffs would place too onerous a burden on occupiers. The danger was an obvious one and there were no special circumstances requiring the defendant to take particular care for this plaintiff. Even the standard of reasonable care, owed by occupiers towards visitors, would not place such a demand on them; consequently the lower duty owed to recreational users, not to injure intentionally or by reckless disregard, could not impose such a burden. The court adverted to different possible interpretations of reckless disregard, such as a gross negligence standard and the distinction between objective and subjective recklessness,[9] but did not express any definitive opinion on which was appropriate. **18**

Comments

A non-exhaustive list of nine relevant factors is provided in respect of determining reckless disregard in sec 4(2) of the Occupiers' Liability Act 1995: **19**

(i) whether the occupier knew, or had reasonable grounds for believing, that a danger existed on the premises;
(ii) whether the occupier knew, or had reasonable grounds for believing, that the person or the property was, or was likely to be, on the premises;
(iii) whether the occupier knew, or had reasonable grounds for believing, that the person or the property was, or was likely to be, in the vicinity of the danger;
(iv) whether the danger was one against which the occupier should provide protection;
(v) the burden of eliminating the danger or providing protection against it;
(vi) the character of the premises (such as a tradition of open access);
(vii) the conduct of the entrant and the level of care that could reasonably be expected of entrants in relation to their own safety;
(viii) the nature of any warnings given by any person in respect of the danger;
(ix) the level of supervision by persons accompanying the entrant that could be expected.

The list is very similar to the factors that would be relevant in a negligence inquiry, albeit articulated in a more detailed fashion specific to the context. Neither the legislation nor the case law has yet clearly determined the relationship between the listed factors. The IESC decision here notes that the burden would be too onerous in light of the obviousness of the risk and the effect it would have on coastal properties in gen- **20**

9 Citing the discussion of the issue in *B McMahon/W Binchy*, Law of Torts (3rd edn 2001) § 12.109.

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eral – thus factors (v), (vi) and (vii) were clearly involved in the balance; factor (viii) was clearly absent and factors (i), (ii) and (iii) must have been in play to some extent. The decision shows that the balance between burden and risk is largely intuitive. Recklessness must require a greater departure from careful behaviour than negligence, but the precise nature of the difference is left unresolved by the decision.

21 Intention or recklessness also form the basis of liability in other torts; there is a similar difficulty with finding and applying precise criteria in the cases.[10]

15. Malta

Annunziato d'Amato and Another v Joseph Camilleri and Another (Court of Appeal – Qorti tal-Appell) 3 March 1958

Collected Judgments, Vol XLII, part I, 74

Facts

1 The defendants were engaged in scraping the bottom of a vessel at sea. To do this they turned the vessel while afloat on its side and, by applying heat, set fire to the tar and other encrustations stuck to the bottom. Some burning tar, which had become detached, drifted close to a floating patch of fuel oil and set it on fire. The defendants attempted to extinguish the fire by dousing it with sea water, but to no avail. The fire spread and caused substantial damage to the plaintiffs' fishing trawler which was moored close by. An additional factor was that a military vessel had intervened and attempted to extinguish the flames by hosing water on the oil. Since the water was under pressure, it had the unintended effect of pushing the burning oil closer to the plaintiffs' vessel. The plaintiffs sued the defendants for the damage caused to their vessel and for lost earnings. They argued that the patch of oil was visible from the defendants' position and, under the circumstances, it was highly imprudent for them to work as they did. The defendants pleaded that they were not to blame since the accident was due to *casus* or pure happenstance.

Decision

2 The first instance court rejected the plaintiffs' claim.

3 Under the circumstances, since they could not have foreseen the accident and they had taken the usual precautions, the defendants were making use of their

10 See *PDP v HSE* [2012] IEHC 591, noted by *E Quill*, Ireland, in: K Oliphant/BC Steininger (eds), ETL 2012 (2013) 345, nos 11–17 – misfeasance in public office (bad faith misconduct); *Murphy v Kirwan* [1994] 1 ILRM 293 – malice (improper motive) in respect of malicious prosecution; *Northern Bank Finance Corp Ltd v Charlton* [1979] IR 149 – deceit (fraud as misconduct).

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rights within the proper limits when carrying on with their work and therefore, in terms of art 1030 of the Civil Code,[1] they were not liable for any damage which may have resulted therefrom. The cause of the damage was not the defendants' action in allowing burning tar to fall into the water but the particular circumstances which made the fire spread uncontrollably.

The plaintiffs appealed. The Court of Appeal upheld the appeal and overturned the judgment. The court explained that for an agent to be held at fault for negligence it must be shown that: (a) his act was voluntary; and (b) the consequences of that act were foreseeable. Foreseeability is of the 'essence' for a finding of negligence; if the consequences are actually foreseen, there would be *dolus*; if they are neither foreseeable nor foreseen, there would be *casus*. The question in the present case therefore is whether the defendants could have foreseen the harmful consequences of their actions. The court then noted the following considerations which led it to conclude that the defendants were indeed negligent: (i) the defendants were dealing with fire, which, of its nature, is 'inherently dangerous' and which was rendered much more dangerous by the presence of fuel oil on the surface; (ii) they knew that there was a chance that burning pieces of tar might fall onto the surface of the sea; (iii) they also knew that there were patches of fuel oil floating close by; (iv) they ought to have known that keeping drums of water as a precaution against fire was not sufficient; (v) they did not warn others in the vicinity to keep to a safe distance because of the danger. The intervention of a third party (the military vessel) was not deemed to have broken the chain of causation. **4**

The fact that the defendants had followed the same practice for several years without harmful results was not evidence that such harmful results were not foreseeable and did not excuse the failure to take proper precautions. On every occasion where they used the same method, the defendants were in effect creating a danger and on every occasion they should have been prepared for the worst. Turning then to the argument that what was foreseeable for the defendants ought to have been equally foreseeable for the plaintiffs, the court observed that one would be guilty of contributory negligence if one failed to take reasonable care of one's own safety and that of one's belongings. However, one is justified in assuming that whoever undertakes an activity will properly perform his legal duties by taking proper care and precautions to avoid causing damage to others. The fact that no warning of danger was given strengthens this assumption. One cannot be charged with contributory negligence if the other fails to take proper care; one is not expected to foresee that others will be negligent and to take precautions against such negligence. **5**

1 Article 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.

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Comments

6 This judgment singles out foreseeability as the determining factor for a finding of negligence, but it also considers other criteria. It did not go so far as to endorse the plaintiffs' argument that creating a danger or undertaking a dangerous activity entails an absolute liability, or, at least, that it creates a strong presumption of fault which can only be rebutted by proving *vis maior*. However, it did state that such an activity creates a stronger duty to take proper precautions even if, in the past, such precautions were never actually needed. The measure of the adequacy of such precautions is the degree of danger created and not past events, in the sense that the fact that no accidents occurred in the past does not exonerate one from the duty to take precautions.

7 The observations on contributory negligence are also interesting because they uphold the principle that it is the party who undertakes the dangerous activity, and not the potential victim, who is to take the necessary precautions. One is not necessarily expected to change one's behaviour merely because someone else decides to create a risk. Presumably the conclusion might have been different had the plaintiffs moored their vessel in an area reserved for dangerous works; in such a case their failure to observe the applicable norms would possibly have been considered as a contributory factor to the damage, if not to the accident itself.[2] The court also remarked on the fact that the defendants had failed to warn the plaintiffs about the danger, thereby justifying the plaintiffs' assumption that all necessary precautions were taken. However, it is doubtful whether such a warning, if it had been given, would have made a difference. Surely it is unreasonable to allow private persons to appropriate a public space by warning others that it is dangerous to stay there, and to make others guilty of contributory negligence if they refuse to give up their right to make use of that space.

16. Denmark

Vestre Landsret (Western Court of Appeal) 21 March 2001

U.2001.1374V

Facts

1 A driver, V, was seriously injured when he was hit by a tree which was placed on a property owned by A. At the same time, V's car was severely damaged. Prior to the accident another tree on the same property had toppled.

2 See the Maltese judgments reported under §§ 4 and 5 below.

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Decision

The court found that A had acted negligently by not having examined the tree at all. 2
The fact that another tree had fallen prior to the accident should have prompted A to examine the trees. There was no reason to assume that the wind conditions had been so unusual that this could have caused the damage. The tree fell because the lower part of it was rotten. The tree was of a considerable size and was located near a road. The court found that, with a mere cursory examination, A could have discovered that there was something wrong with the tree and that it certainly needed further investigation. On these grounds A was held liable for the personal injury sustained by V and the damage to his car.

Comments

The case shows the factors which are relevant in assessing whether the required 3
standard of conduct has been met. Overall, the standard may be laid down in an objective and a subjective way. From an objective point of view, the standard of conduct is decided on the basis of norms laid down in some kind of statutory or non-statutory regulation. From a subjective point of view, the standard is determined by looking at what a reasonable person would do (or not omit to do) in a given situation. In the present case there was no applicable regulation so the standard was determined according to the subjective test (based on the reasonable person) and certain basic considerations regarding dangerousness and risk. More specifically the relevant factors in this case were: (a) the dangerousness of the failure to examine the tree; (b) the extent of the risk that damage would ensue due to the said omission; (c) the extent of the potential damage; and (d) the feasibility of avoiding damage. With respect to the risk of damage, the court found that a failure to properly examine the tree could indeed have caused the damage. Thus, the tree was of a considerable size and it was placed next to a public road. Moreover, the following facts: (a) that there were no unusual wind conditions; (b) that the tree toppled by itself; and (c) that another tree on A's property had already toppled seem to have substantiated the court's finding that the risk of damage ensuing was significant. When evaluating the cost of taking precautions against the risk, the court emphasised that the problem could have been easily discovered and prevented since there were immediately observable signs that the tree was rotten.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 1 December 1973
Rt 1973, 1364

Facts

1 In 1968, while submerged, a Norwegian submarine ran into the net of a fishing vessel from the Netherlands in the sea off the coast of Shetland. The owner of the Dutch vessel sued the Norwegian state for the material damage to the vessel and for loss of income. It was generally assumed by the Norwegian Navy that the equipment on board was capable of detecting a net in the water. After the collision, new investigations were carried out. The results showed that it was not possible to detect a net from a submerged submarine.

Decision

2 The crucial question in the case was whether it was reasonable of the crew on the submarine to assume that the sonar equipment in the submarine would register a net in the water in a way that would prevent the submarine from colliding with the net. The court assumed that the equipment was used in a proper way. The decisive question, therefore, concerned an evaluation of the foreseeability of the risk of damage. At the time of the accident, the prevailing expert opinion was that such equipment would detect a net in the water and provide reliable, differentiated signals. Based on the testimony of an expert witness, however, the court concluded that the prevailing opinion was wrong, and that it would not have been possible to register a net in the water at the time of the accident, regardless of what technical equipment had been available in the submarine. Due to this factual situation in the case, the court was forced to ground its decision on a more creative basis than usual and the interplay between the relevant criteria in the *culpa* norm became more explicit than in many other judgments. This was also due to the fact that two of five judges dissented. The Norwegian state was not held liable in damages.

Comments

3 The decision shows that the foreseeability standard in the Norwegian *culpa* norm is based on an objective evaluation of the prevailing expert knowledge at the time the damage occurred. The foreseeability evaluation concerns the specific risk of damage. It has some similarities to a good faith standard, because subjective knowledge would probably constitute *culpa*, even though the prevailing expert opinion held otherwise. The foreseeability standard also appears to have a sound basis in the *culpa* rule as an absolute prerequisite for the existence of fault. Many of the other criteria at play in the *culpa* rule, such as dangerousness, close connection to the

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risk, etc, would assume, however, that the Norwegian Navy should have borne the costs of the risk of damage in this case. The criteria in interplay are especially clearly pronounced in this decision because of the strong dissent among the Supreme Court judges. The majority of the judges put most weight on a formal foreseeability standard and decided that the assumption made by the crew was still considered reasonable because it was based on the prevailing expert opinion at the time of the accident. The minority placed much less weight on the foreseeability standard and found that the crew of the submarine, despite the general opinion about reliance on sonar equipment, had behaved inappropriately in the concrete case. It was held that the evaluation of the risk of damage should have been more cautious and based on more information than a specific signal from the sonar equipment indicating a net in the water. The leading officers on the submarine had noticed signals from the sonar indicating an approaching ship in the sea an hour and a half before the collision. They could have – to be absolutely safe – changed the course of the submarine. This would also have been appropriate based on the general risk of damage, because the general opinion was that the sonar equipment could detect any object that might naturally appear when shipping in the Atlantic Ocean, for instance other types of fishing equipment. The dissenting judges concluded that the crew had taken an unnecessary risk when they so unconditionally placed their trust in the sonar equipment despite the fact that other precautionary and alternative methods were readily available.

18. Sweden

Högsta domstolen (Supreme Court) 30 June 2011
NJA 2011, 454

Facts

Extensive water damage to property occurred as a result of a hose between the tenant's dishwasher and tap coming loose from the tap. It was stated in the lease contract, included among the terms, that the water supply to the machine should be switched off every time after use, but in this case the tenant had not done so. Why the hose became loose was not investigated, but it was natural to assume that the incident could be considered an accident. The house owner sued the tenant. **1**

Decision

The Supreme Court stated that, in tenancy relations, a violation of the contract terms cannot simply be regarded as a relevant breach of the duty to take good care of the apartment. 'Instead, a more open examination of the circumstances has to be performed'. Thereby the court demonstrated the criteria of establishing the relevant **2**

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standard of conduct (and these criteria can be interpreted as relevant also in the case of non-contractual liability). The likelihood that the hose would break had to be regarded as rather low. On the other hand, it was pointed out that a hose connection where the water was constantly under pressure was 'a major risk factor'. The damage that could occur if the hose broke or came off the tap could be great, when the water flowed out freely. To eliminate this risk, the tenant could easily, without incurring any costs or inconvenience, have turned off the water from the tap to the dishwasher. The tenant must have realised the risk and that the damage could be great. The tenant had referred to the insurance opportunities (ie that the landlord could have insured the house). The Supreme Court though, found that the insurance issue was of no relevance in this case, since damage caused by flowing water could have been covered by both the landlord's and the tenant's insurance. The tenant was considered negligent and was therefore found liable for the water damage.

Comments

3 This case can be viewed as an ideal precedent, which demonstrates the criteria of the Swedish '*culpa* rule' (negligence) and the method of dealing with a range of interplaying components (both as regards contractual and non-contractual liability). Instead of just pointing to the violation of the terms of the tenancy agreement, the different factors on each party's side were evaluated. From the judgment we can establish: (a) the risk factors (circumstances that make it possible for negative consequences to be suffered by others); (b) the damage factors (circumstances relating to the damage that can occur if the risk factors materialise); (c) the alternative action factors (what could have been done and what costs or inconveniences such an alternative would have led to); and (d) the subjective factors (the issue regarding the wrongdoer's awareness of the risks and other above-mentioned factors – nevertheless these so-called 'subjective' issues are in fact interpreted in an objective way as regards the question of whether the wrongdoer 'should have' understood this or that factor). When these criteria are contemplated, the genuine normative evaluation takes place, that is the question as to whether these factors weighed against each other – and also weighed against those factors which can make the action acceptable – and can lead to the conclusion that this action was too risky and that another safer alternative would have been the 'right' standard of conduct. If this is the case, the term *culpa* (negligence) is used.[1]

4 In this judgment, we can observe some typical circumstances that are often put forward as strong arguments for or against liability, but nevertheless this time did not pave the way for the usual conclusion. First, the fact that a violation of the terms

1 As regards the weighing of the different factors, see also Högsta domstolen (Supreme Court) 11 June 1985, 3c/18 nos 1–3, and Högsta domstolen (Supreme Court) 4 June 1981, 3c/18 nos 4–6.

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of the tenancy agreements as regards the switching off of the water had taken place: this could be seen as an indication that the proper course of action was not followed (and hence that the tenant was negligent), but, according to the court, this detail in itself was not conclusive, but merely a part of the total evaluation. Then the fact that the actual course of events was classified as an accident, which can often be used as an argument that there is no *culpa* (but just *casus*): however, the court came to the conclusion that the constant risk factor due to the water being under pressure was a major risk. Therefore the relevant factor was not the specific fact that the hose became loose, but the total evaluation of the risk structure.

Finally, the insurance argument was used by the tenant, but the judgment demonstrates that such economic arguments concerning cheapest cost avoider, etc are not always convincing. In tort law we must often make the evaluation that, even if the victim's damage is, in economic terms, smaller than the costs which would have been needed to avoid the risk, it is rarely a valid argument in a specific single case that you should be allowed to sacrifice the interests of others if you yourself can profit from it.[2] 5

20. Estonia

Tallinna Ringkonnakohus (Tallinn Circuit Court) 28 September 2012

Civil Matter No 2-11-26543

Facts

According to the statement of claim, the plaintiff tried to put a postal item into the mailbox of the defendant as a part of his professional duties. Since the footpath on the defendant's (registered) land that the plaintiff used to access the mailbox was icy, the plaintiff slipped, fell on his back, and was injured (fracture of the sixth vertebra). The plaintiff requested compensation from the defendant for pecuniary and non-pecuniary damage. The defendant contested the action by claiming that he had not violated the obligations of a land owner and that safe access to the mailbox was ensured in every way. 1

The county court satisfied the action. 2

Decision

The circuit court partially changed the reasoning to the county court's decision. According to the circuit court, the county court was correct to find that the defendant 3

2 The case is discussed by various authors in *H-Å Wängberg et al* (eds), Hyresgästs skadeståndsansvar (2012).

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had violated the general duty to maintain safety, but this duty did not arise from the provision of property maintenance rules referred to by the county court, since that document only establishes the obligations of the defendant towards a public authority. The defendant knew that the postal worker would bring mail to his mailbox and use the footpath that is located on his registered immovable to reach that mailbox. Because of this, the defendant is obliged to take the reasonably necessary, suitable and feasible measures on his registered immovable to protect the plaintiff from falling on the way to the mailbox and the resulting bodily injuries. Falling on an icy and slippery pavement may have extensive harmful consequences, the likelihood of injury is high and, at the same time, the expenses necessary to clear an icy path are not high. It has been found in legal theory that the more grave the impending damage is, the more likely it is that the damage will occur and the lower is the objective effort and expenditure required to prevent the damage, the higher is the likeliness that the defendant had a duty to maintain safety by taking the measures to prevent or eliminate danger.

Comments

4 The peculiarity of this case was that the plaintiff was injured at the defendant's registered immovable (land). The circuit court emphasised in its statement of reasons that the defendant knew that a letter carrier regularly accesses the mailbox on his immovable property. This is the circumstance in relation to which the circuit court found that the defendant had a general duty to maintain the safety of the plaintiff, also considering the fact that the potential damage was extensive and the costs required to prevent it were relatively low. It is not impossible that the courts would have arrived at a different decision if the plaintiff had not been a postal worker and if the damage had occurred at the defendant's registered immovable at a place which other persons usually did not visit according to the defendant's knowledge. This case may also qualify under 3e/20.

5 See also Judgment No 2-12-34167 of Harju County Court, 28 August 2013 under 3f/20 nos 1–5 and Judgment No 2-08-13854 of the Tallinn Circuit Court, 18 June 2010 under 6/20 nos 6–13.

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21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-40/2014, 19 March 2014

Unpublished

Facts

The newspaper, the Evening News, during the period from September until December 1998 published eight articles on a former high-ranking official of the Ministry of Agriculture (the claimant), whereby several allegedly false defamatory statements were made, violating his honour and dignity and illegally interfering with his privacy by suggesting that the claimant had participated in homosexual orgies. The newspaper claimed photographic evidence confirming his participation in the said orgies had come into its possession. In April 2006 the claimant brought an action requesting a withdrawal of the false and offensive statements in question, which violated his dignity and honour, seeking compensation for non-pecuniary damage in the amount of € 142,287 caused by the unlawful violation of the claimant's privacy. 1

Decision

The court of first instance rejected the claim. Having reviewed the case on its merits, the court of appeals satisfied the claim in part. The court ordered the author of the article to pay the claimant compensation of € 7,114 for an unlawful violation of the claimant's honour and dignity. The Senate of the Supreme Court reversed and remanded the decision of the second instance court. When the Chamber of Civil Cases of the Supreme Court reviewed the case for the second time, the claim was rejected and the claimant appealed to the Supreme Court, emphasising in particular the unlawful violation of his privacy. The claimant indicated that making allegations about his sexual orientation, as well as publishing photos of homosexual acts together with photos of members of his family (his wife and daughter) constituted an infringement of his right to privacy. 2

The Chamber of Civil Cases of the Supreme Court reversed and remanded the decision of the court of the second instance and emphasised that an interference with a person's privacy may be and also may not be unlawful depending on the particular set of circumstances. The court of appeals failed to duly assess this. 3

The Chamber of Civil Cases of the Supreme Court supported the view of the court of appeals that, in a democratic society, politicians and public officials ought to expect more criticism than an average person (see ECtHR decision *Lingens v Austria*[1]). It was, however, pointed out that not only the public status of the involved 4

1 8.7.1986, no 9815/82, para 42.

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person is of importance, but also the significance of the issue, which serves as a justification of infringement, in the eyes of the public. Therefore, the criticism regarding public officials and politicians may be permitted to a greater extent, insofar as the fulfilment of professional duties are directly or indirectly concerned, while criticism aimed at their private lives could be allowed to a much narrower extent while the use of offensive remarks would be acceptable only if it were justified by the interests of the general public. In addition, when assessing the content of a published article, the manner in which the information is presented must be taken into account.

Comments

5 This case confirms that, when assessing whether the infringement of privacy is to be considered unlawful, the conclusion depends on a person's status in society, on the limits of the freedom of expression and on various criteria and their interplay.

6 When an infringement of the privacy of a person by the media is evaluated, two legal principles which are constitutional in nature collide. On the one hand, art 96 of the Constitution (*Latvijas Republikas Satversme*) states that everyone has the right to inviolability of his/her private life, home and correspondence[2] while art 100 of the Constitution provides that everyone has the right to freedom of expression, including the right to collect and process information, and to express their opinion.

7 In accordance with art 116 of the Constitution, the aforementioned rights may be restricted where explicitly provided by law, in order to protect the rights of other people, the democratic structure of the state, and public safety, welfare and morals. None of these rights are absolute in nature and may be subject to certain restrictions. The Law on the Press and Other Mass Media also stipulates that interferences in an individual's private life is prohibited and the use of media for that reason is subject to liability, which also corresponds to art 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Hence, liability for an unlawful violation of a person's right to private life according to art 2352[1] (3) of the CLL and arts 7 and 28 of the Law on the Press and Other Mass Media could be imposed.

8 If certain information regarding a popular person is published, then the facts that could potentially raise discussions in a democratic society on the person or fulfilment of his/her professional duties is to be distinguished from revealing details on his/her private life to the general public. For example, the ECtHR decision of 24 June 2004 (in the case *Von Hannover v Germany*) suggests that the public has no le-

2 <http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Constitution.doc>.

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gitimate interest in learning how Princess Caroline of Monaco behaved and acted privately, despite the fact that she is a well-known person.[3]

In this case, the decision of the court of appeals did not contain such an as- 9
sessment of the published photographs, although it may have been crucial in evaluating a potential invasion of privacy. The Senate of the Supreme Court therefore was consistent in concluding that the decision of the court of appeals rejecting the claimant's claim regarding the harm caused by the violation of his private life cannot be considered to be legitimate and well-founded.

22. Lithuania

JR and ZR v Vilnius University Hospital Santariskiu Clinics, 30 March 2005

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-206/2005; <http://www.lat.lt>[1]

Facts

The plaintiffs' 11-year-old daughter, who had a congenital heart defect, was oper- 1
ated on at Vilnius University Hospital Santariskiu Clinics, by a heart surgeon who had been invited from the UK. The patient died after the corrective operation. The plaintiffs filed a tort claim[2] against the Clinics, arguing that the mother of the deceased child gave her written consent to another type of operation, which was much less radical than that which was performed and therefore less risky. The defendant argued that the corrective operation was in the best interests of the minor because its aim was to fully correct the heart defect. Moreover, the death of the patient was not caused by the operation, which met the highest scientific and professional standards, but by heart bleeding which was a complication of the operation that could have developed after any operation, including that for which consent had been given.

3 See the ECtHR decision *Von Hannover v Germany*, 24.6.2004, no 59320/00, ECtHR *Peck v United Kingdom*, 28.1.2003, no 44647/98 and ECtHR *Murray v United Kingdom*, 28.10.1994, no 14310/88 as well as the decision of the Senate of the Supreme Court No SKC-11/2013, 28.2.2013, para 7.3.

1 The case was commented upon by *J Kiršienė/S Selelionytė-Drukteinienė* in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, Vol 1: Essential Cases on Natural Causation (2007) 69 ff, nos 1–4.

2 Medical malpractice cases, as well as cases for the breach of duty to inform a patient, are based on tortious liability rules in Lithuanian case law.

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Decision

2 The court of first instance granted the claim. Both the appellate instance court and the Lithuanian Supreme Court upheld the decision of the court of first instance. According to the courts, the defendant breached the required standard of care required from the medical institution because the patient's parents had not been properly informed about the substance and risks of the operation, which in Lithuanian heart surgery was novel. The Lithuanian Supreme Court analysed statistical data relating to mortality rates after both types of operations and concluded that it was about 16% for children between the ages of four and ten and 27.27% among all patients upon whom the less risky operation had been performed. The mortality rate of the patients who had undergone the corrective operation that had in fact been performed on the patient amounted to 50%. Therefore, since the acts of the heart surgeon exceeded the competence granted by the mother of the patient and the performed operation was much more risky than thought by the parents of the patient, the courts awarded pecuniary damages to the parents for the damage suffered due to their daughter's death.

Comments

3 According to Lithuanian law, the standard of care to which doctors are subject is not only very high if medical malpractice is concerned,[3] but also in cases of a lack of informed consent by a patient. According to the authors, such attitude is based on the set of criteria justifying the high standard, in particular, on: (a) the nature and value of the protected interest involved (life and health, as the most important values); (b) the expertise to be expected of a doctor as a provider of medical services; (c) the foreseeability of the damage (doctors are able to foresee the consequences of their acts according to the statistical data provided by medical science); and (d) the relationship of proximity or special reliance between the patient and the doctor.

4 Moreover, this case also demonstrates that it is not an easy task to find a reasonable and fair balance between these criteria. Some may be over-emphasised at the expense of others. Although the courts of all instances could not establish drawbacks of the operation itself,[4] they held that the detrimental consequences of the operation and the defendant's failure to maintain proper fiduciary relationships

3 See also 5/22 no 6.

4 It was contested by the parents, and the courts agreed with them, that no proper post-surgical care was provided to the patient – though the operation was novel in Lithuanian heart surgery practice, the first medical record by the operating doctors had been registered only on the ninth day following the operation and a meeting of the several specialists had been summoned only on the fourteenth day after the operation. However, the courts did not analyse in depth how these breaches were linked with the consequences of the operation (heart bleeding and death of the patient).

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with the patient's parents[5] constituted the basis for the successful malpractice claim.

23. Poland

Sąd Najwyższy (Supreme Court) 20 May 2005, III CK 661/04

OSNC 4/2006, item 73

Facts

V held an investment account and had a contract for brokerage services with the securities broker at the defendant bank (A). Initially, V mandated the broker in person. On the latter's advice, in order to facilitate the transfer of money between accounts and eliminate the need for personal visits to the bank, V opened a current account at A and left the broker with some money transfer forms signed in blanco. After a revolving credit had been granted to V, the managing broker stole € 150,000 by using two in blanco cheques. **1**

In the lawsuit against A, the regional court ruled for V on the basis of art 430 KC (vicarious liability in tort). The court of appeals affirmed. In cassation the bank contested liability and raised a contributory negligence defence. **2**

Decision

The liability of the bank was found on both contractual and delictual grounds. As to the first ground, the bank was in a clear breach of the contract for a current account (art 725 KC). It did not rebut the presumption of the debtor's liability (art 471 KC). The practice of accepting money orders signed by a client in blanco was unacceptable and contrary to banking regulations. Any losses resulting therefrom imply a breach of a banking account contract. The breach is negligent because the bank did not act with the degree of diligence required from a professional according to both banking law and art 355 § 2 KC. **3**

With regard to the tort basis for the claim, not all the conditions of vicarious liability provided for in art 430 KC were fulfilled, as the fraud was an act committed outside the scope of entrusted duties of the subordinate (here: an employee).[1] **4**

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5 The basic rule in Lithuanian law is that the minor patient younger than 16 years old shall be treated only upon consent of his legal representatives, except the cases where a health care intervention is urgently needed.

1 Article 430: 'A person who on his own account entrusts the performance of an act to a person who in the performance of the act is under his control and has a duty to abide by his instructions is liable for any damage caused by that person's fault in the course of performance.'

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5 In this case, A's conduct led to the establishment of liability under the general clause of tort liability (art 415 KC). The fraud committed by A's employee was evident and made possible by the defective organisation of the bank's operation relating to A's account, which facilitated the criminal conduct of a bank employee. As such this constituted the bank's own tort. There is a general duty of any banking institution to organise its operations in such a way as to ensure adequate safety of deposits. General duties of banking institutions have been construed by doctrine in connection with their status and functions. The general duty of care is independent of the particular obligations arising from various types of banking contracts. The duty exists in the pre-contractual and post-contractual phase of a legal relation. A general duty to protect the safety of deposits is also provided for in banking law.

Comments

6 The court established banks' general duty of care towards depositors. The scope of this duty goes beyond the existence of contractual obligations as well as beyond detailed regulation of banking law. A breach of this duty constitutes the bank's own fault leading to its liability on the general tort basis (art 415 KC).

7 The standard against which a professional tortfeasor's conduct is measured is objective. The evaluation of the standard of conduct takes into account different professional standards, for example, the duties which rest upon bankers are different to those for lawyers. But the standard of duty of care is always higher for professionals when compared to 'average' persons.

8 The comparison is with the conduct that would be expected of a professional of the given type, and only to a small extent with the conduct that would be expected of the individual tortfeasor himself. The negligence of the bank amounted to the misconduct that justified the claim in tort, which was more favourable to the victim with respect to prescription periods.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic)
27 September 2007
25 Cdo 2142/2005

Facts

1 The claimant sought compensation for damage to health, consisting in a loss of earnings during her inability to work, pain suffered, aggravation of social position and administrative costs incurred in connection with her injury. The claimant suffered damage while returning from work in the evening when she slipped on an icy pavement. As a result, she broke her right leg. She was unable to work for almost

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one year. The respondent was the municipality which was legally obliged to maintain roads and pavements to ensure they were passable and to keep them in a suitable condition.

The court of first instance rejected the claim. The court of first instance ruled that, taking into account the provision of sec 9a(3) of Act No 135/1961 Coll, on Land Roads (Road Act),[1] which provides for strict liability of the obliged party to maintain pavements, the liability of the municipality did not exist because the condition of safety of the pavement was not restricted within the meaning of sec 12(5) of Decree No 35/1984 Coll. This provision states that defects in the practicability (passability) of pavements are defects which do not allow the safe passage of pedestrians even when due caution is taken. Moreover, the court also refused the liability of the municipality based on sec 420 CC.[2] 2

The court of second instance confirmed this judgment. To the reasoning of the court of first instance, it added that the application of sec 420 CC was not possible because the Road Act, as a special law, excludes its application to the fullest extent. 3

Decision

Pursuant to sec 9a(3) of the Road Act, the administrators of local roads are liable for damage whose cause was a defect in the practicability (passability) of, inter alia, pavements, unless they prove that it was not feasible to remove such defects or to announce them. 4

Therefore, the conditions for liability of the administrator in the meaning of sec 9a(3) of the Road Act are defects; (a) in the practicability; (b) the occurrence of damage; and (c) a causal connection between them, regardless of the fault of the administrator of the road or its employees. If one of the most crucial reasons for liability can be subsumed under the concept 'defect in the passability' (*závada ve sjízdnosti*) as defined by sec 12(5) of Decree No 136/1961 Coll, which provides an interpretation of the Road Act, the strict liability of the administrator is established. Consequently, it is its duty to prove that it was neither feasible for it to remove such defect nor to draw attention to such defect. 5

Thus, the decision regarding the owner's liability in particular depends on the identification of the road's conditions at the time and place of the accident as well as on the nature of the defect that led to the accident. In general, the strict liability is bound to such a state of the pavement that establishes the defect in the passability in the meaning of sec 9a(3) of the Road Act. 6

As to the exclusion of application of sec 420 CC, the Supreme Court did not agree with the court of second instance as to the opinion that the Road Act is of such 7

1 Zákon č 135/1961 Sb, o pozemních komunikacích (silniční zákon).

2 Section 420(1): 'Every person is liable for damage which he caused by breaching a legal obligation.'

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a nature that it excludes the application of a general provision on liability for damage as stipulated under sec 420 CC. The Road Act presents a special law with respect to the general provision on liability for damage as stipulated in sec 420 CC. However, this fact does not mean that, in the case of denying strict liability of the road's administrator pursuant to the Road Act, its general liability for a particular breach of legal duties shall also be excluded. The Road Act only regulates the strict liability of the road's administrator for damage the cause of which was solely a defect in the passability and not a breach of a general legal duty.

8 The Civil Code regulates general liability based on fault, whereas the conditions for liability based on fault and those without fault are not identical. The same applies to conditions under which the liable subject can exculpate or release itself from liability.

Comments

9 The decision of the Supreme Court can be divided into two parts: (a) the qualification of the liability of an owner of the local road and the conditions for its release from liability; and (b) conditions of application of sec 420 CC.

10 The first issue the court decided on was the interpretation of the provisions of the Road Act which stipulate the duty of the owner of land to keep it in a safe condition, and its possible liability if it fails to do so. The court concluded that such a provision establishes cases of strict liability. However, the owner can be released from liability if it proves that it was neither feasible for it to remove such defect in the passability nor to draw attention to such defect. Besides this, a release from liability can be influenced by the qualification of the defect in the passability, as stipulated further in the statutory instrument.

11 Thus, the decision regarding the owner's strict liability in particular depends on the identification of the road's conditions at the time and place of the accident as well as on the nature of the defect that led to the accident. In general, strict liability is bound to the state of the pavement, which establishes the defects in the passability within the meaning of sec 9a(3) of the Road Act.

12 The second issue decided by the Supreme Court related to the question as to whether sec 9a of the Road Act excludes the application of the general provision on liability for damage pursuant to the Civil Code.

13 Following the previous case law of the Supreme Court,[3] the court decided that, although the Road Act presents a special law with respect to the general provision on liability for damage as stipulated in sec 420 CC, this fact does not mean that, in

3 Supreme Court, R 93/1957, R 23/1976.

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the case of denying strict liability pursuant to the Road Act, general liability for a particular breach of legal duties shall also be excluded.

As regards the duties to be carried out, the Road Act clearly stipulates them as any activity which ensures the passability of the road without endangering the users of the road. The negligence relevant for the application of sec 420 CC and currently sec 2910 NCC consists in breaching this maintenance duty which serves to safeguard the interest of the public. However, also the injured party must be diligent and, in case of winter conditions, exercise more skills and diligence in order to avoid any damage and, if he fails to do so, he shall be held contributorily liable. **14**

When considering the liability of anybody in a similar case based on an omission to carry out various duties, it is also necessary to take into account the provision of sec 415[4] CC, which sets out the duty to behave in such a manner that no damage to health, property or other value is inflicted. The breach of this legal duty involves, consequently, liability of the wrongdoer for damage inflicted by the breach of duties pursuant to sec 420 CC. The Supreme Court considers this provision as a general norm for liability if no particular duty is set forth by another legal regulation. **15**

Nevertheless, the application of sec 415 CC in the present case would be incorrect as the Road Act presents an undisputed *Schutznorm* based on which liability can be imposed. Therefore, it is not necessary to seek a general norm when the Road Act's provision sets forth the duty to behave in the particular case. **16**

The NCC contains a similar provision in sec 2900;[5] however, its interpretation within the meaning of sec 415 is questionable. Scholars opt for a narrower interpretation, but the case law will probably follow the traditional approach which reflects the broad interpretation. **17**

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 31 August 2004, Case No 25 Cdo 2542/2003

<http://kraken.slv.cz/25Cdo2542/2003>

Facts

The facts of the case showed that the claimant was medically treated for the consequences of a spinal injury suffered in childhood. The defendant's treatment meth- **1**

4 Section 415: 'Everybody is obliged to behave in such a way that no damage to health, property, nature and the environment occurs.'

5 'If required by the circumstances of the case or the habits of private life, everyone is obliged to behave in his actions so as to avoid unreasonable harm to freedom, life, health or property of another.'

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ods, ie medication, infusions and injections were administered correctly. Only the technically incorrect administration of the spinal nerve root injection, performed by the defendant, was considered questionable as the medication entered the spinal meninges. As a result, severe physical disability was caused. The District Court decided on the question of compensation of the damage. The appellate court affirmed the decision of the court of first instance, concluding that, when the harm to health is causally linked with the administration of Mesocaine, to which the patient was allergic, this is a case of strict liability under § 421a[1] of the Civil Code.

2 The defendant filed an appellate review against this decision. The court of appellate review quashed the decision of the appellate court and remanded the case for further proceedings.

Decision

3 A precondition of general liability for damage under § 420 (1)[2] of the Civil Code is a breach of duty set by law (an unlawful/wrongful act) in which the following is included: acting contrary to the objective law, resulting damage, a causal relationship between the unlawful act and the resulting damage, and a presumed fault. In legal terms, a breach of duty arises when there is an objective disparity between how a person acted in reality (or omitted to act), and how such person should have acted in order to fulfil his/her obligations. If these preconditions of liability are established, fault may be presumed. In such a case the wrongdoer must prove that the damage was not caused through his/her fault, not even through the so-called unconscious negligence. It does not suffice to prove that the wrongdoer did all he/she could in accordance with his/her subjective knowledge and skills. The criterion for the decision must be objective and the extent of efforts which may be expected of every person is most decisive. This criterion must be applicable to the particular case, distinctively and with respect to the actual specific situations.

Comments

4 The court of appellate review criticised the process of the appellate court because, contrary to the case law, the appellate court applied the provisions of the civil law concerning strict liability despite the fact that the evidence proved that the harm to the patient's health was caused by the physician's erroneous medical intervention (not estimating the depth of the injection needle correctly). The determination of

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1 § 421a: 'A person shall also be liable for damage caused by circumstances which have their origin in the nature of instruments or another thing which he used in performing an obligation. There can be no release from such liability.'

2 § 420 (1): 'A person is liable for damage which he caused by breaching a legal obligation.'

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this fact was of extraordinary significance for the defendant. While under the provisions of § 421a of the Civil Code no release of strict liability is possible, the provisions of § 420 (3)[3] make it possible for the wrongdoer to prove that the damage was not his fault. The Supreme Court, as the court of appeal, affirmed that the damage was a consequence of the doctor's conduct (the administration of the medicine was 'technically wrong'), and, therefore, the application of strict liability has to be excluded. The court did not accept the defendant's arguments that 'he did everything according to his skills and knowledge', arguing that the extent of efforts which could be expected from every person, obviously with regard to the actual situation, was most decisive. The court's view supports the latest tendency to objectify fault.[4]

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 29 May 2013, Case No 25 Cdo 3979/2011

<http://www.profipravo.cz>

Facts

The claimant sought compensation for harm to his health and the actual damage resulting from a robbery which took place after he had visited a casino. He filed his claim against the robbers (first defendants) and against the casino operator (second defendant). The court of first instance decided that the second defendant was not liable for the damage caused to the claimant, despite the fact that one of the offenders was his employee. The responsibility of the second defendant can also not be inferred from § 415 of the Civil Code, because, in the view of the court in this case, no circumstances existed that required preventive measures to be taken. The City Court, acting as the appellate court, affirmed the decision of the court of first instance concerning the claim against the second defendant. The claimant filed an appellate review against this decision. **5**

Decision

The Supreme Court of the Czech Republic did not accept the appellate review. Requiring the operator of a casino to provide a bodyguard for a customer on his way home undoubtedly exceeds the extent to which the burden of the duty of preventive care may be imposed on the operator of such business activities even if the customer leaves the premises with a substantial amount of money. **6**

3 § 420 (3): 'A person shall be relieved of the said liability if he proves that he did not cause damage.'

4 See eg *K Csach et al*, Profesijná zodpovednosť (2011) 131 at fn 349.

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7 It is primarily the customer who must take the required safety measures when leaving a casino with a substantial amount of money. A casino operator cannot foresee that his employees may act in an improper manner especially where such conduct bears the signs of intentional criminal activity. In this case, absent any indication that the casino operator's employee was planning to commit a crime against the customer (the winner), the casino operator could not be blamed for breaching his duty of preventive care when he did not take any actual measures against robbery committed against the aggrieved by other persons outside the casino.

Comments

8 In the appellate review the defendants interpreted § 415 of the Civil Code by raising the so-called issue of principal legal significance: '... it is important whether the casino operator or any operator of business activities involving similar risks cannot foresee a crime being committed by another, and whether the operator must, within the duty of preventive care, take active measures to prevent it'. According to the claimant, the defendant should have bound his employees to secrecy, and provided for his safety, not only on the casino premises, but also in its closest vicinity (organising someone to accompany him to his car, driving the customer home). The defendant argued that, in such a case, the employer could not be held responsible for the improper conduct of his employee; such interpretation exceeded the existing case law. The Supreme Court examined the interpretation of the provisions of §§ 415 and 420 of the Civil Code. In the court's view, the requirement of general preventive care includes a breach of a legal duty under § 420 (1) of the Civil Code to the extent that every person must take such a degree of care as may be reasonably expected from that person with regard to the situation in terms of the actual time and place, provided the person is objectively capable of preventing or reducing, as much as possible, the risks of harm to life, health and property. This provision, in the opinion of the court, presumes an ordinary standard of care and prudence corresponding with the usual situation in the actual conditions, and not a limitless duty to foresee and prevent any damage which could possibly arise in the future. As reasoned by the court, it is clear that casinos (gambling places) represent a specific environment which could be vulnerable to possible criminal activities committed against their operators or their customers. Therefore, the operators of gambling places are specifically required to take measures that can reduce the danger of criminal assaults, but it is not possible to expect that the threat of criminal activities is completely eliminated. From the standpoint of the so-called general preventive care in the given case, the employer's conduct in hiring the employees and inspecting the performance of the employees' duties are very important. The court admitted that some measures taken in accordance with labour law could be perceived as purely formal (eg proof of past criminal record, confidentiality clause in the contract of work), rep-

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resenting, however, the typical tools to guarantee the usual standard of quality in choosing employees. The fact that the defendant did not take other measures cannot be considered a breach of his duty of preventive care.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 11 October 2006, Case No 25 Cdo 1369/2006

<http://kraken.slv.cz/25Cdo1369/2006>

Facts

9 The court of first instance imposed on the defendant the duty to pay CZK 260,000 (approx € 9,300). In this case the claimant was the owner of immovable property used by the defendant company, an illegal occupier. In a letter dated 2 September 1999, the claimant asked the defendant to vacate the property by 30 September 1999. On 31 August 1999 the claimant concluded a pre-emption agreement with a third person, stating a purchase price of CZK 600,000 (approx € 21,500) and a stipulation that if the property was not vacated, the seller/claimant would pay a penalty of CZK 150,000 (approx € 5,400). The defendant failed to vacate the property by the given date, and consequently the purchase agreement was not concluded. Later the claimant sold the property to another person for a reduced price (CZK 490,000, approx € 17,500) plus a contractual penalty. The claimant argued that the difference in the purchase price (CZK 110,000, approx € 4,000) and the payment of the penalty represented the pecuniary loss incurred as a result of the unlawful conduct of the defendant who failed to vacate the property on time. The appellate court affirmed the judgment in part. The court took into account the fact that the claimant had stipulated a short period of time within which the property had to be vacated in the situation when it was not possible to expect that the property would be vacated on time. Thus, in the court's view, the claimant acted contrary to § 415 of the Civil Code, and thus contributed to the loss himself. The claimant filed an appellate review against the changed judgment, arguing that the 28-day period to vacate the property was not too short, because the defendant knew the property was being used in an unlawful manner, and the property was in fact vacated two days after this period had expired. The Supreme Court examined the case and ruled that the appellate review was not reasonable.

Decision

10 The duty of general preventive care applies to the exercise of subjective rights. The civil law principles of prevention and prohibition of causing harm to any one (*neminem laedere*) are fundamental principles in civil law. Everyone must always take all possible measures that could reasonably be expected of him/her with regard to the actual situation in terms of time and place, provided the person is objectively

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capable of preventing or reducing, as much as possible, the risks of harm to life, health or property.

Comments

11 In its decision the appellate court stressed that the provisions of § 415 of the Civil Code set a duty of general preventive care[5] that applies to the exercise of subjective rights. In the court's view, the liability of the wrongdoer for unlawful conduct, as a result of which the damage increased, must be taken into account also when the immediate cause of the damage was the conduct of the aggrieved person. The immediate cause of the damage was the defendant's unlawful use of the property. By entering into the contract, however, the claimant failed to act as prudently as could be expected of him in the actual circumstances. It was certainly clear to the claimant that making or not making the agreement did not objectively rest upon him and that within a short time period he would not be able to take effective legal steps to have the property vacated in a proper and timely manner. Although the claimant's conduct was lawful, in the actual circumstances it was considered by the court as imprudent and careless, as a result of which his pecuniary loss increased. The claimant was reasonably required to adjust his freedom of contract to the possibility of incurring a loss which he would not be able to avert effectively himself. In the opinion of the Supreme Court, in performing the duty of preventive care, it would be appropriate to impose a penalty equal to 50% of the amount sought taking the actual circumstances into account.

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 909/08-2 of 23 February 2010

<www.vsrh.hr>

Facts

1 V1, V2, V3, V4 and V5 sued an insurer for compensation of damage sustained due to the death of V1's husband and V2's, V3's, V4's and V5's father (the direct victim). The direct victim died in a traffic accident when A, insured with the sued insurer, hit him with his car at a crossroads. In the first instance proceedings it was established that the direct victim, aged 67, began crossing the road when the pedestrian light was red. A approached the crossroads driving at 60 km/h, exceeding the speed limit

5 Duty to behave in such way as to avert damage to health and property and to nature and the living environment.

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by 10 km/h. In the first instance proceedings, an expert witness established that A would have hit the direct victim even at the permitted 50 km/h and that the accident could have been avoided only at the speed of 42 km/h.

Against this background, the court of first instance ruled that A was liable to the extent of 30% whereas the direct victim contributed to his own damage to the extent of 70%. The court of second instance upheld this decision. 2

Decision

The SCRC upheld both the first and second instance decisions. With respect to the tortfeasor's liability, the SCRC held that, although he had exceeded the speed limit, in the case at hand this fact was not decisive for the occurrence of the accident since, as established by an expert witness, the accident could have been avoided only at a speed of 42 km/h, 8 km/h below the speed limit. What the SCRC held against the tortfeasor was that he had 'misjudged' the possibility that an obstruction would appear on the road. In this respect, the SCRC held that the tortfeasor had violated the relevant traffic regulation which requires that drivers adapt their driving to the conditions on the road in order to be able to avoid any foreseeable obstruction on the road. In this respect the SCRC opined that, when the tortfeasor was approaching the crossroads, he should have foreseen the possibility of a pedestrian crossing the road even when the traffic lights were at red for pedestrians and should have adapted his driving accordingly. 3

As to the direct victim, the SCRC held that he behaved 'grossly irresponsibly'. In assessing the direct victim's behaviour, the SCRC took into consideration several elements. First and foremost, the fact that the direct victim had violated the relevant traffic regulation, which requires that every pedestrian respect traffic signals. Second, the SCRC took into account the fact that the direct victim was aged 67, which, on the one hand, made him old enough to understand both the unlawfulness of and the gross danger connected to his behaviour and, on the other hand, should have made him realise the physical limitations of his age. Finally, the SCRC took into account the fact that the direct victim lived in the vicinity of the scene of the accident, which meant that he was fully aware of how dangerous the road he was crossing was. 4

Taking all these factors into account, the SCRC decided that, given the circumstances of the case at hand, the distribution of liability made by the lower courts was appropriate. 5

Comments

It is evident that, in assessing the conduct of all persons involved in a harmful event, the courts examined several different criteria which were assessed in conjunction. First, with respect to both the direct victim and the tortfeasor, the courts 6

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examined the unlawfulness of their actions primarily on the basis of relevant legal provisions. In other words, the courts assessed the extent to which the behaviour of the involved parties corresponded to the requirements of the relevant traffic regulations. With respect to the conduct of the tortfeasor, the courts specifically addressed the issue of whether an obvious violation of a relevant traffic regulation (ie exceeding the speed limit) contributed to the occurrence of damage, and answered this issue in the negative. Furthermore, the courts also examined the criteria of foreseeability, holding that, in the given circumstances, the tortfeasor should have foreseen the possibility of a pedestrian crossing the road at a red light, which is where the courts found the tortfeasor's actions to be in violation of relevant regulations. In assessing the direct victim's conduct, the courts examined the age criterion, holding that given his age (67), the direct victim should have known that his age limited his ability to act. Furthermore, the courts assessed the direct victim's contribution to his own damage based on the fact that the environment was familiar to him and he should have been aware of the dangerousness of his conduct. Finally, an important element of the courts' assessment of the direct victim's behaviour was the extreme dangerousness of his behaviour.

7 Once they examined all these different criteria in isolation, the courts made an assessment of each party's contribution to the occurrence of the damage and in doing so the courts examined all these criteria in conjunction establishing in percentages the extent of the liability which should be apportioned to each party involved.

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 70/2014, 25 September 2014

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113071913/> (25 February 2015)

Facts

1 The administrator of a hunting reserve had informed the roads' administrator about the regular crossing places used by game but the roads' administrator did not take other measures to keep game away from the roads, eg by road lighting or smell barriers. The plaintiff suffered pecuniary and non-pecuniary loss in a traffic accident, when he was driving a motorcycle within the speed limit and a roebuck leapt from the right into the front light of the motorcycle. The accident occurred on a section of the road at which game often cross. The plaintiff demanded compensation of loss from the hunting organisation as administrator of the hunting reserve at this part of the road and from the state as administrator of the road on which the traffic accident occurred. The judgment of the court of lower instance granted the claim for com-

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pensation against the administrator of the hunting reserve and rejected the claim against the state.

Decision

The Supreme Court rejected revision and confirmed the judgment of the court of lower instance. The Supreme Court stressed that an administrator is liable for damage by game occurring in non-hunting areas if the damage occurred through their fault, otherwise the state is liable. The burden of proof of the existence of unlawful behaviour, damage and a causal link between the unlawful behaviour and the damage is borne by the injured party and an administrator of a hunting reserve must prove that the damage did not occur through his fault. The task of the administrator of a hunting reserve is to carry out planned measures for preventing damage by game. **2**

Comments

Liability for damage caused by game is regulated by the Game and Hunting Act.[1] The administrator of a hunting reserve must take measures to prevent game crossing, eg to propose the erection of traffic signs or a protective fence to the roads' administrator. The administrator of a hunting reserve is only relieved of liability if he/she proves that he/she took such measures. It is important whether the administrator of the hunting reserve knows about game frequently crossing the road and whether he/she has taken any measures in this respect. In cases in which game regularly cross a particular section of the road and this is known to the administrator of the hunting reserve but he/she has not taken appropriate measures, the behaviour of the administrator is unlawful and he/she is therefore liable for damages.[2] It is interesting that court practice does not say in this case by what criteria the standard of care of the administrator of the hunting reserve was judged, for example that it is judged against the care of a good administrator of a hunting reserve. A recent court judgment of whether culpable liability is shown simply took into account all the circumstances of the case, for example the circumstances in which work was actually performed, circumstances about the specific risk of damage occurring.[3] These criteria alleviate or make stricter the criteria for the judgement of care. It remains **3**

1 Uradni list RS (Official Journal) No 16/2004 – 46/2014.

2 Decision of the Supreme Court II Ips 309/2006, 6 November 2008, <http://www.sodisce.si/vsrs/odlocitve/723/> (25 February 2015).

3 See the legal opinion of a plenary session of the Supreme Court, Poročilo VSS – Report of the Supreme Court 2/1992, 9.

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debatable in court practice though, in contrast to theory,[4] whether it is permissible to seek a criterion of care within the framework of the legal standard of a good professional or a good master and an average person, according to criteria of the narrower group from which the specific causer comes.[5]

28. Romania

Judecătoria Craiova (Court of First Instance of Craiova) Civil Decision No 6355 of 17 April 17 2013

<http://legeaz.net>

Facts

1 The tortfeasor, a bus passenger, deliberately hit and damaged the front windows of a bus.

Decision

2 The first instance court of Craiova opened its reasoning by finding that misconduct (illegal act) implies tort liability and the obligation to pay damages and clarified that the provisions on tort liability for one's own acts governed by art 1349 of the new Civil Code were applicable in this case. The court arrived at the conclusion that 'from the analysis of the provisions of arts 1349 and 1357 of the new Civil Code, the following conditions of tort liability can be deduced: harm, an unlawful act, a causal link between the harm and the unlawful act, fault of the tortfeasor that may take the form of intention, negligence or *culpa levissima*.'

3 Fault is mentioned among the conditions of liability based on the joint interpretation of arts 1349 and 1357 of the new Civil Code. Concerning the damage as a condition of liability, the court considered it as a *conditio sine qua non*, the most important element of tort liability. In establishing wrongfulness, the court took into account both the objective and subjective elements of the tortfeasor's fault, stating that, in civil law, an unlawful act is any human deed which infringes the subjective right of another by violating legal norms. However, continued the court, tort liability

4 *S Cigoj*, Odškodninsko pravo Jugoslavije (1972) 270; *N Plavšak*, Krivdna neposlovna odškodninska odgovornost z domnevo krivde [Culpable non-business damage liability with presumed fault], in: N Plavšak/M Juhart/R Vrenčur, Obligacijsko pravo, Splošni del [Obligational law, General part] (2009) 528.

5 *D Jadek-Pensa*, 135. člen Obligacijskega zakonika (OZ) [Article 135 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 799.

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applies not only when a subjective right was infringed, but also when the interest of another person was harmed. In establishing the unlawfulness of an act, account should be taken not only of legal norms but also of the norms of social life when these follow from legal norms. The court concluded its reasoning with an analysis of fault, emphasising that, since the tortfeasor committed the act intentionally, his fault can be established and thus the conditions of liability under art 1349 of the new Civil Code are fulfilled.

Comments

Since the 1970s, there has been settled case law in Romania on awarding damages for the infringement of a legitimate interest.[1] However, this is the very first time that the protection of an interest has been codified in the Romanian Civil Code as a possible ground to claim damages. In this case the court of first instance again interpreted art 1349 as implying fault as a prerequisite of liability and invoked arts 1349 and 1357 as alternatives. However, the highest court established subsequently that art 1349 does not require fault as a prerequisite of tort liability.[2] Although the court built its reasoning on wrongfulness, namely the infringement of the norms of social life when establishing the unlawfulness of the act of the tortfeasor, it still considered it necessary to establish fault, because the tortfeasor committed the act intentionally. 4

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) Civil Section I, Decision No 278/2015 of 28 January 2015

<http://legeaz.net>

Facts

The plaintiffs sued the Ministry of Finance for compensation of damage caused by the loss of use of their land and the construction situated on that land during the period from 1 June 1948 to 9 April 2007, when these immovables were abusively confiscated by the communist regime. These properties were retroceded to the former owners on 9 May 2008 in a decision of the mayor of the city of Bucharest, on the basis of Law no 10/2001 on the legal regime of immovables confiscated abusively. The plaintiffs argued that, although the immovables were returned to them, the compensation they received did not cover the loss of earning (*lucrum cessans*) for which the Romanian state is liable since it illegally confiscated the immovable in 1945 and 5

1 *LR Boilă* in: FB Baias/E Chelaru/R Constantinovici/I Macovei (eds), Noul Cod Civil. Comentariu pe articole (2013) 1427.

2 ÎCCJ, Secția a II-a civilă, Decision no 2358, 24 June 2014.

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they were deprived of possessing and using their property. The plaintiffs based their complaint (submitted on 16 May 2011) on the general provisions on tort law of the old Civil Code, art 998f. At first instance the court did not contemplate the substance of the case, but it declined its competence and referred the case to the Tribunal of Bucharest, which sent it back to the court of first instance of District 4, Bucharest. The tribunal established that, although the plaintiffs were deprived of their property rights during the period of 16 January 1945 to 19 April 2007, they were compensated *in natura* by having their property returned to them and this equals full compensation of the damage, according to the law on restitution of nationalised immovables (Law no 10/2001). The court argued that the statute only provides for restitution *in natura* or *in equivalent*. It further stated that, because Law no 10/2001 only deals with the issue of effective loss (*damnum emergens*), the plaintiffs cannot be compensated for loss of benefits. Further, since Law no 10/2001 is a special law on state liability, it implies that the general rule of the Civil Code on tort liability does not apply. Thus, in the opinion of the tribunal, absent a special law on compensation for loss of benefits, by granting such damages under art 998f old Civil Code, the court would exceed the limits of its judicial power. The plaintiffs challenged this decision at the Court of Appeal of Bucharest on the ground that the statute does not exclude or forbid compensation for loss of benefit caused by the abusive confiscation of immovables by the state during the communist regime, and if this were the case, the law would have contained a specific provision stating this. However, the Court of Appeal declared the appeal unjustified on the ground that the plaintiffs had their properties returned to them by virtue of a statute and within an administrative procedure and not as a result of a court complaint, which would have established the fault of the state. If the fault of the state had been established, this would have justified the compensation for eventual damage. However, the court also emphasised that statute acknowledges the abusive nature of the confiscation and that this would be difficult to prove in a private law suit. Thus, argued the court, because the plaintiffs enjoyed the benefits of a special law, their rights are limited to those granted by statute. The plaintiffs challenged this decision before the ÎCCJ.

Decision

6 The ÎCCJ admitted that the fact that the special law does not contain rules on compensation for loss of benefits does not in principle exclude the possibility of filing a lawsuit under the common regime of private law, since such right is not explicitly forbidden by this special law. However, the parties could only initiate a suit for the fault of the state under the special law concerning the restitution procedure of the property and not for the fault of the state for depriving the plaintiffs of the use of their properties during the communist regime. Thus, the ÎCCJ confirmed the findings of the lower courts and added that the plaintiffs did not go to court with an action of revendication of their property rights within which the courts would have compared

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the property rights of the plaintiffs with the property right of the state and thus the legality of the possession of those properties by the state could not be verified. The court continued by establishing that, according to Law no 10/2001, the plaintiffs did not become owners retroactively by the restitution *in natura*, but only from the date of restitution. Thus they were entitled to invoke the deprivation of use of their property only from the date when they became owners of those properties by virtue of Law no 10/2001. For this reason, the issue of full reparation can only be analysed within the limits of the special law, which does not provide for full reparation. Surprisingly, despite this explanation at the end of its reasoning, the ÎCCJ indeed challenged the applicability of Law no 10/2001 as a legal basis for the claim of the plaintiffs invoking that this Law was replaced by another regime, instituted by Law no 1/2009 before the plaintiffs submitted their court action in 2011. However, the ÎCCJ did not enter into an analysis of the entitlements of the plaintiffs under the new regime on restitution of nationalised properties, but concluded by finding that Law no 10/2001 and the subsequent legislation on restitution of nationalised properties do not govern the issue of compensation for loss of benefits and for this reason the plaintiffs are not entitled to such damages.

Comments

This case demonstrates how fragile the issue of consequential loss can be as the issue of restitution of nationalised properties is still alive in Romania. At the lower instance courts, the case failed because of a lack of fault by the state on the ground that the plaintiffs did not revendicate in a private lawsuit that they were deposed of their property. Within such a procedure, the court could have established the fault of the state, because Law no 10/2001 considers such confiscation as abusive. The courts simply ignored the fact that the plaintiffs based their suit on the general provisions of tort law of the old Civil Code, art 998 f. At the highest court, the judges came to the same conclusion by a different path, by primarily challenging the entitlement of the plaintiffs to full reparation on the basis of lack of ownership during the period for which they claimed the compensation for loss of benefits. Thus the discourse was shifted from procedural arguments to the ground of private law. However, neither the lower courts nor the highest court entered into an in-depth analysis of the principle of *lex specialis derogat lex generalis* (law governing a specific subject matter prevails over general provisions), in the context of competition between public law (the statute on restitution) and the common law provision on tort liability. Viewed from a purely private law perspective, the decision is more than surprising since theoretically the plaintiffs could not submit an action for the revendication of their property, which requires the ownership of title. Thus, this case differs in essence from those situations where the owner holding a property right is deprived of the use of their property. The plaintiffs were deprived of their property title, and not only from using their property. Even more unusual is the fact

7

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that the lower courts (including the Court of Appeal) based their reasoning on the special law (Law no 10/2001) which clearly states in its art 2(2) that, 'the persons whose immovables were confiscated without a valid legal title preserve their right of ownership they had at the moment when their properties were confiscated and will exercise this ownership right according to the present law, upon the receipt of the decision of restitution or of a court decision'. Although Law no 1/2009 amended art 2(2) Law no 10/2001, this does not challenge the fact that Law no 10/2001 and its subsequent amendment still qualify nationalisation as 'abusive', which, from a legal point of view, implies the fault of the state. Last but not least, although the plaintiffs went to court in 2011, their property was returned to them on 9 May 2008 in a decision of the mayor of the city of Bucharest, on the basis of Law no 10/2001, thus before the replacement of art 2(2) of Law no 10/2001. They claimed damages for loss of benefit, having an ownership right granted by Law no 10/2001 when art 2(2) was still in place.

8 The case was determined under the old Civil Code. However, the outcome would not differ much under the new Civil Code either, because art 1385 of the new Civil Code provides for reparation for damage in full if not provided otherwise by law, meaning that full reparation can be limited by special law. It remains open whether the lack of special provision would suffice for the rejection of a claim such as in this case.

29. European Union

Court of First Instance, 17 December 1998

T-203/96, Embassy Limousines & Services v Parliament [1998] ECR II-4239[1]

1 For facts and decision see above 2/29 nos 18–20.

Comments

2 While no cases were found where 'the nature and value of the protected interest involved' were specifically linked to the cause of liability, this might have played a role in this case, where Parliament was held to have been 'at fault' (sic) when encouraging a tenderer to invest in the future performance of a contract ultimately not awarded. Here, the extent of the amounts incurred by the tenderer may have played a role, distinguishing in particular the losses compensated from 'the economic risks

1 This case was already presented with a different focus in *B Winiger et al* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 9/28.

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inherent in their activities' that tenderers must bear themselves.[2] However, such a conclusion can at best be drawn from reading between the lines and bear a certain element of speculation.

European Court of Justice, 6 December 1984

Case 59/83, SA Biovilac NV v EEC [1984] ECR 4057

Facts

In reaction to an oversupply of skimmed-milk powder on the internal market, the Commission introduced various 'special measures' targeting at an increase in sales, in particular by reducing the selling price. The claimant complained of a drastic reduction in its sales of basic feeding stuffs that compete with skimmed-milk powder and demanded compensation for such losses, alleging inter alia the unlawfulness of the measures adopted by the Commission. Among others, the claimant argued that these measures were 'akin to an expropriation of property' by depriving the claimant's 'property and business of all commercial value.'[3] Alternatively, if these were deemed lawful by the court, damages were claimed on the equivalent of the German concept of *Sonderopfer* (special sacrifice), the claimant arguing therefore that it was particularly affected by such acts of the Commission, far more seriously than other market participants in the Community. **3**

Decision

The court was unconvinced by the claimant's arguments. In particular, it denied that the measures taken by the Commission amounted to unlawful expropriation, thereby infringing upon the claimant's 'right to property and its right to carry on an established business'. While such rights were indeed protected under Community law, the negative effect the measures had upon the sales of the claimant's products 'cannot be regarded as an infringement of the substance of those rights, particularly where, as in this case, the detrimental effect is merely an indirect consequence of a policy with which *aims of general public interest* are pursued which vary greatly, depending on the economic factors affecting market trends and on the general direction of the common agricultural policy' (para 22, emphasis added). **4**

2 *Embassy Limousines*, para 75 f.

3 These arguments were obviously based on the German concept of *Erfolgsunrecht* (unlawfulness resulting per se from a harmful result), which comes as no surprise as the (Belgian) claimant was represented by a German law firm.

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Comments

5 While further aspects of this ruling will be addressed elsewhere in this volume,[4] it is noteworthy here because it effectively addresses the German concept of *Erfolgsunrecht* when dealing with (and ultimately rejecting) the claimant's argument that the impact of the Commission's measures on its property and business per se made them unlawful. While the court acknowledged that the right to property is 'one of the fundamental rights guaranteed by the Community legal order',[5] the measures complained of did not 'encroach on the substance of those rights'. The losses incurred were merely a secondary consequence of a legitimate policy and therefore not compensable.[6]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 For around 90 years, the sport of cricket has been played on a ground just beside a public road. During these years, there have been no reported incidents of a ball hitting anyone on the road until V, a lady standing outside her house, is struck and injured by a ball which is hit out of the ground. It is very rare for a ball to be hit out of the ground and onto the road: six instances have been reported in the last 28 years. The cricket field, at the point at which the ball left it, is protected by a 2 m high fence, but the upward slope of the ground is such that the top of the fence is some 5 m above the cricket pitch. The distance from the batter to the fence is about 70 m. V argues that the A, the occupier of the cricket ground, violated his required standard of conduct by failing to take sufficient precautions to prevent cricket balls from escaping the ground.[1]

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4 3f/29 nos 2–6.

5 Cf also now art 17 CFREU.

6 Cf also ECJ 9.9.2008, joined cases C-120/06 P and C-121/06 P, *FIAMM and Others v Council and Commission* [2008] ECR I-6513, para 183 f: '[T]he right to property and the freedom to pursue a trade or profession … do not constitute absolute prerogatives, but must be viewed in relation to their social function. … [A] Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community.'

1 Scenario of the English case: *Bolton v Stone*, HL, 10 May 1951, [1951] AC 850, above 3a/12 nos 1–6 with comments by *K Oliphant/V Wilcox*. See also the Scottish case: *Lamond v Glasgow Corporation*, 1968 SLT 291, below 3f/13 nos 1–4 with comments by *M Hogg*.

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Solutions

a) Solution According to PETL

The criteria relevant in assessing whether the required standard of conduct has been attained are listed in art 4:102(1) PETL: 'The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods'. **2**

In the present scenario, the question is thus whether a reasonable person responsible for the cricket ground would have taken additional measures to prevent cricket balls from escaping from the ground, when taking into account the criteria mentioned in art 4:102(1) PETL. **3**

Under the PETL, on the one hand, the interest of potential victims in being protected against injuries to their personal integrity is to be taken into account. It is to be balanced, in line with the circumstances of the case, against the freedom to organise and engage in sports such as cricket. Bodily integrity enjoys the highest protection under the PETL, see art 2:102(2) PETL. However, in the last 28 years, there were only six occasions in which a ball was hit over the fence, and in 90 years no injury has been reported. The risk of being injured by a cricket ball escaping from this ground was thus extremely low, as was the number of potential victims and, arguably, the severity of any potential injuries. The nature of the protective fence in question was such that it was effectively equivalent to a 5 m high fence, and was thus as high as it could practically be without undertaking major rebuilding work. The distance between the batter and the fence was considerable. Although no precise data is provided in the scenario, it can be assumed that the costs of further protective measures assuring that cricket balls do not escape the ground would have been high, in particular when compared to the low risk of injury for third parties. An analysis under the PETL would thus arguably lead to the result that the A, the occupier of the cricket ground, did not violate their required standard of conduct.[2] **4**

This case illustrates the interaction of the criteria mentioned in art 4:102(1) PETL, none of them having absolute priority over the others, and the balancing of interests often necessary to determine the required standard of conduct. **5**

2 This result corresponds to the outcome reached by the House of Lords.

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b) Solution According to the DCFR

6 Article VI–101, the basic rule for extra-contractual liability of the DCFR, provides: '(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage *intentionally or negligently* ...'.[3] Pursuant to art VI–3:102(b) DCFR, conduct is negligent when it does not 'amount to such care as could be expected from a reasonably careful person in the circumstances'. Like the PETL, the DCFR therefore uses an objective standard of care.[4] Regarding the burden of proof, the basic rule for extra-contractual liability in art VI–101 DCFR presupposes 'that the injured person has to set out, and if need be, prove the requirements which have to be satisfied if there is to be a right to reparation'.[5]

7 Unlike art 4:102(1) PETL, the text of the DCFR does not provide a list of indicative factors to take into account when deciding whether a particular act achieves the required standard or whether fault can be established. According to the drafters of the DCFR, '[t]he question of what reasonably careful conduct means under the circumstances of each individual case is affected by several factors which are beyond conclusive enumeration'.[6] Establishing a 'conclusive list of deciding factors [would be] impossible'. The commentary further states that '[t]he assessment of negligence in particular cases must therefore remain with the courts, whose assessment of what constitutes careful conduct or conduct without due care in a given set of facts may quite properly change over time'.[7]

8 The argument under the DCFR could thus be similar to that exposed above under the PETL. In the absence of precise criteria determining misconduct, however, any further prediction of the solution of the above case under the DCFR would be purely speculative.

31. Comparative Report

1 All the reporters submitted cases in this sub-category except those for Belgium and Finland. For the latter legal systems, the criteria involved in the assessment of the required standard of conduct and their interplay can be discerned from cases submitted in subsequent parts of general category 3: Criteria for Assessment. Indeed, other cases in this general category further illuminate the criteria employed in *all* the selected legal systems and their interplay.

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3 Emphasis added.
4 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).
5 *C v Bar/E Clive*, DCFR, art VI–1:101, Comment A (p 3086).
6 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406 f).
7 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3407).

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There is a broad consensus across jurisdictions about the relevant criteria and how they interact. Almost all reports accepted that the court's task in deciding the required standard of conduct is to weigh in the balance a number of different considerations, none of which is on its own decisive.[1] The highlighting of specific considerations in 3b ff below is not intended to suggest the contrary, but merely to allow the different aspects of this complex inquiry to be addressed in turn. It should be borne in mind that each factor is to be looked at in its relationship with the others and not in isolation.[2] The law treats each as a variable, and is concerned with the degree to which each aspect is present on specific facts; it does not stipulate for an absolute quantity of each.[3] **2**

In some countries, there is a more or less standardised list of relevant considerations that are applied in the courts or at least itemised in scholarly commentaries.[4] By and large, these include – or substantially overlap with – the factors identified in 3b ff: the nature and value of the protected interest involved (3b); the dangerousness of the activity in question (3c); the foreseeability of the damage (3d); any relationship of proximity or special reliance between those involved (3e); and the availability and the costs of precautionary or alternative methods (3f). In broad terms, what they entail is a complex balancing exercise in which the risk for which the defendant is responsible is weighed against the negative consequences (not just the economic costs) flowing from the measures required to reduce or eliminate it.[5] In Greece, France and Belgium, there is no generally recognised list of criteria but rather the repeated incantation of a simple (though rather vague) formula: good faith, correct conduct, or the standard of the reasonable careful person (or *bonus pater familias*).[6] It is accepted, however, that some such criteria guide the reason- **3**

1 See eg Austria 3a/3 no 2f; Netherlands 3a/8 no 4; England and Wales 3a/12 no 3; Scotland 3a/13 nos 2f and 5; Ireland 3a/14 nos 16 and 20; Norway 3a/17 no 3; Sweden 3a/18 no 3; Lithuania 3a/22 no 3f; PETL/DCFR 3a/30 nos 5 (referring to art 4:102(1) PETL) and 7 (referring to the commentary on art VI.–3:102(b) DCFR), accepting that various factors have to be weighed, but rejecting the idea of a conclusive list). Cf France 3a/6 no 7: *Cour de cassation* will never explicitly weigh different criteria against one another.

2 See especially Netherlands 3a/8 no 4; England and Wales 3a/12 no 6; Ireland 3a/14 no 6; Norway 3a/17 no 3; Sweden 3a/18 no 3; Latvia 3a/21 no 5.

3 See especially England and Wales 3a/12 no 6; Ireland 3a/14 no 6; Malta 3a/15 no 7; Estonia 3a/20 no 2.

4 See especially Historical Report 3a/8 no 3; Austria 3a/3 no 2f; Netherlands 3a/8 nos 2, 4; England and Wales 3a/12 no 3; Scotland 3a/13 no 2f; Ireland 3a/14 no 6; Denmark 3a/16 no 3; Sweden 3a/18 no 3; Estonia 3a/20 no 2.

5 See especially Portugal 3a/11 no 1ff; England and Wales 3a/12 no 3 (Learned Hand formula); Scotland 3a/13 no 2; Ireland 3a/14 nos 6 and 9; Denmark 3a/16 no 3. See also Greece 3a/5 no 5 (approach in environmental law).

6 Greece 3a/5 no 4; France 3a/6 no 3; Belgium 3a/7 no 1f. The French report contains an exceptionally interesting analysis of why this may be so: France 3a/6 no 3ff. See also art VI.–3:102(b) DCFR

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able person's practical judgement, even if not explicitly set out. Still, it is noteworthy that some authors and some legal traditions so tenaciously oppose the listing of relevant criteria.

4 It is generally accepted that, though the fact of an accident may in some legal systems raise an inference of a failure to meet the required standard of conduct,[7] whether the standard has actually been attained turns on how the accident was caused. It entails a case-by-case approach, having regard to the specific circumstances of the individual claim.[8] The Historical Report provides a classical illustration from Roman Law: where the defendant set fire to his stubble field in order to scorch it, and the fire spread to the neighbour's field and burnt his crop, the outcome depends on the reasonableness of the defendant's activity. According to Paulus, the defendant would be negligent if it was a windy day or if he failed to watch over the fire, but not if he took all the necessary precautionary measures and it was a sudden gust of wind (on an otherwise wind-still day) that made the fire spread.[9] It is interesting that we see already in this early discussion of negligence something similar to the distinction between activity level and level of care that is central to modern economic analysis of law.[10]

5 We also see modern courts making the same adjustments in what is required conduct in light of the circumstances in which the defendant was placed. Allowance has to be made for the need for split-second judgement and rapid reactions in contexts such as dangerous sports[11] or public emergencies.[12] But it is not enough for the defendant to invoke special transient external factors if he ought reasonably to have taken steps to overcome them himself.[13]

6 In some legal systems, the set of relevant factors is adapted according to the activity in which the defendant is engaged or the type of situation in question.[14] Specific case illustrations of adapted standards were provided for, inter alia, me-

('such care as could be expected from a reasonably careful person in the circumstances of the case') and PETL/DCFR 3a/30 no 7, noting that the DCFR commentary asserts the impossibility of establishing a conclusive list of deciding factors.

7 As under the Common law principle of *res ipsa loquitur*: England and Wales 1/12 no 5; Scotland 1/13 no 9; Ireland 1/14 no 6; Malta 1/15 no 4.

8 Historical Report 3a/1 no 3; Austria 3a/3 no 3; Greece 3a/5 no 4; Netherlands 3a/8 nos 1ff and 5ff.

9 Historical Report 3a/1 no 1ff.

10 The classic treatment is *S Shavell*, Strict Liability Versus Negligence, 9 J Leg Stud 1 (1980).

11 Austria 3a/3 no 1ff; France 3a/6 no 1ff.

12 England and Wales 3f/12 no 4ff.

13 See eg Germany 3a/2 no 1ff (notary disturbed by air raid warning); Switzerland 3a/4 no 1ff (doctor in emergency ward); Ireland 3a/14 no 1ff (storm blowing down cables); Czech Republic 3a/24 no 14 (winter conditions).

14 Netherlands 3a/8 no 3; Italy 3a/9 no 3.

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dical professionals,[15] participants in dangerous sports or games,[16] employment relationships,[17] bank-client relationships,[18] landowners,[19] and defamatory publications.[20]

15 Switzerland 3a/4 no 1 ff; Italy 3a/9 no 1 ff; Lithuania 3a/22 no 1 ff.
16 Austria 3a/3 no 1 ff. See also Poland 3e/23 no 21.
17 Scotland 3a/13 no 2 f.
18 Poland 3a/23 no 1 ff.
19 Ireland 3a/14 nos 12 ff (nuisance) and 19 (occupiers' liability).
20 Netherlands 3a/8 no 5 ff; Latvia 3a/21 no 1 ff.

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3b. The Nature and Value of the Protected Interest Involved

1. Historical Report

Paulus, D 9, 2, 22 pr

Facts

1 The defendant killed a slave who had been sold by his owner and was supposed to be delivered to the other contracting party under a penalty. Consequently, the owner had to pay the contractual penalty due to the impossibility of delivering the slave and therefore he asked for higher compensation.

Decision

2 The jurist Paulus[1] affirmed that the amount of the penalty had to be taken into account as well when calculating the amount of the total damage under the *lex Aquilia*.

Comments

3 In this decision the contractual penalty for the deliverance of the slave, in itself an economic loss, was considered by the Roman jurist Paulus while calculating the compensation to be paid for the killing (*occidere*) of a slave under the First Chapter of the *lex Aquilia*.

4 However, compensation for economic losses was only granted under specific circumstances. As a general rule, a claim under the *lex Aquilia* could only arise if an act fell within the scope of one of its chapters, most importantly Chapters one and three. The situations covered included the killing of a slave or cattle (*occidere*) and the damaging of someone else's property by burning (*urere*), breaking (*frangere*) or wounding (*rumpere*).[2] All had in common that they required damage to a specific piece of property. Therefore, primary economic losses, which were not consequential upon the infringement of property (pure economic losses), could not be recov-

1 Iulius Paulus, 1st half of the 3rd century AD.

2 Eventually, 'rumpere' was interpreted as 'corrumpere' and comprised all forms of damaging property not already covered by the first chapter; cf *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 16 ff; *R Zimmermann*, The Law of Obligations. Roman Foundations of the Civilian Tradition (1990) 983 ff.

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ered under the *lex Aquilia*.[3] Although the jurists also granted analogous *actiones in factum* modelled on the *actio legis Aquiliae* in cases where there was no actual corruption of property in the narrow sense, the tortfeasor's conduct still had to be related to a specific corporeal asset in the plaintiff's property.[4] For instance, if somebody released someone else's slave from his bonds moved by pity and thus enabled the slave to run away, he could not be said to have 'corrupted' the slave. Nevertheless, he caused the owner damage that related to the corporeal asset 'slave' and was therefore liable under an *actio in factum*.[5] In cases that lacked this relation to a corporeal asset, the *actio de dolo* provided for some relief but was confined to (rare) situations of fraudulent behaviour.[6]

In the present case, the claimant's damage, ie the contractual penalty, was a consequence of the defendant's act constituting *occidere* under the first chapter of the *lex Aquilia*. The jurist Paulus could therefore take it into account when calculating the amount of compensation awarded.[7] **5**

In conclusion, whereas property enjoyed comprehensive protection by the *lex Aquilia*,[8] compensation for economic losses was only possible when they were consequential on damage to a specific piece of property or at least related to it. Thus, the nature of the protected interest played a role for liability under Roman law. **6**

3 In detail *H Kaufmann*, Rezeption und Usus modernus der actio legis Aquiliae (1958) 13 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1022; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 216 f; *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 18.

4 *H Kaufmann*, Rezeption und Usus modernus der actio legis Aquiliae (1958) 47; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1022; cf *Ulpian*, D 9.2.5.3: In this specific case, Ulpian held that a father could recover his loss of income and medical expenses arising due to the fact that his son was injured tortiously. (Although, according to Roman law, the *filius familias* was not the father's property, he was at least in his power [*patria potestas*] and therefore at least in a similar position as a slave.) However, the damage is still consequential upon the son's physical injury and is not a pure economic loss in the sense of modern law.

5 Inst 4.3.16; similar cases are *Alfenus*, D 19.5.23; *Ulpian*, D 9.2.27.21, *Proculus*, D 41.1.55.

6 *H Kaufmann*, Rezeption und Usus modernus der actio legis Aquiliae (1958) 47; generally on the *actio doli* cf *M Kaser*, Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht (2nd edn 1971) 627 f and *A Watson*, Actio de dolo and actiones in factum, 78 (1961) ZSS 392 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 664 ff.

7 Generally on the '*quod interest*' cf *R Knütel*, Stipulatio poenae (1976) 241 f; *TJ Gerke*, Geschichtliche Entwicklung der Bemessung der Ansprüche aus der Lex Aquilia (1957) 172 f; *H Honsell*, Quod interest im bonae-fidei-iudicium (1969) 143 fn 8.

8 Even *culpa levissima* of the tortfeasor gave rise to liability under the Lex Aquilia, cf *Ulpian*, D 9.2.44 pr: 'In lege Aquilia et levissima culpa venit'.

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Wolfgang Adam Lauterbach, Collegium theoretico-practicum, Lib IX, Tit II, XV

Facts

7 An advocate offered bad advice to a client causing him damage.

Decision

8 Lauterbach[9] held that the client could rely on the *actio in factum* and recover his damage.

Comments

9 Due to the existence and development of particular (customary) laws (*ius proprium*), the jurists of the era of *usus modernus*[10] (17th and 18th century) had to find a compromise between the learned Roman law (*ius commune*[11]) and their own customary laws by adapting the rules of Roman law to a certain extent. The case at hand is discussed by Wolfgang Adam Lauterbach, one of the most influential jurists of the *usus modernus pandectarum*.

10 According to the tradition of classical Roman law (which was still respected in the Middle Ages and early modern time), pure economic loss could in principle not be recovered,[12] so that the nature of the protected interest remained a decisive factor for establishing liability. As this case shows, the jurists of the *usus modernus* however no longer respected the boundaries applied in classical Roman law. A wide interpretation of the Roman sources[13] cleared the path for the *lex Aquilia* to

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9 German jurist, 1618–1678.

10 The period was named after the book 'Usus modernus pandectarum' by *Samuel Stryk* in 1690; cf *H Schlosser*, Neuere Privatrechtsgeschichte (10th edn 2005) 76.

11 In general see *R König*, Das allgemeine Schadenersatzrecht im Mittelalter im Anschluss an die Lex Aquilia (1954).

12 *H Kaufmann*, Rezeption und Usus modernus der action legis Aquiliae (1958) 19 f; *N Jansen*, Die Struktur des Haftungsrechts (2003) 274 f and fn 24; there is only one isolated case to suggest elsewise, namely *G Durantis*, Speculum iudiciale, Lib IV, Partic IV, De Iniuriis et damno dato § 2 sequitur, 14: The tortfeasor threw rubbish in front of the victim's door. Subsequently, the public authorities imposed a fine on the victim because of infringement of a statute dealing with waste removal; the victim was allowed to recover this fine. However, the fine can also be seen as consequential on the impairment of the victim´s property. It is thus a case on the borderline between consequential and pure economic loss. For the discussion of similar problems in modern law see *H Koziol*, Beeinträchtigung des Eigentümers ohne Beschädigung oder Entziehung der Sache: Eigentumsverletzung oder bloßer Vermögensschaden? Festschrift Fenyves (2013) 241 ff.

13 Particularly of Inst 4.3.16: '... sed si non corpore damnum fuerit datum neque corpus laesum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa neque utilis Aquilia,

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become a general comprehensive regime for all kinds of damages including pure economic losses.[14] This is all the more astonishing as the client's damage could just as well have been recovered by way of the *actio mandati*, a contractual claim arising from the *mandatum* between the *advocatus* and the client.[15] Nevertheless, Lauterbach based his decision on the delictual statutory law of the *lex Aquilia*. Although he and his contemporaries did not grant the *actio directa*, ie the *actio legis Aquiliae*, but the analogous *actio in factum*, it was generally recognised that there was no practical difference between the *actio directa* (*legis Aquiliae*) and the *actio in factum*. It was only a matter of nomenclature.[16] As a matter of fact, the jurists extended the original scope so extensively that another leading author of the *usus modernus*, Christian Thomasius, rejected any link between the Roman *lex Aquilia* and the way it was actually applied in his days and even titled his treatise in 1703 '*Larva legis Aquiliae*' ('The mask of the *lex Aquilia*'), which he wanted to 'tear off'.[17]

The view of the *usus modernus* was concurrent with that of natural lawyers, **11** such as Hugo Grotius or Samuel Pufendorf, whose accomplishment it was to formulate clear and comprehensive general clauses that also provided for the compensation of any kind of damage.[18]

In short, the jurists of the *usus modernus* and natural law authors were willing **12** to grant compensation regardless of the interest in question. It was then the German

placuit eum qui obnoxius fuerit in factum actione teneri ...' which – taken out of context – basically refers to any kind of damage.

14 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1024; *N Jansen*, Die Struktur des Haftungsrechts (2003) 292ff; for examples cf *H Kaufmann*, Rezeption und Usus modernus der action legis Aquiliae (1958) 46ff; cf *S Stryk*, Usus modernus pandectarum, in: Opera Omnia (1837ff) Lib IX, Tit II, § 1: 'omnium damnorum reparatio ex hoc petatur' which explicitly refers to all kinds of damages; it is assumed that the jurists were not aware of this discrepancy with the classical Roman view, cf *H Kaufmann*, Rezeption und Usus modernus der action legis Aquiliae (1958) 62f.

15 *N Jansen*, Die Struktur des Haftungsrechts (2003) 293.

16 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1023.

17 Cf *R Zimmermann*, Christian Thomasius, the Reception of Roman Law and the History of the Lex Aquilia in: M Hewett (ed), Larva Legis Aquilia – The mask of the lex Aquilia torn off the action for damage done (2000) 64.

18 Most famously *H Grotius*, De jure belli ac pacis (1625) Lib II, cap 17: 'Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo quod aut homines communiter, aut pro ratione certae qualitatis facere debent. Ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur.', a formula which left its marks on § 1295 Austrian ABGB and art 1382 French CC; cf *R Feenstra*, Zum Ursprung der deliktischen Generalklausel in den modernen europäischen Kodifikationen, ZEuP 2001, 585ff.

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Romanist scholarship of the 19th century ('Pandectism') which advocated a return to the approach of classical Roman jurists.[19]

2. Germany

Bundesgerichtshof (Federal Supreme Court) 4 February 1964, VI ZR 25/63

NJW 1964, 720

Facts

1 The claimant was a farmer who bred chickens. The two defendants were a construction enterprise and its employee. For construction work on a road, the defendants had to cut some trees. Due to the inadvertence of the employee, one tree fell on, and cut, an electric wire, which led to the claimant's farm. The wire itself belonged to the regional power company. Because of the lack of electricity, the farmer's breeding machinery did not work and from the 3,600 eggs in the machinery, no saleable chickens could be produced. The farmer claimed compensation for the loss equivalent to the income which 3,000 freshly hatched chickens would have generated (DM 0.60 per chick = DM 1,800).

Decision

2 The farmer was entitled to compensation of the property damage in the claimed amount. There was still a recoverable property damage caused by the defendants although they had directly damaged only the wire of the power provider. The farmer merely suffered indirect damage. Nonetheless property of the farmer was damaged because the eggs could no longer be used to produce chickens. The cutting-off of necessary water, electricity or similar, upon which goods depend, is sufficient to entitle a party affected to compensation if the goods suffer damage as a result thereof. By contrast, a mere interruption of production, where the lack of electricity or similar does not damage the goods, causes a pure economic loss which would be non-recoverable.

3 In addition, the farmer was not obliged to take precautions against any possible power failure. The fact that he did not have an emergency generator did not constitute contributory negligence.

4 The court also stated that the interruption of electricity did not constitute an infringement of the right of an established and operating business because the infringement was not a direct attack on the business.

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19 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1036; this is still reflected in § 823 German BGB.

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Comments

The result is still disputed[1] but accepted by the clearly prevailing view.[2] The differentiation between indirectly caused property damage (recoverable) and indirectly caused pure economic loss (irrecoverable) corresponds to the distinction which the BGB draws between absolutely protected rights, such as life, bodily integrity, freedom, property, on the one hand, and pure economic loss, on the other. The latter is recoverable in tort only under narrow conditions, primarily if the tortfeasor acted both with intent and in violation of good morals.[3] The underlying reason for this is to keep the circle of potential claimants and the amounts of compensation within reasonable boundaries. This latter reasoning also extends to the scope of the so-called right of an established and operating business (*Recht am eingerichteten und ausgeübten Gewerbebetrieb*). A merely negligent infringement of this right usually does not constitute a direct intervention which alone founds a claim for compensation of the economic loss that the business has suffered.[4] Thus, the intention to injure can outweigh the otherwise lack of protection of certain rights such as pure economic interest. 5

3. Austria

Oberster Gerichtshof (Supreme Court) 6 September 1972, 1 Ob 176/72
JBl 1973, 579

Facts

The defendant, a construction firm, damaged an electricity cable in the course of building work leading to several hours of mains failure and a production downtime for the suing company, which demanded compensation therefor. 1

Decision

The defendant was not held liable. To avoid a proliferation of liability, the Supreme Court holds the opinion that a distinction has to be made between direct and indirect damage under tort law. Indirect damage occurs as a side effect in a sphere of 2

1 Contra any liability in such cases *E Picker*, JZ 2010, 541, 548 fn 53.

2 See eg *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 149; *D Looschelders*, Schuldrecht Besonderer Teil (8th edn 2013) no 1211; *C Grüneberg* in: Palandt BGB (73rd edn 2014) Vor § 249 no 52.

3 See § 826 BGB; other cases of compensation of pure economic loss in tort are regulated by specific provisions, for instance § 33 (3) GWB or § 9 UWG.

4 See already BGHZ 29, 65.

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interest not protected by the prohibition. As the claimant was not the owner of the electricity cable, the defendant did not violate any absolute right of the claimant. The applicable provisions, however, are not intended to protect everybody who has a mere obligatory relationship with the electricity provider. The damage is hence outside the norm's scope of protection and therefore not recoverable.

Comments

3 Although the general clause in § 1295 ABGB states that everybody is entitled to claim compensation for damage inflicted unlawfully and culpably upon him,[1] it is well-recognised these days that only absolute rights (personality rights such as life, physical integrity or honour, rights in rem and intellectual property rights) are comprehensively protected under tort law.[2] However, even within this category gradations exist regarding the required standard of care: eg, if personality rights such as life, health and personal integrity are at risk, higher duties of care have to be fulfilled than when it comes to property rights.[3] Pure economic loss on the other hand, ie loss not resulting from the infringement of an absolute right, is in principle not recoverable in tort.[4]

4 This principle is demonstrated by the well-known electricity cable cases, one of which is the case at hand: only the directly damaged proprietor of the cable is entitled to compensation, as his absolute property right has been violated. The subscriber on the other hand, who solely suffers a loss in revenue, hence pure economic loss, does not recover damages, because he is only indirectly damaged.[5] The damage is beyond the infringed rule's scope of protection, as this is solely intended to protect absolute rights.[6] However, if absolute rights of the subscriber himself have

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1 *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law, Basic Texts (2011) § 1295 (1) Austrian Civil Code: 'Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by the breach of a contractual duty or independently of any contract.'

2 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 1/24; *idem*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 f; *G Kodek* in: A Kletečka/M Schauer, ABGB-ON (edn 1.01, 2013) § 1294 no 8 ff.

3 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/29.

4 Cf *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 2; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 20 ff; *idem*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/47 ff; OGH 1 Ob 562/92 = SZ 65/76; OGH 4 Ob 2259/96a = SZ 69/229.

5 On indirect damage *K-H Danzl*, Mittelbare Schäden im Schadenersatzrecht, ZVR 2002, 363 ff.

6 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/40; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 13.

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been violated – eg because products spoil in his freezer due to a power cut – he is directly damaged as well and hence entitled to compensation.[7]

Nevertheless, in exceptional cases pure economic loss may be recoverable even under tort law,[8] in particular when an intentional infliction of damage *contra bonos mores* is concerned (§ 1295 (2) ABGB), knowingly giving false advice (§ 1300 sent 2 ABGB) or a protective statute is violated (§ 1311 ABGB), if such is precisely intended to protect pure economic interests. 5

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 11 March 1980

ATF 106 II 75

Facts

While ploughing his field with a tractor, A broke an electric cable of the local electricity provider. The factories V1 and V2 had no electricity for 25 hours and their activities were completely interrupted. Both claimed damages for indirect economic loss (*Vermögensschaden*). V1, an asphalt producer, claimed further an amount of CHF 4,000 (€ 3300) for asphalt, which became unusable. 1

The cantonal judge dismissed V1 and V2 conclusions on indirect economic loss and awarded V1 CHF 4,000 for the spoiled asphalt. 2

Decision

V1's and V2's appeal was dismissed by the Supreme Court and the judgment of the cantonal court was confirmed. 3

A violated art 58 of the Federal Road Traffic Act (LCR). According to this norm, the keeper of a vehicle is liable for damage to persons and material damage. The legal literature and the insurance practice interpret this norm restrictively. 4

Swiss law commonly distinguishes between (i) damage to persons, (ii) material damage and (iii) other forms of damage. As the latter (iii) is not mentioned in art 58 LCR, damages for pure economic loss are excluded. Consequently, V1 and V2 are not entitled to damages for their economic loss; V2 was awarded CHF 4,000 for the unusable asphalt, as this is considered as material damage. 5

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7 *R Welser*, Der OGH und der Rechtswidrigkeitszusammenhang, ÖJZ 1975, 37, 42; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/41; cf OGH 8 Ob 49/72 = JBl 1973, 581; not considered by OGH 8 Ob 119/75 = JBl 1976, 210.

8 Fundamental *H Koziol*, Schadenersatz für reine Vermögensschäden, JBl 2004, 273 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 2.

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Comments

6 For the comment, see ATF 102 II 85 (1976) at 3b/4 nos 12–15.

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 2 March 1976

ATF 102 II 85

Facts

7 The construction company A broke an underground electric cable of a public energy provider. Previously, it had not verified the plans indicating the cable network. The electricity supply of the factories V1 and V2 was interrupted for several hours. V1 and V2 file a claim against A for approx CHF 30,000 (about € 25,000).

8 The cantonal court accepted V1's and V2's claim.

Decision

9 The appeal filed by A was dismissed by the Supreme Court and the judgment of the cantonal court confirmed.

10 The main reasoning of the Supreme Court concerns the unlawfulness of A's act. It referred to art 239 of the Swiss Penal Code (SPC), which states that one should refrain from acts which stop, trouble or endanger, intentionally or by negligence, the exploitation of installations for the distribution of water, light, energy or heat. The purpose of art 239 SPC is to protect the interests of enterprises and subscribers of such services. As V1's and V2's interests in energy supply were violated, A's act is unlawful. Consequently, A's argument, according to which V1's and V2's damage was indirect, was irrelevant.

11 Further, the Supreme Court stated that unlawfulness does not necessarily include the violation of a subjective right. It is sufficient that the damaging act breached a norm the aim of which is to protect the victim.

Comments

12 This case is a reminder that Swiss tort law makes a distinction between two kinds of damage. On the one hand, there is the 'primary damage' which – directly and personally – affects the victim of another's damaging behaviour. On the other hand, there is the *Reflexschaden* (*dommage réfléchi*/*dommage par ricochet*) which – indirectly – affects a third person, who is often close to the direct victim (close affectively, contractually, by distance, etc), but who is not directly concerned by the initial tort law relation, which connects the victim and the author (*res inter alios acta*).

13 In principle, in Swiss tort law, only the victim of a 'primary damage' can obtain compensation from the tortfeasor. However, there are exceptions to this principle. According to academic literature, the exceptions to this fundamental principle are

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based on the 'violation of a specific rule of protection'[1] (*Schutzzwecklehre, norme protectrice spécifique*), which can be written or unwritten and can have its roots in private, public or criminal law. The main cases of such a specific protection rule are: the 'means of support'[2] (*Versorgerschaden, perte de soutien*) of art 45 al 3 of the Swiss Code of Obligations (SCO), the 'satisfaction'[3] (*Leistung von Genugtuung, tort moral*) of art 47 SCO (to dependants of the deceased) and art 49 SCO (to dependants of the severely injured victim), the 'nervous shock'[4] (*Schockschäden, choc nerveux*) protected by art 122ff SPC (*assault, Körperverletzung, lésions corporelles*) and the 'cable break'[5] (*Kabelbruch, rupture de cable*) which can be protected by art 239 SPC (disruption of public services, *Störung von Betrieben, die der Allgemeinheit dienen, entrave aux services d'intérêt général*).

In the first and more recent case presented here (ATF 106 II 75 (1980) at 3b/4 nos 1–6; see also ATF 114 II 376 [1988]), the Supreme Court refused to repair the ricochet damage, whereas in the present case, which had been decided four years earlier and which is based on very similar facts, our judges admitted reparation. How to explain this difference? In the present case the judges considered that a penal norm had been violated, while they did not in the more recent case. Unfortunately, they failed to explain the reasons for this difference. According to a generally admitted principle, the violation of *any norm* of the legal system protecting the victim is considered as unlawful and leads (if all the other conditions are fulfilled) to the repara- **14**

1 *H Landolt*, Kommentar zum schweizerischen Zivilrecht (Zürcher Kommentar) Art 45-49 OR (3rd edn 2007) no 98; *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 83, no 356; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 87 f, no 14.21; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 17; *C Müller*, La responsabilité civile extracontractuelle (2013) 38, no 103; *F Werro*, La responsabilité civile (2nd edn 2011) 44, no 130.

2 See ATF 112 II 118 (1986). *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 82, no 352 and 83 ff, no 357 ff; *H Honsell*, Schweizerisches Haftpflichtrecht (1995) 8; *C Müller*, La responsabilité civile extracontractuelle (2013) 38, no 103; *F Werro*, La responsabilité civile (2nd edn 2011) 44, no 129; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 18.

3 *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 84, no 359; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 87, no 14.21; *C Müller*, La responsabilité civile extracontractuelle (2013) 39, no 103; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 19. For some important questions regarding satisfaction in Swiss tort law, see, for instance, *C Chappuis/B Winiger/A Campi* (eds), Le tort moral en question (2013).

4 See ATF 112 II 118 (1986). *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 87, no 14.21; *C Müller*, La responsabilité civile extracontractuelle (2013) 39, no 103.

5 See for instance ATF 102 II 85 (1976) at 3b/4 nos 7–15; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 88, no 14.21; *C Müller*, La responsabilité civile extracontractuelle (2013) 39, no 103; *W Fellmann/A Kottmann*, Schweizerisches Haftpflichtrecht I (2012) 111, no 303.

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tion of the inflicted damage. The judges seem to have ignored this principle in the more recent case (ATF 106 II 75 [1980]). As a result, there remains uncertainty about the outcome of future similar cases.

15 As to the principle that consequential damage is not reparable, it is maintained in both decisions, as in the present case the application of the penal norm transformed the consequential victim into a primary victim. He can be considered as primary, as he is directly protected by art 239 SPC.[6]

5. Greece

Efeteio Kritis (Crete Court of Appeal) 427/2007

EllDni (49) 2008, 223

Facts

1 V, owner of a poultry house in Chania, Crete, had put the 19,000 hens he owned into different booths in each one of which he had installed several ventilation machines. In order to meet the needs of his poultry house, V had signed a contract of electricity supply with an electricity company A. On 5 September 1999, there was a breakdown in the electricity supply network, which resulted in an approximately four-hour power cut. Following the power cut, the power supply generator was activated immediately. However, due to a petroleum shortage in the generator, the ventilation system of the poultry house failed. As a result, a great number of hens (4,360) died of suffocation.

Decision

2 The court held that it derives from the combination of arts 914, 297 and 298 GCC that, whosoever unlawfully and culpably destroys property belonging to another, is obliged to pay damages for the actual damage as well as for lost profits. In the present case the electricity supply network breakdown was due to a short-circuit in the insulators of the local network of power supply provoked by the accumulation of dust and salt, for which A's employees were liable. In particular the said employees, violating their specific legal obligation to show care and providence as well as the general duty imposed by art 914 GCC not to culpably harm third parties, not only neglected to perform preventive controls in the power supply network but also neglected to conduct maintenance to it in order to eradicate any danger which ultimately led to the death of the hens. Thus, A was held vicariously liable for the loss

6 See similarly ATF 101 1b 252 (1975).

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of the hens. Nevertheless, V was held jointly liable to the extent of 30%, as he had neglected to supply the generator with the necessary quantity of petroleum in order for it to properly function in case of need.[1]

Comments

In Greece, the principle of *cumul* (free concurrence of claims) exists; thus, a plaintiff can base his claim either in contract or in tort if the facts of the case can lead to the conclusion that, even without the contract, the behaviour would have been tortious. The present case was based on tort, as deduced from the application of art 914 GCC. **3**

In this context, the GCC does not draw any distinction between absolutely protected rights, such as life, bodily integrity, freedom, and property, on the one hand, and pure economic loss, on the other; all damage has to be compensated. There is a distinction in Greek law between directly affected persons whose damage is recoverable and indirectly affected persons whose damage, as a rule, is non-recoverable,[2] as they fall outside the ambit of the protective aim of the infringed rule of law.[3] However, the court did not deal with this distinction in the present case and granted damages, although the negligent behaviour of the defendants' employees damaged the insulators and the plaintiff was only indirectly damaged, in the sense that the breakdown in the electricity supply network had as a direct consequence the collapse of the ventilation system of the poultry house unit. The death of the hens was the result of non-ventilation and thus it was indirect damage. **4**

1 It is accepted in Greek law (see, among others, *V Peraki*, in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 300, no 5), that the fault of the victim can be demonstrated before, during or after the sustained damage, as there is no relevant determination of the time the victim should show negligent behaviour in relation to art 300 GCC (on concurrent fault).

2 According to Greek law, it is deduced from arts 914, 297 and 298 GCC that only the person who has been directly prejudiced may ask for reparation. On the contrary, the person who has been indirectly prejudiced, that is the one who has sustained damage from the damage of a legal good appertaining to another person, has a right to damages only if such a right is specifically provided by law, as in arts 928 subpara b and 929 subpara b GCC according to which, in the case of the death of a person, the tortfeasor is obliged to pay damages to any person who was entitled by law to claim maintenance or the performance of services from the victim (art 928 subpara b GCC) and, in the case of bodily or mental injury, damages must also be paid to a third party who was entitled by law to claim the performance of services from the victim and is now deprived of them (art 929 subpara b GCC). (See relatively, among others, *P Kornilakis*, Law of Obligations, Special Part I (2002) § 102 4 610 ff).

3 See *M Stathopoulo*s, Law of Obligations, General Part (2004) § 15 no 57.

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6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 18 May 2000

98-12.802, Bull civ II, no 85

Facts

1 While rock climbing, a person fell, taking the climber behind him with him. The second climber was injured and he brought a claim against the first climber and his insurer. The appellate denied compensation on the ground that the plaintiff had not demonstrated the defendant's fault. This decision was challenged in front of the *Cour de cassation*.

Decision

2 The *Cour de cassation* quashed the appellate court's decision and ruled that the defendant was liable under art 1382 (now art 1240) of the *Code civil*, given that 'to bring about another climber's fall constitutes a fault' ('*le fait de provoquer la chute d'un autre grimpeur constitue une faute*').

Comments

3 This decision illustrates how little justification the *Cour de cassation* can give when it recognises or denies the existence of a fault. The blunt affirmation that the mere fact of bringing about another climber's fall constitutes a fault is difficult to reconcile with the prevailing scholarly view that fault normally consists in the violation of a duty of care. It is quite likely, however, that this bold affirmation was motivated by the type of damage suffered (bodily injury), as well as by the fact that the defendant was insured.

Cour de cassation, Chambre commerciale (Supreme Court, Commerical Division), 22 October 2002

00-12.914, Bull civ IV, no 152

Facts

4 A retail company had offered a wristwatch to its clients, which was basically a copy of a famous Cartier watch. The model, however, had fallen into the public domain as it was more than 70 years old. Cartier nevertheless sued the company and was awarded FF 500,000 (approx € 75,000) by the Paris appellate court, on the ground that the retail company had committed a fault by copying a renowned watch. The defendant brought the case before the *Cour de cassation*.

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Decision

The *Cour de cassation* upheld the appellate court's decision. Whereas the watch which had been copied was a renowned luxury good, the defendant company had turned it into a mere 'advertising gadget' and had thus damaged the product's image. This was culpable behaviour which had caused damage to Cartier, even though no property right had been infringed. 5

Comments

The existence of fault in this case was by no means evident. The defendant had violated no intellectual property right. Besides, the loss suffered by Cartier in this case, which consisted in its *image de marque* being hurt, was obviously purely patrimonial in nature. Yet, this did not prevent the appellate court and the *Cour de cassation* from finding the defendant to be at fault, even though the company had infringed no intellectual property right. This case illustrates how much French courts can force defendants to meet high standards when it comes to assessing the required standard of conduct, even when purely economic interests are at stake. 6

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 19 October 1994

92-21.543, Bull civ II, no 200; D 1995, 499, note *Gavard-Gilles*

Facts

An association with an official mission of compensating the unemployed and retired workers had organised a meeting for a company's employees to inform them of the possibilities of anticipated retirement. Following that meeting, an employee had chosen to retire early, but his benefits proved to be less than what had been told to him at the meeting. He then sued the association in order to be compensated for his loss. The appellate court turned down his claim, being of the opinion that the employee should have submitted the details of his personal situation to the association in order to be given precise advice, before taking such an important decision. The employee challenged this decision before the *Cour de cassation*. 7

Decision

The *Cour de cassation* struck down the appellate court's decision, stating that 'he who has accepted to give information must inform himself in order to inform others in full knowledge' and ruling that the association had been at fault for giving incomplete information. 8

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Comments

9 This decision and the rule it states on the duty to fully inform oneself before giving information to someone else illustrate the protection enjoyed by purely economic interests under French law and the strictness with which the existence of fault is appreciated when such interests are at stake. Admittedly, the defendant in this case had an official mission to help employees. Yet, the decision seems quite harsh.

10 This is an indication that the nature of the interest involved is usually not a decisive criterion for French courts when assessing the existence of fault. The conclusion should not be drawn from this case and the former one that purely economic interests are more protected under French law than the interest in the integrity of one's person or property: the first case in this section illustrates sufficiently how favourable to plaintiffs French courts may be when a bodily injury was suffered. Rather, these various cases show that, while the courts are prompt to find fault in bodily injury cases, they tend to require nearly as much from defendants when seemingly less important interests are at stake.

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 5 July 2001

99-21.445, Bull civ II, no 136

Facts

11 A woman had an affair with a married man. After having given birth to a child, she brought a suit against the man on the basis of art 1382 (now art 1240) of the *Code civil* so that his fatherhood be recognised. The wife of the man then claimed damages against the woman, on the ground that having an affair with her husband amounted to a fault vis-à-vis her. The appellate court turned down the claim and the wife brought the case before the *Cour de cassation*.

Decision

12 The *Cour de cassation* affirmed the appellate court's decision, stating that the mere fact of having an affair with a married man did not constitute a fault vis-à-vis his wife.

Comments

13 Marriage is traditionally regarded under French law as having a contractual dimension – even though it is more than a contract. In this case, one could therefore have expected the well-established French contractual rule to apply, whereby wilfully contributing to a party breaching his contract constitutes a fault vis-à-vis the other contracting party. If the *Cour de cassation* departed from this traditional rule in the present case, it is presumably because of the weakening of the fidelity requirement

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in marriage and because the court is of the opinion that the interest of a spouse that the other spouse be faithful to him or her is no longer worthy of protection.

This is therefore one rare case in which the nature of the interest at stake seems to have played a decisive role in assessing the defendant's behaviour, and in lowering the demands put on her. It must be noted, however, that this is not said explicitly – as is normal, given the style of the *Cour de cassation's* decisions. This also means that one should not expect to find in the court's ruling the reason(s) why the interest in the fidelity of one's spouse is not as worthy of protection as other interests. It is possible that the justices regard the fact of having an extra-marital affair as falling within a 'personal development' right, as has been recognised in other legal systems; but this is only conjecture, and the text of the decision allows no firm conclusion on that count. 14

7. Belgium

Cour d'appel (Court of Appeal) Brussels, 1 March 2005

RGAR 2006, 14107

Facts

While work was being carried out by a business (A) using a crane, an underground cable belonging to a telephone company (V) was damaged. The cable location plan which V had provided did not show the depth to which the cables were buried. After having determined the depth of the cables itself, A was surprised to find that they were buried at a much more shallow depth than they had anticipated. 1

V, who is a third party as far as the work (service) contract is concerned, claimed compensation for loss of profits caused by the brief interruption to the telephone lines, while A disputed having been at fault. 2

Decision

In its judgment, the Court of Appeal decided that by proceeding, without specific safety measures, to conduct work using a crane in a location where it knew an underground cable was buried, A breached its duty of care and diligence, and therefore acted negligently in the sense of art 1382 of the Civil Code. It must therefore compensate V. 3

Comments

In its assessment of the behaviour of the person causing the damage, the judge only examines whether an ordinarily prudent and diligent person, taking the circumstances into account, would have taken the same approach. In this regard, the rea- 4

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sonably prudent person must not restrict himself to avoiding causing certain forms of damage and not others. Obviously, the required prudence may lead a person to take some preventive measures according to the circumstances (if the measure would have an influence on a person's life or when material loss is concerned). However, a Belgian judge will not decide that conduct is not faulty on the sole fact that the jeopardised interest is an interest of low value and he/she is not allowed to exclude or to limit compensation of certain categories of harm.

5 In the case described above, the Court of Appeal did not pay any attention to the nature of the harm (economic and financial loss) or the value of the protected interest. Only the congruence between A's behaviour and that of an ordinarily prudent and diligent company in the same circumstances is relevant, the greater or lesser importance to be accorded to the protection of V's economic interests being totally disregarded. With regard to the *bonus pater familias* standard, no priority is given to one interest or another and there is *a priori* is no hierarchy of interests.

6 Starting from this well-established principle of Belgian law, it is not impossible that a judge, in a specific case where the fault originated from a breach of law imposing particular behaviour, might examine the aim of that law, and the particular interest which it claims to protect.[1] Indeed the breach of a legal standard can only constitute fault from the moment this standard imposes specific behaviour on its subject. In this context, an assessment of the objectives which the standard pursues and of the sphere of protected persons can be made in order to verify whether fault exists. As such the Supreme Court has accepted that it is possible, in certain provisions of the Highway Code (in this case art 10.1, 1° and 3° of the *Code de la route*/*Wegcode*, namely the obligation upon a driver to regulate his speed insofar as is required by the presence of other road users and in particular those who are most vulnerable, weather conditions, the road layout, congestion and the direction of traffic, visibility, the condition of the road and the load borne by his vehicle, but also the obligation to be able, in all circumstances, to stop before reaching a foreseeable obstacle), to detect the specified duties whose breach as such constitutes fault, and thus to take into account the aim of safeguarding the persons or assets in question.[2]

1 *B Dubuisson*, Faute, illégalité et erreur d'interprétation en droit de la responsabilité civile, RCJB 2001, 28, no 17.

2 Cass, 22 September 1989, Pas 1989 I, 631.

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Cour d'appel (Court of Appeal) Anvers, 27 March 1991
RW 1994–1995, 366

Facts

A vehicle carrying containers on behalf of a firm (A) crashed into a bridge of the City of Antwerp (V1); the bridge was crossed by two railroads. For the safety of users, all vehicles were prohibited by the City (V1) from circulating on the bridge for two months (the time needed to undergo the repair work). 7

Due to this prohibition, the Belgian Railway Company (V2) was forced to modify the rail service and to reroute the traffic. This resulted in significant costs. 8

V2 brought a lawsuit against firm A seeking the reimbursement of these costs. Although its fault was not contested, A said that its liability was not engaged towards V2. 9

Decision

Firstly, the Court of Appeal noted that the diversion of the trains resulted in additional costs for V2 with a detriment to its assets. The court decided that these costs were the direct consequence of A's fault. Consequently A had to compensate V2. 10

Comments

This decision illustrates the comments made under the previous decision in nos 4–6 above. Although the focus of the debate was not on the notion of fault, we observe that the judge decided on V2's liability without any regard for the nature of the damage (the so-called 'pure economic loss', as it is sometimes referred to). 11

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 1 July 1977, ECLI:NL:HR:1977:AB7010
NJ 1978/84 (Van Hees/Esbeek)

Facts

During excavation activities, a gas pipeline was damaged as a result of which a stone factory could not operate for seven hours. The stone factory claimed compensation from the excavator. 1

Decision

Specifically in the light of the evident interest of a client of a gas pipeline to enjoy undisturbed gas flow, an excavator has a duty of care to avoid damage to a gas pipe- 2

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line. This is not altered by the simple fact that a breach of such a duty could result in a great number of duties to indemnify. The excavator was held liable.

Comments

3 Under Dutch law, the nature and value of the protected interest are usually taken into account in a decision on the scope of protection of a norm (art 6:163 CC) or in a decision on the chain of causation (art 6:98 CC). This aspect is mostly not addressed separately when deciding on the standard of care. This (old) case, regarding pure economic loss suffered by the stone factory, seems to be an exception in this respect. Yet its outcome still seems to be accepted. Nevertheless, the nature of the protected interest probably affects the standard of care in the sense that higher ranked values, such as personality interests, require a higher standard of care.[1] A comparison between interests which are more or less worthy of protection is not made explicit in case law.

9. Italy

Corte di Cassazione, Sezioni Unite (Court of Cassation, Joint Divisions) 24 June 1972, no 2135[1]

Giur It 1973, I, 1, c 1124, note by *G Visintini*; Foro It 1973, I, 1,100, note by *VM Caferra*

Facts

1 The claimant was a company producing pasta. The respondent, through its careless use of explosive materials, damaged the power line belonging to the electricity company serving the claimant's factory, interrupting its energy supply and causing the pasta being processed to dry out. The claimant applied for compensation for the damage caused by the forced suspension of production. The first instance court of Cagliari (14 December 1967, Giur It 1970, I, 2, 644), dismissed the suit, finding that any compensation for interference with contractual rights under the contract for the supply of electric energy, which results in non-performance, was conceivable only

1 See for example HR 1 October 1993, ECLI:NL:HR:1993:ZC1080, NJ 1995/182 (Lekkende Kruik III), where a maternity nurse had not used a prescribed safety bottle, but a hot water bottle that appeared to be leaking. The courts stressed the nature of the explicit, stringent and common safety standard in relation to the scope of protection of extremely helpless newborn children against the risk of very severe injuries, precisely to be prevented by the safety standard.

1 Already reported in *B Winiger/H Koziol/BA Koch/R Zimmermann* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 5/9 nos 1–2 and 5–7.

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from the debtor under the supply contract, not from third parties. In the appeal proceedings, the first instance judgment was reversed, and the respondent was ordered to pay compensation for damage (Cagliari Court of Appeal, 28 March 1969, Giur It 1970, I, 2, 644, annotated by *G Visintini*).

Decision

The *Corte di Cassazione* upheld the judgment of the Court of Appeal. Article 2043 of the Civil Code must be interpreted in the sense that there is a right to compensation for damage suffered by a claimant consequent upon a temporary interruption of the electricity supply. A's careless conduct, which resulted in damage to an instrument – the power line – that was essential to the person liable in providing a service in an outsourcing relationship, rendering that service impossible for the period of time needed to reinstate that instrument, was therefore liable for the consequential permanent and irreparable loss suffered by the claimant that could not otherwise have been avoided. **2**

Comments

The only question for the court to decide in this case was whether the cutting of the power supply by A amounted to wrongful damage (*danno ingiusto*) under art 2043 Civil Code. As a matter of fact, it was undisputed that the defendant company had carried out its operations leading to the interruption of the power supply in a careless way. The question raised before the court was nonetheless controversial because, until that case, it had been unclear whether interference with a contractual right by a third party could amount to wrongful damage (*danno ingiusto*), or not. In the celebrated *Pasta Puddu* case reported here, the court recognised the right of the pasta producer to compensation for damage consisting in a permanent irrecoverable loss, going beyond the loss of the pasta under production when the production at the plant came to a halt. The doctrine elaborated in *Pasta Puddu* has been constantly adopted by the courts in cable cases.[2] **3**

2 Cass 14 May 1999, no 4762, Danno resp 2000, 167, note by *AM Musy*; Cass 23 August 1999, no 8838, Danno resp 2000, 512, note by *AM Musy*. The same doctrine was also adopted in a case where a ship exploded while in a harbour, although this ruling is also based on art 2050 Civil Code, concerning liability for dangerous activities: Coll Arbitrale 10 August 1984, Dir mar 1985, 853 note by *C Rossello*.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 31 January 2012

RJ 2012\2031

Facts

1 V, a fish farm owner, sued A, an electric power company, seeking € 2,567,941.10 in compensation for the loss of 616,360 kg of trout. The trout died after being starved of oxygen due to a lack of water supply from a river for two hours, which was caused by the failure of a hydroelectric generator of the defendant located in the upper reaches of the river. The Court of First Instance ruled in favour of the claimant, but the defendant filed an appeal and the Court of Appeal overturned the decision. On cassation, the Supreme Court also dismissed the claim.

Decision

2 The conditions of operation of the fish farm state that: 'operation is at all times subject to the operation of the regulation reservoir of the river and corresponding channels'. They add that: 'interruptions or changes in the supply to them does not result in any compensation, either from the public authorities or from the power companies that have obtained an administrative concession, provided that their actions conform to the conditions of their concessions'. Furthermore, these conditions state that: 'to this end, the fish farm company A is obliged to put in place accurate devices in order to monitor the derived water flows at all times and to maintain proper operation of the farm, as well as the survival of the existing biomass in any situation that could arise from this cause'. The statement of facts reveals the existence of a risk for the farm due to an interruption in the river water flow due to a stoppage of the plant. However, this fact does not reveal in itself negligent conduct that would point to a lack of foresight and care on the part of the defendant in not taking the safety measures that were necessary to prevent damage. The conduct of the claimant 'interferes' in an essential manner in the causal link, since he had not furnished his facilities with adequate measures to provide oxygen to the trout for two hours. These measures were possible and affordable and the administrative concession given to the farm required them. The claimant could not require an alternative way of discharging water from the reservoirs when the gates of the two turbines were closed either, something which would have allowed the water to flow in less than two hours, since the conditions of the administrative concession forced him to adapt to existing mechanisms.

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Comments

Implicitly, this decision starts from the premise that the terms of the administrative concession contract that allowed the claimant to operate the farm adequately protected his interests. There is no contractual relationship between the claimant and the defendant. However, the administrative conditions (*concesión*) under which the claimant operated the fish farm indirectly protected the operator of the dam against third party claims. 3

It also seems to start from the idea that the claimant could and should have protected himself from the possibility of a loss of flow of the river on the grounds of the existing dam and its operation. In cases of pecuniary loss suffered by overflows caused by the discharge from reservoirs and dams of hydroelectric power stations, a similar argument is used to exonerate public authorities from liability.[1] 4

11. Portugal

Tribunal da Relação de Évora (Évora Court of Appeal) 29 November 2007 (Silva Rato)

Facts

A truck driven by A, in B's service, crashed into a power pole knocking it down. As a result, the area supplied by that pole was without electricity for over half a day. In consequence of this loss of power, a tomato pulp factory was forced to stop its production for the period of the power loss, consequently suffering a loss of profit due to the production interruption (at the time they were working continuously) and damage in respect of the destruction of the raw material being processed at the time. The company owner of the affected factory, V, took legal action against B's insurance company seeking compensation for the described damage. 1

Decision

It was for the court to assess whether there was a causal link between the road accident and the damages claimed by the factory. The court decided that there was a reasonable causal link in the chain of events that led to the damage. Although the events in question were separated in space and the truck did not directly hit any of the claimant's property, the court decided that there was an essential chain of events between the two occasions and that the factory would not have suffered the 2

1 See *JF Fernández García*, La responsabilidad patrimonial de la Administración Hidráulica en el supuesto de inundaciones, RAP 182 (2010) 126–129.

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claimed damage if the truck accident had not taken place. The damage was essentially caused by the destruction of the power line. The destruction of the power line was an adequate causal link between the power cut suffered by the factory and the subsequent damage.

3 As A was driving the vehicle in the service of B, B was vicariously liable but, A was also liable because of the presumption of fault or liability that is set by art 503(3) Civil Code: 'Whosoever drives a vehicle in the service of another is liable for the damage caused, unless he proves there was no fault'. A, the driver, could not rebut that presumption of fault. On these terms, and having met the legal requirements for liability, A was considered liable and by the same token, B was held vicariously liable (art 500). Therefore, B's insurance company was ordered to pay damages[1] to the company owner of the tomato pulp factory for the damage caused to the raw materials, the loss of profit on those raw materials and the loss of profit for the production stoppage in the factory as a whole.

Comments

4 Wrongfulness is one of the requirements of liability provided by art 483(1) of the Civil Code and is divided in two variants: the violation of another's person rights and the violation of legal provisions the aims of which are to protect the rights of others. The first concerns the violation of individual rights, primarily, absolute rights, namely, property rights, while the second concerns legitimate interests protected by law. There is, however, a third source of wrongfulness that can be considered to meet the requirements of art 483 of the Civil Code, which is the abuse of a right, which is not expressly referred to by law; nevertheless, it is clear that, in view of art 334 Civil Code,[2] if behaviour is classified as an abuse of a right, the agent is bound to repair the damage caused to others.[3] This is not a violation of individual rights or of legitimate interests protected by law, but rather this is the abnormal and reprehensible exercise of a legitimate right.[4]

5 In the case at hand a truck, violating the rules of the road (art 13 of the Road Traffic Code) knocked down a power pole supplying electricity, thus cutting off the supply of energy to a certain area for a significant period of time, and causing the destruction of raw materials being processed in a factory as well as an interruption in the production process. The violation of the individual right upon which liability

1 The insurance company is not liable in tort but is liable in contract.

2 'The exercise of a right is illegitimate when its holder obviously exceeds the boundaries set by good faith, good practice, or by the norm's social or economic purpose.'

3 *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 554.

4 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 474.

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is based was the knocking down of the pole,[5] which was the property of the electricity distribution company (the first variant of liability).

In Portugal the obligation to pay damages is limited to the injuries that the injured probably would not have suffered if the harmful act had not taken place (this is the negative form of causation).[6] In these terms the court decided, in the case at hand, that the knocking down of the power line pole was an appropriate cause of the damage suffered by the factory. This decision is, nevertheless, debatable. It is not clear in the Portuguese legal system that damages can be awarded in cases where the link of causation is so extended. Another relevant factor to consider is the nature of the goods affected. In the case at hand, in addition to the damage to the pole (which, being property of the power supply company, will obviously be compensated), we also have the damage suffered by the factory through the interruption of production and damage to its raw materials (property). The former is a *pure economic loss* (*danos patrimoniais puros*) and, therefore, there is, in general, no claim in tort in our legal system because the law only protects absolute rights and, thus, does not grant the right to reparation of pure economic losses.[7] The latter is damage to property thus giving rise to damages.[8] **6**

12. England and Wales

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd, Court of Appeal (Civil Division) 14 December 1971

[1973] 1 QB 27

Facts

Spartan Steel was a manufacturer of stainless steel. The task required a steady supply of electricity to maintain the temperature in an arc furnace in which metal was being melted to be converted into ingots. The defendant contractors were doing work on a road and damaged the cable which supplied electricity to the Spartan works. The power cut lasted 14½ hours. Spartan Steel claimed damages under three heads: (a) physical damage to some melted material its workers tried to save which **1**

5 Wrongfulness relates to the behaviour, see *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 305 ff.

6 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 767 ff; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 898 ff.

7 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 621 and *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 187–191.

8 See *J Sinde Monteiro*, Hipóteses Típicas de Responsabilidade Civil, Revista Jurídica da Universidade Moderna 1, 1 (1998) 6 f and *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 257 f.

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was assessed at £ 368 (property damage); (b) loss of the £ 400 profit that would have been made on the same melted material if the melt had been properly completed (consequential economic loss); (c) and loss of the £ 1,767 profit that the claimant argued it would have been able to make on four more melts it could have put through the furnace in the period in question had the power remained on.

Decision

2 The court ruled by a majority of 2:1 that the claimant should recover under (a) and (b) but not under (c), because that was economic loss independent of physical damage. Such loss fell outside the scope of the defendant's duty of care or alternatively was too remote from the defendant's breach of that duty. Lord Denning observed that, whichever of the two analyses one adopted, the question of recovering damages for economic loss was ultimately one of policy, reflecting the desirability of setting a limit on the responsibility of the defendant.[1] In his view, the cutting of the electricity supply was a common hazard which inconvenienced a multitude of persons and sometimes caused them economic loss; it was 'regarded by most people as a thing they must put up with – without seeking compensation from anyone'. To guard against such risk, a person might install a standby system, take out insurance against power failure or try to make up the economic loss by doing more work the following day. To Lord Denning, this was 'a healthy attitude which the law should encourage.'[2] Further policy considerations he mentioned included the floodgates argument and the likelihood of inflated or even spurious claims.

Comments

3 The decision highlights the law's differentiated attitude towards different types of protected interests. As under art 2:102(4) Principle of European Tort Law (PETL), the scope of protection afforded to pure economic interests is limited in contrast to that in respect of interests in the person or property. As Lord Oliver stated in *Murphy v Brentwood District Council*:[3]

> 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen.'

1 See also *Conarken Group Ltd v Network Rail Infrastructure Ltd* [2011] 2 CLC 1.
2 [1973] 1 QB 27, 38.
3 [1991] 1 AC 398, 487.

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This reflects, on the one hand, a feeling that pure economic interests are less important than interests in the person or property and, on the other hand, a fear that allowing recovery for negligently-inflicted economic loss may have undesirable consequences (eg a crushing liability on defendants). However, liability for such loss may still arise where an especially proximate relationship is established between the claimant and the defendant (see 3e/12 below). **4**

English law gives effect to these considerations with reference to the scope of the defendant's duty of care. Thus the issue is not one which relates to the question of the required standard of conduct, but rather the scope of the consequences that a person is liable to compensate in the event of a failure to satisfy the required standard of conduct. **5**

Nevertheless, it seems clear that the nature of the interest threatened by a person's conduct may impact upon the conduct which is reasonably required of him. Greater weight should be attached to the protection of personal safety than the preservation of property or the accumulation of wealth. As Denning LJ, as he was then, remarked in another case: 'the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk'.[4] **6**

13. Scotland

Dynamco v Holland Hannen & Cubitts, Court of Session (Inner House), 15 July 1971
1971 SC 257

Facts

While carrying out building operations on an industrial estate, the defenders, a firm of contractors, severed an underground electrical cable carrying power to a factory and to other premises. No property of the occupiers of the factory was damaged, but production was interrupted, causing economic losses to them. In an action of damages brought by the pursuers, the occupiers of the factory, against the contractors, they argued that the defenders were under a duty to ascertain the position of electric cables on the estate and to take reasonable care to avoid damaging such cables. At first instance, the court dismissed the pursuers' claim. The pursuers appealed. **1**

4 *Watt v Hertfordshire County Council* [1954] 1 WLR 835, 838.

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Decision

2 The Inner House of the Court of Session upheld the decision at first instance, holding that Scots law does not allow a damages claim for financial loss that does not arise from damage to the injured party's own property, and that the loss alleged was too remote to sound in damages. One of the appeal court judges (Lord Cameron) doubted that any duty of care was owed to the pursuers on the facts of this case;[1] he also stressed that the losses suffered were not a direct consequence of the wrongful act, and thus were not claimable. The other judges did not address the duty of care issue, disposing of the case simply by reference to the rationale that resulting economic losses are claimable in delict only if they arise out of loss to the claimant's own property.[2]

Comments

3 The decision demonstrates the lesser protection accorded to economic loss in Scots law, and also the concern of the law that economic losses have a tendency to multiply and radiate out from an initial instance of harm. The policy given effect on this case is one of the means by which the law attempts to control recovery for such economic losses.

4 Lord Cameron's secondary reasoning that the losses suffered were not a direct consequence of the wrongful act, and thus were not claimable, puts the reason for refusing the claim in terms of the so-called 'remoteness' of the losses. This approach was justified, in Lord Cameron's view, by reference to the so-called 'grand rules' on recoverable damages set out in the previous case of *Allan v Barclay*, this being that no damages can be claimed 'except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer.'[3]

5 So two alternative justifications can be given for the result in this case: (a) economic interests have a lesser protected status than the interest someone has in his/her body or its property; and (b) the losses here were too remote from the harm, being losses only arising indirectly out of the harm done to the property of another party.

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1 See discussion at 272.

2 See, for instance, the comment of Lord Migdale (at 267): 'the wrongful act of the defenders has deprived [the pursuers] of a supply of electricity. It was not their electricity. The damage was done outside their premises and before the cable reached their meter. It was not their cable and no part of their property was damaged.'

3 *Allan v Barclay* (1864) 2 M 873, per Lord Kinloch.

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14. Ireland

William Egan & Sons Ltd v John Sisk & Sons Ltd, High Court, 6 May 1985
[1986] ILRM 283

Facts

The plaintiff's warehouse in Cork was flooded due to the defendant's negligence; **1**
the plaintiff ran a mail order business in the US market. The flood destroyed the brochures stored there and the plaintiff was unable to get them reprinted in time for the lucrative Christmas market and suffered extensive loss. The defendant argued that the scale of loss could not have been anticipated; neither could the plaintiff's failure to get a reprint in time for the Christmas market.

Decision

Carroll J upheld the plaintiff's claim; she held that the warehouse was a commercial **2**
property and the defendant must have foreseen that any goods contained therein would have a commercial value, including profit. It was immaterial whether the economic loss consequential to the damage to the goods was large or small.[1] Once the plaintiff made reasonable efforts to mitigate the loss, its failure to actually do so and the defendant's inability to foresee that consequence were immaterial and the defendant had to pay for the full loss.

Comments

This case demonstrates that the question of economic loss consequential to physical **3**
damage to property is dealt with by way of the principles governing causation and remoteness of damage. The duty is conceived of in terms of the initial physical damage, but the measure of loss for the physical harm extends to consequential losses that are not too remote. The misconduct (in this case negligence), which makes one liable for the property damage also incorporates liability for consequential loss, provided the latter does not fall foul of the rules on proximate cause. The same approach applies to other categories of consequential harm, such as mental suffering. The general approach is the same for the other nominate torts – the misconduct (whether fault, or strict liability or other form of liability) which violates the primary protected interest gives rise to liability which includes consequential loss or harm,

1 Applying the *Wagon Mound* principle, *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388. See also *Riordan's Travel Ltd and Riordan's Shipping Ltd v Acres and Co Ltd* [1979] ILRM 3 (Case 6/14 in Digest II). The principle also applies in private nuisance cases, *Rabbette v Mayo County Council* [1984] ILRM 156.

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subject to rules on proximate cause (though the details of the remoteness rules vary for some torts, such as deceit and the trespass torts). The misconduct enquiry is focused on the primary harm; consequential harm is addressed as a matter of causation or damage.

Boyd v Great Northern Railway, Exchequer Division, 10 May 1895

[1895] 2 IR 555

Facts

4 The plaintiff, a doctor with a large practice, was delayed for 20 minutes at a level crossing due to the negligence of the defendant. The plaintiff instituted a claim for financial loss resulting from the public nuisance.

Decision

5 Andrews J (Murphy J concurring) reversed the trial judge's dismissal of the claim. The statutory power of the defendant to obstruct the public highway was confined to such period as is reasonably necessary; the 20-minute delay was not necessary in the circumstances. The other requirement for a public nuisance claim is that 'the plaintiff suffered thereby some appreciable damage peculiar to himself beyond that suffered by other members of the public ordinarily using the highway.' The plaintiff's loss, although small (10 shillings), was sufficient.

Comments

6 The misconduct element of public nuisance claims is the violation of a public right, such as a right of way over the highway, but this wrong is only actionable as a tort if the plaintiff has suffered special or particular damage. The damage suffered must be different from that suffered by members of the public generally (there is a lack of agreement on the precise nature of the level of difference required and a shortage of case law on the question). The *Boyd* case was subsequently applied in *Smith v Wilson*,[2] where the plaintiff farmer was able to recover additional transport costs incurred when he had to take a longer route to market because the defendant closed off a public right of way over his land. These cases demonstrate that pure economic loss resulting from unreasonable delay is a sufficiently special damage; mere inconvenience suffered by the public generally is not sufficient. In both cases the economic loss was inferred from the fact that the plaintiffs were engaged in commercial activi-

2 [1903] 2 IR 45.

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ties. There are no modern authorities on the question of economic loss as special damage, though public nuisance remains as a distinct cause of action.[3]

Irish Paper Sacks Ltd v John Sisk & Son (Dublin) Ltd, High Court, 18 May 1972

Unreported

Facts

The electricity supply to the plaintiff's factory failed and was not restored for two days, during which time economic loss amounting to £ 1,183 was suffered, although no damage to any property of the plaintiff was caused. The plaintiff alleged that the break in the electricity supply was due to damage caused by one of the defendant builder's workers when operating a bulldozer during the laying of the cables and that subsequent water percolation eventually caused the cable to fail. The cable was the property of the state electricity company, the ESB. The defendant denied liability on grounds of a lack of duty and on the absence of any negligent behaviour causing the damage. **7**

Decision

O'Keeffe P upheld both of the defence arguments; firstly, no duty was owed where the defendant caused only economic loss to the plaintiff without any damage to the plaintiff's person or property. In any event, the plaintiff failed to prove that the defendant had caused the damage to the cable. On the first ground, the principle applied was derived from English cases on pure economic loss.[4] **8**

Comments

The second reason for the decision would be enough to dispose of the individual case, but the first principle, on pure economic loss, has wider implications for what can constitute actionable misconduct. This case follows the principle in English law that relational loss is not generally recoverable in negligence; ie if the plaintiff suffers economic loss as a result of physical damage to a third party's person or prop- **9**

3 Personal injury and physical damage to property are actionable harms for the purposes of the tort; see eg *Connolly v South of Ireland Asphalt Co* [1977] IR 99 (personal injury); *Lynch v Dawson* [1946] IR 504 (property damage and personal injury); *Walsh v Morgan and Sons Ltd* (1938) 73 ILTR 4 (IECC) (property damage). See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 24.05 ff; *E Quill*, Torts in Ireland (4th edn 2014) 230 f.

4 *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569; *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205; *Elliott v Sir Robert McAlpine & Sons Ltd* [1966] 2 Lloyd's Rep 482 and *SCM (UK) Ltd v W & J Whittall & Son Ltd* [1971] 1 QB 337.

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erty with which the plaintiff has some relationship or dependence, the plaintiff has no claim in negligence against the person causing the injury. The principle that pure economic loss is generally not recoverable, except in limited categories of cases such as negligent misrepresentation and defective buildings cases, was reaffirmed by the IESC in *Glencar Explorations plc v Mayo County Council (No 2)*.[5] This is somewhat broader than the relational economic loss exclusionary rule.

10 The cases demonstrate that the question of negligently inflicted pure economic loss is primarily dealt with under the duty of care enquiry. If there is no duty to take precautions against harm to the plaintiff, then negligent behaviour cannot give rise to liability on the defendant's part. Economic interests are protected under a variety of other nominate torts such as deceit, passing off and unlawful interference with economic relations.

11 The approach to mental harm is similar to pure economic loss; mental harm that is consequential to physical injury, such as loss of enjoyment of amenities, is readily recoverable, subject to remoteness of damage principles; recovery for negligently inflicted psychiatric harm where there is no physical injury is based on a constrained approach to the duty question;[6] intentionally inflicted mental distress is actionable (but in an underdeveloped state in the case law);[7] some other nominate torts indirectly protect aspects of mental harm (eg trespass to the person, defamation, malicious prosecution). There is no single standard of misconduct for these various causes of action. For a negligence claim, the failure to exercise reasonable care can only be regarded as actionable misconduct if a duty of care arises.

15. Malta

Gaetano Abdilla and Others v Lucrezio Briffa and Another (Court of Appeal – Qorti tal-Appell) 25 April 2008

<http://www.justiceservices.gov.mt>

Facts

1 The plaintiffs entered into a promise of sale agreement with both the defendants whereby the defendants bound themselves to sell a tenement to the plaintiffs. The

5 [2002] 1 IR 84, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1996 (1997) 554–574; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2001 (2002) 293, nos 3–5.

6 *Kelly v Hennessy* [1995] 3 IR 253; *Fletcher v Commissioners of Public Works* [2003] IESC 13; [2003] 1 IR 465; *Quigley v Complex Tooling & Moulding Ltd* [2008] IESC 44; [2009] 1 IR 349. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) ch 17; *E Quill*, Torts in Ireland (4th edn 2014) 57 ff; *J Tully*, Tort Law in Ireland (2014) ch 4.

7 *Sullivan v Boylan* [2013] IEHC 104, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2013 (2014) 318, nos 10–16.

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plaintiffs also paid the defendants a deposit on account of the price. The promise of sale agreement was to remain binding for a specified time. During the period of validity of the promise of sale agreement with the defendants, the plaintiffs entered into another promise of sale agreement with a third party whereby they bound themselves to sell the same tenement (after they acquired it from the defendants) to the third party. The plaintiffs also received from the third party an earnest or forfeitable deposit. When earnest has been given in a promise of sale, each of the parties is at liberty to recede from the contract: the party giving the earnest forfeiting such earnest, and the party receiving the earnest returning double the amount thereof, ie the original earnest plus an earnest-penalty.[1]

Before the promise of sale agreement between the plaintiffs and the defendants was due to lapse, its period of validity was extended. The deed extending the validity of the agreement was signed by the plaintiffs and by the first defendant who signed on his own behalf and on behalf of the second defendant, his wife. The second defendant did not appear in person on the deed, but the first defendant asserted that he had been verbally authorised by her to sign on her behalf. **2**

Before the extended agreement lapsed, the plaintiffs called upon the defendants to conclude the sale. The defendants refused and the plaintiffs thereupon filed an action for the specific performance of the promise of sale. The second defendant pleaded that she had never authorised the first defendant to sign on her behalf the deed extending the period of validity of the promise of sale, and the promise had therefore lapsed in her regard. The plea succeeded and the plaintiffs' action for specific enforcement therefore failed.[2] Consequently, the plaintiffs were not able to deliver on their promise to the third party, and they had to pay the earnest-penalty. **3**

Alleging that the defendants or, at least, the first defendant, had acted fraudulently, the plaintiffs then filed the present action to recover the deposit they had paid the defendants and, by way of damages, the earnest-penalty they had paid the third party and lost profits. The defendants admitted the claim for the return of the deposit but contested the claim for damages. **4**

The first instance court allowed the claim for the return of the deposit (which had been admitted by the defendants) but, although it found that the first defendant had indeed acted fraudulently when he had knowingly misrepresented himself as authorised to sign the deed of extension of validity on behalf of the second defendant, it rejected the claim for damages (the earnest-penalty and lost profits). **5**

The plaintiffs appealed the part of the judgment which rejected their claim for damages. **6**

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1 Article 1539 Civil Code.

2 The plaintiffs could still have enforced the promise on the first defendant's share of the tenement, but this would have been of no use to them.

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Decision

7 The Court of Appeal allowed the appeal. It observed that, when entering into a subsequent promise of sale agreement with a third party, the plaintiffs were not assigning to that third party their rights against the defendants under the first promise; they were, in effect, undertaking to sell to the third party property which they did not yet own but which they had a legitimate expectation of acquiring. They were perfectly entitled to do this since they would have been free to dispose of the property as they deemed fit once they had acquired it from the defendants. The court therefore ordered the defendants to pay the damages requested by the plaintiffs, in addition to returning the deposit they had received from them.

Comments

8 In allowing the claim for loss of profits, the Court of Appeal showed that pure economic interests are to be protected against damage caused by misconduct, at least when the tortfeasor is guilty of fraud or voluntary misconduct. It also showed that the frustration of a contract with a third party is a ground for liability in tort even when the tortfeasor was not aware, and had no reason to be aware, of the existence of such contract.

9 It is arguable whether the argument can be extended by analogy to a general liability for loss of an opportunity to gain a benefit. Admittedly, the present case was particularly strong because the chance of making a profit was not merely hypothetical but concrete, since the agreement with the third party was already in place and the profit would have materialised but for the defendant's misconduct.[3] The plaintiffs would probably not have succeeded had the opportunity been merely hypothetical, although possibly the claim would have been defeated on the ground of lack of direct causation rather than because the interest in question is not a legally protected interest.

10 It is not clear why the Court of Appeal ordered both the defendants to pay damages when only the first defendant was found guilty of fraud. The defendants were husband and wife but there was no judicial pronouncement that the second defendant was aware of her husband's fraudulent misrepresentation. Presumably, if she had been a party to the fraud, her claim to rescind the deed would have failed.

3 See also *Charles Grima nomine v John Caruana* at 3f/15 nos 12–19 below.

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16. Denmark

Højesteret (Supreme Court) 8 August 1994
U 1994.785 H

Facts

A trawler owned by V was moored at the Danish harbor of Hanstholm when another vessel owned by the shipping company, A, ran into it. The trawler was damaged and V subsequently sued A for repair costs and loss of profits. Moreover, A was sued for loss of profits by C who owned a vessel which trawled together with V. 1

Decision

The court found that the crew of the vessel owned by A had acted negligently and held A liable for the said repair costs and loss of profits pursuant to sec 220(1) of the Danish Merchant Shipping Act.[1] However, the court refused to award damages to C for the loss of profits he had incurred due to the damage to the trawler owned by V. 2

Comments

The case shows that the Danish courts are reluctant to award damages in tort for pure economic loss incurred by parties who have not themselves suffered damage as a direct result of the conduct of the tortfeasor. There are at least two reasons for this reluctance to award damages to such third parties (ie parties who have merely suffered damage 'indirectly' so to speak). First, the courts do not want to extend the liability of tortfeasors beyond what could be reasonably foreseen and second, the courts are concerned that recovery of pure economic loss suffered by third parties would allow too many claims to be filed; see the well-known argument against opening the floodgates for an indeterminate number of claims.[2] In order for compensation for pure economic loss to be awarded to third parties, the courts will usually require that there is a special connection or proximity between the third party and the party suffering the initial damage. However, the court did not find that the fact that C trawled with V constituted such a special connection. Moreover, the courts may award damages for pure economic loss if the tortfeasor caused the rele- 3

1 Consolidated Act No 75 of 17 January 2014 (*daværende Sølov med* § 220 = Consolidated Act No 159 of 15 March 1989).

2 See *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 329 and *A Ehlers*, Om Adækvanslæren i Erstatningsretten (1st edn 2011) 224 f.

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vant harm intentionally[3] or acted against *bonos mores* but this was not the case here.

Vestre Landsret (Western Court of Appeal) 8 November 1961
U 1962.190 V

Facts
4 When repairing a road, a contractor damaged some power lines causing a power cut for a couple of hours. Inter alia the power was cut at a nearby poultry farm damaging about 3,000 eggs in the farmer's incubator. The farmer claimed damages from the contractor in the amount of € 335.

Decision
5 The court found that the contractor was liable for the loss incurred by the farmer.[4] It said first that the road repair was a dangerous activity causing a significant risk that power lines could be cut if sufficient precautions were not taken. Since the contractor had not taken such sufficient precautions, his conduct was qualified as being negligent. Moreover, the court found that the damage to the eggs was a proximate cause of the negligent conduct.

Comments
6 The principal question raised in this case is whether a claimant, who has suffered property damage due to an initial damage to the property of another person (ie the owner of the power line), can successfully claim damages from the tortfeasor who caused the initial damage. As noted above (see comments to U 1994.785 H in 3b/16 no 3) Danish courts are reluctant to award damages to such third parties or indirect claimants but in the present case the court found that the connection between the indirectly harmed claimant (the poultry farmer) and the power company was sufficiently strong to hold the contractor liable. The court probably arrived at this conclusion because of the dependence of the poultry farmer's business on the supply of power and the fact that the farm was placed merely 150 m from where the power lines had been cut. Also, it may have been important that the damage suffered by the farmer was property damage as opposed to a pure economic loss. Thus, it is well known that Danish courts are generally more willing to award damages for damage

3 See *S Jørgensen*, Erstatningsret (2nd edn 1972) 208 and *H Ussing*, Erstatningsret (1962) 64.
4 However, in assessing the damages, a minor reduction of approx € 40 was made.

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to property than pure economic loss.[5] However, in cases concerning power cuts, it should be noted that the courts may also be willing to award damages for pure economic loss such as loss of profits, see eg U 2004.2389 H where damages for such loss were awarded to an employer due to a power cut caused by the contractor and a subcontractor. As in the present case, there was merely an insignificant spatial distance between the place of the power cut and the property of the employer and, in any case concerning damages for power cuts, this criterion will be important.[6] It should be noted, however, that in the case from 2004 (as opposed to the case from 1962), there was a contract between the tortfeasors (the contractor and the subcontractor) and the claimant (the employer) and this may also have been important to the decision of the court in the former case.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 19 January 2010

Rt 2010, 24

Facts

A company concluded a contract with the state for the maintenance of a picnic area beside a busy motorway in Norway. The contract also entitled the company to rent two fast food restaurants adjacent to the motorway, one on each side of the road. In December 2006, part of the roof of a tunnel six km from the fast food restaurants fell down. Because of this, the southbound lane of the tunnel was closed, and traffic in both directions had to use the northbound lane until January 2007. At this point, it was decided to investigate the safety of the whole tunnel and to secure it. The tunnel was therefore closed until June 2007. The road that passed the fast food restaurants was never closed, but sales from the restaurants fell by 20–30% in the period from January to June compared with the year before. Both restaurants were forced to close, leaving the employees temporarily unemployed. However, the company continued to maintain the picnic area, cleaning the toilets, etc. The company filed a lawsuit against the state, claiming compensation for loss of profit. The two parties agreed on an assessment of the company's total loss at NOK 1,200,000 (€ 150,000). **1**

5 See *T Iversen*, Erstatningsberegning i Kontraktsforhold (1st edn 2000) 48 f, 104 ff and also *A Ehlers*, Om Adækvanslæren i Erstatningsretten (1st edn 2011) 243.

6 See no 3 above regarding the floodgate argument.

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Decision

2 The question for the court was whether the state was liable for the loss on contractual or on delictual grounds. The court unanimously found that the building of the tunnel had been negligent and that this was the cause of parts of the roof falling down. Hence the way in which the tunnel was built apparently amounted to culpability. The majority of the court found, however, that there was no adequate connection between the negligent act on the part of the state and the loss suffered by the company. The connection between the negligent building work and the interest of the company in making a profit from sales at the fast food restaurants was too weak. The causal connection lacked the proximity and directness required by the rule of adequacy as practised by the courts.[1] The minority of the court found that the state was liable for the company's loss. It was emphasised in particular that the state had caused the primary damage (the damage to the tunnel) itself. The case should therefore not be dealt with pursuant to the doctrine of adequacy as developed in connection with cases involving a tortfeasor, a primary victim and a secondary victim (*tredjemannskade* – third party damage).

Comments

3 The majority of the court is quite restrictive here, hesitating, or more precisely, refusing to let the misconduct of the building of the tunnel render the state liable for the losses suffered by parties who based their claim on a contract remotely connected to the damage in the tunnel. A probable reason for this attitude is that the majority was worried about 'opening the floodgates'. The most interesting consequence of the decision could be its bearing on other cases where traffic is hindered. The physical distance (6 km) involved and the connection between the rights and obligations under the contract and the loss suffered seemed to play a part in the reasoning on adequacy. It can be inferred from the case that a purely delictual claim for pure economic loss, in which no contract between the tortfeasor and the plaintiff is involved, will have less chance of succeeding. An example of the latter would be where faulty behaviour – misconduct – causes a road accident that prevents many people from getting to work or fulfilling other kinds of contractual obligation. The mere interest in not being hindered when using a public road is not sufficiently protected, even if there is misconduct involved.

4 An interesting point is the disagreement between the majority and the minority of the court regarding the importance of the fact that the state was responsible for the damage to its own tunnel. Should it really matter whether the company was the primary or the secondary victim? The misconduct that causes damage to the sub-

1 This rule is developed by the Supreme Court in important cases such as Rt 1955, 872 and Rt 1973, 1268.

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ject's own property may not be considered to be misconduct at all in the conventional understanding of the concept. The case shows that the mere interest in making a profit based on sales to those travelling on the road was too remote and weak for compensation given the context. The distinction between damage to primary and secondary victims has been drawn in other cases in Norwegian tort law, but at least one scholar has debated whether the question is really immaterial.[2] In the case in hand, the difference probably did not have any significance due to the fact that the crucial point of the case was the remoteness of the loss, or the weakness of the connection between the physical damage to the tunnel and the pure economic loss suffered by those renting the fast food restaurants.

Høyesterett (Norwegian Supreme Court, Hr) 10 November 1973
Rt 1973, 1268

Facts

An airplane, belonging to the Norwegian air force, crashed into electricity cables, **5**
leaving a large number of electricity users with no electricity. One of the users of electricity was a fish farmer, who due to the lack of electricity, suffered a loss stemming from the fact that many fish died. The lack of electricity made it impossible for the fish farmer to keep the water in which the fish swam sufficiently hot. The fish farmer sued the state, claiming compensation for the loss of income as a consequence of the dead fish.

Decision

The Supreme Court stated that the damage was foreseeable, but could still not be **6**
compensated, because the damage was too remote – *fjernt og avledet*, something that can be translated into English in the terms 'remote and derived'. The court supplied the reasoning with additional arguments: the court found that the risk of being ruined by a floodgate of claims in cable cases called for guidelines that could limit the circle of compensable consequences. At this point the court added that the remote character of the interest of many users of electricity was a feature of the case that put the arguments regarding fault 'in the background'. Furthermore: the fish farmer had knowledge of the fact that his fish was vulnerable to loss of electricity and subsequent loss of heat in the water. The fish farmer could have eliminated the risk by providing an alternative power supply, something that he had not chosen to do. Given these facts, the court found that the loss on the part of the fish farmer did not qualify for compensation.

2 *N Nygaard*, Skade og ansvar (6th edn 2007) 365.

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Comments

7 The case has been perceived as a case on adequacy, but it still illustrates the role which the nature of interest may play in cases on misconduct. The case has significantly influenced subsequent case law in this area. The case shows that a chain of events between the misconduct and the pecuniary loss on the part of the claimant may render the loss too remote for compensation. The floodgate argument is, as mentioned, also present in the case, because liability for damage to interests such as those of the fish farmer would open up possibilities for lawsuits from many users of electricity. The formulation of the court as to arguments that fault has been 'put in the background' seems to implicate that even gross negligence may not result in liability in cases where the damaged interest is as remote as in this case. It is, however, also important to note that the decision is a product of a set of arguments that includes arguments connected to the claimant's own behaviour (see the reflections on the alternative power supply above). The additional arguments may be the most decisive when deciding whether a certain interest is protected. In difficult cases on remoteness of damage, the case may turn on a balancing of the interests of the parties involved, see for example Rt 2004, 1816: the employer of an employee who was vital to the employer's business was not awarded any compensation for loss of income stemming from the personal injury caused to the employee. The court referred first to the arguments established in the current case, Rt 1973, 1268, and based its restrictive reasoning on these. As one can see, the nature of the interest is important for the question of liability. The nature of the interest is, however, under Norwegian law mostly dealt with under the heading of causality and adequacy, not as a question of whether misconduct is established.[3]

18. Sweden

Högsta domstolen (Supreme Court) 2 February 2009

NJA 2009, 16

Facts

1 A co-operative housing association hired a construction company to replace waste water facilities in the association's building. The contractor was liable to the association (as the 'direct victim') for causing damage to the floor and underlying joists

3 See the most important textbooks, *N Nygaard*, Skade og ansvar (6th edn 2007) 378 ff and *P Lødrup*, Lærebok i erstatningsrett (6th edn 2009) 388 ff. Further on the subject, *B Askeland,* Konkret og nærliggende interesse som avgrensningskriterium for tredjemannstap [Concrete and Close Interest as Criterion of Delimitation Regarding Claims from Third Parties], Jussens venner 2001, 303–319.

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in one of the apartments, when hot water leaked onto the floor. The case deals with the issue of whether the contractor was also liable for the costs that the tenant (as the 'third party') incurred for substitute housing during the repair work (ie the tenant sued the contractor).

Decision

The Supreme Court referred to the main rule – no compensation for third-party losses – but clarified that solutions cannot be based on a single general criterion. Instead of such general guidelines, the court stated that a piecemeal development could be made with regard to the interests that can assert themselves with varying degrees of strength in different types of cases. Among the reasons for compensation, the court mentioned that the user had partly taken over the interest that can be attached to the capital value of the direct victim's property (ie the building). The court declared that, if the tenant in such circumstances is awarded compensation, it cannot be seen as an extension of liability that would lead to unforeseeable or otherwise unjustifiable consequences. Compensation was thus awarded to the tenant. **2**

Comments

The main rule concerning third party losses – ie economic damage as a result of a direct victim's damage – is that only the direct victim is entitled to compensation. However, when discussing a 'main rule', there are always 'exceptions'. When legitimising exceptions to the general rule, the method is to differentiate between various interests of third parties. An expression that is often used is that the third party should have a 'concrete and close interest' linked to the damaged property.[1] Since the court deliberately avoided setting up general third party formulae, it demonstrated that legal development must be supported by practical considerations of purpose, reasons and interests. The judgment shows that a broad survey of the general reasons as well as the specific case scenarios is likely – in the future – to generate clearer indications about different third-party situations. **3**

The current case is a typical situation where the third-party's loss depends on a contract with the direct victim and where the damage occurs to the object of the contract. The characteristics of such cases are that the owner is giving the other party an opportunity to use the former's real or movable property. Whether the agreement is called rent, lease or otherwise does not play a fundamental role in this respect; in- **4**

1 The only Scandinavian monograph on third-party losses is *H Andersson*, Trepartsrelationer i skadeståndsrätten (1997); see 17 ff and passim, for an overview of the main rule and the different problem types with their various lines of arguments. See also *J Hellner/M Radetzki*, Skadeståndsrätt (8th edn 2010) 360 ff.

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stead, the specific circumstances of the concrete situation is decisive. If property is damaged, it is natural that someone who is entitled to use it often has at least as much interest in the property's utility value as the owner. Due to the specific details of the contractual relationship, the independence of the user's (the third party's) interest – in relation to the interest of the owner (the direct victim) and to other third parties – can vary in strength. A rule of thumb is that the third party has an even better chance of receiving compensation as his position increasingly becomes similar to that of an owner of that kind of property. That compensation may exceed the value of the property itself cannot be used as a principled argument against third-party compensation, because the property could also have been used in the same lucrative way in the owner's hands without any disputed compensation.

19. Finland

Korkein oikeus (Supreme Court) KKO 2003:124, 12.12.2003
<http://www.finlex.fi>

Facts

1 A had damaged an overhead power line by intentionally shooting at its insulators. He was convicted in the criminal courts for malicious damage. The damaged power line had caused a sudden drop in voltage in the electricity supply to the surrounding area. Equipment was broken due to the lack of power/electricity. As a result, the machines of some industrial companies were damaged and production was stopped for some time because their protective systems had tripped. The drop in the voltage caused some production line machinery to lose speed, resulting in broken equipment. The broken equipment was owned by the factories and the power line was owned by someone else. These two companies sued A for the losses caused by the damage to the power line. This was regarded as a third-party loss because the power line was owned by someone other than the factories who owned the damaged machines.

Decision

2 According to the Supreme Court, A was not liable to compensate for the damage he had caused the companies (split decision 4-1). In the Supreme Court's opinion, A had intentionally damaged the power line by shooting at its insulators. He did not, however, intend, by this act or otherwise, to cause injury to the companies concerned.

3 The Finnish compensation system is based on the idea that only those who suffer injury or loss as a direct result of a given incident are entitled to damages. If someone else suffers losses as a result of the 'first damage', that damage is only compensated in special cases, for example when specified in law.

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According to the Supreme Court, in this case there were no special provisions allowing for the compensation of third-party damage. The companies were supplied with electricity for their factories through the power line that A had damaged, and the companies had a contractual relationship with the owner of the power line. Therefore, the court reasoned that the companies' losses were due to a disruption in the supply of electricity and not directly to A's criminal act. The companies did not have a usufruct or other comparable license or right; instead, they were in the same position as other users of electricity. On these grounds, the Supreme Court took the view that the losses caused to the companies by A's act were third-party losses and could not be compensated, as there were no grounds for compensation. 4

Comments

This is a typical example of the restrictive way in which tort law cases are resolved in Finnish jurisprudence. Only certain kinds of damage are compensated and only if the preconditions for compensation – either through a provision in the legislation or if there are other special reasons for compensation – are fulfilled. However, if the tortfeasor intended to cause damage to a third party, compensation will be granted.[1] 5

Hemmo points out Judge Lehtimaja's dissenting opinion, in which he stated that, in contrast to an earlier 'third-party damage case', KKO 1991:41, where a helicopter flew into a power line, shooting the insulators of a power line served no useful function for society. He also remarked that the act of shooting a firearm was also inherently likely to cause damage. It was also generally known that many areas of society depended on an uninterrupted supply of electricity. Thus, in respect of assessing the foreseeability of the damage, it was unreasonable to set a requirement that the tortfeasor should be aware of the technicalities of how the damage could occur in detail and who would be effected. 6

Like dissenting Judge Lehtimaja, Professor Hemmo would have preferred some adjusted form of compensation for the industrial companies, because he regards the court's 'anti-compensation' judgment as problematic from the perspective of providing an economic deterrent to such acts. Liability that is directly limited to the damage caused to property is often very minor compared to the total losses that such vandalism can cause. More powerful negative incentives for influencing tortfeasors' behaviour therefore seem justified. 7

1 See KKO 1991:141, *M Hemmo*, Tahallisuus ja kolmannelle aiheutuneen vahingon korvaaminen, in: Pekka Timonen (ed), KKO:n ratkaisut kommentein 2003:II (2004) and *H Saxén*, Skadeståndsrätt (1975) 79.

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21. Latvia

Augstākās tiesas Civillietu tiesu palāta (The Chamber of Civil Cases of the Supreme Court) No C05043505, PAC-714, 1 December 2006
Unpublished

Facts

1 On 16 June 1997 the claimant received medical treatment in a municipality owned local hospital (the defendant) during childbirth. The defendant's medical personnel performed a Caesarean section on the claimant as well as sterilised the claimant by cutting her fallopian tubes, thus, eliminating the possibility of natural conception. The claimant was neither informed of the sterilisation as a possibility nor did she consent to it. The decision to perform the sterilisation was made by three doctors working for the defendant. The claimant brought an action against the defendant seeking compensation of non-pecuniary harm for the reproductive impairment and the pain and suffering inflicted by the defendant in the amount of more than € 70,000. The claimant alleged that the sterilisation was, not in fact necessary and the defendant violated her rights as a patient to personal autonomy as well as her human rights and failed to receive her informed consent to perform the sterilisation. The defendant argued that it was necessary to perform the sterilisation in order to ensure the well-being of the claimant. Any future pregnancy could have endangered the life of the claimant and her child.

Decision

2 The court of first instance satisfied the claim partially. The court argued that the patient's rights were violated and the medical personnel of the defendant acted grossly negligently. The defendant was obliged to inform the patient of the necessity of medical procedures to be performed and the consequences of either performing them or not. In addition, the patient was admitted to hospital 30–45 minutes in advance, thus it would have been possible to duly inform her. A group of doctors (a *concilium*) may adopt decisions only in emergency circumstances, where hesitation would endanger the life of the patient. The court indicated that the allegation that the patient's and her child's life may be endangered in case of a subsequent pregnancy is insufficient to justify the performed sterilisation. In addition, the court also noted the fact that two experts' opinions, one of which was ordered by the court, showed that the defendant's personnel had allegedly acted according to the standards of medical care at the time and no violations were to be found. The court of appeals in general agreed with the arguments set forth by the first instance court. The court further indicated that there was no evidence that the patient had been informed of sterilisation as a possible outcome or a possible necessity. Even if a subsequent pregnancy might be dangerous to the claimant, the question is not to be

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decided by the medical personnel unless the claimant's life is endangered. Although the sterilisation was a medically sound procedure in the given circumstances, it violated the patient's right to personal reproductive autonomy. The sterilisation was thus performed unlawfully and was considered as an impairment for which compensation of € 14,229 was adequate.

Comments

In this case, the unlawful conduct was the performance of the sterilisation in the absence of the patient's consent in a situation in which the life of the claimant was not endangered. The *concilium* did not have the right to decide upon sterilisation without the patient's consent. 3

The case reflects the nature and value of the patient's protection and the importance of the principle of a patient's autonomy. The defendant was found to be liable only for the damage that its misconduct contributed towards, despite the fact that the claimant only brought the claim several years after her condition became known to her. It remained uncontested that the sterilisation would have been necessary at some point in the future to save the claimant's life – a fact which was confirmed by two experts' opinions. In cases where a person's reproductive health might be at risk, medical personnel must act with the utmost care and the presented case shows that liability for breaches of procedure may be punitive in nature. 4

The decision mainly focuses on medical considerations, but fails to emphasise the fact that the ability to bear a child is one of the most important and distinguishing characteristics of a woman. Although the doctrine of constitutional law highlights the priority in protecting substantive rights, the CLL does not arrange the protected rights and legitimate interests according to their significance. The law equally protects all and any rights and interests that can be derived from art 1775 of the CLL providing that all damage that is not accidental is also to be compensated pursuant to art 1779. Therefore the idea reflected by the PETL to protect human life and well-being more extensively than pure economic interests cannot be found in the CLL, nor is it established by the court practice with the exception of some general implications. Amendments to the CLL ought to be introduced. Although from the wording of the law one could conclude that pure economic loss is as equally protected as personality rights, courts usually tend to lean towards a more extensive protection of the latter. 5

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Kurzemes apgabaltiesa (Kurzemes Regional Court) No C40112809, 13 November 2012

Unpublished

Facts

6 The claimant owned $^1/_{16}$ of a house in Ventspils (a city in Latvia), which was torn down by the defendant who owned $^1/_2$ of the house in question. The claimant had allegedly lived in the house until 1970 and from 1991 onwards, when he declared the house as his permanent place of residency. Since 2004 the defendant had been disrupting and encumbering the claimant's stay in the house. In 2008 the defendant tore down the house, unlawfully destroying the claimant's property in the house. The defendant had been inter alia fined by the municipality for unauthorised deconstruction works. Arguing that the value of the house was € 68,297, the claimant brought an action against the defendant claiming compensation for pecuniary harm, ie, the damage caused by tearing down the house unlawfully that corresponds to the $^1/_{16}$ of the alleged value and compensation for non-pecuniary harm inflicted by the said conduct of the defendant.

Decision

7 The court of first instance partly satisfied the claim for damages. As regards the non-pecuniary harm, the claimant failed to establish such harm despite the claimant's allegation that he had lived in the house in question for the previous ten years. The claimant appealed the decision only insofar as the compensation for non-pecuniary damage was concerned. The court of appeals also satisfied the claim partially. The defendant appealed the decision to the Supreme Court, which subsequently reversed and remanded the decision. The court of second instance rejected the claim when the case was reviewed on its merits for the second time, indicating that non-pecuniary harm under Latvian law is pain and suffering[1] that has been caused by unlawful conduct violating a person's immaterial rights and legitimate interests. The claimant did not lose a place of residence as he had not lived there nor had he maintained it. Damages equal to the value of the corresponding share in the co-owned property had already been awarded. The court, however, did not find a breach of the claimant's immaterial rights and legitimate interests causing non-pecuniary harm. The claimant's substantive rights, well-being or reputation were not violated, thus, in the circumstances at hand, only pecuniary damages may be awarded.

1 According to the definition provided by art 1635(2) CLL, non-pecuniary harm is physical or mental suffering inflicted by an unlawful act infringing a person's rights or protected interests.

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Comments

The case at hand shows the problem of various interests being infringed simultaneously by one illegal act. Without a doubt, the defendant's act in destroying the claimant's property was illegal and it constituted the basis for an administrative fine. And without a doubt, the owner had the right to receive compensation for pecuniary harm. The question posed by the owner before the court was whether this conduct constitutes a breach of fundamental human rights such as the right to own property, provided by art 105 of the Constitution of the Republic of Latvia.[2] The claimant considered he had a right to claim compensation for non-pecuniary damage. It was not mentioned by the claimant, but according to art 2:102 of the Principles of European Tort Law (PETL),[3] extensive protection is granted to property rights, including those in intangible property. The question of the grounds for compensation for non-pecuniary damage is often discussed in the context of Latvian court practice.[4] The legislator has differentiated between rights and legitimate interests with different levels of protection and theoretically compensation for non-pecuniary harm could be sought in all cases when such harm is inflicted upon a person. The case provides an example of a defendant acting in a manner which did not violate a right of the claimant constituting an infringement that could entail any compensable non-pecuniary damage. However, the claimant's right to pecuniary loss would probably not have been affected if such an action had been brought and such damage could have been proved. The outcome of the case insofar as the compensation for non-pecuniary damage is concerned would have been different if the same act had resulted in a breach of rights and legitimate interests of a person protected under art 1635 (3).[5] Therefore, one could conclude that the protected interests do bear importance in an assessment of the tortfeasor's conduct. **8**

2 The Constitution of the Republic of Latvia (Riga 2013) 298.

3 PETL <http://www.egtl.org/Principles/index.htm>.

4 More than 500 cases on non-pecuniary damage have been reviewed by the Supreme court of Latvia since 2006. See the case review on compensation on non-pecuniary damage in civil cases available at: <http://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/Morala%20kaitejuma%20atlidzinasana_2014_galigais.doc>.

5 Article 1635 CLL identifies only some cases of breach of the claimant's non-pecuniary rights and protected interests, ie, criminal offences against a person's life, health, morals, sexual autonomy, freedom, honour, dignity or against the family, or minors, where non-pecuniary harm is assumed to be inflicted by the offence itself. In those cases a claimant would be exempted from the obligation to prove the existence of non-pecuniary harm as a result of breach of his non-pecuniary rights and protected interests. Thus, in cases that do not fall under the categories mentioned by the said article, it would be very complicated to prove non-pecuniary harm and the courts usually award compensation for non-pecuniary harm in exceptional cases, insofar as protected interests referred to by the third paragraph of art 1635 CLL are not affected.

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22. Lithuania

IM v RG, 25 July 2013

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-417/2013; <http://www.lat.lt>[1]

Facts

1 During their daily walk, the plaintiff's Yorkshire Terrier was attacked and severely injured by the defendant's German Shepherd. Because of the injuries, the plaintiff's dog was euthanised. The plaintiff filed a claim requesting compensation for pecuniary and non-pecuniary damage.

2 The court of first instance granted the claim, reducing the requested amount of non-pecuniary damages. On appeal, the decision was changed and the claim to award non-pecuniary damages was dismissed by the district court. The court noted that, since under art 6.250(2) CC the victim is only entitled to compensation of non-pecuniary damage if the statutory rule so provides and art 6.267(1) CC providing for damage caused by domestic animals does not indicate the compensation of non-pecuniary damage, there was no legal basis to award non-pecuniary damages due to the loss of the pet. The appeal instance court held that, although the plaintiff experienced stress, it was not caused because of her health injury, which would be a ground to award non-pecuniary damages, but due to the loss of her property.

Decision

3 The Lithuanian Supreme Court quashed the decision of the appeal instance court concerning the non-pecuniary damages and awarded LTL 300 (€ 87), ie ten times less than was sought by the plaintiff. Although the court noted that a non-pecuniary interest had been breached – a need to meet one's need for a relationship through building the human-animal bond – is not essential in the hierarchy of protected interests because it can be at least partly restored and the conduct of the defendant did not amount to gross negligence, it awarded compensation of non-pecuniary damage on the basis of art 30(2)[2] of the Constitution.

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1 The case was commented upon by *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 387, nos 31–47.

2 Article 30(2) of the Constitution reads: 'The law shall establish the procedure for compensating material and moral damage inflicted on a person.' (official translation).

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Comments

The decision of the Lithuanian Supreme Court to rely directly on the Constitution is rather courageous in the context of a system where the victim is only entitled to compensation of non-pecuniary damage if the statutory rule so provides, therefore provoked academic debate as to whether the Lithuanian Supreme Court had not exceeded its discretion.[3] In terms of misconduct, the court did not clearly state what standard of conduct should be applied where less important interests have been infringed. Instead, the court emphasised that in this case the negligent supervision of the pet cannot be considered as 'insignificant or trivial', perhaps bearing in mind that such misconduct may result in a violation of much more important or even essential interests. 4

UAB 'Stagena' v AB SEB Bank and GS, 26 July 2013

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-420/2013; <http://www.lat.lt>[4]

Facts

The plaintiff, a company in bankruptcy proceedings, represented by its bankruptcy administrator, filed a claim against its former executive and the SEB bank, alleging that the executive had taken part in unreasonable real estate acquisition transactions which were financed by the SEB bank and, according to the plaintiff, drove the company to insolvency and consequently to bankruptcy, causing considerable damage to the creditors of the company. 5

The court of first instance in essence granted the claim and awarded pecuniary damages from both defendants solidarily. The Court of Appeal quashed the decision and dismissed the claim. 6

Decision

The Lithuanian Supreme Court upheld the decision of the Court of Appeal. The Lithuanian Supreme Court asserted that the tortious liability of a bank or other credit institution for financing services may be established when the interests of third parties are infringed, however only if the conduct of the bank issuing credit clearly derogated from the standard of a reasonable banker. Moreover, tortious liability of the bank may also be established for financing clearly unreasonable com- 7

3 See *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) nos 39–46.

4 The case was commented upon in *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) nos 48–59.

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mercial decisions of the borrower if the bank influenced the making of those decisions. According to the Lithuanian Supreme Court, a company's executive may also be held liable only for clearly unreasonable business decisions, infringing creditors' interests through deliberate intent or gross negligence. Taking a normal business risk, which is inevitable in business practice, is not the basis for an executive's liability. The conditions of tort liability were not proved in this particular case, because money was not embezzled. It instead was used for the acquisition of real estate, which according to a business plan, was intended to be used in order to expand the business.

Comments

8 An employee of a credit institution in Lithuanian legal doctrine and practice is considered to be a professional for whom a high standard of care is applicable.[5] Although the concept of 'pure economic loss' was not known in Lithuanian case law until 2015 when the Lithuanian Supreme Court, following the Lithuanian legal doctrine,[6] *expressis verbis* stated[7] that interests of a purely economic nature deserve lower protection in tort law, the Lithuanian courts in fact have been refusing to grant protection for pure economic loss on various grounds (eg lack of a causal link). However, compensation of losses of a purely economic nature is awarded in cases of breaches of *culpa in contrahendo*,[8] specialists'[9] liability cases and under the public liability regime (arts 6.271(1) and 6.272(1)(2) CC). The annotated case apparently demonstrates that, in cases of pure economic loss, the standard of grossly negligent or even deliberate conduct is applied. The authors would not dare to state that the same rule would apply to other instances of pure economic loss.

5 See also 3a/22 no 3 and 5/22 no 6.

6 *S Selelionytė-Drukteinienė*, Grynai ekonominio pobūdžio žala kaip specifinė žalos kategorija Lietuvos Respublikos deliktų teisėje [Pure economic loss as the special kind of loss in Lithuanian tort law], Jurisprudencija No 4(118) (2009) 123–146. The article is available in Lithuanian at <www.mruni.eu>.

7 *UAB 'Lik 2' v Vilnius City Municipality and Others*, LSC 27 January 2015, case No 3K-3-8-916/2015.

8 3e/22 nos 4–10.

9 Auditors, notaries, lawyers, etc.

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23. Poland

Sąd Najwyższy (Supreme Court) 26 June 2013, II CSK 582/12 (intent leading to a tort – contractual parties, pure economic loss)

OSNIC ZD B/2014, item 30

Facts

In 2005 the plaintiff sold agricultural land to the defendant for PLN 7,000 (€ 1,750), while its real value at that time was PLN 166,000 (€ 41,500). In 2008 the defendant sold the land to a third party for PLN 350,000 (€ 87,500). The defendant was convicted for the offence of obtaining property by deception (art 286 of the Penal Code). The Regional Court applied art 388 § 1 KC[1] (contractual exploitation) and equalised the performances of both parties by awarding PLN 159,000 (€ 39,750) to the plaintiff. The sum was calculated as the difference between the value of the land at the date of conclusion of the contract (€ 41,500) and the price paid by the defendant (€ 1,750). 1

The plaintiff lodged an appeal, alleging that the defendant should be held liable in tort and the damage (pure economic loss) should be estimated according to art 361 § 2 KC (*damnum emergens* and *lucrum cessans*) and the damages calculated in compliance with art 363 § 2 KC (ie according to the prices at the time of the adjudication by a court). The Court of Appeal dismissed the appeal, holding that the concurrence of legal rules on contractual exploitation and on torts is inadmissible. The provision concerning contractual exploitation is an exception to the rule of art 58 § 2 KC, according to which a contract is invalid *ab initio* if it is contrary to statute or the principles of equity, and a legal transaction carried out in such circumstances cannot be recognised as a tort in the meaning of art 415 KC. 2

Decision

The Supreme Court ruled that reprehensible behaviour of the contractual party who exploits the weaker party qualifies as a tort. Moreover, art 388 KC, which allows the court to equalise the terms of the contract or even to invalidate the latter, and art 415 3

1 § 1: 'If one of the parties, taking advantage of the forced circumstances, infirmity or inexperience of the other party, in exchange for his performance accepts or stipulates for himself or for a third party the performance whose value at the moment of the conclusion of the contract grossly exceeds the value of his own performance, the other party may demand a reduction in his performance or an increase in the performance due to him, and where both are excessively difficult, he may demand invalidation of the contract.' § 2: 'The above entitlements shall expire upon the lapse of two years from the day of the conclusion of the contract.' Translation by *T Bil*/*A Broniek*/*A Cincio*/*M Kiełbasa*, Kodeks cywilny/Civil Code (2011) 175 f.

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KC, which determines tort liability, serve different purposes. The concurrence of rules on contractual exploitation and tort liability is admissible.

4 Thus, an injured party may choose the legal basis upon which he/she will pursue the removal of unjust consequences of the agreement. A contrary interpretation would unjustifiably put an aggrieved party at a disadvantage as compared to the situation of a victim of a tort. In particular, claims based on exploitation extinguish after two years from the conclusion of the contract, while tort claims are time-barred after a minimum of three years (prescription does not result in the termination of a right).

5 The court stated that a contrary interpretation, which was followed by the Court of Appeal, could not be accepted for policy reasons. When damage is caused by reprehensible conduct (including a criminal offence) to a person who is incapable or who finds herself in forced circumstances, the law should protect the weaker party. Furthermore, two general rules of civil law: 1) that the concurrence of different legal bases for establishing liability is permissible and 2) that legal interests of the party seeking legal protection should be taken into account, justify the statutory construction endorsed by the Supreme Court.

Comments

6 In this case there is no doubt that the behaviour of the defendant constituted both contractual exploitation and a tort. Through his deliberate and reprehensible act – qualified by the criminal court as an offence – the defendant brought the inexperienced plaintiff to unfavourably dispose of her property. Thus, V suffered pure economic loss. Generally speaking, pure economic loss is not a distinct head of damage or damages in Polish law and the courts do not apply this concept. It is not seen as relevant in the light of the wide scope of the provisions of the Civil Code concerning liability in tort. Under the principle of full compensation of damage, pure economic loss, which falls within the limits of adequate causation, will be compensated.[2] Although pure economic loss is difficult to categorise in Polish law, it will be equally available on both contract and tort grounds.

7 The facts of the case matched the hypotheses of both art 388 and art 415 KC. Given the concurrence of claims in Polish civil law, the Supreme Court correctly stated that the given concurrence is admissible and it was up to the plaintiff to elect the legal path. It seems that the intentional conduct of the defendant, on the one hand, and a clear pecuniary interest of the victim, on the other, justified the protection under tort law rules. In other words, the misconduct had a tortious nature de-

2 SN 21 January 2011, III CZP 116/10, OSNZD C/2011, item 54.

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spite the original contractual relation. We are not sure whether the same result would be reached had the defendant acted negligently.

The Regional Court correctly ruled that the proper date for the equalisation should be the date of the conclusion of the contract. This was probably the reason why the plaintiff argued that the tort regime (art 415 KC) should apply to his claim, and thereby that this regime also governs the scope of damages (art 363 § 2 KC mandates the prices prevailing at the time the compensation is adjudicated). 8

Sąd Najwyższy (Supreme Court) 17 December 2004, II CK 300/04

OSP 2/2006, item 20

Facts

V sued the seller (A) and the producer (B) for compensation of material and non-material losses inflicted by the use of two defective leg prostheses. The latter were delivered by the defendant seller and co-paid by V and social benefits office. The devices were ordered to be specifically tailored to V's anatomy, however both were delivered in such a condition that V could not use them without enduring serious pain. A did not timely meet his duties under the warranty regime. All the repairs of the prostheses failed to meet the expectations of the buyer. 9

The court of first instance held that A was in breach of contract and awarded the price refund. It dismissed the remaining claims as well as the suit against B for the lack of privity. The decision was affirmed on appeal. According to both courts, in Polish law a victim has no claim for non-material loss if the cause of action is placed in the contractual regime of liability. 10

Decision

The Supreme Court held that the lower courts overlooked the fact that in this case the breach of contract caused personal injury. V's suffering was serious, albeit temporary. 11

The court observed that the conduct of both defendants was wrongful and tortious. The seller was in breach of contract, and violated both the rights of a patient as well as the principles of community life. 12

A seller of a defective orthopaedic device commits a tort when he fails to repair the device in due time and the subsequent attempts to repair the device fail to ensure the required quality, which in turn results in the aggravated physical effort and suffering of the disabled user. The court stressed that A, acting contrary to the expectations of the disabled buyer, impaired the situation of the latter and induced her physical and mental suffering thereby violating not only his contractual obligations but also moral principles (which is wrongful). Hence, as Polish law recognises 13

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the concurrence of the causes of liability,[3] V's claim for non-pecuniary loss needs to be re-evaluated by the trial court.

Comments

14 Polish courts have established that inflicting bodily injury upon a person always constitutes a tort. If the bodily injury is caused by a failure to perform or an improper performance of an existing obligation, the wrongdoer may be liable either *ex contractu* or *ex delicto*. The practical implications of the concurrence approach to the relationship between tortious and contractual liability are significant in some areas, including medical liability, travel law and product liability. In Polish law the concurrence of liabilities plays an important role when seeking compensation for non-pecuniary loss, which is only available under tort law rules.

15 Hence, the fact that V suffered this kind of loss was an important factor in the process of establishing that A had not only breached contractual duties, but that this breach was tortious in nature. The claim was possible under the general clause (art 415 KC) and the broad concept of wrongfulness.

16 In other words, the nature of the protected interest was a decisive factor in regarding A's conduct as 'tortious fault' that led to the infliction of the injury.

17 See also SN 15 March 1976, IV CR 68/76 OSNC 1977, item 12.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic)
30 September 2009
25 Cdo 4228/2007

Facts

1 This claim was brought by a hospital that was not paid for health care rendered to the injured party. The injured party, along with other unidentified persons, attacked the respondent and his wife in order to steal her handbag containing cash in the amount of CZK 100,000 (€ 4,000). The respondent mistakenly believed that the injured party seised his wife's bag (because of a large number of individuals who were involved in the criminal act) and defended their persons and property with a legally held firearm. He fired at the injured person, who ran out of the place of attack, and caused him several injuries which required subsequent hospitalisation and medical

3 See art 443 cc: 'The fact that the act or omission from which the damage arose constituted the non-performance or the improper performance of a pre-existing obligation does not preclude a claim for damages in tort, unless the pre-existing obligation provides otherwise.'

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care. However, due to the severity of his injuries, the injured party died whilst in the hospital.

Since the injured party was neither insured under the public health insurance nor had they taken out private insurance, all the costs of the medical treatment incurred by the hospital remained unpaid. 2

The court of first instance awarded the hospital damages pursuant to sec 449 CC amounting to 50% of the costs incurred. The court justified the portion by the fact that the injured, by unlawfully attacking someone in order to steal her handbag, was the main cause, while the respondent, who averted the attack, had not met the conditions necessary to classify his conduct as self-defence. 3

The court of second instance confirmed this decision. 4

Decision

Provided that the wrongdoer caused damage intentionally and the injured acted with contributory negligence, the respective negligence of the injured party will be, with respect to the intentional act of the wrongdoer, so minor that it will not be possible to take it into account. 5

The attack of the injured, whose intention was to steal a handbag with money, was directed against property, whilst the respondent's subsequent attack was directed against life and health, that is against interests which are considered more worthy of protection by law. 6

The contributory negligence of the injured consists in the fact that his attack provoked a conflict situation which one may assume will be met with a defensive reaction. As regards the scope of contributory negligence of the injured party, the nature of (the value of) a legally protected interest may also be one of the most important factors that influence the proportion to which the conduct of the wrongdoer and the injured take part in the damage, and it may therefore influence the extent of participation of the claimant. Life, physical and mental integrity, human dignity and freedom enjoy the highest protection (see art 2:102 PETL). 7

Comments

This case shows the consideration of the court as to which share of the damage shall be borne by the primary wrongdoer, who intentionally acted with the aim of stealing a handbag (a case of robbery), and the secondary wrongdoer, who protected his property with a legally held firearm out of necessity. However, in the given case, the conditions for self-defence were not met, and as a result, such a person must be held liable for the damage caused. 8

The Supreme Court dealt with the issue as to which portion of the damage was to be attributed to a person who protects its property but severely injures the attacker. The court explicitly used the arguments laid down in art 2:102 Principle of 9

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European Tort Law (PETL) that life, physical and mental integrity, human dignity and freedom enjoy the highest protection. Thus, as regards the scope of contributory negligence of the injured party, the nature of (the value of) a legally protected interest may also be one of the most important factors that influence the respective contribution of the conduct of the wrongdoer.

10 In the present case, however, the attack was organised by several persons, occurred suddenly, and the value of property which was subject to the robbery was extremely high. Therefore, although the primary wrongdoer was killed, his contribution to the occurrence of the damage was greater.

11 This conclusion corresponds with the current wording of self-defence and its conditions as laid down in the NCC. Under sec 2907 NCC, in assessing whether someone acted in self-defence, or of necessity, regard shall be taken of the agitated state of mind of the person who was averting an attack or other danger.

12 As the respondent was acting in such a state caused by the injured party and he believed that a huge amount of money was going to be stolen, these facts directly influence any conclusion on the value of the protected interest, although the injured party was not aware of the amount of money in the handbag. However, due to his conduct with the other robbers, he obviously accepted the scope of risk.

26. Croatia

Decision of the Supreme Court of the Republic of Croatia No 1210/09-2 of 27 April 2011

<www.vsrh.hr>

Facts

1 V sued the Republic of Croatia for compensation for the damage sustained due to his inability to use his immovable property. After V left his property (presumably as a result of armed hostilities), the Republic of Croatia took possession of V's house on the basis of a special regulation concerning temporary use and management of temporarily abandoned immovable properties. V's house was given to a refugee from Bosnia and Herzegovina for temporary use.

2 The court of first instance dismissed V's claim, amongst others, due to the fact that the Republic of Croatia took possession of V's house on the basis of a special regulation, hence its actions were not unlawful. The court of second instance affirmed the first instance decision.

Decision

3 The SCRC remanded the case to the court of first instance for re-examination. In substantiating its decision, the SCRC held that the case involved a claim for dam-

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ages caused by a violation of an ownership right. Since ownership is a right protected by the Constitution and international sources which Croatia is party to, notably the ECHR, in determining whether or not the Republic of Croatia had acted lawfully, the lower courts should have decided not only on the basis of general rules of tort liability but also on the basis of the requirements enshrined in the Constitution and the ECHR. In this respect, the SCRC opined that, according to the ECHR, the state can limit ownership if and to the extent that public interest so requires. The SCRC continued by stating that the Republic of Croatia had a legitimate interest in taking V's immovable property under its custody and to temporarily consign the property to the refugees. By doing so, the Republic of Croatia accomplished two legitimate interests; it protected abandoned property from deterioration and devastation and it provided housing for refugees. In this respect, the SCRC held that the state's actions were lawful. However, according to the SCRC, these two legitimate interests existed only until V requested restitution of his property. Once V requested restitution of his property, the interest to protect abandoned property from deterioration and devastation ceased to exist and only the interest of the Republic of Croatia to provide housing for the refugees remained. However, according to the SCRC, this interest has no precedence over V's interest to have his property returned and thus his ownership restored, given the fact that ownership is proclaimed one of the highest values of the constitutional order of the Republic of Croatia and as such, is afforded special constitutional protection. Hence, by refusing to return V's property immediately after V so requested, the Republic of Croatia had limited V's ownership without a legitimate public interest justifying such limitation and consequently the SCRC held that V's claim should have been assessed in light of this special position of a right of ownership in the Croatian legal system. For this reason, the SCRC remanded the case for re-examination.

Comments

Generally speaking, Croatian tort law does not recognise the concept of *a priori* legally protected interests. Therefore, Croatian law in principle enables any loss to be considered as damage, and as such, to be compensated, regardless of the nature of the right or interest violated by the wrongful act. In this respect, under the rules of Croatian tort law, as a matter of principle, even pure economic loss is recoverable.[1] **4**

However, as is evident from this judgment, particular subjective rights are of special importance and as such are protected by constitutional provisions and provisions of international treaties. One of those rights is ownership which is enumerated in the Constitution as one of the highest values of the constitutional order of **5**

1 See in more detail *I Gliha/M Baretić/S Nikšić*, Pure Economic Loss in Croatian Law, in: M Bussani (ed), European Tort Law Eastern and Western Perspectives (2007) 249 ff.

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the Republic of Croatia. As is clearly noted by the SCRC in this judgment, this specific position of right of ownership in the Croatian legal system should be taken into account when damages for violation of this right are assessed. Hence, in the case of damage, the (in)admissibility of actions which limit ownership or interfere with one's ownership and thus inflict damage should be assessed by taking into account the rules of the Constitution and ECHR concerning protection of ownership.

6 In this particular case, at first glance it seems that the actions of the Republic of Croatia were perfectly in line with the requirements of the legal order since a special law entitled the Republic of Croatia to take V's house into its possession. However, the SCRC held that, in assessing the inadmissibility (wrongfulness) of the Republic of Croatia's actions, the lower courts failed to take into consideration the relevant Constitutional provisions the aim of which is to protect ownership. In this respect, the SCRC held that the Republic of Croatia's actions, although based on a specific law, represented an excessive intrusion into the victim's ownership right, prohibited by the relevant Constitutional norms and the ECHR's norms, which made these actions unlawful. Hence, according to the SCRC, the fact that ownership is afforded special Constitutional protection, the special status of this right ought to be taken into consideration whenever an assessment is made of the admissibility of interferences with this right.

7 It is also worth mentioning that, in deciding on the wrongfulness of the tortfeasor's actions, the SCRC undertook an unusual, rather sophisticated exercise of 'weighting' concurring rights against each another. The SCRC established that the Republic of Croatia had a legitimate interest in holding V's property in its possession, notably to provide housing for the refugees. On the other hand, V had a legitimate interest in having his property returned. Hence, when one legitimate interest collides with another legitimate interest, the court must decide which interest should take precedence. According to the SCRC, a constitutionally protected right (interest) should take precedence. Based on such considerations, the SCRC decided that, by holding V's property in its possession, the Republic of Croatia acted unlawfully since V's legitimate interest took precedence over the legitimate interest of the Republic of Croatia.

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 591/99, 28 June 2000

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/6603/> (7 March 2015)

Facts

1 The director of a company suffered a number of injuries in a traffic accident and was absent from work for approximately one year because of treatment. The plaintiff,

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who performed contract work in the company, claimed compensation for lost income from the causer of the damage, basing the claim on the fact that the company did not do business during the absence of the director, because of which he also could not perform contract work in the company and obtain income. The courts of first and second instance had rejected the plaintiff's claim for compensation for lost income.

Decision

The Supreme Court confirmed the judgment of the courts of first and second in- **2**
stance. The Supreme Court called on the theory of an adequate causal link and stressed that it is necessary to consider as legally relevant causes those circumstances which, in the normal course of events, lead to harmful consequences. A company obtaining income depends on a number of factors, such as the activity in which the company is involved, demand for services that the company provides and competitiveness of the company on the market. One of the essential criteria for the success of a company is also the director of the company but his absence is not a decisive cause for a drop in income of the company. Because numerous factors influence the extent of a company's income, the income of a contract worker is also subject to a number of factors. The Supreme Court thus rejected the existence of a causal link between the traffic accident and thus the injury to the director of the company and the drop in income of contract work in this company.

Comments

Slovenian court practice and theory, in studying the causal link between unlawful **3**
behaviour and damage, rely on the theory of adequate cause and the theory of *ratio legis* causality.[1] According to the theory of adequate causality, a cause shall be considered that which is typical for the occurrence of specific damage, thus that which generally leads to such damage.[2] In accordance with the stated theory on adequate causality in the above case, the court rejected the existence of a causal link between

1 Pravno mnenje občne seje Vrhovnega sodišča RS [Legal opinion of a plenary meeting of the Supreme Court RS], Pravnik 1992, 570; decision of the Supreme Court II Ips 178/2007, 16 September 2010, <http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2010040815249734/> (28 February 2015); *A Polajnar Pavčnik*, Vzročnost kot pravnovrednostni pojem [Causality as a legally valuable concept], Zbornik znanstvenih razprav 1993, 187; *D Jadek Pensa*, Uvodni komentar [Introductory commentary], in: M Juhart/N Plavšak, (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 676, 677.

2 *B Novak*, Vzročna zveza protipravnost in krivda pri odškodninski odgovornosti [Causal link, unlawfulness and fault in tortious liability], Zbornik znanstvenih razprav Pravne fakultete v Ljubljani 1997, 271, 280.

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the absence of the company's director and the drop in income of a person who performed contract work in this company. The traffic accident that resulted in the absence of the director, namely, is not the only and decisive reason for the reduction in income of a company and thus the drop in income of contract workers.

4 Slovenian tort law principally does not differentiate between different protected interests and even pure economic loss might be compensable in tort law. Hence, also the Supreme Court did not discuss the issue of the protected interests involved. However, Slovenian courts discuss this matter as an issue of adequate causality and restrict liability in this way.

28. Romania

Tribunalul Timiș (Tribunal of Timiș) Civil Section I, Decision No 568 of 15 May 2013
<http://www.juridice.ro/333697/tribunalul-timis-statul-obligat-la-plata-dedespagubiri-pentru-avariile-cauzate-unui-autoturism-din-cauza-gropilor-din-asfalt.html>

Facts

1 A car owner claimed compensation for the harm caused to his car on a public road after entering a hole in the road.

Decision

2 The Tribunal of Timișoara established the liability of the municipality of Timișoara on the basis of the general rules on tort liability of arts 998 and 999 of the old Civil Code upon finding that there was a causal link between the hole in the road and the damage to the car, *without entering into an analysis of the fault* on the side of the municipality. In addition, the company contracted by the municipality to conduct the repair works was also found liable for lack of proper marking of the worksite. Wrongfulness (*fapta ilicită*) of the company consisted in its non-compliance with its obligation established in art 5(1) and (2) of Emergency Government Ordinance 195/2002 and art 8(1) and (2) of the implementing regulation of the Ordinance) which establish the duties of companies undertaking such works.

Comments

3 This case is interesting because it was not decided on the rules on liability for damage caused by goods, but rather under the rules on tort liability for one's own acts. The fact that there was an infringement of a duty stemming from a statute on road maintenance (the Emergency Government Ordinance 195/2002) sufficed to establish wrongfulness. The outcome would be similar under art 1349 of the new Civil Code, which no longer requires the fault of the tortfeasor as a condition of liability.

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Tribunalul Gorj (Tribunal of Gorj), Civil Section II, Decision No 78 of 12 March 2012
<http://legeaz.net>

Facts

An insurance company sued the National Directorate of Roads and the Regional Directorate of Roads and Bridges and claimed compensation for damage caused to the car of its client due to numerous holes in the road. 4

Decision

The Tribunal of Gorj established the liability of the defendants on the basis of the provisions of the Emergency Government Ordinance 195/2012, arts 45 and 5(2), that lay down the duty of the road administration to take all emergency measures needed to prevent and remove obstacles that affect/endanger traffic on public roads. The fault of the road administration company was presumed since it is the guardian of the public roads, thus it is liable for damage caused by the good (public road) under its control and supervision. The damages were granted by the tribunal on the basis of the provisions on liability for damage caused by goods of art 1376 of the new Civil Code. 5

Comments

The victim could have also claimed damages directly from the company that made the hole. However, in practice victims usually prefer to sue the guardian of the good (in our case the guardian of the road) whose liability is objective, which implies for the plaintiff an easier burden of proof compared to a suit based on fault liability. Liability is founded on the idea of risk inherent in the activity. However, according to art 1380 of the new Civil Code, the guardian of a good is not liable if the damage is the result of *force majeure*, or was caused by the deeds of the victim, or the acts of a third person. In such a case, in order to be exonerated from liability, the guardian of the good must prove that the harm was caused exclusively by events or acts outside his control. In the case of objective liability, wrongfulness, in the sense of infringement of a duty, also has to be proved. If this element is lacking, no liability may be imposed on the guardian. A causal link is required between the good, as the direct source of the damage, and the damage. In cases when a causal relation cannot be established, the good being only a vehicle/instrument used for causing the damage, the tortfeasor will be liable under the provision on liability for one's own deeds (arts 1357–1371).[1] 6

1 *L Pop/I-F Popa/SI Vidu*, Curs de Drept Civil (2015) 383.

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7 Cases on road accidents where the damage is caused as a result of lack of warning or defective warning are determined either on the basis of the general rules on tort liability (art 1357 new Civil Code) or under the rules on liability for damage caused by things (art 1376). The court's approach on the legal basis of such tort lawsuits does not seem to be uniform. Non-statutory norms (eg professional standards, codes of conduct, or unwritten common practice) play an important role in determining the required standard of conduct when there are no imperative legal provisions (special laws) governing the type of activity in question. According to art 1376(1), anyone is liable, regardless of his fault, to compensate damage caused by goods under his/her control.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 A, a construction company, is doing work on a road in the vicinity of V, a company producing stainless steel. A carelessly damages a cable that supplies electricity to V's factory. The cable is owned by a third party. The power is off for 14 hours, disrupting V's 24-hour-a-day operations. V claims damages under three heads:

2 (a) physical damage to melted material which was in the furnace when the power supply was cut and which V's workers tried to save. The damage to this material amounts to € 15,000;

3 (b) loss of the € 10,000 profit that would have been made on the same melted material if the melt had been properly completed;

4 (c) loss of € 40,000 profit V would have been able to make on four more melts which could have been put through the furnace, had the power remained on.[1]

Solutions

a) Solution According to PETL

5 In the above scenario, the damaged cable was owned by a primary victim (rather than by V). A negligently injured the primary victim in the property of its cable, and for this it can claim damages under the PETL[2] and arguably all European national jurisdictions.

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1 Scenario of the English case: *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*, Court of Appeal (Civil Division) 14 December 1971, [1973] 1 QB 27, below 3b/12 nos 1–6 with comments by *K Oliphant*/*V Wilcox*; see also: Digest II, 6/12 nos 1–3 with comments by *K Oliphant*. For numerous examples of 'cable cases' in other jurisdictions, see the references in the following footnotes.

2 Compare Digest II, 5/29 no 4 f with comments by *T Kadner Graziano*.

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V, a secondary victim who did not own the cable, was deprived of its energy supply and consequently suffered physical damage to the material which was in the furnace in the amount of € 15,000. V is thus claiming € 15,000 for damage to *property*. 6

Had V been able to properly complete the melt, it would have been able to sell the material for a profit of € 10,000. This € 10,000 is thus *loss* which is *consequential to damage to property*. 7

Last but not least, V is claiming € 40,000 for loss of profit it would have been able to make on four more melts, had the power supply not been cut. The loss of € 40,000 in profit, suffered by V, does *not* follow from the damage to V's property. It is, on the contrary, pure economic loss not resulting from physical injury to V's property but from the fact that the V's activities were interrupted as a consequence of the damage to the power cable owned by a third party.[3] 8

This case raises the issue of the extent to which a party (in the above scenario: the construction company A) is required to avoid different categories of loss, and in particular whether it is required to avoid causing 'pure economic loss' to third parties (in the scenario: V). 9

In a first group of European jurisdictions, indirect loss suffered by a secondary victim (steel company V) would not be recoverable even if damage was caused to the secondary victim's property. The arguments provided for this (comparably restrictive) attitude is that the circle of potential secondary victims may be very wide, and so the burden on the person claimed to be liable may be very heavy to the point of being ruined by a flood of claims, and that the victim could have taken precautions in view of a shortage of electricity supply.[4] 10

In a second group of jurisdictions, no distinction would be made in principle in the above scenario between the primary and secondary victims and between damage to property and pure economic loss. The whole loss claimed by the steel company would be recoverable. These jurisdictions focus primarily on the victim's interest in compensation and, in particular, the victim's interest in an uninterrupted supply of essential commodities such as electricity, gas, etc.[5] 11

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3 Compare PETL – Text and Commentary (2005) art 2:102 no 9 (*H Koziol*): 'Pure economic loss is a financial loss which does nor result from physical injury to the plaintiff's own person or property'.

4 See the reasoning in the Norwegian case: Hr (Norwegian Supreme Court) 29.9.1955, Rt 1955, 872, and 10.11.1973, Rt 1973, 1268, above 3b/17 nos 5–7 with comments by *AM Frøseth*/*B Askeland:* (facts of the latter case:) an airplane crashed into a set of electricity cables causing a fish farmer to lose a great number of fish due to the resulting power cut. The number of potential claimants was large. The claim was rejected. See also Digest II, 5/16 no 5 with comments by *B Askeland*. For a similar result in Finnish law, see the case: Korkein oikeus (Supreme Court) KKO 2003:124, R2001/939, 12.12.2003/3074, above 3b/19 nos 1–7 with comments by *P Korpisaari*.

5 Compare for Dutch law: HR (Dutch Supreme Court) 1 July 1977, ECLI:NL:HR:1977:AB7010, NJ 1978/84 (Van Hees/Esbeek), above 3b/8 nos 1–3. with comments by *SD Lindenbergh*; for French law:

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12 Most European courts would reach a third outcome, hereby making a fundamental distinction in the above scenario between positions (a) and (b) on the one hand, and position (c) on the other. Damage to property and financial loss consequential to damage to property which was foreseeable and avoidable for a reasonable person in the circumstances (positions (a) and (b)) is recoverable in these jurisdictions, even if the chain of causation is long. However, there is, in principle, no duty to avoid pure economic loss (position (c)). The damage of € 15,000 resulting from the impairment of material which was in the furnace, as well as when the € 10,000 loss, which is consequential to the damage to the factory's property in the material, would be recoverable in these jurisdictions. On the contrary, the defendant would not be liable for the further loss of profit in the amount of € 40,000 (the so-called *pure economic loss*).[6]

13 According to these systems, the further loss of € 40,000 would only be recoverable if the person alleged to be liable violated a provision which specifically protected the victim against this type of (pure economic) loss.[7]

14 Under the PETL, the reasoning would start with the fact that V suffered physical damage to the metal that was in the furnace when the cable was cut. Just like the owner of the cable, V has suffered damage to its property. Given that property rights enjoy extensive protection under art 2:102(3) PETL, that the PETL make no fundamental distinction regarding the length of the chain of causation and that they make no fundamental distinction between primary and secondary victims when it comes to damage to property,[8] under the PETL, A was required to take reasonable care with respect to the protection of property of secondary victims such as V. Experience shows that carelessly digging in the vicinity of roads and factories entails a risk of

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Cass civ 2 (Court of Cassation, 2nd civil chamber) 8 May 1970 (*Société Allamigeon Frères et Lacroix c Lafarge*) no 69-11446, Bull 1970 no 160; for Italian Law: Cass SS UU (Court of Cassation, Joint Divisions) 24 June 1972, no 2135 (*Pasta case*) Giur It 1973, I,1,c 1124; Foro It 1973, I1,100, above 3b/9 nos 1–3 with comments by *N Coggiola*/*B Gardella Tedeschi*/*M Graziadei*. See also Digest II, 5/9 no 1 with comments by *N Coggiola*/*B Gardella Tedeschi*/*M Graziadei*.

6 See for England: *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*, Court of Appeal (Civil Division) 14 December 1971, [1973] 1 QB 27, below 3b/12 nos 1–6 with comments by *K Oliphant*/*V Wilcox*; see also: Digest II, 6/12 nos 1–3 with comments by *K Oliphant*; for Ireland: *Irish Paper Sacks Ltd v John Sisk & Son (Dublin) Ltd*, High Court, 18.5.1972; above, 3b/14 nos 7–11 with comments by *E Quill*: no duty of care to avoid pure economic loss; see also Digest II, 5/14 nos 1–5 with comments by *E Quill*; for Scotland: *Dynamco v Holland and Hannen and Cubitts,* 15.7.1971, SC 257, 1972 SLT 38 (decision of the Inner House of the Court of Session); above, 3b/13 nos 1–5 with comments by *M Hogg*; see also Digest II, 5/13 nos 1–4 with comments by *M Hogg*; Germany: BGH (Federal Supreme Court of Justice) 4.2.1964, BGHZ 41, 123 (chicken case).

7 Which is the case for cable cases eg in Switzerland, see: Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 2 March 1976, ATF 102 II 85, above 3b/4 nos 7–15 with comments by *B Winiger*/*A Campi*/*C Duret*/*J Retamozo*.

8 Compare Digest II, 5/29/9 with comments by *T Kadner Graziano*.

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cutting the supply of essential commodities, so in this respect the damage to V would have been foreseeable. A was carrying out its professional activities, it should have had the expertise necessary to avoid this damage, and could have avoided it at reasonable cost and effort by surveying the location of underground power lines (see the criteria provided in art 4:102(1) PETL). Following this line of reasoning, the V could successfully claim compensation for the damage to the steel that was in the furnace when the cable was cut (position (a)).

Under the PETL, once liability for damage to property is established, the liable person has to restore the victim 'so far as money can, to the position he would have been in if the wrong complained of had not been committed', art 10:101(1) 1st sent PETL. Under this line of reasoning, the damage to V's property would thus include V's loss of profit which is consequential to the property damage, that is, the loss of the € 10,000 profit that would have been made if the melt had been properly completed (position (b)). This solution under the PETL would be in line with the second and third solutions found in the national jurisdictions. **15**

The last question is whether A was also required to not cause pure economic loss to third parties (in the scenario: V) and, consequently, whether it is required to compensate V's further loss in the amount of € 40,000. As we have seen above, the PETL list the factors relevant in assessing whether the required standard of conduct has been attained in art 4:102(1). According to this provision, '[t]he required standard of conduct' depends, among other criteria, 'on the nature and value of the protected interest involved'. Article 2:102 PETL defines the protected interests and provides in para (4) that '[p]rotection of *pure economic interests* or contractual relationships may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim'.[9] **16**

Under the PETL, the duty to protect others from pure economic loss 'may' thus be less intensive than the duty to avoid injury to life, bodily or mental integrity, human dignity, liberty and property rights (compare art 2:102 (1)–(3) PETL). In the above scenario, A and V were not in a relationship with each other and the A was not 'aware' of the fact that it was it was causing damage to V (see the criteria in art 2:102(4) PETL). Thus, it may very well be argued that under the PETL, A did not have a duty to protect V against further loss suffered due to the standstill of V's operations. This outcome would be in line with the majority view in European jurisdictions. **17**

A further argument for treating victims who suffer property damage differently from victims suffering pure economic loss under the PETL is the number of potential **18**

9 Emphasis added.

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victims. The number of victims who may suffer pure economic loss due to a shortage in energy supply is much larger than that of victims who may suffer damage to property. In national jurisdictions, liability for (pure economic) loss in 'cable case' situations has been rejected in particular in situations where the number of potential secondary victims was large and the defendant risked being ruined by a flood of claims should he have been held liable.[10] The large number of potential claimants is arguably another reason why national courts are reluctant to hold electricity companies liable in tort vis-à-vis their clients in cases where they negligently interrupted the power electricity supply for the customers.[11]

19 Last but not least, under art 8:101(1) PETL (contributory conduct or activity), it may be argued (just as courts do in some jurisdictions) that V could or should have taken precautions against the cutting of energy supply, thereby avoiding the occurrence of damage to its property (with the effect that such liability is reduced), and against the occurrence of pure economic loss (which may be another argument to exclude liability for such loss altogether).[12]

20 Thus, it may very well be argued that under the PETL A was required to take all reasonable care to avoid V from suffering *property damage* as well as the *loss of earning consequential to this property damage*, whereas A was not required to prevent V from suffering *pure economic loss* following a shortage in power supply. The case may then illustrate the less extensive protection of pure economic interests under the PETL, when compared to the protection of body, health, or property rights, for instance.

b) Solution According to the DCFR

21 The owner of the cable has suffered damage to his property. According to art VI–2:206, damage to property is 'legally relevant damage' under the DCFR and the contractors are, pursuant to arts VI–1:101 and VI–2:206 DCFR, liable for the damage to the property of the cable's owner just as under the PETL and arguably all European national jurisdictions. The construction company has to pay the owner the cost of repair or otherwise repair the damage itself (compare art VI–6:101 DCFR).

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10 Compare in particular the reasoning of the Norwegian Supreme Court, above 3b/17 no 6 with comments by *AM Frøseth/B. Askeland*.

11 Compare eg the Spanish case: Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 31 January 2012, RJ 2012\2031, above 3b/10 nos 1–4 with comments by *M Martín-Casals/J Ribot*; contrast with the Greek case: Efeteio Kritis (Crete Court of Appeal) 427/11 September 2007, EllDni (49) 2008, 22, above 3b/5 nos 1–4 with comments by *EG Dacoronia*: following a power cut, 4,360 hens die of suffocation; the electricity company is held liable for 70% of the damage, with 30% concurrent liability of the victim because they had not properly maintained their safety generator.

12 Compare the reasoning of the Norwegian Supreme Court, above fn 4.

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With respect to the damage suffered by the steel factory V, under the DCFR, this case again raises the issue of the extent to which a party (in the above scenario: the construction company A) is required to avoid different categories of loss, and in particular whether it is required to avoid causing 'pure economic loss' to third parties (in the scenario: to the steel factory V). 22

The official commentary to the DCFR deals explicitly with a 'cable case' scenario similar to that above.[13] According to the commentary, art VI–2:206 DCFR protects the owner of the damaged cable as well as the owner of the factory against damage to their property (for example, damage to the heated metal in the furnace that cools down and is thereby damaged) and against losses consequential to such damage (for example, lost profits resulting from this damage to property). The commentary hence suggests that once property rights are violated, damage is 'legally relevant' not only with regard to primary victims but also regarding secondary victims who suffer damage to property. The decisive criterion under the DCFR is therefore not the length of the chain of causation but the fact that the victim's property right is infringed. 23

The commentary further suggests, on the other hand, that the DCFR does not protect the factory owner – who is a secondary victim – against *pure economic loss* that does *not* result from damage to his property but from the mere temporary interruption of the power supply. 24

According to the solution suggested by the official commentary to the DCFR, the loss suffered by V due to the physical damage to the metal (€ 10,000), as well as the profit lost when selling the melted metal (€ 15,000), is to be regarded as legally relevant damage, whereas V's further loss of profits in the amount of € 40,000 is not recoverable. 25

31. Comparative Report

All the reporters submitted cases in this sub-category except those for Estonia, Slovakia and the EU. 1

Several reporters were prepared to accept that, in principle, the nature and value of the protected interest influences the conduct that is required of a reasonable person:[1] the more important the interest affected, the greater the care and attention that must be demonstrated towards it by the defendant (other things being 2

13 *C v Bar/E Clive*, DCFR, art VI–2:206, Comment B, Illustration 4 (p 3317).

1 See art 4:201(1) PETL: 'The required standard of conduct is that of the reasonable person in the circumstances, and depends... [inter alia] on the nature and value of the protected interest involved...'.

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equal).[2] This seems true even in legal systems which have no formal set of interests protected by tort law, as a hierarchy of such interests is often given at least implicit recognition.[3] Yet it proved surprisingly hard to track down cases that demonstrated the proposition unequivocally and explicitly. The French reporters think that the high importance attached by their courts to the interest in freedom from bodily injury explains the ease with which fault was found on not particularly strong facts in one of the cases they include here, but they underline that this was not part of the court's express reasoning.[4] The especial importance attached to interests in the person[5] is also acknowledged in other legal systems, whether by specific rules[6] or merely a judicial tendency to give them more protection in practice.[7]

3 A large number of cases considered the issue of the recoverability of economic loss. Of course, this is generally considered a matter of the protective scope of the violated norm or, to use the common law terminology, the scope of the duty of care.[8] But the inverse side of the coin warrants attention here insofar as the nature of the interest affected may determine *whether or not* the defendant's conduct should be adapted to take into account the specified interest of the claimant at all. So legal systems that distinguish between pure and consequential economic losses, for example, and treat the former as prima facie non-recoverable – with no such barrier existing to the recovery of damages for consequential economic loss,[9] are in effect

2 See especially Austria 3b/3 no 3; Netherlands 3b/8 no 3; England and Wales 3b/12 no 6. See also Switzerland 3c/4 no 24.

3 Latvia 3b/21 no 5 (a tendency to give priority to rights in the person); Croatia 3b/26 no 3 ff (high constitutional value attached to ownership of property). But cf Belgium 3b/7 no 5: 'With regard to the *bonus pater familias'* behaviour, considerations of priority given to one interest or another or hierarchy between interests are *a priori* not involved.' Under the DCFR, there is no hierarchy of protected interests but instead a distinction between damage that is 'legally relevant' and that which is not: see further PETL/DCFR 3b/30 no 20 ff. I have written elsewhere that 'the listed instances reflect an implicit understanding of what interests are worthy of legal protection, and their relative importance': *K Oliphant*, European Tort Law (2009) 20 King's LJ 189, 197.

4 France 3b/6 no 1 ff (especially no 3).

5 Cf art 1:102(2) PETL: 'Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.'

6 Poland 3b/23 no 1 ff; Czech Republic 3b/24 nos 7 and 9.

7 Latvia 3b/21 no 5.

8 See especially Austria 3b/3 no 4; Netherlands 3b/8 no 3; England and Wales 3b/12 no 5; Ireland 3b/14 nos 6 and 10. Cf art 2:102 PETL.

9 See Germany 3b/2 no 5; Austria 3b/3 no 4; Netherlands 3b/8 no 3; Portugal 3b/11 no 6 (but there was liability on the facts of the case submitted); England and Wales 3b/12 no 3 f; Scotland 3b/13 no 2; Ireland 3b/14 no 9; Lithuania 3b/22 no 8 (since SC decision of 2015). Even where there is no formal distinction in law, courts may be reluctant to compensate for pure economic loss: Denmark 3b/16 nos 3 and 6 (a reluctance to compensate); Norway 3b/17 no 3 (less chance of success); Latvia 3b/21 no 5 (less extensive protection). Liability for pure economic loss resulting from negligence was also denied in classical Roman law: see Historical Report 3b/1 nos 4 and 10. Regarding exceptions to the

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saying that persons generally have no duty to take reasonable care of the purely economic interests of others except in special circumstances.

The distinction can be illustrated with reference to one or more of the large number of 'cable cases' that have come before the courts in many countries. The typical scenario is where the power cable supplying electricity to a factory is broken because of negligently conducted works on adjoining or nearby land, but it is (mostly) immaterial *why* the power is cut off so long as it was done negligently, or *what activity* was interrupted so long as it had economic value. Where the loss results from the inability to continue production per se it is purely economic and, in some legal systems (especially in the German-speaking and common law areas), will not be compensated.[10] It makes no difference that there was damage to the cable if that was the property of a third party, not the claimant.[11] Naturally, if the power outage results in damage to the claimant's own property, the economic losses consequential on that damage do normally fall to be compensated.[12] **4**

No distinction is made between pure and consequential economic loss in other countries, especially (though not only) in southern Europe.[13] In cable cases in these countries, liability extends beyond the value of goods that are destroyed and entails compensation even for pure loss of profits.[14] A similar outcome is reached in the also familiar scenarios of damage to a bridge[15] and blockage of a tunnel.[16] However, a di- **5**

general exclusionary rule, see eg Ireland 3b/14 no 4ff (public nuisance) and more generally 3e below, discussing relationships of proximity.

10 Germany 3b/2 no 5; Austria 3b/3 no 1ff; Switzerland 3b/4 no 1ff (but cf *idem* no 7ff); England and Wales 3b/12 no 1ff; Scotland 3b/13 no 1ff; Ireland 3b/14 no 7ff. For an overview of the different approaches taken in such cases, see PETL/DCFR 3b/30 no 1ff.

11 Austria 3a/3 no 2; England and Wales 3b/12 no 1ff; Scotland 3b/13 no 2; Ireland 3b/14 no 7ff; Denmark 3b/16 no 1ff; but cf Portugal 3b/11 no 1ff (liability for pure economic loss even though damaged pole does not seem to have been on V's land).

12 Germany 3b/2 no 1ff (eggs would not hatch); Austria 3b/3 no 5 (spoilage of items in freezer); England and Wales 3b/12 no 1ff (damage to metal being process at the time of the outage); Ireland 3b/14 no 1ff; Denmark 3b/16 nos 1ff and 4ff. What counts as a sufficient interest in the property may of course be a disputed issue: see Sweden 3b/18 no 1ff (tenant of housing association property).

13 Greece 3b/5 no 4; France 3b/6 no 10; Belgium 3b/7 no 11; Poland 3b/23 no 6; Croatia 3b/26 no 4; Slovenia 3b/27 no 4.

14 Greece 3b/5 no 1ff; Belgium 3b/7 no 1ff (telephone cable); Netherlands 3b/8 no 1ff (gas pipeline); Italy 3b/9 no 1ff (*Pasta Puddu*). See also Portugal 3b/11 no 1ff (liability even though pure economic loss generally gives rise to no claim in tort).

15 Belgium 3b/7 no 7ff.

16 Norway no 1ff. See also Denmark 3b/16 no 1ff (trawling halted because of damage to another trawler).

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rect/indirect distinction can be applied which may have the effect, if not the explicit purpose, of precluding liability for pure economic loss in some situations.[17]

6 Whether or not pure economic loss is generally recoverable in a given legal system, courts sometimes refuse to compensate even loss attributable to property damage that is occasioned by a power outage, but that seems to be because the loss was found to have been the consequence of the owner's own failure to have a power back-up or similar.[18] In such cases, the defendant is entitled to rely on the owner taking reasonable preventive steps and the harm resulting from the failure to do so is not the defendant's responsibility.

7 The situation is very different, of course, where a pure economic loss results from fraud or some other form of intentional misconduct, as it is very clear that this constitutes a violation of the required standard of conduct for which liability may arise in damages.[19] Liability may yet be denied, however, if the claimant was a remote victim of the misconduct.[20]

17 Greece 3b/5 no 4; Norway 3b/17 no 2; Slovenia 3b/27 no 1ff. See also the application of the distinction in Germany (3b/2 no 5), Austria (3b/3 no 2) and Switzerland (3b/4 no 12f), where it is more explicitly tied with the denial of liability for pure economic loss.

18 Spain 3b/10 no 1ff; Norway 3b/17 no 5ff.

19 Historical Report 3b/1 no 4 (Roman *action de dolo*); Ireland 3b/14 no 10f; Malta 3b/15 no 8; Denmark 3b/16 no 3; 3b/19 no 5; Lithuania 3b/22 no 7; Poland 3b/23 no 1ff; Czech Republic 3b/24 no 1ff. In some legal systems, a violation of good morals is also required: Germany 3b/2 no 5 (§ 826 BGB); Austria 3b/3 no 5 (§ 1295(2) ABGB).

20 Finland 3b/19 no 1ff (intentional damage to electricity power line).

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3c. The Dangerousness of the Activity in Question

1. Historical Report

Paulus, D 9.2.28 pr and D 9.2.28.1

Facts

The defendant dug pits in order to catch bears and deer. A slave fell in one of them and got injured. **1**

Hypothesis 1: The pits were dug along a path.

Hypothesis 2: The pits were dug within a hunting area.

Hypothesis 3: The slave was warned or elsewise could have foreseen the danger.

Decision

Paulus[1] held the damaging party liable in hypothesis 1, but not in hypotheses 2 and 3. **2**

Comments

The distinction made by Paulus exemplifies the role which the dangerousness of the activity could play for establishing liability under Roman law.[2] **3**

Digging pits could in principle trigger the tortfeasor's liability, seeing that he created a (manageable) risk for passers-by who were certain to suffer some form of injury if they fell in one of them.[3] However, Paulus granted an action based on the lex Aquilia only in hypothesis 1, but rejected it in hypotheses 2 and 3. The overarching criterion governing his decisions seems to be the recognisability of the danger. Thus, within a hunting area one had to expect pits and exercise proper care, otherwise the defendant could not be blamed. After all, he did only what he was allowed to do (according to Roman Law). The case was different for paths where pits constituted a source of danger that generally was not and had not to be anticipated by the passing slave. But Paulus went a step further and added an additional refinement: if the slave was warned, knew or elsewise could have foreseen the pits, the defendant **4**

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1 Iulius Paulus, 1st half of the 3rd century AD.

2 On the decision in general cf *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 258 ff; *C Wollschläger*, Das eigene Verschulden des Verletzten im römischen Recht, ZSS 93 (1976) 115, 125 ff; *C Möller*, Die Rolle der Unterscheidung von *via publica* und *via privata* im römischen Deliktsrecht, in: Ars iuris. Festschrift für Okko Behrends zum 70. Geburtstag (2009) 440 ff; *W Kunkel*, Exegetische Studien zur aquilischen Haftung, ZSS 49 (1929) 158, 171 ff.

3 Whether Paulus advocated the *actio legis Aquiliae* or the analogous *actio in factum* is not entirely clear from the text: 'lege Aquilia obligati sunt'.

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was not liable, even if he dug them along a path. In this last hypothesis, the misconduct of the defendant seems to be concurring with that of the injured party. Yet, according to Roman Law, *culpa* could only lie with one of the parties involved and the defendant was either liable or not. The Roman jurists probably based their decisions on considerations similar to the idea of a primary implied assumption of risk.[4]

5 The present case is quite in line with others. Thus, the liability of a javelin-thrower depended on whether he practised on a drill ground or a public place.[5] Similarly, for the jurist Sabinus[6] a pruner injuring a passing slave only incurred liability depending on whether he cut branches along a public or a private path.[7]

6 In conclusion, the dangerousness of the activity in question was an important criterion for liability under the lex Aquilia. However, the jurists also took into account the recognisability of the emanating danger to the victim, which could relieve the injurer.

2. Germany

Bundesgerichtshof (Federal Supreme Court) 12 November 1996, VI ZR 270/95

NJW 1997, 582

Facts

1 The claimants were the parents of a boy who, at six and a half years old, while playing, fell into a fire water pond (a pond containing water used exclusively in fire fighting) on the ground of one of the three defendants. The boy went under water but was rescued after a while. He suffered severe brain damage with unresponsive wakefulness syndrome (a persistent vegetative state) and died six years later. The pond had been planned without a fence by the supervising architect and was so erected by a construction firm although, according to the applicable industry norm (DIN), such ponds had to be surrounded by a fence at least 1.25 m high. The architect and the construction firm were the other defendants. They had already finished their work when three months later the accident happened. Their work included the erection of a hall for trucks; the pond was to collect the rain water from the hall's roof and to serve in case of fire. The ground of the owner had a fence which, however, had been trampled down by children who used to pass it in order to play there. Very close to the pond there was a steep 5 m high earth wall from which the boy had slid down into the pond.

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4 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 261.

5 *Ulpian*, D 9.2.9.4.

6 Masurius Sabinus, 1st century AD.

7 *Sabinus*, D 9.2.31 (3d/1 nos 1–7).

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Decision

All three defendants were held liable. The court found that all three defendants had a duty of care (*Verkehrssicherungspflicht*) to take reasonable precautions against dangers for children playing near the pond. The architect and the construction firm were liable because they left behind an unsafe site which was particularly dangerous for children but also attractive for them. It was therefore no excuse for the architect and the construction firm that the accident happened three months after they had finished their work. Their duty continued until another had in fact taken over the task of securing the source of danger. Although the owner was likewise liable for the safety of his site, this did not relieve the other responsible persons. **2**

Comments

It may appear as a rather far-reaching liability that architects and construction firms remain liable even after they have finished their work and the owner is in possession of the work. All the more so as they are held liable towards third persons – the injured boy who actually was not entitled to enter the neighbouring ground and to play there. However, the degree of danger justifies the consequence. The higher these dangers are and the more attractive the sources of potential dangers for children are and the less able children are to realise those dangers, the stricter is the duty of the responsible person(s) to take precautions.[1] Because a fence had not been erected, in order to avoid liability, the architect and the construction firm should have explicitly warned the ground owner that he would have to take further steps to avoid dangers.[2] The fact that the existing fence surrounding the whole property was trampled down played no role since the children could have entered the ground also via the open entrance for trucks. The decision is a good example of the courts imposing a higher level of care due to the dangerousness of the activity. **3**

3. Austria

Oberster Gerichtshof (Supreme Court) 12 September 1989, 5 Ob 595/89

JBl 1990, 113

Facts

The defendant was a society whose members were residents of a housing estate. The society acquired two portable soccer goals made of steel and erected them on the **1**

1 For an overview of similar decisions see *G Hager* in: J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse (2009) § 823 no E 211.

2 BGH NJW 1997, 582, 584.

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grounds of the estate. Although the goals were first anchored in the ground, they were nevertheless instable. After the anchorage had been removed by unknown persons, the goals were often shifted. The claimant, a child, was hit by one of the goals falling while playing with his friends and demanded compensation.

Decision

2 The Supreme Court accepted the claim. It stated that whoever creates or retains a source of danger in his sphere of control has to protect other persons as far as is reasonable against this risk. The defendant had the duty to implement safety precautions (*Verkehrssicherungspflicht*) regarding the goals, because it had the legal power of disposition in respect of these and provided them for the children. A foreseeable possibility of a danger is sufficient to create an obligation to act, as long as potential measures are reasonable. The instability as well as the risk of the goals falling and injuring children was foreseeable and requiring appropriate erection and anchorage would be reasonable. As the duty to maintain safety also applies to dangers created unlawfully and willfully by third parties once the damage is objectively perceptible, the defendant was not exonerated by the actions of unknown third parties. The requirements in respect of the duties are even higher if children are likely to be endangered.

Comments

3 Under Austrian law, the dangerousness of certain conduct plays a significant role for the assessment of wrongfulness and the standard of care applicable.

4 This is true firstly for the finding of whether the infringement of an absolute right is to be deemed unlawful or not, as this requires a weighing of interests (cf 3a/3 no 3).[1] To this end, not only the value of the protected interest, the reasonableness of alternative behaviour and the general interest in freedom of action, but also the dangerousness of the activity have to be taken into account.[2] The dangerousness in this regard relates to the probability of damage occurring.

5 Secondly, the protection of absolute rights is reinforced by duties to maintain safety and to protect others against risks one has created (so-called *Verkehrssiche-*

1 OGH 5 Ob 73/88 = SZ 61/270; 4 Ob 524/92 = ZVR 1992/177; 3 Ob 501/94 = JBl 1995, 658 *D Karollus-Bruner*; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4; *H Koziol*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 ff.

2 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/28 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4.

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rungspflichten).[3] These duties not only forbid any conduct that endangers absolute rights but also require the tortfeasor to actively prevent damage; in this particular case, omissions are considered wrongful even under tort law.[4]

As far as the determination of the afore-mentioned duties is concerned, the degree of dangerousness is also decisive: the greater the danger (assessed according to the probability of the occurrence as well as the possible gravity of the harm) posed by the activity, the more extensive the duties to be fulfilled. This principle is generally accepted by case-law and academic literature.[5] A particular danger may arise from quite different circumstances, especially from the type and condition of a facility.[6] In a situation of particular danger – as in the case at hand – a duty to act may exist even if the danger is only caused by the wrongdoing of third parties and thus may comprise the prevention of abusive conduct.[7] **6**

Accordingly, the Supreme Court held in a case similar to the one at issue that a cross on the summit of a mountain, which is repeatedly abusively used as play equipment, is to be safeguarded against dangers arising from the loosening of screws and bracing.[8] **7**

Finally, it should be noted that, under Austrian law, the element of dangerousness of conduct has an effect on liability as a whole. The greater the danger, the stricter the liability:[9] this applies – as already mentioned – to wrongfulness, where infringement of an absolute right requires a weighing of interests (cf 3a/3 no 3 above). Beyond that, protective statutes within the meaning of § 1311 ABGB already forbid certain conduct due to its merely abstract dangerousness (see also 4/3 nos 3–6). With regard to fault, § 1299 ABGB states that experts are subject to an objective standard of care, as an activity requiring special skills may involve increased dangers (see also 6/3 nos 3–4). In the case of even greater danger, liability for objective carelessness with a reversal of the burden of proof applies (§ 1319 ABGB: liability for defective structures; § 1320 ABGB: liability for animals). Finally, there is strict liabil- **8**

3 *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 57 ff; *G Kodek* in: A Kletečka/M Schauer (eds), ABGB-ON (edn 1.01, 2013) § 1294 no 31 ff; *BC Steininger*, Verschärfung der Verschuldenshaftung (2007) 63 ff.

4 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 6.

5 *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 62; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1294 no 70; OGH 3 Ob 35/98p = ZVR 1998/143.

6 See *E Karner*, Schutz vor Naturgefahren und Haftung, ZVR 2011/112, 116 f.

7 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1294 no 72 with reference to BGH VI ZR 202/76 = NJW 1978, 1629: swimming pool/use of a clothes slide as a playslide.

8 OGH 1 Ob 76/98b: injury to an uninvolved pupil.

9 See *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/188 ff; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 6/1 ff; furthermore *BC Steininger*, Verschärfung der Verschuldenshaftung (2007) 43 ff.

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ity in respect of the greatest dangers. Here, relief from liability depends on the degree of danger posed by the activity:[10] whereas the Statute on Liability for Keeping Railways and Motor Vehicles (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG) still provides in § 9 for an exemption of liability in the case of an 'unavoidable event' (cf 12/3 nos 5 and 11), the Nuclear Liability Act (*Atomhaftpflichtgesetz*, AtomHG) does not provide any ground at all for relief from liability.

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 26 May 1964

ATF 90 II 227

Facts

1 V worked in a laundry. As a spin-dryer located there had no cover, V's superior A warned V repeatedly of the danger of approaching the machine too closely. When handling clothes, V had his arm ripped off. He filed a claim against V for CHF 42,000 (€ 35,000).

2 The cantonal court denied A's liability for the damage caused to V.

Decision

3 The Supreme Court admitted V's appeal.

4 As the spin-dryer is fixed on the floor, it has to be considered as part of the real estate. According to art 58 of the Swiss Code of Obligations (SCO),[1] an owner is liable for construction faults and insufficient maintenance.

5 The Supreme Court stated that an owner or employer has to take safety measures against risks resulting from a normal use of a thing, but not against unlikely risks or dangers, which can be avoided with minimal prudence. Further, an owner or employer is not obliged to invest in safety measures which exceed what he/she could equitably afford.

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10 Cf *BA Koch/H Koziol*, Strict Liability under Austrian Law, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 12, 25 f.

1 Article 58 of the Swiss Code of Obligations (SCO):
Liability of property owners; Damages
[1]The owner of a building or any other structure is liable for any damage caused by defects in its construction or design or by inadequate maintenance.
[2]He has a right of recourse against persons liable to him in this regard.

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The employer's argument, that many other spin-dryers have no cover, is irrelevant. *In casu*, the installation of a simple cover would have been sufficient to avoid the risk created by the machine. Consequently, A was held liable towards V. 6

Comments

For the comments see ATF 117 II 50 (1991) at 3c/4 nos 16–24. 7

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 12 March 1991
ATF 117 II 50

Facts

V1 spent his holidays with his wife V2 and their six-month-old child V3 in the chalet of V2's uncle, A. While taking a bath, he suffered carbon monoxide poisoning, because the gas installation was defective (a system with insufficient ventilation). Mentally 'turned back to childhood', he became 100% definitively disabled and became totally dependent on his wife. 8

V2, for herself and on behalf of V3, filed a claim against A for moral tort. 9

The cantonal court admitted V2's and rejected V3's claim. 10

Decision

The Supreme Court partially admitted V2's and V3's appeal. 11

The Supreme Court stated that the owner of a building is liable for defective construction and insufficient maintenance (art 58 SCO). A building's construction is defective if it does not offer a sufficient degree of safety while used normally. The obligation of the owner is assessed more strictly if the risk is high and if technical means for a safer installation would be available for a modest amount of money. 12

The installation was defective, insofar as: (i) the bathroom was insufficiently ventilated; and (ii) it would have been simple to install a better ventilation system. A's defence that he had warned V1 and V2 of the system's danger was rejected by the court. A simple warning was considered as insufficient, given the degree of danger. But as V1 had not taken into account the warnings, and as this kind of danger was publicly known, the court considered V1's behaviour as slightly negligent. 13

The court decided that V2 is entitled to damages for moral tort. Further, despite her young age and the incapacity of understanding what had happened, the six-month-old daughter V3 was also awarded damages due to the fact that as her incapacity is not final and it is only a matter of time before she will suffer as a result of her father's disability (so-called future moral tort). 14

The contributory negligence of V1 resulted in a 30% reduction in the amount of damages awarded to V2 and V3. 15

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Comments

16 These cases are examples of *Gefahrensatz* which can be described as an 'unwritten principle of Swiss tort law'[2] to prevent the creation or the maintenance of a dangerous situation.[3] According to this principle, a person who creates or maintains a dangerous situation has a duty to take measures to avoid damage.[4]

17 This complex criterion creates doctrinal arguments about some interesting misconduct-related questions. First of all, the Swiss Supreme Court seems to have some doubts about whether to relate the *Gefahrensatz* to unlawfulness or rather to fault.[5] Scholars have different opinions on this issue, which seems to remain open.[6]

18 On the one hand, some scholars,[7] with the support of older Supreme Court decisions,[8] equate *Gefahrensatz* with unlawfulness. This principle would create a duty to take specific measures against damage to an 'absolute right'.[9] The violation of this duty would represent an unlawful omission[10]. On the other hand, some other scholars[11] think, with the support of another and more recent Supreme Court decision,[12]

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2 ATF 124 III 297, 300 c 5b (1998); *H Honsell*, Schweizerisches Haftpflichtrecht (1995) 40; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 44; *V Roberto*, Haftpflichtrecht (2013) 36, no 04.82 ff; *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 450.

3 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 44 f; *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 172, no 753; *H Honsell*, Schweizerisches Haftpflichtrecht (1995) 40; *C Müller*, La responsabilité civile extracontractuelle (2013) 60, no 169; *M Jaun*, Haftung für Sorgfaltspflichtverletzung (2007) 48 ff.

4 ATF 124 III 297, 300 c 5b (1998).

5 See ATF 124 III 297, 300 c 5b (1998); *V Roberto*, Haftpflichtrecht (2013) 36 f, no 04.84 ff; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 46.

6 *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 172 f, no 756. See also *P Widmer*, Gefahren des Gefahrensatzes, in: ZBJV/RJB (106/8 August 1970) 289 and 305; *K Oftinger/E Stark*, Schweizerisches Haftpflichtrecht I (5th edn 1995) 182 f, no 44.

7 *V Roberto*, Haftpflichtrecht (2013) 37, no 04.89; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 370, no 50.32 ff; *C Müller*, La responsabilité civile extracontractuelle (2013) 60, no 169 f.

8 ATF 116 Ia 162 (1990); ATF 95 II 93, 96 c I.2 (1969).

9 *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 370 f, no 50.33; *C Müller*, La responsabilité civile extracontractuelle (2013) 60, no 170; *V Roberto*, Haftpflichtrecht (2013) 37, no 04.89.

10 ATF 116 Ia 162, c 2cC (1990); *C Müller*, La responsabilité civile extracontractuelle (2013) 60, no 169 f; *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 370 f, no 50.33.

11 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 45 and no 201; *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 199 f, no 866 ff; *H Honsell*, Schweizerisches Haftpflichtrecht (1995) 41.

12 ATF 124 III 297, 300 c 5b (1998).

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that *Gefahrensatz*' should be brought near the condition of fault as a violation of the duty of diligence.[13]

In casu, the Supreme Court first provided an abstract of its former concept of *Ge-* **19**
fahrensatz: according to this concept, the *Gefahrensatz* was the basis to assess: (i) the causal link between an omission and damage; and (ii) the unlawfulness of this omission. Further judges claim that the violation of the *Gefahrensatz* amounts to fault, as it is an omission of the duty of diligence (*Sorgfaltspflicht*). After this short preview, the judges explain that they rejoin the newer academic literature, according to which the *Gefahrensatz* could not be considered as a foundation for the unlawfulness of an omission.

The Supreme Court's solution is somewhat confusing. The application of the *Ge-* **20**
fahrensatz in any case supposes an assessment of whether this principle has been violated (unlawfulness). If it is not violated, an examination of the fault is not necessary. But if it is violated, according to the Supreme Court, this violation has to be disregarded and the judge has only to focus on fault. In other terms, the application of the *Gefahrensatz* would suppose at the same time that unlawfulness has to be taken into account and disregarded.

In our opinion, the older concept of the Supreme Court is clearly preferable, as it **21**
described the *Gefahrensatz* correctly as a general and unwritten norm. A detailed description of the application of the *Gefahrensatz* has to distinguish between two main steps: the first step is to assess: (i) whether a danger had been created; (ii) whether no efficient safety measures have been taken; and (iii) whether there a causal link existed between the behaviour of the actor and the danger. If the answers to these questions are affirmative, the judge has to conclude that the *Gefahrensatz* has been violated and that unlawfulness is established. In a second step, the judge has to ask whether the actor should and could have avoided damage. If so, he/she is culpable and has to repair the damage.[14]

Although the older concept of the *Gefahrensatz* is theoretically consistent, cer- **22**
tain authors maintained that it could not be used as a criterion for unlawfulness, because it was much too general. Probably they feared that it would lead to an uncontrolled extension of tort law, for example in the following case: A's lawful business competition to B could be considered as a danger to B's fortune; consequently, if B's fortune diminished because of A's business competition, the latter would have to repair the damage caused to B.[15] In order to solve this problem, the Supreme Court

13 *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 199 f, no 866 ff.

14 See also *G Schamps*, La mise en danger: Un concept fondateur d'un principe général de responsabilité (1998) 271 ff and especially 275.

15 *K Oftinger/E Stark*, Schweizerisches Haftpflichtrecht I (5th edn 1995) 182 f, no 44.

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declared that the *Gefahrensatz* is not a protective norm, ie that its violation is not unlawful, and that its function is limited to establish culpability.[16]

23 A remedy to the problem could be to supplement the *Gefahrensatz* as follows: the one who creates or maintains a dangerous situation has to take measures to avoid damage *to a normatively protected good*. It would be rather a clarification and not an innovation, as it seems that the addition '*normatively protected good*' is in fact already implicitly present in the *Gefahrensatz*. As an effect it would notably allow absolute rights (but not contractual rights) to be protected. This formulation would be a complement to art 41 SCO, extending it to dangerous situations which have not yet provoked damage.

24 Materially the *Gefahrensatz* imposes a duty upon those who cause a dangerous situation to take all the necessary measures to avoid damage. For the judge, the criteria to be examined are: whether there was a danger and whether it was easily possible and financially affordable to take protective measures. Implicitly the judge would probably consider that the protective measures have to be the more efficient, the higher the value of the threatened good. As the case above shows, a simple warning will often not be considered as sufficient.

5. Greece

Areios Pagos (Greek Court of Cassation) 381/2005

ChrID E/2005, 710

Facts

1 On 9 October 1998 the plaintiff, a German citizen on vacation in Greece, took a walk on the premises of the hotel where he was residing. He alleged that, when trying to tread on what he perceived to be a step, he fell down an empty space, which was 2 m deep and was thus injured. The plaintiff brought an action in tort against the hotel.

Decision

2 The Court of Cassation ruled that a person who provokes perilous situations is obliged, according to good faith, to take all necessary measures required by the rules of science and common experience to avert damage, even if such an obligation is not specifically provided for by law. Accordingly, the court held the defendant

16 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 46.

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liable for omitting to construct a parapet, which would have averted the fall and injury of the victim.

Comments

It is accepted in Greek jurisprudence that an omission can also lead to an obligation to pay damages according to art 914 GCC, as long as the tortfeasor was obliged to act either by law, by contract or by good faith, according to prevailing social understanding, and, in particular, when he/she himself/herself had created the perilous situation likely to cause damage to third parties. In particular, a person who creates perilous situations is obliged, according to good faith, to take all necessary measures required by the rules of science and common experience to avert damage, even if such an obligation is not specifically provided by law; otherwise, the violation of the rule especially providing for such an obligation would alone constitute the element of unlawfulness required by art 914 of the GCC. 3

Areios Pagos (Greek Court of Cassation) 5/2001

ChrID A/2001, 310 f

Facts

The first defendant company was the owner of a supermarket, also operating a nearby underground garage for its clients' cars and inviting the clients with special signs to park their cars in the garage while shopping. The plaintiff went shopping at that supermarket and parked in the above-mentioned garage. There she was attacked by two persons on a motorbike, who smashed the car window, stole some things from the car, and then disappeared. The defendant had no security guards in the garage. The plaintiff suffered pecuniary damage, a shock, and, as a result, moral harm and claimed damages and moral compensation due to the unlawful act of the defendant, ie its omission to hire guards. The plaintiff chose to base her claim on tort (damage caused as a result of a dangerous activity and the omission to take all necessary measures to avoid the danger). 4

Decision

The Court of Cassation held the defendant and its employees (the director and the person responsible for security) liable, because it regarded their failure to hire security guards as negligent. It ruled that unlawful behaviour also exists when there is an obligation to protect, dictated by law or contract or good faith according to the prevailing social understanding, and, more particularly, when somebody has created a situation of danger and he has not taken the necessary measures to avoid 5

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such a danger.[1] Such an obligation to protect also exists when an enterprise has invited the public to visit or use a particular space of its premises; in this case the enterprise should have taken all necessary and appropriate measures to ensure the safety of its visitors.

Comments

6 The Court of Cassation took another position, though, in another case, taking into consideration the difference in the presented facts: in this particular case, the parking area was open-air, it was provided free of charge, the customers were able to check on their cars and moreover a sign was placed at the parking area notifying customers that the shop-owner bore no responsibility regarding the safeguarding of the parked cars. Accordingly, the court held that, under the said circumstances, good faith (arts 200, 281 and 288 GCC), ie the uprightness in transactions displayed by a prudent and upright person, as well as the general spirit of the law, did not impose on the shop-owner an obligation to safeguard the parked cars.[2]

7 The contrast between the two cases shows us how the court, depending on the facts of the case, interprets the requirement of 'good faith'. The court most probably considered that the car park in the former case was more dangerous because it was situated underground and the customers were not able to check on their cars, so when the supermarket put up signs inviting its clients to park their cars in its underground garage, 'good faith' imposed on it the obligation to have security guards.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 5 October 2006
05-14.825, RCA 2006, comm 364, note *H Groutel*

Facts

1 A 17-year-old teenager had climbed onto the roof of a disused building, whence he fell through a plastic sheet. He brought a claim in damages against the company

1 See also *M Stathopoulos*, Law of Obligations, General Part (2004) § 15 no 44.

2 AP 174/2005 EEN 2005, 496. See also (in English) *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2005 (2006) 306, no 2ff. See also Thessaloniki Magistrate's Court 765/2013 TPCL 6 (2013) 425, which shares the same view of lack of liability. (See for more details (in English) *E Dacoronia*, Greece, in: E Karner/BC Steininger (eds), ETL 2013 (2014) 273, no 26f). In the remarks that follow the decision it is mentioned that when a businessman gains profits by renting parking spaces, he has the obligation to safeguard the parked cars, an obligation that derives from the principle of good faith (*E Margaritis*, TPCL 6 (2013) 428). See for more details (in English) *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), ETL 2005 (2006) 306, no 19ff.

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owning the building and its insurer. The appellate court turned down the claim. It ruled that the owner had been at fault in failing to fence off the building, even though the town administration had pointed to its dangerousness several times, but that this negligence had not been the direct cause of the accident, which was rather due to the plaintiff's recklessness. The case was brought before the *Cour de cassation*.

Decision

The *Cour de cassation* quashed the appellate court's decision, confirming the existence of the defendant's fault, but reversing the decision of the lower court on the issue of causation between that fault and the plaintiff's injuries. The case was thus referred back to a lower court to be judged anew. **2**

Comments

This case illustrates how the dangerousness of premises can create a duty for the owner to fence it off, in order to prevent trespassers from injuring themselves. It shows that when life and limb is at stake, not only can the party who creates a danger be at fault, but also the party that does not reduce an existing danger. Yet, one should not expect the French *Cour de cassation* to formulate an explicit rule whereby the dangerousness of a situation increases the duty of care, or creates such a duty. **3**

7. Belgium

Cour d'appel (Court of Appeal) Ghent, 15 February 1930
RGAR 1930, 674

Facts

While workmen were moving a piece of equipment (an old crane used to lift heavy loads, parts of structures, stones, etc),[1] a mistake was committed and it fell down. V, a passer-by, was injured. **1**

1 Definition taken from Larousse.

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Decision

2 The Court of Appeal adopted the reasoning of the judge at first instance. The latter highlighted the fact that the movement of a crane is a difficult task, taking into account the machine's height and lack of balance, such that the operation creates a danger zone in proximity to the movement. It then noted that, in such a situation, prudence demanded the taking of necessary precautions in order to avoid harm ensuing, which in the circumstances translates into the need to ensure that the area surrounding the work is clearly marked and to warn people who might find themselves there of the danger. Holding that such precautions had not been taken by the contractor in charge of moving the crane, the Court of Appeal decided that he had committed a negligent act, such that he should compensate V for his loss.

Comments

3 The dangerousness of an activity does not alter the manner with which the existence of fault is to be assessed. The judge continued to refer to the ordinarily prudent and diligent person test. The fact of engaging in dangerous activities does not constitute fault in itself. Prudence should be evidenced in all circumstances, regardless of the nature of the activity undertaken.[2]

4 When a person engages in a dangerous activity, he/she has a duty, as would a reasonably prudent person in such circumstances, to take necessary measures in order to prevent harm occurring. The extent of these measures will depend on the dangerousness of the undertaken activity. In this respect, the faulty undertaking of a dangerous activity should be distinguished from the failure to take adequate precautions in the light of that dangerousness. Therefore, in the case law set out above, the court could highlight two different types of behaviour: the error which led to the crane falling over and an absence of safety measures to prevent people from getting closer to the work. In any event, in both cases, the only question to be asked was how a prudent and diligent person would have acted in carrying out the activity in question.

5 In the same line of thinking, we generally consider that the fact of creating a dangerous situation unnecessarily constitutes fault.[3] For example, a person who leaves a hosepipe to trail along the pavement is judged to have been at fault because he created an obstacle likely to obstruct pedestrians and cyclists.[4]

2 Cf also Court of Appeal of Mons, 28 June 2011, RGAR 2001, 14768.

3 *RO Dalcq*, Traité de responsabilité civile, vol 1 (1967) no 336.

4 Police judge (Pol) Brussels, 9 September 2005, CRA/VAV 2007, 74.

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 6 October 1998, ECLI:NL:HR:1995:ZC1836
NJ 1998/190 with comment *CJH Brunner* (Turnster)

Facts

A 14-year-old girl was performing gymnastics when she fell on her head just next to the safety mattress and consequently suffered severe brain damage. She argued that both the trainer and the trainer's employer, the gymnastics association, should be held liable. **1**

Decision

In activities such as gymnastics, falling with the risk of very serious injury is not always avoidable and therefore, taking special measures to prevent or restrict the consequences thereof is necessary. The fact that such measures may not in every case be sufficient to prevent or substantially reduce the consequences does not alter this. Both the trainer and her employer were held liable. **2**

Comments

This case clearly illustrates the relevance of the dangerousness of a situation for the standard of care to be applied. The fact that the activity creates a certain risk of very serious injury weighs heavily on the scale in which the several relevant factors resulting from the Kelderluik (Coca Cola) decision[1] – the landmark decision regarding the standard of care related to hazardous situations – are balanced. In particular, the possibility and difficulty of taking precautionary measures to reduce the consequences are in such a case an important factor, more precisely when it is, as was recognised in this case, impossible to prevent the risk of falling as such.[2] **3**

1 See 3a/8 nos 1–4 above.

2 See Losbl Onrechtmatige Daad, art 6:162 sec 2, cmt 88.4.3 (*Jansen*) (Loose leaf).

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9. Italy

Corte di Cassazione (Court of Cassation) 13 February 2009, no 3528

Resp civ prev 2009, 1551, note by *A Sesti*

Facts

1 During the qualification trials for the Italian championships, a bobsleigh being ridden by MM skidded onto one side and hit one of the walls of the track. He suffered serious injuries due to the impact. MM brought an action against the organiser of the sporting competition, arguing that, because of poor alignment of the lateral walls of the track, a large splinter broke off his helmet, hit his face and cut the straps of the helmet.

Decision

2 The *Corte di Cassazione* held that organising a sport competition was a dangerous activity, within the meaning of art 2050 because, from experience, there is a strong possibility of accidents resulting in injury. In particular, for the athletes, the dangerous activity carried out by the organiser is restricted to that activity which may expose the athletes to more serious consequences than might be caused by the same errors made by the athletes involved in the competition.

Comments

3 For comments see 3c/9 nos 6–11 below.

Corte di Cassazione (Court of Cassation) 20 July 1993, no 8069

Giust Civ 1994, I, 1037, note by *A Barenghi*

Facts

4 A patient took eight doses of Trilergan, a drug containing gamma globulin, and contracted hepatitis B. An investigation of the batches of the drug taken showed that the batch taken by the plaintiff contained traces of the hepatitis B virus.

Decision

5 The *Corte di Cassazione* described the activity of producing and importing drugs containing human gamma globulin as dangerous. According to the court, the producer of the drug, and before that the producer of the gamma globulin, are under a duty to directly verify the safety of the materials received, and this duty of verification requires the adoption of all the analysis and control methods that medical sci-

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ence is able to offer, irrespective of the cost or ability to perfect it, referring to a previous dictum in a judgment on the same case in 1991.[1]

Comments

The Italian Civil Code includes a provision, art 2050, which specifically regulates liability for dangerous activities.[2] Therefore, if the activity is recognised by the court as dangerous, the liability regime of art 2043 Civil Code does not apply, but this more specific provision governs the case. As stated in art 2050 Civil Code, the criteria to be fulfilled to classify the activity as 'dangerous' relate to the nature of the activity itself or the nature of the means used to perform it. **6**

Article 2050 Civil Code establishes that A shall be liable for (wrongful) damage caused by a dangerous activity unless A took all the measures deemed necessary to avoid the damage. The criterion used by art 2050 to attribute liability does not mention negligence. As noted below under 3d/9 no 5, the current interpretation of art 2050 Civil Code denies that the concept of negligence has a role to play in this respect. In the cases reported, organising sporting events or selling blood products have been considered as 'dangerous' within the scope of art 2050.[3] **7**

This Criminal Code provision is often invoked before the courts, as it clearly favours the victim because the burden of proof relating to the exonerating evidence is very heavy. In principle, A is held liable unless all the resources that science and technology make available to be able to avoid the loss are employed. (Cass 1984, no 5960; Cass 1990, no 7571; Cass 1991, no 4710, *ex multis*). The list of 'dangerous' activities is, therefore, varied, lengthy and very disparate. **8**

Article 2050 Civil Code has been an important innovation introduced by the legislator of the 1942 Civil Code, which intended merely to reverse the burden of proof of negligence in cases where a dangerous activity is being carried out. In the mid-1960s, Trimarchi based a new theory of business risk liability on that article.[4] Ac- **9**

1 Cass 27 July 1991, no 8395, Giur It 1992, I, 1, 1332; Nuova giur civ comm 1992, I, 569. The development of liability for blood transfusion, in recent case law, declared the Ministry of Health (Ministero della salute) liable under art 2043 Civil Code for the failure to carry out supervision and monitoring of drugs safety (Cass 11 January 2008, no 576, Foro It 2008, 1529, confirmed by Cass 23 January 2014, no 1355; Cass 31 May 2005, no 11609, Resp civ prev with note of *N Coggiola*, also commented by the same author in ERPL 2007, 451). In general, on liability for transfusion and blood products, *M Dragone*, Il danno da trasfusione, in: P Cendon (ed), La prova ed il quantum nel risarcimento del danno (2014) 849.

2 For an overview of liability for dangerous activities in Italian law, and cases decided by the courts, cf *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 832ff.

3 Cf *B Gardella Tedeschi*, Ripensando la responsabilità civile per le società sportive, in: R Lombardi (ed), Ordinamento sportivo e calcio professionistico: tra diritto e economia (2009).

4 *P Trimarchi*, Rischio e responsabilità oggettiva (1961).

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cording to this reading of art 2050 Civil Code, liability should be borne by the person who increases the risk of damage in society. In part, the strict reading of art 2050 Civil Code on exonerating evidence is related to Trimarchi's theory.

10 As commentators emphasise, liability for carrying out a dangerous activity requires the instrument of insurance, as the difficulty of releasing oneself from liability forces the person carrying out dangerous activities to take out insurance.[5]

11 Quite apart from what has been said above with respect to activities that are dangerous under art 2050, the level of care to be employed by A varies with the level of danger associated with a certain act or activity. In particular, art 2050 does not apply to individual acts that do not constitute an activity. With respect to them, there is no doubt that the care to be applied in contexts where danger is apparent – although there is no 'dangerous activity' as defined in art 2025 Civil Code – is evaluated with reference to the specific circumstances of the case.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 21 July 2008

RJ 2008\6282

Facts

1 The defendant A1 worked as a waiter in a nightclub owned by A2. When the nightclub was empty and the staff were cleaning, A1 took a sample of caustic soda used to clean the premises and put it inside a regular bottle of the mineral water of the type that was sold at the disco and which still had its original label, filling it almost to the brim. After closing the bottle with its original cap, he placed it on the counter of the bar, close to a bottle of water of the same type and together with several glasses, bottles and other beverages. A1 was required by another colleague to help him to take out the garbage from the premises. At that moment, V, who was with a group of friends and who was also A1's friend, feeling thirsty and without any request or prior notice, took the bottle filled with the colourless liquid containing caustic soda in the belief that it was a bottle of mineral water and drank from it. The intake of the liquid immediately caused her burns in her oesophagus and stomach, leaving her with severe physical and mental injuries for which she filed a claim against the waiter, the owner of the nightclub and his insurer. The defendants were held solidarily liable in the first instance and on appeal. The owner of the nightclub appealed to the Supreme Court, which dismissed his appeal on cassation.

5 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 18.

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Decision

The Supreme Court considered that the defendant A1 had been grossly negligent, and that this absorbed any contributory negligence that could be attributed to the victim. First, because he acted alone when filling the water bottle with a liquid that was notoriously dangerous and choosing the most inappropriate container, without transforming its label to warn of the danger. Second, because he did not warn those who were also on the premises about the bottle that he had left with its harmless appearance at the wrong place. By leaving the bottle on the counter close to another bottle of the same features and to other bottles and beverages, his actions added to the confusion. Furthermore, the defendant voluntarily lost all control over the bottle when he left the premises to take out the garbage. 2

Comments

For comments see below 3c/10 nos 6–7. 3

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 16 October 2007
RJ 2007\7102

Facts

V, a 20-year-old boy suffering from paranoid schizophrenia, went to a shop selling orthopaedic devices, laboratory instruments and chemical products, to purchase a certain amount of cyanide. V had already tried to commit suicide several times, but he presented a normal appearance and did not show any outward signs of his condition. To ensure that the employee would sell him the product, he showed him a card from a jewellery shop where he was allegedly working and where he would use the product for his work. After ingesting an unspecified amount of this substance, V died and his parents sued the shop owner and his insurer. All instances rejected the claim, since they did not find that the defendant had been negligent. The claimants filed an appeal in cassation and the Supreme Court dismissed the claim. 4

Decision

In practice, it is usually possible to increase safety, but in the case under review, such an increase would have required inquiries or investigations that do not fit in the normal operation of a business and, therefore, the seller could not be reproached in any social or legal sense. The substance sold could be purchased freely in the sense that its sale was not subject to any regulatory requirement. The buyer was of legal age, of normal appearance, without any symptoms that could give rise to the suspicion that he suffered an imbalance or mental disorder. Moreover, it appeared that he knew the toxic or harmful nature of the product purchased well. The 5

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employee and owner were completely unaware of the personal circumstances of the purchaser. According to the normality of the situation, when he requested that the buyer justify the purchase, he considered that the intended use of the substance that he was selling was justified by the buyer's display of a jewellery shop card, this type of shop being one of the possible places where the substance is used. The fact that the seller was deceived, as any other person in such circumstances could have been deceived, could not give rise to liability. Liability cannot result either from the fact that after the incident the measures to prevent cyanide or any other harmful product from reaching the public have been intensified, since neither from this fact nor from a possible discontinuation of the sale of toxic substances can it be concluded that the result was predictable or that the conduct had been negligent.

Comments

6 This decision and the previous one are litigated under tort law rules and illustrate that case law relates negligence to the circumstances of the case, emphasising the dangerousness of the defendant's conduct, and the presence of elements which either point to his/her fault for the damage caused or which, by contrast, are such that they give rise to the conclusion that the defendant acted reasonably in the circumstances. The handling of caustic soda and its storage in containers used for beverages is very dangerous in the circumstances in which such conduct took place. However, the sale of cyanide, despite the danger inherent in this substance, does not result in negligence if it is sold to an adult who has no signs of a mental disorder, and who appears to be an employee of a jewellery shop which is supposed to be the intended user of the dangerous product within the normal activity of its trade.

7 Dangerousness may be inherent in the activity itself[1] or result from the circumstances in which it takes place, as is the case of the organisation of sporting events, when these take place in areas with a specific hazard which should have been known and avoided.[2] In both cases, the consequence is that the diligence required includes additional measures to prevent damage and their omission gives rise to liability. Sometimes these measures should have been taken in the light of developments, ie when detecting that the previously adopted safety measures had proved inadequate and the risk had increased. In STS 21 March 2007,[3] for instance, the organisers of a rally were ordered to pay damages for part of the harm suffered by

1 As, for instance, the operation of jet boats or jet skis (STS 14.3.2011 [RJ 2011\2771]).

2 STS 31.5.2006 (RJ 2006\3494) held liable the organisation of the Tour of Spain for injuries suffered by a cyclist who fell over due to obstacles placed in an unlit tunnel.

3 RJ 2007\1544.

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spectators who moved en masse to one corner and were run over when one participant pulled over, since the number of people in that area would have required the adoption of much more effective measures than simply putting up a dividing tape.

11. Portugal

Tribunal da Relação de Coimbra (Coimbra Court of Appeal) 19 June 2013 (Arlindo Oliveira)

Facts

Because of the realisation of works by A, the aim of which was the installation of natural gas supply pipes, V fell down a ditch in the pavement right after banging his head, with considerable force, on a machine that was operating in those works. As a result, V suffered serious damage, compensation for which he sought from A. Although the worksite and machines operating in it were visible at a distance of at least 20 m, there were neither warning signs at the works nor signs of the presence of machines and the ditch. Passers-by were forced to go over the ditch when walking on the pavement. 1

Decision

The Court of Appeal decided that the works in question were a dangerous activity pursuant to art 493(2) of the Civil Code: 'Whosoever causes damage to someone else during the exercise of an activity, dangerous by its own nature or by nature of the means used, is obliged to repair that damage, unless he proves that he used all required procedures and measures to prevent the damage.' Besides the fact that the use of the pavement by people passing by the worksite was dangerous in itself (they had to walk over the ditch and close to the machinery), there were no warning signs. Accordingly, the court considered that the defendant was presumed to have been at fault in accordance with the aforementioned norm, and that he had not succeeded in rebutting this presumption. In this way, the court ruled that A was to pay damages to V for the damage suffered by him. 2

Comments

The liability for dangerous activities is regulated, in the Portuguese legal system, by art 493(2) of the Civil Code and it qualifies as an exception to the rule of art 487, according to which the plaintiff has to prove that the defendant's behaviour was faulty. The legislator stipulated a general rule of identification of dangerous activities. In order to be considered dangerous, the activity must include a greater probability of causing damage than that predictable in other activities, taking into con- 3

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sideration the nature of the activity and the equipment used.[1] Therefore the qualification of an activity as dangerous can only be done by taking into consideration the circumstances of the individual case.[2] In the case at hand, considering the danger associated with the use of the pavement by passers-by and workers, with their equipment and open works, and the fact that insufficient safety measures had been taken, it is clear that this activity is bound to be considered dangerous. The norm of the Civil Code establishes a reversal of the burden of proof; that is, a presumption of fault is established against those exercising the dangerous activity (because of the duty of prevention and care that lies with them).[3] Thereinafter, if the defendant wants to rebut the presumption of fault (art 493(2)) he must prove that the expected diligence of conduct (of any person in his situation) was met in order to prevent possible damage.

4 It should be noted that the legal requirement of proof that all due diligence was taken is not solely assessed by the criteria of the dutiful *pater familias*, as a basis of comparison to assess fault. There is an increased duty of diligence in view of the circumstances of the case,[4] which means that, taking into consideration the dangerousness of an activity, special care is required. For example, special care is required from a person who is changing glass windows over a public passage, from a javelin thrower, from a fisherman who uses a fishing rod near a public passage. In all of these cases, if some injury results from these activities, the agent will be burdened with the duty of proving that the damage was not caused by his actions.

Supremo Tribunal de Justiça (Supreme Court of Justice) 26 February 2006 (Pires da Rosa)

Facts

5 V, a 12-year-old child, suffered serious injury when he was hit by a falling soccer goal post, that was not properly fixed to the ground, during a football game in a field from sports club A, of which he was not a member. The child sought compensation from A.

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1 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 588; *A Vaz Serra*, Responsabilidade pelos danos causados por coisas ou actividades [1959] BMJ no 85, 361.

2 See *P de Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 495.

3 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 587.

4 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 588, note 2; *A Vaz Serra*, Responsabilidade pelos danos causados por coisas ou actividades [1959] BMJ no 85, 378 f; *Antunes Varela*, Revista de Legislação e Jurisprudência 121, no 3767, 51.

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Decision

This case concerns non-contractual liability and, thus, arts 483(1) and 493(1) of the Civil Code have to be analysed in order to assess the liability of the sports club. Article 493(1) of the Civil Code clearly establishes that whosoever has in his possession a thing with the duty to monitor it is liable for the damage created by it, except if he proves that he has fulfilled his duty of vigilance or that the damage would have taken place even if he had fulfilled such duty. Therefore, the Supreme Court of Justice ruled that the sports club, A, necessarily had to monitor the goals in a way that would exclude the possibility of them falling onto a person, regardless of whether or not that person was a member of the club, and that in such a case there was a rebuttable presumption of fault (art 493(1)). The club failed to rebut this presumption. **6**

According to the court, even if the child had climbed up the goal, the defendant's conduct would not be considered less censurable, because it is foreseeable that a child would behave in such a manner. The club had to adapt its equipment in order to prevent this kind of accident, taking into consideration the fact that the field could be used by children. **7**

To reinforce its decision, the court referred to Decree-Law No 100/2003, 23 March, which aims towards the: 'Regulation of technical and safety conditions as regards the design, installation and maintenance of soccer goals', and which states expressly in its art 4(1) that equipment has to be maintained in such a way that the possibility of it falling accidentally is completely excluded, when used in a reasonably predictable manner, and that predictable usage scenarios has to include the possibility of someone dangling from the top of it. In this way, the behaviour of the child was completely foreseeable to the sports club. **8**

The Supreme Court of Justice concluded, therefore, that the sports club, A, was liable for the damage suffered by V and was to pay him compensation in accordance with the terms of arts 483(1) and 493(1) of the Civil Code. **9**

Comments

In this particular case the legal basis for the damages awarded to V was the liability for things which a person is obliged to supervise and maintain. This special duty of supervision is imposed in any case in which a thing represents a special danger to others (guns, fuel tanks, needles, blades, boilers, things that can unexpectedly fall, etc).[5] The person under this supervision duty does not have to be the owner but this duty falls on the individual who effectively controls the thing (eg the custodian, the tenant, etc).[6] The sports club was considered as the party under an obligation to su- **10**

5 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 594 ff.

6 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 495.

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pervise the goals in order to prevent any harmful events related to them (regardless of whether or not the users were members of the club).

11 Article 493(1) of the Civil Code establishes that in such cases the burden of proof shall be reversed (art 350 of the Civil Code[7]) and, therefore, the presumption of fault[8] of the sports club is an exception to the provision of art 487(1), which establishes that is the plaintiff who has to prove that the defendant's behaviour was faulty.[9] This special liability of the supervisor focuses on the protection of third persons, because, if this special regime did not exist, there would probably be more careless acts, and poorer safety measures, leaving the safety of citizens at risk. In addition, the party supervising the thing is in a better position to provide proof related to his fault.[10]

12 The damage caused by these things should be understood in a natural sense, linked to the inherent risks of the thing, and not to facts linked, primarily, to the plaintiff.[11] To rebut the presumption, the defendant must prove that there was no fault in his behaviour, or that the damage would have been caused in the same way without his faulty behaviour.[12] This liability arises irrespective of the fact that the

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7 '(1) Whosoever has in his favour a legal presumption does not need to prove the fact established by the presumption.
(2) The legal presumptions can, however, be rebutted if the one burdened by it proves the contrary, except in cases where the law establishes that they are non-rebuttable.'

8 Arguing that the presumption is related to unlawfulness and not properly to fault see *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 584.

9 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 590.

10 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 584; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 594; *A Vaz Serra*, Responsabilidade pelos danos causados por coisas ou actividades [1959] BMJ no 85, 365.

11 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 587; *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 584; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 593.

12 See authors like *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 494 who argue that we are in this last chance (the proof that the damage would have happened if the behaviour of the supervisor had not taken place) faced with a case of negative relevance of the virtual cause. However, we can understand that the presumption of fault (and consequent inversion of the burden of proof) also leads to a presumption of the existence of causation, that is, if the agent should have predicted and prevented the event, it is because the fact is adequate to the production of the damage. In this way art 493 allows liability to be set aside by proving that there is no causal link (see *H Sousa Antunes*, Responsabilidade civil dos obrigados à vigilância de pessoa naturalmente incapaz (2000) 272). Thus, the removal of cause and the negative relevance of the virtual cause are different things: although in both cases a comparison of the real and the hypothetical situation takes place, the negative relevance of the virtual cause presupposes two different causes (as happens with, for example, in the case of art 807(2) Civil Code – the debtor in delay has to prove that, even if he had paid his dues on time, the damage would have taken place because of another fact); whereas to rebut the presumption of causation, the defendant shall prove that the damage would have taken place because of the same event. (See *Sousa Antunes*, supra 284).

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accident was caused when the child climbed onto the goal because, as the court pointed out, this should have been foreseeable. The supervisor was the party who had to adapt and act diligently to ensure the safety of anyone that could be harmed by the goal, in our case, they should have taken into consideration that the field could be used by children.

12. England and Wales

Beckett v Newalls Insulation Co Ltd, Court of Appeal (Civil Division) 1 December 1952

[1953] 1 WLR 8

Facts

The first defendant was an insulation company and the second a company that constructed refrigeration chambers. Both were retained to fit out a ship. The refrigeration company brought a gas container on board for the purpose of brazing. On the close of work one Friday, the refrigeration company's foreman disconnected a cable leading from the gas container, turned off the container's valve and adjusted its regulator. This should have prevented the escape of gas. The cylinder was then left in the corner of one of two of the refrigeration chambers in the ship. On Saturday, a couple of men from the insulation company came to plaster the two chambers. The electric bulbs on the ship had been removed to prevent theft and the electricity turned off. To shed light, one of the workers struck a match which caused an explosion when the gas and air came into contact with the naked flame. The claimant, who sustained serious burns as a result, brought a negligence action against the two companies. **1**

Decision

Both members of the Court of Appeal found for the claimant. While the allegation of negligence against the insulation company was not proved, that against the refrigeration company was. It is they who brought something of a dangerous character onto the ship. There was nothing wrong with that per se as long as sufficient care was taken in dealing with it. However, in the case of dangerous things or operations, there is a special responsibility to take care: **2**

> '[t]he law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter; the law expects greater care if there is introduced on to an enclosed space in a ship a container with gas inside it which may escape if precautions are not taken'.[1]

1 *Beckett v Newalls Insulation Co Ltd* [1953] 1 WLR 8, 16 per Singleton LJ.

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3 On the facts, though it could not be proven exactly how the gas had escaped – the foreman might have failed to close the valve properly, or the container may have begun to leak when it was moved – the court agreed that the foreman should have taken more care to prevent the escape.

Comments

4 The case illustrates the elementary proposition that the degree of care required is to be measured by the danger of the activity involved. As Lord Macmillan noted in another case, '[t]he more dangerous the act the greater is the care that must be taken in performing it.'[2] This does not involve the adoption of a special rule in cases involving special dangers,[3] but merely the application of the ordinary negligence standard to such cases.[4]

5 On the facts, the court did not want to specify exactly what precautions the foreman should have taken, but noted that it would have been reasonable for him to have placed a cap over the valve or moved the cylinder to a safer place.

6 It may be noted that the former workers' compensation scheme was abolished in England and Wales in 1948[5] and that employers' liability is usually considered as a liability in tort, though strictly speaking it is concurrent in contract and tort.[6]

Haley v London Electricity Board, House of Lords, 28 July 1964

[1965] AC 778

Facts

7 The appellant, Mr Haley, was a blind man who, with the aid of his white stick, had learned to avoid all ordinary obstacles. His routine was to walk unaccompanied from his home for about 100 yards (approx 91.44 m) along a pavement and then to get someone to help him to cross the main road where he boarded a bus to work.

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2 *Read v J Lyons & Co Ltd* [1947] AC 156, 172, quoted by Morris LJ in *Beckett* [1953] 1 WLR 8, 18.

3 Cf the distinct strict liability for dangerous things brought onto one's land and escaping from it: *Rylands v Fletcher* (1868) LR 3 HL 330.

4 This was noted by *PH Winfield*, Textbook of the Law of Tort (1937) § 160, which appears to be the original source of the contrast between carrying a pound of dynamite and carrying a pound of butter that Singleton LJ had in mind in *Beckett* (with reference to the 5th edition of Winfield's text, published in 1950). The chapter in question, entitled 'Dangerous Chattels', does not appear in modern editions of the text: see most recently *WE Peel/J Goudkamp*, Winfield and Jolowicz on Tort (19th edn 2015).

5 See *R Lewis*, Employers' Liability and Workers' Compensation: England and Wales, in: K Oliphant/G Wagner (eds), Employers' Liability and Workers' Compensation (2012) no 10.

6 *K Oliphant*, Liability of Employers, in: id (ed), The Law of Tort (2nd edn 2007) § 20.5.

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One morning, Mr Haley met with an accident. Unbeknownst to him, workmen of the respondent Board had dug a trench in a pavement some 50 yards from his house. To guard against injury, the workmen had placed warning notices at each end of the excavation and blocked the pavement with a punner (a work tool), forcing pedestrians to walk along the road. Mr Haley tripped over it and fell, striking his head on the ground; in consequence of the fall he became deaf.

Decision

On the question of whether the duty of care was discharged in the case, the House of Lords unanimously answered in the negative. The workers were under a duty to take reasonable care not to act in a way likely to endanger persons who may reasonably be expected to walk along the pavement. Although the signs were adequate to give reasonable and proper warning to ordinary able-bodied pedestrians, the workers should have contemplated the safety of all road users, which include the blind and other persons with particular susceptibilities. The duty would have been discharged had the workmen set up an adequate fence. 8

Comments

This case illustrates the proposition that an activity that presents no undue danger to ordinary people may require precautions for the protection of especially vulnerable persons for whom it foreseeably poses special risks. 9

Paris v Stepney Borough Council, House of Lords, 13 December 1950
[1951] AC 367

Facts

The appellant, who was blind in one eye, was a garage hand employed by the defendant council. The job required him to position his eye close to bolts that needed hammering. As he did so on one occasion, a splinter of steel broke off a bolt and entered his good eye with the disastrous consequence that he lost the sight of it altogether. That event gave rise to the present action. The appellant averred that, since the council had knowledge of his condition, it was its duty to supply him with suitable goggles for the protection of his eyes while he was engaged in such work and to require him to use them. The council sought to rely on the fact that it was not common practice for a workman in the appellant's position to be given goggles to do such work. 10

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Decision

11 The House of Lords upheld the appeal, finding by a majority of 3:2 that the council had failed in its duty of care. Lord Normand observed that blindness is a great calamity and the risk of blindness from sparks of metal is greater for a one-eyed man than for a two-eyed man. The ordinary reasonable and prudent employer would thus be influenced not only by the greater or less probability of an accident occurring but also by the gravity of the consequences if an accident should occur, and take reasonable precautions to guard against it. Lord Oaksey, who also found for the claimant, added that it was a simple and inexpensive precaution to take to supply protective goggles. Lord MacDermott agreed, while Lords Simonds and Morton dissented.

Comments

12 The degree of danger posed by an activity may be appreciably greater for one person than it is for another in light of the consequences if the risk eventuates. Although the appellant ran no graver risk of injury than the other workmen engaged in the maintenance work, he ran a risk of greater injury. The effect of the decision is therefore that the duty owed by an employer is to every individual workman and employers may be held to account for practices, however widespread, carried on in disregard of risks that are reasonably foreseeable to particular employees.[7]

13. Scotland

Porteous v National Coal Board, Court of Session (Outer House), 16 December 1966

1967 SLT 117

Facts

1 The pursuer was employed by the National Coal Board, the defenders in this action. Since birth, the pursuer had suffered from a congenital cataract in both his eyes, causing him to suffer defective vision in both eyes. At the time he began working for the defenders, he had no useful vision in his right eye and had defective vision in the left eye. While he was at work and was plunging a drain, his left eye was injured by a twig or branch. This caused a retinal detachment in the left eye, which left him totally blind. He sued the defenders in delict for damages, arguing that they had failed in the duty of care they owed to him by requiring him to undertake a task which put him at a heightened risk of injury given his pre-existing medical condition.

7 [1951] AC 367, 377 per Lord Simonds.

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Decision

The court found in favour of the pursuer, holding that: (a) an employer owed a particular duty to each employee in all the circumstances relevant to that employee; (b) the gravity of the damage which the employee might suffer if an accident occurred was a relevant factor in assessing whether the employer had broken the duty owed to the employee; (c) given that the defender knew of the pursuer's pre-existing condition, instructing him to undertake the labouring work on which he was engaged had created a risk of graver than normal consequences if injury resulted, as well as a heightened probability of an accident occurring; and therefore (d) the employers were negligent. Damages of £ 2,000 were awarded to the pursuer. **2**

Comments

The judgment of Lord Hunter in the case drew attention to the fact the standard of care owed in delict is a 'personal' one, that is to say it is a standard which must be assessed by reference to the circumstances of the individual pursuer in every case. So far as the circumstances of an employee were concerned, Lord Hunter emphasised that the relevant principles of law were that: **3**

> 'an employer owes a particular duty to each of his employees, that the employer's liability arises from failure to take reasonable care in regard to the particular employee, that all the circumstances relevant to that employee must be taken into consideration, and that the gravity of the damage which the employee will suffer if an accident occurs is a relevant factor.'[1]

What this meant was that: **4**

> 'With a workman who was, because of defective vision, so obviously prone to injury and who, in the event of even a slight injury to his one partially useful eye faced the risk of total blindness, the greatest care should, in my opinion, have been taken by the defenders to see that he was employed only on work where the risk were reduced to a minimum.'[2]

The approach of Lord Hunter makes it entirely clear that pre-existing conditions from which a person suffers, and of which the other party is aware, must be taken into account when assessing the level of care that must be shown to such a person. A failure to do this, which results in harm which the injured person was especially prone to suffer, or the effects of which have a disproportionately severe effect on the individual, will most likely constitute an actionable wrong. **5**

The similarities of this case to the earlier decision of the English court in *Paris v Stepney Borough Council*[3] are marked (though the pursuer's pre-existing eyesight **6**

1 At 119.

2 At 120.

3 [1951] AC 367. See 3c/12 nos 9–11.

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was even poorer than that of the plaintiff's in *Paris*), and heavy reliance was placed on the *Paris* decision by counsel for the pursuer in this case.

Lockhart v Barr

1941 SC 578[4]

Facts

7 The pursuer suffered injury after drinking from a bottle of the Scottish soft drink 'iron brew', manufactured by the defender, which had been contaminated with phenol. The pursuer was unable to specify exactly how the bottle had become contaminated by phenol, but alleged that it must have been as a result of one of the defender's employees at the bottling plant failing to ensure that a used bottle contaminated with phenol had not been properly cleaned before being re-filled with iron brew. The pursuer claimed damages in delict from the defender. At first instance, her claim was rejected, on the basis that she had failed to prove that the defender had been negligent. She appealed against this decision.

Decision

8 The Inner House of the Court of Session overturned the judgment at first instance, and awarded the pursuer damages. The court held that, when a beverage manufacturer knowingly uses 'second hand' or returned bottles, any one of which may contain a poisonous substance capable, even in very small quantities, of causing injury or death, it is reasonable to require the manufacturer to demonstrate a 'very high standard of diligence' in relation to the plant utilised in the manufacturing process, the system of working of the plant, and the care and skill to be displayed by employees in performing their duties. On the facts of this case, the court found that the improper act of an employee in using an unwashed bottle, coupled with a defective lay-out and system of working, justified an inference of negligence on the part of the defender (that is, of its 'failure to exercise the high standard of care which the circumstances impose upon them in this case'[5]).

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4 The decision was appealed by the defender to the House of Lords, but the very short affirming judgment of the Lords (reported at 1943 SC (HL) 1) adds nothing of substance to the view of the Inner House.

5 See the judgment of the court, delivered by Lord Justice-Clerk Cooper, at 586.

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Comments

The judgment is noteworthy for its imposition of a 'high standard' of care on the defender in this case, said to be justified by virtue of the risk of severe injury to health if a contaminated bottle were used to bottle the defender's soft drink. The unanimous judgment of the court makes it clear that the level of care to be expected of a defender relates directly to the level of danger arising on the facts, the court stating that '[t]he standard of care may fairly be said to vary directly with the risk of contamination'.[6] This should not be understood as a deviation from the standard of reasonable care stipulated in *Donoghue v Stevenson*,[7] but simply as exemplifying the fact that the care which it is reasonable to take in the circumstances of a particular risk will be greater than that which will be necessary where the risk is absent. **9**

In the present era, the liability of a manufacturer of goods such as a soft drink would in practice be determined not by the common law but under the Consumer Protection Act 1987, which (implementing the European consumer sales directive) imposes strict liability on manufacturers of defective consumer products. Nonetheless, the approach adopted by the court in this case remains valid in the modern law of negligence generally. See also *Lamond v Glasgow Corporation* at 3f/13 nos 1–4. **10**

14. Ireland

Fitzsimons v Telecom Éireann, High Court, 31 July 1990

[1991] 1 IR 536

For facts and decision see 3a/14 nos 1–5 above. **1**

Comments

The case makes it clear that, in assessing the standard of reasonable care, the degree of precautions taken must be directly proportional to the magnitude of the risk. Thus as the degree of risk rises, so must the extent of the precautions taken to prevent it materialising. Increased risk can result from either the likelihood of accidents increasing or an increase in the severity of injury that may result from an accident. In the present case a high level of precaution was expected because the hazard involved was particularly dangerous – 10kv of electrical current and the erratic nature of fallen cables. **2**

6 At 584.

7 1932 SC (HL) 31, 1932 SLT 317, [1932] AC 562; for discussion of this case, see 13/13 nos 1–6.

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Boylan v Northern Bank Ltd, High Court, 21 July 1977
[1976–7] ILRM 287

Facts

3 The first defendant (a bank) engaged an independent contractor (the second defendant) to demolish its premises; the gable end of the plaintiff's premises next door was only two inches away from the defendant's gable. At the top, the walls of both premises were joined by a concrete beam on top of which there was a gutter for drainage of rainwater. After the demolition work, the plaintiff noticed extensive cracks in her building; she sued the bank and the demolition contractor.

Decision

4 Costello J held that the contractor was negligent in the conduct of the work and this was the cause of the damage to the plaintiff's premises. The first defendant was held liable for the conduct of the contractor. The normal principle that an employer is not liable for the negligence of an independent contractor once care has been exercised in the selection of that contractor does not apply where the activity for which the contractor is engaged is inherently dangerous. The employer has an extended duty to ensure that reasonable precautions are taken against the inherent dangers of the operation in such cases.[1]

Comments

5 This case provides an example of a non-delegable duty for inherently dangerous activities; it goes beyond the normal duty to exercise reasonable care in the selection of a contractor and obliges the employer either to supervise or accept a form of pseudo vicarious liability for the manner of performance of the task by the contractor. The employer's misconduct can be viewed either as a failure to supervise or simply the attribution of the contractor's negligence to the employer. The non-delegable duty based on inherent danger only arises in rare instances where the activity is dangerous even when carefully conducted. In *Power v Crowley and Reddy Enterprises Ltd*[2] Blayney J held that the demolition of an internal wall, approximately ten feet high, was not an inherently dangerous operation. The fact that the

1 Relying on a *dictum* of Atkin LJ *Belvedere Fish Guano Co Ltd v Rainham Chemical Works Ltd* [1920] 2 KB 487, 504.

2 Unreported IEHC, 29 October 1992.

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work was carried out without scaffolding, which had been used earlier in knocking a similar wall on the same premises, was treated as generating a collateral risk, rather than an inherent one. The differences between the two cases are the scale of the work and the relative ease (or lack of ease) with which the danger can be avoided.

15. Malta

Michael Vella v Saint Andrew's Band Club (Court of Appeal – Qorti tal-Appell) 16 March 1963

Collected Judgments, Vol XLVII part I, 578

Facts

The defendant club engaged some persons to let off fireworks from a field very close to the plaintiff's property. The persons engaged had sufficient experience and were competent to perform the task entrusted to them. Since the spot chosen was close to his property, the plaintiff expressed his concern to the club's managers but the club proceeded with its plans nonetheless. 1

The fireworks were let off and the plaintiff's property was damaged. The plaintiff sued for damages. The defendant pleaded that the damage was caused by the persons who actually set off the fireworks and that it was not guilty of *culpa in eligendo* in engaging those persons for the task. 2

Decision

The first court accepted the defendant's plea and rejected the claim. The persons engaged by the club to let off the fireworks were competent and experienced and the club had no reason to think otherwise. The plaintiff appealed. 3

The Court of Appeal allowed the appeal. Letting off fireworks is in itself a dangerous activity and it was made even more so by the choice of venue. The risk was foreseeable and, in any case, the defendant had been warned by the plaintiff. The decision to proceed as well as the choice of venue was made by the club and it should therefore answer for the consequences. 4

Comments

This was not a case of vicarious liability: the defendant was made to answer not for the acts of the persons who let off the fireworks but for its own acts in commissioning a dangerous and inherently risky activity. The failure in question was not that of exercising proper care in letting off the fireworks but that of failing to appreciate the possible consequences of the club's decision. 5

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6 This would seem to be very close to imposing a strict liability for undertaking dangerous activities[1] but is not necessarily so. In the first place, the element of fault is still present in choosing to undertake or to commission the activity in question – in the present case the fault lay in the failure to foresee the damage which could quite possibly be caused by letting off fireworks so close to another's property, even when such activity is entrusted to competent and experienced persons. Presumably, the social value or utility of the dangerous activity would be a relevant factor in balancing the interests of the parties. Moreover, the Court of Appeal observed that, had the damage been due to a fault in the manufacture of the fireworks, or to an incorrect procedure in letting them off, the defence of lack of *culpa in eligendo* might have succeeded. This implies that when the cause of the damage is not the activity in itself but the incorrect way it is carried out, then the person who commissioned the activity may avoid liability provided he had not instructed incompetent persons to carry it out. There is therefore no strict liability.

Hugh P Zammit on behalf of another v Director of Roads and Another (Court of Appeal – Qorti tal-Appell) 23 January 2004

Collected Judgments, Vol LXXXVIII, part II, 86

Facts

7 A rain culvert running across a road was covered by a grating so as to ensure an even surface. On various occasions the grating was stolen by third parties and the culvert left uncovered, thus posing a hazard to traffic. The defendant, who was responsible for the upkeep of the road, would replace the grating but only months after the theft. On this occasion the plaintiff drove over the open culvert and damaged his car. There was no evidence to show how long before the event the grating had gone missing. However, a year *after* the event the grating had not been replaced.

Decision

8 The first instance court observed that, normally, evidence relative to subsequent events is not considered relevant. In the present case, however, the fact that, a year after the event, and notwithstanding the accident, the missing grating had not yet been replaced, was relevant as evidence of the way the defendant went about his duty to keep the road in a proper state of repair. Moreover, since the grating had been stolen repeatedly on previous occasions, the defendant ought to have foreseen

1 See also *D'Amato v Camilleri* in 3a/15 nos 1–7 above.

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that this could happen again and he ought to have taken steps to regularly check the state of the road and to avoid danger to motorists. The court considered this failure as sufficient evidence of habitually negligent omission of duties even though it was not shown how long *before* the event the grating had gone missing. The judgment was confirmed on appeal.

Comments

Although the defendant had not created the danger himself, he was nonetheless held responsible for not having put in place effective procedures to become aware of the danger and for not having eliminated it. In this context, it is interesting to note the use made of *de facto* presumptions. There was no actual reversal of the burden of evidence, but a liberal interpretation of the rules of evidence certainly made that burden lighter for the plaintiff. **9**

16. Denmark

Vestre Landsret (Western Court of Appeal) 12 August 1969

U 1969.964 V

Facts

A contractor, who was doing repair work on a road, had set up warning signs indicating that repair was going on and that people using the road should take due care. Further, the contractor had set up four bars with flashing lights to properly warn users of the repairs on the road. However, one day after work, two of the bars were damaged by motorists so that the lights were no longer working. A few hours later a car, which was approaching the area where the roadworks were being carried out, crashed into a nearby ditch and was damaged. **1**

Decision

The court found that the contractor had acted negligently by failing to secure the area where the roadworks were going on in accordance with sec 61 of the Danish Road Traffic Act.[1] According to that section, people using the road should be duly warned about work being carried out on the road at any time. **2**

1 Consolidated Act No 1384 of 11 December 2013.

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Comments

3 One of the basic goals of Danish tort law is to prevent accidents by inducing people to conduct their business with due care. Thus, when people carry out potentially dangerous activities such as repairing a road, they may be held liable for even minor failures to ensure the safety of other people.[2] In the case at hand, the contractor had taken several precautions by setting up warning signs and bars with flashing lights and this would seem sufficient to avoid liability. However, the court adopted an interpretation of the said sec 61 which placed the risk for the adequacy of the safety precautions on the contractor even though the damage to the bars was inflicted after working hours by motorists with whom he had no association at all. This interpretation was in accord with the wording of sec 61 and therefore, the ruling of the court is not surprising. But it shows that a rather high standard of care must be observed when people engage in dangerous activities.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 27 May 1967

Rt 1967, 697

Facts

1 A municipality in the eastern part of Norway, Lier, had to remove sewage (a total of eight cubic metres) from three municipal apartment buildings. The municipality engaged a contractor, A, to get rid of the sewage without making any preconditions regarding which method he should use to do so. The contractor dumped the sewage in a small river nearby, the water of which was used for various purposes. A married couple, who lived next to the river, made their living by raising trout and chicken. For both species the fresh water was vital, and the contaminated water caused the death of both trout and chickens, which led to the couple going out of business. They sued the municipality, claiming compensation for pecuniary loss.

Decision

2 The court found that the municipality was liable to the claimants. The reasoning stressed the fact that there was a great risk involved in engaging a contractor, not in any way especially educated or skilled, to provide for the disposal of such material dangerous to the health of humans and animals. The disposal took place in July, the hottest time of the year, a fact which increased the risks involved. There were no

2 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 106–111.

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known places nearby which would have been well suited for the disposal of such material. The payment of NOK 500 (approx € 50) to the contractor after the material was disposed of in itself constituted a motivation for the contractor to dispose of the material in a simple way. The municipality of Lier had quite clear health regulations on how sewage should be disposed of. The employee who acted on behalf of the municipality did not know whether A was aware of these regulations and he also failed to inform A about them. The municipality held that they could not have foreseen that A would act in such a negligent way. The court, however, taking all the circumstances into account, found that it was not unforeseeable for the municipality that the disposal would be performed in such a dangerous manner.

Comments

The case is typical for Norwegian Supreme Court reasoning. The court discussed the concrete merits of the case very closely; the nature and severity of the risk, and the possibilities of the alleged tortfeasor to diminish or eliminate the risk. Nygaard has pointed out that the general risk, ie the wide range of possibly damaging incidents due to the negligent disposal of the sewage, probably explains why the municipality was found liable. The theoretical point seems to be that a general risk is more likely to render the tortfeasor liable than a special risk of damage. The mentioned viewpoint is, however, not explained or elaborated upon further nor supported by other legal sources. Interesting as the distinction may be, we do not think that the question of general versus special risk really was decisive in this case. Rather, it was the accumulated gravity of the risk, the dangerousness of the activity that really mattered. As for the current case, it seems obvious that it would have been rather easy for the municipality to have taken precautions, for example by requiring that the sewage should be disposed in a specific way. Looking at the case with the hygiene standards of today, and especially the awareness of environmental dangers, the conclusion should be even clearer. It seems very odd and unacceptable that a public entity such as a municipality passes on a disposal problem to a third party who is ignorant of the methods used to do so. Although the man who directly caused the damage was an independent contractor, it may be noted that the core of the negligence on the part of the municipality is *culpa in eligendo*. 3

Høyesterett (Norwegian Supreme Court, Hr) 14 December 2004

Rt 2004, 1942

Facts

Two boys, who were 15 and 16 years old, were given fireworks from an older boy. One night, they set off several firecrackers in a schoolyard. They also met another 16-year-old boy, who decided to follow them into the schoolyard and watch what 4

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they were doing. One of the boys had the idea of putting one of the crackers into an air vent on the wall. He borrowed a lighter from the boy who was the last to join them. They ran away as the cracker exploded and did not come back. The explosion resulted in a smouldering fire, which later flared up and caused substantial damage to the school building. The owner of the building – the municipality – claimed damages from the parents' insurer. The insurer claimed recourse from the parents, asserting that the damage was caused by gross negligence.

Decision

5 Pursuant to skl § 4-2, cf § 4-3, in order to be entitled to claim recourse, it is a requirement that the defendant acted with intent or gross negligence. The Act also contains special grounds for liability as a result of actions by children under the age of 18, cf § 1-1. Children might be liable in damages for intentional or careless acts if this seems reasonable taking their age, development and behaviour into consideration. The Supreme Court points out that the assessment has to take into account reasonable expectations of children of the defendants' age. In this assessment, it is of no relevance whether the defendants have liability insurance. The court stated that the risk of damage caused by a fire was substantial considering how the cracker was placed directly into the wall of the building. The court also noted that a fire in the school building could cause a considerable amount of damage. The activity was therefore very dangerous.

6 The court assumed that the boys understood the nature of the specific risk. Earlier in the evening, they had also observed the potential power and sparks from a cracker when it exploded. The majority concluded that the fire was caused by an intentional act of vandalism. The action represented such a substantial and blameworthy deviation from reasonable behaviour that it could be characterised as grossly negligent with regard to the specific risk of damage that could be caused by a possible fire, even when the boys' age was taken into consideration.

7 As regards the boy who played a passive role in the chain of causation, the majority concluded that he had contributed in a cooperative and substantial way. He had been very helpful and had used his lighter to light up the area where the cracker was to be placed. He had also given his lighter to the other boy for the purpose of lighting the cracker, when another lighter turned out to be broken.

8 The Supreme Court's majority concluded that the boys had acted with gross negligence. Two of the justices dissented. The minority agreed on the relevant arguments, but assessed them differently. The minority pointed out that the latter boy had joined the other boys by chance, and just watched. Moreover, even though he had lent his lighter to the principal boy in the group, which he saw as a simple favour, the overall behaviour of the young boy could not be characterised as grossly negligent.

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Comments

The decision is a good example of several important aspects of the *culpa* rule in practice. It is in connection with gross negligence that the nature of the risk and, hence the dangerousness of the activity in question, has its most important role. In the evaluation of the dangerousness of an activity, it seems to make a difference whether the defendant created the source of the risk or whether he/she could have been expected to mitigate a risk created by somebody else. In the latter case, the minority appear to assume that the expectations of an adolescent must be lower than those of an adult as regards the duty to mitigate a risk – even though it is a very dangerous activity when considered objectively. This is especially the case if the risk is created in a context of social pressure. The majority appeared to evaluate the latter boy's conduct as being a more faulty and blameworthy contribution than the minority did, and, in their overall assessment, they judged the contribution more strictly. This might be because they put decisive weight on the fact that the case concerned the creation of a very dangerous risk of damage, and hence that the relationship of proximity between those involved in itself constituted *culpa*. Even passively watching such an activity might constitute *culpa*, as long as each member is part of a team or joint effort with the goal of seeing the very dangerous risk materialise. 9

18. Sweden

Högsta domstolen (Supreme Court) 11 June 1985
NJA 1985, 456

Facts

Around a construction site in the downtown area of a big city (Gothenburg) a temporary walkway was built of wood. The crossbars were 1 cm higher than the rest of the walkway. A person who was walking did not notice the crossbar, fell and was injured. 1

Decision

Although the accident risk was small in each particular case of a person walking around the site, the court considered that ultimately it could not be viewed as insignificant. Since the construction work would continue for a long time, the walkway would be used by a large number of pedestrians. This threat posed an obvious risk of serious injuries if a person suddenly fell; further it could not be expected that every passer-by paid sufficient attention. Thus the construction company had to warn pedestrians, for example by clearly marking the barriers. Since this was not done – and since such an arrangement would have been neither costly nor unrea- 2

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sonable considering the risky situation – the construction company was considered negligent.

Comments

3 The case demonstrates that the time criterion is relevant when evaluating risk factors. If many people are exposed to a risk factor, which in itself is not particularly probable and dangerous for a longer period of time, the result will nevertheless be that the risk is relevant. The significant risk evaluation is thus always a kind of balancing act – low points as regards the possibility of injury can be matched against high points as regards the frequency with which people are exposed to that risk. Accordingly, a low probability will nevertheless be seen as relevant if the injuries (in the implausible cases) are serious. For example, even if the likelihood of hell (maybe) is pretty small, we should (maybe) take this diminutive risk into account – since it would (maybe) be hellish to reach hell.

Högsta domstolen (Supreme Court) 4 June 1981

NJA 1981, 683

Facts

4 Due to road construction work, the walkway had been temporarily lowered, thereby the stone foundation to the steps outside a house was now 2 cm higher than the rest of the street. The company conducting the works had placed a warning sign at the end of the street and traffic cones to mark the raised stone. During a weekend – when the construction work was down, and the cones were removed by unauthorised persons – a person stumbled on the stone and was injured.

Decision

5 The court found that the different levels of the street and stone involved a risk of accidents which was not negligible. Therefore the company had to arrange for appropriate warning devices, for example, the cones. Since the cones were removable, it had to be evaluated whether the company should have done more to prevent such occurrences. Thereby a balancing of costs and inconveniencies on the one hand and the nature and extent of the risks on the other had to be performed. While the risk of accidents was not viewed as particularly serious, it was held that the company had no duty – besides the placing of cones – to take such time and labour-intensive measures that would have been needed to ensure that the cones remained in position over the weekend. Therefore the company had not negligently caused the injury.

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Comments

The facts as well as the criteria of NJA 1981, 683 and NJA 1985, 456[1] are pretty similar; nevertheless the outcomes are different. Thus it is not always negligent to create a risky situation for pedestrians in the area of a construction site. The difference has to be explained by reference to the evaluation concerning what could be done – and at what costs and inconveniences – concerning the dangerousness. In the 1985 case, nothing was done, and since the small risk exposed many people to threats over a long period of time, the risk could be seen as relevant and therefore constituting negligence. In the 1981 case, the period of exposure to risk was shorter and something had been done to prevent accidents; although these measures failed to prevent damage in the specific case, the risk factors were not so dangerous that any further measures should have been taken. Thus the case demonstrates that tort law does not demand that everything has to be done in every case to prevent every injury; the dangerousness must be viewed in the concrete situation and hence be evaluated and balanced together with the overall picture of risks and countermeasures. **6**

20. Estonia

Riigikohus (Supreme Court) 30 June 2013

Civil Matter No 3-2-1-73-13

Facts

The plaintiff visited her daughter, who rented an apartment in a house that belonged to the defendant. The hallway of the defendant's house had automatic lighting that worked on a timer and was switched on by movement detected by a motion sensor. When the plaintiff left her daughter's apartment, the daughter switched on the lighting of the general hallway that was lit for 1 minute and 42 seconds. After the light went out, the plaintiff found support from a brick wall on her right and slowly moved down the stairs in the darkness until she reached a place in which there was an opening in the wall (dimensions 105 cm (height) × 311.5 cm (width) × 44.5 cm (depth)) to the general hallway. Since she was unaware of the opening, she fell from the second floor to the first floor through the opening. As a result of the fall, the plaintiff's spine broke. The plaintiff requested compensation from the defendant for pecuniary and non-pecuniary damage. The defendant contested the action by claiming that his conduct was neither unlawful nor wrongful. **1**

1 3c/18 nos 1–3. See for analyses of these cases, *A Agell* in: J Hellner et al (eds), Festskrift till Ulf K Nordenson (1999) 1ff and *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 95f.

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2 The county court satisfied the claim. The circuit court annulled the decision of the county court and dismissed the claim.

Decision

3 The Supreme Court annulled the decision of the circuit court and partially satisfied the claim.

4 The Supreme Court found that the defendant, as the owner of the house and a person who rented out the apartments in the building, had to ensure the safety of people moving around in the hallway – both lessees and other persons. The hallway solution established by the courts does not ensure safety of an averagely reasonable person moving in the hallway in the dark. At the same time, the defendant did not prove that making the opening safe, eg by building a barrier in front of the opening, would have been impossible or required unreasonable expenses from him. Yet, it is obvious that by, eg placing a barrier in front of the opening, the materialisation of this danger could easily have been prevented. The Supreme Court explained that the more likely it is that the damage will occur and the lower is the effort and expenditure required to prevent the damage, the higher is the likelihood that there is a duty to maintain safety by taking the measures to avoid or eliminate danger. The impossible cannot be required from a person under a duty to maintain safety, and the behaviour expected from the defendant as a homeowner must be reasonable. In assessing the level of the defendant's duty to maintain safety under § 1050 (1) of LOA, it also has to be taken into consideration that the defendant is renting out apartments and thus has to be careful to an extent that is compliant with the level of care of an average lessor. The lessor has to take into consideration that the rooms rented out may be visited by persons who enter the hallway of this house for the first time and may not immediately realise the possible dangers. Therefore, if a similar accident had happened to the plaintiff in a house where no rooms are rented out, the courts may have found, assessing the circumstances of this case, that the house owner did not violate the general duty to maintain safety.

Comments

5 This Supreme Court decision is an important decision in the sense of developing and harmonising Estonian judicial practice because the Supreme Court explained a violation of the general duty to maintain safety for the first time as one of the possibilities to establish the delictual liability of a tortfeasor. The Supreme Court based its decision on the fact that the danger of the situation created by the defendant manifested itself as a concurrence of two factors – the opening and the lighting – in this case. According to the assessment of the Supreme Court based on the circumstances established by the courts, the defendant could have made the situation safer and could have prevented the occurrence of damage with a simple and cheap solution –

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by building a barrier. The Supreme Court found this measure proportional, taking into consideration the gravity of the potential danger. It needs to be emphasised that, in giving such an assessment, the Supreme Court took into consideration the fact that the defendant was a lessor and the accident took place in the hallway of a rented property. Unlike the county court, the Supreme Court did not directly blame the defendant for the fact that he could and should have improved the lighting of the hallway. This case also qualifies well for question 3f/20.

See also Judgment no 2-12-34167 of Harju County Court, 28 August 2013 under 3f/20 nos 1–5. 6

21. Latvia

Augstākās tiesas Senāts (The Senate of the Supreme Court) No SKC-69/2008, 20 March 2008

Unpublished

Summarised in 3f/21 nos 1–8. 1

22. Lithuania

IL v UADB 'Baltikums draudimas', VS and VP, 15 April 2008

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-136/2008; <http://www.lat.lt>

Facts

The plaintiff was severely injured in a car accident when a car driven by GM collided with the car in which the plaintiff was travelling as a passenger. GM was driving the car of defendant VS who, drunk and not able to drive, had asked GM, who was mentally ill, to drive. It was established in the criminal investigation that, although GM had a valid driver's licence, he was mentally incapable at the time of the accident. The plaintiff filed a claim seeking non-pecuniary damages solidarily from the mentally incapable driver's mother VP and VS, who, as the keeper of an object of higher danger, had frivolously passed control of the object to mentally incapable GM having not enough practice to drive a car. 1

Both the court of first instance and the appellate instance court dismissed the claim for non-pecuniary damages against VP and VS. The courts discovered that VS had not known about GM's illness. The courts found that VS had acted carelessly as he had not checked whether GM actually had his driver's licence with him (in fact he had not). However, the conduct of VS was not a sufficient basis to hold him liable in tort. 2

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Decision

3 The Lithuanian Supreme Court quashed the decision of the appellate instance court and granted the claim against VS, awarding compensation for non-pecuniary damage. The Lithuanian Supreme Court held that art 6.270(3) CC, which states that a keeper of an object of a higher danger, having lost control over it through his fault, would be solidarily liable with the person who has taken control over it, could not be applied since there was no loss of control of an object in this case. However, according to the court, VS, as the keeper of an object of a higher danger, had frivolously passed control of it to a person he knew little about, since he had no information about GM's driving skills. The fact that GM had no car of his own, in the opinion of the Lithuanian Supreme Court, should have made VS suspicions about GM's poor driving skills.

Comments

4 According to art 6.270(2) CC, the person who is the keeper of an object of a higher danger is liable for the damage caused by that object on the basis of the strict liability rule of art 6.270(1) CC. When the control of the object is passed to another person voluntarily, this person, as the keeper of an object of a higher danger, becomes liable for the damage resulting from the object.

5 In this case the Lithuanian Supreme Court decided that the transfer of control of an object of a higher danger had not met the requirements of law and, therefore, the primary keeper of the object should remain fully liable for the damage caused by that object (perhaps together with the person to whom the control was passed had he been mentally capable). Although the motivation of the Lithuanian Supreme Court on the legal basis for the liability of the owner of the object of a higher danger is somewhat ambiguous, the result clearly shows that the higher danger inherent in an object justifies stricter requirements on the conduct of a person controlling such an object. Perhaps the Lithuanian Supreme Court intended to state that the primary keeper of an object of a higher danger is liable on the basis of general liability rules in arts 6.263(1), 6.263(2) and 6.246(1) CC, providing that a person is liable for the breach of the general duty to act with due care.

VP v DD, GŽ, EŠ, JM and VS, 3 March 2014

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-7-144/2014; <http://www.lat.lt>

Facts

6 Two robbers, defendants DD and GŽ, broke into the plaintiff's apartment and seriously wounded him using a gun, which had been stolen by GŽ from the defendant VS. The gun was temporarily kept by VS at his girlfriend's home in a cupboard,

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thereby it became easily accessible to GŽ who was the nephew of VS's girlfriend and who lived with his aunt.

The plaintiff filed a civil claim requesting pecuniary and non-pecuniary dam- **7** ages from all accomplices of the crime, ie the two perpetrators DD and GŽ, the organiser and the accessory who had promised beforehand to conceal the objects obtained criminally. In addition, the plaintiff sought compensation from VS solidarily with the accomplices of the crime.

The case reached the Lithuanian Supreme Court twice. In the first round, the **8** court of first instance granted the claim against one of the two perpetrators who wounded the plaintiff with the gun. The Court of Appeal changed the decision and ordered damages to be paid from both perpetrators solidarily. The Lithuanian Supreme Court in 2010[1] quashed the decisions and returned the case to the Court of Appeal. The Lithuanian Supreme Court argued that the lower instance courts had breached the rules of solidary liability with respect to the organiser and accessory of a crime, as well as to the owner of the gun. In 2011[2] the Court of Appeal granted the claim against all five defendants. The plaintiff filed a cassation claim contesting the amount of non-pecuniary damages awarded. The defendant VS filed a cassation claim contesting his liability towards the plaintiff.

Decision

The Lithuanian Supreme Court, sitting in an extended composition of 7 judges,[3] **9** agreed with the findings of the Court of Appeal.[4] The Lithuanian Supreme Court held that defendant VS, as the owner of the gun, should be liable on the basis of art 6.270(3) CC which provides that a keeper of an object of a higher danger, having lost control over it through his fault, should be solidarily liable with the person who has taken control over it. Despite the fact that VS asserted that he kept the gun hidden in order that it would not become easily accessible to others and that he could have not foreseen that GŽ, who had never been convicted or suspected of commit-

1 *VP v DD, GŽ, EŠ, JM and VS*, LSC 3 May 2010, case No 3K-3-196/2010.

2 *VP v DD, GŽ, EŠ, JM and VS*, CoA 31 January 2011, case No 2A-146/2011.

3 The composition of the panel of four judges from the Civil Cases Department and three judges from the Penal Cases Department was quite unusual for the LSC where usually the panels are indiscrete and demonstrates the complexity of the issue solved.

4 Three judges from the Penal Cases Department dissented from the majority from the Civil Cases Department. The dissenting judges emphasised that there was no causal link between the omission of the defendant VS and the damage, because the perpetrators had a gas pistol handed to them by the organiser of the crime. According to the dissenting judges, the crime would have been committed had the gun not been stolen from VS. According to the authors, the dissenting opinion lacks support because a gas pistol is a non-lethal weapon and in fact the damage was inflicted on the plaintiff using the gun stolen from VS.

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ting a crime in the past and was in general a positive character, the Lithuanian Supreme Court considered that the owner of the gun was at fault for losing control over the gun because he breached the laws which stipulate the rules concerning the storage of guns.[5] However, three judges from the Penal Cases Department dissented from the majority opinion of the Civil Cases Department. The dissenting judges emphasised that there was no causal link between the omission of the defendant VS and the damage, because the perpetrators had a gas-pistol handed over to them by the organiser of the crime. According to the dissenting judges, the crime would have been committed even if the gun had not been stolen from VS.[6]

Comments

10 This case, as the previous one,[7] shows that the standard of care of a keeper of an object of a higher danger in order to ensure that others do not get hold of them is very high.

23. Poland

Sąd Najwyższy (Supreme Court) 2 June 1972, I CR 42/72

OSPiKA 7-8/1973, item 152

Facts

1 Vs claim damages for wrongful death of their wife and mother. The deceased suffered serious injuries and died after a balcony she had been standing on detached from the building and fell down on the ground. The defendants are the owner of the building (A) and the City Hall (the State Treasury) – B. The said building had been in a poor technical condition for years. There had been a clear danger of the balconies detaching since 1966 when the first one detached. After that incident, B issued a decision ordering the owner to demolish the balconies. Because the latter failed to do so, the authorities called him to do so under threat of a fine. He still failed to perform. After five years the second balcony detached.

Decision

2 The regional court ruled for Vs. On appeal, the Supreme Court held that the owner of the building is strictly liable for the detachment, because he did not prove any ex-

5 See below, 4/22 nos 2–3.

6 According to the authors, the dissenting opinion lacks support because a gas pistol is a non-lethal weapon and in fact the damage was inflicted on the plaintiff using the gun stolen from VS.

7 3c/22 nos 1–5.

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onerating circumstances (art 435 KC).[1] B is liable for the negligent omission of its functionaries to execute the decision on behalf of the owner. B had a duty to implement its decision. Absent a voluntary enforcement by the owner, B should have applied a compulsory administrative execution at the expense of the owner because the balconies constituted a danger to people's life and things. Omission of such an action leads to B's liability regardless of the liability of A. Both defendants bear joint and several liability.

Comments

The direct cause of the damage was the poor technical condition of the building and not the failure to enforce the administrative decision. The building's owner bears full responsibility. Yet, the liability of the state is grounded in its own negligent omission, which is causally linked with the damage. 3

According to the court, the state was obliged to apply effective measures to prevent the detachment of the balconies once the Department of Building knew that the condition of the balconies posed a real and serious threat to its residents. There is no general obligation of the state to avert risks from its citizens but in this particular case the conduct of the state was negligent as it could have and should have applied effective measures of administrative enforcement. 4

The two factors taken into account by the court concern the hazard created by the tortfeasor's activity and the conduct of the parties (even when fault irrelevant because liability is based upon risk or equity). 5

Sąd Najwyższy (Supreme Court) 18 January 2012, I CSK 157/11

OSNC ZD B/2013, item 30

Facts

V, a young girl, lost her eye as a result of an attack by one group of teenagers on another group of teenagers gathered at a bonfire in 1998. The attackers shot at the group with a sling, using stones and pinecones. One of the stones hit V and injured her in the eye. It is uncertain whose slingshot it was. Five defendants in this case were tried by a juvenile court for assault and battery. V sued them jointly and severally for damages. 6

1 Article 435 § 1 KC: 'A person conducting on his own account an enterprise or business set into operation by forces of nature (steam, gas, electricity, liquid fuel, etc) is liable for any damage to persons or property caused through the operation of the enterprise or business, unless the damage was caused by *force majeure* or exclusively by the fault of the injured party or of a third person for whom he is not liable.'

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7 According to the Regional Court, all defendants actively participated in the assault on V, hence their liability is joint and several (art 441 KC).

8 One of As appealed, alleging that he did not shoot the sling that hit V as he had given the sling to one of the other participants after he had injured his palm. According to the Regional Court, this appellant had actively participated in the assault and, by giving away the sling, he had facilitated the dangerous situation and attack. He was at fault because he could have foreseen that the group's conduct could lead to the infliction of injury and consented to that result. His liability was based on art 422 (liability of an accomplice) and art 441 KC (joint and several liability in tort).

9 The court rejected the limitation of action defence, because a period of ten years had not lapsed since the criminal act.

Decision

10 The Court of Appeals upheld the judgment. The fact that the appellant did not shoot the injurious stone does not absolve him from liability because it was sufficient for V to prove that he participated in the assault and battery that resulted in V's personal injury. However, the appellant was a direct tortfeasor.

11 On cassation, the Supreme Court upheld the judgment, however, the court focused on the allegation concerning the incorrect application of the rules on limitation of actions.

12 Polish case law and scholars have accepted that if a personally connected group (such as participants in a dangerous game) *as a whole* create a dangerous situation leading to damage and where the actual perpetrator cannot be established, all the members of the group may be considered joint tortfeasors. It does not matter whether the actions of one party were direct or indirect or whether one party is more blameworthy than the other. The degree of fault of individual persons is not to be identified or differentiated in the main lawsuit.

Comments

13 The same concept of fault in participation in a dangerous activity or game has been applied in hunters' cases or in cases where a number of persons participated in a hazardous activity. Liability is also explained by the doctrine of adequate causation that exists between the creation of the risk and the infliction of harm. Thus, the person responsible for the risk will be jointly and severally liable for the damage that occurred due to the realisation of that risk.[2]

2 See *M Nesterowicz/E Bagińska*, Multiple Tortfeasors under Polish Law, in: WVH Rogers (ed), Unification of Tort Law: Multiple Tortfeasors (2004) 153, 156.

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Sąd Najwyższy (Supreme Court) 11 December 1965, I CR 326/65
OSNC 10/1966, item 167

Facts

V participated in a summer scouts camp. The camp's commander organised a historic 'knights' battle' to commemorate the battle's anniversary. For the performance, the commander selected the best behaved children between the ages of 11 and 14. After having been instructed as to how to use the weapons, the children used sharply ended swords and other wooden blades during the rehearsal and the performance, which was also supervised by other attending adults. During the 'battle' V was hit in the eye, which ultimately resulted in the loss of vision in that eye. **14**

The defendant participant who injured V (A) and the commander (B) denied fault. The defendant organiser (the State Treasury – C) denied liability for lack of fault of the commander. The regional court ordered B and C to jointly pay compensation and dismissed the claim against A. On appeal to the Supreme Court, B and C questioned the findings of fault in the supervision of the children. **15**

Decision

The Supreme Court upheld the verdict. The court emphasised that, when the scouts' camp commander organised a 'knights' battle" in which participating children between 11 and 14 years old use sharp swords and wooden blades without any head protecting helmets, he creates a danger of bodily injury. When actual harm materialises, the commander is liable and his fault is presumed. Because he was entrusted with the exercise of care over children, he had the duty to ensure full safety of playing games or not to organise them. The facts showed that the knights' battle was not safe and therefore should not have been organised at all. Instructing the children and rehearsing the scenes with them were not sufficient because it is foreseeable that children become very emotional and uncontrollable during performances and plays. They should have been provided with helmets or protective masks, as well as with harmless imitations of weapons (eg made of hard paper). Hence, C is vicariously liable for the damage caused by B (art 430 KC). **16**

Comments

This is an example of established line of case law. Liability may be based on the ground that teachers or other guardians were negligent in permitting dangerous activities.[3] Negligence in supervision over persons who cannot be ascribed fault due **17**

3 SN 27 January 1958, 2 CR 469/57, OSPiKA 1960/3, 70.

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to age may consist in, for example, allowing children to play with dangerous instruments, using incorrect educational methods, tolerating the child's wicked friends, etc. Article 427 § 1 KC also applies to the vicarious liability for persons directly obliged to exercise supervision (eg for teachers, tutors). This means that a victim suing a local government or private school may rely on the two presumptions arising from art 427 KC: the presumption of fault and the presumption of causation.

18 The courts often refer to the concept of duty.[4] Hence, there is a duty to provide safety at school, at hospital, at a discotheque, etc. This duty can in fact be laid down in regulatory law and sometimes can be inferred from the principles of proper conduct and community life. The greater the danger, the more likely that the court will approach the case as a problem of duty to provide safety. It is not limited to the safety of people's lives or health, but also of property, eg deposits at a bank.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 17 March 2009

25 Cdo 3516/07

Facts

1 The claimant, a minor (child), with her mother and sister visited the family of the respondents in their apartment, where a German shepherd was freely moving around. The damaging incident occurred at a time when everyone was about to leave the apartment for a walk with the dog. The claimant was bitten after she entered the apartment hallway and stroked the dog. However, others present insisted that she hugged the dog from behind, which was likely the reason why the dog acted unexpectedly wildly.

2 Based on these established facts, the court of first instance concluded that the behaviour of the dog, even a trained and quiet dog is unpredictable, like a child; therefore, if any assault from the dog should be limited, close contact between a dog and a child must be avoided. The dog owner as well as the person in charge of the supervision of the child must both ensure safety.

3 Since neither the respondents nor the claimant's mother did everything possible to prevent the attack, and their negligent conduct was causally related to the damage suffered, the respondents and the mother were held liable for the damage in the amount of 10% and the remaining 90% was attributed to a random, unfortunate set of circumstances.

4 SN 15 March 1976, IV CR 68/76, OSNC 1977, item 12.

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The court of second instance changed the ratio to which the respondents and the mother were liable. The court concluded that the respondents were liable for $^2/_3$ and the mother for $^1/_3$ of the damage caused. In such a case involving a child, all the tortfeasors, ie the respondents and the mother, were jointly and severally liable for the whole amount whereas the shares thereof only concerned possible recourse actions. 4

Decision

The causes of damage to the health of the claimant also depended on the behaviour of the claimant and her mother. The mother of the claimant had not taken sufficient measures to ensure that the dog would not have closer contact with the child. On the contrary, she called her daughter into the hall, where the respondents were preparing the dog for a walk, and even during visits she did not sufficiently supervise the claimant, although she knew that the dog was moving around freely in the apartment. Thus, she thereby neglected her duty to properly supervise her daughter. 5

If a parent of a minor child, who suffered damage caused by a third party, neglects their duty of supervision, this cannot be considered to be the contributory negligence of the injured party. The parent of the minor child in this case is liable for damages under secs 420 and 438 CC, together with those who caused the damage by their involvement in the damage. 6

Comments

This case shows more aspects of liability for damage: however, it clearly shows that a person who keeps a dog must be held liable for any omission in the supervision of the dog, which, similar to a child, cannot consider its conduct. 7

As regards wrongfulness, the conclusion of the Supreme Court was based on a breach of sec 415 CC, which sets out the duty to behave in such a manner that no damage to health, property or other value is inflicted. The breach of this legal duty consequently leads to the liability of the wrongdoer for damage inflicted by the breach of duties pursuant to sec 420 CC. In the given case the respondents breached this duty by the fact that their dog was able to move freely in their apartment although visitors with small children were present and a diligent keeper could assume that an interaction between the visitors and the dog may occur. 8

Thus, the Supreme Court came to the conclusion that, based on sec 415 CC, each interaction results in different types of risks and it is the duty of the owner of the animal (but also of another thing) to take such measures which are necessary to protect third parties from risks. However, the court did not specify in detail which steps and measures must be taken but set forth general criteria which are to be the basis for the possible liability of the obliged party. 9

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10 This conclusion fully complies with the classification of dangerousness resulting from a thing as a basic fact which must be observed when acting in compliance with sec 415 CC.

11 As regards the rule in the NCC, this basic approach was fully accepted and copied into sec 2900.

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 30 June 1986, Case No 1 Cz 25/1986

Collection of Judicial Decisions and Opinions – R 36/1988

Facts

1 The claimant tripped over a wire protruding from the ground and as a consequence he broke his femur (thigh) bone. The district court decided that the responsibility for the caused damage lay with the defendant, who was the owner of the property where the accident took place. The regional court questioned the claim, which stated that the defendant had neglected to fulfill his responsibilities (§ 415 of the Civil Code).

2 According to the appellate court, the defendant was not responsible for the maintenance of the part of his property where the accident took place (§ 415 of the Civil Code) because it was not intended to be used as a path although people did in fact walk there.

Decision

3 The Supreme Court of the Czech Republic supported the objections raised by the Prosecutor General and, as a consequence, overruled the verdicts of both the district and regional courts. The owner, the manager, or the user of a piece of land upon which there is no path have no duty (not even in respect of the provisions of § 415 of the Civil Code) to provide for the shape and adjustment of the land for regular walking regardless of whether it is in fact used for walking. Dangerous places on the land (eg uncovered holes), not visible even when enhanced care is taken, or dangerous equipment placed on the land must be appropriately secured against access (eg by fencing the land or a part thereof).

Comments

4 The defendant neglected to fulfill his responsibility to prevent possible damage (§ 415 of the Civil Code) by not taking adequate care of the property, even though it was an area frequently visited by pedestrians and motor vehicle drivers. Further-

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more, the pavement was not visibly separated from the unkempt terrain by a curb. The injured party was held to be responsible for the damage in the amount of 50% since he walked through the unkempt terrain while not paying sufficient attention to where he was walking. As a pedestrian, he could have remained on the road instead.

It was stressed that the conduct of the defendant has to be taken into account with consideration of all the other circumstances which led to the accident. The Supreme Court acknowledged the fact that the claimant could have walked on the road. When the claimant left this road, he became responsible for adjusting his conduct (walking) to the state of the unkempt terrain, and thus he should have been more cautious. It was not proved whether the claimant deliberately walked on the unkempt terrain as a shortcut, or if he had had no possibility to recognise that the road he was walking on was not part of a proper road. If the claimant had deliberately been using the unkempt terrain as a shortcut, there would be no reason to conclude that the defendant had acted unlawfully. 5

Finally, the court held that the defendant was not responsible for the maintenance of that part of his property, which was not designed for walking. If, however, there were certain places on his property, which could be potentially dangerous even in the case of walking there with more caution (such as an insufficiently covered hole) or if there was dangerous equipment on his land, it would be the defendant's (whether that is the owner, an administrator, or a subject in use of the property) responsibility to make such parts of the terrain appropriately visible or enclosed, eg by a fence. 6

26. Croatia

Decision of the Supreme Court of the Republic of Croatia No Rev 724/1991-2 of 26 September 1991

<www.vsrh.hr>

Facts

V was injured as a pedestrian when a car hit him on the road. V sued the insurer of the car involved in the accident. In the first instance proceedings, the court established that A, the driver of the car, had been driving on the right hand side of the road, that he had not exceeded the speed limit and had generally adapted his driving to the road conditions. V, a child, was walking with a group of children on the pavement in an appropriate manner. Suddenly, V dropped an apple which rolled onto the right hand side of the road. In an attempt to fetch the apple, V stepped onto the road without paying attention to the traffic when he was hit by the car. An expert witness confirmed that, in the given circumstances, the driver of the car could have done nothing to prevent the accident. Against this background, the court of 1

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first instance dismissed V's claim, opining that the driver of the car had done nothing wrong; that his driving was fully in accordance with the requirements of relevant traffic regulations and that the accident was fully attributable to V's behaviour since he stepped onto the road without taking necessary precautionary measures.

2 The court of second instance reaffirmed the first instance judgment.

Decision

3 In the cited judgment the SCRC quashed the first and second instance decisions and remanded the case for re-examination.

4 The SCRC first recalled that the relevant traffic regulation requires those who take part in road traffic to pay particular attention to the safety of children, disabled persons and the elderly. According to the SCRC, this requirement affords children special protection given the fact that it is to be expected that, in some circumstances, children in traffic may not react properly. Against this background, the SCRC determined that it was not sufficient that the driver merely attempted to avoid a child once he noticed him stepping onto the road. Instead, according to the SCRC, given the special protection children in traffic are afforded, the driver should have sounded his horn when he saw children by the road approaching him who were not paying attention to the traffic. Given that relevant traffic regulation requires drivers to use sound signals whenever this is required for reasons of traffic safety, and especially if children who are not paying attention to the traffic are passing, the driver should have been more attentive. For this reason, the SCRC opined that it must be assumed that V would not have stepped onto the road without paying attention to the traffic had the driver used sound signals in due time.

5 Since the lower courts did not determine if the driver had used sound signals, holding this issue irrelevant for the case at hand, the SCRC remanded the case to the court of first instance for re-examination.

Comments

6 It is evident from the facts of this case that the car driver behaved in a manner which is usually expected from a prudent driver. However, according to the SCRC, in the case at hand this was not enough. Due to the specific circumstances of the case, notably the specific dangerousness of driving while a group of children are passing by the road, and due to the need for specific protection of children in traffic, the SCRC held that the driver should have done more than is usually expected from a prudent driver, notably to use a sound signal in order to warn children of the approaching vehicle in due time. Hence, according to the SCRC, in the case at hand, the appropriateness of the driver's actions should have been assessed on the basis of specific requirements imposed on drivers due to the specific dangerousness of driving when children in traffic are involved.

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This case clearly suggests that the conduct requirements that the legal system imposes upon legal subjects will often depend on the circumstances of the particular case. In this sense, there is a possibility that the permissibility of the very same action will be assessed differently, depending on the circumstances of the case, notably the dangerousness of the activity in question.[1] Whereas in any other situation A's actions would have been assessed as perfectly in line with relevant traffic regulations, in this case, due to the fact that the case involved children in traffic, the SCRC found that A failed to meet specific requirements imposed by traffic regulations. 7

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 246/2009, 8 June 2009

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/61519/#> (7 March 2015)

Facts

The plaintiff slipped on a pavement, fell onto the plaintiff's land and was physically injured. The pavement on which he fell ran past the land and building of the defendant, which was surrounded by a concrete wall of the same height as the pavement. Between the concrete wall, the corner of which extended to the pavement, and the pavement is an empty concrete space (ditch), 150 cm deep and 20 to 65 cm wide, into which the plaintiff slipped. The plaintiff claimed compensation of damage from the owner of the land on which the concrete ditch was located. The court of first instance granted the claim for compensation, which was also confirmed by the court of second instance. 1

Decision

The Supreme Court rejected revision as unfounded. The Supreme Court highlighted as relevant the facts that there was a 1.5 m concrete ditch directly beside the pavement on the defendant's property, which is poorly visible, that the frequency of passers-by along the pavement is considerable since it is a public area and the fact that the defendant knew that children frequently played on this part of the pavement. In such circumstances, the defendant should have erected a suitable protective barrier or provided other adequate safety measures that would prevent passers-by from falling into the slope between the pavement and the defendant's building. 2

1 See also judgment of the County Court in Zagreb No Pn-1209/00 Gžn-1464/02 of 8 March 2003.

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The Supreme Court derived the duty of the owner of the land to undertake all measures to prevent harm to other persons from the general ban on causing harm to other persons (*neminem laedere*).[1] According to this rule, everyone is obliged not just to refrain from behaviour by which harm could be caused to others but also has the duty of anyone to undertake suitable measures to prevent the occurrence of harm.

Comments

3 The duty of a person to take all necessary measures to prevent the occurrence of harm to other persons can be derived in Slovenian law from the general ban on causing harm to others, which is enshrined in art 10 of the Code of Obligations among the basic principles of obligational law: 'Everyone has a duty to refrain from behaviour by which harm could be caused to others'.[2] If a person is passive and does not take the necessary measures to prevent harm, he/she behaves in conflict with the cited prohibition and their behaviour is therefore unlawful. A violation of this rule, together with the fulfilment of the other preconditions of tortious liability (occurrence of damage, causal link between the unlawfulness and the damage and culpability of the causer) results in the tortious liability of the causer of the harm.

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 525/2009, 11 October 2012

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113049978/> (7 March 2015)

Facts

4 The plaintiff was injured while performing compulsory military service,[3] when he was carrying out a mock attack on a bunker, which involved an obstacle course down a hill. The soldiers were warned before the exercise of the need for care because of snow and ice but not also of barbed wire, which was not visible. The plaintiff became entangled in the barbed wire, fell and injured his back and therefore claimed compensation for non-pecuniary damage. The court of first instance decided in an interim judgment that the plaintiff's claim was basically well-founded. The appeal of the defendant was rejected.

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1 See art 10 of the Code of Obligations.

2 *V Kranjc*, 10. člen Obligacijskega zakonika (OZ) [Article 10 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knijga [Code of Obligations with commentary, General part, vol 1] (2003) 122.

3 Slovenia no longer has compulsory military service.

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Decision

The revision of the defendant was rejected. The revision court confirmed the position of the lower courts that the downhill course that the soldiers performed did not in itself present a risk that was greater than normal. However, it was necessary in the specific case to take into account that the plaintiff did not fall because of the run downhill but because he became entangled in barbed wire, which was covered in snow and could not be seen. He was not warned of this. Such an exercise, in the view of the revision court, because the plaintiff was not a professional soldier but a conscript, became a dangerous activity. The defendant's liability was therefore judged by the rules of strict liability. **5**

Comments

In the case of a dangerous object or dangerous activity, the Slovenian Code of Obligations deviates from the general principle on culpable responsibility and determines strict responsibility in a general clause (art 149 of the Code of Obligations).[4] This form of responsibility, because it is not based on fault, can also be shown even if a person is not at fault in their behaviour. Such strict liability in law must be an exception and not the rule so such liability may only be prescribed by law. Strict liability established by law for damage from dangerous objects and dangerous activities thus demands a restrictive interpretation of the concepts of dangerous object and dangerous activity in court practice.[5] Court practice has attempted for a long time to find a suitable interpretation of a dangerous object or dangerous activity. The Supreme Court has for this purpose accepted in practice the interpretation, cited several times, that, for an object to be defined as dangerous, the danger must derive from the nature of the object itself. If the dangerousness is a consequence of non-fulfilment of the duty of supervision or other careless behaviour, it is not possible to speak of increased danger as a cause of the damage event, but about impermissible culpable behaviour. Only properties of an object of an objective nature that are not a result of lack of care can contribute to an object being assessed as dangerous.[6] In other words: a dangerous object is only an object whose negative influences exceed the normal boundaries of social acceptability and therefore in itself or be- **6**

4 See 1/27 no 2.

5 It follows from court practice that strict liability must only be retained for those cases of danger that, despite sufficient care, it is not always possible to have under control and with which, despite such great care, it is not possible to prevent the occurrence of harm. The application of rules on strict liability is thus not appropriate for normal dangers to which we are exposed every day – judgment of the Supreme Court II Ips 310/2009, Sodnikov informator 2/2011, 9.

6 Judgment of the Supreme Court II Ips 78/2008, 31 March 2011, <http://www.sodisce.si/vsrs/odlocitve/2010040815255017/> (28 February 2015).

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cause of its other properties frequently and to a marked extent can cause harm.[7] Similarly as with the concept of a dangerous object, in the case of a dangerous activity, court practice also requires a risk that is greater than normal and with which participants face dangers that exceed those that are part of everyday life or normal tasks.[8]

7 Thus when law envisages strict liability for a specific individual dangerous object or activity, it wishes to protect a person who suffers harm as much as possible. For the purpose of protecting an injured party, the law also presumes with strict liability that any harm that occurs in connection with a dangerous object or dangerous activity also derives from it (art 149 of the Code of Obligations). This means that the causal link in strict liability is presumed (presumed causality, para 2 art 131 of the Code of Obligations). Presumed causality has as a consequence that the holder of the dangerous object or the operator of a dangerous activity must already be liable because he/she is the holder of a dangerous object or the operator of a dangerous activity, irrespective of whether he/she was also at fault for the damage that occurred.[9]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Scenario 1

Facts

1 During a storm just before 1 o'clock on a Saturday afternoon, a telephone cable is blown out and droops over a 10kW power line before falling onto the road. At approximately 7 pm the next day, the V's husband is killed when trying to clear the fallen telephone cable off the road.

2 V brings a claim against both the telephone company A1 and the electricity company A2. She alleges three breaches of duty: firstly, that A1 and A2 had failed to ensure that sufficient precautions were taken to address the hazards arising out of the proximity of the two sets of lines; secondly, that the A1 did not take prompt measures to make its line safe once it became aware that the line was damaged;

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7 Decision of the Supreme Court II Ips 111/2008, 5 May 2011, <http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2010040815255044/> (28 February 2015).

8 Judgment of the Supreme Court II Ips 592/2008, 3 November 2011 <http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2010040815262206/> (28 February 2015).

9 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 242.

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and, finally, that the A2 did not have a sufficient cut-out system on the line involved in the accident.

At the time of the accident, it was known to A1 and A2 that falling cables often behave in an erratic and unforeseeable way, that the overlap of phone and power lines creates a heightened risk, and that – under unusual circumstances – there may be a danger to life, although the likelihood of a fatal injury is low. Burying cables underground would have avoided all risk to human life. However, the cost of comprehensive underground cabling in comparison to overhead cabling was considerable. Underground cabling would also have added to the time and cost of repairs should any fault develop in the phone lines; the resulting detriment would not only be felt by the phone company in having to conduct repairs, but would also have included disturbances to the local area's electricity supply and, possibly, major disruption for road users or property owners at the site of repairs.[1] **3**

Scenario 2

Facts

A is walking along a narrow lane which runs between a golf course and the embankment of a disused railway line. He is seriously injured by a golf ball hit from the adjacent golf course owned by B. On average, 6,000 shots a year are played over the fence surrounding the golf course onto or over the lane, yet prior to the accident there had been no reported case of a pedestrian on the lane having been struck by a golf ball. A claims damages from B, arguing that B should either have installed a protective perimeter around the course so as to prevent golf balls from striking pedestrians walking along the lane, or else have redesigned the course.[2] **4**

In another case, during an ice hockey league game, the hockey puck flies out of the ring hitting A, a member of the crowd and damaging his mouth. This injury is typical and foreseeable for a sport like ice hockey.[3] **5**

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1 Scenario of the Irish case: *Fitzsimons v Telecom Éireann* [1991] 1 IR 536, above 3c/14 no 1f and 3a/14 nos 1–11 with comments by *E Quill*; see also eg the Estonian cases: Judgment No 2-09-32485 of the Tallinn Circuit Court, 28 October 2011, below 4/20 nos 1–5 with comments by *J Lahe*/*T Tampuu;* Riigikohus (Supreme Court) 30 June 2013, Civil Matter No 3-2-1-73-13, above 3c/20 nos 1–6 with comments by *J Lahe*/*T Tampuu*.

2 Scenario of the Scottish case: *Lamond v Glasgow Corporation*, 1968 SLT 291, above 3f/13 nos 1–4 with comments by *M Hogg*. Compare and contrast with the English case: *Bolton v Stone*, HL, 10 May 1951, [1951] AC 850, above 3a/12 nos 1–6 with comments by *K Oliphant*/*V Wilcox*.

3 Scenario of the Finnish case: Korkein oikeus (Supreme Court) KKO 1975 II 64, above 3d/19 nos 1–3 with comments by *P Korpisaari*. For more sport accidents raising questions regarding the required standard of conduct, see eg the Italian case: Cass (Court of Cassation) 13 February 2009, No 3528, Resp civ prev 2000, 1551 (accident during the qualification trials for the Italian bobsleigh championships), above 3c/9 nos 1–3 with comments by *N Coggiola*/*B Gardella*/*M Graziadei*.

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Solutions

a) Solution According to PETL

6 Article 4:102(1) PETL provides a whole set of factors relevant in assessing whether the required standard of conduct has been attained, including 'the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it out, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods'.

7 Using the criteria provided by the PETL, the analysis of Case 1 under the PETL could be as follows: V's husband lost his life, which is the interest enjoying the highest protection under the PETL, art 2:102(2). The more serious the threatened injury, and the more likely the injury, the greater the level of precaution that must be taken. It was known to A1 and A2 that having phone and power lines overlap was dangerous and could put human life at risk. A very serious, fatal accident was thus foreseeable. The accident could have been avoided with certainty by using underground cables.

8 The likelihood of deadly injury was however low, the cost of burying cables would have been tremendous and, when compared with the relatively low risk of fatal injury, possibly disproportionate. Less costly alternative methods for reducing the risk would however have been available, including better insulation of cables, better coordination for detecting incidents in areas where two sets of lines overlapped, putting into place an emergency engineer call-out service to respond promptly or immediately to incidents such as the one that caused the plaintiff's death (rather than responding only several hours or even days after the cable falls), and putting into place a safety system which would automatically cut the power upon detection of an incident, etc. When considering and putting into place such alternative measures, a high level of expertise was to be expected from A1 and A2, both being specialised in this area.

9 Case 1 thus illustrates the interplay of factors involved in assessing the required standard of care under the PETL: the value of the endangered interest, the magnitude of risk, the likelihood and gravity of injury, the costs of prevention, the search for alternative means of reducing the danger to the protected interest, and, last but not least, the application of a proportionality test when weighing up all interests at stake.[4]

10 Regarding the ultimate outcome, the conclusion reached by *E Quill* with regard to Irish law may very well apply for the PETL as well: 'despite the use of well-

4 The analysis is indeed similar to the one under Irish law, compare the comments by *E Quill*, above 3c/14 no 2 and 3a/14 nos 2–11.

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articulated and elaborated criteria, a somewhat intuitive judgement still has to be reached on their application to the facts'.[5]

The reasoning employed under the PETL in Case 2, whereby serious injury was caused by a golf ball hit off the course, would be similar to that which was set out above in the scenario of the escaping cricket ball, with regard to the criteria for assessment of the required standard of conduct and their interplay.[6] **11**

When weighing the interest of the pedestrian A in being protected from injuries to his/her personal integrity against the freedom to organise and engage in sports, the value of the A's injured interest would be taken into account (very high according to art 2:102(2) PETL), as well as the severity of damage (serious in that single case), the probability of being hit by a golf ball and the number of potential victims (extremely low, no previous injury is known to have happened) and ultimately the cost of taking preventive action (not provided in the scenario but presumably high). **12**

Depending on the precise data, the analysis under the PETL and the balancing of interests would either lead to the result that the persons responsible for the sports ground did indeed violate the required standard of conduct (as was decided in the Scottish case that served as the source of inspiration for Case 2[7]) or that they acted in accordance with the required standard (as in the case of the persons responsible for the cricket ground discussed above).[8] **13**

In the case of the (severe) injury suffered due to the hockey puck that flew out of the ring, the injury was typical for a sport like ice hockey and thus foreseeable. The outcome under the PETL would most likely subsequently depend on the question of whether the organiser of the match had taken all possible precautions to avoid this kind of injury. In determining the reasonable costs for precautionary measures, under the PETL, the extent to which these costs could be spread over the entire community benefiting from the sport via membership fees or entrance tickets may be taken into account. **14**

The analysis might eventually lead to the conclusion that, even when taking into account the high value of the injured interest, the organisers of the sporting event had acted in accordance with the required standard of conduct and thus did not commit any fault. The subsequent question is whether the costs should then indeed be borne by the victims (spectators or bystanders hit by a cricket or golf ball or an ice hockey puck), or, alternatively, whether they should be borne by the organisers despite the fact that they respected the required standard of conduct. **15**

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5 *E Quill*, above 3a/14 no 8.

6 Above 3a/30 nos 1–8.

7 Above fn. 2 with critical comments by *M Hogg*.

8 See above, 3a/30 no 1.

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16 In some jurisdictions represented in this Digest, organising sport events that frequently or unavoidably lead to damage to participants, spectators or bystanders is regarded as a dangerous activity and the organiser is held liable without fault.[9]

17 Several arguments speak in favour of this solution: the first argument is that of *cost-spreading*.

18 Instead of putting the costs of the accident and the whole burden on the shoulders of a single person who was accidentally hit by a cricket or golf ball or an ice hockey puck (like being hit by lightning), the burden is put on the organiser of the event who will then have the option of spreading the cost of (unavoidable) accidents among the whole community of people benefitting from the activity through ticket pricing or membership fees. The organiser might also self-insure against liability and then spread the costs of insurance, rather than the cost of damage, among the beneficiaries. Liability and cost-spreading would thus operate to alleviate the expense of (unavoidable) accidents.

19 The second argument is that of *injury prevention*. By having to bear the accident costs associated with an activity, the organiser has the incentive to take all possible precautions against recurrence of the accident.

20 Thirdly and finally comes the argument of *fairness*. It was the business of the organisers to secure safe conditions for participants, spectators and bystanders. If they had not done so, they created a hazard which allowed the accident to occur. It seems only fair for an organiser to therefore pay for any accidents which occur during the course of the activity, even if the aforementioned acted with all required care. These three arguments taken together speak in favour of liability for damage resulting from dangerous activities such as those dealt with in the above cases.

21 However, and contrary to most European national liability systems,[10] the PETL neither contain a general clause nor a series of specific clauses on liability for dangerous activities. Quite the contrary, the PETL's rule on strict liability in art 5:101 follows the US-American approach to strict liability. The above scenarios are well beyond the scope of that rule.

b) Solution According to the DCFR

22 Article VI-101, the basic rule for extra-contractual liability of the DCFR, provides: '(1) A person who suffers legally relevant damage has a right to reparation from a

9 See in particular the report on Italy, above 3c/9 nos 1–11 with reference to art 2050 of the Italian Codice civile. French law reaches a similar result via art 1384 of the French Code civil, for numerous references see *T Kadner Graziano*, JETL 2016, 1, 12–15 (regarding ski accidents in particular).

10 The texts of many relevant provisions can be found translated into English in: *K Oliphant/BC Steininger*, European Tort Law – Basic Texts (2011); *T Kadner Graziano*, Comparative Tort Law – Cases, Materials and Exercises, Chapter 6 (forthcoming).

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person who caused the damage intentionally or negligently …'.[11] Pursuant to art VI–3:102(b) DCFR, conduct is negligent when it does not 'amount to such care as could be expected from a reasonably careful person in the circumstances'. Like the PETL, the DCFR thus uses an objective standard of care.[12] However, unlike art 4:102(1) PETL, the text of the DCFR does not provide a list of indicative factors to take into account when deciding whether a particular act achieves the required standard or whether fault can be established. The commentary further states that '[t]he assessment of negligence in particular cases must therefore remain with the courts, whose assessment of what constitutes careful conduct or conduct without due care in a given set of facts may quite properly change over time'.[13]

The argument under the DCFR could thus be similar to that exposed above under the PETL. In the absence of precise criteria determining misconduct, however, any further prediction of the solution of the above case under the DCFR would be purely speculative. **23**

31. Comparative Report

All the reporters submitted cases in this sub-category except those for Finland, Romania[1] and the EU. For Latvia, the report refers to a case summarised in 3f. **1**

It is generally recognised that dangerousness is an important consideration in determining the conduct that is required of a defendant – and conversely the conduct for which he may be held liable.[2] The greater the danger involved, the more the defendant should do to guard against it.[3] The law expects a higher degree of care in carrying a quantity of dynamite than the same amount of butter.[4] **2**

Many legal systems conceive of danger as the product of the probability of occurrence and the gravity of the harm if it should occur.[5] Whether the law requires **3**

11 Emphasis added.

12 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

13 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3407).

1 However, Romania 3e/28 no 1 ff seems relevant in this context.

2 Expressly: Historical Report 3c/1 no 6; Austria 3c/3 no 3; Netherlands 3c/8 no 3 ('weighs heavily').

3 Germany 3c/2 no 3; Austria 3c/3 no 6; Italy 3c/9 no 11; Spain 3c/10 no 7; Portugal 3c/11 no 4; England and Wales 3c/12 no 3; Scotland 3c/13 nos 4 and 9; Ireland 3c/14 no 2; Denmark 3c/16 no 3; Lithuania 3c/22 no 10.

4 England and Wales 3c/12 no 2.

5 See especially Austria 3c/3 no 6; Belgium 3/7 no 4; Netherlands 3c/8 no 2f; Italy 3c/9 no 11; Spain 3c/10 no 5; England and Wales 3c/12 no 10 f; Scotland 3c/13 no 2 ff; Ireland 3c/14 no 2; Norway3c/17 no 3; Sweden 3c/18 nos 3 and 5 f; Estonia 3c/20 no 4 f. See also art 4:201(2) PETL: '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.'

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whoever is responsible for the danger to guard against it requires consideration of the precautions available to him and their cost and practicality (see further 3f). Whether it is reasonable to demand the taking of those precautions depends on a balancing of the burden they would impose with the danger to be avoided in the particular circumstances of the case.[6] This must be done with regard to the persons likely to be affected by the danger: greater care, entailing more extensive precautions, may thus be required where it is foreseeable that a child may come into the vicinity of the danger – all the more so where the latter constitutes an allurement to children or the circumstances are such as to encourage exuberant and thoughtless behaviour by them.[7] The same applies where persons unable to protect themselves against common hazards because of disability ought to be in the defendant's contemplation.[8] Extraordinary precautions may also be required where the defendant should foresee that the effects of the injury for the claimant will be significantly greater than for an average person, meaning that – to that extent – the danger to him is especially acute.[9]

4 The degree of danger posed by an activity or thing also depends on *where* it is, *when* it is there and *how long* it is there for. Many activities or things which pose no undue danger when performed or situated in a proper place can present an unreasonable degree of risk when transplanted elsewhere, precisely because they are not usual for that environment and other people do not think to guard against them.[10] A classic example is a hole on or next to a road or passageway.[11] Sometimes even dangers on one's own land have to be neutralised – for example, by fencing them off – if it can be foreseen that another may enter the land, even as a trespasser,[12] and encounter the danger.[13] The time at which an activity is performed, or a thing presents a danger, is also important. An activity performed at an improper time of year may breach the required standard of conduct for that reason.[14] Another time-related factor is how long the risk continues: a situation that poses only a small element of risk

6 See especially Austria 3c/3 nos 2 and 4; Switzerland 3c/4 no 5f; Netherlands 3c/8 no 2f; England and Wales 3c/12 no 10f; Ireland 3c/14 no 2; Sweden 3c/18 no 6; Romania 3e/28 no 1ff.

7 Germany 3c/2 no 1ff; Portugal 3c/11 no 5ff; Poland 3c/23 no 14ff; Czech Republic 3c/24 no 1ff; Croatia 3c/26 no 1ff. See also Netherlands 3f/8 no 1ff.

8 England and Wales 3c/12 no 6ff (hazard to blind persons on public street).

9 England and Wales 3c/12 no 9ff; Scotland 3c/13 no 1ff.

10 Historical Report 3c/1 no 4f; Austria 3c/3 no 3; Spain 3c/10 no 1ff (cleaning product placed in water bottle); Malta 3c/15 no 1ff (fireworks). *Aliter* if V should have adverted to and guarded against the risk: Malta 3a/15 no 1ff.

11 Greece 3c/5 no 1ff; Portugal 3c/11 no 1ff; England and Wales 3c/12 no 6ff; Slovakia 3c/25 nos 3 and 6; Slovenia 3c/27 no 1ff. See also Sweden 3c/18 nos 1ff and 4ff (uneven surfaces).

12 Germany 3c/2 no 1ff; France 3c/6 no 1ff.

13 Greece 3c/5 nos 1ff and 4ff; Estonia 3c/20 no 1ff.

14 Norway 3c/17 no 1ff (disposal of sewage in high summer). See also Malta 3f/15 no 12ff (construction work adjacent to hotel during holiday season).

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at any given moment may yet be regarded as dangerous because of its long duration.[15]

The discussion to this point makes clear that a person's creation of a source of danger, or other responsibility for it, may also entail the existence of *affirmative* obligations to guard against it.[16] Such obligations may come into existence even if the danger was created by a third party[17] or (as is conceivable) arose by virtue of a natural occurrence.[18] The danger thus acts as a basis of liability for omission.[19] Of course, the *unnecessary* creation of a danger may itself be a breach of the required standard of conduct – resulting in a liability for misfeasance rather than nonfeasance.[20] **5**

As pointed out in several reports,[21] danger is also the source of strict liability in many legal systems, or at least a stricter liability based on (for example) the reversal of the normal burden of proof.[22] However, it is questionable to what extent these liabilities entail a raising of the standard of care expected of a reasonable person, rather than the acceptance that liability can legitimately be imposed irrespective of misconduct on the basis of considerations of distributive justice and entrepreneurial risk.[23] **6**

15 Sweden 3c/18 no 1ff.

16 Germany 3c/2 no 1ff; Austria 3c/3 no 1ff; Switzerland 3c/4 no 1ff; Greece 3c/5 nos 1ff and 4ff; France 3c/6 no 1ff; Portugal 3c/11 no 5ff; England and Wales 3c/12 nos 1ff and 6ff; Malta 3c/15 no 7ff; Denmark 3c/16 no 1ff; Sweden 3c/18 no 1ff; Poland 3e/23 no 1ff; Czech Republic 3c/24 no 9. See also Italy 3f/9 no 1ff.

17 Austria 3c/3 nos 2 and 6f; Greece 3c/5 no 4ff; Malta 3c/15 no 7ff; Denmark 3c/16 no 1ff.

18 Cf the decision of the UK Privy Council in *Goldman v Hargrave* [1967] 1 AC 645 (lightning setting fire to tree on person's land).

19 Expressly: Austria 3c/3 no 5; Switzerland 3c/4 no 19; Greece 3c/5 no 3; Spain 3c/10 no 7; Malta 3c/15 no 9; Poland 3c/23 no 2f; Czech Republic 3c/24 no 7. See also Italy 3f/9 no 3.

20 See Belgium 3c/7 no 5.

21 See eg Austria 3c/3 no 8; Italy 3c/9 no 6ff; Portugal 3c/11 no 1ff; Ireland 3c/14 no 3ff (non-delegable duty); Lithuania 3c/22 no 4; Slovenia 3c/27 no 6. See also Malta 3a/15 no 7 (strong presumption of liability). Cf art 5:101 PETL (strict liability for abnormally dangerous activities); art VI–3:206 DCFR (accountability for damage caused by dangerous substances).

22 As regards the defence that the defendant took precautionary measures against the risk, see Italy 3c/9 no 7ff (art 2050 CC); Portugal 3c/11 no 2ff (art 493(2) CC); Slovenia 3c/27 no 6 (art 149 CO).

23 Italy 3c/9 no 9.

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3d. The Foreseeability of the Damage

1. Historical Report

Ulpian, D 9.2.31

Facts

1 A pruner cut the branches of a tree. A slave passed underneath the tree, was hit by one of the branches and died.

Decision

2 Quintus Mucius Scaevola[1] and Paul[2] held that the pruner should incur liability if a diligent man would have foreseen the danger and shouted a warning to the passer-by in order to avoid the accident.

Comments

3 The case is quite famous as it seems to be the oldest text employing the notion of *culpa* as the decisive criterion for liability under the *lex Aquilia*.[3]

4 The decision starts with a sentence which was probably to be found in the work of Sabinus[4], a jurist of the first century AD: the pruner incurred liability if he cut the branches in a public place and failed to shout a warning. This rather abstract rule based on the distinction between public and private places already seems to have been criticised by Quintus Mucius Scaevola, the most eminent jurist of the second century BC. In his view, there was *culpa* 'when what could have been foreseen by a diligent man was not foreseen'.[5] This generalising statement of Quintus Mucius Scaevola is the most prominent attempt to provide a definition of *culpa* in the Roman sources. It provides a good example for the jurists' (tendentially) objective approach, seeing that the formula required a comparison of the tortfeasor's conduct

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1 2nd century BC.

2 Iulius Paulus, 1st half of the 3rd century AD.

3 *B Winiger*, La responsabilité aquilienne romaine (1997) 118.

4 *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 141; *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 257; according to *A Watson*, The Law of Obligations in the Later Roman Republic (1965) 239 it is a correction of an earlier opinion by Quintus Mucius.

5 'Culpam autem esse, quod cum a diligente provideri poterit, non esset provisum'; translation by *A Watson*, The Digest of Justinian I (revised edn 1998) 288.

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with that of a *vir diligens*.[6] Paulus followed Quintus Mucius and affirmed that the old distinction between public and private places was irrelevant since people often made their way across private places. In both cases, it came down to whether the pruner should have foreseen the slave passing by and yet failed to shout a warning. However, Paulus went on and limited the pruner's liability to intentional conduct (*dolus*) if there was no path underneath the tree. For there was no *culpa* on the pruner's part when he could not have presumed somebody passing by.[7]

The seemingly general nature of Quintus Mucius' formula led some scholars to **5** believe that the Roman jurists equated *culpa* with negligence, the failure to exercise the care of a *bonus pater familias*, with foreseeability as its main criterion.[8] However, according to the prevailing view, Mucius did not provide a general definition of *culpa* as such. His considerations are thought to be confined to the specific circumstances of the pruner's case. He held the pruner liable for *culpa* and specified what constituted *culpa* in this case.[9] In this sense, the concept of *culpa* was broader than carelessness (and foreseeability). It implied that somebody behaved in a way he should not have behaved but left open the nature of the behaviour.[10]

The criterion of foreseeability was also referred to in other cases. Thus, it was **6** the idea underlying the principles *imperitia culpae adnumeratur* ('inexperience constitutes fault')[11] and *infirmitas culpae adnumeretur* ('weakness constitutes fault').[12]

In conclusion, foreseeability featured a prominent role in Aquilian liability. **7** However, liability always depended on an evaluation of all the circumstances of a case.

6 *B Winiger*, La responsabilité aquilienne romaine (1997) 118; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1008.

7 'cum divinare non potuerit'.

8 Cf *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 202 and fn 6.

9 Cf *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 204: 'The conclusion to be drawn is not that Mucius used *culpa* in the sense of negligence but that he treated a specific act of carelessness on the part of the pruner, which he defined in some detail, as fault.'; *R Robaye*, Remarques sur le concept de faute dans l'interpretation classique de la lex Aquilia, RIDA 38 (1991) 333, 342ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1008 fn 69; *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 258 fn 111.

10 *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 202.

11 Cf 7/1.

12 Cf 9/1; *R Robaye*, RIDA 38 (1991) 333, 365.

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2. Germany

Bundesgerichtshof (Federal Supreme Court) 23 April 1952, III ZR 100/51

NJW 1952, 1010

Facts

1 The claimants were the wife and the son of the deceased. The latter had been hit by the defendant's car in an accident in 1937 for which the defendant was responsible. Due to the accident the right leg of the deceased had to be amputated. Thereafter he had to wear a prosthesis and used sticks but could walk although only slowly. In the last months of the Second World War, he was killed in 1945 by artillery fire when he tried to reach a bunker but could approach only slowly. The claimants requested maintenance from the defendant. They regarded the death of their breadwinner as the result of the car accident.

Decision

2 The defendant was not liable because the car accident was not an adequate condition of the death of the deceased. Causation in the sense of the *conditio sine qua non* formula could not be denied. However, this is only a necessary though not sufficient condition. As a further filter, causation must be adequate which means that it must be examined whether or not it is reasonable that the defendant should be held liable for the consequences of his conduct. Adequate causation is only present if the actor's conduct increased the possibility of the damaging event or 'if a fact, in general and not under particularly strange, completely improbable and under the regular course of things negligible events was able to create the result'.[1] The court argued that the risk to be killed in war times by artillery fire was not particularly higher for persons with handicaps than for others.

Comments

3 The adequate causation formula is based on the probability with which certain facts lead to certain consequences. This is in fact a specific kind of foreseeability test. The concept of adequate causation has often been criticised as vague and discretionary.[2]

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1 RGZ 113, 126, 127.

2 See eg *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 193; as to a critique also *H Oetker* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch vol 5 (6th edn 2013) § 249 no 109 ff; *G Schiemann* in: J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse (2005) § 249 no 17 ff.

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Nonetheless, the courts still apply the formula.[3] However, in cases of problematic causation, the courts rely on further policy considerations which mainly focus on the protective purpose of the violated norm.[4] The increased probability is no longer the only or primary aspect under which the possible causes are reduced to a socially acceptable limit. Seen from the aspect of fault, the decision shows that the courts do not link too remote and unforeseeable consequences to the misconduct that constitutes fault.

3. Austria

Oberster Gerichtshof (Supreme Court) 6 September 1961, 1 Ob 247/61

JBl 1962, 151

Facts

The claimant applied for a victim's public pension and a maintenance assistance pension. While the former was granted, the latter was denied by the mayor of Vienna as was the application for a supplementary pension, due to the fact that the claimant's maintenance was not at stake. As a consequence, the claimant sued the Republic of Austria for damages, arguing that the denial of pension caused a severe shock and led to an aggravation of his general state of health. He claimed further that the organs of the Republic of Austria had acted with gross negligence and that his life expectancy had been diminished by ten years due to the physical and mental damage he had suffered. **1**

Decision

The Supreme Court dismissed the claim, stating that the defendant was not liable due to a lack of adequate causation. It referred to the rule that the alleged tortfeasor is not liable for all damage caused by his conduct in a logical sense, but only for damage the occurrence of which was not outside all life experience in the ordinary course of events. However, that was exactly the case here. Severe physical and mental damage are not consequences to be expected of an unsuccessful application. Apart from this, it held that it is not reasonable for the authority to have to deal with the personal concerns of every applicant in order to find out whether his psyche could be affected by an adverse decision. **2**

3 Eg BGH NJW 1998, 138, 140; BGH NJW 2005, 1420.

4 See eg BGHZ 30, 154, 157; BGH NJW 2004, 1945, 1946.

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Comments

3 See below 3d/3 nos 6–10.

Oberster Gerichtshof (Supreme Court) 3 November 2005, 2 Ob 137/05v
immolex 2006/59

Facts

4 The defendant was the owner of school premises. In 1982 building work had been carried out in the school yard causing undiscovered damage to the roots of a tree approximately 10 metres high. Almost 20 years later, the tree fell on the claimant, a schoolgirl, who has been paraplegic ever since and sought compensation.

Decision

5 The Supreme Court found in favour of the claimant. It stated that the possessor of a building or any other structure erected on land is liable if the damage is a consequence of the structure's defective condition and he cannot prove that he exercised all care necessary to avert the damage[1] (*Bauwerkehaftung*, § 1319 ABGB). According to established case-law, the former provision is also applicable to trees. The possessor may only escape liability by proving that he took all necessary care to prevent the damage. However, liability does require the danger to be noticeable or at least foreseeable. The court subscribed to the opinion of the appeal court that, since there had been building work some 20 years previously and the tree stood in a busy school yard, the defendant should have consulted an expert regarding its safety, although only few experts would have been able to interpret the symptoms of tree disease that later occurred. It was the defendant's duty of care to inform itself of any possible damage and its effect on the tree's safety. Due to lack of submissions by the defendant party regarding safety precautions possibly taken and reasons why it might assume the tree not to be dangerous and therefore not organise any inspection, the claim was awarded.

Comments

6 The issue of foreseeability plays a role in several aspects under Austrian law.

7 Firstly, objective foreseeability of a danger or damage is relevant with regard to the assessment of wrongfulness.[2] Particularly as regards duties to maintain safety and to protect others against risks one has created (*Verkehrssicherungspflichten*),

1 *K Oliphant/BC Steininger* (eds), European Tort Law, Basic Texts (2011) § 1319 Civil Code.

2 Cf also 3c/3 nos 4–8 above.

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emphasis is placed on the recognisability or foreseeability of the danger as a precondition of liability.[3]

Secondly – still on the level of wrongfulness – foreseeability is important for limitation of imputation. As liability for all unlawfully and culpably caused damage is considered too extensive and would lead to a proliferation of liability, leeway to adjudge how imputation be limited is required.[4] Particularly significant in this respect are the theories of scope of protection (*Rechtswidrigkeitszusammenhang* cf 4/3 no 4) and of adequate causation. The latter, although presented in many variations, in principle excludes liability for atypical damage only arising due to a coincidental, objectively unforeseeable combination of circumstances.[5] The reasoning is that damage that is too remote cannot be considered to have been controlled by the tortfeasor and thus is not attributable to his free self-determination.[6] The notion of deterrence is also an issue in this regard: as far as consequences of damage that could not objectively have been expected to arise from the conduct in question are concerned, imposing liability for such cannot have any motivating effect on the conduct of potential liable parties.[7] **8**

However, adequacy is but a rough filter and very seldom – for example in the first decision concerning the pension claim (3d/3 nos 1–3 above) – negated. Here too, it is nonetheless questionable whether the damage was really not adequately caused,[8] or rather was beyond the norm's scope of protection.[9] Adequacy was also denied in the case of a mental shock caused by car damage,[10] but affirmed when grievous bodily harm led to abuse of pain killers[11] or drug addiction.[12] **9**

Finally, foreseeability of the damage is significant on the level of fault: the tortfeasor is only liable for blameworthy conduct, thus solely if he would have been **10**

3 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2004) § 1294 no 69; OGH 2 Ob 5/79 = JBl 1979, 485; 7 Ob 24/02h = ZVR 2003/76 (*C Huber*); 3 Ob 72/02p = RdW 2003/107; regarding § 1319 ABGB (liability for buildings) see 1 Ob 729/82 = EvBl 1983/63; 1 Ob 93/00h = ZVR 2002/21; 2 Ob 137/05v = immolex 2006/59.

4 See *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/1ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 6ff.

5 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/7; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/3.

6 *K Larenz*, Lehrbuch des Schuldrechts, Band I, Allgemeiner Teil (14th edn 1987) § 27 IIIb; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/7; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/3.

7 *F Bydlinski*, Probleme der Schadensverursachung nach deutschem und österreichischem Recht (1964) 60; *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 7/7.

8 Critical *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/12.

9 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1295 no 16.

10 OGH 2 Ob 100/05b = ÖAMTC-LSK 2005/118.

11 OGH 2 Ob 130/69 = JBl 1970, 317.

12 OGH 2 Ob 46/93 = ZVR 1995/73.

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able to behave differently due to his possession of the necessary powers of discernment. In that case, however – provided that adequacy is affirmed and the damage is within the norm's scope of protection – fault has only to relate to the 'primary damage', not to all of the consequential damage. The latter is imputed even if the tortfeasor could not have foreseen or avoided it.[13] Only in cases of protective statutes (*Schutzgesetze*, § 1311 ABGB) must fault merely relate to the breach of the law and not to the harmful result[14] (cf 1/3 no 7 and 4/3 no 3).

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 28 November 2003
ATF 130 IV 7

1 For facts and decision see 3a/4 nos 1–9.

Comments
2 Foreseeability plays a central role for the concept of adequacy. Defined as that which could be expected according to the 'ordinary course of events and the general experience of life', adequacy is based on the foreseeability of the consequences. As such it is also directly related to the standard of conduct, because an expert is in a better position than an average person to foresee the outcome of certain conduct.

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 8 September 2004
ATF 130 III 736

Facts
3 While her father and grandmother were working in the garden, the three and a half year-old V was playing unsupervised on a road close to a water canal. After a while, the father noticed her absence and found her body floating in the water. V suffered severe brain damage.

4 V filed a claim against the owner of the canal, A, and sought damages of CHF 46,000 (€ 38,000). She argued that the damage would not have occurred, had A secured the canal.

5 The cantonal court rejected the claim.

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13 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/78.

14 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 269 ff.

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Decision

The Supreme Court rejected the appeal. 6

Among others, the Supreme Court examined the question of whether the owner A should have taken safety measures. It found that the canal was not unsafe and that the question was rather whether the road next to it should have been secured. The court recalled that an owner is obliged to make a site or construction safe for normal use and that risks resulting from incautious or extravagant behaviour can be disregarded. Further, an owner is not obliged to take unreasonably expensive or disproportional measures. Roads always bear a certain risk and an owner cannot be obliged to take all measures to guarantee the highest possible degree of safety. 7

The court admitted that there can be exceptions to the principle, according to which an owner only has to take into account a normal use of the site, for example, an owner may be liable for inappropriate behaviour of children. After a review of older decisions,[1] the court concluded that young children, who do not dispose of the necessary reason, have to be supervised. The owner can even suppose that only children with training in how to behave in traffic find themselves without supervision on the roads. Further, the court stressed that in any case an owner is liable only under the conditions, that: (i) the inappropriate behaviour was foreseeable; and (ii) it would have been possible to take reasonable measures to avoid inappropriate use. 8

In casu, it was foreseeable that a little child would play alone on the road, but the owner could trust that the parents would supervise her. Additionally, it would be disproportionate to impose upon the owner measures to secure roads even for young unsupervised children. 9

Comments

For comments on the concept of 'foreseeability', see ATF 116 II 422 (1990) at 3d/4 no 17. 10

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 19 September 1990
ATF 116 II 422

Facts

The 15-year-old V went to A's swimming pool. A was aware of the fact that people often jumped into the pool at a place which was obviously (and perceivably for everybody) not intended for diving and that the pool was not deep at this point. Never- 11

1 ATF 116 II 422 (1990); ATF 130 III 571 (2004); ATF 72 II 198 (1946).

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theless, A did not install warning signs or obstacles. When V dived from a height of 1.3 metres into the pool where it was 1.6 metres deep, he hit the ground with his head. Since the incident, V is tetraplegic. He filed a claim against A for CHF 36,000 (€ 30,000).

12 The cantonal court admitted the claim partially and reduced the quantum of the damages because of V's contributory negligence.

Decision

13 The Supreme Court allocated damages to V, but reduced them due to his contributory negligence.

14 The Supreme Court stated that an owner of real estate is liable for damage if a building used appropriately does not offer sufficient safety. However, it added that an owner may also be held liable if the building itself or the foreseeably unreasonable behaviour of its users provoke a danger and if affordable and reasonable preventive security measures against inappropriate use have not been taken. In this case, an owner cannot argue that the reasonable use would have been safe. The fact that a known potential danger was tolerated in the past is considered a fault.

15 As the place where the accident occurred could provoke a rather strong incentive to jump into the water, the absence of safety precautions was considered as a defect of the building.

16 The Supreme Court considered V to have been contributorily negligent as he failed to take into account the fact that the place, from which he dived into the water, was obviously not intended for jumping, and it therefore reduced the damages by a third.

Comments

17 According to Swiss authors, foreseeability plays a role as one of a number of relevant factors in the assessment of fault.[2] The actor has to take sufficient account of the possible consequences of his conduct.[3] Generally, foreseeability is determined according to objective criteria.[4] This is a very old requirement. Already Roman jurists, Mucius in particular, considered that the condition of fault lies in the fact of not foreseeing what a sensible person (*bonus vir*) would have foreseen (*culpam*

2 *V Roberto*, Haftpflichtrecht (2013) 87, no 07.14 f.

3 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 171.

4 *W Fellmann/A Kottmann*, Schweizerisches Haftpflichtrecht (2012) 151, no 425; *B Berger*, Allgemeines Schuldrecht (2nd edn 2012) 515, no 1528; ATF 85 I 66, 70 c 2b (1959); *I Schwenzer*, Schweizerisches Obligationenrecht Allgemeiner Teil (6th edn 2012) 145, no 22.03.

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autem esse, quod cum a diligente provideri poterit, non esset provisum, aut tum denunciatum esset, cum periculum evitari non possit[5]).[6] On the contrary foreseeability is not a criterion for unlawfulness.

5. Greece

Areios Pagos (Greek Court of Cassation) 8/2005 (full bench)[1]

NoV 53 (2005) 1063 = EllDni 46 (2005) 694

Facts

During the 1999 Athens earthquake a factory collapsed and 39 workers were recovered dead from its ruins. Their relatives filed an action against the civil engineer who had defectively constructed the factory, asking that he should be held liable for its collapse and the death of their beloved relatives. **1**

Decision

Regarding culpability, the court held that the engineer acted with *dolus eventualis*, because he had foreseen the consequences as a possible by-product of his conduct and he accepted them, namely: (a) he knew that the building was highly likely to collapse after an earthquake while the possibility of collapse was so high that it could not justify the faith that the consequences might be avoided; and (b) he aimed to reduce the cost of the construction, according to a request from the factory's owners, and gain more utility space. The court concluded that, as it follows from the foregoing, the possibility of employees dying was taken into consideration by the engineer, who, after balancing this against his objectives, decided to go ahead with his unlawful behaviour. **2**

5 See *Fragmentum Paulus*, Digest 9.2.31.

6 *JP Dunand/B Schmidlin/B Winiger*, Droit privé romain II (2012) 203 f.

1 For similar decisions see also AP 9/2005 (full bench), published at NOMOS; AP 10/2005 (full bench), ChrID E/2005, 504; AP 11/2005 (full bench), ArchN 56 (2005) 456 followed by a comment by *C Nikolaidis*; AP 12/2005 (full bench), ChrID ΣΤ/2006, 40 and AP 13/2005 (full bench), published at NOMOS.

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Areios Pagos (Greek Court of Cassation) 422/2008

ChrID H/2008, 785 followed by a note by *K Christakakou*

Facts

3 On 18 March 2002, A, the defendant-appellant, was driving his car on a national road on a day when there was 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 damages.

Decision

4 The Court of Cassation confirmed the decision of the Court of Appeal of Patras 837/2006 which held that A was exclusively liable for the boy's injury, because, out of negligence, he did not pay the attention that an ordinary prudent driver under the same circumstances would have done, which had as a consequence that he was not able to foresee and avoid the accident. The court further concluded that there was no fault on the part of the parents in exercising their supervision of the child.

Comments

5 Although there is no 'formal' list of relevant considerations, there are certain factors that the court regularly takes into account in deciding the question of fault on the part of the tortfeasor; foreseeability of the damage is one of those factors. In particular, according to Greek law, intention (*dolus*) exists when the tortfeasor foresaw the (certain or potential) detrimental result of his unlawful behaviour and wanted it (*direct dolus*) or accepted it, ie he was indifferent as to whether or not the damage would occur (*dolus eventualis*).[2] Also in the case of negligence, the tortfeasor is negligent when he does not show the required intensity of care, so as to foresee that his particular behaviour would entail an 'unlawful' result, in order to avoid the said behaviour, or take appropriate measures in order to avoid the occurrence of the said result or, though he foresees the eventuality of the detrimental result, he undertakes the act without taking any measures in order to avert it, having the non-permissible hope that the said result will not occur.[3] In any case, the standard of required conduct is different when the defendant knows of or accepts the risk of danger, and when he simply overlooks the risk.

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2 See, among others, *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 508 f.

3 See, among others, *I Karakostas*, Law of Torts (2014) 129; *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 510.

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6. France

Cour de cassation, Chambre criminelle (Supreme Court, Criminal Division)
1 June 2010
09-87.159, Bull crim, no 96

Facts

René, an experienced hunter and former president of a hunting association, went on a wild boar hunt with five friends. All six were aware that *Cannelle* (Cinnamon in English), the last female bear of pure Pyrenean stock, a protected species that could not be hunted down, had been spotted in the area where the hunting party was. One of the hunters came across *Cannelle*, and managed to scare her away by firing into the air. After this incident, thanks to his friend's reaction, René was warned of *Cannelle*'s presence, and a moment later, it was his turn to face her. He was able to escape, and fell on a ledge. Using his mobile phone, René asked his friends to come and rescue him. His hunting mates replied that a rescue team was on its way, but before they arrived, René decided to come out of his hiding place. He found himself eye-to-eye with *Cannelle*, and fired a lethal shot. 1

René was criminally prosecuted for having shot down a protected animal. Various non-profit organisations involved in the protection of the environment and of wild animals joined the criminal procedure, as is possible under French law, and claimed damages for *Cannelle's* death, which had ruined their efforts to preserve pure Pyrenean bears. René claimed he had acted in self-defence, guided by necessity (*état de nécessité*). Thus he argued that he had committed no civil fault and could not be liable in damages. 2

Decision

The *Cour de cassation* rejected his rationale, and ruled that the appellate court was right to state that where someone consciously places themselves in a situation of danger, they commit a fault which prevents them from later using the shield of necessity to justify their wrongful act, even though the danger they faced was real and that they performed an act of unavoidable necessity. 3

Comments

This case may belong to many categories: it is, of course, an interesting illustration of the required conditions to a successful claim based on unavoidable necessity (*état de nécessité*). In addition, it shows that an act is wrongful when actors ignored a *foreseeable damage*: all the hunters knew that the bear was in the area, and René was well aware, in particular, that *Cannelle* was in close proximity of his hiding place. 4

3d/6 J-S Borghetti/M Séjean

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7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 9 May 1971
RGAR 1972, 8749

Facts

1 A child (A) was playing in a park, propelling a plastic aeroplane using a slingshot. From A's position he could no longer see whether anyone was passing between two hedges. When he propelled the aeroplane again, he accidentally hit V, a walker, in the eye, causing him serious bruising.

Decision

2 The trial judges considered that A acted negligently by propelling the aeroplane with force, without being able to either foresee or influence its trajectory, and that the fact that the consequences of that act had not been foreseen and that they were born of a confluence of unfortunate circumstances did not take away from the fact that it was reckless.

3 The Supreme Court approved the trial judges' reasoning and rejected the appeal.[1]

Comments

4 First, it is important to note that A was considered to have the judgement necessary for fault to be present. This element did not pose any difficulties. The real issue rather concerned the foreseeability of the damage which occurred.

5 For an act to constitute fault, it is necessary that the person acting could have foreseen that damage could result. More specifically, the person does not need to have precise knowledge of the possible consequences of his/her act when, due to the context, he/she could not legitimately exclude the possibility of a risk. In order to establish fault, it is not necessary that the individual could have been able to foresee either the damage as it actually occurred, or its scope, or to have been aware of the identity of the victim(s). On the contrary it is sufficient that he/she could have anticipated that any damage might occur, independently of the fact that ultimately

1 One must, however, be careful not to attribute too much significance to this judgment because the Supreme Court rejected the plea raised on the grounds that it was based upon an error of fact, which only means that the applicant had given significance to the appealed decision which it did not have, ie that it had misread and misinterpreted it (see: *JF van Drooghenbroeck*, Prendre le temps de lire le droit, comprendre un arrêt de la Cour de cassation, in: Le temps et le droit. Hommage au Professeur Closset-Marchal (2013) 181, esp no 17).

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different forms of damage, or more extensive damage, occur. If he/she foresaw that his/her act could have harmful consequences, he/she should have taken necessary measures in order to prevent harm from occurring.[2]

In this context, the role of the judge is particularly important. He/she must de- **6**
termine whether the damage was reasonably foreseeable to the defendant. In order to do this, he/she will refer to the standard conduct of the reasonably prudent person and decide whether the latter could have foreseen the occurrence of damage.

We can therefore understand the trial judge's finding in this instance, which **7**
was approved by the Supreme Court, which decided to attribute fault to A, even though an unhappy coincidence led to the circumstances described above. Clearly A had not foreseen, and indeed could not have foreseen the damage as it actually occurred (the injury to the eye of a passer-by), but he would have been able to foresee that some type of damage might occur due to his reckless behaviour (namely propelling a plastic aeroplane into the air with force while his view was not clear).

In Belgian law we can find certain decisions which allude to the remoteness of **8**
the damage in order to exempt the person who committed the harmful act from any liability. When the harm is particularly remote from the harmful conduct, case law demonstrates a tendency towards exempting the person who committed the harmful act from liability. In order to justify this solution, it is based, in certain cases, upon the unforeseeability of the damage.

We can give the example of a decision made in a matter in which the driver of a **9**
truck collided with an oil tank causing it to leak. The liquid then ran into the drains of the company which owned the tank, subsequently reached the public drains, and ultimately a water treatment plant, which suffered damage as a result. In this instance, the Court of Appeal of Antwerp held that the driver was not at fault, because he could not have foreseen the damage.[3] However, on closer inspection, the driver could not have been unaware that damage could result from his error, which led to the collision with the tank. In this respect it is of little importance that he could not have foreseen the actual damage which ultimately occurred. In other words, the mere foreseeability of *any* damage is, in principle, sufficient grounds for the establishment of fault.[4]

2 Cass, 12 November 1951, Pas 1952 I, 129.

3 Court of Appeal of Antwerp, 29 April 2003, RW 2006–2007, 405.

4 *RO Dalcq*, Traité de la responsabilité civile, vol 1 (1967) no 309; *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996–2007, vol 1: Le fait générateur et le lien causal (2009) 39, no 26.

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 8 January 1982, ECLI:NL:HR:1982:AG4306
NJ 1982/614 (Natronloog)

Facts

1 The cleaning lady of a village social centre placed a bucket with a chemical substance in a cardboard box in a plastic bag at the side of the road to be picked up by dustmen. When a dustman threw the bucket into the dustcart, the bucket was squeezed and the liquid chemical came into contact with the dustman's face and eye, causing injury.

Decision

2 It is contrary to the standard of conduct required in society, in order to protect the safety of anyone who could come into contact with the content of garbage bags, to place outside, a bucket with an unknown substance in a cardboard box with nothing else around it other than a plastic garbage bag unless one knows, or has good reason to assume, that it is a liquid that creates no danger. The conduct of the employee was decided to have been unlawful.

Comments

3 Foreseeability of damage is relevant in relation to the standard of care, because the standard of care relates to the knowledge of the average and reasonable actor ('the extent of the chance that an accident would result from the activity').[1] This decision illustrates how the knowledge of the actor is relevant for the standard of care to be applied. In this case the knowledge of the actor is strictly objectified to what he should have known, or to which risk he was allowed to take absent specific knowledge. The decision is remarkably strict, which may be explained by the fact that a chemical substance was involved. In another case, in which two horses ate from branches of a yew tree which had been planted at the border of neighbouring property and died as a result, the tree owner was not held liable, because he did not know and was not obliged to know about the toxic characteristics of the tree.[2]

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1 See extensively on this relationship Losbl Onrechtmatige Daad, art 6:162 sec 2, cmt 88.6 (*Jansen*) (Loose leaf).

2 HR 22 April 1994, ECLI:NL:HR:1994:ZC1347, NJ 1994/624 (Taxus). The difference seems to be that in the first case the risk had an industrial background, whereas in the second case the risk resulted from natural characteristics. See Losbl Onrechtmatige Daad, art 6:162 sec 2, cmt 88.6.6 (*Jansen*) (Loose leaf).

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9. Italy

Corte di Cassazione (Court of Cassation) 18 December 1996, no 11323

<www.iusexplorer.it>

Facts

A police car was driving against the traffic at very high speed with its sirens blaring. A pedestrian crossing the road could not get out of the way in time and was hit and injured. The pedestrian claimed compensation for the damage from the police's motor insurance policy. 1

Decision

According to the *Corte di Cassazione*, the Highway Code (old art 126) states that drivers of police cars on emergency duty driving with their sirens on are not exempt from the general obligation to adhere to respecting common prudence and diligence and must take appropriate safety measures to prevent danger to public safety. In particular, art 2054 of the Civil Code provides for the aggravated liability of drivers who can only be exempt from liability by providing exonerating evidence of having done everything possible to avoid the damage. The court therefore set aside the judgment of the Court of Appeal and referred the matter to a new level of appeal to ascertain whether the driver actually could not have avoided the damage. 2

Comments

The question of the foreseeability of damage is central in tort law as negligence (*colpa*) is commonly defined, inter alia, as the failure to foresee what should have been foreseen, and to act accordingly. The assessment of the foreseeability of the event is made by the courts in the abstract, with reference to the parameter stated in art 1176, that is the diligence of an average person (*buon padre di famiglia*, see 6/9 nos 1 and 4 and 7/9 no 2 below).[1] Some authors, however, consider that in these cases negligence is not truly defined in the objective sense but is assessed by the courts with regard to the subjective characteristics of the person causing the damage to foresee the event. Then, according to well-established precedents, there cannot be tort liability 'when the damaging event does not occur in circumstances such that the person acting could not have foreseen it, common diligence being required in relation to what generally happens (*plerumque accidit*)'.[2] The case mentioned 3

1 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 97 f; *P Cendon* (ed), Commentario al Codice Civile, artt 2043–2053 (2008) 143–146.

2 Cass 13 July 1945, no 539, Giur It 1946, I 1, 332.

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above concerns an instance involving road traffic, which provides for the liability of the driver if he does not prove 'that he did everything possible to avoid the damage'.

4 It is of common understanding, also among Italian scholars, that liability for a foreseeable event relates to the deterrence function of tort law, as it gives incentives to take precautions in order to avoid damage.

5 Among the cases of aggravated liability, foreseeability of damage is more specifically related to the head of liability for dangerous activities (art 2050 Civil Code). This is a form of aggravated liability, from which it is possible to be released only by demonstrating that all possible measures to avoid the damage were adopted. Liability for dangerous activities is expanding when compared with liability for negligence.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 14 June 2013

RJ 2013\3946

Facts

1 A fire broke out in a camper parking lot owned by A1. The origin of the fire was identified as a short circuit in the system supplying electricity to the interior of the camper van owned by A2, which was parked alongside other vehicles in A1's facilities. The fire spread through the premises and destroyed 57 vehicles and caravans parked there. The owners sued both A1 and A2. The Court of First Instance found that the fire was an unforeseeable or unavoidable event and decided in favour of the defendants. On appeal, however, the defendants were order to pay all damages claimed jointly and severally. The Supreme Court upheld this ruling.

Decision

2 This case shows circumstances that are more than sufficient to establish A1's liability. Firstly, when the fire started, A1's employee failed to notice the presence of fire in the premises due to a lack of fire detectors. Furthermore, despite the high risk of fire, since on the premises there were many motor vehicles that had fuel tanks and there were other highly flammable items such as generators functioning with petrol and, inside the caravans, bottles of butane or propane gas, the premises had neither sprinklers, nor other means to extinguish the fire. In fact, when noticing the fire, the only thing that the employee did was to call the firefighters, and it was not even clear whether the parking lot had fire hydrants, hydrants or extinguishers. The decision does not provide a specific reasoning on the grounds of liability, but it refers to some prior decisions where liability is derived from the fact that the fire came from

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the sphere of the defendant. Implicitly, a connection with strict liability for the emission of obnoxious substances or smoke seems to be established (art 1908 CC).

Comments

The Spanish Supreme Court has declared that: 'foreseeability is an essential condition to give rise to liability in tort', adding that, 'where damage was unforeseeable it will be understood that liability has ceased by application of art 1105 CC and then the mechanism of *caso fortuito* ("cause étrangère") will play its role'.[1] Foreseeability is then assessed, as in the context of art 1104 CC, in an objective way taking into account all the circumstances from an objective view (foreseeable for a diligent person) not from the view of the concrete tortfeasor. 3

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 18 May 1999

RJ 1999\3352

Facts

A three-year-old girl drowned in a private swimming pool when she was under the supervision of her 13-year-old sister. The girl had surreptitiously entered A's fenced premises, where the pool was located, through a door that had no lock. The girl's father filed a claim against A on the grounds that he had failed to take safety measures in a case of a foreseeable risk. He alleged that since A had given him and his family a house attached to the premises in order that the family take care of the premises and garden and since they had several young daughters, there was a certain risk involving the swimming pool, which A should have foreseen to avoid the fatal event. The claim was dismissed at all instances and also in cassation. 4

Decision

A finding of fault or negligence requires the presence of the element of foreseeability, and fault does not exist if the result was unforeseeable, taking into account the corresponding and accepted social parameters. In this case, it was illogical to think that, since the pool was within a fenced enclosure where access was prohibited and 5

1 STS 1.10.1998 (RJ 1998\7556). In the same direction STS 23.6.1990 (RJ 1990\4888), 30.4.1998 (RJ 1998\2602), 2.3.2001 (RJ 2001\2589) and 15.7.2002 (RJ 2002\5911). Some decisions mention that 'damage was foreseeable in the course of the events', but this statement is not made in the framework of fault but when dealing with adequacy of causation (SSTS 10.2.1987 [RJ 1987\702], 23.11.1994 [RJ 1994\8772] and 30.4.1998 [RJ 1998\2602]). Foreseeability can be seen, therefore, as a condition for fault and as a condition for adequacy, but it has different scope and meaning.

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protected by appropriate enclosures, a three-year-old girl – left with the rest of the claimant's underage offspring under the care of their 13-year-old sister – could sneak into the premises and fall into the pool. The Supreme Court declared that it could not be established which conduct A could have adopted to prevent the incident and whose breach would have allowed the court to attribute the unfortunate consequences to him.

Comments

6 This case shows a certain parallel with a later case, in which the claim against the defendant owner was dismissed. In STS 6 September 2005[2] a girl fell into an irrigation pool with no fence located outdoors in a rural area. The Supreme Court held that in that case, 'the creation of a risk (ie the pool, understood as a potential risk factor) was not a sufficient element to establish liability.' It considered that what was required was 'a violation of the required diligence, which in any case should be identified with the normal care and not with an utmost anticipation of all possible effects of each act'. As in the noted judgment, in this 2005 judgment, together with the unforeseeability of the accident, the accident was attributed to the parents for having left the girls alone or under the supervision of their elder sister.[3]

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 24 December 1994

RJ 1994\10384

Facts

7 A was driving a rental car along an urban road when suddenly the engine caught fire. Although visibility was extremely poor because of the smoke coming from the engine, he decided to continue steering and drove the vehicle to the port. After hitting a pedestrian, A jumped out of the vehicle and the vehicle continued moving until it crashed against a container full of cigarette boxes which caught fire and were completely destroyed. X, the insurance company of the cigarette boxes' owner, brought a recourse claim against A, the owner of the vehicle's rental company and its insurer. At all instances the defendants were held jointly and severally liable and the Supreme Court dismissed the appeal in cassation.

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2 RJ 2005\6745.

3 It is doubtful whether in fact all these cases imply unforeseeability. See, by contrast, other cases where the foreseeability of the accident gave rise to the defendants' liability, since they should have known about the presence of children and should have taken the appropriate measures to prevent the damage (STS 26.3.2004 [RJ 2004\1952] and 11.5.2004 [RJ 2004\2730]).

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Decision

A's negligence must be established since, despite noticing that a fire had broken out in the front part of the vehicle, he did not stop the car to extinguish it. The argument that the driver intended to drive the car into the sea did not seem acceptable, given the distance remaining when he realised that the vehicle had caught fire and the possibility of causing damage to persons or property, as finally was the case, during an uncontrolled drive when he could see nothing. Moreover, the fact that the vehicle continued moving caused the fire to become so great that it was impossible to extinguish. **8**

Comments

This judgment does not elaborate any theoretical framework but confines itself to explaining the facts from which it can be deduced that the chain of events causing the damage could have been foreseen and avoided by a diligent person in the situation of the defendant (art 1104 in connection with art 1105 CC). Accordingly, the court accepted the action of recoupment brought by the insurance company and ordered the defendant to pay for the destroyed cigarette boxes. It follows from this that this type of damage was not considered unforeseen or too remote taking into account how it had occurred and the negligent conduct of the driver of the damaged vehicle. The magnitude of the damage eventually caused was not an obstacle to attributing it to the driver. The vicinity of the harbour and goods stored therein, in addition to the likelihood of people working or visiting the area, brought the damage completely within the area of foreseeable consequences of reckless behaviour such as the conduct of the defendant in this case. The defendant's behaviour was faulty and disproportionately dangerous in any event. Under the specific circumstances of the case, it was even more reprehensible indeed, due to the high probability of causing damage such as that caused. **9**

11. Portugal

Tribunal da Relação de Porto (Porto Court of Appeal) 11 November 2013 (Alberto Ruço)

Facts

V, a six-year-old child, was in a restaurant when she ran into A, a waitress (the restaurant was owned by C and managed by B), who was carrying an open bucket full of boiling oil to a container placed on the terrace at the back of the restaurant. The collision took place in a narrow corridor on the way to the toilets, and caused serious harm to the child as a result of the extensive burns suffered. **1**

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Decision

2 The first question that the court had to consider was whether the harmful act could be imputed to the manager of the restaurant (B) and consequently to the company (C), in accordance with art 6(5) of the Commercial Companies Code[1] and to art 500 of the Civil Code.[2] There was an adequate causal link between carrying boiling oil in an open bucket, without a lid, in an area open with customers and the accident. The court ruled that the manager B could not have overlooked the risks that the procedure implied. It was part of B's functions to organise and oversee the activities of the restaurant employees and to establish necessary and adequate safety procedures to avoid predictable accidents, in accordance with the special duties of care imposed by art 64(1)(a) of the Commercial Companies Code, which states: 'Managers and administrators of a company shall observe: (a) Duties of care, expressing the availability, the technical expertise and knowledge of the activity of the company according to their position and function and acting with all the diligence of a meticulous and orderly manager.' Failing to do so, B violated his duty by omission, thus the court decided that his behaviour was faulty, due to his negligence.

3 The defendant, A, argued that the accident had been caused by the restlessness of the child, V; nevertheless, the court decided that this was not causally linked to the damage.

4 The court concluded that it was foreseeable that a child would behave in this way, but that a waitress would carry an open bucket of boiling oil, likely to burn anyone who accidentally bumped into her was neither foreseeable nor acceptable. Neither the child nor her parents could be expected to predict that a waitress would carry an open bucket of boiling oil in a public area of a restaurant. For the victim and her parents the predictability of an accident like this happening is completely beyond the scope of common sense. Only someone who was already aware of this dangerous practice in this particular restaurant could be asked to take it into account.

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1 'A company is civilly liable for the acts or omissions of those who legally represent it in the same way as a principal is liable for the acts and omissions of its agents.'

2 '(1) A person who directs another to perform a certain activity shall be liable, irrespective of fault, for the damage caused by such an agent, provided that the latter is also liable.
(2) The liability of a principal shall only exist if the damaging fact was committed by an agent in the exercise of the function entrusted to him, even if deliberately or against the instructions of the principal.
(3) A principal who has paid compensation shall have the right to demand a reimbursement from an agent, unless he was also guilty; in the latter case, paragraph 2 of art 497 shall apply.'

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Comments

The wrongfulness in this case was the violation of the child's physical integrity. It was more difficult to assess whether or not the actions that led to the injury were culpable. **5**

In order to consider behaviour as culpable, two requirements have to be fulfilled: firstly, the imputability[3] of the fact to the agent (which is the inherent capacity of the agent to predict the effects of his actions and to determine his conduct in accordance with the judgment that he makes from those acts[4]); secondly, the censure of the conduct by the legal system and the measure of that censure (either as wilful misconduct or as negligence).[5] **6**

B had a special duty of care (art 64(1)(a) Commercial Companies Code), which he omitted to fulfill, causing the damage. The event was, therefore, imputable to him, and it had to be concluded that B's behaviour was faulty, specifically negligent,[6] because it was predictable that carrying boiling oil, in an open pot in a public area of a restaurant, would likely lead to harmful accidents, and it was this likelihood that should have been assessed by the manager and properly dealt with.[7] A alleged that the accident had been caused by the child's restlessness. But in the same way the manager should have predicted the danger in carrying the oil in this manner, the waitress should have predicted the possibility of an accident like this. V, as well as her parents, did not have to know that that the oil was carried inside the restaurant in the way it was and, therefore, they could not have foreseen the harmful event. Consequently as the requirements for the establishment of their fault were not met, the act could not be imputable to them and their conduct did not deserve any kind of censure. **7**

3 See *A Mafalda Barbosa*, O papel da imputabilidade no quadro da responsabilidade delitual – breve apontamento, Boletim da Faculdade de Direito no 82 (2006) 501.

4 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580; and *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 563; *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 89 f; *A Sá e Mello*, Critérios de apreciação da culpa na responsabilidade civil (breve anotação ao regime do código), Revista da Ordem dos Advogados 49 (1989) vol II, 528.

5 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 582.

6 *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 582; *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 472.

7 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 473.

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Supremo Tribunal de Justiça (Supreme Court of Justice) 15 January 2002
CJ-STJ, I, (2002) 36

Facts

8 On 26 April 1997, a Saturday – when the workers were not working – FV, an 8-year-old child, his brother MA and friend JB, who used to live nearby, entered a building under construction in order to play. When FV was on the ground level, one of the other children on the first floor touched a brick that fell and severely injured him. It was proved that the building had no signs warning of the danger, but it was not proved in court that the construction site was not completely enclosed.

Decision

9 The Supreme Court decided that the omission of the defendants – the absence of signs warning of the building construction – could not be considered as an *adequate cause* of the injuries suffered by FV, as these are abnormal, atypical or exceptional consequences. This damage was caused by the *exceptional*, *extraordinary* consequences of the case. Thus the defendants were not found responsible and the child received no compensation.

Comments

10 The Portuguese Civil Code (art 563) has adopted the *Adäquanztheorie*. In the domain of tort law, the academic literature defends that one shall follow the negative formulation of this theory, for example, an act or omission which was the cause of damage is no longer considered as an adequate cause when 'exceptional, abnormal, extraordinary causes' have decisively contributed to its production. In this case the Supreme Court considered there was no causal link between the unlawful omission of the defendant and the damage. This decision did not take into consideration the existence of various norms that regulate the activity of construction. In fact, the Handbook of Safety in the Building place,[8] the Legal Framework of Urban Edifications and moreover the Penal Code (art 277) punishes the violation of building rules. On the other hand, art 483(1) of the Civil Code establishes an obligation to compensate for damage caused whenever the 'rights of another' or any 'legal provision designed to protect the interests of others' has been unlawfully violated, with fault (malice or mere negligence). It is discussed in the literature whether the violation of a legal provision designed to protect the interests of others (*Schutznorm*) leads to an inversion of the burden of proof of fault and a presumption of causality. The

8 Published by the Portuguese Association of Construction Entrepreneurs, with the support of the Ministry of Work.

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dominant doctrine, however, supports the view that 'the violation of abstract danger norms leads to a presumption of fault of the wrongdoer'.[9] As to causation, some admit that the violation of a protective law leads to a real inversion of the burden of proof, or, at least, to a natural, judicial presumption of causality.[10] In order to recognise the characteristics of a legal provision designed to protect the interests of others, such a norm shall attempt to protect one person or a group of people, and not the community as a whole. One must also interpret the norm in order to ascertain whether it aims to protect that person against the type of damage which materialised and against that sort of risk.[11] It seems to the authors that the purpose of technical rules which impose a duty to warn of danger and to enclose a building site (particularly since its violation is sanctioned by the Penal Code) is to protect that group of people (children living in the neighbourhood) from that type of accident (the accidental falling of a brick when children were playing in the building at the weekend). Taking into account this perspective, such an accident does not appear as an exceptional or extraordinary event vis-à-vis the wrongful omission in applying the legal rules governing construction. This would allow the child who suffered physical injuries to be compensated and the entrepreneur who did not fulfill his legal duties to be punished.[12] On the other hand, art 486 punishes the omission when the duty to act is established by statute or contract. Even if there were no specific statutes imposing the duty to warn of the risks and to take all necessary steps in order to avoid harm to children of the neighbourhood, one could question if the theory of duties of care should apply here.

9 See *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 265; in the jurisprudence, see Supreme Court, 21-2-1961 [BMJ no 104, 417, 421] and Coimbra's Court of Appeal, 21-9-1993 [CJ, T-IV, (1993) 37 f, 39].

10 *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 267.

11 *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 249.

12 Traditionally civil liability had the sole objective of repairing the damage produced by the tortfeasor, and many authors still believe that this is the only purpose of civil liability. But other authors now believe that, although remedying damage is the primary objective of civil liability, we also have to consider the objectives of punishment of the tortfeasor and of prevention of new infractions. If we consider the Portuguese legislation we may see that, in favour of the traditional opinion, the damage suffered by the victim is both a prerequisite and a limit of the remedies available, but we can also see, in favour of the latest opinion, that different types of fault can have an influence on the amount of the damages awarded (for instance where the tortfeasor acts with simple negligence, the court can reduce the amount of damages or simply eliminate the necessity of damages). The function of prevention of new infractions and the idea of punitive damages also fits the new idea of civil law of prevention of damage in society. See *PC Monteiro Guimarães*, Os danos punitivos e a função punitiva da responsabilidade civil, in: Direito e Justiça XV, tomo 1 (2001) 159–206; and *P Meira Lourenço*, Os Danos Punitivos, in: Revista da Faculdade de Direito da Universidade de Lisboa, vol 43, 2 (2002) 1019.

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11 The Supreme Court did not consider the possibility of applying art 493(2), which imposes a presumption of fault in the case of damage caused by things, animals or dangerous activities.[13] One could also question if there is a presumption of causality and whether construction could be considered as a dangerous activity.[14]

12. England and Wales

Miller v Jackson, Court of Appeal (Civil Division) 6 April 1977

[1977] QB 966

Facts

1 The claimants were joint owners of a residential property whose garden nearly[1] abutted the grounds of a cricket club. The defendants were the chairman and secretary of that club. Cricket had been played on the grounds since 1905 (ie for over 70 years at the time the Court of Appeal came to decide the action). It was only in 1970 that the pasture adjacent to the cricket ground was sold to developers who went on to build dwellings (all of whose rear gardens shared a boundary with the club). Two years later, the claimants purchased their house and shortly after the club increased the height of its existing boundary fence to 15 feet (approx 4.57 m), the maximum height practicable having regard to its exposure to strong winds. The claimants brought an action for damages for negligence and nuisance and sought an injunction to restrain the club from playing cricket on the ground. They gave evidence of 13 incidents between 1972 and 1975 when balls had been hit into their property, some of which chipped their brickwork, damaged their roof tiles and window hinges or landed in their garden. Neighbours had suffered similar damage. The couple added that they were so apprehensive of danger to themselves and their children that they did not venture into the garden at all if cricket was being played.

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13 'Whosoever causes damage to someone else during the exercise of an activity which is dangerous by its own nature or by nature of the means used, is obliged to repair that damage, unless he proves that he used all required procedures and measures to prevent the damage.'

14 See Lisbon's Court of Appeal, 20-3-2001 [CJ, XXVI, T-II (2001) 83].

1 There was a distance of 102 feet (approx 31.09 m) between the north boundary of the cricket grounds and the claimants' garden. There was a further distance of 60 feet (approx 18.29 m) between the garden and the house. The cricket field itself was small, measuring 95 × 90 feet (approx 28.96 × 27.43 m).

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Decision

The Court of Appeal ruled (2:1) that the defendants were guilty of negligence. In contrast to the facts in *Bolton v Stone* (see 3a/12 no 1 above), the risk of injury to property was foreseeable, foreseen and continuous. The risk of serious injury to persons was also real, albeit yet to materialise. It was thus the duty of the cricketers to conduct their operations so as not to harm property or persons they could or ought reasonably to foresee might be affected by their actions, and this duty was breached each time balls fell 'like thunderbolts from the heavens'[2] over the fence and caused damage. Although the club had taken steps to reduce the risk, these were not wholly effective; nor was it an answer to offer to fit louvred shutters to the claimants' windows or to erect a wire mesh or roof over the whole garden while matches were in progress as it would be unreasonable to expect the claimants to live in a cage behind shutters in summer. **2**

The majority of the Court of Appeal also found that the club's use of its land involved unreasonable interference with the claimants' use and peaceful enjoyment of their land and hence amounted to a private nuisance.[3] **3**

The court awarded the claimants damages for past and future inconvenience, but, having regard to the public interest in the playing of cricket, rejected the application for an injunction. **4**

Comments

This case bears an obvious resemblance to *Bolton v Stone* (see 3a/12 nos 1–6 above), which also concerned the hitting of cricket balls out of the ground. The difference in outcome between the two cases can be put down to the greater foreseeability of damage in *Miller*: balls had been hit into the claimants' garden 13 times in three years, and also into other gardens, whereas in *Bolton* only half a dozen hits out of the ground were proven in 28 years. The fact that the claimants in *Miller* had already suffered physical damage to their property made the foreseeability of further similar incidents particularly evident. **5**

2 [1977] QB 966, 988 per Cumming-Bruce LJ.

3 Lord Denning MR dissented on the basis that the playing of cricket amounted to a legitimate use of the defendant's land. In his view, the claimants, newcomers and no lovers of cricket, heaped trouble on their own head by purchasing houses that would inevitably be hit by balls. He felt that the real cause of the problem was the profit-driven activity of the property developers, whom the planning authorities should not have allowed to build houses so close to the ground.

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Overseas Tankship (UK) Ltd v The Miller Steamship Co or Wagon Mound (No 2), Privy Council, 25 May 1966
[1967] 1 AC 617

Facts

6 Overseas Tankship owned a ship named the Wagon Mound, which was moored at a dock. In the course of refuelling the Wagon Mound leaked oil into the sea, which spread to a harbour nearby where the claimant's two vessels were undergoing repairs. Sparks from the welders ignited the oil causing extensive damage to the wharf and all three ships. The wharf owner brought a separate action in negligence (*Wagon Mound No 1*[4]) and the owner of the two ships raised the present action in negligence and public nuisance. It was accepted that oil of the character in question was extremely difficult to ignite.

Decision

7 In a unanimous decision delivered by Lord Reid, the Privy Council found for the ships' owner. In so doing, it had regard, inter alia, to *Bolton v Stone* (see 3a/12 nos 1–6 above) where the House of Lords found that a reasonable man would think it right to reject the small risk that the facts there evidenced. However, the Privy Council observed that it was not always reasonable to ignore a risk of even a very small magnitude. The question was whether there was any valid reason for doing so – for example, that it would involve considerable expense to eliminate the risk. A reasonable person would weigh the risk against the difficulty of eliminating it and would not neglect it simply because it was small if the action to eliminate it presented no difficulty, involved no disadvantage and required no expense – *a fortiori* where, as in the case at hand, the conduct actually engaged in was unlawful (discharging oil was an offence). On the facts, the Privy Council found that a vigilant chief engineer ought to have known that it was possible to ignite the type of oil involved on water. Although possible only in very exceptional circumstances, it was not far-fetched that this might happen. Moreover, such a person should know that considerable damage would result if the risk eventuated. There was thus no question of balancing advantages and disadvantages. In any case, the chief engineer of the Wagon Mound clearly had ample time to come to a decision in light of the volume of oil discharged.

4 [1961] AC 388.

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Comments

This decision demonstrates that even remote possibilities may sometimes have to be guarded against by a reasonable person.[5] As with the other cases mentioned here, it also illustrates the inter-dependence of the different factors that are relevant in evaluating the defendant's actions or inactions, including the ease and cost of taking precautions against the risk of harm and the social value of the activity in question (see 3f/12 below). On the facts, as the discharge of oil was a criminal offence, the defendant was effectively precluded from arguing that it had social utility. **8**

Roe v Minister of Health, Court of Appeal (Queen's Bench Division) 8 April 1954

[1954] 2 QB 66

Facts

The claimants had both undergone minor operations on the same day requiring spinal anaesthetisation. Following the procedures, they both became paralysed from the waist down. They brought claims against the first defendant, the Minister of Health, and the second defendant, an anaesthetist. The latter carried on a private practice but was under an obligation to provide regular paid service to the NHS (National Health Service) hospital in which the claimants were treated. The trial judge found, and counsel accepted, that the paralysis had been caused by a sterilising solution (phenol) percolating through invisible cracks in the ampoules containing the anaesthetics. The anaesthetist testified that he had examined each ampoule for cracks before use, but the claimants argued that that was not enough. They brought forward evidence that some hospitals stained the phenol with a vivid dye to make it easier to detect percolation through fine cracks. **9**

Decision

The Court of Appeal concluded unanimously that neither the anaesthetist nor any member of the hospital staff was guilty of actionable negligence. Somervell LJ found that it was not until 1951 that attention was first drawn in England to the risks posed by the latter cracks. Thus, while the general run of competent anaesthetists would have foreseen that cracks could be detected on inspection (hence the anaesthetist's examination), they would not have appreciated the risk of contamination posed by cracks undetectable to the naked eye at the time of the operations (in 1947). As the medical profession had no reason to foresee invisible cracks by ordinary inspection at the time, this was not a case of negligence. Denning LJ agreed, adding that it was **10**

5 See *RWM Dias*, Trouble on Oiled Waters: Problems of The Wagon Mound (No 2) [1967] CLJ 62 at 68 ff.

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necessary to resist the temptation 'to be wise after the event and to condemn as negligence that which was only a misadventure ... We must not look at the 1947 accident with 1954 spectacles.'[6]

Comments

11 A notice on the box of ampoules instructed users to treat them as 'frankly septic'. Thus, in disinfecting them, the anaesthetist sought to avert one risk but was inadvertently creating another. In arriving at its decision, the court had regard to the fact that invisible cracks were very exceptional and indeed the two operations under examination first disclosed the risk of their presence. Since they were not detectable by visual or tactile inspection, there was no reason to foresee the dire consequences to follow from sterilising such ampoules. Given the then-existing state of medical literature, the court was not prepared to condemn as negligent a failure which no reasonable profession or hospital could contemplate. The case thus usefully indicates the time dimension of the foreseeability inquiry. As Denning LJ observed, now that the danger was disclosed, the incident had taught doctors to be on their guard against invisible cracks. It would undoubtedly be negligence today for doctors not to appreciate and guard against that danger, but it was not at the time at which the accidents occurred.

13. Scotland

Muir v Glasgow Corporation, House of Lords, 16 April 1943

1943 SC (HL) 3, [1943] AC 448, 1944 SLT 60

Facts

1 Mrs Alexander, the manageress of a tea-room and a small shop owned by the defender, Glasgow Corporation, allowed a group of picnickers to occupy the tea-room, and to consume their own food and drink on the premises. Access to the tea-room was gained through a narrow passageway in the shop, bounded on one side by a counter where sweets and other items were sold to the public. A tea-urn, which was being carried by two of the picnickers along the passage, overturned and some children making purchases at the counter were scalded by hot water. The manageress knew that hot tea for the picnic would be carried through the passageway in an urn, but she had had no warning that the urn was being carried at that precise moment, and she had not warned the customers in the shop that hot tea would be carried

6 [1954] 2 QB 66, 83 f.

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through the premises. The precise cause of the dropping of the urn was not determined. The parents of the injured children brought an action of damages in delict against Glasgow Corporation.

Decision

Reversing the judgment of the Inner House of the Court of Session, the House of Lords held that, as there was nothing intrinsically dangerous in the carrying of a tea-urn through the passageway if that was done with ordinary care, a reasonable person in the shoes of the manageress could not be expected to have foreseen that the accident would occur (the cause of which the pursuer had failed to explain). As Lord Thankerton stated in his speech: **2**

> 'it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man.'[1]

The manageress had not therefore been at fault in failing to take steps to protect the children, and the claim of the children's parents was dismissed. **3**

Comments

The decision of the House of Lords is the principal authority in Scots law for the rule that a duty of care in delict extends only to those consequences of conduct which ought to have been foreseen as the reasonable and probable consequences of the conduct. **4**

The standard required is what might be called 'subjective objectivity', that is the standard of the reasonable person *in the shoes of* the defender, in other words in the circumstances in which the defender found him/herself at the relevant time. This is emphasised in the speech of Lord Wright: **5**

> 'It is not a question of what Mrs Alexander actually foresaw, but what the hypothetical reasonable person in Mrs Alexander's situation would have foreseen. The test is what she ought to have foreseen.'[2]

In summary, therefore, it is not a question of what the actual defender could have foreseen had he/she addressed the matter, but what a reasonable person in his/her shoes could have foreseen. Furthermore, liability only extends to consequences **6**

1 At 8.
2 At 13.

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which such a reasonable person could have foreseen as the reasonable and probable consequences of his/her conduct. Unreasonable or improbably consequences may be discounted, and need not therefore be the subject of any preventative measures. This approach remains the accepted one, though it is not without possible criticism. One criticism relates to how foreseeable consequences might or might not be 'reasonable', as opposed to 'probable'. Many conceivable consequences may result in whole or in part from non-human causes (eg machinery malfunctioning, or chemical reactions) and it is hard to see how those can be described as 'reasonable' or not; by contrast, their being probable or not is unproblematic, as that criterion simply relates to the likelihood of their happening.

7 The decision pre-dates the Occupiers Liability (Scotland) Act 1960, which now governs the liability of occupiers of premises for injuries sustained by persons on those premises. The Act however essentially repeats what was already the common law, by imposing on occupiers a duty to take 'such care as in all the circumstances of the case is reasonable to see that [persons entering on the premises] will not suffer injury or damage by reason of any such danger'.[3] No distinction is made in the Act between commercial and private premises, though the standard of what was reasonable 'in all the circumstances of the case' is clearly malleable enough to distinguish between what may be reasonable for an occupier of commercial premises to have done when compared with what may be reasonable for a non-commercial occupier to have done.

14. Ireland

Kelly v Board of Governors of St Laurence's Hospital, Supreme Court, 13 October 1988

[1988] IR 402

Facts

1 The plaintiff was suffering from epileptic fits, psychotic fits and episodes of automatism. Various medications had been used to try and control these episodes, but were not succeeding sufficiently. He was admitted to the defendant hospital for the purpose of diagnosing the cause of these incidents, with a view to determining a new course of treatment. He was taken off all medication in order to aid proper diagnosis, though it was accepted that this would increase the risk of suffering attacks. Staff in the ward in which he was being kept were notified of his condition, but no special instructions were issued with respect to his nursing care. On the fifth night,

3 Section 2(1) of the Act.

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the plaintiff left the ward, climbed through a toilet window and fell to the ground some 20 feet below, sustaining significant injuries. A nurse had observed him leaving the ward and going towards the toilets. A jury in the IEHC found the defendant liable;[1] the defendant appealed on a number of grounds, including a claim that the judge's instructions to the jury on the risk of injury were improper because he indicated that where 'there was a real possibility of injury' in allowing the plaintiff to go unaccompanied to the toilet, the jury could find the defendant liable.

Decision

The IESC rejected the appeal, ruling that there was sufficient evidence of negligence for the trial judge to allow the case to go to the jury. On the question of the degree of foreseeability of the risk required, the court held that a risk did not have to amount to a probability before an obligation to take precautions would arise. 2

Comments

The IESC decision is the seminal ruling on the degree of foresight required to trigger a need for precautions to be taken in order to meet the standard of care.[2] Once a person can anticipate a genuine possibility of injury, then precautions commensurate with the level of risk are required. 3

Walsh v Family Planning Services Ltd, Supreme Court, 9 April 1992

[1992] 1 IR 496

Facts

The plaintiff underwent a vasectomy at the defendant's clinic; he subsequently suffered from orchialgia, a rare condition involving significant long-term pain; this can occur without any negligence in the performance of the vasectomy. The plaintiff also suffered other adverse consequences; following several remedial treatments, one of the plaintiff's testicles was removed; he eventually lost sexual function entirely. He sued for negligence and trespass to the person. 4

1 Jury trials for most personal injury actions were abolished by sec 1 of the Courts Act 1988. Claims against hospitals and doctors are usually framed in tort, though in many cases a contractual claim is theoretically available (provided the service is paid for, rather than provided as a free public service).

2 The most succinct statement of the principle is in the judgment of Walsh J [1988] IR 402, 410; the case has been cited in leading cases, including *Dunne v National Maternity Hospital* [1989] IR 91 and *Fitzsimons v Telecom Éireann* [1991] 1 IR 536.

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Decision

5 MacKenzie J, in the IEHC, found no evidence of negligence in the conduct of the procedure or in the warning provided in respect of the possible risks associated with the operation. He did rule in the plaintiff's favour in respect of the trespass claim on the basis that the participation of one of the doctors assisting with the procedure was not consented to by the plaintiff. On appeal the IESC upheld the trial judge's finding that there had been no negligence and overturned the ruling on liability for trespass to the person. With respect to the warning, the IESC indicated, *obiter*, that there was a duty to warn in respect of known complications associated with a procedure, even where such complications only arose rarely. Orchialgia was such a condition and there was a duty to warn the patient about it (which was fulfilled on the facts found); the other sequelae were found to be unique to the plaintiff, going beyond the known parameters of orchialgia cases, so there was no duty to warn of any risk of such consequences.

Comments

6 The ruling on the relationship between the foreseeability of risk and the need for a warning (or other precaution) is necessarily *obiter*, but it does follow the thrust of the earlier ruling in *Kelly*. On the specific issue of warnings, the IESC indicated that another relevant factor was the degree to which the medical procedure was elective. Procedures for the treatment of serious injuries or illnesses carry little real choice – unless one elects to accept the natural progression of the injury or illness, even to the point of death; in such cases warnings as to remote side effects may be unhelpful, as a patient may decline vital treatment because of a disproportionate fear of the disclosed side effect. At the other end of the scale, where a procedure is cosmetic (with no underlying injury to fix), then there is a much greater imperative to disclose known risks, however small. This has been applied in subsequent cases.[3]

Superquinn Ltd v Bray UDC, High Court, 18 February 1998

[1998] IEHC 28, [1998] 3 IR 542

Facts

7 The plaintiff's store was flooded when a nearby river burst its banks during a storm (Hurricane Charlie in August 1986). The first defendant was the sanitary authority responsible for drainage works in the area which were conducted prior to the storm; the third defendant was the contractor that carried out the works; the fourth defen-

3 See *Bolton v Blackrock Clinic Ltd* unreported IESC, 23 January 1997; *Geoghegan v Harris* [2000] 3 IR 536; *Winston v O'Leary* [2006] IEHC 440.

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dant, the national forestry company, owned a reservoir upstream of the river. Proceedings were discontinued against two other defendants. The plaintiff alleged negligence, private nuisance and the rule in *Rylands v Fletcher* (the latter only being maintained against the fourth defendant). The fourth defendant pleaded that the storm was an Act of God, relieving it of liability.

Decision

Laffoy J, in the IEHC, ruled that the first defendant had a statutory immunity in respect of nuisance and no negligence on its behalf was proved. The third defendant was also entitled to the benefit of the statutory protection while working on behalf of the first defendant and no negligence was proved against it either. The reservoir was held to be a non-natural use of land for the purposes of the rule in *Rylands v Fletcher*; it was foreseeable that, if the dam failed and water escaped, properties downstream would be damaged by flooding. The test for the Act of God defence was whether the storm which ensued could reasonably have been foreseen and guarded against; if it could not, then the defence was available. On the facts, the defence was held to apply and no liability was imposed on the fourth defendant because the storm was more extreme than any in living memory. **8**

Comments

The test applied to the foreseeability of the consequences of the defendant's use of land on the plaintiff, including the foreseeability of breach by way of extreme adverse weather, was derived from the House of Lords decision in *Cambridge Water Co Ltd v Eastern Counties Leather plc*;[4] this approach requires that both the general hazard be known and that, if it should escape, then the manner by which it might come to adversely affect the plaintiff must be foreseeable; it is contrary to earlier decisions on the *Rylands v Fletcher* principle, where common (non-expert) knowledge of the general nature of the hazard was sufficient.[5] The approach in the present case brings the misconduct element of a *Rylands v Fletcher* case closer to negligence than its traditional strict liability roots. **9**

4 [1994] 2 AC 264.

5 The traditional approach can be seen in *West v Bristol Tramways Co* [1908] 2 KB 14.

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15. Malta

Alfred Delia v Permanent Secretary in the Public Works Department and others (Court of Appeal – Qorti tal-Appell) 19 May 2004
Collected Judgments, Vol LXXXVIII, part II, 987

Facts

1 Due to heavy rainfall a manhole cover in a public road became dislodged thereby leaving the manhole unprotected. The road itself was flooded and the open manhole was not visible under the water. Unaware of this, the plaintiff drove his car over the open manhole and damaged his car. He sued the Public Works Department and the Director of Roads for damages. The defendants pleaded inter alia that the accident was due to a fortuitous event and irresistible force.

Decision

2 The first instance court accepted the defendants' plea of irresistible force. Although the dislodging of the manhole cover was foreseeable, in the circumstances – particularly in view of the heavy volume of rainwater which flooded the drainage system and caused an upward pressure on the cover – there was nothing the defendants could reasonably be expected to have done to avoid it.

3 The plaintiff appealed. The Court of Appeal observed that such an event had happened before and it therefore could not be said to have been unforeseeable. It remained to be seen whether it was due to an irresistible force. The defendants could rely on this defence only if they showed that no culpable act or omission on their part had contributed to the event. The defendants therefore had to prove that the event could not be avoided even if they had exercised the diligence of a *bonus paterfamilias*. In the present case the defendants were aware that manhole covers can be dislodged when there is heavy rainfall. If the event was foreseeable, then it could have been avoided, and the defendants had failed to show that they had taken any effective steps to avoid the danger. The appeal was therefore allowed and the first instance judgment was reversed.

Comments

4 Although the Court of Appeal was probably correct in reversing the first court's judgment, its reasoning is somewhat inconsistent. Article 1029 of the Civil Code provides that '[a]ny damage which is produced by a fortuitous event, *or*[1] in conse-

1 Emphasis added.

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quence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs'. The Court of Appeal observed that, since similar events had happened in the past, the present instance was also foreseeable, and it proceeded to examine the defence of irresistible force. It then observed that 'since the objective existence of danger due to the dislodging of manhole covers was known, it logically follows that this danger could have been avoided'. In effect, therefore, the court equated foreseeability with avoidability rather than treating them (or, rather, the lack thereof) as separate and autonomous defences. In the present case the danger was certainly both foreseeable and avoidable, and the court's factual conclusion was correct, but one can think of dangers which, though foreseeable (eg power outages which create sudden emergencies), are still not avoidable.

CX v AT and EZ (Court of Appeal – Qorti tal-Appell) 25 October 2013, Writ no 329/2000

<http://www.justiceservices.gov.mt>

Facts

The plaintiff CX, at that time a nine-year-old girl, on her regular weekly visits to her grandfather, got to know AT, the first defendant, a friend of her grandfather's. On one occasion, when the grandfather went out on an errand, AT had sexual contact with her against her will. This happened again on several occasions. AT threatened that, if CX told anyone about it, some harm would befall her grandfather. 5

When CX started going to secondary school, AT used to wait for her outside the school gates to take her to his flat. He even made her miss school on various occasions to make her spend a longer time with him. On two occasions, he asked the second defendant, Dr EZ, a medical practitioner, to issue medical certificates covering various dates and stating that, on those dates, CX had to miss school for medical reasons. Dr EZ complied, although he never saw the child or visited her and although he knew that AT was not her parent. AT then made CX deliver the medical certificates to the school authorities in order to allay suspicion. 6

Finally, AT again took CX to his flat but this time he kept her under lock and key for four days, during which time he raped her repeatedly. Her parents reported her disappearance to the police, who eventually traced her to AT's flat. AT was tried and found guilty of rape by the criminal courts. 7

Claiming that the trauma had caused her severe psychological harm, CX sued AT for damages. She also sued Dr EZ as co-defendant, claiming that, by negligently issuing the medical certificates, he had facilitated AT's wrongdoings. AT did not contest the action; Dr EZ disclaimed liability, denying that he had acted negligently. 8

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Decision

9 The first court held that there was no doubt about the liability of AT. Concerning Dr EZ, the first court considered that he had acted negligently in issuing a medical certificate (i) without seeing the child and (ii) without verifying whether AT was authorised to request the certificate, especially since he knew that AT was not the child's father. This certainly amounted to negligent behaviour which fell far short of the standards of his profession. The court therefore found Dr EZ equally liable.

10 Relying on an expert opinion that CX was suffering from permanent and serious psychological harm which negatively affected her earning capacity, and considering also the 'particular gravity' of the case, the court liquidated damages by way of *lucrum cessans* in the sum of € 114,780.

11 Dr EZ passed away before judgment was delivered and his heirs appealed the first court's judgment. The Court of Appeal observed that the cause of the harm was AT's abuse, not Dr EZ's certificate. Moreover, one of the elements of liability in tort is the foreseeability of the damage which may be caused by one's negligent behaviour. Dr EZ could not have foreseen, and could not reasonably have been expected to have foreseen, the use which AT made of the certificate. The fact that Dr EZ may have acted in breach of professional standards was not, of and by itself, sufficient for liability in tort. The court therefore allowed the appeal while confirming the first court's judgment in respect of AT.

Comments

12 This judgment raises a number of points. In the first place it distinguishes between objective wrongfulness – the failure to abide by professional standards – and fault of the tortfeasor. It also refers, albeit indirectly, to the relevance of non-statutory norms when it says that Dr EZ's failure to abide by professional standards in issuing a medical certificate in respect of a subject whom he had never seen amounted to wrongful behaviour. In referring to the 'particular gravity' of the case as a factor to be taken into account in the assessment of the quantum of damages, the first court judgment also implies that the degree of misconduct is a relevant factor, at least for the purpose of assessment of damages. Admittedly, this part of the judgment was not reviewed by the Court of Appeal since it was not relevant for the purposes of the appeal, and it must also be said that the first court was somewhat inconsistent when it ordered both defendants, jointly, to pay the same amount of damages since, in any case, Dr EZ's misconduct was by no means as heinous as that of AT.

13 For the purposes of the present discussion, what is relevant is the statement by the Court of Appeal that, for wrongful behaviour to also constitute fault, the sinister outcome of such behaviour must be foreseeable. The conclusion which may be drawn is that foreseeability is an element of fault in the sense that the same behaviour may constitute fault with respect to a certain outcome (because that outcome was foreseeable) but not with respect to another outcome (because that other out-

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come was not foreseeable). At this point the distinction between foreseeability as an element of fault and as a measure of damages becomes blurred.

Although the Court of Appeal did also refer to a lack of causation – because the immediate cause of the harm was AT's behaviour and not the issuing of the medical certificates – foreseeability is not necessarily an element of causation because wrongful behaviour may still be the immediate and direct cause of a totally unforeseeable outcome. In such a case, however, the wrongful behaviour would still not constitute fault. **14**

This judgment is not entirely satisfactory because it fails to distinguish the degree of foreseeability required for behaviour which is merely negligent and for behaviour which is wilful. It is not suggested that Dr EZ's conduct was malicious, but certainly it was more than merely negligent. He was aware that AT was not the child's parent or guardian, and therefore was not entitled to the certificate; he was aware that he had not examined the child; he was aware that correct practice prohibited this but still he knowingly issued the certificate. He may not have guessed why AT requested the certificate but he certainly ought to have investigated why the request was not being made by a properly authorised person and why he was not being shown the child. He ought to have suspected that the certificate could possibly be put to an unusual if not necessarily an improper use. After all, the requirement that such certificates can be issued only on the request of a duly authorised person exists for a reason. Under these circumstances, Dr EZ's conduct, if not malicious, was certainly not far from being reckless. The situation would possibly have been different had AT, at least, taken the child with him to the clinic, thereby leading Dr EZ to believe that the child was his; in that case Dr EZ would, at most, have been guilty of negligence in not insisting on proper identification. By not taking these factors into account the Court of Appeal gave undue weight to the factor of foreseeability. **15**

16. Denmark

Højesteret (Supreme Court) 15 November 2011

U 2012.524 H[1]

Facts

V was employed in a kindergarten in which the employees were experiencing problems with each other. In order to improve the working environment in the kindergarten, a weekend seminar for the employees was set up in a summer cottage. Fur- **1**

1 On this case, see also *S Bergenser/A Ehlers* in: K Oliphant/BC Steininger (eds), European Tort Law 2012 (2013) 154–156.

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ther, a professional mediator, A, was hired. On the first day of the seminar, V, who was suffering from a back injury and therefore was often absent from work, decided to address her own situation in plenum. Among other things, she said that her request to change her job to a flexible job had not been duly considered. However, this topic was not addressed in any detail. Instead, A changed the topic of the discussion to a discussion of whether V's absenteeism was a problem for the kindergarten as such. The other employees were asked to comment on this in turn. The next day A continued the said discussion and although V was reluctant to discuss this matter, A continued to focus on this. At some point the head of the kindergarten, B, said that it was a problem to have V as an employee because of her absenteeism. A called for a time out and asked B and the deputy head of the kindergarten to join her in another room to discuss the matter further. The other employees stayed. V felt highly uncomfortable about the situation and started to cry. About 15–20 minutes later A, B, and the deputy head returned. B said that it had been decided to 'work towards' a termination of V's employment at the kindergarten. V was shocked and asked to have the meeting stopped. After the weekend seminar, V did not feel well mentally and was unable to work for a long period of time. This led her to sue the kindergarten (the municipality) for pain and suffering pursuant to secs 1 and 3 of the Danish Liability for Damages Act.[2]

Decision

2 V's claim was dismissed by the City Court and the Eastern Court of Appeal. The former court found that the kindergarten had acted negligently but it decided that V's injury could not be qualified as a personal injury pursuant to sec 1 of the Danish Liability for Damages Act. The Eastern Court of Appeal disagreed with the City Court on the latter question and held that the mental harm suffered by V *was* a personal injury as set out in the said section of the Danish Liability for Damages Act. Further, the court noted that, although liability for mental harm, as a rule, was imposed only when the claimant had suffered initial physical harm or when he/she had been in danger of suffering such harm, it was possible to claim damages when the mental harm was of a certain severity. On the facts of the case, however, the court did not find that the mental harm suffered by V was sufficiently severe to give rise to damages. Before the Supreme Court, a statement was made by a doctor specialising in psychiatry. From this statement it appeared, among other things, that the events at the seminar had caused V to suffer anxiety and depression. Further, immediately after the seminar, V had had symptoms similar to those of a low degree of post-traumatic stress disorder. The Supreme Court agreed with the Eastern Court of Ap-

2 Consolidated Act No 885 of 20 September 2005.

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peal that the kindergarten had acted negligently and that the mental harm was a personal injury pursuant to sec 1 of the Danish Liability for Damages Act. Subsequently the question was whether the requirement for foreseeability was satisfied. The court found that the mental harm suffered by V was foreseeable because the conduct of the kindergarten had increased the risk that such kind of harm would occur. Further, it found that the managing staff of the kindergarten knew that V was in a mentally vulnerable situation and this led the court to conclude that the mental harm was a foreseeable consequence of the kindergarten's negligence. Damages were awarded in the amount of € 6,730.

Comments

As rightly pointed out by the Eastern Court of Appeal, it is a firm rule of Danish law **3** that damages for mental harm cannot be awarded unless the claimant suffered initial physical harm or was in danger of suffering such harm.[3] First and foremost, this rule seems to be based on the notion that losses should be foreseeable to the defendant in order to be recovered. However, in the case at hand, the Supreme Court decided to award damages even though V had not suffered mental harm in either of the said ways. This paves the way for claiming damages in a number of additional damage scenarios. Most notably perhaps, it is now possible to claim damages when a person has in some way been bullied or harassed. The question is, of course, to what extent will the courts allow damages in such cases in the future? The Supreme Court did not answer this question clearly but it gave some important guidelines. Firstly, as it appears from the ruling, the negligent act of the tortfeasor must have significantly increased the risk of the mental harm in question. Essentially, this means that the causal nexus between the negligent act and the mental harm must have a certain *strength* in order to be foreseeable to the claimant. Further, the court emphasised that the managing staff of the kindergarten knew (or ought to have known) that V, psychologically speaking, was in a stressful situation. This finding pertains to the degree of negligence of the kindergarten and the consequent foreseeability of the loss. Finally, the court emphasised that the harm suffered by V was caused 'directly' by the kindergarten. This means that claims cannot be made by persons who, for example, merely witnessed what happened to V. Thus, if one (or

3 For cases where the claimants were awarded damages for mental harm after having suffered initial physical harm or been in danger of suffering such harm, see the Weekly Law Report 1926 at 193 (Supreme Court, West division), 1926 at 1019 (Supreme Court, East Division), 1946 at 199 (Supreme Court, East division), 1973 at 451 (High Court), and 1997 at 721 (High Court). For cases where no damages were awarded (when the claimants had not suffered initial physical harm or been subjected to danger of suffering such harm), see the Weekly Law Report 1955 at 1050 (Supreme Court, West Division), 2005 at 523 (High Court), and 2006 at 2666 (High Court).

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more) of the (other) participants at the seminar were to sue the kindergarten, they would be unsuccessful. This is an important limitation to the tortfeasor's potential liability for mental harm. The decision of the Supreme Court is important and it will be interesting to see what it will take for the courts to award damages for mental harm in the future.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 1 December 1973
Rt 1973, 1364

1 For facts and decision see 3a/17 nos 1–2.

Comments

2 The case shows that foreseeability of the damage is a necessary requisite for establishing *culpa*. An important point in the decision is that the crew on the submarine could not possibly have known that the radar did not detect the net. For further information, see the comments on the case under 3a/17 no 3.

Høyesterett (Norwegian Supreme Court, Hr) 24 June 1997
Rt 1997, 1081

Facts

3 In the course of a gymnastics class, a school teacher asked one of the pupils to lead a warming up-exercise, running round in circles in the gym hall. As a part of the exercise, the pupils passed a trampoline on each round of the hall, which they jumped upon. In the third round the leading pupil chose to do a somersault, something that he himself was perfectly able to do. When the third pupil in the row of running young boys tried to do the same thing, he missed the trampoline and landed on his neck, leaving him with severe personal injuries. If the teacher had supervised the warming up closely, she would have been able to foresee that the other pupils would try to do the same as the leading pupil. She would also have had time to intervene and stop the exercise. The pupil sued the municipality, claiming that the school teacher had acted negligently and that liability could be established according to the Norwegian rule of *respondeat superior*, skl § 2-1. This rule prescribes that an employer is liable if the employee intentionally or negligently caused damage.

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Decision

The question for the Supreme Court was whether the teacher had acted negligently. 4
The court did not find it negligent to let the pupils warm up themselves. The focus of the court was whether the warming up had been supervised in a sufficiently prudent manner. The court put weight on the fact that it was possible for the teacher to foresee that the other pupils would follow the example of the 'leader'. The teacher had an obligation to react upon the obvious risk present and thus to stop the pupils before the accident. The Supreme Court found that she would have had time to stop the exercise before the pupil who was running as only the third in the row jumped. When the gym teacher failed to react, her behaviour amounted to negligence in the eyes of the law. The court took into consideration the need for gym classes to give pupils some freedom of activity.

Comments

The reasoning of the case shows the importance of foreseeability when applying the 5
culpa rule. Foreseeability comes into play as a general requisite: how likely is it that this act leads to damage? *Culpa* also plays a role in the closer evaluation of the factual chain of events. In this case there was closeness between the act of the first pupil and the risk, based on general psychological patterns of group behaviour: it was only a matter of time before one of the other pupils would fail in his attempt to perform the difficult, risky jump that the leading pupil had chosen. Because of this, the situation should have compelled the teacher to act by stopping the exercise in any way possible. Because she failed to react despite the clear indication of the risk embedded in the situation, the court deemed her omission to be negligent.

Høyesterett (Norwegian Supreme Court, Hr) 30 April 1964

Rt 1964, 446

Facts

The Norwegian Home Guard had rented a rifle range from a shooting association. 6
The association had built a suspension bridge across a river to make it easier to gain access to the shooting range. During one of the Home Guard's exercises, two men were ordered to carry a shooting target made of iron and weighing approx 50 kg across the suspension bridge. One of the two men insisted on carrying the figure alone. Half way across the bridge, he had to put the figure down to rest. As he was putting the figure down, he tripped and lost his balance. The man drowned in the heavy rapids. His widow and child sued the shooting association, claiming compensation for maintenance.

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Decision

7 The question before the Supreme Court was whether it was improper of the shooting association to rent out the rifle range with a suspension bridge of this kind. The court noted that the bridge was intended for the transportation of people and small equipment. When used in a proper way by trained Home Guard personnel, the bridge did not represent an especially high risk of harm. The suspension bridge was in normal condition compared to suspension bridges in general. Against this background, the great risk created by this specific man was totally unpredictable. He chose to endanger himself in a manner that, from the defendant's point of view, was not foreseeable.

Comments

8 In this decision, the foreseeability standard was adjusted according to reasonable expectations with respect to the claimant's own mitigation of a foreseeable risk of damage. The main criterion in the *culpa* rule is that the standard should take into account the expectations of any potential claimant who might come into contact with the source of risk. In this case, the source of risk was not accessible to a wide group of potential claimants. Access to the bridge depended on a contractual relationship existing with the owner of the bridge. From the potential defendant's point of view, the duty to mitigate the risk therefore depended on how high the risk of harm appeared to be when the bridge was used by trained personnel from the Home Guard who had professional expertise. A special aspect of the court's argumentation was that it is not just foreseeability based on statistics that is relevant, but also the foreseeability of the specific type of risk that led to the damage. One problem with the latter part of the argumentation might be that it blurs the line between the rules on proximity of causation and the remoteness of damage.

18. Sweden

Högsta domstolen (Supreme Court) 4 February 1931
NJA 1931, 7

Facts

1 Petrol leaked out from a tank belonging to company A when the tank was being rinsed. The petrol ran into a sewer, which led to the nearby harbour, where it accumulated on the surface of the water. B frivolously threw a burning match onto the petrol, whereupon there was an explosive fire and a ship was damaged. The ship owner claimed damages from A.

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Decision

Due to the risky circumstances, company A was obliged to ensure that no petrol was in the tank when cleaning it. Since no such examination had been undertaken, it was considered that A had negligently caused the petrol to flow out into the harbour. Therefore A was liable for the damage caused by B's ignition of the petrol. **2**

Comments

Although the judgment is quite brief (which older Swedish judgments often are), and as a result there is no explicit mention of the foreseeability issue, the case can be understood as an evaluation of the ignition risk. Since the liquid in the tank was petrol – and hence not water, beer and so on – the foreseeable risk of causing an explosive fire was great if appropriate safety measures were not taken. The typical petrol risk was foreseeable, and since many different sources could have started the fire – when the harbour water was covered by petrol – A could not invoke B as a non-foreseeable risk factor. However, if the wrongful act had not included the specific danger of fire, the third person B's intervention would not have led to A being held liable; for example, if A had cleaned his warehouse and left some pieces of wood lying on the ground outside his premises, A would not have been liable if B had set fire to this debris. The foreseeability that anything at all should start a fire is greater after a petrol emission than after emission of other materials. Therefore the foreseeability of fire is greater with 'fire-dangerous' materials than with 'fire-neutral' material (although, of course, any material can burn if the temperature is high enough).[1] **3**

19. Finland

Korkein oikeus (Supreme Court) KKO 1975-II-64
<http://www.finlex.fi>

Facts

During a Finnish ice hockey league game, the hockey puck flew out of the rink hitting a member of the crowd and injuring his mouth. **1**

1 Concerning evaluations of different interventions by third parties, see *H Andersson*, Skyddsändamål och adekvans (1993) 434 ff, 446 ff.

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Decision

2 The Supreme Court ruled that the injury occurred in a typical way and it was also foreseeable for a sport like ice hockey. The match organiser had not proven that it had fulfilled its obligation to ensure the safety of the spectators from such harm. Consequently, the association was held responsible for the damage caused (split decision).

Comments

3 For this positive ruling on liability, it was crucial that the damage occurred in a way which was typical and foreseeable for this type of sport and for this reason the organiser of the game should have taken adequate precautions to prevent the occurrence of such damage. Also taking into account the entrance fee, which was paid, adequate precautions should have been taken.

Korkein oikeus (Supreme Court) KKO 1981-II-84
<http://www.finlex.fi>

Facts

4 During the pre-game warm-up of a volleyball match in a sports hall, a ball flew into the auditorium and struck a spectator in the eye, blinding him. The victim of the accident claimed compensation.

Decision

5 The Supreme Court stated that the injury was unforeseeable, and the auditorium had fulfilled the requirements that reasonably could be set. Consequently the injured person's claim for damages for disability was dismissed.

Comments

6 The difference between the 'ice hockey case' and 'volleyball case' is that an ice hockey puck, as a piece of sporting equipment, is more dangerous than a volleyball. An ice hockey puck is smaller and heavier, and it travels much faster than a volleyball. It is a rare exception for a volleyball to cause serious damage when it hits someone in the face. An ice hockey puck, in contrast, very typically causes serious damage on impact with the face, which is why ice hockey players wear special protective equipment. For these reasons the organiser of an ice hockey game must also ensure the safety of spectators.

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Korkein oikeus (Supreme Court) KKO 2003:70, 20 August 2003
<http://www.finlex.fi>

Facts

A visitor to a gym fell when using a step-board whose legs lacked anti-slip pads. As a result, the board had slid away from her causing her to fall. The customer claimed compensation from the gym, as her arm had been broken as a result of the fall. 7

The step-board consisted of three different parts: the board, extra elements which could be used to heighten the board and anti-slip feet. The heightening extension part in the middle of the board was similar to the foot but without anti-slip pads, the intention being that the anti-slip foot sections would always be on the floor. Since the parts were the same colour and shape, the difference could only be detected by checking whether the part had the rubber anti-slip pad. The claimant, who was an experienced aerobics practitioner, had changed the step-board during the aerobics lesson, and she had taken a board which had the extension section but no anti-slip feet. She had not checked the bottom of the board, despite her aerobics experience and knowledge of the structure of the step-board. 8

Decision

The owner of the gym was responsible for the injury, but the client had also contributed to that injury (split decision 3-1-1). 9

The Supreme Court reasoned that the defendant company had failed to ensure that the boards were checked or correctly pre-assembled before each training session. Moreover, the company had failed to provide adequate instructions or warnings to ensure that their customers did not take boards without anti-slip pads. Consequently, the company had failed to fulfill its obligation to ensure that only safe step-boards were used. There was also a relevant causal link between the company's fault and A's personal injury. 10

Nevertheless, even though A had begun aerobics around 20 years earlier and had been going to the gym in question for two years prior to the accident, she had not checked whether the anti-slip rubber pads were in place when she changed step-boards during the training session. Moreover, she must have known that the extension parts did not have anti-slip pads. When she took the step-board, she should have followed normal safety precautions to avoid injury by ascertaining whether the anti-slip pads were in place. This precaution would have been easy to take. She thus contributed to the injury that occurred. 11

Consequently, the company's liability was limited to 60%, while A's own contribution accounted for 40% of the injury. 12

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Comments

13 This is a typical example of how liability is assessed in Finnish jurisprudence. The company was responsible for ensuring that the equipment used in its business was safe. The responsibility is greater in a professional activity than in a leisure time activity. It is possible that such liability would not have arisen if there had been instructions or warnings next to the boards or if the manager of the gym had asked the participants to check their boards. This case is also usually mentioned as an example of a victim's contribution to injury.

14 Although the Supreme Court did not refer to contractual liability it is obvious that V and A were in a contractual relationship when V was at the gym. In this case the criteria of evaluating negligence are similar to those that are applied when persons visit shops or other public places. For example, even if there is no contractual relationship (because V did not buy anything from a shop) a shopkeeper is liable to take care that persons can walk and move safely in a shop. If someone slips on fruit on the floor next to the fruit counter, the shopkeeper must prove that the cleaning of the area in the fruit department was very carefully taken care of.

20. Estonia

Harju Maakohus (Harju County Court) 28 October 2013
Civil Matter No 2-13-31652

Facts

1 The employer of the plaintiff rented rooms on an immovable property from the defendant, a warehouse terminal (with several warehouses) surrounded by a metal fence and equipped with an electronically operated barrier and video cameras monitored by a guard. The plaintiff entered the defendant's immovable property to reach his workplace. The plaintiff's car was hit by the gate upon entrance to the immovable and damaged. The damage was caused by the fact that the entrance gate had not been fixed to the ground and started to move because of the wind. The plaintiff had previously repeatedly used the gate to enter the defendant's immovable. There had never been any signs or indications of danger or any prohibitory signs in this area. The plaintiff could not detect from a distance that the gate was not correctly affixed and might start moving. The dangerous gate that caused damage to the plaintiff's car was clearly visible from the security guard's post. After the incident, the defendant had the gates fixed with special locking mechanisms that would prevent similar accidents in the future. The defendant contested the claim by saying that the plaintiff started to pass through the gate at a moment when it was already moving and that the damage was also caused by the plaintiff driving at excessive speed.

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Decision

The county court partly satisfied the action. The county court found that the defendant's conduct was unlawful within the meaning of § 1045 (1) 7) of LOA (violation of a duty arising from law) since the defendant owned the gate that moved uncontrollably and caused a dangerous traffic situation. Thus, the defendant violated the obligation stipulated in § 14 (7) of Traffic Act (TA) to ensure the safety of traffic in an area designated for traffic. The defendant did not take the necessary care to maintain safety since he had failed to leave the gate belonging to him fixed in a way that would ensure the safety of the property of a road user who passes through the gate. The defendant also did not install signs that would have warned road users of a gate that moves uncontrollably. 2

In this case, the damage caused to the plaintiff was not extraordinary from the viewpoint of a reasonable person because it was foreseeable for a reasonable person that, in a situation in which a gate situated in an area used for traffic is left unfixed, it may unexpectedly hit some vehicle and cause damage when it starts moving in the wind. 3

Comments

In this case, the court established unlawfulness of the act pursuant to § 1045 (1) 7) of LOA, referring to the fact that the defendant violated § 14 (7) of TA as a law with a protective purpose. Therefore, the county court assessed whether the defendant's omission in violation of this protective law (ie failure to ensure safety in an area designated for traffic) constituted external negligence (failure to meet the objective standard of care) as an element of fault according to § 1050 (1) of LOA. One of the important circumstances the court considered in assessing the care needed to maintain safety was the foreseeability of the occurrence of damage. The court found the occurrence of damage foreseeable because it was not extraordinary that an unfixed gate causes damage to vehicles. 4

Harju Maakohus (Harju County Court) 29 August 2008

Civil Matter No 2-07-20851

Facts

The plaintiff parked his car near a kindergarten and left the car to do electrical works at the kindergarten. At the same time, the defendant was doing landscaping works in the yard of the kindergarten and a branch cut from one of the trees fell on the plaintiff's car during the works. The damage caused to the car comprised paint damage on the front right-side door and breakage of the right-side rear-view mirror and indicator. The car was under repair for four days and the plaintiff had to hire a replacement car. As a final claim, the plaintiff sought compensation for damage in the amount of € 865, a fine for delay and the collection costs of the debt. 5

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Decision

6 The county court partly satisfied the claim. The county court found that, since the defendant performed landscaping works, he, as a person whose acts may cause danger to the property of other people, had to do everything reasonable to protect others. The defendant claimed that he had informed the people in the kindergarten of the danger and asked them to remove their cars from the side of the road. At the same time, he admitted that the plaintiff arrived later and no such instruction was given to him. According to the opinion of the county court, the plaintiff was justified in blaming the defendant for not marking the area of the works and not displaying any signs to indicate the danger. The defendant, who was acting as a professional in his field, must have reasonably foreseen the danger of falling trees that may accompany his work, therefore the defendant was at fault due to his negligence (§ 104 (3) of LOA). At the same time, the defendant's arguments that the plaintiff should have noticed the landscaping works in the yard of the kindergarten and the possibility of danger, but still parked his car in the danger zone, were also justified. The plaintiff should have noticed that the landscaping works were taking place. The court stressed that a reasonable person should have foreseen the danger to his car and would have parked his car somewhere else. For the above reasons, the court reduced the compensation for damage ordered from the defendant by 30% due to contributory negligence under § 139 (1) and (2).

Comments

7 In this case, the court found that the defendant had violated the required duty to maintain safety since he is a professional in landscaping and the danger that trees may fall must have been reasonably foreseeable for him. The court also deemed the plaintiff negligent because the defendant was a professional in his field. In this case, the court justifiably reduced the compensation for damage by 30% since the plaintiff had to realise that, by parking his car where he did, a danger of damage existed. Futher comments can be found in 6/20 no 15.

8 See also Judgment No 2-08-13854 of the Tallinn Circuit Court, 18 June 2010 under 6/20 nos 6–13.

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21. Latvia

Rīgas apgabaltiesa (The Riga Regional Court) C31172307, CA-0980/24, 28 December 2009
Unpublished

Facts

An owner parked his car on the street behind a concrete wall. On the opposite side of the wall, there was a large tree. Strong gusts of wind in the middle of the day caused the tree to topple over, damaging several cars. According to the meteorological information, at the time of the event, the strength of the wind was 26.8 m per second, which could be considered a strong storm, during which, according to meteorologists, occasionally some trees may fall. The claimant brought an action against the co-owners (the defendants) of the land where the tree was growing, claiming compensation for damage *to* the car according to an evaluation of a certified surveyor. The claimant alleged that the owners acted carelessly as they had a duty to remove any unsafe trees on the property and prevent other threats to third party property. 1

The defendants argued that the tree had been illegally notched several years ago by unknown persons, however, in spite of *this,* the tree was verdant in summers and there had been no visible signs of withering. According to the defendants, a tree collapsing during a storm is considered to be a result of a natural disaster, ie, *force majeure*, which, in accordance with art 1774 of the CLL, exempts the land owner from liability thereof. In addition, the claimant should have foreseen the possibility that such an event may occur, when parking a car in windy weather. 2

Decision

The court of first instance satisfied the claim and concluded that the reference to the strong wind, in connection with the fact that the tree was notched, could not be considered as *force majeure*. The Meteorological Agency indicated that a wind speed of 26.8 m per second may only result in certain branches breaking off, but trees may fall if the speed of the wind is 28.5 m per second or higher and this was not proven to be the case. The court did not support the argument that the claimant was negligent, indicating that the concrete wall blocked the view of the state of tree in question. 3

The defendants appealed the decision arguing that the court failed to specify how exactly the defendants were in breach of their duty of care. The court had not paid attention to the fact that the tree was only slightly notched. Wind gusts of 25–26 m per second falls under the 10th category of the Beaufort scale, thus, the tree in question might have toppled over due to the said weather conditions. On the day of the incident, the possibility of stormy conditions was announced on the radio, urging people to be careful. 4

3d/21 K Torgāns/J Kubilis

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5 The Regional Court of Riga, after reviewing the case on its merits, satisfied the claim. The court concluded that the tree fell on top of the car not only due to the strong wind, but also due to the pre-existing notch and the deterioration it entailed. The defendants were negligent and therefore liable as they failed to exercise sufficient care as regards the existence of a damaged tree on their property. By failing to strengthen or cut down the tree, the defendants demonstrated a lack of diligence in compliance with the *bonus pater familias* standard. Therefore the three preconditions for liability – an illegal act, loss and a causal link – were supported with evidence.

6 The Supreme Court refused to initiate the cassation proceedings and the decision of the Regional Court of Riga thereby became effective on 14 May 2010.

Comments

7 The issue of foreseeability of non-contractual damage, especially if the misconduct is an omission, has not been extensively addressed. According to art 1779[1] of the CLL,[1] damage shall be compensated to the extent the person could have foreseen when the agreement was entered into. Although the said article specifically refers to contractual damage, and, thus, would not be directly applicable in tort law, it could however be argued that the article contains a general principle recognised by the CLL.[2] However, in Latvian court practice, foreseeability has not been extensively applied and there is almost no court practice indicating that a claim for damages was rejected on the grounds that the harm was unforeseeable. In the case at hand, the court analysed the sufficiency of diligence, as well as whether the damage was of a direct, indirect or incidental nature. Although clearly in this case an accumulation of several conditions (strong wind and the notch) caused the tree to topple over, the reasoning of the court led to the conclusion that the defendants could not be exempted from liability.

8 This decision does not clearly permit a conclusion as to whether the defendants actually had a chance to take preventive measures to avoid a situation where a tree falls over a concrete wall onto a vehicle causing damage. If such preventive measures were in fact available to the defendant and the damage could thereby have been prevented, then one could argue that the reason for applying these preventive measures was also known to the defendant, ie to avoid causing damage to another. Hence, the damage was foreseeable. Although the court did not address this issue explicitly, it may be the underlying reasoning implied by the court when deciding

1 Amendments made in 2009 and influenced by the Principles of European Contract Law.

2 *J Kubilis*, Kaitējuma paredzamība Latvijas deliktu tiesībās [Foreseeability of Damage in Latvian Tort Law] Latvijas Universitātes 5. starptautiskās konferences 'Juridiskā izglītība un kultūra: pagātnes mācības un nākotnes izaicinājumi' raksti (Riga, University of Latvia 2014) 541–551.

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the case at hand. In addition to highlighting the mere issue of foreseeability, the case also tackles the availability and use of preventive measures.

Foreseeability of a negative outcome is assessed and may serve as a basis for the exemption from liability in cases of alleged medical malpractice (see 6/21). That is to say, if the medical complications were quite rare or unpredictable in the given set of circumstances, experts might not conclude that the act of the medical personnel constituted misconduct. 9

Rīgas apgabaltiesa (Riga Regional Court) No C30445909, 27 January 2014
Unpublished

Facts

The claimant – an insurance company – brought an action against the owner of an apartment (the defendant), from which a leakage of water caused damage to the apartment one floor below as the claimant had paid out an insurance sum. The claim was brought as a recourse action against the person liable for the damage. The claimant alleged that the defendant committed an unlawful act by breaching his obligation to maintain the apartment in a hazardless and safe condition as prescribed by arts 7 and 15 of the Law on the Residential Property. The defendant denied that he had violated any rules or standards of conduct, and argued that the apartment in question was purchased a few months before the accident and the seller undertook to repair any construction flaws within 24 months. An expert's opinion revealed that the water leakage was due to an unfit sealant on a pipe joint during the construction process, which later led to a burst pipe. Pipelines were located under a layer of concrete and the apartment owner could not have discovered the deficiency in a timely fashion nor could he have taken any measures to prevent the pipes from bursting. 10

Decision

The first instance court rejected the claim. The court of appeals satisfied the claim partly. The Senate of the Supreme Court examined the cassation appeal, reversed the decision and remanded the case, arguing that the court's interpretation of the substantive law was formal and unfounded. Having reviewed the case on its merits for the second time, the court of appeals rejected the claim and the decision was not further appealed. The court inter alia indicated that the defendant's obligations of safekeeping were not unlimited. The court mentioned that the defendant, having no knowledge of the defect in the pipeline that was covered by a layer of concrete, was not able nor was he obliged to foresee such damage. 11

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Comments

12 Court practice reflects different cases concerning damage caused to apartments by water leakage, and the issue of whether the owner of an apartment from which the water leaked exercised due care and whether his behaviour was unlawful are usually thoroughly examined. There are decisions whereby such an apartment owner is ordered to pay damages, for example, when he replaced a radiator or hired workers to replace it, and the work was carried out in a poor manner, or when an owner forgot to close a valve properly when the water flow was interrupted due to a drop in the water pressure.

13 In the case at hand it is clear that the owner of the lower apartment suffered damage. It is possible that the outcome would have been favourable to the insurer if it had brought an action against the seller of the apartment providing an explicit guarantee of the quality of construction works. It may be argued whether a victim, in cases where damage is caused by water leakage, is obliged to look for the person whose unlawful conduct is the cause-in-fact of the losses suffered by the victim, or the liability is to be imposed prima facie on the owner, based on the responsibility for safekeeping of one's property. Article 1084 of the CLL in that regard specifies that the owner is obliged to keep his building in a state that is without hazards for others. The liability for damage caused to a third party by an apartment owner is also indicated by arts 7 and 15 of the Law on Residential Property. The liability of an apartment owner thus slightly resembles liability for risk, which does not require proving the fault or negligence of an apartment owner.

14 The question of liability in this case involved an assessment of foreseeability as even the obligation to keep one's building in a state that is without hazards to others is not imposed without assessing the ability to ascertain risks and foresee the harmful consequences to others in the particular set of circumstances. Therefore, as illustrated by the presented case, the standard of conduct may depend on the foreseeability of the damage. The standard of conduct is objective and the ability of the particular person is not relevant but rather the standard of a reasonable person is to be invoked.[3] Although the court did not explain how the foreseeability of damage was evaluated in the case at hand, but took into account the reasoning employed by the lower court in its entirety, the surrounding circumstances played a decisive role.

3 *J Kubilis*, Kaitējuma paredzamība Latvijas deliktu tiesībās [Foreseeability of Damage in Latvian Tort Law] Latvijas Universitātes 5. starptautiskās konferences 'Juridiskā izglītība un kultūra: pagātnes mācības un nākotnes izaicinājumi' raksti (Riga, University of Latvia 2014) 541–551.

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22. Lithuania

SU, DU and GU v DN and the Republic of Lithuania, 26 February 2010

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-91/2010; <http://www.lat.lt>[1]

Facts

At midnight a motor vehicle accident occurred. The police arrived, closed the street and started investigatory proceedings into the cause of the accident. Because of the street closure, traffic congestion occurred behind the accident scene. When a taxi carrying the husband and father of the plaintiffs approached the scene of the first accident, a police officer showed a sign indicating either to go backwards or to turn around. The passenger of the taxi stepped out of the cab on to the street in order to help the taxi driver to turn around. Another car driven by a speeding and intoxicated driver (defendant DN) crashed into the man causing him fatal injuries. 1

The plaintiffs sought compensation from the driver DN and the state of Lithuania, represented by the Vilnius District Supreme Police Commissariat, solidarily, for pecuniary and non-pecuniary damage. The plaintiffs argued that liability should also be incurred by the state, since the police officers contributed to the damage by failing to ensure the safety of the traffic at the scene of the first accident. 2

The court of first instance dismissed the claim against the state, justifying its decision inter alia on the basis of the unforeseeability of the damage. The court stated that 'the failure of the police officers to foresee that a drunk driver would arrive at the accident scene and that he would not react to the flashing warning lights of police cars and that he would cause the second detrimental accident does not amount to a breach of the duties of police officers'. 3

The Court of Appeal reversed, finding the state liable on the basis of art 6.271(1) CC which provides for liability of the state for damage inflicted in the course of the activity of public authorities irrespective of the fault of any particular officer. 4

Decision

The Lithuanian Supreme Court agreed with the findings of the Court of Appeal. Both courts held that the officers failed to take the action necessary to control the behaviour of traffic participants, leaving it to the drivers to decide on how to act. Since the police officers had not detoured traffic after the first accident, they failed to exercise their duties in order to ensure general traffic safety. According to the Court of Appeal and the Lithuanian Supreme Court, since a causal link between the omission of 5

1 The decision was commented upon by *H Gabartas/L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2010 (2011) 353, nos 1–15.

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the police officers is only indirect, the state shall be responsible for only 5% of the damage.[2]

Comments

6 Case law has constantly held that the liability of the state (municipality) is strict according to art 6.271(1) CC. However because according to art 6.271(4) CC the civil liability of the state (municipality) arises when officers of public institutions failed to act in the manner prescribed by the laws, the courts in fact consider this as a breach of the standard of care. The court of first instance evaluated the foreseeability of damage with respect to the standard of care owed by police officers and concluded that the absence of foreseeability justifies a lower degree of care. The approach of the court of first instance is rather unusual since usually the foreseeability of the damage is taken into account when applying the remoteness of damage test in the second stage of the two-stage inquiry of a causal link.[3] The Court of Appeal did not agree with the findings of the court of first instance on the foreseeability issue, stating that 'police officers have to take all appropriate measures in order to ensure the safety of the traffic, instead of relying on drivers' rational thinking and caution'. The statement of the Court of Appeal implies that the police officers should have foreseen that the damage might have been caused due to the traffic jam for which they were responsible. The Lithuanian Supreme Court did not address the issue of remoteness explicitly but, since it agreed with the finding of the Court of Appeal, it can be concluded that it also agreed with the statements made by the Court of Appeal concerning this issue. Additionally, the Lithuanian Supreme Court explicitly indicated that the damage was not too remote a consequence of the omission of the police officers.

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2 It seems difficult for Lithuanian courts to abandon the rule that if the conduct of one party only indirectly creates the possibility for another to cause damage by his independent conduct, the liability of those parties would be several. This approach precludes an application of solidary liability in any case where there is a person whose conduct is a direct cause of damage, whereas another person fails to prevent infliction of that damage, even if he was under a legal duty to do so. For critics on the approach see *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 387, no 23.

3 Ever since 2007 the LSC has held that, when establishing a causal relation in the second stage, it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right, and the protective purpose of the rule that has been violated, as well as the basis of liability and the ordinary risks of life. See *LB, IV, IZA and Others v 'Medvėgalis' and Others*, LSC 26 November 2007, case No 3K-7-345/2007.

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SP v RL, the Republic of Lithuania and Vilnius City Municipality, 13 February 2013
Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-18/2013; <http://www.apeliacinis.lt>[4]

Facts

Defendant RL, who suffered from paranoid schizophrenia for 30 years, on 1 December 2004 shot the 12-year-old daughter of the plaintiff. The subsequent criminal investigation established that RL was mentally incompetent at the time of his action. The plaintiff filed a claim for compensation of pecuniary and non-pecuniary damage from the Republic of Lithuania, represented by the Ministry of Health, and the Vilnius City Municipality. The plaintiff also alleged that the Vilnius Antakalnio clinic, participating in the case as a third party and which was the last mental health services provider to RL, rendered improper healthcare to the mentally ill person, failed to predict the worsening of the patient's condition, as well as failed to involuntarily hospitalise the mentally ill RL.[5] **7**

It was proven in the case by the plaintiff that the Vilnius Antakalnio clinic provided mental health services to RL only episodically. The last record of such treatment was three years before the felony. According to the plaintiff, the worsening of RL's condition was caused by RL being diagnosed with cancer on 13 October 2004. The plaintiff argued that RL should have been treated by a psychiatrist after he was given this diagnosis. **8**

The Vilnius Antakalnio clinic argued that, under the Law on Mental Health Care, a mentally ill patient has the right to choose his/her doctor, healthcare institution, and scope of medical services and at any time may terminate treatment, except in the case of involuntary hospitalisation. However, involuntary hospitalisation, in order to take place, should meet certain preconditions, which were not found in this particular case. Since 1997, the patient had been treated conservatively in the clinic where he had been prescribed medical treatment. As his mental health improved, the diagnosis was changed to a milder form of mental disorder in 2000. RL lived alone, was unemployed, and had no close relations. Therefore no one informed the healthcare provider or public institutions about the worsening of RL's condition. Moreover, it was established that before the felony not one of the few persons who **9**

4 The case was commented upon in *H Gabartas*/*L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2010 (2011) 353, nos 79–85 and *S Selelionytė-Drukteinienė*/*L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 387, nos 76–87.

5 In the decision of 2010 the LSC, returning the case for retrial in the appellate instance, stated that since the case involved a pressing need of public interest, it was the court's duty to investigate the standard of care of medical treatment institutions, disregarding the fact that they were not participating in the case as the defendants. See *H Gabartas*/*L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2010 (2011) 353, no 83.

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had interactions with the mentally ill RL, including the doctors who were treating his cancer, noticed a worsening of his mental condition.

10 The court of first instance dismissed the claim against both defendants and also found that the mental health institution had not breached the required standard of care.

Decision

11 The Lithuanian Court of Appeal upheld the decision. The court accepted the excuse presented by the Vilnius Antakalnio clinic and decided that it had not acted unlawfully and was not at fault. Furthermore, the Court of Appeal held that the failure to involuntary hospitalise RL was also not proven, because involuntary hospitalisation should be justified by a real danger that, by his actions, the mentally ill person is likely to commit serious harm to his/her health and life or to the health and life of others, which had not been established prior to the occurrence of the felony in this case.

Comments

12 The decision of the Court of Appeal was directly influenced by the practice of the ECtHR on positive obligations of states to ensure the right to life, ie the obligation to take reasonable preventive measures to counter a real and immediate danger to human life posed by another private person, of which the authorities knew or ought to have known of. Although it was not expressly mentioned in the decision that the worsening of RL's condition and the intent to commit a crime could not have been foreseen by the mental health institution even if its psychiatrist had consulted RL after the cancer diagnosis, the facts employed by the Court of Appeal to justify the decision demonstrate that the liability of the healthcare institution was not established because of a lack of foreseeability.

VP v DD, GŽ, EŠ, JM and VS, 3 March 2014

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-7-144/2014; <http://www.lat.lt>

13 For facts and decision see 3c/22 nos 6–10.

Comments

14 Although the Lithuanian Supreme Court did not elaborate explicitly on the issue of foreseeability, it is clear from the reasoning that an owner of an object of a higher danger is under a duty to foresee that the storage of objects in breach of the applicable legal acts may lead to (unwanted) use of the object by third parties.

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23. Poland

Court of Appeal in Bialystok, 30 November 2000, I ACa 340/00
OSA 6/2001, item 33

Facts

A consumer organisation filed a claim for compensation on behalf of a consumer who was injured while using canned foam to seal his bathtub. The consumer had read the instructions on the product and had opened all the windows to ensure better ventilation before he started work. One of the four cans he used exploded when his wife switched on the washing machine. The cause of the explosion was an ignition of the propane gas that had been leaking from the can. The consumer suffered burns on his hands and his washing machine was destroyed. Defendant seller (A) and producer (B) argued that the product conformed to the special labelling requirements set by law and had received a quality certificate. **1**

Decision

The court found B liable for failure to provide adequate warnings (art 415 KC). A manufacturer is a professional who, being aware of foreseeable risks linked with the use of his product offered on the market, has a duty to give clear warnings. The fact that the product got a certificate of a proper agency and fulfilled the labelling standards set in the regulation concerning dangerous chemical substances is not a defence to the producer's negligence. V sprayed the foam at the wrong angle, which was contrary to the instruction of use given on the label. Nevertheless, B did not warn of the negative effect of such a foreseeable manner of using the can. Therefore, the instructions were inadequate. Moreover, they were incomplete, as the producer did not give any warnings about the dangerous gas component and the possibility of ignition. **2**

Comments

The court relied in its holding on the well-approved doctrine of the liability for failure to warn. The general liability clause was applicable to the facts because the harm caused by a dangerous product occurred before the new law on producers' liability came into force (Act of 2 March 2000 on The Protection of Some Consumer Rights and Products Liability[1]). **3**

1 DzU 2000, no 22, 271.

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4 Before the implementation of the Product Liability Directive, producers' liability was fault-based, albeit with some evidential and procedural mechanisms developed by courts which made the proof of fault much easier for victims of defective products. In this fault-based system, defect, risk, and foreseeability of an accident became the integral part of the considerations of 'fault'.

Sąd Najwyższy (Supreme Court) 3 November 1964, I CR 500/64

OSNC 1965, no 10, item 166

Facts

5 The plaintiff was visiting her friend when an electricity failure unexpectedly happened and continued for 3.5 hours. During the power cut, the plaintiff parted with her friend and while exiting the building in the dark, fell on the stairway and suffered personal injuries. She sued the building administrator for damages. The court established that the construction of the stairway was proper and safe and that the only reason for the accident was that there was no light when the plaintiff walked down the stairs.

Decision

6 On a preliminary question sent to the Supreme Court by the court of second instance, the Supreme Court held that the defendant was not at fault. Power cuts happened infrequently, and although the blackout in this case lasted for a longer time, the house administration could not foresee occasional electricity failures and hence was not obliged to install any substitute light. Such a duty could only be imposed in cases of more frequent power cuts, notified by the power plant. The plaintiff should have acted more cautiously and vigilantly when leaving the premises of her friend in the dark (she should have used matches or a flashlight).

Comments

7 This is an old case. Nevertheless, unforeseeable electricity failures were translated by the court into unforeseeability of damaging consequences and the court phrased its conclusion in the words of a duty of care. The final result can be questioned in present times.

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24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 28 January 2003

25 Cdo 1094/2001

Facts

The claimant sought compensation for the damage caused to his car by the respondent's horse. While the respondent was riding on his mare, he met two horsemen with young stallions. One of these stallions began fighting with the mare after all the horsemen had dismounted from their horses. The stallion kicked the respondent, and during the next stallion's attack on the mare, the latter broke loose from the respondent's grip and ran off. The mare galloped onto the road and into the claimant's car. The mare was fatally injured in the collision, and the car was damaged. 1

The court of first instance rejected the claim because it considered that the claimant had neither proved that the respondent had breached his duties nor that the respondent had not taken necessary measures to prevent the mare from running onto a public road without supervision. The court of second instance changed the prior decision and granted the claim. In the opinion of the court, the respondent had not succeeded in proving that he had not caused the damage. Although he had only little experience with the mare, due to the short time which he had owned it, he should have supposed that a chance meeting between a mare and a stallion might fundamentally change the behaviour of the horse. This breach of the owner's duty allowed the mare to run onto the road and, consequently, constituted the direct cause of the damage to the car. 2

Decision

The respondent, as a horse breeder, even if he was not aware thereof, should have known that his mare could break loose from his grip when in contact with a stallion and could become uncontrollable. The respondent did not sufficiently supervise the animal. The problem in the given circumstances included not only his failure to take account of the possibility of a chance meeting with a stallion but he was also guilty of inexperience in horse breeding, ignorance of biological processes of animals, insufficient foreknowledge of the mare's mental condition, etc. Due to the absence of such foresight and abilities, the breeder should possibly have avoided riding out with his horse into a public area. 3

The causal connection existed because the main and the direct cause of the damage to the car was the wrongful behaviour (negligence) of the respondent consisting in his inadequate supervision of his mare. Due to this fact, the horse had unrestricted access to the public road, where it collided head-on into the claimant's moving vehicle and caused damage. 4

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Comments

5 The present case is an example of acting in violation of sec 415 CC. Whoever allows horses to have direct contact with traffic on roads becomes subject to certain requirements relating to operational activity.

6 In the present case, the respondent acted negligently because, without having sufficient grounds to do so, he did not meet these duties (duty of care) of a breeder and relied upon the fact that he would be able to manage any situation and that a stallion would not attack his mare. Therefore, he acted wrongfully.

7 This breach of a legal duty is then causally linked with the damage which the claimant suffered because, absent the breach of the duty to properly take care of the horse, it would not have been possible for it to run onto the road.

8 Usually, the courts in such cases adjudicate on the question of wrongfulness, which seems to be the crucial point of the case. If considered positively, the issue of causal connection, which should be recorded in the judgment, becomes subject to further court evaluation. However, in most cases the judgments are not very well developed in this regard, and the courts mostly establish a causal link due to the existence of wrongfulness. This case could be an example of the above-mentioned approach, as the Supreme Court only repeated the conclusion of the court of second instance and stated that: 'the causal connection exists because the main and the direct cause of the damage to the car was the wrongful behaviour (negligence) of the respondent, consisting in his inadequate supervision of his mare. Due to this fact, it had unrestricted access to the public road, where it collided head-on into the moving car of the claimant and caused damage.'

9 This could have been a typical case of damage inflicted by more acts/events, and perhaps the court would have found the stallion's owner liable, which would have resulted in him becoming jointly and severally liable with the owner of the mare to compensate the damage that occurred. It is a fact that the possible occurrence of the damage was foreseeable for all the parties involved.

10 As regards foreseeability in tort law, this term has three meanings in Czech legal theory which is not very developed.[1] Firstly, it is considered relevant from the causation point of view. According to the theory of adequacy, only a foreseeable result of an action or omission may cause the outcome which is attributable to the wrongdoer as a relevant damage. The second meaning relates to fault (negligence) as the subjective relationship of the wrongdoer to the negative consequence of his action or omission. The third aspect is derived from former commercial law which stipulated (until 31 December 2013) that only foreseeable damage shall be compensated. Such

1 See comments on secs 2910 and 2911 NCC by *J Hrádek* in: J Švestka/J Dvořák/J Fiala, Občanský zákoník – Komentář [Civil Code – Commentary] no 47; *M Stefek*, Předvídatelnost škody v novém občanském zákoníku [Foreseeability of damage in the new Civil Code], Jurisprudence 25–33.

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interpretation leads to the conclusion that foreseeability is the decisive factor for damage being compensable regardless of any other criteria, such as fault.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 25 February 2003

25 Cdo 618/2001

For facts and decision see 2/24 nos 11–14. 11

Comments

As the ruling of the Supreme Court shows, it is quite complicated to determine, in general, the kind of conduct required by the individual in any particular situation. The general rule based on sec 415 CC determines that everybody is obliged to behave in such a way that no damage to health, property, nature and the environment occurs, but this provision is generalised to the extent that this could be required of every possible kind of behaviour. 12

The Supreme Court rejected the claim and refused to award the claimant compensation for damage to health. The reasoning of the ruling shows that the respondent had not acted at fault. Therefore, although adequate causality between the maintenance of the bridge and the injury could be found, the respondent could not be held liable for the injury. The duty of prevention is thus not an absolute obligation and it is not possible to ensure that no damage will occur. The present case is not, of course, the first case in which the court has decided on a duty of prevention. But the important point is that the court refused to hold the respondent liable by reasoning that foreseeability of all future damage is not possible. 13

25. Slovakia

Vrchní soud v Praze (High Court in Prague) 4 February 2014, Case No 1 Cmo 303/2013-166

<http://www.codexisuno.cz>

Facts

The City Court in Prague imposed on the defendant the duty to pay compensation for damage. According to the claim, the defendant was bound by a contract to provide all arrangements for the exhibition, Pragodent (Fair) 2008. One of the agreed tasks was to borrow a large number of movable assets. However, a massive fire destroyed the entire exhibition. The damage was equal to the value of the borrowed assets, which could not be returned. The defendant submitted that the claim should 1

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be denied on the grounds that all equipment and assets were destroyed in the fire, the cause of which could not be attributed to the defendant. Following extensive evidence taking, the court of first instance reached the conclusion that the defendant could be relieved of liability for damage pursuant to § 374 of the Commercial Code[1]. The claimant appealed to the High Court in Prague, which decided that the appeal was well founded.

Decision

2 Every person has a duty to act carefully (prudently) to the extent that may be reasonably required in the actual circumstances of the situation and in terms of the particular time and place, in order to ensure that the person prevents or at least reduces, to the greatest extent possible, the risks of damage to life, health or property. However, this statutory provision does not impose a duty to foresee every loss that could possibly occur in the future – the duty of general preventive care is not without limits. The absence of property insurance providing protection against damage resulting from a fire cannot, by itself, be considered a breach of the duty of general preventive care.

Comments

3 The legal positions of the respective parties were governed by the contract,[2] which was a mixed agreement. In such a case, liability is determined in accordance with §§ 373ff of the Commercial Code.[3] The evidence showed that the fire was the fact on account of which the defendant's obligation to return the leased assets ceased to exist. With the legal reasons of liability for damage being satisfied and established,

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1 § 374 (1): 'Circumstances excluding liability are an obstacle which arose independently of the obligated (liable) party's will and which prevented this party from performing its obligation, provided that it cannot be reasonably expected that the obligated party could have averted or overcome such an obstacle or its consequences, and further that the occurrence of such an obstacle was unpredictable at the time when the obligated party undertook to perform such obligation.'
§ 374 (2): 'An obstacle which only arose during the time when the obligated party was in default with performance of its obligation, or which ensued from its financial situation, shall not exclude its liability.'
§ 374 (3): 'The consequences excluding liability are limited only to the duration of the obstacle to which they relate.'

2 The Civil Code makes no distinction between an obligation arising from a legal rule (*ex lege*) or that arising from a contract (*ex contractu*), a breach of obligation. See 1/25 no 4.

3 § 373: 'Whoever breaches a duty arising from a contractual relationship is obliged to provide compensation for the damage (ie damages) caused to the other party, unless he proves that such a breach was caused by circumstances excluding his liability.'

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the courts only dealt with the circumstance under which unlawfulness was ruled out.

According to the findings of the court, none of the fire-related causes was within the effects of the defendant's conduct. Moreover, the fire was reported in the evening, ie after the time set for visitors and exhibitors. The court also addressed the issue of whether the defendant had breached either the duty of special preventive care (under § 382 of the Commercial Code)[4] or the duty of general preventive care (under § 415 of the Civil Code) by not foreseeing the fire, or whether it was reasonable to expect that a fire would not break out.. The court came to the conclusion that the site was built for the purposes of holding exhibitions, to which purpose it also served, and there was no indication that holding exhibitions represented – based on the nature of such activities – higher safety risks. Only in such a case could a higher duty of preventive care be required of the exhibitors to prevent damage. In the court's view, the defendant did not breach any duty of preventive care within the meaning of § 382 of the Commercial Code. As for the general preventive care, the court arrived at its decision by referring to current case law (Judgment of the Supreme Court of the Czech Republic of 25 February 2003, Case No 25 Cdo 618/2001), emphasising that the duty set out in § 415 of the Civil Code is not without limits. These provisions do not impose a duty to foresee every possible occurrence of damage in the future. The defendant could not have foreseen the possibility of a fire breaking out. **4**

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 28 February 2013, Case No 25 Cdo 2819/2011

<http://kraken.slv.cz/25Cdo2819/2011>

Facts

The claimant's daughter suffered a fatal accident on woodland, which was managed by the defendant. The accident occurred when a part of a tree fell and killed the claimant's daughter who was cycling. The District Court ordered the defendant to compensate the damage resulting from the breach of its duty of care set in § 415 of the Civil Code and also referred to the fact that the defendant had failed to inspect the conditions of the trees. The defendant argued, among others, that because the forest was a part of a nature reserve, he only had limited possibilities to intervene in **5**

4 § 382: 'The aggrieved party has no right to compensation for that part of the damage which was caused by the non-fulfilment (non-performance) of its own duty as defined by the statutory provisions which were issued for the purpose of preventing the occurrence of such damage or limiting its extent.'

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the forest resources. The appellate court affirmed the decision of the court of first instance. The defendant filed an appellate review. The Supreme Court held the appellate review to be unfounded.

Decision

6 A duty of preventive care is imposed by § 415 of the Civil Code on all persons, ie also on the owner or manager of land which must be used and managed in such a way as not to cause damage to other persons, including the duty to take any measure to prevent or reduce possible damage or harm to health, property and other values, and to take measures to avert any hazard if there is a threat of such damage. As for the defendant's arguments invoking the provisions of § 19 of the Forest Act, it may be admitted that the forest owner cannot be held responsible for any harm to health or damage to property of persons who have entered the forest, as it is impossible for the owner to be in full control of the entire forest area. At the same time, however, under these provisions, the duty of care of the forest owner for damage or harm arises where, taking the actual situation and circumstances into account, some degree of care of the trees and foresight may be required from the forest owner in relation to a risk of damage. In this case the fatal accident did not happen to a person freely moving in the woods but she was riding a bicycle on a forest path, where the movement of persons is usual. Moreover, the path was marked as a cycle path, on which a large number of visitors had to be foreseen by the forest owner who had to adjust his activities in relation to the conditions and quality of the forest if it could be a threat to the safety of movement. Further, the defendant was a professional forest manager, who had a staff of experienced professionals helping him in his work and therefore all of these circumstances required increased caution and more careful inspection of the conditions of the forest close to the path used by tourists and visitors. Because the defendant had failed to conduct inspections of the forest, had failed to determine the defective condition of the trees, and had failed to take any measures to remove or to reduce the risks of trees falling on the cycle path, it was found that the defendant had breached his duty of preventive care under § 415 of the Civil Code, and therefore, was liable for the damage caused pursuant to § 420 of the Civil Code.

Comments

7 In the appellate review proceedings, the claimant considered the following legal issues to be of principal importance in the given case: a) the extent, the premises and the conditions for the existence of the requirement of general preventive care to be just and fair, b) the extent to which performance of the obligations imposed by special law (*lex speciali* to § 415) is taken into account when considering the requirement of compliance with the duty of general preventive care, and c) the mutual

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relations of the provisions set by special law (Forest Act, Landscape Protection Act) and the provisions set in §§ 415 and 420 of the Civil Code.

First, the courts did not accept the defendant's argument that there was no relationship between the diseased trees and neglected duty of inspection. According to the defendant, a tree may be rotting even if there are no visible signs of this and without a detailed analysis of a sample taken from a tree, even an experienced professional looking with the naked eye would not be able to ascertain the real conditions of the trees. Under the actual circumstances, the defendant would need to take measures, which, in his view, were absurd and objectively impossible. **8**

Secondly, according to the defendant, it is the exclusive responsibility of people entering the woods to consider the possible risks, especially in nature reserves where visitors must take into account the fact that they are on territory in which the protection of nature is the priority. Thus, according to the defendant, he cannot be criticised for the non-fulfilment of his duty of care as stated in § 415 of the Civil Code because he followed the procedures prescribed by a special law. **9**

In this case, the courts correctly maintained that the defendant breached his duty of care as provided in § 415 of the Civil Code, because as the manager of woodland making occasional inspections, he should have known that the given locality was at immediate risk of falling trees. The courts predominantly took into account the fact that the cycle path was running through the area, in which one should foresee increased movement of people. Both the appellate court and the court of first instance refused to establish the contributory fault of the injured cyclist. In their opinion, the injured person entered the woods at a time when there was no risk of trees being uprooted because of bad weather. Within the meaning of the arguments of the courts, the provisions of special law defining the right to enter the woods at one's own risk does not exclude the liability of the forest owner (administrator) for damage if the damage occurred in a causal relationship with his unlawful/wrongful conduct. **10**

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 1131/1992-2 of 17 September 1992

<www.vsrh.hr>

Facts

V's car was damaged when a gust of wind blew away lumber piled on A's terrace, which fell on V's car. V insisted that the damage was attributable to A since he carelessly piled lumber on his terrace, without taking into account the possibility that it could be blown away by a strong gust of wind. A claimed such damage could not have been foreseen because no one could have foreseen such a strong gust of wind. **1**

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In support of his assertions, A presented meteorological statistics showing that this was the strongest gust of wind in 20 years. The court of first instance disagreed with A's arguments and awarded V damages. The court of second instance upheld the first instance decision.

Decision

2 The SCRC upheld both, first and second instance decisions. In substantiating this decision, the SCRC held that in the coastal area where the event took place, strong winds appeared regularly, once or twice a year, especially in wintertime so that the tortfeasor could not successfully argue that the damage sustained by the victim was caused by an unforeseeable event. As to the meteorological statistics introduced in the first instance proceedings, the SCRC opined that they clearly demonstrated that in wintertime strong winds regularly occurred in the area where the event took place and accordingly they demonstrated that the tortfeasor should have foreseen a possibility of a gust of wind of such magnitude occurring.

Decision of the County Court in Zagreb No Pn 1995/85 Gž-13/88 of 13 January 1988
Unreported

Facts

3 V was driving a car under the influence of alcohol and just when his car entered a crossroads, he was hit by A's car, which A had driven through a red light. V was sentenced for the misdemeanour of driving under the influence of alcohol. Subsequently V brought an action against A's insurer claiming compensation for the damage he sustained in the car accident. The defendant submitted that V was to blame for the damage since he drove a car under the influence of alcohol.

Decision

4 The County Court in Zagreb, acting as an appellate court, dismissed the proposal that V should be blamed for the traffic accident due to his intoxication. According to the court, V's intoxication was not in a legally relevant causal relationship with the accident. As was established in the proceedings, the damage occurred when A drove through a red light at the crossroads. Hence, according to the County Court in Zagreb, the fact that V was under the influence of alcohol had no impact on the occurrence of the accident. Moreover, according to the County Court in Zagreb, since V drove through the crossroads when 'his' traffic lights were green, he could have legitimately expected that no one would enter the same crossroad from the right as this would mean that a driver had ignored a red light. Accordingly, the County Court in Zagreb concluded that an average person cannot expect to anticipate that some-

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one will drive through a red light at a crossroads. For these reasons, the County Court in Zagreb found no elements in V's conduct which would suggest that V was responsible for the traffic accident and the damage caused thereby.

Comments

The cited case law suggests that foreseeability plays an important role in establishing liability. However, two distinct forms of foreseeability must be distinguished; foreseeability of damage and foreseeability of a harmful event. Foreseeability of a harmful event is one of the elements which bear relevance in the course of assessing a person's conduct. As is evident from the judgment of the SCRC No Rev 1131/1992-2 (3d/26 nos 1–2 and 5–6) and the Decision of the County Court in Zagreb No Pn 1995/85 Gž-13/88 (3d/26 nos 3–6), whether a person acted with due care is frequently decided on the basis of the foreseeability of a harmful event. Whereas in No Rev 1131/1992-2 the court held the tortfeasor liable because he failed to foresee the possibility of a harmful event occurring, in Pn 1995/85 Gž-13/88 the victim was not held to be contributory negligent based on the court's conviction that the occurrence of the harmful event could not have been foreseen by an average person. Hence, as demonstrated in these decisions, the foreseeability of a harmful event is frequently employed as a decisive element when assessing whether the required standard of conduct has been met. 5

Apart from the foreseeability of a harmful event, Croatian courts often discuss the issue of foreseeability of damage, ie, whether a particular type of damage could have been foreseen in a specific case. However, foreseeability of damage is an element which is decisive not for establishing liability as such, but rather for determining the quantum of damages. Although specifically contained in statutory provisions on contractual liability, the concept of foreseeability of damage is regularly employed even in cases of extra-contractual liability, where the courts assess whether particular damage can be imputed to a tortfeasor. The exercise undertaken by the courts in such cases resembles the 'remoteness of damage' concept, employed by English law. 6

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 591/99, 29 January 2009

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/6603/> (7 March 2015)

Facts

1 The plaintiff claimed compensation of damage from the insurer of the driver of a vehicle for the non-material damage that she suffered in a traffic accident. The plaintiff was riding a bicycle along a cycle path on the wrong, left side. When the bicycle path ended, the plaintiff turned left onto the road, rode approximately 15 metres, stopped and, because of the dense traffic, waited by the road to be able to cross. The plaintiff crossed the road at a part where there was not a crossing for pedestrians and cyclists. While crossing the road, the defendant struck her with a car. At the time of the collision, the road surface was dry and visibility good. An expert witness testified in the proceedings that, at the moment that she decided to cross the road, the plaintiff could see the vehicle of the defendant. The courts of first and second instance rejected the plaintiff's claim for compensation of damage.

Decision

2 The Supreme Court partially granted the revision and in an interim judgment decided that the defendant shared responsibility for the occurrence of the damage to 30%. It did not agree with the courts of first and second instance in relation to the existence of conditions for the complete relief of strict tortious liability. It stressed that the finding that the defendant could not be expected to anticipate the plaintiff's unlawful crossing of the road is not enough for the existence of an unpredictable event. The unpredictability of a damage event is judged by a stricter criterion – the criterion of extreme care, whereby the court must judge whether the injured party's behaviour in the given circumstances would have been anticipated by a particularly careful driver. In view of the fact that the accident happened in daylight, with good visibility and on an open part of the road, the Supreme Court concluded that the defendant could have anticipated the plaintiff crossing the road and was thus 30% responsible for the damage that occurred.

Comments

3 Slovenian theory and court practice deal with the criterion of predictability of damage in connection with unlawfulness of the behaviour of the responsible person. Unlawful behaviour is behaviour as a result of which a person could predict the occurrence of damage. If damage occurs as a result of particular conduct, it is not

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unlawful merely because damage occurred. Behaviour is unlawful if the occurrence of the harmful consequences was predictable. In judging the predictability of the occurrence of harmful consequences, it is important that the harmful consequence of specific behaviour was objectively predictable and not that the specific causer was capable of predicting the occurrence of harmful consequences. Similarly, it is not important whether the causer of the damage was capable of predicting the actual form of damage that later occurred.[1]

Court practice deals with the predictability of a damage event mainly in dam- **4**
ages disputes in connection with traffic accidents, in particular when examining the reasons that exclude strict tortious liability. The question of predictability is tackled in a similar way as described for unlawfulness also in the case of strict liability. The holder of a dangerous object is relieved of tortious liability if he/she proves that the damage derived from some cause that was outside the object and its effect could not be expected, avoided or prevented.[2] The holder of a dangerous object is also freed of liability if he/she proves that the damage occurred exclusively because of the action of the injured party or third party, which could neither be anticipated nor its consequences avoided or prevented.[3] In the case in question, the Supreme Court stressed that the predictability must be assessed by the strictest criterion of extreme care, which means that the court judges whether the occurrence of the damage event could have been foreseen in the given circumstances by a particularly careful driver. If a participant in traffic can be expected in specific circumstances to have anticipated incorrect behaviour by another participant in traffic, he/she must do everything to prevent the occurrence of harm, otherwise he/she is responsible or shares responsibility for the occurrence of the harm.[4]

1 *N Plavšak*, 131. člen Obligacijskega zakonika [Article 131 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 702–707.

2 Para 1 art 153 of the Code of Obligations.

3 Para 2 art 153 of the Code of Obligations.

4 Judgment of the Supreme Court II Ips 37/1994, 6 July 1995; judgment of the Supreme Court II Ips 626/1992, 21 April 1993; decision of the Higher Court in Ljubljana II Cp 581/2006, 6 September 2006, <http://www.sodisce.si/vsrs/odlocitve> (28 February 2015).

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29. European Union

European Court of Justice, 16 December 2008
C-47/07 P, Masdar (UK) Ltd v Commission [2008] ECR I-9761

Facts

1 The Greek consultant firm, Helmico, had been awarded development projects in Moldova and Russia by the Commission in 1996. Helmico in turn subcontracted certain services to Masdar. At the end of 1997, Masdar became concerned about late payments by Helmico. One year later, it started to seek help from the Commission in this matter. In reaction to the latter's communication, Helmico gave Masdar's chairman power of attorney to transfer funds from specified accounts to which payments to Helmico were made by the Commission. While Masdar managed to withdraw € 200,000 in the course of the following year, its claims arising under the two projects were still not yet fully settled. After further communication with the Commission in 2000, the latter decided to stop payments to Helmico and to recover amounts already paid, realising at this point that Helmico had been guilty of fraud in the performance of both contracts. Masdar was unable to recover funds from Helmico itself and therefore explored options to be indemnified by the Commission directly for work carried out under the two projects. When the Commission continued to refrain from making any offer of remuneration to Masdar as late as 2003, and subsequent attempts to settle failed, Masdar sued the Commission for compensation on various grounds, including unjust enrichment, *negotiorum gestio*, breach of the principle of the protection of legitimate expectations and fault. The Court of First Instance rejected all pleas, so Masdar appealed to the ECJ, which confirmed the lower court's decision on all counts.

Decision

2 As the court expressly stated with respect to the fault plea, '"negligence" entails an act or omission by which the party responsible breaches the duty of care which it should have discharged, and could have discharged, in view of its attributes, knowledge and abilities ... It is therefore possible for the Community administration to be non-contractually liable for wrongful conduct where it fails to act with all necessary care and, as a result, causes harm ... That duty of care is inherent in the principle of sound administration. It applies generally to the actions of the Community administration in its relations with the public.' (paras 90–92).

3 However, while the Commission had to act 'with care and caution', it was not required to protect Masdar from 'all harm flowing from normal commercial risks' (para 93). It was particularly not obliged 'to align its decisions with Masdar's interests or to institute an ad hoc mechanism, such as the payment of the outstanding financial assistance into a special account over which Masdar had power of attorney' (para 95).

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Comments

While the outcome of the case is unsatisfactory in particular with respect to the other grounds of action, the decision is still noteworthy inasmuch as it is one of the few where a classic negligence claim was brought against an EU institution and was also dealt with as such by the ECJ.[1] It therefore analyses the duty of care principle, though denying ultimately that such a duty had existed vis-à-vis the claimant in the instant case. 4

The basis of such a duty of care – if any – can be found in the 'principle of sound administration', which leaves ample room for flexibility (and therefore unpredictability) for future cases. Some specifications were, however, provided by subsequent case law of the CFI, such as in *Tillack* where that court stated that this principle 'does not, in itself, confer rights upon individuals ... except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of art 41 of the Charter of Fundamental Rights of the European Union'.[2] 5

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

A ship is moored at a dock. In the course of refuelling, the ship leaks oil into the sea which spreads to a harbour nearby where two vessels are undergoing repairs. Sparks from welders ignite the oil causing extensive damage to the wharf and to all three ships. It is accepted that oil of this nature is extremely difficult to ignite. The owner of the damaged ships claims damages from the owner of the ship which was refuelled.[1] 1

Solutions

a) Solution According to PETL

When determining the required standard of conduct, pursuant to art 4:102(1) PETL, 'the nature and value of the protected interest involved, the dangerousness of the 2

1 If only because it is an English case submitted by English barristers.

2 CFI 4.10.2006, T-193/04, *Tillack v Commission* [2006] ECR II-3995.

1 Scenario of the English case: *Overseas Tankship (UK) Ltd v The Miller Steamship Co or Wagon Mound (No 2)* Privy Council, 25 May 1966, [1967] 1 AC 617, above 3d/12 nos 6–8 with comments by *K Oliphant/V Wilcox*.

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activity, the expertise to be expected of a person carrying it on, the *foreseeability of the damage*, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods' need to be taken into consideration.[2]

3 In the present case, the victim was injured in the property of his ships. Property is extensively protected under art 2:102(3) PETL. The question is whether the damage to the property was foreseeable. Foreseeability of damage is one of the crucial criteria when it comes to determining both the required standard of conduct pursuant to art 4:102(1) and the scope of liability under art 3:201 PETL, the latter providing that '[w]here an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as (a) the *foreseeability of the damage* to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or *the magnitude of the damage* in relation to the normal consequences of such an activity'.[3]

4 Under the PETL, '[a] person cannot be held liable for a consequence of her behaviour if, notwithstanding all due caution, she was not able to foresee it'.[4] Foreseeability has to be considered *ex ante*.[5] The PETL hereby apply an objective standard. The damaging consequences must have been foreseeable 'to a reasonable person at the time of the activity'.[6] According to the commentary to the PETL, '[f]oreseeability probably is the most important and most applied factor'.[7]

5 In the present scenario, it is accepted that the type of oil in question is 'extremely difficult' to ignite. Thus, from an *ex ante* perspective, the likelihood of causing damage was 'extremely' low, and the damage difficult to foresee. Bearing in mind that foreseeability is a required criterion under the PETL, it may thus prove difficult to attribute the damage to the refuelling ship's owner.

6 On the other hand, it could be argued that the damage done to the property of the owner of the ships was considerable, the cost of avoiding the risk would have been low, and that it would have even been beneficial for society at large if the oil had not been spilled in the harbour, but had been collected and properly disposed of. It may further be argued that a careful boat mechanic ought to have known that it was possible for this type of oil to ignite in water, even if the probability of damage was (very) low.

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2 Emphasis added.

3 Emphasis added.

4 PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*).

5 PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*).

6 Article 3:201(1)(a) PETL; PETL – Text and Commentary (2005) art 4:201, no 11 (*P Widmer*); ibid, art 3:201, no 13 (*J Spier*).

7 PETL – Text and Commentary (2005) art 3:201, no 13 (*J Spier*).

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Therefore, even the most minor of risks may sometimes not be left ignored. Valid justification may be required to discard this obligation, for example, that eliminating the risk would involve considerable difficulty or expense. It may be argued that a reasonable person would weigh the magnitude of the risk against the difficulty in eliminating it. Thus, the reasonable person would not neglect a risk to others' property on the simple basis that it would be minor if the action to eliminate such risk presented no difficulty, involved no disadvantage, and required little to no expense.[8] **7**

The scenario illustrates once more the interdependence of the criteria and factors mentioned in arts 4:102 and 3:201 PETL. Taking into consideration the whole set of criteria (such as the value of the protected interest, the magnitude of potential damage, the cost and benefit of alternative measures, and social utility thereof) might lead to the result that even a remote chance of risk may sometimes have to be guarded against by reasonable persons. **8**

b) Solution According to the DCFR

As set out above,[9] like the PETL, the DCFR uses an objective standard of care.[10] However, unlike art 4:102(1) PETL, the text of the DCFR does not provide a list of indicative factors to take into account when deciding whether a particular act achieves the required standard or whether fault can be established. The argument under the DCFR may be similar to that exposed above under the PETL. However, in the absence of precise criteria determining misconduct, any further prediction of the solution of the above case under the DCFR would be purely speculative. **9**

31. Comparative Report

All the reporters submitted cases in this sub-category with the sole exception of Romania. **1**

Foreseeability is very widely recognised as a crucial aspect of the inquiry into whether or not there has been misconduct in the sense of wrongfulness or fault.[1] It **2**

8 Compare the reasoning of the English Privy Council: *Overseas Tankship (UK) Ltd v The Miller Steamship Co or Wagon Mound (No 2)* Privy Council, 25 May 1966, [1967] 1 AC 617, above 3d/12 nos 7–8 with comments by *K Oliphant/V Wilcox*.

9 Above, 1/30 nos 18–19.

10 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

1 See especially Historical Report 3d/1 no 5 ('main criterion'); Austria 3d/3 no 7; Switzerland 3d/4 no 17 (fault but not unlawfulness); Greece 3d/5 no 5; Belgium 3d/7 no 7; Netherlands 3d/8 no 3; Italy 3d/9 no 3 (a 'central' question); Spain 3d/10 no 3 ('an essential condition'); England and Wales 3a/12

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may be regarded as a component of the dangerousness of, or risk inherent in, the defendant's conduct (see 3c above). It refers to the degree of probability, assessed objectively[2] but from the defendant's situation at the time,[3] that the conduct would result in legally recognised harm. But, so long as there is foreseeability in this sense, it is immaterial that the harm that actually occurred could not reasonably have been foreseen – or its extent, or even the identity of the victim(s).[4] Further, as the reasonable person guards only against risks that are sufficiently foreseeable, it follows that there are many risks that are simply so unlikely to happen that no one need take them into account in their actions.[5] But even a risk that is very unlikely to eventuate should be adverted to if the consequences of its occurrence would be extremely serious.[6] That is not the end of the matter, however, because it must then be assessed whether the precautions available to guard against the risk (see 3f) ought reasonably to be taken, which requires a weighing of their cost against the foreseeable risk.[7] For this reason, not all foreseeable risks have to be guarded against.[8] Foreseeability, then, like the other factors, is considered to be a matter of degree and is only one part of a complex balancing process.[9]

3 Foreseeability also bears upon the behaviour of other people, including the expectation that potential victims will themselves take steps by way of self-protection, and that persons in a supervisory role will guard their charges against normal risks.[10] But, even where a claimant failed to take due steps for his own safety, it may be that liability is still imposed on the basis that the defendant ought to guard against even behaviour evidencing a disregard for personal safety, though with a deduction for contributory fault.[11]

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no 3; Scotland 3d/13 nos 4–6; Ireland 3d/14 no 3; Norway 3d/17 no 2 ('a necessary requisite'); Croatia 3d/26 no 2 ('an important role'); Slovenia 3d/27 no 3.

2 Expressly: Historical Report 3d/1 no 4; Austria 3d/3 no 7; Switzerland 3d/4 no 17 (generally); Spain 3d/10 no 3; Scotland 3d/13 no 5f; Slovenia 3d/27 no 3; PETL/DCFR 3d/30 nos 4 (PETL) and 9 (DCFR). Cf Italy 3d/9 no 3 (assessed in the abstract with reference to the diligence of an average person, but seen by some authors as not truly objective).

3 Expressly: Spain 3d/10 no 9; England and Wales 3d/12 no 9ff; Scotland 3d/13 no 5.

4 Belgium 3d/7 no 5; Croatia 3d/26 no 5 (distinguishing the foreseeability of a harmful event from foreseeability of the particular type of damage suffered).

5 Austria 3d/3 nos 5, 7 and 10; Scotland 3d/13 no 6.

6 England and Wales 3d/12 no 6ff; PETL/DCFR 3d/30 no 7.

7 Switzerland 3d/4 no 7; PETL/DCFR 3d/30 nos 6 and 8 (PETL). See further Comparative Report 3a/31 no 3.

8 Switzerland 3d/4 no 7.

9 Netherlands 3d/8 no 3; England and Wales 3d/12 no 7f; Ireland 3d/14 no 3. See further Comparative Report 3a/31 no 2.

10 Switzerland 3d/4 no 3ff; Spain 3d/10 no 6. Cf Greece 3d/5 no 3ff (no fault in supervision on the facts).

11 Switzerland 3d/4 no 11.

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Foreseeability is, of course, also relevant in the scope of liability context, especially in connection with the application of principles of adequate causation[12] or remoteness of damage.[13] But that is a different matter from the role of foreseeability in determining the conduct required. In the former context, foreseeability may well be considered in isolation and as indicating a fixed point on the scale of probability; here, it is a variable and consideration in its relation to other variables, including the gravity of the threatened hard and the cost of precautions.[14] There is no absolute 'value' of foreseeability that must be obtained before conduct can be regarded as a negligent failure to attain the required standard of care.[15] 4

12 Germany 3d/2 no 1ff; Austria 3d/3 nos 1–3 and 8f; Switzerland 3d/4 no 2; Portugal 3d/11 no 10; Czech Republic 3d/24 no 10.

13 Belgium 3d/7 no 8; Norway 3d/17 no 8; Lithuania 3d/22 no 6; Croatia 3d/26 no 6. See also Malta 3d/15 no 1ff.

14 Switzerland 3d/4 no 17. See further Comparative Report 3a/31 no 2.

15 Cf Ireland 3d/14 no 2; Spain 3e/10 no 1ff.

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3e. A Relationship of Proximity or Special Reliance Between Those Involved

1. Historical Report

Modestinus, D 18.1.62.1

Facts

1 The purchaser bought sacred, religious or public places without being aware of this and assuming that these grounds belonged to private parties.

Decision

2 The jurist Modestin[1] held that the contract of sale was to be considered void because sacred, religious or public places could not be objects of purchase. Nevertheless, the purchaser may bring an action on sale (*actio empti*) against the seller to 'recover the amount of the interest he had in not being deceived'.[2]

Comments[3]

3 Under classical Roman Law, religious, sacred or public places could not be bought or sold because they were so-called *res extra commercium*. Hence, whenever the sale of such *res extra commercium* was the object of a contract, the sales contract (*emptio venditio*) was considered to be void by the Roman jurists due to legal impossibility, which means that in principle no mutual claims or obligations could arise.[4] Nevertheless, in the present decision the jurist granted a contractual legal claim, the *actio empti* (the action on sale) though technically there was no contract for this action to be based upon.[5]

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1 Herennius Modestinus, died after 239 AD.

2 'Quod interfuit eius, ne deciperetur'; see also *Justinian*, Inst 3.23.5.

3 For earlier comments on this text in connection with the amount of damages see *F Meissel/C Mokrejs*, Modestinus D 18.1.62.1 (9/1 nos 3–7), in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 419 ff.

4 'Impossibilium nulla est obligatio', impossible things can never be the subject matter of a contract; cf *Celsus*, D 50.17.185.

5 This 'paradoxon' has given rise to numerous discussions about the reliability of this text, see *D Medicus*, Id quod interest (1962) 164 f; had the contractual claim not been granted, some think that there could remain the possibility for the purchaser to rely upon an *actio in factum* as in *Ulpian*, D 11.7.8.1.

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There are various attempts to explain why, according to Modestinus, a contrac- 4
tual legal claim was possible if there was no sales contract due to the impossibility of performance. First of all, the *actio empti* might have been granted because the vendor's behaviour was not seen as being in conformity with the principle of good faith (*bona fides*).[6] Furthermore, it has been argued that the *actio empti* was more suitable for such a case because it was easier for the judge to examine the facts of the case within an action which was based on the principle of good faith (*bonae fidei iudicum*), such as the *actio empti*.[7] So even if the judge came to the conclusion that the sales contract was void, the *actio empti* provided him with a margin of discretion to choose the suitable legal consequences. Finally, it has been put forward that even if the sales contract was to be considered void in the last consequence, there had nevertheless been a sales agreement, a *consensus* between the parties, which might have been considered as a sufficient legal basis by the Roman jurists to grant a remedy.[8] In any case, the *actio empti* was granted by Modestinus. Although the sales contract was void under the specific circumstances of the case[9], the common endeavour of the parties to conclude a contract and the reached agreement nevertheless entailed special obligations.

Taking into account the nullity of the contract, it seems that the basis of the 5
claim was not the non-performance of the contract but the lack of information about the impossibility of the contract. Based on this and other texts[10], the German jurist Rudolf von Jhering[11] (1818–1892) developed his famous concept of 'pre-contractual duties' or *culpa in contrahendo*. Jhering himself conceded that such duties were not a general concept of Roman law. In principle, pure economic losses were recoverable only by way of the *actio doli* which presupposed fraudulent behaviour.[12] A contractual claim depended on the existence of a contract and the *actio legis Aquiliae* only applied to damages that were related to a specific corporeal asset in the plain-

6 *H Honsell*, Quod interest im bonae-fidei-iudicium (1969) 100.

7 *F Peters*, Zur dogmatischen Einordnung der anfänglichen objektiven Unmöglichkeit beim Kauf, in: Festschrift Kaser (1976) 304.

8 However, it could be argued that the connection between the validity of the contract of sale and the availability of the action derived from it was to be considered indissoluble, *F Peters*, Zur dogmatischen Einordnung der anfänglichen objektiven Unmöglichkeit beim Kauf, in: Festschrift Kaser (1976) 347.

9 *F Peters*, Zur dogmatischen Einordnung der anfänglichen objektiven Unmöglichkeit beim Kauf, in: Festschrift Kaser (1976); *M Kaser*, Das römische Privatrecht. Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht (2nd edn 1971) 549; *H Honsell*, Quod interest im bonae-fidei-iudicium (1969) 107 f.

10 For instance *Ulpian*, D 11.7.8.1 who granted an analogous *actio in factum* in the same situation.

11 *R v Jhering*, Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 4 (1861) 1 ff; cf *E Schanze*, Culpa in contrahendo bei Jhering, Ius Commune 7 (1978) 326 ff.

12 See 3b/1 no 4.

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tiff's property.[13] Nevertheless, Jhering regarded this result in certain cases as 'inequitable' since the innocent victim would have to bear the consequences of the culprit's behaviour.[14] He identified those cases as situations in which the conclusion of a contract is intended,[15] or in other words, where there is a sufficient relationship of proximity between the parties involved.

2. Germany

Bundesgerichtshof (Federal Supreme Court) 14 May 2013, VI ZR 255/11

NJW 2014, 64

Facts

1 The claimant was a bailiff, the defendant was a father whose son was mentally handicapped and collected things with which he had filled the father's house in which he still lived. The father successfully applied for a court order requiring his son to clear the house and had mandated the claimant to enforce the judgment. When the claimant appeared, the father opened the door but the son pushed the father to the side and shot at the claimant with a semi-automatic gun which he had shown the father the day before and with which he had tried to force the father not to open the door. The claimant was severely injured and claimed damages for pain and suffering.

Decision

2 The father was held liable. In opening the door and not warning the claimant, the father had omitted to provide the necessary help and had violated the respective provision of the German Criminal Code (§ 323c). The court regarded § 323c Criminal Code as a provision the aim of which is not only to protect the public but also the particular person in danger. The provision therefore qualifies as a protective norm

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13 *H Kaufmann*, Rezeption und Usus modernus der actio legis Aquiliae (1958) 47; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1022.

14 *R v Jhering*, Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 4 (1861) 2f: 'Die Unbilligkeit und praktische Trostlosigkeit eines solchen Resultats liegt auf der Hand; der culpose Theil geht frei aus, der unschuldige wird das Opfer der fremden Culpa! Führen die Grundsätze des römischen Rechts in der That zu einem solchen Resultat, so darf man ihm den Vorwurf machen, daß es nach dieser Seite hin eine empfindliche Lücke darbiete.'

15 *R v Jhering*, Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen, Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 4 (1861) 7.

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(*Schutzgesetz*) in the sense of § 823 (2) BGB.[1] According to the Criminal Code, in the face of a potential danger, a person is obliged to warn an endangered person if this can be done without unreasonable risk and effort. Moreover, in the case at hand, the father had realised the imminent danger for the claimant but had nevertheless accepted this risk because he wanted the mess in his house to be cleared and removed.

Comments

In German law cases where a situation of special reliance between tortfeasor and victim exists are mainly resolved by applying contract law via the instrument of a contract with protective effects towards third persons.[2] In tort law the provision on omitted help (§ 323c Criminal Code)[3] in connection with § 823 (2) BGB is the basis for a damages claim where a person did not help another endangered or injured person although help was possible without unreasonable burden. Since the protective norm in § 323c Criminal Code requires intent (including *dolus eventualis*),[4] also for § 823 (2) BGB *dolus* is required.[5] In the concrete case the father had a special contractual relationship of reliance to the claimant whom he had engaged and who could reasonably trust that the father would inform him of any possible dangerous circumstances. In addition, the father knew of the specific circumstances and the danger arising from the gun in the hands of his mentally handicapped son. The decision shows that a special relationship between tortfeasor and victim will regularly increase the level of care that the tortfeasor owes. **3**

Bundesgerichtshof (Federal Supreme Court) 28 January 1976, VIII ZR 246/74

NJW 1976, 712

Facts

The 14-year-old claimant accompanied her mother to a supermarket run by the defendant. While the mother was queuing up to pay,for her goods, the claimant went **4**

1 See already BGH NJW 2002, 1356.

2 See for instance BGHZ 51, 96; BGHZ 128, 168, 173.

3 § 323c StGB: 'Omission to effect an easy rescue. Whosoever does not render assistance during accidents or common danger or emergency although it is necessary and can be expected of him under the circumstances, particularly if it is possible without substantial danger to himself and without violation of other important duties shall be liable to imprisonment not exceeding one year or a fine.'

4 BGHSt 5, 126.

5 For liability under § 823 (2) BGB to be established, all requirements of the protective norm must be met. However, if the norm does not require fault, the liable person must have acted at least with negligence (§ 823 (2) sent 2 BGB).

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through the checkout. There she slipped on a vegetable leaf and hurt her knee which required extensive medical treatment. Several years later she claimed damages.

Decision

5 The Federal Supreme Court upheld the decision of the lower court, which had awarded the claimant 75% of the amount that she had claimed to compensate her pecuniary loss. (Under the German law valid at that time, non-pecuniary loss could have been compensated only under tort law for which, however, the limitation period had already lapsed.) The court based its decision on a combination of two institutes developed by the courts outside the BGB, namely liability under *culpa in contrahendo* in connection with a contract with protective effects (*Vertrag mit Schutzwirkung*). The court held that a pre-contractual relationship existed between the claimant's mother and the defendant company because the mother had intended to conclude a contract with the defendant and, by choosing the goods for purchase, had already taken steps in that direction. If the mother had slipped, it was therefore clear for the court that the defendant would have been liable because it negligently did not provide the required safety in the shop. However, the court also extended this pre-contractual protection to the claimant by using the institute of the contract with protective effects. These protective effects shall also cover the pre-contractual phase of contract negotiation and, in particular, they protect persons for whose 'weal and woe' (*Wohl und Wehe*) the – intended – contract partner is responsible.

6 Therefore the daughter could recover three quarters of her pecuniary loss. One quarter was denied because of her own contributory negligence.

Comments

7 The famous decision is accepted as the leading case by courts[6] and legal doctrine.[7] The basis of liability in this case is primarily contract law although other European jurisdictions would qualify the case as a tort case. The *culpa in contrahendo* and the contract with protective effects owe their existence to a considerable extent to certain shortcomings in German tort law, in particular that pure economic loss is recoverable in tort only under very restrictive conditions (intent and violation of good

6 See eg BGHZ 197, 304; OLG Saarbrücken NJW-RR 2012, 152.

7 See eg *D Looschelders*, Schuldrecht: Allgemeiner Teil (13th edn 2015) nos 198, 201; *D Medicus*/*St Lorenz*, Schuldrecht I: Allgemeiner Teil (20th edn 2012) no 104; *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 311 nos 11, 29.

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morals)[8] and that in tort the employer can exonerate itself from liability for torts of the employee by proving sufficient selection and control.[9] Where however a special legal relationship (*Schuldverhältnis*) already exists, both these shortcomings become irrelevant: pure economic loss is then recoverable and the debtor is responsible without exoneration for all persons he engages for the performance of the legal relationship. Even non-pecuniary loss can now be claimed in cases of *culpa in contrahendo*.[10] It is worth mentioning that the reform of the German law of obligations in 2002 introduced the institute of *culpa in contrahendo* into the BGB: § 311 (2) now explicitly covers *culpa in contrahendo* and § 311 (3) concerns certain specific cases of that institute and according to some even the contract with protective effects.[11]

3. Austria

Oberster Gerichtshof (Supreme Court) 20 November 1996, 7 Ob 513/96

SZ 69/258

Facts

The defendant, a court-approved expert, was commissioned by an innkeeper to render a valuation report regarding his mortgaged property for the purpose of a debt refinancing. The innkeeper explicitly mentioned that the opinion was supposed to serve the obtainment of credit. He was finally granted a loan from the claimant bank on the basis of the market value as shown in the report. The bank was granted a real security in the form of a mortgage. However, the market value had been miscalculated and was in fact much lower. After one month, the innkeeper stopped the payments and his property was put up for compulsory auction. The claimant received a sum much lower than the loan he had given and sought compensation from the expert, arguing that the objectively incorrect report had been the decisive factor for the granting of the loan. **1**

Decision

The Supreme Court held that, in respect of third parties, the expert is in principle only liable under tort law, thus pure economic loss is not recoverable. However, case law has established a more extensive liability of the expert in exceptional **2**

8 See § 826 BGB.

9 See § 831 BGB.

10 *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 311 no 19.

11 See *D Looschelders*, Schuldrecht: Allgemeiner Teil (13th edn 2015) no 202; *W Ernst* in: Münchener Kommentar zum BGB, Band 2: Schuldrecht – Allgemeiner Teil (7th edn 2016) Einleitung no 49.

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cases. If it is discernible to the expert that the principal is also pursuing the interests of the third party, he is liable based on a so-called contract with protective effects towards third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*). This construct is nevertheless problematic in these case configurations, as the interests of a firm applying for credit and those of the bank granting credit are typically opposed. Rather, it might be said that the expert has an objective legal duty to protect in favour of the third party (*objektiv-rechtliche Schutzpflichten*) if he must assume that the third party will make economic dispositions on the basis of his report. This is the case if the report is also intended for the third party, who is supposed to rely on it. The circle of protected persons is determined by the rules of customary standards (*Verkehrsübung*) and the purpose of the report. In the case at issue, the innkeeper explicitly commissioned the expert opinion 'to present it at the bank', making it clear to the defendant that a credit institution would rely on its correctness. Therefore the defendant, who was subject to an objective standard of care (§ 1299 ABGB), was liable in principle to the claimant, who was nevertheless held to be contributorily negligent.

Comments

3 See below 3e/3 nos 6–9.

Oberster Gerichtshof (Supreme Court) 13 September 2012, 6 Ob 91/12v
ZVR 2013/125

Facts

4 The defendant, an experienced climber, took the claimant and his girlfriend, neither of whom had ever attended a climbing course, to a climbing gym. The defendant explained how to belay and check with the climbing partner. While belaying, the claimant made a mistake that remained unnoticed by the defendant, leading to the claimant's fall from a height. The claimant sought compensation for his injuries.

Decision

5 The Supreme Court adjudged damages in the amount of three-quarters of the claim. It referred to its case law regarding the 'guide as a favour' (*Führer aus Gefälligkeit*) on mountain hikes, stating that if someone only brings about a circumstance leading to another person's decision to endanger or damage his legal interests ('psychological causality'), a thorough weighing up of interests is necessary. This follows from the principle of self-responsibility. In the case at issue, however, the defendant voluntarily undertook duties of care towards the claimant, as he took the claimant climbing although he knew that the claimant was inexperienced. Without the de-

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fendant, the claimant would not have been allowed to use the climbing gym. Only this voluntary assumption of duties is decisive for the issue of liability; the legal classification of the parties' relationship as contractual or mere courtesy is neither essential for the existence of the obligation nor for the applicable standard of care. The defendant's duties of care not only involved providing instruction, but also checking that the belaying was executed correctly, which the defendant failed to perform correctly. Although the claimant also acted negligently, the defendant's fault preponderated considerably.

Comments

Unlike in many other European legal systems, contractual and tortious liability are jointly regulated by the same set of provisions under Austrian law (§§ 1293 ff ABGB).[1] However, there are significant differences between the two forms of liability. Contractual liability is 'more stringent' than tortious liability in principle due to the special relationship (*Sonderbeziehung*) between the injuring party and the plaintiff.[2] Firstly, unlike in tort law, pure economic loss is compensable under contract law. Furthermore, § 1298 ABGB provides for a reversal of the burden of proof regarding fault if contractual (or pre-contractual) duties are neglected, and finally, comprehensive rules for vicarious liability are applicable under contract law (§ 1313a ABGB). In the present context it should be noted that the existence of such a special relationship also defines the scope of duties owed to the other party as well as the range of protected interests. This may result in liability for mere omissions and – as aforementioned – compensation of pure economic loss. **6**

Despite these differences, contractual and tortious liability are not considered two strictly separate areas under Austrian law.[3] Consequently, an interim area is acknowledged, within which it has to be determined whether to apply contractual or tortious provisions in order to obtain an appropriate result. Manifestations of this interim legal area are, for example, cases of *culpa in contrahendo*[4], contracts with protective effects towards third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*)[5] **7**

1 See also overview 1/3 no 1.

2 See *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 1 with further references.

3 Groundbreaking *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 4/2 ff; *idem*, Delikt, Verletzung von Schuldverhältnissen und Zwischenbereich, JBl 1994, 209 ff; *idem*, The Borderline between Tort Liability and Contract, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 25 ff.

4 See *R Welser*, Vertretung ohne Vollmacht (1970); *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 70 ff.

5 On this *F Bydlinski*, Vertragliche Sorgfaltspflichten zugunsten Dritter, JBl 1960, 359; see also *G Schmaranzer*, Der Vertrag mit Schutzwirkung zugunsten Dritter (2006).

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and – particularly with regard to the liability of experts towards third parties – liability based on objective legal duties of care (*objektiv-rechtliche Schutzpflichten*).[6] The two decisions referred to above deal with such cases situated in the interim area and may serve as an example.

8 According to § 1300 ABGB first sentence, an expert is liable if, for payment, he negligently gives prejudicial advice in a matter pertaining to his art or science. In principle, he is responsible for erroneous advice or opinions solely with respect to the recipient, who asked for the advice and paid for it, not to third parties.[7] However, if – as in the decision concerning the real estate valuation – the opinion is precisely intended to serve as a basis for the third party's disposition, the situation is different. In this case, the expert's liability also covers the damage of the third party and follows the strict rules of contract law (§§ 1313a, 1298 ABGB, compensation of pure economic loss). The legal basis for such a 'quasi-contractual' liability is seen in a contract with protective effects towards third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*)[8] or an extension of objective legal duties of care (*objektiv-rechtliche Schutzpflichten*).[9] The decisive factor is the existence of a declaration aimed at a third party because such a declaration creates a situation of trust regarding this third party.

9 The second decision concerning a climbing guide shows that more stringent liability may apply not only in the field of business contacts but also in the case of a social relationship,[10] which might be, for example, formed to go mountain climbing together:[11] whoever places himself in a relationship of specific trust and mutual dependency may demand compliance with higher duties of care vis-à-vis this partner than would normally exist between strangers. In particular, this may also lead to liability for mere omissions. According to the Supreme Court, it is not crucial whether such a relationship is qualified as 'contractual' or not; however, this does not resolve the problem as to what extent contractual or tortious provisions must be applied in the given case: even with mere social contacts it may be justified – as in the cases of *culpa in contrahendo* – not only to increase the duties of care but also to adopt the contractual reversal of the burden of proof regarding fault (§ 1298 ABGB).

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6 See *R Welser*, Die Haftung für Rat, Auskunft und Gutachten (1983) 86 ff; *E Karner*, Haftung für Rat und Auskunft zwischen Vertrag und Delikt, in: P Apathy/R Bollenberger/P Bydlinski/G Iro/E Karner/M Karollus (eds), Festschrift für Helmut Koziol (2010) 695 ff.

7 OGH 8 Ob 281/70 = SZ 43/236.

8 *F Bydlinski*, JBl 1965, 319; *H Koziol*, JBl 1981, 319.

9 *R Welser*, Die Haftung für Rat, Auskunft und Gutachten (1983) 86 ff; *E Karner*, Haftung für Rat und Auskunft zwischen Vertrag und Delikt, in: P Apathy/R Bollenberger/P Bydlinski/G Iro/E Karner/M Karollus (eds), Festschrift für Helmut Koziol (2010) 711 ff.

10 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/50.

11 See *A Michalek*, Die Haftung des Bergsteigers bei alpinen Unfällen (2nd edn 1990) 83 ff; concerning the 'guide as a favour' *J Stabentheiner*, Zum Tourenführer aus Gefälligkeit, JBl 2000, 273.

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4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 15 November 1994

ATF 120 II 331

Facts

Swissair Beteiligungen AG (Swissair) was the owner of Country Residences AG. The latter had concluded a rental contract with V, according to which V, who paid CHF 90,000 (€ 75,000), could use the Country Residences' network of luxury apartments for a certain time. 1

In its publicity materials, Country Residences AG stressed its strong link with Swissair, stating that the airline was 'behind' Country Residences AG. Swissair never contested to have been aware of this publicity and to have tolerated it. 2

As Country Residences AG never finalised its business plan, it withdrew from the contract with V and informed V that it would repay the amount it had received, plus 7% interest. V never received his money. He filed a claim against Swissair for CHF 98,000 (€ 82,000). 3

The cantonal court rejected the claim. 4

Decision

The Supreme Court partially admitted V's appeal and returned the case to the cantonal court for further investigation. 5

The Supreme Court asserted that Swissair was not a guarantor of Country Residences AG (art 111 of the Swiss Code of Obligations [SCO]). Consequently, Swissair was liable neither in contract nor in tort, as it had not committed an unlawful act. 6

However, the court affirmed that there might be a third voice of liability, resulting from the confidence one has generated due to one's conduct. This liability can be based on a generalisation of the principle of *culpa in contrahendo*[1]. This principle is a particular form of a more general juridical figure related to good faith. 7

If someone suggests that an enterprise is trustworthy and creditworthy, the confidence provoked by this suggestion can be protected and the violation of the duties resulting from this can justify damages. If a company raises certain expectations concerning its behaviour and responsibility and if it subsequently acts contrary to good faith, such conduct may result in the establishment of liability. 8

1 In this sense, see *MA Kessler*, Basler Kommentar OR I, Art 1–529 OR (6th edn 2015) art 41 no 44 ff; *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 244 f.

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9 *In casu*, the minimal obligation of Swissair would have been to ensure that Country Residences AG had informed V correctly about its financial situation and the chances of economic survival. More generally, V could trust that Swissair would guarantee Country Residences AG's trustful and correct behaviour.

10 As Swissair had (negligently) betrayed V's confidence by violating the principle of good faith, it was declared liable towards V.

Comments

11 For the comments see ATF 121 III 350 at 3e/4 nos 21–23.

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 10 October 1995
ATF 121 III 350

Facts

12 The Swiss Federation of Amateur Wrestlers (FSLA) officially determined the criteria which would have to be fulfilled by a wrestler, who would represent Switzerland at the World Championship 1989.

13 Once V had fulfilled all the criteria, the FSLA fixed as a new condition, that he should have an additional selection fight with K. V lost the fight and could not represent Switzerland at the championships.

14 V filed a claim against the FSLA for damages amounting to CHF 10,000 (€ 8,300) for the expenditure he incurred for the qualification and an amount for moral tort to be fixed by the tribunal.

Decision

15 The Supreme Court accepted V's claim.

16 The judges considered that the FSLA's decision to order a further fight contradicted the qualification criteria it had fixed initially and that this condition was unforeseeable for V. The shocking behaviour of the FSLA could not be justified at all and was contrary to the principle of good faith (art 2 of the Swiss Civil Code [SCC]).

17 According to case law, the behaviour of X contradicting another behaviour of X (*venire contra factum proprium*) is not protected if X's previous behaviour led Y to have legitimate confidence into X when determining his acts, which turned out to be damaging for Y once the situation has changed. *In casu* V's confidence, which is worthy of protection, was betrayed due to the federation's decision to modify the qualification conditions.

18 The liability of the FSLA is not contractual, but directly based on the general provision of art 41 of the Swiss Code of Obligations (SCO). Judges consider that behaviour

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contrary to the principle of good faith is unlawful.[2] Based on the German concept of liability for (deceived) confidence (*Vertrauenshaftung*), they adopt the view that a person who creates a situation of confidence, upon which another person can and does actually rely on, is liable on the ground of the principle of good faith.

According to ATF 120 II 331 (1994) (at 3e/4 nos 1–11), the conditions for such a liability are strict: the behaviour of the mother of an economic group (*Muttergesellschaft*) must have provoked and subsequently deceived, in a way contrary to good faith, the expectations concerning: (i) the role the mother will play in the future; and (ii) her responsibility towards the group. This type of liability supposes a particular relationship (*Sonderverbindung*) of confidence and faith between the victim and the person liable. **19**

In casu, no direct (contractual) link existed between the parties. But the FSLA has a monopoly as regards wrestling and this has an impact on the victim. As a consequence, the FSLA has to respect certain fundamental principles towards sportspersons, in particular consistency within it's own acts. There is a particular relationship of confidence between the sportspersons and the FSLA. As a result, the FSLA is liable towards V if it betrays this confidence by not respecting the selection criteria it had adopted. **20**

Comments

The Swissair decision has been the subject of much debate both in and beyond Switzerland, as it states that there is not only contractual and tortious liability, but also a third form – *tertium datur* – belonging to neither of these two categories[3]. The so-called responsibility based on confidence (*Vertrauenshaftung, responsabilité fondée sur la confiance*), whose origin is based on German academic literature,[4] was admitted again one year later in the famous wrestler case[5], but not since then. In the **21**

2 Notably *M Keller/S Gabi*, Das schweizerische Schuldrecht, vol 2, Haftpflichtrecht (2nd edn 1988) 39 ff.

3 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 53e; *V Roberto*, Haftpflichtrecht (2013) 63, no 05.80 ff.

4 See *CW Canaris*, Die Vertrauenshaftung im deutschen Privatrecht (1971); *HP Walter*, La responsabilité fondée sur la confiance dans la jurisprudence du Tribunal fédéral, in: C Chappuis/B Winiger (eds), La responsabilité fondée sur la confiance (2001) 147–161; *V Roberto*, Haftpflichtrecht (2013) 63, no 05.80 ff; *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 244; *H Rey*, Ausservertragliches Haftpflichtrecht (34th edn 2008) 10 f, no 37. For a detailed analysis of this German influence on Swiss Law, see *O Chapuis*, Die Haftung wegen Ausbleibens der Erfüllung im Sinne von Art. 97 Abs. 1 OR: ein Begriff im Wandel? AJP/PJA 2005, 653 ff.

5 ATF 121 III 350 (1995); see *B Winiger/H Koziol/BA Koch/R Zimmermann* (eds), Digest of European Tort Law II: Essential Cases on Damage (2011) 430 f, 9/4 no 12 ff; ATF 124 III 297 (1998) (see *H Rey*, Ausservertragliches Haftpflichtrecht (4th edn 2008) 10 f, no 37).

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meantime, the conditions have been specified and strongly tightened. The very critical views developed by the academic literature could explain why the Supreme Court has developed an extremely restrictive jurisprudence on this topic.

22 It is admitted that this form of liability is based on a special relationship in the form of confidence between the victim and the injuring party. The injuring party must have provoked in the victim a confidence worthy of protection and must have later betrayed this confidence.[6] The Supreme Court stressed that a victim who has imprudently trusted the injuring party is not protected, nor if the loss results from business risks taken by the victim.[7] The academic literature defines the responsibility for confidence as 'an extra-contractual cause founding an obligation based on the confidence arising in a special legal relation' (*rechtsgeschäftsbezogene Sonderverbindung*).[8] According to the Supreme Court, this special legal relation between the parties justifies submitting them to the duties of protection and information deriving from the principle of good faith (art 2 SCC).[9]

23 Finally, it may be added that the Supreme Court applied the prescription of claims for responsibility based on confidence to the rules of tort liability (art 60 SCO)[10]. As responsibility based on confidence has only been applied twice, and as it is neither contractual nor delictual,[11] it is difficult to know to what extent contractual or delictual rules should be applied.

5. Greece

Areios Pagos (Greek Court of Cassation) 355/2001

ChrID A/2001, 419 f

Facts

1 A customer of a bank withdrew a larger amount of money (Greek drachmas 3,950,000, € 11,592) than what she should have (Greek drachmas 395,000, € 1,159,21), due to a mistake made by a cashier. The customer, however, concealed the mistake and then refused to return the money when the mistake was discovered.

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6 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 53e.

7 ATF 133 III 449, 451 c 4.1 (2007).

8 *P Loser*, Vertrauenshaftung im schweizerischen Schuldrecht (2006) 143, no 206.

9 ATF 134 III 390, 395 c 4.3.2 (2008).

10 ATF 134 III 390, 398 c 4.3.3 (2008). *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 53c ff.

11 ATF 134 III 390, 395 c 4.3.2 (2008).

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Decision

It was held that, by this behaviour, the customer violated the principles of good faith and mutual trust and was obliged to pay damages according to art 914 GCC. 2

Comments

According to Greek law, behaviour that is contrary to good faith can generate tortious liability under art 914 GCC.[1] Thus, the special relationship between a bank and its customers creates, according to the principle of good faith, an obligation of the contracting parties to behave in an honest way. When this does not happen, an obligation to pay damages may arise. It has to be noted here that the same obligation would arise according to the principle of 'good faith' even if the bank had made the erroneous payment to someone who was not its customer; that person would also be under an obligation of good faith to behave honestly and so would also have to pay damages if he kept the money. 3

It has to be noted that although the violation of contractual obligations – like those deriving from the relation of the bank with its customers – is governed by specific rules (arts 330, 335f, 362ff, 382f GCC), and it may be argued that the said provisions, as special provisions, prevail over those regarding tortious liability and do not concur with them (the principle of *non cumul*), Greek jurisprudence adopts, as also stated above, the principle of 'the free concurrence of claims'.[2] According to this principle, when an act or omission which constitutes the contractual non-performance is simultaneously and in itself unlawful, the two liabilities, delictual and contractual, concur and the plaintiff can opt to base his claim on either of them. 4

1 See, among others, *P Kornilakis*, Law of Obligations, Special Part I (2002) § 84 3 490.

2 See *P Kornilakis*, Law of Obligations, Special Part I (2002) § 79 4, 461ff, where also (462, fn 3) reference to the abundant relevant jurisprudence is made; *M Stathopoulos*, Contract Law in Hellas (in English) (1995) § 41; ibid, § 15 no 10. See also, indicatively, AP 895/2004 ChrID 2004, 1009. AP 1145/2003, EllDni 2004, 458 = DEE 2004, 1179 = EEmpD 2004, 819 = ChrID 2004, 55 followed by comments of *E Kastrissios*, AP 1538/2002, published at NOMOS, AP 836/2002 DEE 2002.

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6. France

Cour de cassation, chambre commerciale (Supreme Court, Commerical Division) 27 February 1996, Vilgrain

94-11.241, Bull civ IV, no 65; JCP 1996, II, 22665, note *Ghestin*; D 1996, 518, note *Malaurie*; RTD civ 1997, 114, obs *Mestre*; LPA 17 February 1997, note *DR Martin*

Facts

1 Vilgrain, the chairman of the board of a commercial company, had agreed to help a minority shareholder to sell her shares and had bought them himself. After only a short time, he resold those shares at a much higher price to another company, which was taking control over his company and with which he had been negotiating for some time. When she learnt about this, the minority shareholder brought a claim in order to have the first sale rescinded because of the director's fraudulent misrepresentation (*réticence dolosive*, art 1116 *Code civil*). The appellate court granted the claim and its decision was challenged before the *Cour de cassation*.

Decision

2 The *Cour de cassation* affirmed the appellate court's decision, stating that a company's director had a duty of loyalty vis-à-vis the company's shareholders, and that this duty had been breached in this case.

Comments

3 Although the legal basis of the claim was in contract, this case is nevertheless interesting from the perspective of tort law and liability for misconduct. As a matter of fact, fraudulent misrepresentation is closely connected to delict and to fault,[1] and it has always been accepted in tort law that the victim of fraudulent misrepresentation could seek damages on the basis of art 1382 (now art 1240) of the *Code civil* in lieu of or in addition to asking for the rescission of the contract.[2] In this case, quite independently of the remedy sought by the plaintiff, the director was clearly at fault.

4 This decision is especially interesting as it demonstrates that proximity between the parties can create a special duty, the violation of which constitutes a fault. Such special duties, not expressly provided for in any statutory or regulatory text, are however exceptional in French law. The reason for this is probably that the general duty of care leaves little room for them. Although the *Cour de cassation* does not

1 See *F Terré/P Simler/Y Lequette*, Les obligations (11th edn 2013) no 231ff.

2 See Cass civ 1, 4 February 1975, no 72-13.217 Bull civ I, no 43.

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speak explicitly about proximity, it is clear that it is this element that justifies the existence of the special duty of directors. Absent such proximity, there is no special duty whereby the buyer should inform the seller of the value of the thing sold, even if the former knows that he can make a fair profit by re-selling the purchased item immediately.[3]

7. Belgium

Cour d'appel (Court of Appeal) Ghent, 25 February 2005
Bull Ass/T Verz 2006, 123

Facts

During an indoor climbing session, two students were training together. One of them always remained on the floor to ensure the safety of the other who was climbing, by holding on to them with a rope. At one point, A, the student on the ground, was distracted and failed to provide the necessary counterbalance with the safety rope. This caused V to fall. **1**

Decision

The Court of Appeal held that A had, in a moment of distraction, failed to use the safety system which had, however, been shown to him directly before the beginning of the climbing session and, due to this fault, he was responsible for the accident. **2**

Comments

In his decision, the judge was not interested in the friendship or closeness which existed between the victim and the negligent party. He only examined the harmful behaviour of the latter, in an objective manner. **3**

It is in this that the decision allows us to demonstrate that in Belgian law, we do not take friendship or enmity, familial ties or other close relationships into account when assessing whether fault exists. **4**

3 See the famous *Baldus* case, in which Mrs Boucher had sold 135 photographs of Baldus to Mr Clin at the price of FF 1,000 each, ignorant of the fact, known to the latter, that they were worth around 20 times more; the *Cour de cassation* quashed the appellate court's decision that had ordered Mr Clin to pay nearly FF 2,000,000 in damages to Mrs Boucher, on the ground that he owed her no information duty: Cass civ 1, 3 May 2000, no 98-11.381, Bull civ I, no 131, JCP G 2001, II, 10510, note *C Jamin*, RTD civ 2000, 566, obs *J Mestre* et *B Fages*.

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5 We know that the judge compared the approach of the person who committed the harmful act with that which would be expected of an ordinarily prudent and diligent person in the same circumstances, in order to determine whether a fault had been committed. The reasonably prudent person is not, in these circumstances, more prudent because he/she is dealing with a member of his/her family or a friend rather than someone who is a stranger to him/her. Taking account of the objective assessment of the fault, the personal characteristics of the person who committed the harmful act, including any possible relationship of proximity they might have to the victim, is in principle excluded from consideration in constructing the abstract figure of the reasonably prudent person.

6 Conversely it is true that the reasonably prudent person takes the sensitivities and weaknesses (such as young or old age, illness, etc) of the person he/she is dealing with into account in order to adapt his/her behaviour accordingly. For example, prudence might require more vigilance when a person is dealing with a child,[1] rather than an adult. Or one might even be bound to take certain precautionary measures in view of the victim's particular situation (therefore, in the example in the Questionnaire featuring the blind child, it is quite possible that a Belgian judge would consider that the instructor should, on this occasion, have foreseen the need for protective glasses during the walk).

Cour d'appel (Court of Appeal) Liège, 26 June 2008
JLMB 2011, 442

Facts

7 Company A contacted company V in order to have an apartment block built. The development of the project, the clarification of the respective tasks and the agreement on the practical arrangements of the collaboration were the subject of relatively long negotiations. A notary was responsible for providing assistance to the parties in the drafting process of the contract. Several projects are prepared and discussed. Once the contract was finalised, the parties continued in their attempts to realise the project, meeting several potential purchasers and several contractors who were to work on the site.

8 Without any real reasons, under the pretext of fears about some points which had been known for quite a long time, A announced its intention to stop the project

1 See, for example, for the case of an accident involving a young child at a swimming pool, Court of Appeal of Mons, 17 February 1996, RGAR 1997, 12859, which specifies that 'whatever the precise circumstances of the accident, in any event [the swimming pool operator] has a general duty of care and safety which [he] must look after in the interests of his clients, and particularly as regards young children who often visit' (free translation).

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after eight months of discussion. V decided to bring a lawsuit to obtain damages considering the expenses incurred in vain and the loss of earnings it incurred. Further, V was informed that A had signed an agreement with another company.

Decision

The first instance judge and the Court of Appeal of Liège ordered A to compensate the damage suffered by V. According to the judges, despite the fact that parties are free to contract or not, they are subject to a general obligation to initiate, to pursue and to break negotiations prudently. Regarding this obligation, they decided that A frustrated V's legitimate expectation, by negligently creating the appearance that the project had been finalised. They added that A's faulty conduct consists in the fact of having pursued the negotiations unreservedly and of having revealed fears on points which it had been aware of from the beginning of the negotiations. **9**

Comments

Although the close relationships between parties (friendships, family relationships) are not taken into account to assess the existence of fault, it is true that a person may be subject to some obligations deriving from the general obligation of care and diligence, considering his/her relationship with another person. This is especially true as far as pre-contractual relations are concerned. It is recognised that the breaking of pre-contractual negotiations should not violate the legitimate expectations of the other party.[2] The commented decision illustrates this principle. **10**

To this extent, one may consider that the relationship between two parties constitutes an element that allows the judge to determine the conduct which should have been adopted by the defendant. **11**

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 12 May 1995, ECLI:NL:HR:1995:ZC1725

NJ 1996/118 ('t Ruige Veld)

Facts

A 13-year-old mentally handicapped patient of a mental health care institute set a house on fire. The insurer of the house filed a recourse action against the mental health care institute. **1**

2 *P Wéry*, Droit des obligations, vol 1: Théorie générale du contrat (2011) 150.

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Decision

2 The standard of care appropriate in society requires, in relation to mentally handicapped persons, that anyone who has, in the course of treatment, accepted supervision over them is required to take as much care as reasonably possible so that they do not harm others or themselves. The mental health care institute was held liable.

Comments

3 This case illustrates that professional institutions, which have the care of patients (health institutions) or children (schools), owe a special duty of care to these persons as well as to others.[1] Moreover, in general, there is a particularly strict duty of care for children because of their vulnerability.[2]

Hoge Raad (Dutch Supreme Court) 12 May 2000, NJ 2001/300, with comment *Jac Hijma*

VR 2001/77 (Moving sisters)

Facts

4 The plaintiff, Wendy, helped her sister, Monique, to move a chest of drawers. Due to an unexpected and unfortunate movement by Monique, Wendy severely hurt her arm, which eventually had to be amputated. Wendy argued that her sister was liable.

Decision

5 The Supreme Court held that Monique's behaviour did not make the accident so probable that she had to refrain from it. Although the courts of lower instance held Monique liable, the Supreme Court decided that she was not liable.

Comments

6 Although the Supreme Court did not elicit its reasoning, although it explicitly decided against the courts of lower instance, this case is seen among scholars as an illustration of the line of thinking according to which, in home situations and within family relationships, in the case of unpaid help, unlawfulness is only accepted beyond a(n) (un)certain threshold.[3]

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1 See Onrechtmatige Daad, art 6:162, sec 2 BW (*Jansen*), cmt 90.

2 See Onrechtmatige Daad, art 6:162, sec 2 BW (*Jansen*), cmt 95.2.

3 See the authors mentioned in Onrechtmatige Daad, art 6:162, sec 2 BW (*Jansen*), cmt 94.2.

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9. Italy

Corte di Cassazione (Court of Cassation) 22 January 1999, no 589

Foro It 1999, I, 3332 note by *F Di Ciommo*

Facts

MP, a minor at the time of the facts, fell on broken glass from a bottle, and after being taken to hospital, had an operation on her right hand, which did not recover its full functionality. MP's father, representing his daughter, took action against the hospital and the surgeons. 1

Decision

The court related the loss to negligence by the doctors who did not carry out the suture correctly and did not diagnose the damage to the median nerve promptly. The judges declared that the liability of the hospital and surgeons was based on the legal relationship between the hospital and the doctors employed by the public facility and the patients. Even though there is no expressly contractual relationship, the *Corte di Cassazione* placed these relationships under the contractual paradigm. In particular, the court considered that 'with regard to the doctor, an employee of the hospital, there would always be a contractual liability arising out of an obligation without performance criteria, which places this on the boundary between contract and tort. The basis of the liability goes back to the 'social contact' between the doctor and the patient.' The court also specifically stated that 'contrary to what happens in civil law regulations, where the tendency to establish that liability in the area of *torts* persists', in countries with a Roman law tradition, the liability of the doctor falls within the scope of the contract. 2

Corte di Cassazione (Court of Cassation) 14 June 1999, no 5880

Danno Resp 1999, 1022, note by *G Pedrazzi*

Facts

Mr V, a customer of a bank, was used to making payments to the bank through a bank employee, Mr M, who collected the funds at his residence and used pre-printed forms of the bank to conduct these transactions. After the employment relationship between M and the bank came to an end, M went to V who, being unaware of the fact that M no longer worked for the bank, gave him a substantial sum to pay into his account without knowing that he was not working for the defendant bank. Obviously, M disappeared with the sum of money. V then took action against the bank, claiming compensation for the loss for not having informed him that M was no longer their employee. 3

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Decision

4 The *Corte di Cassazione* considered that, although there was no general and absolute obligation upon the bank to give information to its customers and third parties that any employment relationships with its employees have been terminated. Nonetheless, it held that the precept of *neminem ledere* (harm no-one) of art 2043 of the Civil Code required the bank to give adequate notification whenever third parties may be led to rely on the existence, or continuation, of an employment relationship. On this basis, the bank was held liable for the client's money that was misappropriated by its former employee.

Comments

5 In Italian law, no legislative provision enacts a general rule establishing that A should be liable to V because there was a particular relationship between them that justifies the imposition of liability for a certain conduct. Nonetheless, in reading cases, one can reach the conclusion that the scope and intensity of the duties owed by A to V is shaped by the special relationship existing between them. As a matter of fact, there are some situations where liability is premised upon the particular relationship existing between the parties. The most important case is the liability of a doctor, employed by a public hospital, for medical malpractice, which up until the recent reform of medical liability law was considered by the *Corte di Cassazione* to be a form of contractual liability, by virtue of the particular relationship binding the patient to the attending doctor and the hospital, although no contract was actually concluded between them. The contractual basis of the liability invoked by the patient in such a context has now been called into question by a recent legislative reform (Law 189/2012) and a judgment holding that this should rather be considered as a case of extra-contractual liability, as the new law on medical liability passed in 2017 expressly establishes with respect to actions against health professionals (Law 8 March 2017, No 24, art 7).[1] Certainly, however, the particular situation of the two parties in such a case justifies a particular liability regime. The second case to consider in this respect is the liability of a bank for providing inaccurate information about the creditworthiness of one of its clients to a third party. In this case too, the link established by the release of information, and the reliance on such information by the party receiving it, may justify the imposition of liability.[2]

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1 Court of Appeal (App) Milano, 17 July 2014, in <www.personaedanno.it>. The recent law on medical liability mentioned above establishes a complex regime, which cannot be fully considered here. Hospitals (and their insurers) may be sued on the basis of contractual, rather than extra-contractual liability rules.

2 Cass 9 June 1998, no 5659, Foro It 1999, I, 661, with note by *L Lambo*.

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10. Spain

Sentencia de la Audiencia Provincial Biscay (Judgment of Provincial Court of Biscay) 15 March 1999

AC 1999\881

Facts

V went climbing with his friends X and A. While for both V and X it was the first time they climbed, A was an experienced mountaineer who was a member of the Mountaineering Federation. During the descent, A helped V by holding a rope, but at one point, apparently because of V's weight and the inadequate length of the rope, the rope jumped out of the safety mechanisms and V fell through the cracks and died. His father brought a claim against A and the insurer of the Mountaineering Federation and both first and second instance courts ordered them to pay damages. 1

Decision

A person who practises a sport must assume the consequences inherent in it. But this statement must be qualified in those cases where damage is not caused by the sport itself, but by the state of the premises where it is practiced, by the absence of measures taken by the organisation to prevent such risks, or when a practitioner of a sport is still in a learning phase and the person who teaches him does not take the required precautionary measures or does not use the required instruments. This case shows that the lack of safety measures led to the accident. The defendant did not consider V's weight and that V's inexperience advised caution. A should have foreseen that the rhythmic pace that this technique required going downwards was difficult for someone who had no experience. It may not be said that, because the victim was attached by ropes to his friend, he should have assumed his lack of care, since in this case we are not dealing with two people who were equally able to make decisions, but rather with a person who was an expert and another who was not, and who, accordingly, could hardly question whether the technique or material that was used was adequate or could minimise the risk increased by his lack of experience. 2

Comments

This case illustrates the special trust that determines a higher duty of care, which arises from the expertise of a person who interacts with another who is not, although it may be understood that the victim had assumed the danger posed by certain activities. Regardless of the fact that the event took place while friends were participating in a recreational activity, the trust that the victim had in his fellow col- 3

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league triggers the latter's liability due to the higher standard of care, which takes into account the knowledge gained in his experience as a mountaineer.

4 Other non-contractual contexts where this special relationship of trust is an essential element when analysing the performance of one's duties towards third parties are the areas of business where the public relies upon reports delivered by professionals. Professionals who improperly performed property appraisals have been held liable towards third parties who relied on their reports to buy a piece of land[1] or to accept mortgages on a number of apartments.[2] The very same idea applies to the duties towards third parties arising from audit reports, as long as the scope of the auditor's liability includes investors and other relevant third parties.[3] According to art 22.2 II Auditors' Act (as consolidated by Royal Legislative Decree 1/2011, of 1 July): 'In this respect, a third party may be any legal or natural person proving that they had acted or refrained from acting on the basis of the audit report, insofar as it was an essential and relevant element for its consent, conduct or decision'.

5 In the area of pre-contractual liability, the Spanish Civil Code does not make any reference to the situation where one of the parties causes damage to the other through his malicious or incorrect conduct in the course of contractual negotiations. In fact, it does not create any duties for the parties during the pre-contractual stage. However, the broad scope of the general rule of liability for torts (art 1902 CC) probably makes it unnecessary to make use of the idea of duties of protection at the pre-contractual level. Although case law and legal scholarship is not unanimous, the prevailing opinion in Spanish law is that *culpa in contrahendo* is governed by the rules of tort (art 1902ff CC).[4] It may be noted that some court decisions – and legal scholars – ground liability for *culpa in contrahendo* upon the general doctrine on the abuse of rights (pursuant to art 7 CC);[5] however, that leaves the fact that it is governed by art 1902 CC unchanged (STS 16.12.1999 [RJ 1999\8978]).

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1 STS 28.3.2012 (RJ 2012\5592).

2 STS 18.7.2013 (RJ 2013\5532).

3 See STS 7.6.2012 (RJ 2012\7408). In legal scholarship, among many others, *JM Busto Lago*, La responsabilidad civil de los terceros de confianza y la teoría de los flood gates, AJA 881 (2014) 3 and *M Alba Fernández/T Rodríguez de las Heras Ballell*, Las agencias de 'rating' como terceros de confianza. Responsabilidad civil extracontractual y protección de la seguridad del tráfico, RDBB 2010, 141–177.

4 Among others see *Á Carrasco Perera*, Comentario al Art 1101 CC, in: M Albaladejo (ed), Comentarios al Código civil y compilaciones forales, vol XV-1 (1989) 429 and *J Espinoza Espinoza*, La responsabilidad civil precontractual, Revista general de legislación y jurisprudencia 2 (2014) 207, 250.

5 See *M Paz García Rubio*, La responsabilidad precontractual en el Derecho español (1991) 131 with further references.

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11. Portugal

Supremo Tribunal Administrativo (Supreme Administrative Court) 3 March 1998 (Maria Angelina Domingues)

Facts

V1 and V2, married, acquired land with the intention of building a house, and for that matter they required the City Hall of town B to approve a viability study for the construction. The City Hall did not provide its approval because the urbanisation plan did not allow constructions in that area. As a result, V1 and V2 sold the land to C to avoid further losses. Later, they found out that a building was being constructed, under license, on that land. 1

Outraged by the City Hall's contradictory acts, they asked if there had been any alteration to the urbanisation plan since the time when they sought permission to build on the land. It was proved that the urbanisation plan had not been modified in the time between the two contradictory acts, and consequently V1 and V2 sought compensation for the damage suffered as a result of selling the land (below its commercial value) and for the others inconveniences suffered as a consequence of being given the wrong information by the City Hall. 2

Decision

V1 and V2 had proven the unlawfulness and fault of the City Hall in its reply to the plaintiffs' request, as the urbanisation plan had not undergone any changes that would have justified different responses to the same question asked first by V1 and V2 and afterwards by C. The City Hall had a legal obligation to provide appropriate and accurate information and, because it did not do so, the court decided that it had not complied with this duty, its behaviour was unlawful and faulty. The City Hall was ordered to pay compensation to V1 and V2. 3

Comments

The legislator felt the need to establish specific forms of liability, in addition to the general clause of liability of art 483(1) of the Civil Code, in the two strands of unlawfulness (the violation of individual rights, and the violation of the legal provision to protect legitimate interests)[1] in order to cover cases that would not be subsumed in these provision. One of these cases is the liability for advice, recommendations and information. 4

1 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 548; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 562ff.

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5 Liability for advice, recommendations and information is recognised in art 485 of the Civil Code, which establishes, as a general rule, that anyone who gives advice, recommendations or information, even if given negligently, shall not be held liable, stating: 'Mere advice, recommendations or information shall not render the person from whom the same emanate liable even if there is negligence on his part'. However, the second number of the same provision allows three exceptions to that rule. Thus, liability will be established when the person giving the advice, recommendation or information: (a) had assumed the responsibility for damage arising from the information; (b) there was a legal obligation to give that information and the person acted with fault; and (c) the act constituted a criminally punishable act. The discussion on this has not been without controversy: some authors think that the person giving information has to be held responsible for the said information,[2] therefore, advocating that, because light and thoughtless conduct cannot be endorsed, the article should be interpreted restrictively; others justify this provision by pointing to the fact that, in the majority of cases, the act of giving information is not an appropriate way to perform obligations, considering that the legislator established exceptions when this is not the case.[3] Article 485(1) of the Civil Code only has simple information (such as that given outside of the business or professional field[4]) in mind; however, in cases where there is a legal (as was our case) or a contractual duty to act and the agent does not fulfil his obligation, by negligence or wilful misconduct (a simple mistake is not relevant[5]), he will be liable to pay damages to the person to whom he was obligated to give information.[6]

6 In the case in study, the author of the misinformation was a public servant that was obliged to act because of his/her duties. Therefore liability falls upon the City Hall, which had a legal duty to give accurate information. That is, the City Hall had an obligation to inform because of the functions that were given to it as a department of the state administration, a duty that is established in art 268(1) of the Constitution of the Portuguese Republic[7] and in art 7(1)(a) of the Administrative Pro-

2 See, among others, *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) and *J Sinde Monteiro*, Responsabilidade por informações, Cadernos de Direito Privado no 36 (November/December 2002) 22.

3 See, namely, *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 550; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 564 f; *F Pessoa Jorge*, Ensaio sobre os pressupostos da responsabilidade civil (1999) 310.

4 See *J Baptista Machado*, A cláusula razoável, Revista de Legislação e Jurisprudência no 120, 163.

5 See *P Lima*/*A Varela*, Código Civil Anotado, vol I (4th edn 1998) 487.

6 See *P Lima*/*A Varela*, Código Civil Anotado, vol I (4th edn 1998) 486.

7 'Citizens shall possess the right to be informed by the Administration whenever they so request as to the progress of the processes in which they are directly interested, as well as to be made aware of such decisions as are taken in relation to them.'

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ceedings Code.[8] Failing to do so, the City Hall was held liable on the terms set by art 485(2) of the Civil Code. The City Hall could, however, in its turn, claim compensation from its public servant if he/she acted intentionally or with gross negligence.

12. England and Wales

Hedley Byrne & Co Ltd v Heller & Partners Ltd, House of Lords, 28 May 1963

[1964] AC 465

Facts

Hedley Byrne, the claimant, was a firm of advertising agents. Easipower Ltd asked Hedley Byrne to place substantial orders for advertising time on television programmes and advertising space in certain newspapers on credit. Before doing so, Hedley Byrne got its bank, National Provincial Bank, to solicit from Easipower's banks, Heller & Partners Ltd, a view on Easipower's creditworthiness, which it did 'in confidence, and without responsibility' on Heller's part. Heller, who gave the advice for free, responded that Easipower was a '[r]espectably constituted Company' that was 'considered good for its ordinary business engagements'. Hedley Byrne relied on this assessment and as a result lost over £ 17,000 when Easipower went into liquidation. It sued Heller arguing that the replies given by them were negligent and painted a false and misleading picture of their client's credit. Heller argued otherwise; in any case, they averred, the words employed were apt to exclude any liability. 1

Decision

The House found unanimously for Heller & Partners on the basis that it had successfully excluded any liability to Hedley Byrne by its express disclaimer of responsibility. However, in the absence of a disclaimer, the Law Lords accepted that a duty of care might arise in respect of the provision of advice by a party possessed of special skill who knows that the person to whom the advice is provided trusts him to exercise due care and will place reliance on his skill and judgement. In such a case, it would be open to the court to find that there was a 'special relationship' of proximity between the parties that was 'equivalent to contract' and thus apt to establish a duty of care. 2

8 'The departments of the state administration taking over the responsibility, namely, for: (a) giving information and clarification to individuals and all the explanations that they need shall act in close cooperation with the individuals, seeking reasonable assurance of their involvement in the administrative procoess.'

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3 For several of the Law Lords, there was a need for an especially close relationship of proximity because the case concerned negligent words rather than negligent acts. As Lord Pearce explained:[1]

> 'Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage.'

4 Further, as Lord Reid observed, '[q]uite careful people often express definite opinions on social or informal occasions even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally or in a business connection.'[2]

Comments

5 The case is one of economic loss caused by an innocent but negligent misrepresentation. Before *Hedley Byrne*, the position was that a duty of care in respect of such loss only arose in a contractual or fiduciary context. Although liability on the facts was denied on the basis of the disclaimer, subsequent cases accept that a bank can in principle be liable to a third party for endorsing the creditworthiness of its customer.[3] *Hedley Byrne* thus added an important dimension to tortious claims: that is, that a duty may arise even in respect of pure economic loss where a 'special relationship' is shown to exist. The *Hedley Byrne* principle has been developed in subsequent decisions and applied, for example, to gratuitous advice in a purely social context[4] and to the delivery of professional services not specifically related to the provision of advice.[5]

6 Nowadays, the *Hedley Byrne* decision is considered the major exception to the general exclusion of pure economic loss from the scope of the duty of care,[6] but it is interesting to note in retrospect that the Law Lords' opinions in the case are more concerned with the difference between negligent words and negligent acts rather than with the specific problems of pure economic loss. Indeed, Lord Devlin described it as 'nonsense' to make a distinction between financial loss caused through physical injury and financial loss caused directly,[7] though in the modern law the

1 [1964] AC 465, 534.
2 [1964] AC 465, 483.
3 See eg *UBAF v European American Banking Corpn, The Pacific Colcotronis* [1984] QB 713.
4 *Chaudhry v Prabhakar* [1988] 3 All ER 718.
5 *Henderson v Merrett* [1995] 2 AC 145.
6 See eg *M Lunney/K Oliphant*, Tort Law: Text & Materials (5th edn 2013) 396 ff.
7 [1964] AC 465, 517.

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distinction between pure and consequential economic loss is considered crucial. It is also worth noting that the introduction of the Unfair Contract Terms Act 1977 may prevent a disclaimer such as that in *Hedley Byrne* from applying on appropriate facts arising today.[8]

7 The reference in the case to 'proximity' harks back to the famous neighbour principle in *Donoghue v Stevenson*,[9] in which Lord Atkin asked 'Who, then, in law is my neighbour?' and continued: 'The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[10] In his view, the term 'proximity' was appropriate to denote the close and direct relations necessary to give rise to a duty of care provided it was not confined to mere physical proximity.[11] Proximity is now regarded as one of three constituent elements of the duty, along with the foreseeability of damage and the fairness, justice and reasonableness of imposing such a duty.[12] While some consider that the three prerequisites 'overlap with each other and are really facets of the same thing',[13] others view proximity as conceptually distinct.[14] In practice, the existence of the proximity necessary to give rise to a duty of care is never disputed in routine cases of physical injury, but raised as an issue only when some problematic feature is present (eg loss that is purely mental or purely economic or conduct consisting of an omission rather than a positive act).

8 Though this summary is included in the present volume under the heading 'The Required Standard of Conduct' it must be emphasised that English lawyers would not classify it in that way. Within the framework of English law, it is a case about the existence and scope of the duty of care, and not about the standard of care owed when a duty exists or the assessment whether the defendant attained that standard on the facts.

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8 See eg *Smith v Eric S Bush* [1989] 1 AC 831 (liability of a surveyor to a purchaser of a property by a mortgage despite a disclaimer).

9 [1932] AC 562. See 13/13 nos 1–6.

10 [1932] AC 562, 580.

11 [1932] AC 562, 581, referring to the discussion of proximity by AL Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491, 504.

12 *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

13 *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 633 per Lord Oliver as endorsed by Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1994] 1 WLR 1071, 1071. See also *Stovin v Wise* [1996] AC 923, 932 per Lord Nicholls.

14 For a detailed analysis, see *M Lunney/K Oliphant*, Tort Law: Text and Materials (5th edn 2013) 138 ff.

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Home Office v Dorset Yacht Co Ltd, House of Lords, 6 May 1970
[1970] AC 1004

Facts

9 The claimant company owned a motor yacht which was lying at moorings off Brownsea Island in Poole Harbour. One night, seven Borstal boys (young offenders) escaped from Brownsea Island where they had been on a training exercise under the control and supervision of the defendant. In the course of their escape, the boys boarded, cast adrift and damaged the claimant's yacht. Five of the boys had records of previous escapes from Borstal institutions. The claimant alleged negligence on the part of the defendant's officers in failing to exercise effective control or supervision over the boys despite their knowledge of the boys' criminal records and the previous escapes.

Decision

10 On a preliminary issue considered on the pleaded facts, the House of Lords (Viscount Dilhorne dissenting) ruled that the defendant's officers owed the claimant a duty of care inasmuch as they had had control over the boys and it was likely (per Lord Reid) or at least reasonably foreseeable (per the other members of the majority) that, if they did not exercise this control effectively, the boys might seek to escape and cause damage to those in the vicinity in doing so. Whether or not breach of such a duty could be proven on the facts was to be decided at trial.

Comments

11 The above decision is rather difficult to summarise, as each of the four members of the House of Lords majority took a slightly different approach. For Lord Reid, for example, the true issue was remoteness of damage or *novus actus interveniens* (two arguably distinct concepts which he seems to have conflated), though his analysis on that issue apparently underpins his conclusion that a duty of care existed.[15] For the other members of the majority, the scope of the officers' duty of care appears to have been the decisive question, and they clearly contemplated that the heightened risk to those in the vicinity of the training exercise, especially in the event of an escape from the officers' supervision, might justify a conclusion on the facts that such a duty was indeed owed to the claimant company. In addition to the foreseeability of the damage, two distinct ideas may be extracted from this reasoning: first, the

15 Near the conclusion of his opinion, for example, he asked rhetorically: 'If the carelessness of the Borstal officers was the cause of the plaintiffs' loss, what justification is there for holding that they had no duty to take care?'

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claimant's 'geographical proximity'[16] to the defendant's activities; second, the control exercised by the defendant's officers over the young offenders.[17] It may be inferred that, had the boys reached the mainland and committed a robbery some distance away, this would have fallen outside the scope of the duty of care for whose breach the defendant was responsible and could not therefore have given rise to any liability in damages on its part.[18]

The control reasoning is also employed in the context of the liability of parents and persons acting *in loco parentis* for harm caused by children in their care,[19] but is unlikely to be applied to adults except in the narrow context of persons in lawful detention.[20] **12**

The same general considerations are also relevant in establishing liability *to* the person under the defendant's control, for example a child in the defendant's school,[21] an incapacitated person to whom the defendant has assumed responsibility,[22] or a participant in a dangerous activity that the defendant has organised.[23] There is no duty in English law to assist another person, even in a life-threatening situation, except where some form of proximate relationship exists.[24] **13**

Again, it should be noted that the analysis of such cases in English law has nothing to do with the required standard of conduct as such, and focuses instead on the scope of the duty of care. **14**

16 [1970] AC 1004, 1054 per Lord Pearson. The *temporal* proximity of the damage to the escape might also have been emphasised, but does not seem to have been a major part of the Law Lords' reasoning.

17 '[C]ontrol imports responsibility': [1970] AC 1004, 1055 per Lord Pearson.

18 As Lord Pearson observed: 'In other cases a difficult problem may arise as to how widely the "neighbourhood" extends, but no such problem faces the plaintiffs in this case': [1970] AC 1004, 1055.

19 See eg *Carmarthenshire County Council v Lewis* [1955] AC 549 (duty of care owed by school).

20 Cf the rejection of the control reasoning in *Hill v Chief Constable of West Yorks* [1989] AC 53 where a suspect in a serial murder inquiry who was ultimately identified as the perpetrator was never actually taken into custody.

21 *Barnes v Hampshire County Council* [1969] 1 WLR 1563.

22 *Barrett v Ministry of Defence* [1995] 1 WLR 1217 (drunken serviceman).

23 *Watson v British Boxing Board of Control Ltd* [2001] QB 1134 (duty to provide appropriate medical facilities and assistance at boxing bout).

24 *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, 192 per Lord Keith ('[no] liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air and forbears to shout a warning'); *Sutradhar v National Environment Research Council* [2006] 4 All ER 490 (no duty on geological survey team to identify risk of major environmental disaster to population of Bangladesh).

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13. Scotland

Cross v Highlands and Islands Enterprise, Court of Session (Outer House), 5 December 2000

2001 SLT 1060

Facts

1 An employee of the defenders committed suicide, and his widow, children, and father sought damages from the defenders, alleging that his suicide was caused by depression resulting from the stress to which he was subjected at work. The pursuers argued that the defenders were in breach of duties of care owed to them at common law and under the Management of Health and Safety at Work Regulations 1992 ('the 1992 Regulations'). In relation to the latter, they argued that, given the defenders' general knowledge of the possible effects of stress at work and, in particular, that the deceased had been ill as a result of such stress, they were under a duty under reg 3 of the 1992 Regulations to make an assessment of the risks at work.[1] The defenders argued inter alia that psychiatric injury should be treated differently from physical injury, and that only injury as a result of psychiatric injury ('nervous shock') was recoverable.

2 At a proof (ie a trial of the facts), evidence was led that the deceased had approached his manager, mentioning problems with his workload, and, shortly after this, was certified unfit for work by his doctor (who identified 'stress' as the cause). The deceased was certified as fit for work two months later. Shortly before returning to work, he attended a session with a stress adviser to whom he was referred by the defenders' personnel manager. He had committed suicide two months after returning to work.

Decision

3 The judge (Lord Macfadyen) absolved the defenders from any liability in respect of the deceased's suicide. As a matter of fact, he found that, although the deceased was suffering from a major depressive disorder, it had not been proved that this was caused by stress at work. In relation to the defenders' common law duty of care towards the deceased, the judge held that the duty of an employer to take reasonable care for the employee's safety and health extended to a duty to take reasonable care not to subject the employee to working conditions that were reasonably foreseeably likely to cause him psychiatric injury or illness, so-called 'nervous shock' not being

1 Regulation 3 of which provided that an employer 'shall make a suitable and sufficient assessment of ... the risks to the health and safety of his employees to which they are exposed whilst they are at work'.

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the only type of psychiatric injury that could give rise to an action in negligence. In judging what was reasonably foreseeable, it was necessary for an employer to bear in mind any special susceptibility of the employee to harm of which the employer was actually or ought reasonably to have been aware, and in the present case, the relevant question was the likelihood of the deceased suffering psychiatric, as opposed to physical, injury. In relation to that issue, the judge held that the evidence did not establish that, prior to the deceased committing suicide, the defenders knew that he was suffering from depression, or the severity of that illness. As to the alleged breach of the 1992 Regulations, the judge held that the duties created by the 1992 Regulations did not give rise to a civil right of action.

Comments

The judgment in this important case is a detailed one (running to 130 paragraphs), **4** touching on a number of issues relating to duty of care, standard of care, causation (including the question of whether the suicide was a *novus actus interveniens*), title to sue under UK Regulations, and the possible direct effect of the European Directive on which the 1992 Regulations were based. Not all of these issues are addressed in the facts and decision above, and only one is considered in these comments: the relevance of the relationship between pursuer and defender to the standard of care to be shown by the defender.

On this issue of the relevance of the parties' relationship (ie their proximity) and **5** the standard of care expected of the defender, the judge emphasised a point that has already been encountered earlier in discussion of the *Porteous* case (see 3c/13 nos 1–6): that an employer's duty of care is owed to each employee as an individual, and the employer must therefore take into account any particular susceptibility of the employee of which he is or ought to be aware (the *Porteous* case was cited by the judge in this respect). The judge, in holding that it was therefore 'necessary to bear in mind as a factor affecting what is reasonably foreseeable the actual knowledge of the employer of any special susceptibility to harm possessed by the employee, and any such susceptibility of which the employer (if not actually aware) ought reasonably to have been aware',[2] was thus defining the standard of care to be met by the employer by reference to the proximity of the relationship between the parties, and the information which this relationship had disclosed (or ought reasonably to have disclosed).

Employment relationships provide a clear example of the judicial practice of **6** considering the proximity (as well as other characteristics) of the parties in defining the appropriate standard of care to be expected from a defender. Another category

2 At 1078.

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of case where this commonly occurs is in relation to occupiers' liability, where known vulnerabilities of those entering premises are taken into account when assessing the applicable standard of care under the Occupiers' Liability (Scotland) Act 1960. A recent case concerning the liability of a solicitor for the fraud of his client indicates that the standard of care expected of a solicitor will also be directly affected by the specific details of the relationship between the solicitor and the party on the other side of the relevant transaction.[3] On the facts, the court held that the standard to be expected extended to requiring the defender proactively to warn the pursuer that the former's client had been acting in a fraudulent fashion.

14. Ireland

McKenna v Best Travel, Supreme Court, 18 November 1997
[1998] 3 IR 57

Facts

1 The plaintiff booked a holiday in Cyprus through an agent of the first defendant holiday company. While there she booked a mini-cruise to Egypt and Israel (advertised in the defendant's brochure); a coach tour to Bethlehem was included. During the course of the tour the plaintiff was injured when a protester threw a stone through the window of the coach. She sued the travel company and the travel agent for breach of contract and breach of duty in tort. The breach of contract claim was dismissed in the IEHC, but the negligence claim was sustained. The defendants appealed.

Decision

2 The IESC allowed the appeal as there was insufficient evidence of any negligence to sustain a verdict in favour of the plaintiff, as the defendants had no special knowledge of the risk. Even though the defendants were not directly involved in booking the mini-cruise, they had knowledge of the plaintiff's intent to do so; as a result they owed a duty in respect of the plaintiff's safety on the mini-cruise. The scope of the duty was confined to such risks as should be known to the travel company and not to the tourist; the tourist would be expected to acquaint herself with general knowledge of the destination, such as could be gleaned from advertisements or news items relating thereto. The risk that materialised was in the latter category.

3 *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 79.

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Comments

This case indicates that proximity can arise from contractual relationships and the duty in tort may, in some cases, be more extensive than the terms of the contract. However, the tortious duty does not displace the plaintiff's obligation to acquaint herself with the risk involved; this is a rare example of self-responsibility being examined as part of the standard of care enquiry. Absent a special relationship, there is no general obligation to offer assistance to others in Irish law.[1] **3**

Kelly v Haughey Boland & Co, High Court, 30 July 1985

[1989] ILRM 373

Facts

The defendant accountants prepared audited accounts for a company over a number of years, and these were used by the plaintiffs in the course of a take-over of the company. The auditing process was improperly conducted, as the auditor failed to make adequate checks on the stock taking procedure, thereby departing from up to date professional practice. The plaintiffs incurred significant losses in running the company and sued the defendants on the grounds that the audited accounts presented an inaccurate picture of the company's financial condition. **4**

Decision

Lardner J held that the defendants owed the plaintiffs a duty of care in respect of accounts drawn up when they had specific knowledge of a take-over bid; a duty was also owed in respect of previous accounts, where the company's financial state was such that a take-over was a reasonably foreseeable possibility. The claim failed however, as the plaintiffs failed to prove that the accounts gave a misleading picture of the company's financial condition, thus they were not misled. **5**

Comments

The questions of special relationship and reliance are part of the duty of care enquiry rather than the standard of care. The duty in Irish law is broader than the equivalent duty in English law.[2] The reliance issue is explored in detail in *Wildgust v Norwich Union Ltd*.[3] If a duty arises, the standard of care is determined by the same **6**

1 See *E Quill*, Affirmative Duties of Care in the Common Law (2011) 2 JETL 151.

2 See *E Quill*, Maintaining the Distinction Between Duty and Liability (1998) 20 DULJ 183.

3 [2006] 1 IR 570, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2006 (2007) 547–549; *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2006 (2008) 281, nos 6–10; *R Ryan/D Ryan*

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principles as other negligence cases; as the defendant was a professional firm, the principles of professional negligence were applicable to determine the standard of care.[4] Liability was not determined by the fault enquiry; rather, the case failed because there was no significant falsehood resulting from the negligent auditing to link the error in the accounts to the losses suffered, thus there was a lack of sufficient causal connection between the negligence and the loss.

15. Malta

Mary Xuereb and others v Emmanuele Agius (Court of Appeal – Qorti tal-Appell) 23 May 1960

Collected Judgments, Vol XLIV, part I, 161

Facts

1 The plaintiffs held property by title of temporary emphyteusis[1] which was due to expire in 42 years, at the end of which time it was to revert to the direct owner. They reached agreement to transfer their title to a third party and engaged the defendant, a notary public, to draft and publish the deed of transfer. The defendant had often handled the plaintiffs' affairs before and he was their trusted adviser.

2 In the draft of the deed of transfer, the defendant indicated the remaining time of the empyhteusis as 'approximately' 55 years. The plaintiffs protested: they were not sure of the exact remaining duration of their title but they knew that it was between 40 and 43 years, and they pointed this out to the defendant. The defendant however said that, since they were not quite sure of the exact duration, it would be in the buyer's interest to indicate a longer period to ensure that he would acquire the entire remaining time, which would not be the case if a shorter time were indicated in the deed. He also advised that inserting the word 'approximately' would exonerate the plaintiffs from responsibility. On both points his advice was wrong. Since they had complete trust in the defendant, the plaintiffs took his advice and signed the deed.

(2006) 1(3) QRTL 13. Differences between Irish and English law on misstatements are explored by *P Fahy*, Liability of Pension Scheme Advisers – The Irish and Common Law Position (2007) 14 CLP 121 and *M Austin*, Negligent Misstatement – Where Now Following *Patchett v Swimming Pool & Allied Trades Association*? (2010) 28 ILT 122 (*Patchett* concerned a representation on the Internet).

4 *Dunne v National Maternity Hospital* [1989] IR 91 (6/14 nos 1–5).

1 Emphyteusis is a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure – art 1494(10) of the Civil Code.

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Sometime after the deed was signed and published, the buyer found out that the remaining time had actually been 42 years and he successfully sued the plaintiffs under the seller's guarantee. The plaintiffs then sued the defendant for damages. 3

Decision

The first court observed that the defendant had not merely given advice which can be freely rejected; considering the unquestioning trust the plaintiff had in him, he effectively imposed his will. The first court therefore found for the plaintiff. The defendant appealed; the Court of Appeal rejected the appeal not only because of the reasons given by the first court but also because the defendant had acted with 'gross negligence'. 4

Comments

The plaintiffs were aware that the duration as stated in the contract was incorrect but they nevertheless proceeded to sign the deed. Under normal circumstances *volenti non fit iniuria* might have possibly been pleaded as a defence or at least as a ground of contributory negligence. It was not only because the defendant was a professional but also because he was the plaintiffs' trusted adviser of long standing that the court considered that the plaintiffs' knowledge was not relevant as a contributory factor. 5

Of course, since the defendant had fallen short of the standards of his profession by showing 'gross negligence', he would have been held liable even in the absence of the particular situation of trust which existed between him and the plaintiffs. 6

16. Denmark

Højesteret (Supreme Court) 9 December 1976
U 1976.82 H

Facts

An employer, A, had engaged a contractor, B, for a building project on a certain estate. While doing excavation work on the estate, a subcontractor, C, damaged a cable which supplied electricity to the adjacent property. Due to the power cut, a company owned by V on the adjacent property suffered a loss and consequently A, B, and C were sued by V. 1

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Decision

2 The court held that A and B were liable for the said loss since they had not taken proper care to ensure that the work carried out by C was done properly (ie in a way that would not cause damage). With regard to C, the court found that it had not been proved that C was aware of the location of the cable and therefore C was not held liable.

Comments

3 It is a well-established rule of Danish tort law that an indirectly injured person cannot claim any compensation. Basically, there seem to be two reasons for this rule. First, as in the present case, the loss of an indirectly injured party is often of a purely economic nature (rather than a loss flowing from personal injury or property damage) and in Danish tort law there is a general reluctance to award damages for such loss. Second, the rule is based on the principle that only foreseeable losses can be recovered. However, the case shows that exemptions to the said rule may be made when there is a certain proximity and/or some kind of special reliance between the indirectly injured party, V, and the tortfeasors (A and B). With regard to the former, the court found that there was indeed special reliance between A and B, on the one hand, and V on the other. The main reason for this appears to be that it was in fact A and B who had mounted the cable which was damaged. With regard to the latter, the court does not seem to have been concerned that liability would extend too far since the company owned by V was in close proximity to the damaged cable (ie on the adjacent property).

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 14 December 2004
Rt 2004, 1942

1 For facts and decision see 3c/17 nos 4–8.

Comments

2 There is no case in Norwegian tort law that in an illustrative way points to relationships that may trigger a duty of affirmative action to mitigate risk of damage in the form of personal injury. The above-mentioned Hr 14 December 2004, Rt 2004, 1942, presented under 3c/17 nos 4–9, regarding the adolescent's creation of a very dangerous risk of damage, might be a case that only slightly touches upon the issue. The duty to mitigate a risk in the mentioned case is towards a third person – the municipality – not another party in the joint venture.

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Eidsivating Lagmannsrett (Eidsivating appeal court) 23 September 1984
RG 1984, 338

Facts

A, who owned a flat in a housing cooperation (a legal entity), forgot her keys in a mailbox at the entrance to the building; in all 14 keys were on the keyring. At the time of the incident, the main entrance door was locked. A went to another town and was away for several hours. A neighbour, who was passing by the mailbox, noticed the forgotten keys, removed them and kept them for a while. He was, however, soon told that the owner of the keys was out shopping and that she would come back after a short period of time. He therefore put the keys back in the locker of the mailbox. A thief took the keys and robbed A's flat in her absence. Goods valued at NOK 150,000 (approx € 19,000) were stolen from the flat. A sued the neighbour, claiming that he was responsible for the loss. 3

Decision

The court found that the neighbour was not liable for the loss. According to the court, the neighbour did not have a duty to take care of A's forgotten keys. The court stated that tortious liability would be stretched too far if the mere knowledge of forgotten keys and the owner's identity created a sufficient relationship of proximity to create a duty to mitigate the risk of burglary. The fact that he first took care of the keys, and thereafter put them back, was considered irrelevant. 4

Comments

The decision is probably correct and it is consistent with the doctrinal view that has been held for many years. The prevailing view has been that a bystander watching a drowning man has no duty to help. Merely being a bystander does not create a special relationship between the parties involved.[1] An interesting point is that the fact that the neighbour first took care of the keys before he put them back made no difference to the question of liability. One could argue that the fact that the neighbour involved himself actively led to the establishment of a relationship as a result of which he could be held liable for the loss. The very fact that he did so altered the situation on a crucial point. For a short period of time he was a *gestor* in a *negotiorum gestio* endeavour and he also prevented other neighbours from taking care of the situation in a way that possibly could have prevented the thief from gaining access to the keys. Based on such reasoning, one may argue that the neighbour should 5

1 *N Nygaard*, Skade og ansvar (6th edn 2007) 185 f.

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have been liable for the loss after all. The Norwegian stance, however, seems to be that a mere involvement that only puts the risk situation back to its original stage is not enough for the establishment of liability.

Høyesterett (Norwegian Supreme Court, Hr) 28 October 1967
Rt 1967, 1248

Facts

6 A building entrepreneur was building a house for a private owner. The entrepreneur noticed that the ground was loose and not fit for building houses upon. Despite this knowledge, he built the walls that were to constitute the ground floor of the house. After some time the walls fell down because of the loose soil and sand in the ground. The entrepreneur was sued by the owner for the loss that stemmed from the collapse of the building. The municipality was also sued, a lawsuit based on the preposition that the municipality should not have allowed buildings to be erected on such loose ground.

Decision

7 The Supreme Court found that the entrepreneur should have stopped the building works and informed the owner about the weaknesses in the ground. As a result of his role as a party to the contractual relationship with the owner, he had a duty to be loyal towards the owner of the house. As an entrepreneur he was obliged to warn the owner of the house of what he knew; that the ground was loose and that it would be very risky to build a house on such soil. In this respect weight was put on the fact that the entrepreneur had taken on a contract acting as an entrepreneur and that he had performed such tasks for many years. The court based this reasoning on an application of the general *culpa* rule.

Comments

8 The decision is perceived as an example of how duties flowing from a contract affect the duties relevant to the question of culpability. The main rule deciding the case is the general *culpa* rule, although some might say that the entrepreneur could be sued on the basis of contract. The fact that the specific duty to warn the builder of the house about the state of the ground was not based upon a positive, written clause in the contract made it possible for the court to apply the general *culpa* norm. Since this decision, it has become more common to grant compensation in contract on the basis of implied duties of loyalty between the contracting parties. In fact, there is quite a tradition of implying duties based on loyalty between parties to a contract. The special approach in this case – making the contract an argument for

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culpability – is, however, taken only rarely. The line of reasoning, that the contractual relationship in itself is relevant to an assessment in torts, is still a familiar way of thinking for tort lawyers.

Høyesterett (Norwegian Supreme Court, Hr) 28 August 2008

Rt 2008, 1078

Facts

A vendor of a house had supplied incorrect information to a purchaser due to errors in an appraisement produced by a surveyor. The error consisted of calculating the size of the house incorrectly – it was stated that the house was 30 m^2 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 had no claim against the surveyor. In fact, the vendor had made a greater profit than he would have done if the appraisement had been correct regarding the actual size of the house. **9**

Decision

The Supreme Court found that the surveyor was liable *in tort* to the vendor (the vendor's insurance company via subrogation) 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 appraisement. 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 the 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.[2] **10**

2 In its analysis, the court quoted a doctoral thesis concerning direct claims, *A Bjøranger Tørum*, Direktekrav [Direct Claims] (2000). On the page quoted, the author states that the mentioned Ameri-

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11 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.

Comments

12 The argumentation in relation to the concrete solution in this case appears to be unproblematic at first sight. However, there are factual complications relating to the decision that allows an insurer to file a claim against the liability insurer directly. 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 any compensation 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. The special reliance had formed a basis for a duty due to the surveyor's misconduct in respect of an economic interest. It is interesting that the court confirmed that the legal issues and criteria from international soft law principles are relevant in Norwegian tort law. 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 criterion of special reliance is a prerequisite for the protection of the economic interest of a third party due to a tortfeasor's misconduct regarding misleading information.

18. Sweden

Högsta domstolen (Supreme Court) 12 September 2005

NJA 2005, 608

Facts

1 The hamburger chain restaurant V had a ten-year rental contract for premises in the centre of a town. After V had obtained a more attractive location in the same town

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can principles are summarised in Restatement (Second) of Torts § 522 nos 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 of the principles of 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.

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centre, V decided to let out the former location for the rest of the lease period. The restaurant, V, made it clear during the negotiations that a rental would only be accepted if the new tenant were running a competitively neutral business. The real estate company, B, that hired the premises accepted this and told V that an art gallery would be established there. Shortly before the contract between V and B was signed, another hamburger restaurant, A, acquired the greater part of the share capital in B, and a few months later A opened a competing hamburger restaurant in the location that B had taken over from V. The issue in this judgment was if A was liable to V for complicity of fraud regarding the signing of the rental contract.

Decision

The main rule for contractual situations is that only the parties themselves can claim performance or compensation with reference to the agreement. As an exception, the court mentioned that, in particularly grave cases, a third party, who in a seriously unreasonable manner intervenes in another's contractual relations, in a way which promotes one party to take harmful measures against the other, can be held liable in tort. The court found that A held a decisive influence over B at the time when the contract was signed between V and B. Already then, the purpose of concluding the contract with V was to make it possible for A to compete in the hamburger business. A was therefore seen as having acted in complicity with B to gain control over the premises. This resulted in profits for B and A – and in damage to V. The court held that A must have understood that this would lead to V's losses. In addition, V would never have sublet the premises to B if V had known this background. In short, the court asserted that the case was so grave that A must be liable in tort for the damage caused to V. **2**

Comments

The special relationship between the parties in this complex of contracts led to the exception from the main rule that pure economic loss cannot be compensated unless an explicitly established exception is at hand.[1] Since the main rule is very strict, exceptional circumstances are necessary for a court to reach an affirmative response to a claim. One argumentative strategy can be to depict the situation as at least 'quasi-contractual'. This alternative was not explicitly stated in this case, but the idea could be seen as an argumentative background. **3**

The style of argument of the Supreme Court in this case gives explicit signs of restrictiveness. After placing strong emphasis on the main rule of only contractual **4**

1 Concerning the main rule and exceptions, *J Kleineman*, Ren förmögenhetsskada (1987) passim.

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liability, the Supreme Court stated that, in 'especially grave cases', a third party who interferes 'in an exceptionally undue manner' in contractual relations so that the other party breaches the contract could also be held liable. Since A was the party with most interest in acquiring the premises, and since B only acted for the promotion of A's advantage, it would be seen as a 'gap' in law if A was not to be considered as a proper defendant in tort law at all. B was complicit in A's wish to prevent V from gaining the advantage that V had hoped to attain by letting out the premises to B. Since A held a decisive influence over B at the time the contract was signed between V and B, A was not just 'any third party'. On the contrary, A could in reality use B as a means to obtain the premises, and thereby ruin V's purpose of hiring out the location to a competitively neutral business. Although not a contractual party, A was at least involved in the 'surroundings' of the contractual web. Moreover, the collusion between B and A was not neutral to V's losses, but actually aimed at causing them (ie the loss for V was not just a subsidiary effect). Last – among the restrictive interpretative signs – the court emphasised that A's conduct was 'exceptionally undue'. Therefore, the case cannot be considered as dealing with the ordinary rule of negligence, but must be explained due to the special relationship between the parties.

19. Finland

Korkein oikeus (Supreme Court) KKO 2009:36, 13.5.2009
<http://www.finlex.fi>

Facts

1 A and B had been dating for one year but were not cohabiting. They had spent the day together at A's home, also in the presence of B's uncle. All had been drinking alcohol, but A had drunk less than B and his uncle. In the evening A and B went to the condominium's sauna at 8:30 pm.

2 At about 10 pm, A had left the sauna and went to her apartment, while B remained in the sauna. He had been sitting on the lowest bench when A had gone home. Soon after, A came back for B, but meanwhile the automatic time lock on the door that led to the sauna had been activated, and A had been unable to gain entrance or contact B. Despite the time lock B could have opened the lock from inside. The purpose of the clock was to prohibit anybody from going into the sauna at night when the sauna time was over.

3 B was found dead in the sauna as a result of heat stroke the next morning. He had a blood alcohol content of 0.3%. The question was whether A had been guilty of either failure to act or involuntary manslaughter.

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Decision

The main question was whether A was responsible for taking care of B. According to the Criminal Code of Finland, ch 3, sec 3, omission constitutes an *actus reus* if: (a) it is specifically provided for in the statutory definition of an offence; or (b) the perpetrator fails to prevent an occurrence that accords with the statutory definition of an offence when he/she had a special legal duty to prevent such an occurrence. Such a duty may be based on: **4**

(1) an office, function or position;
(2) the relationship between the perpetrator and the victim;
(3) the assumption of an assignment or a contract;
(4) the action of the perpetrator in creating the danger; or
(5) another reason comparable to these.

The Supreme Court evaluated the case in the light of criteria 2, 4 and 5. **5**

It ruled that A and B's relationship was not sufficiently close in order to establish liability in this case, in contrast, for example, to the relationship between a parent and a child or between married couples if one of the spouses had an illness or handicap. **6**

B had gone to the sauna on his own initiative. However, B was also extremely drunk, of which A must also have been aware. Nevertheless, B's behaviour during the sauna did not radically differ from normal behaviour to the extent that A could or should have perceived that B could not get out of the sauna without her help. Consequently, A could well have been of the opinion that B could take care of himself. **7**

She was unable to enter the sauna building after 10 pm, but she knew that the actual sauna door was not locked and that the sauna heater had gone off and that it was possible to exit the sauna. Taking into consideration the circumstances in their entirety, the Supreme Court held that A's duty of care to B did not oblige her to ensure that B was able to function despite his drunken state or to ensure that he did not stay in the sauna so long that there was a danger of death from heat stroke, even though the sauna heater would soon go off. Moreover, no other reason for such a responsibility was found. **8**

Comments

This case, although a criminal case, is nevertheless a good example of when a person has a duty of care towards another person. Liability in tort can be based on an omission if the person in question had a special duty to act. Similar principles to those in criminal law are also applied in tort law. However, it is commonly held that liability in tort can be more easily attributed than liability in a criminal case, and in fact liability in tort for omission is said to exist when only some of the aforementioned conditions in the Criminal Code are fulfilled. **9**

P Korpisaari 3e/19

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10 In tort law so-called 'cumulative responsibility' can also be deemed to exist. This means that an omission to act can lead to liability if there are omissions by many actors in an organisation even though it is impossible to say that any single person had been negligent (see, eg, KKO 2004:48).

11 The sauna case can be compared to an earlier case, KKO 1981 II 97, where the Supreme Court found the accused guilty of failing to act and manslaughter in a situation where they knew of their drinking mate's extreme intoxication but left him outside alone to cope with the darkness and cold, after which the person, who was in a helpless state, drowned in an unusual, but still not unpredictable manner.[1]

20. Estonia

1 The authors did not find any relevant examples in case law concerning this issue. Judgment No 2-11-26543 of the Tallinn Circuit Court, 28 September 2012 under 3a/20 nos 1–5 and Judgment No 2-08-55008 of the Tartu County Court, 28 October 2009 under 3g/20 nos 1–6 may qualify.

Comments

2 It should be noted that Estonian law also recognises liability based on a violation of pre-contractual duties (*culpa in contrahendo*). For example, LOA § 14 (1) provides that persons who engage in pre-contractual negotiations or other preparations for entering into a contract shall take reasonable account of each other's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate. According to § 14 (3) sent 2, 'a person shall not engage in negotiations in bad faith, in particular if the person has no real intention of entering into a contract, nor break off negotiations in bad faith.' According to Estonian judicial practice, a person violating these provisions is liable under the general rules of non-performance (§ 115) and not under tort law.[1]

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1 See closer: *V Hahto*, Tuottamus vahingonkorvausoikeudessa (2008) 29 ff. Other cases concerning damages and the predictability of the danger include: KKO 1989:129 (the trotting-case, see 3f/19 nos 1–9), KKO 1990:42 (damage caused by medicine), KKO 1991:138 (public road administrator's liability), KKO 1992:41 (public road administrator's liability), KKO 1992:123 (property owner's liability) and KKO 1997:151 (a condominium's liability for the area surrounding its buildings).

1 Judgment No 3-2-1-62-13 of the Supreme Court, 5 June 2013. LOA § 115 regulates the compensation for damage primarily in the case of breach of contract. § 115 (1) provides: 'In the case of non-performance of an obligation by an obligor, the obligee may, together with or in lieu of performance, claim compensation for damage caused by the non-performance from the obligor except in

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21. Latvia

Zemgales apgabaltiesa (Zemgales Regional Court) No C16035004, 25 January 2008
Unpublished

Facts

The claimant, an employee of the defendant, suffered an injury while participating in construction works on a bridge over a river. The claimant suffered from a loss of the functioning of his right arm and therefore had a very limited capacity to work. The defendant was ordered to pay an administrative fine for failure to ensure the requirements set by labour safety regulations. The claimant brought an action against the defendant, requesting compensation for the medical expenses and damage due to loss of working capacity and non-pecuniary damage. The defendant pointed out that the claimant suffered injury due to his own fault. The claimant had familiarised himself with labour safety instructions. He was a disabled pensioner who suffered from diabetes mellitus and had weak eyesight. 1

Decision

The court of first instance rejected the claim, holding that the claimant suffered damage following the accident at work that could have caused the damage to the claimant's health and that no proof that the claimant's condition was caused by and aggravated by the injury at work was presented. The court of appeals satisfied the claim partially, awarding the claimant compensation for non-pecuniary damage in the amount of € 711 and compensation for medical expenses. The court inter alia indicated that the claimant suffered an injury that resulted in the deterioration of the functionality of the right arm and loss of 10% of his working capacity. The claimant withheld information of his disability and weak eyesight when entering into the employment agreement with the defendant and one of the causes of the injury was the claimant's negligence. In addition, the claimant received a pension; thus in light of all the factors, the compensation for non-pecuniary damage was to be reduced to 1/6 of the sum that was claimed. 2

The Senate of the Supreme Court reviewed the case and upheld the decision of the court of appeals and the decision presented herein became effective and final. 3

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cases where the obligor is not liable for the non-performance or the damage is not subject to compensation for any other reason provided by law.'

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Comments

4 This case highlights the importance of compliance with labour safety regulations, on the one hand, and the conduct of the injured, on the other hand, as well as the interaction between the two. Usually, if an employer has failed to ensure a safe work environment, the burden of proof would be shifted to the employer to either prove a pre-existing condition of the employee aggravating or extending the negative effect of the injury, lack of causation, contributory negligence, etc. Since the employee is more vulnerable than the employer, the law leans towards protecting the former and imposing various duties to ensure the safety of employees whilst work duties are being carried out. This would constitute a relationship of special reliance between the parties that a safe working environment is ensured, whereas this aspect would be absent in a business-to-business type of agreement. It must also be taken into account that an employee has limited rights to refuse to follow the requests of the employer and perform work as prescribed by the employer. The rationale behind setting a specific standard of conduct for the employer is to ensure that the employee is protected against foreseeable and serious risks of injury.

5 In this and in other cases, when the accident took place during the period of employment, the court practice leant towards not treating the damage as a result of breach of a contract,[1] but rather applying the law of tort. It could be argued to what extent the nature of the liability is contractual or tortious as, despite the contractual nature of employer-employee relations, an employee is subject to compulsory social insurance[2] and art 2347 of the CLL, addressing strict liability for ultra-hazardous activities, may serve as a basis for additional liability. The factual circumstances of the case, however, do not reflect the amount of benefits received under the social insurance.

6 The unlawful conduct of the defendant would be the failure to ensure that the safety regulations are complied with despite the fact that the evidence in the case suggested that the main cause of the injury was the claimant's own negligence. Although the decision does not provide a detailed description of the surrounding circumstances of the accident, it very possible that the information withheld by the claimant concerning his health conditions also did not enable the employer to take precautionary measures to prevent such or similar injury.

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1 *K Torgāns*, Saistību tiesības [Obligation Law] (Rīga 2014) 485.

2 Law on Compulsory Social Insurance in respect of Accidents at Work and Occupational Diseases (Likums 'Par obligāto sociālo apdrošināšanu pret nelaimes gadījumiem darbā un arodslimībām'). Available at: <http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Complusory_Soc._Ins._in_respect_of_Accidents_at_Work_amd_Occ._Diseases.doc>.

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22. Lithuania

UAB 'Panevėžio spaustuvė' v RŠ, AB and AG, 1 February 2012

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-19/2012; <http://www.lat.lt>

Facts

The creditor of a company under bankruptcy filed a claim against the director and several shareholders of the company requesting compensation for pecuniary damage. The plaintiff argued that he suffered damage due to frivolous and malicious actions of the defendants who deliberately ordered goods from the plaintiff knowing that their company was insolvent and would not be able to pay. The court of first instance dismissed the claim. The appellate instance court quashed the decision of the court of first instance and transferred the claim to the bankruptcy case, considering that the plaintiff had filed an indirect claim asserted in the name of the company. 1

Decision

The Lithuanian Supreme Court reversed the decision of the appellate court and ordered a retrial. The Lithuanian Supreme Court held that there are no legal relationships between a director and creditors of a company if a limited liability company is financially 'normal'. However, when the financial situation of a company worsens, the fiduciary duty of a director to take into consideration the interests of the creditors emerges. In other words, the worse the financial situation of a company is, the more weight the interests of the creditors have in the decision making of the company's executives. Moreover, although the functions of the director and shareholders are distinct, if a shareholder in fact performs functions, which by law are designated to the director, then the shareholder shall be liable as the factual director. 2

Comments

In this case the Lithuanian Supreme Court did not expressly state that the liability of a director and shareholders of a company which is in a poor financial situation vis-à-vis creditors is justified due to the proximity of relations, but this is obvious in the court's argumentation. Although a company is an autonomous subject of law and its executives, as well as shareholders, acting in the name of the company, do not assume personal liability for their decisions, the balance of interests that should be taken into account in the decision-making process changes when the company is in financial difficulties. In such cases the duty of a company's executives to carefully weigh the creditors' interests emerges. Otherwise their decisions could be held fraudulent vis-à-vis creditors and subsequently the 'shield' of the company's 3

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limited liability may be lifted with the result that the company's executives and shareholders are held personally liable for the company's obligations on the basis of arts 2.87(7) and 2.50(3) CC.

AS v UAB 'Pajūrio viešbučiai, 3 April 2009

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-126/2009; <http://www.lat.lt>

Facts

4 The plaintiff sought compensation of pecuniary damage arising out of the defendant's breach of his obligation arising from a preliminary agreement.

5 The parties concluded a preliminary agreement whereby they assumed an obligation to conclude a sales/purchase agreement over a period of eight months whereby the defendant, the seller, would sell to the plaintiff four plots of land near the Baltic Sea. The plaintiff made an advance payment to the defendant. The remainder should have been paid on the day of the conclusion of the sales/purchase agreement.

6 The defendant refused to sell the immovable property to the plaintiff and sold it to third parties for a price higher than that which was agreed by the plaintiff and the defendant in the preliminary agreement.

7 The court of first instance decided that the sales/purchase agreement was not concluded due to the fault of the seller and ordered the defendant to return the advance payment to the plaintiff and to pay a penalty the amount of which was set in the preliminary agreement as equal to the advance payment. The court refused to award damages the amount of which was calculated by the plaintiff as the price difference between the price at which the immovable property was sold to the third parties and the price agreed by her with the seller in the preliminary agreement. The Court of Appeal partly changed the decision as it found out that both parties were at fault and therefore annulled the decision of the first instance court as regards the ordering of the fine.

Decision

8 The court agreed on the findings of the first instance court. The court decided that the damages assessed as the price difference between the price at which the immovable property was sold by the defendant to the third parties and the price agreed by the plaintiff and the defendant in the preliminary agreement cannot be awarded because the plaintiff failed to prove that her losses amounted to a benefit received by the seller. The court also noted that the plaintiff made no attempts to prove that, due to the behaviour of the defendant in the pre-contractual relationship, she lost an opportunity to conclude another contract with a third person.

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Comments

There is much debate in Lithuanian legal doctrine on the basis of liability, as well as the interest protected for the breach of a preliminary agreement. Some authors argue that, as soon as a preliminary contract has been concluded by the parties, their liability is contractual and expectation interest shall be protected.[1] Others argue that liability arising out of a breach of pre-contractual obligations is *sui generis*, ie neither delictual nor contractual, but only reliance interest shall be defended.[2] Lithuanian courts, following the commentary of art 2.1.15(2) of the UNIDROIT Principles, seem to adhere to the latter position. In fact, although the predecessor of art 2.1.15 of the UNIDROIT Principles[3] was the source of inspiration for art 6.163 CC regulating negotiations in bad faith, Lithuanian courts have extended its reasoning to art 6.165(4) CC providing for liability for the breach of a preliminary agreement and argue that only the reliance or negative interest of the aggrieved party shall be protected. Compensation for the pure economic loss arising from the breach of a preliminary agreement may be awarded, as long as it falls under the category of negative interest. **9**

The category of cases for the losses incurred due to the breach of *culpa in contrahendo* demonstrate that a wider scope of protection granted by tort law, thereby including pure economic loss, is justified by the proximity and special reliance between parties involved in pre-contractual relationships. **10**

23. Poland

Sąd Najwyższy (Supreme Court) 12 May 1972, II CR 95/72
OSNC 2/1973, item 28

Facts

V was a nine-year-old minor who was seriously injured while playing with other children at a public landfill site. The site was not secured and there were tonnes of chemical and combustible waste landfilled there. The waste was constantly burn- **1**

1 *J Kiršienė/N Leonova*, Qualification of Pre-Contractual Liability and the Value of Lost Opportunity as a Form of Losses, Jurisprudencija No 115(1) (2009) 221–246. The article is available in English at <www.mruni.eu>.

2 *S Cirtautienė/D Ambrasienė*, Ikisutartinės atsakomybės kvalifikavimo problema: sutartinė, deliktinė ar *sui generis* [The problem of the nature of pre-contractual liability: contractual, delictual or *sui generis*?], Jurisprudencija No 112(10) (2008) 52–63; *D Ambrasienė/I Kryžiūtė*, Atsakomybės už preliminariosios sutarties nevykdymą kvalifikavimo problemos [Problems of qualification of liability for breach of a preliminary agreement], Jurisprudencija No 19(2) (2012) 561–583. The articles are available in Lithuanian at <www.mruni.eu>.

3 Article 2.15 of the UNIDROIT Principles 1994.

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ing. There were neither warnings banning entrance, nor a fence around the whole site. All kinds of waste materials attracted the attention of children who often went to the site without any guardians. The defendant A, a 16-year-old boy, ignited the waste knowing that V was hiding under a foil, when V was set on fire, A left the site without rescuing or helping the others to get V out. V suffered severe injuries (90% disability). He sued the local authorities (B) and the 16-year-old jointly and severally.

2 B alleged that the landfill was operated in accordance with legal rules and was supervised by an employee. The Regional Court awarded compensation jointly and severally from A and B, but reduced A's liability to 10% of the full damages (art 440 KC). It also established liability for future damage.

Decision

3 The Supreme Court changed the verdict in part, holding B solely liable for 90% of the future damage (declaration of liability for future consequences of the tort). It upheld the verdict as to the grounds of liability.

4 The local authorities were held liable for tolerating the practice of landfilling combustible materials on an unsecured site close to residential areas and in consequence tolerating an unceasing burning on the site. In particular, the site should have been secured against the presence of children who may be unaware of a threatening danger. B breached the general duty of safety of public places and hence committed a tort governed by arts 415 and 417 KC.

5 A is liable for raising the fire and failure to help V[1] and another boy, a 14-year-old, who was trying to help. By escaping the landfill site, A left a burning child in a serious, life-threatening situation. His conduct violated the principles of community life that proclaim a duty to assist a weaker person whose life has been put in danger. The refusal to rescue another in a situation that does not expose the rescuer to injury, and especially where the rescuer himself recklessly contributed to the realisation of the danger, is wrongful conduct. Hence, A was held liable on the basis of art 415 KC.

6 The court underlined a special reliance between V and A, who held himself out as an adult, was the oldest in the group, and imposed his patterns of behaviour on the younger children. The court rejected the criminal court's findings as to A's slight mental retardation, because the expert witness in the civil proceedings did not support them. According to the court, any such slight retardation, had it existed, would

1 There was no percentage scale to show to what extent A was held liable. His liability was limited to a certain amount of money. This amounts to proportional liability, but it should be considered as an example of exceptional (if not incorrect) practice of adjudicating multiple tortfeasors on a causal percentage basis.

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not absolve A from liability. The joint and several liability was also affirmed by the Supreme Court.

Comments

While the notion of wrongfulness potentially covers a wide array of norms, including written law and moral rules of conduct, according to the dominant opinion, it does not include a general obligation not to harm others. Indeed, it is debatable whether Polish civil law accepts such a general obligation that can be referred to as the duty of care. On the other hand, a duty to be a 'good Samaritan' is envisaged in criminal law. The Criminal Code of 1997 penalises anyone who does not extend help to those who are in danger of their life or threatened with serious bodily injury if helping them would not involve a similar risk for the helper (art 162). Criminal law rules are even more stringent to physicians.[2] Of course, the criteria that determine fault may vary in tort cases and criminal cases. **7**

A duty to rescue has been recognised in Polish case law. It is rooted in the legal order *sensu largo* that is in the principles of community life. From the civil liability perspective, it is irrelevant whether duties of care are written into the statute or come from general clauses (that are not direct sources of law) the content of which is shaped by court practice. **8**

Only upon satisfactory determination that a person's conduct was unlawful (objectively wrong) can the analysis proceed to determine the person's attitude towards the conduct and its consequences – thus towards establishing whether the conduct was also subjectively wrong. Hence, Polish law requires a certain level of awareness of the nature of one's conduct and its consequences in order to attribute fault to a particular person. In this case, the court did not openly discuss the subjective element of the fault of the 16-year-old, but appeared to have assumed that it had existed. **9**

The Supreme Court emphasised that A was the oldest of all the children playing at the landfill site. He posed as an adult and imposed his behaviour on the younger children. This is why one could expect from a young man of this age to warn children against the consequences of playing on the burning landfill. The relationship between the children was such that the younger children relied on their older friend and trusted him enough to imitate his behaviour. Despite this trust, he set fire to the garbage near the place where the children were playing and refused to help once one of his friends got burned. **10**

2 If there is at least a minimal chance of preventing loss, a physician has to take action. Polish courts are reported to have convicted physicians who denied help to those wishing to commit suicide. See *M Nesterowicz/E Bagińska/A den Exter*, Medical Law in Poland (2011) 64 f, nos 115–117.

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Sąd Najwyższy (Supreme Court) 17 July 2003, III CKN 29/01
OSP 5/2005, item 59

Facts

11 An authorised dealer and distributor of French cars defrauded money of clients who had signed preliminary contracts for sale and paid the full price. V was one of these clients. The dealer went bankrupt and V did not get any car, so he sued the wholesaler (importer, A) for damages. A was aware of the financial difficulties of its dealer (who defaulted on all kind of payments) and of his improper marketing practices that were in violation of the dealership agreement. Although clients reported unacceptable delays in the execution of contracts for sale, A did not examine the financial documents of the dealer, despite such a possibility arising from the dealership contract. A's control at the premises of the dealer did not lead to the termination of the dealership agreement for the following year, even though A had enough knowledge and arguments to terminate the contract with his dealer immediately.

12 The regional court granted compensation (the refund of the price) on the basis of art 422 KC, holding that A had aided the dealer in committing his tort. The Court of Appeals affirmed. A filed a cassation.

Decision

13 The Supreme Court held that the dealer who had accepted money as a price for the car, knowing that he could not deliver the car, committed fraud. A should be held liable as a master for his servant (art 430 KC). A's employees did not react sufficiently to the complaints of the dealer's clients and ignored the delays of several months in payments. Above all, however, A maintained the dealership agreement despite the high economic risk of dealing with the distributor. Such conduct was negligent.

14 It was stressed that a wholesaler benefits from the authorisation of a dealer (distributor). The buyers rely on the trademark in their market choice. Therefore, A could not ignore the interests of the dealer's clients. The failure to sufficiently monitor the diligence and honesty of the dealer is against good customs. A distributor using authorised dealers has a duty of care towards buyers to examine the dealers' reliability and to monitor their commercial activity. The judgment was affirmed.

Comments

15 The wholesaler's liability could only be grounded in tort (art 415 KC or art 416 KC liability for one's own conduct), since no privity of contract existed between him and the buyers. The courts of first and second instances based A's liability on art 422

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KC by attributing him the role of a helper. The Supreme Court, on the other hand, indicated art 430 as the correct basis for A's liability.[3]

A dealer, even though acting for his own account and under his own name, generally takes advantage of a wholesaler's (producer's) trade marks, trade names and reputation. On the other hand, consumers rely on these trade marks and reputation. This association encourages the public to enter into transactions with such a dealer. A client has a right to expect that, in buying from an authorised dealer of a large and well-known company, he takes no risk in such a transaction as the latter will supervise his dealers. Hence, the wholesaler should be responsible for the dealer's practices because of that special reliance.[4] Such a liability does not extend to the cases of dealers' bankruptcy. **16**

There is no general dogmatic concept expanding liability to third parties in cases like the one reported under this heading. The courts decide similar cases on a case-by-case basis. **17**

Sąd Najwyższy (Supreme Court) 25 April 1973, I CR 306/73

OSN 2/1974, item 34

Facts

V was a member of a sports club boxing team. He trained under the supervision of a club coach. During a training session, he suddenly felt bad after the first round, but the coach told him to continue fighting. After the second round V vehemently refused to continue the fight, so the coach decided that he should train on the equipment. V followed the instructions, but fainted during the exercises and, as a consequence, was hospitalised. He was diagnosed with brain and psychic injury that was causally linked with the head injuries incurred during the training session. As a result, V became an invalid with a complete loss of working capacity. He sued the sports club and the coach for a rent and compensation of non-pecuniary loss. **18**

Decision

On the evidence, the coach ordered V to continue his boxing training despite the fact that, both before the training session and after the first round, V complained to him of his bad condition and of headaches. The court held that if a boxer who was to participate in training exercises informed his coach that he was physically unfit or **19**

3 Article 430 KC. See 3a/23 no 4 fn 1.

4 See *M Nesterowicz*, Comment to OSP 2/2005, 246.

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unable to do so and if the coach had no possibility to ask for a doctor's opinion or failed to ask for one, he should have released the boxer from the duty to exercise. Refusal of such a release always constitutes negligence on the part of the coach who should be aware of the consequences of his professional decisions. Hence, he was jointly and severally liable with the sports club for the pecuniary and non-pecuniary damage caused by the injuries suffered at the training session.

Comments

20 Boxing is a particularly dangerous sport that carries with it a risk of injuries both during fights themselves and while training. Therefore, the courts have held that not only the rules of fair play must be obeyed, but a club (a coach) has a duty of special care towards its members with respect to their physical condition and mental health. The duty exists because of the special relationship between the sports club and its sportsmen. The risk assumed by a sportsman cannot embrace damage inflicted due to the fault of another (such as a coach, a doctor and a club).

21 In the legal scholarship it is emphasised that the duty of care required of a person professionally engaged in organising sports events is higher than the duty required of an ordinary person outside the profession. Tomasz Pajor argues that the courts and doctrine should develop the archetypes of a good organiser and a careful sportsman.[5] The author emphasises the role of a sports organiser as a central actor whose influence on the safety of an event is most significant. Where the organiser is a legal person (a club or a federation), it is generally easier to prove its fault. The scope of the duty of safety (duty of care) is specified in national and European sports law. Deviations from the imposed standards of safety establish wrongfulness, and that is sufficient to establish liability of the legal person.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 17 March 2009

25 Cdo 3516/07

1 For facts and decision see 3c/24 nos 1–6.

5 See *T Pajor*, Odpowiedzialnosc cywilna organizatora imprezy sportowej [Civil liability of the sport organizer], PS 10/2002, 37–52.

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Comments

This case shows several aspects of liability for damage as developed by the Supreme Court by the interpretation of sec 415 CC. Based on this fact, the case has also been mentioned under 3c/24 nos 1–11 on the danger resulting from a thing. 2

The liability was based on the breach of the legal duty of both the dog keeper and the mother who was in charge of supervising the child. However, the case also demonstrates the consideration of the court when assessing the share of damage attributable to both parties, taking into account their duties of care, and the fact that between those involved a closer relationship existed. 3

However, not only the respondents but also the mother supervising her child was factually involved, as the latter breached her duty to take care of her child and allowed her to come into contact with the dog. As the child cannot be held liable unless he is capable of judging his own actions and their consequences and to control them, the mother was held to be jointly liable with the respondents. Accordingly, the mother was obliged to pay damages to the child if sought. 4

As regards the closer relationship which existed due to the visit in the home of the respondents, as well as the relationship between the child and mother, the influence of such relationships lead to stricter obligations and the necessity to take into account particular circumstances, such as the age of the child, his abilities and mental capacity, the possible behaviour of the animal and any past experience with the interaction of all the parties involved. 5

As regards the rule in the NCC, this basic approach was adopted, including the provision on the liability of a child.[1] 6

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 11 October 2006

29 Odo 1166/2004

Facts

The claimant, a bank, sought damages as compensation for costs incurred for legal assistance as well as the drafting and approval of a credit agreement when preparing credit documentation for the respondent. The claimant found all the costs to be 7

1 However, under sec 2920, protection of any third party in interaction with a child is strengthened. Under this rule, a minor who has not gained full legal capacity or anyone who suffers from a mental disorder shall compensate damage caused if such person was able to influence actions and consider the consequences thereof. If a minor who has not gained full legal capacity or anyone who suffers from mental disorder was not able to influence its actions and consider the consequences thereof, the injured party has the right to damages if it is fair with respect to proprietary circumstances of the wrongdoer and the injured.

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reasonable because the respondent submitted an application for credit, was aware of the related costs but unreasonably refused to sign it.

8 The court of first instance refused the claim, stating that the claimant did not prove the conclusion of an agreement on the reimbursement of costs; and although there had been a series of negotiations, it found the costs unreasonable. The court of second instance confirmed the previous judgment.

Decision

9 In the case of damage consisting in the incurring of costs in connection with the negotiation of the contract and preparation of the draft contract, the Supreme Court emphasised that potential contractors (ie those interested in the contract) usually generate costs the nature and amount of which depend on the type of implied contract. The parties have to reckon with such costs regardless of whether or not the envisaged agreement is eventually entered into. These 'normal' operating costs cannot be deemed compensable within the meaning of property damage in sec 420 CC. In contrast, costs which cannot be considered – for a particular contract type – 'normal' (usual) and which occurred due to the specific requirements of the other party cannot be excluded from the possibility of reimbursement within an award of damages.

Comments

10 The Supreme Court for the first time dealt with the issue of *culpa in contrahendo* in this case, quite categorically handing down a ruling rejecting the contractual nature of liability within *culpa in contrahendo* and considering only damages within non-contractual liability. Such an approach with respect to pre-contractual liability is not a great surprise, because it pursues the same lines as the European legislator in the Regulation on the law applicable to non-contractual obligations (Rome II) and the European Court of Justice within the interpretation of the Brussels Convention.

11 As regards the outcome of the classification of *culpa in contrahendo* as non-contractual liability, there were only minor differences under the regulation of the former Civil Code. The reason was that there was a general clause in sec 420 CC which set forth the same criteria for liability based on breach of contract and non-contractual liability. However, a difference existed in the case of vicarious liability as anybody was able to exculpate himself if he/she proved that he/she had not caused the damage by his/her fault. In the case of non-contractual liability, this was easy to fulfil as the fault had to be regarded with respect to the selection of the third party and not to his/her activity.

12 The Supreme Court concluded that pre-contractual liability must be understood as an extra-contractual obligation, as in such a context the liable person is not liable

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for a breach of the obligation assumed under a contract. Liability under pre-contractual liability is thus based on a breach of obligations imposed by law.

The Supreme Court further held that liability for damage resulting from a breach of pre-contractual obligations due to the unjust termination of contract negotiations is assessed according to the provisions of secs 415 and 420 CC. Whilst respecting the principle of contractual freedom and equality of participants, the conduct of one of the possible partners shall be considered unlawful under sec 415 CC provided that the contractual negotiations reached a stage where one party, due to the behaviour of the other party, believed that the contract would be concluded and the other party terminated the contract negotiations without a legitimate reason. **13**

A breach of prevention duties, however, results in liability under sec 420 CC only if other statutory conditions are simultaneously met, ie the occurrence of damage, a causal link between the damage and breach of prevention duties and fault. **14**

Given that a pre-contractual relationship can be considered as an objective understanding of the co-existence of non-contractual requirements and contractual arrangements, the duty of care varies based on the intensity of the relations. In particular, the ratio varies depending on the intensity of the contact, as well as the amount of information exchanged and the negotiation procedure. In such a case, sec 415 CC can be applied to determine the desired behaviour even under the pre-contractual relationship. The behaviour required, based on sec 415 CC, thus must be examined in light of the particular circumstances of the case. **15**

The Supreme Court has reiterated this opinion in several decisions, eg 29 Odo 1335/2005 and 25 Cdo 127/2007. **16**

Moreover, issue of *culpa in contrahendo*, which reflects the proximity of the relations between persons, is specifically regulated in secs 1728–1730 of the current Civil Code in the part dealing with contractual negotiations.[2] Unfortunately, the NCC does **17**

2 Section 1728 NCC: '(1) Any person may conduct negotiations of a contract freely and is not liable for the failure to conclude it, unless he commences or continues the negotiations of a contract without the intention to conclude it. (2) When negotiating a contract, the contracting parties shall notify each other of all the factual and legal circumstances of which they know or must know, so that each of the parties can verify the possibility to conclude a valid contract and the interest of each party in concluding the contract is evident to the other party'. Section 1729 NCC: '(1) If contract negotiations between parties reach a point where the conclusion of the contract seems highly probable, the party which terminates the negotiations without a just cause despite reasonable expectations of the other party to conclude the contract acts unfairly. (2) A party who acts unfairly shall compensate the other party for the damage, but only to an extent not exceeding the loss from failing to conclude a contract in similar cases.' Section 1730 NCC: '(1) If parties, when negotiating a contract, provide each other with information and communications, each party has the right to keep records thereof, even if the contract is not concluded. (2) If, during negotiations of a contract, a party obtains confidential information or communication about the other party, it shall take care that such information or communication is not unlawfully misused or disclosed. If a party breaches this duty resulting in its

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not stipulate the character of the liability as, for example, the German Civil Code does, ie whether the pre-contractual liability should be deemed contractual or non-contractual liability, so that the scope of liability and third-party liability remains unclear. Moreover, since the NCC differentiates between contractual liability, which is a case of strict liability, and non-contractual liability, which is based on fault, the qualification is of great importance for the injured parties who have to prove the particular prerequisite. Moreover, if qualified as contractual liability, the scope of damages is much broader (including pure economic loss) than in the case of non-contractual liability.

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 2 September 2008, Case No 25 Cdo 127/2007

<http://kraken. slv.cz/25Cdo127/2007>

Facts

1 The claimant sought CZK 48,160 (approx € 1,720) plus a late payment penalty interest as compensation for the damage allegedly caused to her because, during court proceedings concerning the termination and settlement of divided co-ownership in immovable property, she carried out some acts in relation to the other joint owners required for the out-of-court settlement. Due to the fault of the defendants (the claimant's parents) the contract was not concluded. The District Court ordered the defendant to make the payments pursuant to § 424 of the Civil Code[1]. The defendant appealed to the City Court, which dealt with the appeal and decided that the defendant was under no statutory or contractual obligation to sign the draft agreement. Since the defendant had not breached any duty, no liability for damage arose. The claimant challenged the judgment of the appellate court by filing an appellate review.

Decision

2 A breach of the duty of preventive care results in liability for damage under the provisions of § 420 of the Civil Code only where further requirements set forth by law

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enrichment, it shall surrender to the other party what constitutes such enrichment.' (translation: <http://obcanskyzakonik.justice.cz/anglicky-jazyk/>).

1 § 424: 'A person who causes damage by an intentional contravention of proper morals shall be liable for the damage.'

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are satisfied, ie the existence of damage, a causal relationship between the damage and the breach of the duty of preventive care, and the wrongdoer's fault.

While respecting the principles of contractual discretion and of equal standing 3
of parties to a contract, the conduct of one of the potential parties may be considered unlawful, provided that the contract negotiations had reached a stage at which, based on the activities of one party, the other party could bona fide have expected that the contract would be concluded, but the party terminated the negotiations without legitimate grounds.

Comments

The principal issue in the action was to determine whether by her failure to make an 4
agreement of termination and settlement of divided co-ownership, the defendant had acted contrary to law and, therefore, was liable for the damage. The court of first instance considered whether or not the defendant's conduct in preparing and negotiating the content of the contract was deliberate conduct contrary to good morals, as a result of which a duty to compensate the damage thus caused may arise under § 424 of the Civil Code. The appellate court, on the contrary, did not consider this issue and limited its arguments to the fact that a failure to conclude the contract alone constitutes neither unlawful conduct, nor conduct against good morals.[2] The Supreme Court considered whether there was any statutory rule according to which one party could be held liable for damage caused by the unilateral termination of contract negotiations. The Supreme Court maintained that, where deliberate conduct contrary to good morals is not proved, it is necessary to consider whether the conduct of the party constituted a breach of the duty of preventive care under § 415 of the Civil Code, as a result of which general liability for damage under § 420 (1) and (3) of the Civil Code arises.

26. Croatia

Judgment of the County Court in Zagreb No Gžn 3669/2006 of 2 January 2007

Unreported

Facts

V, a pupil, sued the school he attended for compensation for injuries inflicted by 1
another pupil in the course of practising fighting moves. In the first instance proceedings, it was established that V was injured after a physical training class, out-

2 Generally, an act in law shall be invalid if its contents or purpose contradicts or circumvents the law, or if such contrevenes good morals (see § 39 CC).

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side the gym in a side hall of the school when he and another pupil were practising a particular fighting move without a teacher's supervision.

Decision

2 The court of first instance first established that, pursuant to the relevant statutory provisions, a school is liable for damage caused by a pupil who is a minor while under the supervision of a school, unless it is proven that the school exercised supervision to the extent to which it is obliged to or that the damage could not have been prevented even with due care in exercising supervision.[1] Furthermore, the court of first instance opined that, in the case of fighting sports, there is a greater danger of injury so that pupils should be supervised more intensively while practising such sports, which did not happen in the case at hand. Finally, the court of first instance found that in this particular case teachers had encouraged pupils to practise fighting moves even after school hours, which they were not supposed to do. For these reasons, the court of first instance found the school 20% liable for the damage sustained by the victim.

3 The County Court in Zagreb upheld the first instance judgment and its argument.

Comments

4 As is evident from this judgment, due to the specific proximity and reliance existing in a relationship between a school and its pupils, ie the fact that schools are required to take care of their pupils while under their supervision, the COA provides for specific liability of a school for damage inflicted upon others by pupils while under the school's supervision. In this particular case, the courts found that the school did not entirely live up to the expectations imposed upon it by the COA and held the school partially liable for damage the pupils inflicted upon each other.

5 The COA provides for some further examples of liability imposed due to a relationship of proximity or special reliance between parties such as, for instance, precontractual liability. Pursuant to art 4 of the COA,[2] parties are bound to respect the

1 See art 1058, para 1 of the COA which reads: 'A tutor, school or another institution shall be liable for damage caused to another person by a minor when the minor is under the supervision of that tutor, school or another institution, unless they have proved that they have exercised the supervision to which they are obliged or that the damage could not have been prevented even with due care in exercising supervision.'

2 Article 4 of the COA reads as follows:
Principle of Good Faith and Fair Dealing
Article 4
In creating obligations and exercising the rights and obligations resulting from such obligations, parties shall act in accordance with good faith and fair dealing.

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good faith principle even in the phase of creating an obligation. In negotiations, a special relationship of trust and mutual reliance is developed between the parties, which justifies the requirement that the parties to negotiations treat each other with good faith.[3] For this reason, art 251 of the COA[4] provides that a party who negotiated or broke off negotiations contrary to the good faith principle is to be held liable for damage caused thereby to the other party.

Another example of liability which arises out of the relationship of proximity is **6** the case of liability for damage caused by failure to provide emergency help. Pursuant to art 1082 of the COA,[5] a person who finds himself near an injured person whose life and health are evidently threatened will be held liable for damage if he fails to provide help to the victim providing that such help would not put him in peril.

3 *M Baretić*, Predugovorna odgovornost [Pre-Contractual Liability], Zbornik Pravnog fakulteta u Zagrebu [Collected Papers of Zagreb Law Faculty] vol 49 (1999) 49 f.

4 Article 251 of the COA reads as follows:
Negotiations
Article 251
(1) Negotiations preceding the entering into a contract shall not be binding.
(2) However, a party that has negotiated or broken off negotiations contrary to the principle of good faith shall be liable for the damage thereby caused to the other party.
(3) It is contrary to the principle of good faith inter alia for a party to enter into negotiations with the other party with no real intention of reaching an agreement with the other party.
(4) If confidential information is given in the course of negotiations by one party to the other party or if it enabled the other party to obtain such information, the other party, unless otherwise agreed, shall be under a duty not to disclose such information to third parties or use it for its own purposes whether or not a contract is subsequently entered into.
(5) Liability for breach of the duty under paragraph 4 above may include compensation for loss suffered and a restitution of the benefit received by the party that caused the damage.
(6) Unless agreed otherwise, each party shall bear its expenses in connection with any preparations to enter into a contract, and any joint expenses shall be covered by the parties in equal shares.

5 Article 1082 of the COA reads as follows:
Liability for the Refusal to Provide Emergency Aid
Article 1082
(1) A person who is not in danger and who has refused to provide emergency aid to another person, whose life and health are evidently threatened, shall be liable for damage arising therefrom if the former should have foreseen that damage under the circumstances.
(2) Where it is just, the court may exonerate that person from liability to compensate for damage.

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 434/96, 11 March 1998

<http://www.sodisce.si/vsrs/odlocitve/4856/> (7 March 2015)

Facts

1 On 28 January 1992 a primary school for pupils of lower classes organised a sports day of skiing and sledging on a nearby hill. The surface for skiing and sledging had been prepared by older children who had trampled down the snow and marked the piste with spruce branches the previous day. There was not enough snow on the hill, so molehills poked out from the piste. The plaintiff, who at that time was in year two of primary school and was not yet nine years old, hit a molehill while skiing, fell and broke a leg. The courts of first and second instance decided that the insurance company with whom the school had liability insurance was liable to compensate the plaintiff for the damage.

Decision

2 The Supreme Court rejected revision and confirmed the judgment of the courts of first and second instance. The Supreme Court stressed that the school, in organising the sports day, acted with insufficient care, since it organised a compulsory sports day for pupils of lower classes in inappropriate circumstances. They carried out skiing on a surface that had not been suitably prepared for skiing, although children of lower years of primary school have only average skiing abilities. Such children could not have been expected to avoid molehills on the envisaged piste. The Supreme Court highlighted that a primary school is obliged to ensure the safety of children and should suitably arrange a surface for skiing. The criteria in relation to the suitability of the prepared piste for carrying out a sports day for children of lower classes with little skiing knowledge are therefore stricter than those which apply to a public ski slope. The staff of the school should have abandoned skiing in view of the inadequate preparation of the ski slope, or previously covered the molehills with snow.

Comments

3 The judgment of the Supreme Court is interesting because, in judging the duty of care of a school, it highlighted the special relationship between a school and children. The school has a duty to ensure the safety of children, especially younger children with little skiing knowledge. In the opinion of the Supreme Court, the level of care that a school must show in the preparation of a ski slope for children of lower classes is therefore greater than that which a ski slope management must show in

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preparing the piste at a public ski slope. The cited special relation between the school and the children is thus the grounds for a higher standard of careful behaviour of a school, which influences the judgement of fault as a precondition of tortious liability.

28. Romania

Tribunalul Vrancea (Tribunal of Vrancea) Criminal Section, Decision No 42 of 2 November 2009

<http://legeaz.net>

Facts

At the storehouse of a company specialising in the trade of metallic raw materials, an employee, while delivering 6 m long metal bars to a buyer touched a high voltage electric cable of 20KV located at a height of 7 m above the place where the metal bars were stored. The employee was electrocuted and died in this accident. According to witnesses to this accident, on that date, due to the high temperatures, the electric cables had expanded and were hanging 50 cm lower than they normally did. Employment safety expert opinion established that the cause of the accident was the careless handling of the metal bars by the employee and, in addition to this, other circumstances also contributed to his death, namely the manner in which the working place was organised (by storing the metal bars below the high voltage cable) and lack of identification of the risks presented by such electric cables in a storehouse as well as the risk of electrocution of employees. All these constituted an infringement of several provisions of Law no 319/2006 on safety at the workplace, including the obligation of the employer to properly plan the functioning of the storehouse. 1

Decision

The court established that, due to the inadequate organisation of the workplace (placing the metal bars under a high voltage electric cable), the company infringed art 6(3) and art 13(a) of Law no 319/2006 on safety at the workplace and thus committed a criminal act under art 37(1)–(3) of Law no 319/2006 which qualifies the accident as murder by fault (*culpa*) according to the provisions of art 178(2) of the Criminal Code. 2

Comments

This is the only judgment in a case of electrocution by high voltage cables. The criminal court decision, however, did not deal with the issue of civil law damages. According to Romanian law, it is possible to award civil law damages within a 3

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criminal case if the victim of the criminal act so demands. Civil law damages can also be claimed in a separate civil law suit after the finalisation of the criminal suit. No separate civil law suit on damages can be reported in this case.

4 In Romania, many railways accidents caused by high voltage cables as a result of unauthorised persons accessing premises with railway infrastructure have been discussed in the mass media in the past few years. However, no court decisions can be reported on such accidents.

5 The availability and the costs of precautionary or alternative methods could play a role in establishing unlawful conduct, but since the liability for goods and for the risk of an activity is objectively assessed, the standard of these precautionary or alternative methods would be very severely scrutinised. An undertaking could be freed from liability only if it was shown that it had taken all the reasonable precautionary or alternative methods provided in statutory and non-statutory norms.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 A company asks advertising agency V to place a substantial order on its behalf for advertising time on television programmes and advertising space in newspapers. Before accepting the order and carrying it out, V asks its bank to contact the company's bank, A, so as to enquire into the company's creditworthiness. A gratuitously responds to the request by V's bank, stating that the company is a '[r]espectably constituted company' that is 'considered good for its ordinary business engagements'. V relies on this assessment, subsequently places the order for advertising time on TV programmes and advertising space in newspapers, and advances the costs for these measures. Before the company pays V, the former goes into liquidation. As a result, V loses a considerable amount of money.

2 V sues A for damages on the basis that the latter had negligently painted a false and misleading picture of their client's credit situation.[1]

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1 Scenario inspired by the English case: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, HL 28 May 1963, [1964] AC 465, above 3e/12 nos 1–8 with comments by *K Oliphant*/*V Wilcox*; see also the Irish case: *Kelly v Haughey Boland & Co* [1989] ILRM 373, above 3e/14 nos 4–6 with comments by *E Quill*: Accountants prepared audited accounts for a company over a number of years. They were relied upon by this company during the course of a take-over of a third company. The auditing process was improperly conducted, as the auditor failed to make adequate checks on the stock-taking procedure, thereby neglecting the standard professional practice of this time. The plaintiffs incurred significant losses in running the company and sued the accountants on the grounds that the audited accounts presented an inaccurate picture of the company's financial situation.

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Solutions

a) Solution According to PETL

This scenario raises the question of the extent to which a party (in the above scenario: bank A which is providing information about a client) is required not to cause 'pure economic loss' to the persons ultimately relying on their information (in the scenario: V, which was considering whether to give credit to a client). The case fits into what can be called 'liability for false information or [negligent] misrepresentation',[2] which is itself a particularly prominent example of 'special reliance' cases. 3

In order to determine the required standard of conduct in cases of 'liability for false information or negligent misrepresentation', several provisions of the PETL need to be considered. 4

The first of such provisions is art 2:102, which determines the *interests protected* under the PETL. Pursuant to art 2:102(1), '[t]he scope of protection of an interest depends on its nature; the higher its value, the precision of its definition and its obviousness, the more extensive is its protection'. Para (4) of the same provision specifies that the '[p]rotection of pure economic interests ... may be more limited in scope. In such cases, due regard must be had especially to the proximity between the actor and the endangered person, or to the fact that the actor is aware of the fact that he will cause damage even though his interests are necessarily valued lower than those of the victim'. 5

Secondly, art 4:102(1) PETL, which lists the factors relevant in determining the *required standard of conduct*: 'The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved ...'. 6

Last but not least, art 4:103 on the '*[d]uty to protect others from damage*', which provides that '[a] duty to act positively to protect others from damage may exist ... when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty'. 7

In the above scenario, the negligent statement caused V to suffer pure economic loss. On the one hand, '[p]rotection of "pure economic interests" ... may be more limited in scope' under art 2:101 PETL. Moreover, the party issuing the statement and the one relying on it were not in direct contact, and in no particular proximity, with each other. On the contrary, bank A did not even know the identity of the firm for which the statement was issued. 8

2 PETL – Text and Commentary (2005) art 4:102, no 29 (*P Widmer*).

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9 On the other hand, there is no interest worth protecting in negligently issuing wrongful statements. When issuing a statement about the financial situation and the creditworthiness of a client, a bank must be aware that a false statement is likely to be relied upon and to cause damage to third parties. It was obvious that the very purpose for requesting the statement was to use it as a basis for an investment decision. If it proved to be wrong, the statement was very likely therefore to cause considerable damage to the person relying upon it. The damage was thus easily foreseeable. A bank is expected to have the required expertise to issue reliable statements about the financial situation of its client. Last but not least, there is a situation of special reliance between a bank issuing a credit statement and a person receiving and relying on it. A reasonable person in the circumstances would either have issued a correct and reliable statement or refrained from issuing a statement at all. Given that banks control the number of statements they issue, there is no danger of an uncontrollable, limitless liability.

10 The commentary to the PETL provides the example of an employer D who issues a favourable letter of reference for an employee who has defrauded a considerable sum of money and was consequently dismissed. In the letter of reference, the employer praises the employee's skills in financial management. Another company P employs him, relying on the letter of reference, and suffers damage when he fails to redeem himself.[3]

11 In the case of the unreliable letter of reference, according to the commentary to the PETL, 'it seems likely that, under the Principles, and more specifically by application of Art. 4:101, 4:102 and perhaps 4:103, the first employer D could … be held liable for the (purely economic) loss of the second employer P. This would mean to admit a duty of D vis-à-vis P (or any other person who could be induced in error by the letter of reference) to provide correct information. Such a duty … may also be deduced from the general principle of good faith'.[4]

12 The same is true in the above scenario where, just as in the example provided in the commentary, the victim was a third party who relied on a false statement. In both cases, the issuer of the information must have been aware that the statement may be relied upon and may cause considerable financial damage if wrong. In both cases, the issuer of the statement was expected to have the required expertise to issue a reliable statement, in both cases there was a situation of special reliance. In the above scenario, just as in the example provided in the commentary, a reasonable person in the circumstances would either have issued a correct and reliable statement or refrained from issuing one at all. The person providing the false statement could easily have avoided the damage, therefore, by simply refraining from issuing the statement (compare also art 4:103 4th hypothesis PETL).

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3 PETL – Text and Commentary (2005) art 4:102, no 29 (*P Widmer*).

4 PETL – Text and Commentary (2005) art 4:102, no 29 (*P Widmer*).

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The official commentary to the PETL mentions, however, that this position is not unanimous and that some authors deny that there is liability *per se* and that the same authors require instead a '(pre-existing) "special relationship" between the parties' for there to be liability for false statements.[5] 13

b) Solution According to the DCFR

Contrary to the PETL, the DCFR contains a specific rule addressing the issue of liability for incorrect advice or information. Article VI–2:207 (Loss upon reliance on incorrect advice or information) DCFR provides: 'Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if: (a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and (b) the provider knew or could reasonably be expected to have known that the recipient would rely on the advice or information in making a decision of the kind made'. 14

The official commentary to the DCFR sets out that '[a]s a general principle, there is no liability for advice, recommendation and information. ... The case is otherwise only when the recipient of the information has special cause to rely on the correctness of the information and the provider of the information knows or should know about this special situation in which the recipient of the information is placed. Typical cases concern information about credit-worthiness provided by banks and faulty valuations or certifications'. Not all information or advice 'which is defective and relied upon by the recipient to the recipient's detriment can lead to liability under this Article. The damage must be caused by information provided "in pursuit of a profession or in the course of trade". "Kerbstone" advice falls outside those terms because provision by a professional is not enough; what is required is provision of the defective information or advice in the course of carrying out the profession. In the usual case this will mean in the context of a business activity, albeit irrespective of whether such activity is remunerated and whether there is a pre-existing contractual relationship with the recipient. ... The person who gives the information or advice certainly does not need to know the actual recipient. ... Nor is it necessary that the recipient received the defective information or advice from the provider directly. ...'[6] 15

In the above scenario, the bank Heller, carrying out its profession, provided information about the creditworthiness of its client to another bank who passed it on to their client, Hedley Byrne, who had requested it. In this situation, Hedley Byrne had special cause to rely on the correctness of the information and Heller knew, or 16

5 PETL – Text and Commentary (2005) art 4:102, no 29 (*in fine*) (*P Widmer*).

6 *C v Bar/E Clive*, DCFR, art VI–2:207, 3345–3347.

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could reasonably be expected to have known, that the ultimate recipient of the information would rely on it in making a decision to give credit to the company. Under the DCFR, it does not matter that the information was provided gratuitously by Heller, nor that there was no pre-existing contractual relationship between Heller and the recipient Hedley Byrne, and that Heller did not even know the identity of the person eventually relying on the information.

17 The conditions of art VI–2:207 DCFR being thus fulfilled, Heller's act would be regarded as misconduct under the DCFR and the bank would clearly be liable towards Hedley Byrne.

31. Comparative Report

1 All the reporters submitted cases in this category except in respect of EU law.

2 A relationship of proximity, or a situation in which one person otherwise places special reliance on another, may be relevant legally in a number of respects.

3 First, it may indicate that the precautions that should be taken by the latter (the person relied upon) for the benefit of the former (the person relying) are more extensive than those to be taken for the benefit of persons generally. In other words, the relationship increases the content of the duty of care that is owed.[1]

4 Second, and more specifically, the relationship may be the source of duties of affirmative action that are not owed to persons generally, whether for the purposes of protecting a person with whom one has a proximate relationship[2] or to prevent

1 Austria 3e/3 no 9; France 3e/6 no 1ff (director's duty of loyalty towards company's shareholders); Spain 3e/10 no 1ff; Lithuania 3e/22 no 1ff (director's fiduciary duty towards company's creditors); Slovenia 3e/27 no 1ff.

2 Austria 3e/3 no 4ff; Italy 3e/9 no 3ff; Spain 3e/10 no 1ff; Ireland 3e/14 no 3; Norway 3e/17 no 6ff; Finland 3e/19 no 1ff; Poland 3e/23 nos 1ff (children playing together on burning landfill) and 18ff (boxer/coach); Czech Republic 3e/24 no 1ff (parent/child); Croatia 3e/26 no 1ff (school/pupil); Slovenia 3e/27 no 1ff (school/pupil). Cf Norway 3e/17 no 3ff (no duty because insufficient proximity). See also Belgium 3e/7 no 1ff, of which the reporter states (no 3): 'the judge was not interested in the friendship or closeness which existed between the victim and the negligent party'. In her opinion (no 5), 'the personal characteristics of the person who committed the harmful act, including any possible relationship of proximity they might have to the victim, is in principle excluded from consideration in constructing the abstract figure'. The case is one in which A and V engaged in a dangerous joint venture: climbing. A undertook to hold the safety rope while V climbed. It is hard to believe that these circumstances were to be ignored in assessing whether A was at fault for failing to maintain the pressure on the rope. In the absence of this proximity (arising from the joint venture and A's undertaking to V), it is not so obvious how A could be blamed for not holding the rope properly. It may be noted that in rather similar cases (Austria 3e/3 no 4ff; Spain 3e/10 no 1ff), the Austrian and Spanish reporters highlighted proximity as a significant consideration on the facts.

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them from causing harm to others.[3] It thus provides a basis for a liability for omission.[4]

Third, the relationship may entail that the required standard of conduct must be adjusted to take into account interests that need not otherwise be taken into account and so provide a basis for the imposition of liability for a type of harm for which compensation would not otherwise be payable. The most obvious example is liability for pure economic loss caused by negligent misrepresentation, where the relationship of representor and representee is sufficiently close that the latter is entitled to rely upon the former.[5] In a few legal systems, liability for purely psychiatric harm may also be limited by reference to proximity of relationship.[6] **5**

Lastly, the relationship may enable the claimant to recover damages on the basis of *culpa in contrahendo* going beyond what, if anything, he would have been able to claim on the basis of orthodox tort principles.[7] **6**

For all the above reasons, the conduct required of a person upon whom another reasonably relies may be more onerous than that which is demanded generally.[8] Obviously, it is generally only the person relying who can recover damages for the failure to discharge this more onerous duty. **7**

3 Netherlands 3e/8 no 1 ff (mental health care institution/patient); Italy 3e/9 no 3 ff; Scotland 3e/13 no 6; Denmark 3e/16 no 1 ff; Poland 3e/23 no 11 ff.

4 Austria 3e/3 nos 6 and 9; Finland 3e/19 no 9 f.

5 See Austria 3e/3 nos 1–3 and 6–9; Switzerland 3e/4 no 12 ff; England and Wales 3e/12 no 1 ff; Malta 3e/15 no 1 ff; Norway 3e/17 no 9 ff; Sweden 3e/18 no 1 ff; PETL-DCFR 3e/30 no 1 ff. See also Ireland 3e/14 no 4 ff, where it seems that it was the lack of proximity between A and V that was fatal to the latter's claim. In legal systems in which there is no specific limitation on liability for pure economic loss, it may still be that a close relationship between A and V entails an obligation on A to provide accurate information or advice to V, by way of exception to the general rule that there can be no liability for the provision of information or advice even if negligent: Portugal 3e/11 no 1 ff.

6 Scotland 3e/13 no 1 ff. As regards England and Wales, see *Alcock v Chief Constable of South Yorkshire* [1992] AC 310.

7 Historical Report 3e/1 no 5; Germany 3e/2 no 1 ff; Austria 3e/3 nos 7 and 9; Switzerland 3e/4 no 1 ff; Belgium 3e/7 no 7 ff; Spain 3e/10 no 5; Estonia 3e/20 no 2; Lithuania 3e/22 no 4 ff; Czech Republic 3e/24 no 7 ff; Slovakia 3e/25 no 1 ff.

8 Exceptionally, the proximity of the parties' relationship may have the opposite effect, namely to lower the standard of care that A owes to V, as for example in relationships between family members or close friends: see Netherlands 3e/8 no 4 ff; Spain 3g/10 no 1 ff.

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3f. The Availability and the Costs of Precautionary or Alternative Methods

1. Historical Report

Ulpian, D 9.2.27.9 = Coll 12.7.7

Facts

1 The defendant rented a house. One of his slaves lit a furnace observing the necessary diligence and another slave was supposed to oversee the fire but fell asleep. As a result, the house burnt down. The landlord claimed compensation.

Decision

2 Ulpian[1] decided that the landlord was to be awarded compensation for his property.

Comments

3 At first, Ulpian cited the opinion of Neraz[2] that the defendant was liable under an *actio locati*, a contractual claim arising from the lease contract, if he chose his slaves negligently. Subsequently, Ulpian abruptly turned to discussing the for present purposes the interesting question of whether a delictual claim based on the *lex Aquilia* could be raised against the defendant as well. Under Roman law, a noxal action could be brought against the *dominus* (owner, master) for delicts committed by his slaves.[3] The *dominus* could then either compensate the damage or surrender the slave to the claimant. Thus, the question arose if one of the slaves acted with *culpa* (fault). The first slave acted diligently. He lit the furnace properly and left the fire knowing that somebody else would watch it in his stead. Therefore, his conduct could not give rise to an *actio legis Aquiliae*. Things were different for the second slave, though: according to the jurist, nobody should say that falling asleep was something 'natural and human'.[4] For the slave should have either extinguished the fire or otherwise secured it. As a modern-day lawyer would say, he should have

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1 Domitius Ulpianus, died 223 AD.

2 Neratius Voltina Priscus, 2nd half of the 1st and early 2nd century AD.

3 Cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 916 f; *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 41; *H-P Benöhr*, Zur Haftung für Sklavendelikte, ZSS 97 (1980) 273 ff; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 41 ff.

4 'rem … humanam et naturalem'.

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taken precautionary measures. Thus, Ulpian held the defendant responsible for his slave's *culpa*. Since the *actio directa* required a positive act by the culprit, he granted an analogous *actio utilis*.[5]

Precautionary measures also played a role in other cases. If somebody set fire to a stubble field, he must oversee it.[6] A pruner cutting branches must warn passers-by, just as someone digging pits for hunting purposes.[7] **4**

2. Germany

Bundesgerichtshof (Federal Supreme Court) 14 March 1995, VI ZR 34/94

NJW 1995, 2631

Facts

The claimant was 13 years old when – in 1991 – he climbed on a railway carriage which the defendant, a railway company, had parked on a siding. There were no fences around the area. The carriage had a ladder and there was a warning sign near the ladder showing a lightning symbol. On the roof of the carriage the claimant came close to the power line above the carriage and suffered very severe burns. He claimed damages including compensation for pain and suffering. **1**

Decision

The court awarded 50% of the compensation claimed for pecuniary damage but denied compensation for pain and suffering. The latter claim was refused because the defendant was not at fault, which at that time was required for a successful claim for pain and suffering.[1] Although the court stated that the defendant had neglected its objective duty to warn children more effectively (by a clear pictogram or the like), it further held that the defendant was not at fault in not having adapted the warnings on its carriages and installations to the required higher standard. The reason was that the courts had changed their practice with respect to warnings only after the accident had happened. At the time of the accident, the lightning sign was still regarded as sufficient to comply with the then required duty of care. The defendant **2**

5 For a discussion of the case cf *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 159 ff.

6 *Paulus*, D 9.2.30.3 in 3a/1 nos 1–6.

7 *Paulus*, D 9.2.31 (3d/1 nos 1–7); D 9.2.28.1.

1 This was changed in 2002 when legislation introduced a right to compensation for pain and suffering also under strict liability statutes.

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was allowed to rely on this old lower standard of care that governed at the time of the accident. The Federal Court welcomed the change of the lower courts' attitude for the future and refused the argument that the change should not be accepted because of the extra costs for new signs or for other measures that it would have to incur.

3 The claimant was, however, entitled to compensation of half of his pecuniary damage for which the defendant was liable under a specific strict liability statute[2] (until 2002 the statute explicitly excluded compensation for pain and suffering). Only 50% of the compensation for pecuniary damage was awarded because of the contributory negligence of the claimant who – as a boy of 13 – should have realised that his conduct was forbidden and dangerous.

Comments

4 Today (2017) a railway company would be liable for accidents similar to this if it left its carriages on unfenced sidetracks and if it still used the former lightning sign as a warning. The railway company would have neglected its duty of care in a culpable way and be obliged to compensate the pecuniary and non-pecuniary damage under § 823 (1) in connection with § 253 (2) BGB. However, the railway company would be liable to the same extent under the relevant strict liability statute (§ 1 HaftpflG) which now also includes redress for non-pecuniary damage.[3] Under both regulations, the amounts could be reduced or even excluded because of contributory negligence of the claiming child, always depending on the circumstances of the individual case.

5 It appears that the number of cases decreased where children climbed on railway carriages and were severely injured by overhead power lines.[4] The improved method of warning with a clear pictogram showing a person being struck by lightning, which the courts now demand, may have led or added to this effect. Where there is such a sign and a 13-year-old boy nevertheless climbs on a carriage and is injured, a court denied any claim for compensation in the most recent case. It regarded the boy's contributory negligence as so dominant that it excluded any compensation.[5]

6 The reasoning of the Federal Supreme Court sounds inconsistent at first glance: that there was an objective duty, namely to warn more clearly, but that the defendant was not at fault in disregarding this duty. However, this apparent contradiction

2 § 1 Liability Act (HaftpflG). The Act provides for strict liability for railways and energy plants and installations.

3 § 6 sent 2 HaftpflG.

4 Since 2000 no such cases have at least been reported in the law reports.

5 OLG Hamm (Court of Appeal) 11 September 2000, 13 U 83/00, BeckRS 2000 30130775.

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disappears if the distinction between wrongfulness and fault as well as the time element is taken into account. The duty of care to warn is an objective duty, which is an element of wrongfulness which designates specific conduct as unlawful. The mere violation of this duty is a necessary but not yet sufficient step. Only if the next step – fault – is taken, is liability established. In the majority view[6] it is irrelevant whether fault in the form of negligence is again defined as the failure to take the necessary care.[7] Wrongfulness is also sometimes referred to as the so-called 'outer diligence' that actually everybody should observe: fault is then termed the 'inner diligence', which the concrete actor in the concrete circumstances can be expected to observe.[8] In the concrete case the defendant, at the time of the accident, could not have foreseen that the courts would raise the existing standard of care which the courts had thus far confirmed several times. For the sake of legal certainty, changes of an established court practice thus have no retroactive effect.

The decision further shows that financial aspects of warning or information measures play a certain role in the decision-making of the concrete case. However, the higher the risks created, the greater the financial commitment is expected. **7**

3. Austria

Oberster Gerichtshof (Supreme Court) 16 May 2001, 2 Ob 47/01b

JBl 2002, 250

Facts

The claimant owned a detention basin accessible from an approach road. Warning signs pointing out the danger of going into the basin had not been erected. A fence in the region of the weir was the only safety precaution taken. One day, a family passed by the basin. The child slipped on a brick and was drawn into the water due to the pulling effect of the gravelly soil. The mother and grandfather tried to rescue the child but could not. All three drowned. The claimant, confronted with claims for recourse by insurance companies, sought the finding that it was not liable. **1**

6 For the majority view, see for instance *D Looschelders*, Schuldrecht, Besonderer Teil (8th edn 2013) no 1184 f; but contra *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 128 f.

7 See § 276 (2) BGB.

8 *D Looschelders*, Schuldrecht, Besonderer Teil (8th edn 2013) no 1184; but contra *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 128.

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Decision

2 Whereas the court of first instance had affirmed the liability of the claimant, the second instance had denied it. The Supreme Court remitted the case to the court of first instance to complete proceedings. It referred to the duty to implement safety precautions: whoever creates or retains a safety hazard has to ensure the protection of other persons against this risk. This duty must be fulfilled by the person who is in a position to realise the existence of the danger and to take the necessary precautions, in this case the claimant. However, the endangerment must be foreseeable and the measures to be taken reasonable. The former is yet to be assessed by the court of first instance. Although this duty should not be overstretched, the reasonable standard for precautionary measures is objective. Thus, the claimant – which is the Austrian Republic and thus the greatest landowner in Austria – is not allowed to argue that it could not have fulfilled its duty to warn because it had tens of thousands such bodies of waters in its possession. Instead it ought to have indicated the danger to life with warning signs.

Comments

3 As this decision shows, precautionary or alternative methods are an issue as far as the assessment of wrongfulness is concerned. Especially in the case of duties to maintain safety (*Verkehrssicherungspflichten*; cf 3c/3 no 5), emphasis is placed on their reasonableness.[1]

4 In this context, case law considers economic capacity cautiously in a restrained manner:[2] eg, a distinction may be drawn between small and large municipalities regarding gritting and salting duties.[3] However, hasty assertions that potential measures are uneconomical are not allowed, as the following decisions demonstrate. In the case of a schoolboy, who suffered severe cuts when he stumbled on a staircase and fell against an entrance door made of glass likely to splitter, the Supreme Court emphasised that the reasonableness of an alternative method may not depend on the expenditure necessary therefor.[4] Nor may the owner of unattended animals grazing close to a road with heavy traffic absolve himself by arguing that the costs of fencing in the danger area are relatively high.[5]

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1 See *E Karner*, Schutz vor Naturgefahren und Haftung, ZVR 2011, 112, 117 f; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1294 no 70.

2 *F Bydlinski*, Verkehrssicherungspflichten des Wegehalters im Bergland, ZVR 1998, 326, 334; *E Karner*, Schutz vor Naturgefahren und Haftung, ZVR 2011, 112, 117.

3 OGH 8 Ob 150/78 = ZVR 1979/316.

4 OGH 2 Ob 513/96 = ZVR 1997/128.

5 OGH 8 Ob 216/82 = SZ 55/180.

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Finally, it must be considered that the duties to maintain safety may be graded. 5
First and foremost, the danger spot is to be eliminated or made safe. If such measures are impossible or unreasonable, there may still be a duty to warn or signpost the danger spot. However, if the danger is extreme, warnings are not sufficient:[6] hence, eg a street in the Alps that is in too dangerous a condition due to black ice and cannot be made safe may have to be closed.[7]

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 6 July 1976

ATF 102 II 232

Facts

The community of Lausanne was the owner of a farm and a small restaurant nearby, 1
operated by A. The access to the restaurant was possible either on the normal path, or by a shortcut passing close to the farmhouses. V and his friends went to the restaurant and decided to take the shortcut. There was no indication or sign prohibiting the use of this pedestrian path. When V and his friends passed close to the farmhouses, A's dog, attached to a chain, suddenly attacked them. V hurried away, fell into a pit and seriously injured his back.
V claimed damages from A in the amount of CHF 59,000 (€ 49,000). 2
The cantonal court ordered A to pay V damages of CHF 19,000 (€ 16,000). 3

Decision

The Supreme Court decided that A had not succeeded in proving that his behaviour 4
was not culpable and declared him liable for the damage suffered by V. It sent the case back to the cantonal court for further information on adequate causality and for an assessment of the damages. In addition to other possible damages to be assessed by the lower court, the Supreme Court allocated V CHF 8,000 (€ 6,600) for the moral he suffered.

The Supreme Court recalled that a pet holder[1] (*Tierhalter, détenteur d'un animal*) 5
is liable for damage caused by his animal, except if it is proven that the animal was supervised adequately according to the particular circumstances or that the damage

6 *E Karner*, Schutz vor Naturgefahren und Haftung, ZVR 2011, 112, 117.
7 OGH 2 Ob 144/82 = ZVR 1983/83.

1 *MA Kessler*, Basler Kommentar OR I, Art 1–529 OR (6th edn 2015) art 56 no 10 ff; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1–529 CO (2nd edn 2012) art 56 no 6 ff.

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would not have been prevented despite all due diligence (art 56 of the Swiss Code of Obligations [SCO])[2].

6 The dog had been attached to a long chain. According to the court, this measure was insufficient to avoid damage. Further A had fixed a small sign warning of the dog on the wall of the farmhouse. This warning was also considered as insufficient.

7 The court then enumerated the measures which A should have taken: the access to the farmhouses should have been forbidden by an easily visible warning sign; the sign should have indicated how to reach the restaurant without passing nearby the farmhouses; the dog should have been attached in a manner which would have made an attack impossible on the ground open to the public; an easily visible and sufficiently large sign should have warned of the presence of the dog.

Comments

8 The existence of alternative methods is an important element for judges to consider, as it is a criterion for the evaluation of unlawfulness and fault. If no alternative method is available, it is less likely for the author to be condemned than if it would have been simple for him to adopt another attitude.

9 The indication of alternative methods by the Supreme Court is not an exceptional phenomenon, even if it is afforded greater significance in this case than is usual. Article 56 SCO[3] offers the injuring party the possibility to prove that he took all the (economically justifiable) precautions to avoid the damage which occurred.[4] In the evaluation of this proof, a judge refers to legal or extra-legal[5] norms (eg from private and professional associations[6] such as associations for animal breeding) and may even at times establish his own list of alternative methods on the basis of the general duty of care.[7] The injuring party is exculpated from fault if he shows that he took all the objectively necessary measures, and all those required by the circum-

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2 *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 543 f; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 56 no 14.

3 Article 56 SCO: Liability for animals

[1]In the event of loss or damage caused by an animal, its keeper is liable unless he proves that in keeping and supervising the animal he took all due care or that the damage would have occurred even if all due care had been taken.

[2]He has a right of recourse if the animal was provoked either by another person or by an animal belonging to another person.

4 *P Engel*, Traité des obligations en droit suisse (2nd edn 1997) 544; *C Müller*, La responsabilité civile extracontractuelle (2013) 111, no 326.

5 *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 CO (2nd edn 2012) art 56 no 16; *C Müller*, La responsabilité civile extracontractuelle (2013) 111, no 326 with literature. ATF 126 III 14, 17 c 1b (2000).

6 ATF 4C.237/2001, c 3a.

7 ATF 126 III 14, 17 c 1b (2000).

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stances.[8] It is not sufficient to have taken the normal measures.[9] If there are any doubts about the facts in his favour, the author is considered liable.[10] In the evaluation of fault, the Supreme Court does not only consider the existence of alternative methods of behaviour, but also the financial effort necessary to implement them.[11]

5. Greece

Areios Pagos (Greek Court of Cassation) 219/2006

NoV 54 (2006) 828

Facts

On 26 June 2000, a car collided with a train at an unguarded level crossing (ie where there were no barriers). The driver of the car panicked when he realised, while driving over the rails, that a train was approaching and, instead of accelerating, he stopped his car. Although the driver of the train tried to brake, nevertheless, the train hit the front right part of the car, dragging it at a distance of 300 m, whilst the two front axles of the train derailed. The Court of Appeal held that the accident was due, to an extent of 60%, to the negligent behaviour of the car driver, who did not pay the required attention, as he neither stopped at the crossing to ascertain that no train was approaching nor did he pay sufficient attention to the continuous whistling of the oncoming train despite the existence of the stop sign and the four signs alerting the approach to an unguarded level crossing, and, to an extent of 40%, to the negligent behaviour of the Organisation of Greek Railways (OSE), the competent organs which had not placed protective barriers at the crossing in violation of the law. **1**

Decision

The Court of Cassation upheld the decision of the Court of Appeal. It ruled that an omission can also lead to an obligation for damages according to art 914 GCC, as long as the tortfeasor was obliged to act either by law, by contract or by good faith, **2**

8 *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht I (2012) 294–296, no 871ff and 876f with literature; *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 56 no 52ff. For interesting examples about dogs see ATF 126 III 14, 16 c 1b (2000); ATF 110 II 136, 140 c 2b (1984).

9 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 56 no 50 with references.

10 ATF 131 III 115, 117 c 2.1 (2005).

11 *C Müller*, La responsabilité civile extracontractuelle (2013) 111f, no 326. ATF 131 III 115, 119 c 3.2 (2005). See also ATF 90 II 227 (1964) at 3c/4 nos 1–7 and ATF 130 III 736 (2004) at 3d/4 nos 3–10.

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according to the prevailing social understanding, and, in particular, when he himself had created a perilous situation, likely to cause damage to third parties. In such a case, the person obliged to act cannot invoke in his defence that it was economically impossible to take the measures required to avert danger, in particular when the danger to third persons is inherent to his professional activity. Accordingly, the OSE's claim that it should be exempted from liability because the Greek state did not provide it with the economic means that were indispensable in order to protect the railway crossings was of no legal importance, because, on the one hand, the OSE's relations with the Greek state were *inter alios acta* (a thing done between others does not harm or benefit others) as regards the car driver and, on the other hand, the lack of economic means does not constitute a legal reason of exemption from liability.

Comments

3 The OSE was held jointly liable on the basis of both wrongfulness and fault. Placing protective barriers was an obligation provided by law (art 3 of the Royal Decree of 30 November 1911, art 3 of the Decree of 19 July 1928 as well as art 8 § 2 and art 10 § 3 of the Highway Code (L 2696/1999) ('wrongfulness') and the omission to fulfil the said obligation was due to the negligent behaviour of OSE's competent organs who had not placed the protective barriers ('fault').

4 The judges' point of view, according to which the economic strength of the tortfeasor was of no importance, was not commented upon in the literature. In the case of damage to the environment, however, it is mentioned in Greek theory that the proportion of the extent of the imminent peril to the cost of the safety and providence measures is one of the criteria to be taken into consideration for the determination of the providence and safety measures required.[1]

6. France

Cour de cassation, Chambre civile 1 (Supreme Court, Civil Division) 16 October 2013
12-24.267, JCP N 2014, 1115, obs *M Poumarède*; JCP N 2014, 1135, obs *JP Garçon*

Facts

1 On 22 November 1999, a retired individual signed an undertaking to sell real property, the sale being through a real estate agent. On 28 January 2000, the said property

1 *I Karakostas*, Environmental Law (2nd edn 2006) 472f; *I Karakostas*, Greek & European Environmental Law (2008) 186.

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was sold by *acte authentique*.[1] However, the owner had withheld the information that he had been submitted to judicial liquidation in 1995, and on 18 December 2008, a definitive judgment ruled that the authentic act was ineffective against the creditors participating in their debtor's liquidation proceedings. Therefore, the buyer filed a civil liability action against the notary and the real estate agent. The appellate court turned down the buyer's claim on the ground, among others, that both in the authentic act and in the undertaking to sell, the seller had given false indications; since neither the notary nor the real estate agent knew about the seller's former activity of artisanal trade, they could not be found liable for the sale being ineffective against the creditors who were taking part in the judicial liquidation.

Decision

On the basis of art 1382 (now art 1240) of the *Code civil*, the *Cour de cassation* quashed the appellate court decision. The first part of the solution seems to be in accordance with the appellate court's decision. According to the justices, when notaries or real estate agents draft an act containing false declarations, their civil liability can only be found if it is established that they had reasons to doubt the veracity or the accuracy of the party's statement. However, the second part of the solution states the reason for the quashing of the lower court's decision: nevertheless, notaries and real estate agents alike are expected to verify, through all appropriate investigations, especially when the information is easily accessible to the public though legal publicity, the statements issued by the seller and whose content or legal effects determine the validity or the effectiveness of the juridical act they draft. 2

Comments

For the first time, the *Cour de cassation* rules that there is a *systematic* obligation for notaries and real estate agents to check whether or not the seller is subject to liquidation proceedings. Fault is clearly assessed in the light of the availability of precautionary methods: since the information determining the validity or the effective- 3

1 Acte authentique: 'authenticated instrument' in common law English, or 'authentic act' in civil law English; see the definition of *acte authentique* in the Dictionary of the Civil Code, Association Henri Capitant (dir G Cornu, A Levasseur, and M-E Laporte-Legeais, LexisNexis, 2014, v° 'authentic'): '(...) in contrast with an **acte sous seing privé* – act under private signature, is said of an act which, being executed or drawn by a competent public legal officer and according to the formalities required (on paper or electronically) is valid and is absolute, proof by itself until it is challenged as a forgery. (Frch. civ C. a. 1317, 1319, CPC a. 303 et seq.; Louisiana. civ C. a. 1833, 1836, 1837). Ex. **actes notariés* and acts of civil status are authentic acts.'

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ness of the juridical act was *easily accessible*, the notary and the real estate agent were at fault for not verifying whether or not the seller was subject to liquidation proceedings. Accessibility may be interpreted as including both the fact that the records are public and the cheap cost of accessing them. Notaries pay annual fees to have access to two websites (*Infogreffe* and *Bodacc*). Therefore, it is not difficult for them to check whether or not a seller is undergoing judicial liquidation.

7. Belgium

Cour d'appel (Court of Appeal) Mons, 28 June 2011
RGAR 2011, 14768

Facts

1 A company built a factory to manufacture diamond tools, on a site below which were underground pipelines transporting natural gas under high pressure. When this large project was being carried out, a worker hit one of the underground pipelines with the machine tool he was operating with, which caused serious damage to the pipeline but did not initially lead to an explosion or fire. In the following weeks, the residual thickness of the pipe progressively deteriorated until the day of the accident, when the pressure exerted by the gas caused a crack that had occurred as a result of the accident to become considerably larger. Gas escaped through the crack and spread, until a catastrophic explosion occurred. The explosion caused the death of numerous people, and seriously injured around 100 others who were either present on the construction site or in the area.

2 Criminal proceedings were initiated, and the company managing the gas pipelines was accused of having breached a series of regulatory obligations, but also the general duty of care and diligence owed by everyone. Specifically, it was accused of failing to implement a series of precautionary measures which could, in the victims' opinion, have prevented the damage which actually occurred.

Decision

3 The Court of Appeal of Mons held that there were numerous negligent breaches on the part of the company managing the network which were causally linked with the accident. It reproached the company for not having adopted various safety measures which the court considered were indispensable and, as regards the measures the company had actually taken, for not having carried them out in a diligent manner.

4 In this regard, the court specified that a person engaging in a dangerous activity, such as the operation of a network of high pressure gas pipes, could not content itself with only taking ordinary precautions. On the contrary, it considered that the

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ordinarily prudent and diligent person in such circumstances should take exceptional safety measures, and the fault consists therefore in not having taken the special precautions required when one engages in dangerous activities.

Comments

This important decision was rendered in the context of the much publicised catastrophe which occurred in Ghislenghien in Belgium in 2004. In this case, the company managing the gas pipelines complied with the operating standards under the applicable regulation. In spite of this, the Court of Appeal was of the opinion that it should have implemented even more measures, considering the dangerousness of its activity. In this regard, the court completely disregarded the (very significant) financial cost of these precautionary measures. Therefore, this decision perfectly illustrates, taking into account the numerous safety measures the absence or poor implementation of which the company managing the gas pipes was accused of, that the cost of such measures was irrelevant in the assessment of a person's negligent behaviour. In reality, it is only important to ask whether a normally prudent and diligent person, and in the case used by way of illustration, an ordinarily prudent and diligent company, would have taken the measures in question if it found itself in the same circumstances. On the other hand, no cost-benefit analysis is made. **5**

In concrete terms, 'all required precautions'[1] must be taken, and not only those which are dictated by law, where appropriate, which are not 'restrictive ... and must be accompanied by all safety measures which the circumstances require'.[2] In this regard, the reasonably prudent person does not consider the financial cost of the measure, but only whether it is necessary in order to prevent harm. This amounts to the imposition of a strict obligation which is not embodied in legislation. **6**

It is understood that it is appropriate here for the judge to have significant discretion in order to determine whether the measures adopted by the person whose liability is engaged should be considered sufficient or not. Incidentally, the judge at first instance in the Ghislenghien case did not consider the company managing the gas pipelines to be liable. **7**

1 Free translation of *RO Dalcq*, Traité de la responsabilité civile, vol 1 (1967) no 335.

2 Ibid, no 304 (free translation).

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 25 September 1981, ECLI:NL:HR:1981:AG4235
NJ 1982/254 (Laadschop)

Facts

1 A four-year-old child was, together with other children, playing on a sand heap. At a distance of about 10 m a workman started a digger and drove straight ahead. When he subsequently reversed a few metres, the shovel ran over the child.

Decision

2 Under these circumstances, the standard of conduct appropriate in society requires a driver of a digger, whose visibility is impaired, to refrain from reversing unless appropriate precautions – such as asking a colleague for help – in order to prevent an accident are taken. In this case the driver should have taken into account the unpredictability of young children and the fact that a shovel attracts children's attention. Because of this, the driver should have been more aware of the possible risks when reversing.

Comments

3 This decision illustrates the relevance of precautionary measures, especially when children are at risk. As mentioned under 3a/8 no 4, the difficulty of taking precautionary measures is one of the common components of the standard of care. In this respect the costs of precautionary measures may be of relevance. Although it is recognised that financial restraints do not serve as a sufficient reason not to accept an obligation to take precautionary measures, public authorities with limited funds are given some discretion. Although case law mentioning this aspect in relation to unlawfulness in the sense of art 6:162 DCC is rather scarce,[1] this issue has been elaborated upon more frequently in relation to public authorities' liability for defective 'constructions' (art 6:174 DCC), such as roads,[2] a dike[3] or a sewer system.[4] Although it is not easy to indicate what the exact 'weight' of this circumstance is in individual cases, it seems, in combination with the argument that public authorities

1 HR 9 January 1942, NJ 1942/295 (Wegdek Ferwerderadeel) and HR 9 October 1981, ECLI:NL:HR:1981:AG4240, NJ 1982/332 (Bargerbeek/Juurling). See for a few cases before courts of fact Onrechtmatige Daad, art 6:162, sec 2 BW (*Jansen*), cmt 88.3.3.

2 HR 4 April 2014, ECLI:NL:HR:2014:831.

3 HR 17 December 2010, ECLI:NL:HR:2010:BN6236, NJ 2012/155 with comment *T Hartlief* (Wilnis).

4 HR 30 November 2012, ECLI:NL:HR:2012:BX7487, NJ 2012/689 (Paalrot).

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(should) have discretionary power with regard to public policy, to be of great relevance. In one of the cases the Supreme Court required that the defence that financial means were too limited to allow adequate precautionary measures to be taken must be substantiated by facts.[5]

9. Italy

Corte di Cassazione (Court of Cassation) 19 December 2014, no 26900

Dir Giust, 22 December 2014

Facts

During the night, thieves entered an apartment, without being detected from the street, by climbing up scaffolding that was not lit. 1

Decision

The *Corte di Cassazione* held the proprietor, who erected the scaffolding on the building to carry out necessary building works, liable as he did not take necessary measures, such as lighting the scaffolding at night, to minimise the dangerous situation. 2

Comments

Negligence (*colpa*) is established by proving lack of due care, ie imprudence, lack of skill or expertise, as well as A's failure to meet standards of conduct that can be determined by laws and regulations prescribing a certain course of conduct to prevent the loss from occurring (see case 3a/9 nos 1–5). Precautions that could have prevented the loss may be relevant in this respect. In this framework, the problem of negligence by omission, which is established when A's negligent failure to act is the cause of the loss, should be noted.[1] In order to be held liable for negligence by omission, A must have violated a duty to act, either established by a specific legal provision (like art 2087 Civil Code, see case 4/9 no 1–3), or consequent upon the violation of the duty to act with due care under the general provision of art 2043 Civil Code, as indicated by this judgment. Therefore, if works are carried out on a public road without taking proper precautions to signal danger, those who should 3

5 HR 4 April 2014, ECLI:NL:HR:2014:831.

1 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 101–114.

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have taken adequate measures to prevent harm are liable for the injuries caused to V.[2]

4 If A's activity is considered 'dangerous' pursuant to art 2050 Civil Code, the court may take into account the cost of avoiding damage. As a general rule, the cost is never too high if it has to be balanced against the life or health of the victim. Cf 3c/9 nos 1–11 and 3d/9 nos 3–5.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 24 October 2003

RJ 2003\7519

Facts

1 V, a 15-year-old, boy plunged when the glass roof that he was crossing cracked and broke, thereby suffering serious injuries. The glass roof was located over the terrace of a building into which he had broken from building works in the adjoining building. V's parents brought a claim against the persons in charge of these building works, the building company, the City Council and the religious community that owned the building. V's parents alleged that the defendants failed to adopt the necessary measures to prevent a group of minors from gaining access to the building under construction and that the wall preventing access to the terrace skylight had been knocked down without any measures being adopted either to indicate or protect the skylight. The claim was dismissed at all instances and the Supreme Court also dismissed V's parents appeal in cassation.

Decision

2 The court held, in respect of the case before it, that it was essential to execute the works in a complex building, consisting of an old closed convent that was located in the old town. By contrast to cases decided previously, it was also relevant that there was a fence that enclosed the perimeter of the part of the building under works, with signposts indicating that access to the premises was forbidden to any person unrelated to the building works and that on a previous occasion minors wandering about the works had already been reprimanded.

3 It also held that it could not be considered that the defendants had been negligent, since it was clear that the children had circumvented the barriers (fence and gate) put up to prevent entry into the building. They had intentionally bypassed

2 Cass 20 August 1997, no 7742.

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these filters and wandered about the complex of courtyards, corridors and rooms until they had access to a point far from the place where the works were being carried out. Then, taking advantage of the provisional situation of the premises as a result of the works, they went onto the roof of the building and the victim crossed a skylight, in spite of being warned by one of his friends, and one of the panes of the skylight fractured under the weight of the victim's body.

Comments

For comments see below 3f/10 nos 7–8. 4

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 23 July 2008

RJ 2008\5509

Facts

A 16-year-old boy went to a hotel with a group of friends, although he was not a client, and gained access to the pool from the fire escape. The pool hours ended at one o'clock, a time when the bar closed and there was no longer access to the pool; all lights, except those for reasons of security, went out. The boy gained access to the pool at about four o'clock while highly intoxicated and suffered an accident in which he was seriously injured. His parents sued the owner of the hotel and its insurer. The lawsuit was dismissed at all instances, and the appeal to the Supreme Court was also unsuccessful. 5

Decision

It cannot be required of the owners of a hotel with a swimming pool – or of a community of owners with a common pool or of corporations responsible for a public pool – to maintain surveillance and permanent lighting beyond the established time schedule for its use in order to prevent access by people – either of age or under age – who have enough discernment to know that use of the pool after hours is not allowed. This surveillance and monitoring can be required even less when it is in order to prevent access to the pool through ways not fit for regular access, such as the fire escape of a hotel. Nor can pool owners, who abide by the administrative rules established for the operation of pools and take the usual precautions, be held responsible for the consequences of the conduct of a group of young, highly intoxicated boys who were subject to parental authority. 6

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Comments

7 Both cases reflect the currently prevailing doctrine that the inappropriate use of potentially hazardous premises excludes liability of their owners where such misuse has been the main cause of injury. In addition, the clandestine access to the property of others generally prevents the damaging consequences of this access being transferred to the owner as long as the 'normal' enclosure measures are in place. This restrictive stance can be seen in other decisions as well. In a different case, the claimant lost the sight in one eye while he and his friends were playing with some bottles containing etching acid. The bottles had been removed from a box stored in a pickup truck, which had been parked by the defendant on the street. Although the vehicle was locked, and the box had been hidden under a basket, it was possible for the children to climb into its open body and remove the bottles. The court could have considered that the defendant had negligently parked the vehicle near a site where children usually played. However, it stated that damage was unforeseeable to the defendant. Moreover, it added that even if one could aim at making liability stricter, a claimant always needs to prove that a defendant has behaved in an at least minimally negligent way. According to the decision, the truck driver did not create any legally relevant risk and therefore he could not be held liable.[1]

8 Previously, in the case decided by STS 25 September 1996,[2] a 16-year-old entered an unfenced stone quarry, fell, was seriously injured and died. Only some fences and warnings had been placed in the most dangerous places, but these fences did not actually prevent access. The court declared that 'due care was not fulfilled with the warnings and fences that existed on the most important slopes of the stone quarry; it had to embrace the adoption of all the necessary measures to prevent access to the whole area by strangers or at least to all its dangerous spots'.[3] But see STS 5 October 1994,[4] which reached the opposite solution in a case where children entered an unfenced ground where building materials were stored and one of them was injured while playing there. The court considered that the owner of the ground had no duty to fence it, that the materials stored were not dangerous in themselves and not even in the way they had been stored, and that he could not have foreseen that concrete beams would be used by children in their games.

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1 STS 11.6.2007 (RJ 2007\3570).

2 RJ 1996\6655.

3 For a very similar case, with the same results, STS 13.4.1998 (RJ 1998\2390). Also about the inadequacy of warnings or fences when these do not prevent access to dangerous zones, STS 19.6.1997 (RJ 1997\5423) and 27.9.1993 (RJ 1993\6746).

4 RJ 1994\7453.

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12. England and Wales

Latimer v AEC Ltd, House of Lords, 25 June 1953
[1953] AC 643

Facts

Latimer was a milling machine operator for AEC Ltd. Exceptionally heavy rain poured one afternoon and flooded the floors at AEC Ltd. An oily liquid used as a cooling agent for the machines mixed with the waters whose level rose. When the flood subsided, an oily film was deposited on the factory floor. 40 production workers and 24 volunteers were engaged to spread about three tons of sawdust to dry the floor. However, as a result of the unprecedented amount of water, there was insufficient sawdust and some areas were thus left untreated. Latimer arrived at AEC Ltd for the night shift. Without realising the danger, he attempted to load a heavy barrel weighing about two cwt (100 kg) onto a trolley. He slipped, fell on his back and the barrel crushed his left ankle. Latimer brought an action in damages, inter alia, for negligence. In particular, he argued (after the evidence had closed) that having regard to the nature and extent of the risk created by the slippery patches on the floor, a reasonably prudent employer would have closed the factory or such portion as was dangerous. **1**

Decision

A unanimous House of Lords ruled against the claim. On the question of negligence, as the issue of the cessation of activities was not canvassed in evidence, their Lordships found that proof of the condition of the factory to enable a satisfactory conclusion to be reached was absent. The seriousness of shutting down the works and sending the night shift home and the importance of carrying on the work were all additional elements for consideration and without adequate information on these matters it was impossible to express any final opinion. Nor was it possible to determine whether a partial closing of the factory was possible. In any case, their Lordships concluded that the degree of risk of slipping was too small to justify the drastic step of suspending work. Latimer himself had confessed that there was always 'a certain amount of grease about' and except for the accident to himself, he never knew any accident to happen to anyone else through the same causes. AEC Ltd did their best to remove the effects of the flood, employing several workers and volunteers. All this pointed to the conclusion that it satisfied the standard of an ordinary careful employer. **2**

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Comments

3 Although there was insufficient evidence at trial as to the consequences of closing the factory or a part thereof versus the action taken by AEC Ltd, the case clearly illustrates that the availability of precautionary or alternative methods is a relevant consideration in the court's assessment of the required standard of conduct. This is accepted by the overwhelming majority of commentators,[1] though it is rejected by the Canadian scholar, Ernest Weinrib, who has argued that in English law 'the cost of precautions is irrelevant ... the consideration that the cost to the defendant of precautions would exceed the ex ante quantification of the plaintiff's injury does not exonerate the defendant from liability. The defendant can therefore be liable even for a cost-justified action.'[2] Without citing *Latimer*, Weinrib bases this conclusion on the following dictum of Lord Reid in *Bolton v Stone* (see 3a/12 nos 1–6 above): 'I do not think that it would be right to take into account the difficulty of remedial measures.'[3] However, Weinrib ignores the qualification Lord Reid gave to the words quoted: 'If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.' As the House of Lords gave no indication in *Bolton* that the playing of cricket on the defendant's ground should be stopped, it may be inferred that they considered the costs of this *ultimate precaution* would exceed the benefits derived from the activity, and that analysis would certainly be consistent with the reasoning of the House of Lords in the *Latimer* case and prevailing academic opinion.

Watt v Hertfordshire County Council, Court of Appeal (Civil Division) 7 May 1954

[1954] 1 WLR 835

Facts

4 Watt was an employee in the fire service under the control of the Hertfordshire County Council. An emergency call was placed to the service to the effect that there had been an accident and that a woman was trapped under a bus some 200–300 yards (approx 180–275 m) away. It was clear that an apparatus of some kind might be needed for lifting. In the absence of the vehicle normally used to carry the jack, which weighed between 100–150 kg, the sub-officer instructed the leading fireman in charge of the team of which the claimant was a member to take the jack on the only other available vehicle at the station that day. There were no means of securing the jack to the vehicle so two men held it as best they could and their journey began. The claimant's leg was caught under the jack when the driver applied his brakes

1 See eg *WE Peel/J Goudkamp*, Winfield and Jolowicz on Tort (19th edn 2014) § 6-026.

2 *E Weinrib*, The Idea of Private Law (1995) 149.

3 [1951] AC 850, 867.

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suddenly and the jack slewed forward. This resulted in a very bad injury. He brought proceedings arguing that the defendants breached their duty towards him.

Decision

The Court of Appeal upheld the trial court's judgment in favour of the defendants. **5** The sub-officer had done what a reasonably careful head of a station would have done in such an emergency. It rejected the argument that the fire station should have been better equipped at all times even though the evidence was that a jack was very seldom called for, Morris LJ observing that: 'Had the station been a larger station, had there been unlimited resources, unlimited space and an unlimited number of vehicles, it might be that another fitted vehicle would have been available; but that was not reasonably practicable or possible.'[4] An alternative measure would have been to pass the emergency on to another service some seven miles (approx 11 km) away and delay the response time by an extra ten minutes. The court considered that this would not have been the right way to approach the matter.

Explaining the general principle applicable in such circumstances, Denning LJ **6** stated: 'in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved … The saving of life or limb justifies taking considerable risk'.[5]

Comments

This case demonstrates that the required standard of conduct is assessed not just in **7** the light of the private cost to the defendant of taking precautions or adopting an alternative course of action but also the social cost of so doing. On the facts, it would not have been reasonable to pass the emergency call on to the neighbouring station as that would have delayed the response to the emergency call and imperilled the woman under the lorry further. The social utility of saving her had to be weighed against the risk to the firemen.

4 [1954] 1 WLR 835, 839.

5 [1954] 1 WLR 835, 838.

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Tomlinson v Congleton Borough Council, House of Lords, 31 July 2003
[2004] 1 AC 46

Facts

8 Congleton Borough Council acquired a derelict sand quarry that it reclaimed for municipal recreation. The land, which included a 14-acre lake created by flooding the old quarry, was managed by Cheshire County Council. Notices had been erected at the entrance and elsewhere saying 'Dangerous Water. No Swimming'. However, the prohibition was ineffectual. The risk of a fatality to swimmers was known but, owing to financial constraints, the Borough Council decided not to take recommended steps such as planting reeds on the beach (at a cost of about £ 15,000), which would probably have stopped any swimming. £ 5,000 was, however, eventually allocated to a scheme to make the beaches less hospitable to visitors. This came too late for the claimant, John Tomlinson. One hot morning, he dived into the shallows of the lake but his dive was badly executed; he struck his head hard on the sandy bottom and became a tetraplegic as a result. He brought an action against the Borough and County Councils under the Occupiers' Liability Acts 1957 and 1984 complaining that diving into the lake was dangerous and that there was inadequate warning or discouragement of this fact.

Decision

9 The House of Lords unanimously found for the defendants. It ruled firstly that no duty was owed to the claimant under either Act since the Acts apply only to dangers arising from the state of the occupier's premises, whereas on the facts the danger was exclusively attributable to the claimant's own conduct. Further, even if a duty had arisen under one or other of the Acts, there was no breach of that duty on the facts. As in assessing common law negligence, the correct approach was to take into account 'not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also *the social value of the activity* which gives rise to the risk and *the cost of preventative measures*. These factors have to be balanced against each other.'[6] Significantly, considerations of costs were not limited to money expenditures but also extended to the deprivation of liberty resulting from the withdrawal of a valuable amenity. People of full capacity should be free to decide for themselves whether to take the risks involved.[7] In any case, while the £ 5,000 allocated to the safety improvements was not excessive, such an outlay had to be seen in the context of other items that were rated 'essential' and 'highly desirable' in the Borough Council's budget which had taken precedence in its spending. The fact that

6 [2004] 2 AC 46 at [34] per Lord Hoffmann (emphasis added).
7 Ibid, at [41].

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the Council's safety officers thought that the work was necessary did not show that there was a legal duty to do it.

Comments

This decision underlines that the cost of the measures necessary to eliminate a risk **10** is not to be assessed with reference to out-of-pocket expenditure alone. The law of tort must be careful not to 'stamp out socially desirable activities'[8] simply because the activity carries with it some risk which can be avoided without major expenditure. In fact, the social value of activities which would have to be prohibited in order to reduce or eliminate the risk may be a more significant item in the balancing exercise which the court has to undertake than the financial cost. Whether the social benefit conferred by an activity is such that the degree of risk it entails is acceptable is a question of fact, degree and judgment.[9] But the risk of injury to those willingly engaging in dangerous activities provided 'no reason for imposing a grey and dull safety regime on everyone.'[10]

The decision in *Tomlinson* was reinforced by the enactment of sec 1 of the Com- **11** pensation Act 2006, which gives statutory recognition to the deterrent effect that tort liability may have on the pursuit of 'desirable activities'. The possibility of such an effect may be taken into account in a claim in negligence or breach of statutory duty 'in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise)'.[11] The provision, which was introduced as a response to the perception of the growth of a compensation culture, merely re-states the existing law as expressed in *Tomlinson* and other decisions.[12]

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8 *Barnes v Scout Association* [2010] EWCA Civ 1476, at [45] per Janet Smith LJ.

9 *Barnes v Scout Association* [2010] EWCA Civ 1476, at [45] per Janet Smith LJ.

10 [2004] 2 AC 46 at [94] per Lord Scott.

11 Section 1 Deterrent effect of potential liability:
A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –
(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
(b) discourage persons from undertaking functions in connection with a desirable activity.

12 The Explanatory Notes state 'this provision reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts'. See also *Uren v Corporate Leisure* (UK) Ltd (2011) 108(7) LSG 16, at [13] per Smith LJ and *Wilkin-Shaw v Fuller* [2012] ELR 575, at [42] per Owen J among other authorities. Section 1 has been invoked in a number of other cases, including *Hopps v Mott MacDonald* [2009] EWHC 1881. *Barnes v Scout Association* [2009] EWCA 1476 and *Sutton v Syston Rugby Football Club Ltd* [2011] EWHC Civ 1182. For subsequent legislation along the same lines, see the Social Action, Responsibility and Heroism Act 2015.

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13. Scotland

Lamond v Glasgow Corporation
1968 SLT 291

Facts
1 The pursuer was a pedestrian who, when walking along a narrow lane running between a golf course and the embankment of a disused railway line, was seriously injured by a golf ball hit from an adjacent golf course owned by the defenders. The pursuer claimed damages from the defenders, arguing that the defenders should either have erected a barrier next to the course suitable for preventing golf balls from striking pedestrians walking along the lane or else have redesigned the course. The defenders denied negligence, and also argued that the pursuer should have kept a watch for any golf balls hit on areas of the course next to the lane, and should have taken evasive action to avoid the ball which struck him. Evidence suggested that, on average, 6,000 shots a year were played over the fence surrounding the golf course onto or over the lane, yet prior to the accident there had been no reported case of a pedestrian in the lane having been struck by a golf ball.

Decision
2 The judge held that: (a) the accident was reasonably foreseeable; (b) it would have been neither impracticable nor too expensive for the defenders to have redesigned the course to minimise the risk of injury to passing pedestrians; and (c) there had been no duty in the circumstances on a pedestrian such as the pursuer to take evasive action. He therefore awarded damages to the pursuer.

Comments
3 The facts of the case bear evident similarities with the English case of *Bolton v Stone*[1] (concerning a man injured by a flying cricket ball), and that case is referred to in the judgment handed down in this action. The judge in this case (Lord Thomson) held that, although the risk of someone being struck by a golf ball was very low, there was 'a real risk which the defenders ought to have had regard to and taken steps to obviate or at least minimise'. The language of 'real risk', used to distinguish a 'mere possibility', is taken from the speech of Lord Reid in *The Wagon Mound (No 2)*.[2] The distinction between 'real risk' and 'mere possibility' is a difficult one to apply (as Lord Thomson accepted in this case, remarking that he had not found it easy to de-

1 [1951] AC 850. See 3a/12 nos 1–6.
2 [1966] 2 All ER. 709. See 3d/12 nos 6–8.

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termine whether such a real risk existed), especially given that the absence of any reported incidents of pedestrians being struck by golf balls might suggest to an observer of the judgment that the risk of an injury of this sort might just as easily have been described as a 'mere possibility'.

Having considered that there was a 'real risk' of injury, the judge considered the further matter mentioned by Lord Reid in *The Wagon Mound (No. 2), namely* 'the difficulty and expense of dealing with the risk'. The judge noted two possibilities – 'either a high fence … or a rearrangement of the course so that players would not normally be required to play on a line so close to the lane' – and considered either feasible and neither too expensive. The application of these criteria in determining what the defenders ought to have done is an obvious application of the availability and costs of precautionary measures in determining the appropriate standard of care to be applied. 4

14. Ireland

Heeney v Dublin Corporation, High Court, 16 May 1991

Unreported[1]

Facts

A firefighter was killed when tackling a fire without breathing apparatus in October 1985. It transpired that he had been suffering from coronary artery disease for some time prior to his death. A fatal injuries claim under Part IV of the Civil Liability Act 1961 was instituted against his employer. Two principal grounds of negligence were alleged; one was that breathing apparatus and training should have been provided to the deceased; the second was that annual medical examinations should have been conducted. 1

Decision

Barron J found the defendant negligent on both grounds. The defendant had begun providing breathing apparatus and training to firefighters in 1977; by 1984 some brigades (including the deceased's brigade) had not yet received either. While some time had to be allowed to an employer to adapt to new safety information and de- 2

1 Noted in *R Byrne/W Binchy*, Annual Review of Irish Law 1991 (1993) 398 f. Like professional negligence, employers' liability is generally litigated in tort rather than contract; the framing of the action does not generally affect the content of the obligation (unless there has been an assumption of responsibility going beyond the contract terms); it does affect procedural matters, such as the accrual of action for the purposes of statutory time limits.

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vices (financial cost plus the time and effort involved were relevant considerations), the rate of implementation in this case was too slow to meet the standard of reasonable care. An ancillary finding of negligence was a failure to instruct those without apparatus not to enter buildings. Barron J rejected a defence allegation that there was negligence on the deceased's part in not waiting for a suitably equipped crew to arrive.

3 The issues of medical examinations and early retirement were the subject of an ongoing labour dispute between the employer and unions, focused on the financial implications for those unfit to continue in service. Barron J held that once the need for medical examinations, as a matter of safety, was known to the employer, the implementation of such examinations should have been segregated from the other issues and prioritised; failure to do so amounted to negligence.[2]

Comments

4 The case demonstrates that the cost and availability of protective measures are relevant to the fault enquiry. Employers are generally held to a high standard of care in protecting employees, so although an employer does not have to take every available precaution nor have the most advanced safety systems, in general, safety must weigh more significantly than cost in the balancing exercise. The case also shows that the courts are pragmatic in recognising that transition periods may be necessary in introducing changes that involve high levels of expenditure and ancillary burdens such as retraining. Where costs are relatively low and safety benefits are high, failure to take precautions will readily be treated as negligence.[3]

5 Outside of employment cases, similar principles can be seen in operation. Health care providers, for example, may not be liable for a failure to have state of the art diagnostic equipment, where the cost of acquisition and the burden of training staff in its use would adversely impact the allocation of resources to other aspects of the service provided.[4] The burden that safety measures would have on third parties may also be a relevant consideration.[5]

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2 Barron J stated – 'Regrettably, financial considerations on both sides were allowed to take priority over safety, which does not redound to the credit of either side in the dispute.'

3 See *Fortune v PE Jacob & Co Ltd* [1976–7] ILRM 277; *Barry v Nitrigin Éireann Teo* [1994] 2 ILRM 522.

4 *O'Brien v The Coombe Women's Hospital* unreported IEHC, 2 December 2003. Kearns J found that the lack of ultrasound equipment in the hospital was not a breach of duty, since there was a lack of resources and a shortage of trained personnel to operate such equipment even if it had been acquired.

5 *Mulcare v Southern Health Board* [1988] ILRM 689 (re health care services in a person's home). *Muldoon v Ireland* [1988] ILRM 367 (re prison services and safety precautions that would unduly interfere with prisoners' human rights).

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The balancing of the burden of precautions against the benefits in risk reduction is also evident in other areas, including those governed by fault-based statutory provisions such as occupiers' liability.[6] Cost may also be relevant to the choice of remedy, rather than as part of the misconduct enquiry in some areas, such as private nuisance and passing off.[7] 6

Hayes v Minister for Finance, Supreme Court, 23 February 2007

[2007] IESC 8, [2007] 3 IR 190[8]

Facts

The plaintiff, a pillion passenger on a motorcycle that was being pursued by police, suffered serious injuries when the motorcycle crashed into another vehicle. The police initiated the pursuit when the driver failed to stop at a speed checkpoint, it went along a main road at up to 160 km/h towards a town, where the motorcycle driver evaded a police road block; the accident occurred as the motorcycle sped out the far side of town, at a time when the police were still pursuing, but had dropped off by a considerable distance and were travelling at or under 80 km/h. The plaintiff sued the state on the basis that the police were responsible as concurrent wrongdoers for causing the accident; the action was successful in the IEHC and the defendant appealed. 7

Decision

The IESC allowed the appeal and overturned the IEHC judgment, ruling that the trial judge was incorrect in drawing an inference from the facts that the police driver was in breach of the duty of care owed to the plaintiff. 8

Comments

This demonstrates the relevance of the social utility of the defendant's purpose in assessing the question of negligence; behaviour that would otherwise be negligent 9

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6 Section 4(2)(v) of the Occupiers' Liability Act 1995 (in respect of the reckless disregard standard); the prior common law on occupiers also considered the cost of precautions as part of a negligence enquiry, see *McNamara v ESB* [1975] IR 1; *Keane v ESB* [1981] IR 44. In *Whooley v Dublin Corporation* [1961] IR 60 it was held that continued use of an older design of fire hydrant cover was not negligent where the incidence of risk caused by interference was no greater than for the new design.

7 *Falcon Travel Ltd v Owners Abroad Group plc t/a Falcon Leisure Group* [1991] 1 IR 175 (damages awarded for passing off, rather than an injunction, because of the disproportionate effect an injunction would have).

8 Noted by *E Quill*, Ireland, in: H Koziol/BC Steininger (eds), ETL 2007 (2008) 352, nos 9–11.

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can be treated as reasonable when the defendant is pursuing an important public purpose and the degree of deviation from normal behaviour is proportionate to the purpose.[9] Social utility is also relevant to other negligence cases and cases under the Occupiers' Liability Act 1995.[10] The role of social utility in private nuisance has been considered in *Halpin v Tara Mines Ltd* (3a/14 nos 12–16 above).

15. Malta

RG and Another v DF and Another (Court of Appeal – Qorti tal-Appell) 31 October 2008, Writ no 1311/1999

<http://www.justiceservices.gov.mt>

Facts

1 The plaintiff was admitted to hospital complaining of pains in the pelvic region. She was diagnosed as suffering from advanced endometriosis in her pelvis and was placed under the care of a surgical team headed by the first defendant. The first defendant was of the opinion that surgery was required, and he delegated his assistant, the second defendant, a qualified and experienced surgeon, to carry out the procedure.

2 During surgery the surgeon proceeded to separate a large endometritic ovarian cyst from the parietal wall of the pelvis by sharp dissection. The procedure was rendered more difficult than usual because of anatomical distortions and adhesions due to the endometriosis, particularly where the right urether passes over the pelvic brim under the peritoneum. Surrounding tissue was damaged during the procedure but the surgeon stopped the resulting haemorrhage by suturing the tissues. Unbeknown to the surgeon, the right urether was caught in the sutures and was blocked.

3 The plaintiff showed no adverse symptoms in the immediate post-operative period and she was discharged after some days. After a few months, however, the plaintiff was re-admitted to hospital for investigation. It was discovered that the right kidney was no longer functioning and had to be removed. This was a direct result of the blockage of the urether during the earlier surgery.

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9 Where the deviation is disproportionate, negligence may be found, see *Strick v Tracey* unreported IEHC, 10 June 1993; this case makes clear that the same considerations apply to other emergency vehicles.

10 On negligence, see *Fitzsimons v Telecom Éireann* (3a/14 nos 1–11 above); see also *Superquinn Ltd v Bray UDC* (3d/14 nos 7–9 above), at 561 per Laffoy J – the social utility of improved drainage works justified the creation of a remote risk of flooding to neighbouring land under extreme weather conditions. See sec 4(2)(vi) of the Occupiers' Liability Act 1995 above. On the prior common law, see *Whooley v Dublin Corporation* [1961] IR 60 – fire hydrant lid removed by mischievous third party; no negligence; need of easy access to combat fires.

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The plaintiff then sued for damages. Since the plaintiff had not been informed 4
that the procedure had not been carried out by the first defendant, she filed the action against him. The first defendant pleaded that he could not be held responsible because he had not carried out the surgery. At this point the second defendant – the surgeon who had actually carried out the procedure – was joined in the suit. She pleaded inter alia that she had carried out the procedure correctly according to accepted practice.

Decision

The first court accepted the first defendant's plea. In a state-run hospital the patient 5
does not choose the surgeon, and the surgeon who actually carried out the procedure was fully qualified and competent. Although the first defendant ought probably to have informed the plaintiff that he would not be carrying out the procedure himself, his failure to do so did not have any bearing on the outcome and was not relevant to the issue for the purpose of assessing the second defendant's liability. The court then appointed experts who reported that the diagnosis was correct and that it was also advisable to operate under the circumstances. The procedure itself was carried out correctly and there was no evidence to suggest that the damage to the surrounding tissue, and the consequent need for sutures, was due to negligence or lack of skill. In surgery of this type, operative injury to surrounding tissues was not an unusual occurrence especially considering the plaintiff's particular pathological condition.

The experts then considered whether precautions could have been taken to 6
avoid the blockage of the urether. They reported that a possible precautionary procedure was a pre-operative pyelography (a technique for producing an image of the urinary tract by the introduction of a radio-opaque fluid). They reported further that some surgeons adopted the practice of leaving the catheter used for the pyelography *in situ* during the surgery in order to render the urether more palpable ad therefore less likely to be caught in the sutures. However, this is not a standard procedure and it was not utilised in the present case.

The court observed that the fact that a surgical procedure does not give the de- 7
sired result does not automatically entail the liability of the surgeon. Also, the fact that haemorrhaging had occurred was not proof of negligence or lack of skill. However the question in the present case was whether the surgeon ought to have been aware of the danger of pinching the urether in the sutures and whether she had taken sufficient precautions to avoid this danger. Under normal circumstances, the failure to perform the precautionary procedure described by the experts would not have constituted fault, since that procedure was not standard practice. However, due to the peculiar anatomical distortions and adhesions which rendered the procedure on the plaintiff more than usually difficult, this was not a standard case and it was certainly advisable for easily available albeit non-standard precautions to be

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taken, especially considering the gravity of the consequences which were foreseeable. The court therefore found the second defendant at fault, not for having caused the haemorrhage but for having failed to notice the damage to the urether.

8 The second defendant appealed and the Court of Appeal allowed the appeal and overturned the judgment of the first instance court. Reviewing the law on liability for medical malpractice, the court observed that the relationship between surgeon and patient is to be considered under the aspect of contract rather than of tort even when, as in the present case, treatment was provided in a state hospital and the choice of surgeon depended neither on the surgeon himself nor on the patient. The court further observed that the surgeon's responsibility is not to be measured by the result – an unsuccessful outcome does not necessarily entail liability. The test is an objective one: the obligation is to perform the procedure using the standard of care exercised by an 'ordinary' competent surgeon who keeps reasonably abreast of developments in his field and who follows standard procedures, also taking into account the fact that opinions as to the best possible treatment may legitimately differ. Finally, the court also observed that the burden of evidence lies on the patient to prove that the harm suffered was due to the surgeon's negligence.

9 Turning to the facts of the present case, the Court of Appeal observed that, in stating that the defendant ought to have carried out a post-operative test to ascertain that no damage was caused to the urether, the first court had in effect substituted its own judgment on surgical procedure for that of the defendant. Such a test was not part of standard procedure and the surgeon cannot be blamed for following general surgical practice. The appeal was therefore allowed.

Comments

10 Insofar as it did not endorse the 'crass incompetence' test of earlier judgments[1] this judgment nudges the law in the direction of a more favourable interpretation of patients' rights. However, to some extent it is also a missed opportunity. Departing from earlier decisions, which considered medical malpractice cases from the perspective of tort, this judgment classifies the relationship between surgeon and patient as contractual, irrespective of whether the procedure takes place in a private or a state hospital. This does not affect the standard of care required. Indeed, art 1132(1) of the Civil Code, dealing with obligations in general, provides that '... the degree of diligence to be exercised in the performance of an obligation ... is, in all cases, that of a *bonus paterfamilias* as provided in art 1032', art 1032 being the article, in the Title 'of Torts and Quasi-Torts', which defines fault as the failure to use 'the prudence, diligence and attention of a *bonus paterfamilias*'. Classifying the sur-

1 See *Savona v Asphar* 6/15 nos 1–5 below.

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geon-patient relationship as contractual might nevertheless have reasonably led to a reversal or, at least, to a moderation of the burden of proof.[2] After all, the evidence is more readily available to the surgeon than to the patient who, more often than not, is not conscious during surgery. The Court of Appeal, however, reaffirmed that the burden still lies on the patient as the plaintiff. Except for a longer period of extinctive prescription, no really useful consequences follow from the categorisation.

Also, the court's insistence that following standard procedure in all cases excludes liability is unfortunate. This approach is too mechanical, lacks flexibility and may lead to unjust results. A competent surgeon knows when he ought to depart from standard practice, at least in taking additional precautions. Cases which present special risks surely call for additional precautions, even when these are not standard. In the present case, in view of what was at stake for the patient, the known risks of pinching the urether and the additional risks due to the plaintiff's peculiar anatomical distortions, a relatively simple precaution such as that of leaving the catheter *in situ* would have been a reasonable step, considering also that such a procedure was a known albeit not standard practice. 11

Charles Grima on behalf of Chantilly Aparthotels Limited v John Caruana (Court of Appeal – Qorti tal-Appell) 3 February 2009, Writ no 410/2005
<http://www.justiceservices.gov.mt>

Facts

The plaintiff company ran a hotel which was adjacent to property owned by the defendant. During the summer months the defendant undertook construction works on his property and the resulting dust and noise caused great inconvenience to the guests lodged in the plaintiff's hotel so much so that a number of guests cancelled their bookings. Two tour operators also cancelled their contracts with the plaintiff when they came to know of the situation. 12

Claiming that the defendant had caused it substantial loss by undertaking works during the high season, the plaintiff sued for damages due to loss of earnings. The defendant replied that he had merely availed himself of his right to develop his own property and no liability arises from the exercise of one's rights. 13

Decision

The first court found for the plaintiff. It observed that, in terms of art 1030 of the Civil Code, 'any person who makes use, within the proper limits, of a right compe- 14

2 See *Lorenzo Buttigieg v Henry Hirst nomine* at 16/15 nos 1–5 below.

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tent to him, shall not be liable for any damage which may result therefrom'. However, in the circumstances of the present case it cannot be said that the defendant made use of his right 'within the proper limits'. Although a degree of *immissio in alienum* or intangible invasions of another's property is inevitable for a full enjoyment of one's property and is therefore to be tolerated in the interest of good neighbourly relations, one is still bound to take all reasonable measures to minimise the inconvenience caused to neighbours.

15 In the present case the defendant had chosen to undertake works during the peak tourist season, when he could easily have done the same works during the low season, thereby causing the least possible loss to the plaintiff at no significant added cost to himself. He had thus failed to balance the plaintiff's interests with his own and he was therefore liable for the damage caused.

16 The court then appointed experts to assess the loss of earnings suffered by the plaintiff and, relying on the expert's report, it ordered the defendant to pay damages.

17 The defendant appealed. The Court of Appeal confirmed the first court's decision on liability although it reduced the amount of damages awarded.

Comments

18 The relevance of this judgment for the purposes of the present discussion is that the court acknowledged the fact that failure to make use of available alternative methods to avoid harm to others is a ground for liability. The 'good neighbour theory', whereby one is expected to tolerate a certain degree of inconvenience resulting from a neighbour's enjoyment of his property (in the expectation that the neighbour will do the same), allows a fuller enjoyment of property than would have been the case if all forms of *immissio in alienum* were absolutely and unconditionally wrongful. The court endorsed this theory, but subjected it to the obligation of using available means to reduce inconvenience when these means, having regard to the proportionality between their cost and the inconvenience caused by not using them, are reasonable.

19 In the present case all that was needed to minimise the damage was to carry out the works during the low season. This would have meant that the defendant would have delayed the enjoyment of his property by a few months, which the court considered as not an unreasonable cost under the circumstances. The defendant's decision to avoid losing those months at the cost of depriving the plaintiff of the benefits of the peak season was the reason why the court found him in breach of his 'duty imposed by law'.

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Brian Micallef v Brian Tyre Services Limited and Another (Court of Appeal – Qorti tal-Appell) 31 January 2014, Writ no 913/2000
<http://www.justiceservices.gov.mt>

Facts

The first defendant, a commercial company, ran a tyre repair service and the second defendant was the owner and 'hands-on' director of the company. The plaintiff was an employee. The plaintiff was instructed to inflate a tyre. While air was being pumped into it under pressure the tyre burst, seriously injuring the plaintiff. He sued both the company and the director for damages. The defendants pleaded that the harm was due to an inevitable accident; the second defendant (the director) also pleaded that he was not the plaintiff's employer. 20

Decision

The first instance court found that the tyre had burst not because it had been wrongly subjected to excess pressure but because it was faulty and its sides were weak. The defendants had no way of knowing this because there were no external signs of weakness. However, that fact that tyres could be weak and defective without showing any external signs of this meant that the plaintiff was being exposed to an inherently risky activity and his safety was being left to chance. Moreover, a similar accident had occurred on a previous occasion, though, fortunately, without injury to persons; this showed that the possibility of a tyre blowing up was not a remote one which could not be foreseen. This notwithstanding, the defendant had failed to take any precautions against such an event, eg by providing protective gear or placing a barrier between the tyre and the operator. It therefore failed to provide a safe system of work. 21

Turning to the second defendant, the court observed that, while it was true that he was not the employer, systems of work and working environments are still created by physical persons not by moral entities, and in the present case the second defendant was the person who had actually failed to put the necessary precautions and safety features in place. The first instance court therefore found both the defendants equally liable. 22

The defendants appealed but the Court of Appeal upheld the judgment on liability, although it reduced the damages awarded by the first court for reasons which are not relevant to the present discussion. 23

Comments

The duty of employers to provide a safe system of work entails a duty to take precautions against foreseeable dangers. The plaintiff had a particularly strong case because the event was eminently foreseeable – a similar accident had happened be- 24

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fore – and also because absolutely no precautions were in place. One interesting aspect of the case is the finding that the second defendant was jointly liable. Although the court expressed itself in general terms – working environments are created by physical persons not moral entities – it was possibly influenced by the fact that the second defendant was a 'hands-on' director who also worked on the shop floor with the employees and was fully aware of the conditions. Alternatively, it may be evidence of a general inclination of the courts to find for the plaintiff in cases of injury due to industrial accidents.

25 It is also to be pointed out that, although the action against the first defendant was contractual in nature and that against the second defendant was delictual, the court applied more or less the same standard of liability in both cases.

16. Denmark

Østre Landsret (Eastern Court of Appeal) 27 October 2009

U 2010.336 Ø

Facts

1 On a slippery road A fell off his bike and suffered personal injury. A sued the municipality arguing that the road had not been adequately maintained. Pursuant to sec 3 of the Winter Maintenance Act,[1] the municipality had adopted certain regulations on how roads and footpaths should be maintained and the question before the court was whether the municipality had duly observed their duties according to that regulation.

Decision

2 The court found that the maintenance, which had been carried out by the municipality on the morning of the accident in question, satisfied the requirements laid down in the relevant regulation. Further, it satisfied the requirements for maintenance that could reasonably be expected and therefore, the court did not find that the municipality could be held liable for the said accident.

Comments

3 The case evidences the reluctance of the Danish courts to question the priorities chosen by public authorities (such as a municipality) as regards the manner in

1 Consolidated Act No 1103 of 16 September 2010.

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which they conduct their business. The main reason for this reluctance seems to be a rather strong recognition on the part of courts that municipalities have limited resources and, as long as these resources are spent well, they should, as a rule, not be held liable for damage caused by their activities Thus, one might say that fiscal considerations impact on how the rule of *culpa* is construed when the liability of municipalities is concerned. Normally, the liability attached to land owners for accidents which occur on their land is quite strict but for the above reasons this does not apply to public bodies. Further, it may be argued that the historical reluctance to blame the 'King' for his wrongdoings still impacts on how the liability standard is set by the courts.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 8 March 2000

Rt 2000, 388

Facts

A psychiatric institution failed to make the windows on the second floor of the building safe by not making them unbreakable. A psychiatric patient jumped out of one of the windows, trying to commit suicide. He survived, and afterwards he claimed compensation from the institution for the personal injuries he suffered. He held that the institution should have made security arrangements preventing him from the dangerous jump. 1

Decision

The Supreme Court found that the institution was liable on the basis of the uncodified rule of strict liability for dangerous things or activities. As mentioned in the introduction, the content of this rule is that a legal entity may be liable for damage caused by a *continuous*, *typical* and *extraordinary* risk emerging from the legal entity's physical property or business. The application of the rule in the concrete case was, however, made with references to criteria in the *culpa* rule regarding how the management of the institution had acted before the accident. Thus an important part of the reasoning in the case was that it would have been relatively cheap to replace the windows with unbreakable windows. The costs of the raw materials would have amounted to only NOK 100,000 (approx € 12,500) (in 2000) plus the costs of labour which was needed to actually replace the windows. The court pointed to statements from psychiatrics about the risk of suicidal behaviour among the patients involved, and the fact that there were no clear routines to ensure that suicidal patients had no access to the part of the building where the breakable windows were. Even if the height of the fall had only been 1.8 m, and the probability of seri- 2

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ous physical injury to the patients therefore was relatively low, the hospital still had to bear the costs of the risk of damage due to the low replacement costs and availability of an alternative method that would have eliminated the risk of injury.

Comments

3 The case is one of a series of cases under Norwegian law where strict liability is the legal basis even if the court at the same time puts weight on the fact that the liable party could have avoided the damage by acting more prudently. Scholars have termed this legal basis 'strict liability for culpable arrangements'.[1] It is important to note that misconduct in these cases seems to be necessary to constitute liability in such a form and within such a context, even though the court is not willing to point to a concrete person that should have acted differently. It seems to be a prerequisite that there was an alternative method available at a low cost. This proportionality test is to some extent 'hidden' in the legal basis of strict liability, which in principle does not comprise misconduct in any way. In fact, where there is strict liability, the dangerous activity often does not contradict the law in any way, rather it is in itself a useful activity for the benefit of society as a whole. The case clearly shows that the question of liability may turn on the costs of an alternative, preventive act. The amount of NOK 100,000 was so modest that it could have encouraged the management to take measures.

18. Sweden

Högsta domstolen (Supreme Court) 25 June 1958

NJA 1958, 461

Facts

1 A farmer was driving a tractor on the highway with a trailer laden with freshly boiled potatoes (for his 100 pigs), which spread steam and thus hampered visibility. A motorist travelling behind drove into the trailer and damaged his own car.

Decision

2 The action for damages was dismissed. Since the farmer had to arrange the feeding of his pigs in advance, the court found that he could not be required to cancel the transportation of food every time it was foggy. Furthermore it could not be re-

1 See especially *N Nygaard*, Skade og ansvar (6th edn 2007) 252–254.

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quired that he purchase a trailer with a roof or that he made any other arrangements to counteract the spreading of steam. Instead the court found that the farmer could rely upon the fact that other motorists would not drive under such circumstances without taking precautions themselves. Therefore the farmer was not regarded as negligent.

Comments

This old case has led to a discussion regarding the justification of the outcome. One opinion is that the judgment should be understood as an example of no liability due to the absence of – or difficulty in implementing – any alternative precautionary methods.[1] Another viewpoint is that the case demonstrates a balancing evaluation as regards risk and benefit.[2] The latter interpretation seems to have a systematically strong basis, when contemplating the always – in every tort law case actually – existing option to abstain from action at all (there is no natural law that people have to drive around with steaming loads on our roads). The alternative method of doing nothing at all – instead of doing harm – is always available; however, this option is not always preferable. 3

If a court were faced with the counter-example that the poor visibility had been the result of some kids playing around with a fire on a trailer, a balancing of the availability of precautionary methods, risks and the considerations that could allow the action despite its risks, it would not arrive at the same result as in the 1958 case of the 'boiling potato farmer'. This example, therefore, shows that the acceptance of risk in this case must be explained by something other than the impossibility of alternative conduct. It is the overall evaluation of the balancing of risks and interests that explains the outcome of the case. That the youngsters' actions would have been considered negligent, while the farmer's creation of exactly the same risk would not, seems best to be explained by the fact that the latter's conduct does have a certain utility, which affects the requirements of what must be done to counter the risk. 4

1 *J Hellner*/*M Radetzki*, Skadeståndsrätt (8th edn 2010) 140.

2 *A Agell*, Samtycke och risktagande (1962) 90 f and *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 88 f.

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19. Finland

Korkein oikeus (Supreme Court) KKO 1989:129, 7 October 1989
<http://www.finlex.fi>

Facts

1 The lighting of a harness racing track failed during a competition, and the race track had no emergency lighting system. The lights were off for 15–20 minutes. However, the stands were lit, and some light was given to the track area from the headlamps of cars. Nevertheless, after the failure of the lights, the horses collided in the dark and were injured. Furthermore, the drivers of two sulkies were taken to hospital.

2 The owners of the injured horses claimed compensation for veterinary fees and the decrease in the value of their horses. Some of the injured horses had been unable to take part in harness racing competitions after the accident and therefore they could only be used for breeding.

Decision

3 The Supreme Court stated that the organiser of the harness racing competition had failed to implement the necessary safety measures. It was therefore ordered to pay damages to the horse owners (split decision 3-2).

4 It was not known why the lights failed. According to the district court (the Supreme Court was satisfied with district court's reasoning), the organiser of the harness racing competition knew that if the lighting failed, it would take a considerable length of time before the lights could be turned back on. The time of day, season and weather had meant that the harness racing track was in total darkness when the lighting failed.

5 The organiser of the competition had failed to arrange a backup lighting system that would have prevented the track going dark, and it was the darkness that had caused the falls and injuries. Neither was it completely unexpected that the lights should go off, even though such an occurrence was uncommon. Finally, the costs of secondary lighting would not have been out of proportion with the organiser's returns from the competitions. For these reasons, the organiser was said to have caused the injuries through its negligence. The failure to organise safety measures constituted negligence by omission.

Comments

6 This case is a good example of how the Finnish courts assess negligence in a situation where there are no precise regulations on the action or operation at hand. The Supreme Court did not say whether the question was one of contractual liability or non-contractual liability. As this case has also been used as an example of non-

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contractual negligence in Finnish text books on tort law, it is immaterial whether the negligence arose in a contractual or non-contractual context.

The courts consider the probability of damage or injury, the cost of preventing 7
the damage, the seriousness of the possible damage and the usefulness of the action in question. Of significance is also whether the action of the tortfeasor is connected with his/her professional activities or if it occurred in connection with a leisure time activity. If the purpose of the activity is to gain profit, the expectation for appropriate security measures is higher, because a common principle in Finnish tort law is that if a person creates risks for others in order to gain profit, that person must bear the costs if the risks materialise.[1]

A minority, two judges out of five, were of the opinion that the claims should 8
have been dismissed, because in their view there had been no negligence and harness racing was not so dangerous an activity that liability should be imposed on the organiser of competitions regardless of any fault. In addition to this, participation in the sport was voluntary and the participants had recourse to compensation through insurance.

The author feels, however, that this argument is not entirely convincing, because 9
lighting failure can predictably lead to various personal injuries to sulky drivers in harness racing, and no money can totally compensate, for example, for the loss of sight, paralysis or brain damage (to human beings) that could result from a harness racing accident. The horses can also suffer serious and permanent physical injury.

20. Estonia

Harju Maakohus (Harju County Court) 28 August 2013

Civil Matter No 2-12-34167

Facts

The plaintiff participated as a spectator at an off-road competition organised by the 1
defendant. During the competition, one of the trucks could not drive up a steep climb and rolled back down due to brake failure, driving out of the curve from where the plaintiff was watching the race. The plaintiff had no time to jump away from the vehicle, and the truck drove over the plaintiff's hip area with its rear wheels. The accident took place at a location that spectators had been clearly forbidden from entering by the defendant who had marked the area with yellow tape. The plaintiff sought compensation from the defendant for pecuniary and non-pecuniary damage.

1 See, eg, *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 134–136 and KKO 1972 II 97, KKO 1975 II 30 and KKO 1982 II 123.

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Decision

2 The county court did not satisfy the claim. The county court found that, although the health of the plaintiff is a legal right subject to protection under § 1045 (1) 2) of LOA, it has to be established whether the defendant, as an organiser of the race, violated the general duty to maintain safety, that is, whether or not the defendant ensured safety at the race and ensured sufficient information was given to spectators. A general duty to maintain safety means that anyone who creates a danger with his/her actions or is in control of the situation and allows a dangerous situation to continue is under an obligation in tort law to take all the reasonably necessary and suitable measures that are needed and feasible to avoid or eliminate danger, taking into consideration the circumstances of the case, in order to protect other people and their absolute rights from the materialisation of danger. Such a definition corresponds in essence with the definition of external care that, pursuant to § 104 (3) of LOA, means the requirements of care that a legal order imposes an average careful person based on the specific situation with the aim of protecting the legal rights of people.

3 The court found that the plaintiff's argument that the organiser had done nothing to ensure safety, since the racetrack workers did not ask the plaintiff to leave, is unjustified. It cannot be assumed that, in a situation in which hundreds of spectators are watching the race, a track worker could reach every spectator in person to remove them from the danger zone. The defendant, as an organiser of the race, did not have to surround the entire racetrack with impenetrable barriers but determine the places that were far enough from the racetrack and safe for spectators. That is exactly what the defendant did. The defendant had published information about safety in watching the race on an information board at the race site. Therefore, the defendant had done everything reasonably necessary to ensure that the risk from the danger he had created would not materialise. The impossible cannot be demanded of a person under the general duty to maintain safety. The plaintiff did not justify or prove that the defendant was bound in this situation to comply with a behavioural standard that obligated him to take additional measures to avoid the damage caused to the plaintiff.

Comments

4 The court stated that the definition of the breach of a general duty to maintain safety is equal to external negligence (a failure to follow the objective standard of care, *äußere Sorgfalt*). Such a position is recognised in legal literature.[1] The court established what the defendant had done to ensure the safety of the plaintiff and other spectators of the race. It found that, although the defendant could have done more

1 *T Tampuu*, Lepinguväliste võlasuhete õigus [Law of non-contractual obligations] (2012) 238. See also 1/20 nos 4–5.

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to ensure the safety of the plaintiff, it would have been unreasonable considering the circumstances of this case. As noted above, the accident took place at a location that had been clearly marked as 'off-limit' for spectators by the defendant who had marked the area with yellow tape. The court found that the defendant could not be obliged to compensate the damage simply because the employee he had hired did not additionally inform the plaintiff of the danger and did not ask him to leave the forbidden area. This case could also qualify under 3a/20 and 3c/20.

It can be said for Question 3f/20, based on Judgment No 2-13-10707 of the Harju County Court, 28 June 2013, that repairing the road brings about a general duty for the repairer of the road to maintain safety by doing everything reasonably possible to ensure that the users of the road under repair would not suffer damage due to the roadworks, although the repairer was not the road owner. Please see this Judgment under 4/20 nos 6–8. 5

Riigikohus (Supreme Court) 30 June 2013
Civil Matter No 3-2-1-73-13

For facts and decision see 3c/20 nos 1–4. 6

Comments

In this case the Supreme Court explained that the more likely it is that damage will occur and the lower is the effort and expenditure needed to avoid the damage, the higher is the likelihood that there is a duty to maintain safety by taking measures to avoid or eliminate danger. 7

According to the assessment of the Supreme Court, based on the circumstances established by the courts, the defendant could have made the situation safer and could have prevented the damage occurring by taking a simple and cheap measure, ie by building a barrier. The Supreme Court found this measure proportional, taking into consideration the gravity of the impending danger. It has to be emphasised that, in giving such an assessment, the Supreme Court took into consideration the fact that the defendant was a lessor and the accident took place in a hallway of a rental property. Unlike the county court, the Supreme Court did not directly blame the defendant for the fact that he could and should have improved the lighting of the hallway. 8

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21. Latvia

Augstākās tiesas Senāts (The Senate of the Supreme Court) No SKC-69/2008, 20 March 2008

Unpublished

Facts

1 Defendant A carried out repair works over a river and for that reason a metal wire was used to connect the pillars of the bridge just above the water. The presence of the metal wire was not indicated by warning signs and therefore it was not visible to those travelling on the river. One afternoon, the claimant's boat drove into the rope causing damage to the boat. The claimant brought an action against the principal contractor (defendant A) and its subcontractor (defendant B) requesting compensation for both pecuniary and non-pecuniary damage.

2 Defendant A objected, arguing that liability ought to be imposed on defendant B, which in fact had performed the works and had placed the metal wire between the pillars. In addition, all the necessary permits to carry out the works had been issued. The placing of restrictive signs lay at the discretion of the Latvian Maritime Administration, which only did so after the accident in question. Furthermore, defendant A argued that the claimant himself had not exercised due care, had driven the boat without a license, had not passed an appropriate boat driving test, and was moving at a much higher speed than was permitted.

Decision

3 The first instance court rejected the claim and the court of appeals satisfied the claim. After the Senate of the Supreme Court reversed the decision, the court of appeals satisfied the claim only against defendant A. The latter decision was appealed by defendant A, arguing that the claimant himself could have avoided the accident and the damage by exercising due care and that the court of appeals could not refer to the safety regulations indicating that the principal contractor (defendant A) was responsible for carrying out the construction works in a manner which ensures that another person's rights are not infringed.

4 The Senate of the Supreme Court reviewed the cassation appeal, rejected it and thus the decision of the court of appeals was upheld.

Comments

5 In the case at hand, the court had to resolve a dispute involving three parties. The defendants were bound by a specific sub-contractual relationship. Defendant A also emphasised that the claimant himself had acted wrongfully.

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The statutory law governing the relationship between the principal contractor and the subcontractor is of particular importance when determining whether a person is actually liable for the damage. As established by the court, the metal wire was placed between the bridge pillars by the subcontractor, who in accordance with the agreement with the principal contractor, undertook to bear full responsibility for compliance with the necessary safety regulations. However, the same obligations and responsibility were imposed on the general contractor under the agreement with the procuring authority – the municipality. 6

The counter-arguments concerning the lack of due care by the boat driver were duly assessed and the court found that no speeding had in fact been established. In addition, having a boat driver's license and taking the Ministry of Transport test were not mandatory at the time of the accident. Consequently, the lack of warning signs and low visibility of the metal wire used during the works shifted the outcome in favour of the claimant, concluding that the latter had not acted negligently. 7

The necessity of the precautionary measures informing third parties of the risks was also analysed by the court. If the occurrence of any damage had been unforeseeable or if the need to warn third parties of a possible accident in such situations had been considered unnecessary or if it had been impossible to install warning signs due to other reasons, the outcome of the case might have been different. The court considered the factual circumstances of the case and concluded that warning signs were required as the metal wire was not clearly visible and, therefore, without precautionary measures, the wire created a source of risk towards third parties and thus the conduct of defendant A did not meet the necessary standard of care since the use of such signs was both available and necessary. 8

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-195, 22 March 2006
Unpublished

Facts

During the period of November 1999 to April 2000, unauthorised woodcutting was performed by a person who was not a defendant in the present case (the tortfeasor) in a forest belonging to claimants A and B. The action for compensation of the damage equal to the amount of the value of the timber was brought against the local forestry agency (the defendant). The claimants argued that the defendant discovered the unlawful activities, but the employees of the forestry agency failed to take steps to interrupt or prevent it thereby negligently exercising their duties. The claimants pointed out that the defendant imposed disciplinary measures on the foresters – the employees of the defendant – in connection with the unauthorised woodcutting in question. It was proved that the tortfeasor was not employed by the defendant or in any way connected with the defendant. 9

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Decision

10 The court of first instance satisfied the claim in full. The court of appeals rejected the claim that was brought against the defendant, arguing that the tortfeasor was identified and was found guilty in criminal proceedings for unauthorised woodcutting on private property, thereby causing substantial damage to the claimants. The defendant's employees in general complied with the requirements set by law and internal instructions, namely the foresters of the defendant discovered the unlawful activities of the tortfeasor, prepared the necessary documentation, calculated the damage and reported their findings to law enforcement bodies. The court further noted that, notwithstanding the vicarious liability of the employer for the actions and omissions of its employees, the factual circumstances suggest that the foresters did indeed try to stop the tortfeasor, but the latter intentionally continued his unlawful activities.

11 The Senate of the Supreme Court upheld the decision of the court of appeals indicating that the tortfeasor was found responsible for the unlawful activities causing the damage to the claimants in the criminal proceedings. The claimants were wrong to assert that the defendant failed to take any steps to notify them or interrupt the unlawful activities as the defendant helped to identify the tortfeasor who directly participated in the unlawful activities. The disciplinary measures imposed on the foresters do not justify the imposition of liability for the damage by virtue of vicarious liability. According to the applicable law, the defendant, as a state institution with administrative functions, is not obliged to guard the forest belonging to the claimants, although steps to interrupt and to prevent the unlawful activities were in fact taken.

Comments

12 As regards the standard of conduct on the part of the defendant, the Senate of the Supreme Court quite rightly pointed out that the defendant, as a state institution with specific competence, is not obliged to guard the forest owned by the claimants. On the contrary, the defendant could be held responsible only for failing to do that which is possible to prevent the damage unlawfully caused by another person. Thus, this would not be liability for risk (strict liability), nor would the defendant be automatically liable for all and any damage to the claimant's forest. In the case of wilful misconduct by a third party, the defendant may fail to prevent the harm to the claimant's property if the steps and measures available to the defendant turn out be ineffective. In this case, the defendant did in fact perform the duties it was charged with and took the precautionary steps to prevent the damage, but they turned out to be ineffective against the tortfeasor's conduct.

13 The court concluded that the required standard of conduct was complied with by the foresters and there was no basis for the establishment of vicarious liability. The standard of conduct of the employer in this case towards third parties was lim-

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ited by his duty to choose a suitable person for the task in accordance with art 1782 of the CLL and the employer is not liable for all and any acts or omissions of its employees. The court arrived at the conclusion that the defendant was not liable for the damage as it did not act wrongfully. The liability of the tortfeasor was not the issue and was not further analysed by the court in this case.

It must also be pointed out that the Senate of the Supreme Court indicated that art 1782 of the CLL can be interpreted in a way that the employer becomes liable for the actions or omissions of an employee only if the former failed to examine the capabilities of the employee when hiring him/her. Such an interpretation could be considered somewhat narrow as it would only render the employer liable in cases where the employee lacks the necessary experience, education and/or skills for the job. This may not entirely conform with the prevailing view and the jurisprudence supporting a slightly broader approach. **14**

Augstākās tiesas Senāts (The Senate of the Supreme Court) No SKC-302, 16 August 2000

Unpublished

Facts

The claimant parked his car near a state-owned hospital, at a place which was not reserved for parking. After a few hours a tree above the parked car suddenly split in half and a part of the trunk, with a diameter of 80 cm, fell onto the claimant's car and damaged its roof. It was later discovered that the tree had a disease which was not visible. The claimant brought an action for damages against the defendant (the hospital). **15**

Decision

The court of first instance rejected the claim for damages. The court of appeals also rejected the claim. The court found that, in the case of an accidental event, the claimant shall not be obliged to compensate any loss when no misconduct by the defendant is established. The claimant appealed the latter decision arguing that the court did not correctly apply the norms providing that a person is not liable for damage caused by *casus* (chance) or *vis maior*. The claimant also argued that court did not take into account the landscaping regulations issued by the Riga City Council stipulating that the hospital ought to ensure professional maintenance of greenery. A failure to adequately inspect the condition of the trees would be considered negligent within the meaning of art 1645 of the CLL. The Senate of the Supreme Court rejected the cassation appeal and provided the following rationale: the CLL states what constitutes direct, indirect and accidental loss. Determining the particular type of loss is a conclusion based on an evaluation of the circumstances in each **16**

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case. The court of appeals evaluated all of the factual circumstances of the case and subsequently found that the loss was accidental. It was not within the competence of the Senate of the Supreme Court to re-assess the aforementioned circumstances. In addition, the Senate pointed out that the court evaluated the expert opinion prepared by the Environmental Protection Administration of the Riga City Council on the interpretation and application of the landscaping regulations issued by the Riga City Council that were referred to by the claimant.

Comments

17 Riga, the capital of Latvia, like many other European cities, is well-known for its numerous parks and tree alleys and the greenery is maintained and restored gradually. A variety of measures are taken by local municipality-owned companies and its subdivisions to maintain the city's parks and trees, but they are not obliged to inspect trees on private property. Such surveys could be carried out by the owners of the land, but it might be quite burdensome and expensive if the number of trees is significant.

18 This case provides an example of how the precautionary measures to prevent damage would impose too heavy a burden on a person and how it cannot reasonably be expected that a person complies with such a standard of care. Consequently the damage, when it materialises, is considered to be accidental in nature as no negligence in the conduct of the defendant can be observed. If the risks are not likely to materialise, parties rely on the likelihood that nothing will happen. Every tree cannot be inspected diligently every day and it would not be justifiable to impose such a duty upon the owner of land with trees on it and even that could not prevent damage to another person entirely. Therefore the standard of conduct insofar as the preventive measures are concerned involves an economic analysis of the precautionary and preventive measures to determine whether it would be reasonable to expect someone to comply with that standard. This, however, was not expressly mentioned by the court. The fact that cutting down trees in cities is not allowed without permission from the authorities must also be taken into account.

22. Lithuania

SP v RL, the Republic of Lithuania and Vilnius City Municipality, 13 February 2013

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-18/2013; <http://www.apeliacinis.lt>

Facts

1 The facts of this case are set out above (3d/22 nos 7–10). Additionally it should be mentioned that the plaintiff alleged that the Lithuanian state, represented by the

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Ministry of Health, was responsible for insufficient legal regulation, which should protect society from the potential threat posed by mentally ill persons. According to the plaintiff, legal regulation should ensure that mentally ill persons are observed by mental care institutions and, in the case of threat to others, are involuntarily hospitalised for treatment.

Decision

Both the court of first instance and the Court of Appeal refused to hold that the legal regulation of monitoring of mentally ill patients is insufficient. The Court of Appeal accepted the arguments of the defendant that, if a mentally ill person has no close personal relations and is unemployed and decides himself/herself to terminate the provision of medical services, monitoring of his/her mental condition is limited, which might in turn preclude his/her timely recognition as one who is legally incapable and needs to be assigned a guardian. 2

Furthermore, the Court of Appeal held that the regulation concerning involuntary hospitalisation is also sufficient, because involuntary hospitalisation should be justified by a real danger that, by his/her actions, the mentally ill person is likely to commit serious harm to his/her health and life or to the health and life of others. It cannot be based on the mere fact that a person suffers from mental illness or unfounded allegations of a doctor or other people that a mentally ill person can be dangerous. Hence, legal regulation should balance the interests of society, on the one hand, and the human rights of mentally ill persons, on the other. The application of strict measures to mentally ill persons in order to guarantee the safety of society carries the potential for the abuse of the human rights of these persons. 3

Comments

The case illustrates how the social costs that would be incurred by the state if it took additional precautionary measures against the risk posed by mentally ill persons influence the standard of care of public institutions. It is clear from the facts of the case that the mentally ill person who committed a crime against the plaintiffs' daughter, had not consulted a psychiatrist after his cancer diagnosis, which allegedly was one of the most important reasons for the worsening of his mental health. Nevertheless, the Court of Appeal decided that additional preventive measures against mentally ill persons would be too costly in social terms to ensure the absolute safety of society since it would create a ground for abuse of the rights of mentally ill persons. Therefore the court concluded that the state did not breach the standard of care by not implementing more preventive measures. 4

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Panevėžys regional department of environmental protection v AB 'ORLEN Lietuva', 24 October 2012

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-430/2012; <http://www.lat.lt>[1]

Facts

5 Unidentified persons deliberately damaged an oil pipe owned by the defendant, the oil refinery, 'Orlen Lietuva'. This damage led to oil leaking into a river for 11 hours, causing its contamination, until the defendant managed to stop the leak. The river was cleaned by the defendant to the extent that this was possible under the circumstances. The plaintiff filed a claim against the oil refinery for compensation of environmental damage. Among other arguments, the defendant alleged that the damage was caused by criminal acts of third persons.

6 The court of first instance granted the claim on the basis of strict liability of a keeper of an object of a higher danger. The court found that the defendant was fully responsible for the physical condition of its pipelines and their protection and was under a duty to ensure that third parties had no possibility to physically access them. The Court of Appeal partly changed the decision and reduced the award by half, arguing that the defendant cannot be held liable for the criminal acts of third persons. The Court of Appeal stated that no precautionary measures could have prevented the incident from occurring, especially by persons with criminal intentions. Moreover, the appeal court emphasised that the war on criminality as a social phenomenon is the obligation of the state. According to the court, the defendant should be liable only for the delay in localising and repairing the place of leak.

Decision

7 The Lithuanian Supreme Court reversed and upheld the decision of the court of first instance. The Lithuanian Supreme Court agreed that strict liability should be applied on the basis of art 34(2) of the Law on Environmental Protection and art 6.270(1) CC providing the strict liability of a keeper of an object of a higher danger. The Lithuanian Supreme Court held that, in the case of strict liability, the fact that the defendant had taken all available precautionary measures would not eliminate liability for the damage that emanated from an object of a higher danger. On the other hand, the Lithuanian Supreme Court stated that the very fact that the defendant covered the pipeline with reinforced concrete blocks after the accident was

1 The case was commented upon by *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: K Oliphant/BC Steininger (eds), European Tort Law (ETL) 2012 (2013) 421, nos 22–36.

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sufficient to establish that he had failed to take all available precautionary measures before the accident.

Comments

The case demonstrates that the cost-benefit analysis of precautionary measures falls on the shoulders of the keeper of an object of a higher danger, because, even if all available measures had been taken, this would still entail strict liability. On the other hand, the Lithuanian Supreme Court stated that in fact the defendant had failed to employ the necessary precautionary measures, which indicates faulty behaviour. However, the Lithuanian Supreme Court did not elaborate on the cost-benefit analysis of the additional precautionary measures. Interesting enough, contrary to the settled practice of other European countries,[2] it was deduced automatically that a fault had been committed because, after the accident, the defendant took supplementary safety measures. **8**

GP, SP and DP v the Republic of Lithuania, 29 November 2012

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-539/2012; <http://www.lat.lt>

For facts see 2/22 nos 11–17. **9**

Decision

The courts of all instances decided that the state, as the owner of a plot of land where the tragic accident happened, failed to take easily available precautionary measures in order to avoid damage. According to the courts, in the case of a lack of finances to clean a site and guard unauthorised access to it, as argued by the state, the defendant could have prohibited access to the historical site and this measure would most likely have eliminated the possibility that tragic accidents occur. **10**

Comments

Comparing the argumentation of the courts of all instances in this case with the case discussed above[3] where the mentally ill person fatally shot a girl, it is obvious that available precautionary measures and their cost, including social costs, as well as **11**

2 *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) 331, no 45.

3 3f/22 nos 1–4.

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the alternative measures which the defendant could have taken, are assessed by the courts when deciding on the required standard of conduct. In this case an alternative solution would have been easily available to the defendant as it apparently would have been easy to prohibit access to the site and thus avoid endangering third persons, contrary to the situation discussed in the case of the mentally ill person.

23. Poland

Sąd Najwyższy (Supreme Court) 2 December 2003, III CK 430/03

OSP 2/2005, item 21

1 For facts and decision see 2/23 nos 9–13.

Comments

2 The presented judgment is an example of a case where the court stressed the importance of the precautionary measures. All the mentioned elements, including the lack of an adequate number of properly trained security guards, the fact that they were not recognisable by emblems or clothes, a total freedom to carry glasses around the club, and the lack of a camera monitoring system allowed the court to establish the wrongfulness of A's conduct. The court did not analyse the matter of costs of the mentioned measures, but it can be clearly seen that such precautionary methods are commonly available at rather low cost. It is also worth noting that law did not expressly require any of the mentioned measures. But, as the court stated, this was due to common sense and the professional nature of A's business.

Sąd Najwyższy (Supreme Court) 1 December 1962, I CR 460/62

OSPiKA 1964, item 88

Facts

3 V fell into an excavation dug by A (a company that installed pipelines) in the street in connection with the installation of underground pipelines. Over the excavation, the company had made a provisional bridge with two railings. At some point in time, at night, someone removed one of the railings, so at the time of the incident there was only one. On the evidence, A also failed to install adequate lighting, as the lamp at the site was not functioning. V claimed compensation for serious personal injuries.

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Decision

The Supreme Court held that the lack of both adequate lighting and the second railing was the cause of V's accident. A had a duty to do its best in order to prevent risks to passers-by. According to the court, A should have placed a guard at the bridge, who could have monitored the lighting and the safety precautions at the site. 4

A was held liable both on fault and on the basis of strict liability of enterprises which 'operate by the forces of nature' (presently art 435 KC) whereas the forces need not be instrumental in causing the injury. 5

Sąd Najwyższy (Supreme Court) 4 March 1965, III CR 9/65

OSN 1966, item 17

Facts

V was on vacation at the seaside. When bathing in the sea, he injured his leg on a broken iron barrel, which was lying in the shallow water close to the beach. A, a municipality, requested the action to be dismissed, claiming that V had been swimming at an unguarded beach, which was outwith the arranged bathing area. A warning notice had been put up on that beach stating, 'Unguarded beach. Visitors bath at their own risk.' The officials of the municipality were aware of the barrel's existence as there had already been cases of injuries of people bathing there. The court of first instance and the Supreme Court acting on appeal dismissed the suit holding that V was acting at his own risk. The President of the Supreme Court then filed an extraordinary appeal to the Supreme Court.[1] 6

Decision

The Supreme Court decided that the municipality should not have limited itself to setting up of a warning notice close to the beach of a frequented sea resort but since it kept the beach tidy and removed dangerous objects from the beach, it should have done so also with regard to coastal waters. Although the warning did not state that bathing was forbidden, it could have been read as meaning that there would no rescuer there, so the swimmer ran the risk of drowning. If the municipality had put up a notice prohibiting bathing, this would also have been inefficient. Municipalities are under an obligation to make the beach and coastal water that are open to the public safe and to prevent damage to swimmers. The court stressed that the beach was known to be used by the public and on some previous occasions other swimmers had been injured by the barrel. The presence of the barrel was well known, 7

1 Filing the extraordinary appeal was a special competence of the President of the Supreme Court. Presently no provision provides for such a competence.

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because some red flags had been put on the barrel, but someone had removed them. The court awarded compensation.

Comments

8 As regards the cases in 3f/23 nos 3–5 and 6–7, the courts have been stringent with the public authorities and any non-compliance with regulations on safety of public places has typically led to the finding of fault (hence a tort) leading to liability. The courts have held that any person who is obliged to remove sources of danger (eg holes in a road, an uncovered well, defective condition of stairs, no lighting on a staircase, a building threatening to collapse, etc) should exercise due diligence in taking preventive measures.

9 In this case, the general duty of the local authorities to the public was construed by the court as a concrete duty and hence the omission constituted wrongful conduct. Putting up of a warning notice does not fulfil this duty, regardless of the contents of the notice.[2] Due diligence requires the authorities to react if the danger is known or should have been known. However, the general duty of care, a duty to the public, should not be construed too broadly.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 February 2002

25 Cdo 2471/2000

Facts

1 The respondent breached its obligation arising from the provisions of sec 415 CC, regulating prevention, because for a long time, it had not carried out the felling of trees in order to prevent them growing to a height which posed a risk, ie that they could fall on neighbouring land. Further the respondent did not take any action even when the claimants were immediately endangered on their property, and failed to respond to his neighbours' calls to remove the trees leaning over their land.

2 The courts of first and second instance deduced that the respondent was fully liable as the owner of the land and he could not exempt himself from liability, neither by a unilateral statement nor by shifting his obligation to any third party, for example a company carrying out forest management.

2 SN 17 October 1962, OSPiKA 1963, 282.

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Decision

The obligations of an owner in relation to adjacent property owners are not only duties expressly regulated in law – to refrain from doing anything which would unreasonably endanger or seriously jeopardise other owners' rights (cf sec 127 CC) – but also other obligations imposed by law in sec 415 CC. 3

The obligation of a property owner to act in order to avoid damage means that he has to use and manage his assets in such a way that damage is not caused to another. A property owner has to ensure that arrangements are made on his own land which will prevent or decrease the possibility of damage to the health, property and other values of others, and, if damage threatens these values, to take measures to prevent its occurrence. 4

Comments

The issue of preventive measures and related costs is not well developed under Czech law. Courts, in the majority of cases which are heard by the Supreme Court, state a general principle that each party has an obligation to act so as to avoid damage, which means for a property owner the obligation to use and manage his/her assets in such a way that damage is not caused to others. This means that he/she has to ensure that arrangements are made which will prevent or decrease the possibility of damage to the health, property and other values of others and if, damage threatens these values, to take measures to prevent its occurrence. Nevertheless, there is no exhaustive list of duties or no specific case law of the courts which provides a listing of such duties. 5

The assessment of particular costs is then adjudicated with respect to particular circumstances. However, such a case should not be based on breach of sec 415 CC but on the principle that ownership obliges the owner to act in such a manner that the thing does not limit anybody in his/her rights. 6

Under the NCC, the issue of preventive measures is regulated in sec 2901ff. Pursuant to sec 2901, if required by the circumstances of the case or habits, everyone who creates a dangerous situation or who has control over it, or if it is justified by the nature of the relationship between the parties, has an obligation to act to protect others. A person who has this duty, according to his/her capabilities and ability to easily avert harm, knew or should have known that the impending risk clearly exceeds what is needed to undertake any preventive action. The reimbursement of costs connected with the action is then regulated by sec 2908, which states that 'any individual who has averted imminent harm shall be entitled to reimbursement of the costs reasonably incurred and compensation for injury suffered, even against the will of that person in whose interest he acted, however, to the extent appropriate to what he had prevented.' 7

With respect to costs, the term 'reasonably incurred costs' must be clarified. Although not confirmed by case law, we believe that this term should be interpreted in 8

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a broad sense as to cover not only the costs incurred in order to prevent the occurrence of the damage but also costs incurred to limit or eliminate a situation which creates such danger. The main criterion for the assessment of the compensability of such costs is then their ability to eliminate the imminent danger and their proportionality to the interest protected.

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 23 February 2006, Case No 25 Cdo 65/2005

<http://kraken. slv.cz/25Cdo65/2005>

Facts

1 One morning, at 7:45 am, the claimant suffered an injury resulting from falling on an icy, snow-covered path in a park which had not been gritted. The court of first instance granted the claimant's claim, and ordered the first defendant (the owner of the path) and the second defendant (the company providing maintenance of the path) to compensate for the damage. The appellate court affirmed the decision of the court of first instance. Based on an appellate review, the Supreme Court examined the case, admitting that the review was partially founded, and quashed the judgment affirmed by the appellate court. The case was remanded to the court of first instance for further proceedings.

Decision

2 A breach of the duty of preventive care does only not arise due to the insufficient maintenance of pedestrian paths in a park in winter, but also in failing to notify those walking through the park that it is not possible to clear paths at all times in winter. Such a measure could have prevented the injury caused in this case. The degree of the pedestrian's contributory fault to her injury when she fell while walking in the dark on an icy path in the park must be considered first of all from the point of view of the chances of the pedestrian preventing any risks of harm to her health at a given place and time, and also her chances of adapting her behaviour in the park to circumstances that could be foreseen (§ 415 of the Civil Code).

Comments

3 The court of first instance based its decision on § 415 of the Civil Code, concluding that the first defendant had a duty of care to ensure the path was passable because it was quite a busy place connecting a neighbourhood with the entrance to an underground station. The court, stressing that this incident did not happen at an early

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hour of the day, decided that the defendant had breached his duty of care. In the court's view, the alleged contributory fault of the injured person was unfounded. In the opinion of the court, the path was lightly covered with snow, and the injured person could not have foreseen that such a busy path would not have been treated with grit or salt, which may have prevented falls. In the appellate review the defendant argued that making all municipal roads secure against such risks at the same time is objectively impossible, and more so when, for example, snow falls at night. The defendant argued that there were no grounds to exclude the contributory fault of the injured person. According to the defendant, anyone who walks on such a path should take some degree of precaution because this person can see the actual conditions of the path when walking there, and adjust his/her conduct accordingly. The Supreme Court agreed with the views of both courts concerning the defendant's breach of duty of care provided in § 415 Civil Code. According to the Supreme Court, the breach did not only lie in the insufficient maintenance of pedestrian paths in the park in winter, but also in failing to put up a notice for pedestrians indicating that it was not possible to clear all paths at all times in winter. The Supreme Court also affirmed that the provisions of § 415 Civil Code impose a duty of preventive care upon everyone – not only upon the wrongdoer, but also upon the person threatened with a risk of harm. A breach of the duty of preventive care may arise by the contributory fault of the injured person (§ 441),[1] because every person must behave in a manner so as not to cause harm not only in relation to other persons but also in relation to himself/herself. The degree of the pedestrian's contributory fault to her injury when she fell walking in the dark on an icy path in a park must be considered in relation to the possibilities that she had to prevent any risks of harm to her health, and also to adapt her behaviour to the foreseeable circumstances. If the harm was caused by no-fault conduct of the injured person, the wrongdoer would not be held fully liable. In principle, a chance (*casus*) affects the person to whom it relates. In the opinion of the court, in order to determine the liability of the defendant and the contributory fault of the injured person, it was irrelevant whether or not the injured person could have foreseen that the path had not been secured against accidental falls. Neither the owner nor the administrator of the path was held liable for the consequences of the injury caused by the accidental fall. See also *Nejvyšší soud České republiky* (Supreme Court of the Czech Republic) 28 February 2013, Case No 25 Cdo 2819/2011, in 3d/25 nos 5–10.

1 § 441: 'If the damage caused was also the fault of the person injured, he bears corresponding responsibility for the damage; if the damage was exclusively his own fault, he alone bears the responsibility.'

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Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 30 April 1991, Case No 1 Cz 3/91
Collection of Judicial Decisions and Opinions – R 9/1992

Facts

4 The claimant was hit by a falling tree while driving a motorcycle. He suffered serious injuries with permanent effects. The tree that caused the injury had been standing on property, which was a part of a military facility owned by the Czechoslovak state, and which had been used by the Soviet forces since 10 October 1968. The tree fell because its main root was rotten and this was the result of insufficient maintenance of the property and its vegetation.

5 The district court decided that both accused subjects – the Czechoslovak state (military directory) and the Soviet state – failed to fulfill their obligation of preventing damage according to § 415 of the Civil Code. Thus, the district court ordered them to pay reparation as a form of compensation for the damage caused in the amount of CZK 171,564 (approx € 5,700), while they also ordered the claimant to pay CZK 1,532 (approx € 51) per month as a form of compensation. The regional court overruled the decision by holding the Soviet state solely liable to pay compensation. The Supreme Court of the Czech Republic, based on the objections of the Prosecutor General, overruled both of these verdicts.

Decision

6 If a land owner's attention is drawn to the fact that the conditions of trees on his land could cause damage, he/she has a duty (also if the land is used by another person) to notify the user of this and of the necessity to take the necessary measures to rectify this situation. The non-fulfilment of this duty can result in the owner being held liable for the damage caused due to the defective condition of the trees on his land.

Comments

7 The Supreme Court of the Czech Republic argued that both the district and regional courts addressed the question of insufficient maintenance of property and its vegetation correctly. However, both courts failed to acknowledge a witness statement, in which it was claimed that the military unit had been warned of the fact that the tree could potentially pose a risk to the safety of road users five to six weeks prior to the tree actually falling.

8 If the owner of property (in this case, the Czechoslovak state) has been warned about the fact that the condition of its property may pose a risk of damage, said owner has a duty to inform the occupant of the property about this state. Failing to meet this obligation would mean that the owner would consequently become liable

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for any damage caused. The owner of the property still has an obligation pursuant to § 415 even if the property is being used by someone else. The Supreme Court thus stated that the possible contributory negligence of the Czechoslovak state also had to be taken into account when assessing the consequences of the resulting damage.

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 735/05-2 of 5 October 2005

<www.vsrh.hr>

Facts

V, a 14-year-old boy, was injured when, while playing on the roof of a train parked at a cargo terminal, he came into contact with an overhead power line and was electrocuted. V sued the national railway operator, responsible for the cargo terminal, and claimed damages. The court of first instance partially accepted V's claim. In substantiating its decision, the court of first instance noted that the defendant had failed to properly secure the site by preventing unauthorised persons from entering the cargo terminal, which the defendant was obliged to do given the fact that it carried out a dangerous activity. Furthermore, the court of first instance held that the defendant had failed to comply with an internal regulation, which required the displaying of special danger signs at railway terminals. The County Court in Zagreb partially upheld the judgment of the court of first instance and partially reversed it with respect to the percentage of the defendant's liability. The County Court in Zagreb raised this percentage and ruled that the defendant contributed to the damage by 75%. 1

Decision

The SCRC partially reversed the County Court's decision and finally ruled that the defendant contributed to the damage by 60%. In substantiating its position, the SCRC emphasised that operating a railway service is a particularly dangerous activity and for that reason, the defendant should have done everything in its power to prevent unauthorised persons from entering the cargo terminal. According to the SCRC, the defendant, acting contrary to statutory provisions and its own internal regulations, did nothing to prevent unauthorised persons from entering into the cargo terminal and further failed to warn others of danger by displaying appropriate signs or by engaging a security service. As to the victim's contribution to his own damage, the SCRC determined that, given the fact that he was above the age of 14, the victim should have been aware of the danger resulting from contact with power lines at the railway terminal. 2

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Comments

3 It is hard to deny that in the case at hand it is the victim who predominantly caused the damage. After all, it was the victim who, although aware of the danger ensuing from coming into contact with power lines, decided to play on the roof of a train in close proximity to power lines. Nonetheless, in distributing the liability for the damage sustained by the victim among the persons involved, the courts obviously decided that it was the national railway operator that should bear most of the blame for the incident. The main reason for this decision was obviously the fact that the national railway operator, although it could have taken numerous precautionary measures, failed to employ any of them, thus violating both statutory provisions and its own internal regulations. Hence, this decision clearly demonstrates how much importance Croatian courts attach to the availability of precautionary measures in the course of assessing the level of misconduct in a given case.

4 Indeed, in the case at hand it could easily be argued that even V could have taken some precautionary measures, eg, by not playing at all on the roof of a train. In deciding on the distribution of liability in the case at hand, the courts obviously took this fact into consideration. However, as is evident from the reasoning of both, the SCRC and the County Court in Zagreb, the decision on the distribution of liability in the case at hand was the result of an assessment of a number of different considerations. In their decisions the SCRC and the County Court in Zagreb obviously considered the fact that not only did V play in an obviously dangerous place but also that he was old enough to realise the danger of his conduct. However, the courts held that more blame could be apportioned to the national railway operator for a number of reasons; the fact that it carried out an extra-dangerous activity, the fact that it acted within its professional activity, the fact that a number of precautionary measures were not only available but also required by statutory provisions and the tortfeasor's internal regulations and finally the fact that the tortfeasor failed to implement any of these precautionary measures.

Judgment of the County Court in Zagreb No Pn-4181/6 Gžn-3905/08 of 16 December 2008

Unreported

Facts

5 V sued A, a shopping mall for compensation for the non-material damage he sustained when he was hit by a moving glass door at the entrance of a shopping mall. In the first instance proceedings it was established that at the time of the accident the doors were functioning properly and that there was a sticker fixed to the door visibly displaying the opening hours of the shopping mall. In reviewing footage taken from security cameras, it was established that the accident occurred after V had passed through the first moving glass door walking too fast, looking at the floor

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and not paying attention to the second moving glass door he was approaching. Against this background, the court of first instance dismissed V's claim opining that it was he who exclusively caused the damage.

Decision

The County Court in Zagreb upheld the first instance decision. The court also accepted the first instance court's argument that the accident was exclusively attributable to V's improper behaviour. In assessing the tortfeasor's conduct, the County Court in Zagreb paid particular attention to the issue of whether the shopping mall took all necessary measures to avoid accidents like the one at hand. In this sense, the County Court in Zagreb assigned particular importance to the fact that the door was functioning properly at the time of the accident and that a sticker was fixed on the door, which, according to the County Court in Zagreb, served not only the obvious purpose – displaying the opening hours of the shopping mall – but it also served the purpose of warning people of the glass door. For this reason, the County Court in Zagreb held that V was exclusively responsible for the occurrence of the accident. 6

Comments

Even in this case the County Court in Zagreb paid particular attention to the availability of precautionary measures and only after it was satisfied that all such measures had been taken by the defendant, did the court affirm the first instance decision assigning the responsibility for damage occurrence exclusively to the victim. 7

Hence, the position of the County Court in Zagreb in this case is consistent with the position of the same court in the case Pn-1209/00 Gžn-1464/02 of 8 March 2003, previously analysed under this heading. In both cases, before deciding on the liability of a defendant, the court particularly examined whether there had been any additional precautionary measures available to a defendant and whether these measures had been implemented by the defendant. Since, in the case Pn-1209/00 Gžn-1464/02 of 8 March 2003, the County Court found that there had been particular precautionary measures available, but not taken by the defendant, it assigned a considerable portion of liability to the defendant. On the contrary, in this case the County Court found that the defendant had taken all reasonable precautionary measures and therefore freed him from liability. 8

Finally, it is worth mentioning that in neither of the two discussed cases did the courts address the issue of the economic viability of the available precautionary measures. There is, however, not enough evidence in these cases to support the conclusion that courts in Croatia do not assign any importance to the economic viability of available precautionary measures. 9

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 690/2008, 9 June 2011

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2010040815257485/> (7 March 2015)

Facts

1 Within the framework of a compulsory study programme of sports education, the plaintiff chose skating in the sports hall. Students skated under the supervision of a professor of sports education and carried out exercises according to his instructions. The professor of sports education did not give the students instructions that they must close the door of the skating rink with a bolt nor did he supervise whether the students carried out this measure. When the plaintiff skated to the edge of the rink, she wanted to stop with the aid of the hoarding. Because the door in the hoarding was not bolted, it opened at a touch and the plaintiff fell across the step into the interior of the hall between benches. The court of first instance in an interim judgment basically granted the plaintiff's claim for compensation of damage against the faculty as the organiser of the sports day, which was also confirmed by the court of second instance.

Decision

2 The Supreme Court rejected revision as unfounded. From the principle that everyone must refrain from behaviour which could cause harm to others (art 10 of the Code of Obligations) also derives the duty of active conduct to ensure safety. The faculty that was the organiser of the sports education had a duty to provide suitable safety measures to ensure the safety of the participants – students. The extent and the intensity of the safety measures that an organiser must provide depends on a number of factors, such as the extent of the threat of danger and harm, the likelihood of it happening, possibilities and costs of preventing the damage risk as well as the possibilities of the injured party to avoid the harm. An organiser must, above all, implement safety measures against risks that surpass normal risks connected with carrying out individual sporting activities and against risks that are not evident to participants without further explanation or against risks that cannot be avoided. The participant himself/herself accepts typical risks associated with carrying out an individual sports activity. A skater within the context of classes in physical education, for example, thus accepts the risk of falling on the ice. In contrast, the provider of the activity must ensure safe access to and from the rink. This undoubtedly also includes clear instructions to skaters on the obligation to close the door in the hoarding with a bolt.

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Comments

Any behaviour that violates a legal ban or order is unlawful behaviour. It makes no difference for tortious liability whether this ban or order is contained in the legal norms of civil law or the norm belongs to some other branch of law (for example, criminal, administrative or labour law). It is only important that this norm is also intended to prevent the occurrence of harm. For example, where there is no explicit ban or commandment in the legal order, Slovenian civil law, with the general norm of the ban on causing harm, creates a general clause, the aim of which is to include all cases of unlawfulness.[1] The Code of Obligations determines in the chapter on basic principles that everyone has a duty to refrain from behaviour which could cause damage to others (art 10 of the Code of Obligations). A person who acts in a manner which conflicts with the ban on causing damage behaves unlawfully. A person has therefore a duty to provide all the measures that would prevent the occurrence of damage. The extent and the intensity of the safety measures that an organiser must provide depends on a number of factors, such as the extent of the threat of danger and harm, the likelihood of it happening, possibilities and costs of preventing the damage risk as well as the possibilities of the injured party to avoid the harm.[2] **3**

29. European Union

European Court of Justice, 6 December 1984

Case 59/83, SA Biovilac NV v EEC [1984] ECR 4057

For facts see above 3a/29 no 3. **1**

Decision

The court confirmed earlier case law[1] holding that several conditions have to be met in order for the Community to incur non-contractual liability: apart from the exis- **2**

1 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 238.

2 *V Kranjc*, 10. člen Obligacijskega zakonika (OZ) [Article 10 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knijga [Code of Obligations with commentary, General part, vol 1] (2003) 122; *D Možina*, Odškodninska odgovornost za poškodbe pri športu [Damage liability for injuries in sport], in: V Bergant Rakočević (ed), Šport & pravo [Sport and law] (2008) 301.

1 ECJ 17.12.1981, joined cases 197-200, 243, 245 and 247/80, *Ludwigshafener Walzmühle v Council and Commission* [1981] ECR 3211.

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tence of a compensable loss and a causal link between such damage and the conduct complained of, the latter must have been 'unlawful'. If such an act 'involves choices of economic policy, liability is not incurred unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred'. This in turn requires 'that the institution in question has manifestly and gravely disregarded the limits on the exercise of its powers' (para 10).[2]

3 The court was unconvinced that this had happened in the instant case, as the aims pursued by the Commission (in particular the general policy applied to milk products) were legitimate and the measures taken non-discriminatory in light of the objective differences between the two competing products. The harm incurred by the claimant was 'merely an indirect consequence of a policy with which *aims of general public interest* are pursued which vary greatly, depending on the economic factors affecting market trends and on the general direction of the common agricultural policy' (para 22, emphasis added).

4 Furthermore, the court pointed at the 'foreseeability of the risks inherent in the market conditions at the time' which 'excludes the possibility of any recompense for the loss of competitiveness' the claimant had incurred. 'Those risks form part of the economic risks inherent in the activities of an industrial and commercial undertaking in this sector …'.

Comments

5 One of the reasons why the court denied liability in the instant case[3] was the fact that it held the measures taken by the Commission which allegedly triggered the claimant's losses to be legitimate in light of the common agricultural policy. The court was convinced 'that the Commission made an attempt when implementing the measures … to reconcile the aim of ensuring a fair standard of living for the agricultural community with the aim of stabilising markets. The fact that the technical methods of denaturing chosen to achieve that aim subsequently proved to be partially ineffective does not alter the appraisal of the legality of the contested legislation vis-à-vis Article 39 of the Treaty[4] since the legality of a measure can be adversely affected only if the measure is *manifestly unsuitable for achieving the aim* pursued by the competent Community institution' (para 17, emphasis added).

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2 On the latter aspect, the court cited its ruling of 25.5.1978 in joined cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG and Others v Council and Commission* [1978] ECR 1209.

3 See also above 3a/29 no 3.

4 Now – again – art 39 TFEU (ex art 33 TEC).

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It is also worth mentioning that the court at least hypothetically considered the German *Sonderopfertheorie* as advanced by the claimant,[5] but denied that the latter could rest its case upon such a concept as it should have foreseen the risks it was exposed to on the market for foodstuffs. This argument at least on its face resembles the reasoning underlying the defence of acting at one's own risk.[6] 6

European Court of Justice, 26 March 1996

C-392/93, R v HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631

Facts

The dispute arose on the interpretation of art 8 para 1 of Directive 90/531/EEC,[7] and whether the United Kingdom had properly implemented it. This was denied by British Telecom (BT), arguing that it was discriminated against by the regulatory regime introduced for that purpose vis-à-vis its competitors on the British telecommunications market. BT therefore brought proceedings against the UK government for annulment of the provision sanctioning this exceptional treatment. The UK court referred the matter to the ECJ for a preliminary ruling, asking in essence whether the implementation of the Directive had indeed been flawed and whether the UK may be held liable for the ensuing loss. 7

Decision

The court affirmed that the provision of the Directive at stake had indeed been improperly transposed into UK law. However, despite such a breach of Community law, the UK was still not to be held liable, thereby applying a 'restrictive approach to state liability' in light of 'the concern to ensure that the exercise of legislative func- 8

5 The application of the said theory on the level of Union law was ultimately denied by the ruling in ECJ 9.9.2008, joined cases C-120/06 P and C-121/06 P, *FIAMM and others v Council and Commission* [2008] ECR I-6513, para 135 ff (see in particular para 175: '[W]hile comparative examination of the Member States' legal systems enabled the Court to make at a very early stage the finding … concerning convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature.'). See also *L Antoniolli*, Community Liability, in: H Koziol/R Schulze (eds), Tort Law of the European Community (2008) 213 (no 10/56 ff).

6 Cf art 7:101 para 1 lit d PETL and art 5:101 para 2 PEL Liab Dam.

7 Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 297, 29.10.1990, 1–48.

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tions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests' (para 40). The incorrect implementation of Directive 90/553/EEC was not sufficiently serious to trigger liability, considering in particular 'the clarity and precision of the rule breached'. That rule (art 8 para 1 of said Directive) according to the ECJ was 'imprecisely worded and was reasonably capable of bearing … the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance' (para 42f). Furthermore, 'no guidance' on how to properly interpret that provision had been available to the UK at the time, neither from Community case law nor from the Commission.

Comments

9 This is one of the cases where a breach of Union law did not trigger liability for lack of 'sufficient seriousness'. The UK was excused since the rule it had to implement was imprecise and ambiguous (with other Member States supporting the interpretation given to it by the UK). While the court gave this rule its proper interpretation on the occasion of this dispute, this had obviously not been available to the UK at the time. As this ruling underlines, the clarity of a rule of Union law also plays a decisive role in assessing whether a Member State can be held liable, thereby adding an essential qualification to the illegality element.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Scenario 1

1 V is a patient hospitalised in psychiatric institution A. The windows on the second floor are not made from an unbreakable material and no bars have been installed. V jumps out of one of the windows, trying to commit suicide. He survives, and afterwards claims compensation from A for the personal injuries suffered. He argues that A should have made security arrangements preventing him from the dangerous jump. The height of the fall was 1.80 m and the probability of serious physical injury to patients relatively low. Replacing the windows on the second floor with windows made from unbreakable materials would have cost € 12,500, plus the work to install the windows.[1]

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1 Scenario of the Norwegian case: Hr (Norwegian Supreme Court) 8 March 2000, Rt 2000, 388, above 3f/17 nos 1–3 with comments by *AM Frøseth*/*B Askeland*; for similar scenarios, see the Polish

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Scenario 2

A group which police later fail to identify deliberately damages an oil pipe owned by an oil refinery. The act causes oil to leak into a river for 11 hours, causing contamination. The oil refinery cleans the site as best it can under the circumstances. A claim is brought against the oil refinery in compensation for the environmental damage caused. The defendant alleges that the damage was caused by the criminal acts of a third party.[2] **2**

Solutions

a) Solution According to PETL

Pursuant to art 4:102(1) PETL, when determining the required standard of conduct, 'the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as *the availability and the costs of precautionary or alternative methods*' need to be taken into consideration.[3] In the above scenarios, it is claimed that the persons alleged to be liable *omitted* to prevent the damage: psychiatric institution A in the first scenario by not having installed unbreakable windows, the oil refinery in the second scenario by not having prevented third parties from causing environmental damage. With respect to damage caused by omission, art 4:103 PETL (Duty to protect others from damage) provides: 'A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or *when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side* point towards such a duty.'[4] **3**

In the first scenario, patient V suffered damage to his health. In the second scenario, damage to the environment was caused. Personal integrity enjoys the most extensive protection under art 2:102(2) PETL, whereas the environment is not expressly mentioned among the list of protected interests. However, interests not men- **4**

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case: SN (Polish Supreme Court) 24 February 1962, II CR 363/61, OSNC 6/1963, item 124, below 10/23 nos 1–11 with comments by *E Bagińska*/*I Adrych-Brzezińska;* and the Czech case: Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 16 May 2002, Case No 25 Cdo 1427/2001, below 10/24 nos 1–9 with comments by *L Tichý*/*J Hrádek* and 10/25 nos 1–4 with comments by *A Dulak*.

2 Scenario of the Lithuanian case: *Panevėžys regional department of environmental protection v AB 'ORLEN Lietuva'*, 24 October 2012, Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-430/2012, above 3f/22 nos 5–8 with comments by *J Kiršienė*/*S Palevičienė*/*S Selelionytė-Drukteinienė*.

3 Emphasis added.

4 Emphasis added.

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tioned in art 2:102 PETL, such as human dignity, liberty, privacy, or the environment, may nevertheless be deserving of protection under the PETL, see art 10:301(1) PETL.[5]

Scenario 1

5 In the first scenario, given that the height of a fall was only 1.80 m, the probability of serious physical injury or even fatal injury to patients was relatively low. However, personal integrity enjoys highest protection under the PETL. The likelihood that inpatients in psychiatric hospitals try to hurt themselves or even commit suicide is considerable. This risk is known and foreseeable, and operators of psychiatric hospitals are expected to be aware of it. Under the PETL, the closer the proximity between actors, the more they can be expected to pay attention to their respective interests. Proximity may also create a certain reliance which has to be met.[6] The relationship of proximity or special reliance between hospitals and patients is among the closest possible. Measures to prevent the patient from trying to hurt him- or herself, or even commit suicide, by breaking a window and jumping out of it were available at a cost of € 12,500 plus the cost of installation. Given the high value of the endangered interests, the considerable likelihood of injury, the foreseeability of the risk, and the close relationship between the parties, the cost of the (easily available) precautionary device was relatively low. It is thus submitted that the hospital violated the standard of conduct required under the PETL by omitting to install windows made from unbreakable materials.[7]

Scenario 2

6 In the second scenario, the oil refinery did not cause the damage by its own act. The question under a fault-based liability system[8] would thus be whether the refinery complied with the required standard of conduct or, conversely, if this standard was

5 Compare the illustration provided by PETL – Text and Commentary (2005) art 2:104, no 10 (*U Magnus*): expenses incurred in order to avoid damage to the environment are recoverable under art 2:104 PETL.

6 PETL – Text and Commentary (2005) art 4:102, no 12 (*P Widmer*).

7 This is also the result that was reached by the Norwegian Supreme Court, see above 3f/17 no 2 with comments by *AM Frøseth*/*B Askeland*.

8 Under many national liability systems, the liability of the operator of oil pipelines is strict, compare *T Kadner Graziano*, Comparative Tort Law (forthcoming), Chapter 6 and eg § 2 of the German Civil Liability Act (*Haftpflichtgesetz*) or art 33 of the Swiss Federal Act on Pipelines for the Transport of Liquid or Gaseous Fuels (*Loi fédérale sur les installations de transport par conduites de combustibles ou carburants liquides ou gazeux*).

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violated by not preventing third parties from damaging the pipeline, for example by making sure that third parties did not have physical access to it.

Among the criteria determining the required standard of conduct, mentioned in arts 4:102(1) and 4:103 PETL, two may be of particular interest in the present case: the *foreseeability* of the criminal act by a third party, the *availability and costs of* precautionary *methods* and the *ease of avoiding the damage* on the one hand, and the *seriousness of the potential harm* on the other. Regarding the possibility to avoid the damage, it may be argued that there is no way of guaranteeing that any person with criminal intentions cannot damage a pipeline. It may also be argued that fighting crime, and bearing the cost thereof, is the obligation of the state rather than that of private parties, once the private party has used all reasonable means to avoid the damage. If this line of reasoning were followed, the duty of the pipeline operator would thereinafter be reduced to repairing the leak as soon as possible.[9] **7**

In the case serving as inspiration for the scenario above, after the accident the pipeline operator covered the pipeline with reinforced concrete blocks. The Lithuanian Supreme Court argued that this was sufficient evidence that precautionary measures had been available at reasonable costs to reduce, if not exclude, the risk of similar damaging acts. Provided that these measures would indeed have considerably reduced the risk of causing damage to the environment and that they would have contributed to the prevention of such damage, this case would arguably reach the same conclusion under the PETL. **8**

Cases such as these illustrate that it will often be important to know exactly which precise alternative measures are technically available, as well as their costs and the magnitude of potential damage, in order to be able to proceed to a cost-benefit analysis of precautionary or alternative measures. This may in turn require expert advice. **9**

b) Solution According to the DCFR

As set out above,[10] like the PETL, the DCFR uses an objective standard of care.[11] However, unlike arts 4:102(1) and 4:103 PETL, the text of the DCFR does not provide a list of indicative factors to take into account when deciding whether a particular act meets the required standard or whether fault can be established. The official commentary mentions that the general duty of care may depend, among other factors, on a 'weighing up of the costs and benefits of prevention' of the damage. **10**

9 These were the arguments used by the Lithuanian Court of Appeal, compare above 3f/22 no 6 and the comments by *J Kiršienė*/*S Palevičienė*/*S Selelionytė-Drukteinienė*.

10 Above, 1/30 nos 18–19.

11 *C v Bar*/*E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

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11 The argument under the DCFR may thus be similar to that exposed above under the PETL. However, in the absence of precise criteria determining misconduct, however, any further prediction of the solution of the above case under the DCFR would be purely speculative.

31. Comparative Report

1 All the reporters submitted cases in this category except those for Portugal and Romania.

2 Whether the availability or cost of precautions is a relevant matter at all is a disputed matter amongst legal theories, with some taking the view that it is not. Weinrib, for example, has argued that 'the cost of precautions is irrelevant . . . [T]he consideration that the cost to the defendant of precautions would exceed the ex ante quantification of the plaintiff 's injury does not exonerate the defendant from liability. The defendant can therefore be liable even for a cost-justified action.'[1]

3 Contrarily to this point of view, the majority of countries accept that the availability and costs of precautionary measures are part of the complex balancing exercise that determines whether the defendant complied with the required standard of conduct.[2] It is also true that courts take into account broader considerations, such as the value of the activity the defendant is pursuing and the interests of other persons, because there is a social cost if beneficial activities are curtailed or the interests of others adversely affected.[3] On the other hand, despite sometimes repeated editorial promptings, some authors were strongly resistant to the idea that the cost of precautions might ever figure in the estimation of what a reasonable person would do.[4]

4 We would invite those who reject out of hand the idea that the costs of precautions should be taken into account when determining the required standard of conduct to consider this example. The number of motor accidents would be reduced significantly if vehicles kept to a maximum speed of 4 km/h and were preceded by a

1 *EJ Weinrib*, The Idea of Private Law (1995) 149.

2 Historical Report 3f/1 no 3f; Germany 3f/2 no 7; Austria 3f/3 no 1ff; Switzerland 3f/4 no 8; Greece 3f/5 no 4 (in environmental law); France 3f/6 no 3; Netherlands 3f/8 no 3; Spain 3f/10 nos 1ff and 5ff; England and Wales 3f/12 no 1ff; Scotland 3f/13 no 4; Ireland 3f/14 no 4ff; Malta 3f/15 no 18; Denmark 3f/16 no 1ff; Norway 3f/17 no 1ff; Sweden 3f/18 no 1ff; Finland 3f/19 no 1ff; Estonia 3f/20 nos 1ff and 6ff; Latvia 3f/21 nos 8 and 18; Lithuania 3f/22 no 9ff; Poland 3f/23 no 1f; Slovenia 3f/27 no 2f. See also art 4:102(1) PETL, considered in PETL/DCFR 3f/30 no 3ff. As regards the DCFR, see ibid, no 10.

3 See England and Wales 3f/12 nos 4ff and 8ff; Ireland 3f/14 no 7ff; Lithuania 3f/22 no 1ff; European Union 3f/29 no 1ff.

4 See especially Belgium 3f/7 no 5f. See also Italy 3f/9 no 4: 'As a general rule, the cost is never too high if it has to be balanced against the life of health of the victim.' Cf Croatia 3f/26 no 9.

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pedestrian waving a red flag and ringing a bell. Can it seriously be maintained that, because this would reduce significantly the risk of harm, this is something that would be required of the reasonable motorist? If not, is it not because the precaution proposed (the maximum speed, the red flag, etc) are unreasonable intrusions on the freedom to drive one's vehicle – and to that extent an unreasonable 'cost'?

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3g. Other Relevant Factors

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 12 July 2007
06-16.869, D 2008, 1371, obs *F Granet-Lambrechts*

Facts

1 A man met a woman through small ads. They had intercourse, and months later the woman gave birth to a child. On the child's tenth birthday, the mother filed a paternity case and won. She was also awarded maintenance payments. Her former lover then filed an action against her, claiming that she had committed a fault when she had accepted having intercourse without taking the appropriate measures to avoid or fight the risk of procreation. His claim was based on arts 1382 and 1383 of the *Code civil* (now arts 1240 and 1241).

Decision

2 The *Cour de cassation* ruled that the lower court was entitled to infer, from the circumstances of the case, that the plaintiff had freely and fully consented to unprotected sexual intercourse as early as his first date with her. Given that he was *a sexually experienced man*, he was accountable, as much as his female sexual partner was, to take the appropriate measures to avoid procreation. Therefore, the plaintiff had not established any fault committed by the child's mother for engaging in sexual intercourse or for later filing a paternity and maintenance case.

Comments

3 This case shows how French courts, including the *Cour de cassation*, sometimes refer to abstract figures when assessing fault. The traditional standard was that of the '*bon père de famille*' ('prudent administrator', derived from the *bonus paterfamilias* of Roman law), mentioned in the Civil Code on many occasions in contract law.[1] This standard in now hardly to be found in *Cour de cassation* decisions, probably be-

1 See for instance art 1137 of the French Civil Code: 'The obligation to look after a thing, whether the agreement is for the benefit of one party only or for their common benefit, compels the one in charge to bring to it all the care of a prudent administrator'. However, a recent statute, which has not yet entered into force, provides that all references to the *bon père de famille* in the Civil Code and elsewhere shall be replaced by references to the 'prudent administrator', as the concept of *bon père de famille* is allegedly a symbol of sexual discrimination.

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cause it sounds somehow outdated and rather sexist. But other quite similar standards are now used, as this case illustrates.

Here, the reference used to answer the question of whether a woman must inform her partner that she is not taking contraceptive pills, or, whether she is at fault for lying to him or setting him up – as was boldly claimed by the plaintiff – was the *sexually experienced man*. Admittedly, this standard was applied in this case to the plaintiff, and not to the defendant. It has a connection with fault, however, as the conduct expected of *the defendant* (the woman) was adjusted in line with her reasonable expectations of *the plaintiff*. If the plaintiff had been a much younger and sexually *inexperienced* man, it could have been that the court would have regarded the woman's behaviour as constituting a fault. 4

French courts usually content themselves with such tests as the *bon père de famille*, or the *sexually experienced man*. They feel no need to substantiate these abstract figures, and to mention the criteria which may help determine what a reasonable person's behaviour in any given case would have been. 5

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 17 July 2007[1]

RJ 2007\4895

Facts

V, together with other friends, had gone to have dinner at the home of A1 and her husband, A2, a couple with whom she had a close relationship. Since she knew the house well, when the hosts opened the door, she entered and walked into a corridor where the lights had been turned off and where she stepped on a small toy with wheels, fell over and suffered personal injury. A1 and A2 had underwritten a multirisk household liability insurance with A3. V brought an action against A1 and A2 and their insurance company A3, claiming compensation for the injuries suffered. The Court of First Instance found for the defendants, but the Court of Appeal reversed this decision and held the defendants liable for not having put on the corridor light and for failing to keep it clear of any obstacles that could endanger the physical integrity of guests. According to the judgment on appeal, 'the hosts of a house assume the position of guarantor of the safety of their guests' and 'the social standard of care required the married couple sued to light the way so that the claimant would cross safely, or to withdraw any dangerous objects that could not be 1

1 Commented on by *P Salvador Coderch/S Ramos*, Relaciones de complacencia y deberes para con los invitados, InDret 2 (2008). Available at <www.indret.com>.

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detected from the way'. The insurance company filed an appeal in cassation and the Supreme Court decided in favour of the defendant.

Decision

2 Not every misfortune necessarily implies that someone must be held liable for it, since life itself carries risks. According to case law, liability in cases of falls necessarily requires an identifiable fault or negligence and this will not exist when, as a result of being distracted, the injured victim trips over an obstacle that is within the boundaries of normality. The facts did not allow attributing to the defendant spouses conduct that could qualify as fault or negligence according to art 1902 CC. The Supreme Court considered that playing with toys at home was not a dangerous activity that would justify the reversal of the burden of proof of fault and that, in order to establish fault, the court affirmed that the different criteria of art 4:102 Principles of European Tort Law (PETL) can be applied. Accordingly, it held that 'the conduct of the claimant, who was received by the defendant husband at the entrance of the house, but who headed straight on her own into the kitchen to see the co-defendant wife, reveals a significant degree of proximity or special trust with her hosts with the result that the hosts could not be required to exercise the extreme care consisting in lighting the intermediate section of the corridor, in addition to the initial and final sections that were already lit, and removing every toy from that section of the corridor, no matter how small it was, since the characteristics of the toy in question have never been minimally described, except for the fact that it had wheels'.

Comments

3 The Supreme Court used several arguments to uphold the appeal. The first one was the doctrine of falls, which refers to the 'small risks that life requires one to endure, the general risk of life or unspecific risks, since risks exist in all the activities of life'.[2] The second is that in the domestic environment one can easily imagine negligent acts or omissions of the hosts towards their guests, such as serving a meal without paying attention to whether it is in a safe condition or not having repaired, before the visit, the insulation defects of external or uncovered electric cables. However, this does not mean that absolutely all hypothetically dangerous situations can be attributed to the hosts even if the danger is remote and these situations fall within the normality of a home. To establish whether there was a negligent act or omission, the Supreme Court makes use of the factor of 'proximity' mentioned in

2 On the restrictive stance currently taken by the Supreme Court as to claims based on accidental falls see 1/10 fn 20 above.

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art 4:102 PETL, and holds that the different criteria used in this article can be used as a 'reference to integrate the laconic wording of art 1902 CC and to round off the integrative value of other provisions of the Code included in the chapter referring to the nature and effects of obligations, such as art 1104 CC', when it provides that fault or negligence 'consists of the omission of the diligence which is required by the nature of the obligation and which pertains to the circumstances of the persons, time, and place',[3] in order to define 'diligence corresponding to the standard of a *bonus pater familiae* and thereby configure a model of diligent conduct valid for most cases'.

However, as underlined by legal scholarship, it does not seem that the apparent **4** lower requirement imposed on the conduct of the hosts as regards third parties at home can be justified on the mentioned criterion of the proximity factor whose usual meaning is not that given by the Supreme Court in this case.[4] Indeed, it is submitted that the usual meaning purports a more demanding standard, whereas the argument of the court in the case at hand aims to exonerate the defendant on account of a less demanding standard of care applicable to informal interactions between friends and relatives.[5] From this standpoint, even if one could argue that the decision actually sought to prevent fraud detrimental to insurers in home accidents involving family members, relatives or friends, there are in fact sound reasons for generally applying a lower standard of care to hosts and other parties involved in informal relationships.[6] This idea, however, has not been developed and the decision under comment still stands alone.

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 23 October 2012

RJ 2012\9725

Facts

In 1995, a four-seater plane crashed to the ground during manoeuvres involved in a **5** test to obtain a pilot's licence. Three people were on board: V, a candidate aspiring to obtain a private pilot's licence, who occupied one of the two rear seats and who was not flying at the time; another pilot candidate, who occupied the left front seat and died from the impact; and the examiner pilot, occupying the right front seat,

3 See 1/10 no 2.

4 On the use of this criterion see 3e/10.

5 See the comparative report of *P Salvador Coderch*/*S Ramos*, Relaciones de complacencia y deberes para con los invitados, InDret 2 (2008) 5–7, which focuses on relevant American sources on the issue.

6 *M Martín-Casals*, The Impact of the Principles of European Tort Law (PETL) in Spanish Case Law, JETL 2010, 243, 320.

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who suffered injuries when hitting the dashboard. V brought an action to obtain compensation for the injuries against the owner of the plane, a state company, which also taught the flying course for the two pilot candidates. He also sued the insurer, but not the examiner pilot. The lawsuit was dismissed at all instances, and the appeal to the Supreme Court was also rejected.

Decision

6 The court considered that an institution that trains candidates who want to obtain a pilot's licence should use all means to ensure their safety, but that it is also true that the assumption of the risk of flying has a much higher intensity in the case of candidates for a pilot's licence than in the case of airline passengers. While in air transport the general rule is to avoid risky manoeuvres, teaching flying and the obtaining of qualifications, by contrast, entail manoeuvres simulating tight situations that the aspiring pilot must be able to overcome. Accordingly, in cases such as in the case under discussion, there is an assumption of risk shared by all the crew members of the aircraft, which does not allow imposing on the owner, which at the same time was the owner of the flying school, a regime of strict liability based on art 1902 CC.

Comments

7 The last part of the judgment addresses the reasons why it takes the consequences of the accident from two different points of view. First, it deals with the issue by the application of the Civil Code and leaves aside any specific strict liability legislation applicable to air navigation. At the time the events occurred, this legislation did not apply to damage suffered by the trainees of piloting courses. The claimant, however, relied on the 'doctrine of risk', which he believed would exempt him from proving any defect in the plane and would shift the burden of proof that the plane was in perfect condition before taking off to the defendant. For the court this would have entailed a strict liability regime equivalent to the regime established for the carrier by art 120 of the Air Navigation Act and the claimant actor himself admitted that this regime was not applicable in the case. Secondly, after bringing the case to the field of liability based on fault, the judgment found for the owner of the aircraft and organiser of the pilot course by referring to the claimant's assumption of the risk of flying. This question is connected here, however, with the diligence required of an examiner pilot. When carrying out the test to obtain the licence, the required standard of care is here assessed according to the needs of learning and assessing the skills of those under examination, ie according to circumstances which are absent in the case of passengers or other types of aircraft occupants.

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13. Scotland

Maloco v Littlewoods Organisation Ltd; Smith v Littlewoods Organisation Ltd, House of Lords, 5 February 1987

1987 SC (HL) 37, [1987] AC 241, 1987 SLT 425

Facts

The defenders purchased a cinema, intending to demolish it and build a supermarket on the site. Shortly after the purchase of the building, local youths began breaking into it. Although the contractors working at the site locked and secured the premises when they finished work each night, they discovered that the premises continued to be broken into. When the contractors eventually finished their work on the site, they left the building as secure as they could make it. However, the premises continued to be broken into. The defender's employees noticed signs of someone having attempted to start a fire on the premises, as did the beadle of a nearby church. However, no steps were taken by anyone to alert the police to these matters. Sometime later, a fire deliberately started by youths inside the building spread to a cafe and billiard hall next to the cinema, and to a nearby church which was so substantially damaged that it had to be demolished. The owners of the affected properties claimed damages from the defenders, alleging that the damage to their properties resulted from the defenders' negligence. The claims were rejected by the Inner House of the Court of Session. The owners of the damaged properties appealed. 1

Decision

The House of Lords dismissed the appeals, holding that: (a) there was no general duty of care requiring a party to prevent a third party from causing damage to property by the third party's deliberate wrongdoing, even though there might be a high degree of foreseeability that such damage might occur; (b) there were, however, special circumstances in which a party might be held responsible in law for injuries suffered as the result of a third party's deliberate wrongdoing; (c) one such special circumstance might be where an occupier who negligently caused or permitted a source of danger to be created on his land could reasonably foresee that third parties might trespass on his land and, interfering with the source of danger, might activate it, thereby causing damage to nearby persons or property; (d) a party might be held liable for damage to neighbouring property caused by a fire started on his property by the deliberate wrongdoing of a third party where he had knowledge or means of fire, or indeed had started a fire, on his premises, and then failed to take such steps as were reasonably open to him to prevent any such fire from damaging neighbouring property; (e) the empty cinema could not properly be described as an unusual danger in the nature of a fire hazard; and (f) the defenders should not be held liable for having failed to take reasonable steps to abate a fire risk created by 2

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third parties on their property without their fault since, if there was any such fire risk, they had no means of knowing that it existed.

Comments

3 The fact that harm was caused by a third party with no connection to the defenders, albeit on the defenders' property, adds a degree of complexity to the analysis of misconduct. A person is not vicariously liable for the conduct of unconnected third parties.[1] Nor, as this much cited and discussed[2] case demonstrates, is it sufficient that one can foresee a possibility of third parties entering on to one's property and causing harm to others or to their property.[3] The House of Lords could envisage *some* scenarios where a duty might exist in respect of harm caused by a third party, but such scenarios (in the words of Lord Goff) 'would surely have to be extreme indeed'.[4] Lord Goff found it hard to formulate a general rule as to when such scenarios might arise.[5]

4 An earlier decision of the House of Lords, *Hughes v Lord Advocate*,[6] was not quite in point, as in that case nothing had been done to attempt to prevent children attracted to the site from entering on to it, and it was an intruder himself who had been harmed rather than a third party. Moreover, in *Hughes* an injury caused by burning was reasonably foreseeable; in this case, their Lordships thought that the mere fact that children might break in to the cinema, by 'no means establishes that it was a probable consequence of its being vacated with no steps being taken to maintain it lockfast that it would be set on fire with consequent risk of damage to neighbouring properties'[7] (which seems a somewhat curious conclusion, given that there was indeed evidence that someone had tried to start a fire in the derelict cinema on at least one prior occasion).

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1 A person need certainly not, in Scots law, volunteer information to an unconnected other party about a danger caused by third parties on that other's property; so there was no question, in this case, of the beadle of the neighbouring church being responsible for having failed to inform the defenders about the intruders on their property.

2 For discussion, see for instance: from a Common law perspective, Clerk & Lindsell on Torts (20th edn 2010) ch 12 (Occupiers' liability and defective premises), and *Basil S Markesinis*, Negligence, nuisance and affirmative duties of action (1989) 105 LQR 104–124; and, from a Scots law perspective, *PW Ferguson*, Liability in negligence for trespassing criminals, 1987 Scots Law Times (News) 233–236.

3 Lord Goff stated that 'mere foreseeability of damage is certainly not a sufficient basis to found liability' (SC (HL) at 59).

4 SC (HL) at 59.

5 Ibid.

6 1963 (HL) 31, 1963 SLT 150, [1963] AC 837.

7 Lord Mackay, SC (HL) at 66.

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Lord Mackay ventured a possible generally applicable test: recognising that reasonable foreseeability is the basis of the duty of care analysis, but also that human conduct (such as that of vandals) can be highly unpredictable, he suggested that: **5**

> 'Unless the judge can be satisfied that the result of the human action is highly probable or very likely he may have to conclude that all that the reasonable man could say was that it was a mere possibility. Unless the needle that measures the probability of a particular result flowing from the conduct of a human agent is near the top of the scale it may be hard to conclude that it has risen sufficiently from the bottom to create the duty reasonably to foresee it.'[8]

So what Lord Mackay seems to be saying is that it is only where A can see specific harmful conduct of a third party, C, undertaken on A's property, as 'highly probably' or 'very likely' would it be reasonable to conclude that a duty reasonably to foresee it, and hence to take steps to counteract it, would come into being. So, in third party cases at least, the required degree of reasonable foreseeability is that something was highly likely, and not merely reasonably probably to occur. **6**

The distinction in approach between Lords Goff and Mackay to attempting to formulate a general approach to cases of damage caused by third parties has been noted by commentators of this case: while, as we have seen, Lord Mackay seems to favour a generally applicable test, albeit one requiring a higher degree of foreseeability to be triggered, Lord Goff prefers to stipulate a duty of care arising only in cases where a defender negligently causes or permits a source of danger to be created on premises, and subsequently fails to prevent such a source of danger actuating.[9] **7**

The decision in this case has not put an end to the debate about liability for the unconnected actions of third parties. Evidently, the House of Lords struggled to enunciate a general principle about such cases. Lord Goff went so far as to say that 'I doubt that more can be done than to leave it to the good sense of the judges to apply realistic standards in conformity with generally accepted patterns of behaviour to determine whether in the particular circumstances of a given case there has been a breach of duty sounding in negligence', which is both opaque and unhelpful. **8**

8 Lord Mackay, SC (HL) at 68.

9 Lord Goff, SC (HL) at 77.

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14. Ireland

McComiskey v McDermott, Supreme Court, 26 July 1973
[1974] IR 75

Facts

1 The plaintiff, the navigator of a rally car driven by the defendant, was injured during the course of a rally. The car rounded a bend approaching a checkpoint and the narrow road was occupied by a stationary competitor at the checkpoint; the defendant braked heavily but believed the car would not stop in time to avoid a collision; he released the brake and turned the car into the bank at the side of the road, causing the car to overturn.

Decision

2 The majority in the IESC held that the standard should be that of the reasonable rally driver and that this was lower than the standard applicable to normal road use. The jury finding in favour of the defendant was upheld.

Comments

3 This case emphasises that sports cases require participants to be given greater latitude, partly due to the social benefits of sports and partly due to the fact that decisions are taken in the heat of the moment without time for reflection.[1] Another example of a special adaptation of the reasonable care standard is a teacher's duty to a pupil; a teacher is held to a standard of a reasonable person *in loco parentis*, rather than a professional teaching standard.[2]

4 The duty of reasonable care for the safety of employees tends to be sub-divided into four aspects: place of work, system of work, equipment and competence of co-workers. There is an element of overlap between these issues in many cases, but the sub-division provides a useful method of breaking down issues for analysis. One must always bear in mind, however, that it is not a rigid structure which must be followed in all situations.[3] A high level of precaution is generally expected of em-

1 A more stringent standard is applicable to organisers of sporting events; see *Gordon v Louth Motorcylce Racing Club* [2008] IEHC 175.

2 *Lennon v McCarthy* unreported IESC, 13 July 1966; *Flynn v O'Reilly* [1999] 1 ILRM 458; *Murphy v County Wexford VEC* [2004] IESC 49; *Maher (a minor suing by his mother and next friend) v The Board of Management of Presentation Junior School, Mullingar* [2004] IEHC 337.

3 See *Dunne v Honeywell Control Systems Ltd and Virginia Milk Products Ltd* [1991] ILRM 595.

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ployers,[4] but military service is not subjected as rigorously to the general employment standard, due to the nature of the employment.[5]

20. Estonia

Tartu Maakohus (Tartu County Court) 28 October 2009
Civil Matter No 2-08-55008

Facts

A popular programme on Estonian Television, 'Eyewitness', ('Pealtnägija' in Estonian), broadcast a video clip of a conflict between the plaintiff and the defendant (the plaintiff's ex-wife). With a film crew, the plaintiff entered the property of the defendant and declared his demands to the defendant that the defendant found unjust. Amongst others, the defendant claimed that the plaintiff had a woman in every village and he had had 20 female partners in total. The plaintiff considered these claims incorrect and to amount to defamation. **1**

The plaintiff asked the court to order the defendant to retract the incorrect claims and compensate for the pecuniary damage caused by their broadcast in the amount of € 6,391 and non-pecuniary damage as fair compensation. The plaintiff claimed that his pecuniary damage lay in the fact that his productivity at work had dropped and that his employer terminated a fixed-term employment contract with him after the programme was aired. The plaintiff also found that he suffered non-pecuniary damage since his quality of life had worsened and he was under stress. **2**

Decision

The court partly satisfied the claim. The court found that the plaintiff did not prove that the statements made by the defendant caused him pecuniary or non-pecuniary damage. The court ordered the defendant to retract the claims she had made. In analysing the liability of the defendant, the court stated that the claims made by the defendant should be viewed in a certain context, which is that the plaintiff entered the defendant's property and declared his demands to the defendant that she found unjust. The defendant was a former partner of the plaintiff and made her claims partially based on the information received from the plaintiff. The court found that, because of this fact, the defendant was not obliged to check the validity of the information fully (this meant that the obligation to check the validity of the facts **3**

4 See *Heeney v Dublin Corporation* (3f/14 nos 1–6 above).
5 *Ryan v Ireland* [1989] IR 177.

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was lower than normal). The court found that the defendant was still negligent in disclosing the information (§ 104 (3) of LOA).

Comments

4 In itself, it can be debated whether the defendant disclosed information (facts) about the plaintiff or simply expressed her evaluation that the plaintiff had had many women. In the latter case, the plaintiff could not request a retraction as a legal remedy (§ 1047 (4) of LOA). The court, however, treated the claims made by the defendant as facts. This means that, in considering the obligation of the defendant to compensate the damage, § 1047 (3) of LOA has to be taken into consideration, which states that the disclosure of information or facts is not deemed to be unlawful if the person who discloses the information or facts or the person to whom such facts are disclosed has a legitimate interest in the disclosure and if the person who discloses the information has checked the information or facts with a thoroughness which corresponds to the gravity of the potential violation.

5 In essence, an assessment must be made as to whether the defendant observed the care required by the duty to maintain safety. The court also found that since the defendant was the former partner of the plaintiff and her claims were based on the information received from the plaintiff, her duty to check the validity of the facts (ie the level of care required under a duty to maintain safety) was lower than normal. However, regardless of such a lower standard of care, the court found that the defendant had been negligent. This case could also qualify under 3e/20.

6 See also Judgment No 2-08-13854 of the Tallinn Circuit Court, 18 June 2010, under 6/20 nos 6–13.

23. Poland

Sąd Najwyższy (Supreme Court) 26 June 2013, II CSK 582/12
OSNIC ZD B/2014, item 30

1 For facts and decision see 3b/23 nos 1–5 (intent leading to a tort – contractual parties).

Comments

2 In this case the court held that the plaintiff's action should be governed by tort rules (art 415 KC) and there were strong policy reasons for this decision. On the one hand, the source of damage was reprehensible conduct by the defendant, and on the other hand the plaintiff found herself in a state of necessity in the meaning of art 388 KC. The court emphasised that the law should protect the weaker party and the legal

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interests of the party seeking legal protection should be taken into account when establishing whether a tort (under the general clause of fault) has been committed.

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 613/1993-2 of 16 February 1994

<www.vsrh.hr>

Facts

V sued A for compensation of the damage he sustained when A lodged an appeal against the first instance enforcement decision brought against A as a debtor to the benefit of V as a creditor which, according to V, postponed the settlement of his claim against A. Due to this settlement being postponed, and due to changes in the exchange rate of the domestic currency which occurred in the meanwhile, V ultimately received less than it would have received had A not postponed the whole process by appealing against the first instance decision. A's appeal against the first instance decision was sent via telegram and had not been substantiated at all. 1

The court of first instance accepted V's claim holding A's appeal to be frivolous and unfair and holding that, by lodging this appeal, A misused his procedural rights, notably the right to appeal. 2

The court of second instance quashed the first instance judgment and dismissed V's claim. In so doing, the court of second instance held that there was nothing unlawful in A's actions as A simply used legal remedies which relevant laws provided him with. Since A's actions were not considered unlawful, one condition necessary for liability to arise was lacking and, therefore, V's claim could not be accepted. 3

Decision

The SCRC upheld the decision of the court of second instance. In its reasoning to this decision, the SCRC first pointed out the legal provisions relevant for this case. The SCRC first recalled that the Civil Procedure Act provides for an obligation of parties in civil procedures to use procedural remedies available under the Act with due care. The SCRC also recalled that the right to appeal is a constitutional right, guaranteed by the Constitution of the Republic of Croatia and that the Enforcement Act, in line with the Constitution, provides parties in enforcement proceedings with the right to appeal. The SCRC furthermore established that the Constitution does not provide any details with respect to the content of an appeal. Finally, the SCRC also recalled that it is often the case that parties do not substantiate their appeals at all. 4

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5 Against this background, the SCRC opined that, if unsubstantiated appeals were to be considered unlawful and consequently could lead to the establishment of liability for damage sustained due to lodging an appeal, the constitutional right to appeal would be unjustifiably limited. For this reason, the SCRC held that the second instance court's conclusion that in the case at hand there was nothing unlawful in the actions of the defendant should be upheld for this position resonates with relevant legal provisions.

Comments

6 In this judgment the SCRC examined two concurring legal standards; the requirement for parties in civil proceedings to use their procedural rights fairly and with due care, on the one hand, and a constitutional requirement that citizens be provided with a right to appeal, on the other, and it obviously gave precedence to the latter.

7 As recalled by the SCRC, the Civil Procedure Act requires parties in civil proceedings to use procedural rights the Act provides them with fairly and with due care. As a matter of principle, if a party were to use procedural rights unfairly, this would constitute a misuse of a right and, as was established by the SCRC in the judgment No Rev 976/07-2 of 9 January 2008, a misuse of a right is forbidden and as such, it represents an unlawful act. Consequently, as a matter of principle, a party who misuses its procedural rights could be held liable.

8 It seems that this conclusion holds true for any procedural right but not for the right to appeal. As noted by the SCRC, the right to appeal is a constitutional right and as such, the right should not be limited. On the other hand, if in each particular case courts were at liberty to assess particular appeals against their fairness, and if the unfairness of the appeal could lead to the establishment of liability for damage, the constitutional right to appeal would be impeded and parties would likely be deterred from using their right to appeal freely. Therefore, it appears that the SCRC obviously decided that the right to appeal is too important to be limited, even if this implies that occasionally parties could misuse this right.

9 On the basis of this decision, it is safe to say that the SCRC holds that the general interest of society to enable citizens to use their constitutional right to appeal freely and without fear of being subjected to liability outweighs the requirement for procedural rights not to be misused and it appears that for this reason an appeal should not be regarded as unlawful, even if not substantiated and arguably, even if frivolously lodged.

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31. Comparative Report

Cases were submitted in this sub-category for France, Spain, Scotland, Ireland, Estonia, Poland and Croatia. Many of these could probably be considered relevant to sub-categories 3a–3f above. Some are simply elaborations of, or qualification or adaptations to, the general approach identified in 3a.[1] Others may be seen as related to the questions of dangerousness (3c),[2] proximity (3e)[3] and, insofar as this raises questions of the value of the right asserted by the defendant, the cost of precautions (3f).[4] **1**

1 France 3g/6 no 1ff (sexually experienced man standard); Spain 3g/10 no 5ff (standard of conduct assessed having regard to the needs of the potential victim); Ireland 3g/14 no 1ff (adaptation of standard of care in the context of rally driving); Estonia 3g/20 no 1ff (conduct required before making defamatory statement).

2 Spain 3g/10 no 1ff (no duty to eliminate small risks that life requires one to endure).

3 Spain 3g/10 no 1ff (close friendship with visitor *reducing* the precautions the occupier had to take); Scotland 3g/13 no 1ff (absence of proximate relationship between D and 3P precludes duty to take precautions against the risk the latter might start a fire that spreads from D's premises to adjoining property); Estonia 3g/20 no 1ff (relationship of D to P, her former husband, lowered the content of D's obligation to check her facts before making defamatory statement).

4 Croatia 3g/26 no 1ff (constitutional right to appeal judicial decisions).

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4. The Relevance of Statutory Norms

2. Germany

Bundesgerichtshof (Federal Supreme Court) 30 September 1980, VI ZR 38/79

NJW 1981, 113

Facts

1 The claimant was the Land Northrhine-Westfalia as the employer of two policemen who were severely injured in a car crash, which happened in Cologne when they were pursuing a car which had been stolen. The defendants in the lawsuit were the thief and the liability insurance company which had insured the stolen car. When stealing the car, which had been locked and parked on a public road in Hamburg, the thief had broken the car's door, then found inside the car the car's key (which the owner had left there) and drove away until he was noticed by the police in Cologne. The accident happened when, in the heat of the pursuit of the thief, the police-car drove through a red traffic light and collided with the car of another person. The claimant, who had paid the expenses for the medical treatment of the policemen, claimed these costs from the defendants.

Decision

2 The court held the insurance company liable as it had to answer for any tortious act of its insured car owner. According to § 14 (2) sent 2 StVO (*Straßenverkehrsordnung*, Ordinance on Road Traffic) a car owner is obliged to lock his/her car safely when parking and leaving it. This provision is a protective norm in the sense of § 823 (2) BGB, which allows for damages if such a protective norm has been at least negligently violated. The court was of the opinion that leaving a (second) car key inside the locked car violates the necessary care which requires that a car owner should not make it easier for strangers to use the car. The violation of the protective norm as such does not yet imply fault and does as such not reverse the burden of proof with the consequence that the defendant must prove the absence of fault. Nevertheless, leaving the key in the car is prima facie evidence of fault, which the defendant then has to rebut. It was no excuse that the thief intentionally stole the car and that the damage only occurred when the police collided with the car of the third person. All these consequences were held to be within the protective scope of § 14 (2) sent 2 StVO.

Comments

3 It may appear that liability is rather far-reaching (for which the liability insurer had to answer in this case) if a person who forgets or leaves the key in the car has to

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compensate the damage policemen suffer when they pursue the thief of the car. The underlying reason is, however, that the use of cars by unauthorised and unqualified persons creates high risks which the duty to lock cars safely is intended to avoid or reduce as far as possible. Similar reasoning applies to the liability of the thief whose conduct triggered the police chase. In such cases the pursued person is generally held liable for injuries of the 'pursuers' if he/she created an increased risk of injury (for instance, by fleeing over a steep staircase).[1]

According to § 823 (2) BGB, it is sufficient if the fault relates to the violation of the protective norm. Fault need not relate to the consequential damage unless the protective norm so requires.[2] However, the damage must fall under the protective scope of the violated statutory norm. This norm must be designed to protect persons such as those injured against losses of the kind that occurred. **4**

If the protective norm does not require fault, nonetheless § 823 (2) sent 2 BGB demands at least negligence. If, on the other hand, the protective norm requires intent or gross negligence, the conduct must meet this standard. Simple negligence then does not suffice. **5**

Generally, the violation of statutory norms plays an important part in tortious liability. The required level of fault of that norm is imported into the general tort law provided that, as a minimum, at least negligence is always required. On the contrary, the observance of statutory provisions or other norms (for instance, technical standards such as DIN) does not necessarily exclude liability.[3] **6**

3. Austria

Oberster Gerichtshof (Supreme Court) 21 December 1993, 1 Ob 600/93

JBl 1994, 555

Facts

The defendant ran a holiday home, in which the claimant and other pupils stayed during a school event. In the course of the stay, the claimant fell from a second floor balcony which had a 91 cm high rail. He was severely hurt and sought compensation. The building regulations law applicable to the construction permit from the 1970s did not provide for a minimum height of the rail. **1**

1 See the case, BGHZ 57, 25.

2 See BGHZ 34, 375, 381; *H Sprau* in: Palandt BGB (73rd edn 2014) § 823 no 60; *G Hager* in: J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse (2009) § 823 G 34.

3 See eg BGH NJW 1994, 3349 (DIN norm); BGHZ 139, 43 (complying with age requirement for sale of fireworks to children does not relieve seller of further duties of care).

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Decision

2 The court granted the claim. It held that the landlord has specific duties of care towards guests deriving from the contract, especially as far as dangers relating to the state of the accommodation are concerned. These duties are specified by provisions of public law and official permits, which, however, do not simply define the necessary standard of care but rather outline a minimum standard. Although the then applicable building law did not stipulate a minimum height for balcony rails, the provisions on worker protection provided for a minimum height of one metre as did the subsequently issued Act on constructional engineering that replaced the old building regulations. Though not directly applicable, they are a manifestation of the safety standard considered appropriate. The landlord could not argue in his defence that a requirement of immediate adaptation to altered standards was unacceptable, as the accident occurred almost 12 years after the change of the legal situation. During this time he was obliged to obtain knowledge thereof and take the necessary steps to meet the new standard.

Comments

3 Under tort law, wrongfulness may arise from the violation of a protective statute (*Schutzgesetz*; § 1311 ABGB), which is a particular imperative rule prohibiting certain conduct because of its abstract dangerousness.[1] Liability for violation of a protective statute has some benefits for the victim: firstly, unlawfulness may be determined easily; secondly, fault must merely relate to the breach of the protective statute and not to the harmful result;[2] and thirdly, according to established case law, § 1298 ABGB, providing for a reversal of the burden of proof regarding fault, is applicable in the case of protective statutes,[3] although this provision is in principle designed for contractual liability as well as for other cases of special legal relationships such as pre-contractual liability.[4] Furthermore, causation by the damaging conduct is

1 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 92 f; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 3.

2 *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 269 ff. Accusation of gross negligence or intention must, however, always relate to the damage; see *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 3; *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 22.

3 OGH 2 Ob 2423/96d = ZVR 1998/3; OGH 7 Ob 82/00k = ZVR 2001/17.

4 Thus, against this *R Reischauer*, Der Entlastungsbeweis des Schuldners (1975) 188 f; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 16/40; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 175 ff.

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presumed where precisely that damage is caused which the protective statute was intended to prevent.[5]

Nevertheless, liability for violation of a protective statute always requires the damage to be within the norm's personal and factual scope of protection (*Schutzzweck der Norm*), thus a teleological interpretation must be undertaken. The crucial factor is whether the law was intended to prevent precisely the damage that occurred,[6] eg there is no liability for not having a driving licence if the damage would have occurred anyway.[7] **4**

Protective statutes within the meaning of § 1311 ABGB are not only statutes in a formal sense (such as the provisions of the Road Traffic Act, *Straßenverkehrsordnung*, StVO), but every regulation with a protective purpose, thus also bylaws and administrative decisions.[8] **5**

As the exemplary case shows, protective statutes may also be relevant when it comes to contractual liability because they may define the scope and intensity of the contractual obligations more closely. However, compliance with administrative regulations does not necessarily mean that the required standard of care has been met.[9] This principle applies not only in contract law (as in the case at hand) but also in tort law: the organiser of a huge event in the airport grounds on the occasion of the first landing of Concorde was held liable for material damage inflicted by spectators pushing down the fences and invading the airport buildings, although it conformed to the administrative requirements regarding the number of police officers and firefighters deployed. The organiser should not have considered this number unconditionally sufficient; it would have been reasonable to expect it to deploy separate security forces.[10] **6**

5 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 6.

6 See OGH 2 Ob 11/91 = ZVR 1991/130; 2 Ob 75/94 = ZVR 1995/75; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 5.

7 OGH 2 Ob 902/52 = SZ 26/59; OGH 2 Ob 392/65 = ZVR 1966/151.

8 OGH 2 Ob 310/01d = ZVR 2003/25; OGH 7 Ob 648/56 = JBl 1957, 562; 8 Ob 133/78 = ZVR 1979/283; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1983) 102; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 4.

9 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1297 no 1 with further references.

10 OGH 4 Ob 609/87 = SZ 60/256.

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4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 12 July 1973
ATF 99 II 195

Facts

1 D, an employee of V, was driving a lorry with a trailer when he ignored a sign forbidding him access and entered a place close to a train station, where the employees of the railway company were manoeuvring train wagons.

2 As the employees of the railway company were not sufficiently attentive, they were not able to avoid a collision, causing damage to the lorry.

3 The lorry owner filed a claim against the railway company for CHF 20,000 (€ 17,000). The amount of the damage was not contested by the parties.

Decision

4 The Supreme Court accepted the claim partially.

5 After a detailed analysis of the jurisprudence, the Supreme Court decided that in this case of a collision between a railway, which is subject to the Federal Railway Act (*Loi fédérale sur les chemins de fer*, *Eisenbahngesetz* [LCdF]), and a vehicle subject to the Federal Road Traffic Act (*Loi fédérale sur la circulation routière*, *Strassenverkehrsgesetz* [LCR]), the rules of the LCR (art 61 al 2 LCR) have to be applied by analogy.

6 According to art 61 al 2 LCR, anyone who causes material damage and who is at fault is liable towards the victim. *In casu*, both the employees of the railway company and D had been equally at fault. Consequently, damages have to be borne in equal parts by the railway company and V and the damages the latter had sought have to be reduced by 50%.

Comments

7 A Swiss judge can refer to all forms of written law, such as the Code of Obligations, the Civil Code, Penal Code, but also to particular laws (statutes), regulations (*règlements*) or even legal customs, etc to decide on unlawfulness and fault. Also general principles, such as the principle of good faith and *bonos mores,* can be used as references and probably even elementary moral rules.[1]

8 Among others, the LCdF and the LCR define the required behaviour of persons subject to them. As D had ignored the no entry sign and had entered the place, he

1 For French law see *J Carbonnier*, Droit civil IV, Les obligations (22nd edn 2000) 419.

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acted unlawfully and was at fault. Concerning the employees of the railway company, the material damage they had caused was unlawful (*Erfolgsunrecht*) and their lack of attention amounted to fault.

In the case of contributory fault, damages had to be apportioned under the laws in force in 1973 (in the meantime these statutes have been modified in a way, which, however, is not important for the present purpose). 9

In casu, as the employers were held responsible for their employees' fault, the railway company only had to pay V 50% of the damages he sought. 10

5. Greece

Areios Pagos (Greek Court of Cassation) 163/2007

ChrID Z/2007, 602 ff

Facts

Due to the fault of motorcyclist A, who changed the course of his motorcycle without indicating that he intended to do so, and to the fault of B, who was driving behind A, at an excessive speed and while intoxicated, the two vehicles collided. As a result of the crash, V, a 21-year-old student, co-rider of the motorcycle died. V's close relatives (parents, sister and grandparents) sought compensation for pain and suffering. Both A and B alleged that V's death was also due to her liability, as she had not been wearing a helmet, as required by law. 1

Decision

The court held that V did not contribute to the occurrence of her death by not wearing a helmet, as the death would have been the consequence of the serious fractures and traumas of the thorax and right lung caused by her impact on the road as well as on the windshield of the car; the omission constituting a failure to wear a helmet was not causally connected to her death, as this would have happened as a result of the collision even if V had complied with the law by wearing a helmet. 2

Comments

The violation of a statutory norm that imposes certain behaviour indicates fault which, however, has to be causally related to the detrimental result in order to entail liability.[1] According to the jurisprudence of the Supreme Court, the violation of the 3

1 See, among others, *I Karakostas*, Law of Torts (2014) 143. See also AP 1500/2002 Ell Dni 44 (2003) 420.

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provisions of the Highway Code by the injured party (eg the consumption of alcohol or the failure to wear a helmet by a motorbike rider) as such does not mean that the injured party has contributed by his own conduct to the damage. It constitutes, however, an element, that will be taken into consideration by the court, which will judge whether there is a causal relation between the particular behaviour in violation of the Code and the prejudice.

4 The GCC in art 300 provides that if the injured party has contributed by his own conduct to the causing or the extent of the damage he has sustained, the court may either not award compensation or reduce its amount at its free discretion (there are no standard percentage deductions). Article 300 of the GCC applies in any case of damage, caused either because of non-performance of a contract or as a result of a delictual act.

Areios Pagos (Greek Court of Cassation) 447/2000

NoV 49 (2001) 836

Facts

5 The second defendant was driving his taxi on the new motorway from Thessaloniki to Athens, heading towards Thessaloniki, at a high speed (120 km/h), exceeding the speed limit (60 km/h). When he came close to the crossing with the new ring road in Thessaloniki, he did not slow down, as he should have done, given that it was evening and, due to a strike of the personnel of the Public Electricity Company, there was no street lighting and the traffic lights of the crossing were out of order. He continued driving at the same speed and tried to pass the crossing at this velocity, but at the same time the first defendant was driving his car on the ring road, heading towards Kalochori, with two passengers in his car. The first defendant, despite the existence of a STOP sign on his road obliging him to stop and give priority to cars on the motorway, entered the crossing without respecting the STOP sign. The taxi-driver (second defendant) could not react due to his high speed and his car crashed into the first defendant's car. As a result, the car passengers were killed. The plaintiffs, members of the family of the deceased, claimed compensation from both defendants for their moral harm.

Decision

6 The court held that both drivers were liable for violating the Highway Code. The court also mentioned that the drivers of vehicles are obliged not only to abide by the Highway Code but to go even beyond what is dictated by the said Code when this is necessary in order to avoid a detriment or in order to diminish the detrimental consequences of an act.

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Comments

The court, with the above decision, takes another step towards the existing tendency of broadening the meaning of the term 'unlawfully' in art 914,[2] including therein also the violation of the general duties of providence and care. According to this broad interpretation of the term 'unlawfully', not only is an act that violates a prohibitory provision of the law unlawful, but also an act that violates the general duties of providence and care dictated by the principle of good faith. Therefore, whosoever fails to take appropriate measures in order to avoid the risk of provoking a detriment to the goods of other persons may be liable to pay compensation for the damage caused. **7**

6. France

Cour de cassation, Chambre civile 1 (Supreme Court, Civil Division) 1 February 2005
02-20.633, Bull civ I, no 63, RDC 2005, 736, obs *Fenouillet*

Facts

A commercial company dealing with consumers had inserted unfair commercial terms in its general terms and conditions. A consumer protection group, which had no contractual relationship with that company, brought a claim for damages against it. The appellate court turned down the claim and the case was brought before the *Cour de cassation*. **1**

Decision

The *Cour de cassation* quashed the appellate court's decision, on the ground that stipulating unfair contract terms was in itself a fault that prejudiced the general interest of consumers, which the consumer group was in charge of protecting. **2**

Comments

In this case, the defendant's fault consisted in having violated the prohibition to insert unfair clauses in consumer contracts. This prohibition is actually not explicit, but results from the statutory provision, according to which, such unfair clauses are to be deemed unwritten (*réputées non écrites*). This case illustrates how French courts consider that the violation of any statutory norm constitutes a fault. This rule **3**

2 See the very interesting note by *P Doris* under the above decision AP 447/2000 [2001] NoV 49 (2001) 840, and *P Kornilakis*, Law of Obligations, Special Part I (2002) § 109 IV, 354, 355.

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is not formulated anywhere, and has never been stated so clearly by the courts, but it is generally accepted.[1]

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 14 June 1972

71-11.318, Bull civ II, no 180, D 1973, jur 423, note *Lepointe*

Facts

4 An agricultural cooperative had had an insecticide sprayed on crops. Bees feeding on those crops had died in great numbers as a result and two beekeepers brought a claim against the cooperative and its insurer, claiming that the death of the bees was a consequence of the cooperative's fault. The appellate court granted the claim. The cooperative and its insurer brought the case before the *Cour de cassation*, claiming that the latter had committed no fault, as it had obeyed all regulations applicable to the use of pesticides.

Decision

5 The *Cour de cassation* affirmed the appellate court's decision on the ground that an act may amount to fault, even if it is authorised by statutory rules, if it violates the general duty of care. In this case, the appellate court had found the cooperative to have been negligent, as it should have been aware of the risk of the pesticide for the bees and warned the beekeepers. The decision to grant damages to the latter was therefore justified.

Comments

6 This case illustrates the undisputed rule according to which abiding by statutory norms does not relieve a party of the general duty of care.[2] It is therefore possible to do something which is explicitly authorised by statutory norms, and yet to be at fault if this has been done carelessly, given the specific circumstances of the case.

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1 *G Viney/P Jourdain/S Carval*, Les conditions de la responsabilité (4th edn 2013) no 448; *P Brun*, Responsabilité civile extracontractuelle (4th edn 2016) no 294.

2 *G Viney/P Jourdain/S Carval*, Les conditions de la responsabilité (4th edn 2013) no 450; *M Bacache-Gibeili*, Les obligations. La responsabilité civile extracontractuelle (3rd edn 2016) no 145.

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7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 22 September 1988
Pas 1989 I, 83

Facts

Workers were engaged in cleaning a tank containing chlorates. In order to do this, they were working on a platform inside the tank, suspended at a height of several metres. In the general employment safety regulations, there is a particular provision specifying that workers operating at a height greater than two metres should be strapped and harnessed with a safety belt. However, in this case, the platform tipped over and the workers were not harnessed. A civil liability claim was therefore brought against the company employing the workers and against the foreman. 1

The victims claimed that ignorance of the general employment safety regulations constituted fault. However the trial judge held neither the company nor the foreman responsible, on the basis that the fact of not having required a safety belt to be worn was certainly a violation of the general regulation, but was not contrary to ordinarily prudent and diligent behaviour. The judge considered that the regulation in question was too difficult to implement, was not generally complied with and that, as a consequence, it was necessary to demonstrate flexibility when applying it. 2

Decision

The Supreme Court intervened by specifying that the material transgression of a legal or regulatory provision in itself constitutes fault, which leads to the person responsible being subject to civil liability, provided that the transgression was committed freely and knowingly. It added that therefore it is not legally possible to consider that an employer company is not liable on the basis that the above-mentioned transgression did not go against the general rules of prudence and diligence, and only constituted the omission of an exceptional precaution. 3

Comments

We have already specified (see 1/7 no 2 and 2/7 no 4) the extent to which the behaviour which must be demonstrated by everyone is both expressly formulated in legal rules (in every sense, ie law or regulation) imposing specific conduct on their subjects, and emerges from a more general standard of good behaviour which is not expressly specified. These are the traditional sources of fault. 4

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5 In this sense, the standard of behaviour is not always expressly specified in law, which 'cannot foresee and sanction all possible negligent behaviour'.[1] However when that is the case, that is to say when a legal rule imposes particular behaviour, a breach of that rule *ipso facto* constitutes fault. The Supreme Court's decision described above perfectly illustrates this. It has been affirmed many times.[2] This therefore means that when the fault originates from a rule imposing particular behaviour, it is not necessary to refer to the reasonably prudent person who, by definition, complies with the law.

6 This rule is only valid if the legal provisions impose specific and defined behaviour. This is not the case when it only repeats the general duty of care and diligence applicable to everyone. Sometimes a legal provision requires that certain general safety measures are to be taken, without specifically defining them, in order to avoid harm occurring.[3]

7 Otherwise, a demonstration of the existence of fault requires the establishment of a moral element (namely the decision-making capacity of the defendant), in addition to the material element (a breach of a pre-existing standard). In other words, the failure to comply with the law must have been freely and knowingly undertaken. We have already demonstrated that one cannot reproach a defendant for his behaviour if he/she could not have foreseen that damage would occur. Various authors,[4] however, consider that in the event of an infringement of the law, the foreseeability condition is extinguished. This is understandable to the extent that we can suppose that, at the time the legislator imposed well-defined behaviour (comprising a prohibition or a requirement), it intended to prevent damage which might arise in the event of failure to comply with the rule. The Belgian Supreme Court's case law, however, is not consistent on this point.[5]

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1 Free translation of *X Thunis*, Théorie générale de la faute, vol 2, in: JL Fagnart (ed), Responsabilités. Traité théorique et pratique, vol II/20*bis* (2006) 21, no 22.

2 See in particular Cass, 22 February 1989, Pas 1989 I, 631; Cass, 3 October 1994, JT 1994, 26.

3 See for instance Court of Appeal of Ghent, 18 April 2002, RW 2003-2004, 139, cmt *A Carette*.

4 See in particular *T Vansweevelt*/*B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) no 191; *H Vandenberghe*/*M Van Quickenborne*/*L Wynant*/*M Debaene*, Overzicht van rechtspraak (1994-1999). Aansprakelijkheid uit ontrechtmatige daad, TPR 2000, 1551, no 6; *G Schamps*, La violation de la loi et la prévisibilité du dommage en matière aquilienne, JLMB 1994, 46 (and the cited references); *L Cornelis*, Principes du droit belge de la responsabilité extra-contractuelle, vol 1 (1991) 68 f, no 40.

5 See *B Dubuisson*/*V Callewaert*/*B De Coninck*/*G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 39, no 26.

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 9 January 1981, ECLI:NL:HR:1981:AG4127

NJ 1981/227 (Van Dam/Beukeboom)

Facts

A company creating noise caused a nuisance to neighbours. The company had a permit issued by a local authority to cause noise, but did not act in accordance with the conditions of the permit. **1**

Decision

The conditions of a permit, which aim to protect neighbours, must be considered to have an effect in law similar to rules of conduct issued by central or local lawmakers. The violation of such conditions is, in principal, unlawful vis-à-vis the persons for whose protection the conditions were stipulated. **2**

Comments

An act or omission violating a statutory duty is unlawful according to art 6:162(2) CC (see 1/8 no 1). These statutory duties may be laid down in statutes of any kind, enacted by central or local authorities.[1] This case shows that even acts which violate conditions of permits issued by local lawmakers are considered as breaches of statutory duty. Breaching a statutory duty may, however, not always be a tort, as the scope of protection of a statutory norm may be limited. For example, the aim of the statutory duty not to put restricted medication on the market freely is to protect health, and not the financial interests of a competing pharmaceutical company.[2] Such issues are dealt with under art 6:163 CC on the scope of protection. **3**

Hoge Raad (Dutch Supreme Court) 5 June 2009, ECLI:NL:HR:2009:BH2815

NJ 2012/182 (De Treek/Dexia)

Facts

Several financial institutions had sold many complex financial products to non-professional private investors who appeared unable to bear the financial losses. The private investors claimed compensation from the financial institutions. These insti- **4**

1 Toelichting Meijers, Parliamentary History Book 6, 615.

2 HR 24 March 2006, ECLI:NL:HR:2006:AU7935, NJ 2009/485 (Pfizer/Cosmétique).

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tutions argued that they had not acted unlawfully, because they had – at the time – complied with the standards set by public law regulations.

Decision

5 The court held that the financial institutions were obliged to warn the investors about the risks they were taking before they entered into any contract with them. The failure to fulfil this duty to warn was considered to be tortious towards the investors. The claim made by the financial institutions that meeting the standards of public law regulations precluded the financial institutions from being held liable due to the breach of a private law duty was rejected. The financial institutions were held liable, but the consumers were considered contributorily negligent.

Comments

6 This case shows that meeting standards which originate from public law statutes does not guarantee that a party is not held liable under private law. A similar decision, though essentially on a contractual matter, was rendered on public standards for the use of asbestos by employers: although at the time the use of asbestos was even prescribed by public law, this did not mean that employers could not be held liable under private law.[3]

9. Italy

Corte di Cassazione (Court of Cassation) 19 August 2003, no 12138
<www.iusexplorer.it>

Facts

1 Some workers who suffered from exposure to asbestos dust took action against their employer for compensation for contracting an occupational disease. They argued that their employer did not take the necessary precautions and did not comply with laws to ensure a healthy working environment for his employees.

Decision

2 In both the court of first instance and in the court of second instance, the judges found the employer liable in contract and in tort for the negligent violation of

3 HR 2 October 1998, NJ 1999/683 with comment *JBM Vranken* (Cijsouw/De Schelde II).

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art 2087, which requires an employer to take all necessary measures to protect health in the working environment, art 21 of Presidential Decree No 303/1956, which obliges an employer to eliminate, or at least reduce, the risk of the formation, spread and development of dust in the working environment and art 4(b) of Presidential Decree No 303/1956, for not adequately informing workers of the specific risks to which they were exposed.[1] The *Corte di Cassazione* confirmed what was decided at the two previous levels of jurisdiction.

Comments

The violation of a legal provision falls within the definition of negligence for the purposes of art 2043 Civil Code if such provision was enacted to prevent damage. In this case, the conduct that causes damage is considered to be negligent per se, and no other verification of the element of negligence is required. This is therefore a case of *culpa in re ipsa*. When ascertained in this way, negligence is established by reference to an objective standard of conduct.[2] **3**

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 16 July 1991

RJ 1991\5393

Facts

The claimants sought compensation for damage suffered for having to leave the house where they lived, since life in the house was unbearable for their youngest son, whose health was significantly altered by the immediacy of the defendants' dairy. This facility was located in an inappropriate area, but the City Council had not put an end to this illegal situation. Both the Court of First Instance and the Court of Appeal declared the action prescribed without finding that the infringement of the Regulations on hazardous activities amended the limitation period applicable, since this was a tort law action subject to the one-year prescription period pursuant to art 1968.2 CC. The Supreme Court also rejected the claim. **1**

1 Trib (Tribunal) Barcellona Pozzo di Gotto, 11 November 2004, no 1557; Trib Barcellona Pozzo di Gotto, 11 November 2004, no 1558, Giur It 2005, 1168, with note by *N Coggiola*. On the issue cf *N Coggiola,* Alla ricerca delle cause. Uno studio sulla responsabilità per i danni da amianto (2011) 111 ff.

2 See *M Franzoni*, L'illecito (2nd edn 2010) 184 ff.

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Decision

2 The infringement of the Regulations on hazardous activities has no other meaning than adding the note of wrongfulness, even if this is in the strict sense that identifies it as a violation of the positive law, this being something that some scholars require for an action for damages to succeed. However, the most convincing legal doctrine and case law do not agree with this point of view and consider that, in order for liability to be established, it is sufficient for the concept of wrongfulness to be widely understood, ie that the tortfeasor transgressed the required rules of conduct, omitting due care and diligence and damaging legally protected interests, a situation which exists in the present case and, therefore, meets the conduct referred to in art 1902 CC.

Comments

3 The series of cases outlined under this question offer illustrations of the different interactions between statutory norms and definitions of misconduct for the purposes of imposing civil liability. The underlying approach is always the autonomy of the judicial assessment of misconduct when deciding a tort claim with regard to an assessment of wrongfulness for other legal purposes, namely the imposition of fines or other restrictive measures as a result of a criminal conviction or an administrative procedure.

4 The first decision illustrates the prevailing opinion, which does not restrict the analysis of tort liability by making recourse to the breach of some specific legal or regulatory provision and places the analysis of wrongfulness on a more generic level. As already mentioned,[1] wrongfulness is connected to the illicitness of the conduct in a very loose sense, and must be understood as the infringement of the general duty not to harm others (*neminem laedere*).

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) Administrative Chamber, 6th Section, 1 December 2009

RJ 2009\8129

Facts

5 V was traveling at excessive speed on a highway in perfect condition and with good visibility when his motorcycle skidded on a wet spot, which caused him to fall and crash against the safety fence of the median strip. This fence consisted of a metal plate in double wave form that by its shape may have had a shearing effect and the

1 See 1/10 fn 3, and corresponding text.

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impact with the fence cut off his left leg. V sued the public authorities claiming that his injury would not have occurred if the median safety fence had been of a different type (round, soft, etc).

Decision

Although the cause of the accident was excessive speed, the Supreme Court ordered the defendant to pay damages because the cause of the specific injury was the existence of a certain type of safety fence. Whereas excessive speed is attributable to the claimant, the existence of the hazardous safety fence is attributable to the public authorities. The public authorities had already decided to replace safety fences with fences of a different type, precisely to avoid the consequences of their cutting capability. However, the replacement plan provided for the withdrawal of the fences existing at the scene of the accident at a later date. This means that the existence of such safety fences at that time and at that place met the current technical standards. Nevertheless, the decision regarding the gradual replacement of safety fences by fences of a different type shows that, at the time of the accident, the public authorities were aware that such safety fences were an element of risk, especially for motorcyclists. Since this element of risk was created by the public authorities, which have the power to determine the technical characteristics of the highway fences, it cannot even be stated categorically that the operation of the public service was entirely correct. 6

Comments

This decision illustrates the principle that compliance with legal or regulatory provisions specifically applicable to the case does not necessarily preclude the possibility of attributing liability on the grounds of fault. A defendant may still be liable even if he has complied with all the regulations if, in view of the danger presented, he should have adhered to stricter safety measures. In other words, to prove compliance with administrative regulations imposed on the tortfeasor is not sufficient to prove care. Although art 1902 CC is based on the principle of fault, the case law of the Supreme Court has repeatedly stated that 'the care required includes not only foresight and care established by regulations, but also all those measures that prudence imposes to prevent the damaging event'.[2] This rule allows the courts to over- 7

2 Among many others, STS 3.6.1998 (RJ 1998\5411), 10.3.1994 (RJ 1994\1736), 24.12.1992 (RJ 1992\10656), 19.12.1992 (RJ 1992\10703). In another case of industrial nuisance that harmed the productivity of the neighbouring farms, STS 14.3.2005 (RJ 2005\2236) stated that 'in tort liability, compliance with regulations does not exclude it if there was damage, as in this case.' Previously see the important decision STS 28.1.2004 (RJ 2004\153); commented on by *A Ruda*, CCJC 66 (2004). STS Social

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come the difficulties posed by regulations that have become obsolete or by inefficient measures in order to comply with the duties arising from the regulatory framework applicable to the activity at issue. Historically, indeed, it was the poor enforcement of public safety regulations which led Spanish courts to take a sceptical stance vis-à-vis formal compliance with regulations when this was in fact alleged by defendants in tort proceedings following fires caused by steam engines.[3] During the 20th century, courts even stated on occasion that the very fact that the damaging event had eventuated demonstrated that applicable regulations were insufficient to prevent the accident and that there were measures that the defendant company could and should have taken to avoid it. With time that most extreme version of the autonomy of assessment of the defendant's conduct has been abandoned. As noted recently by STS 16 October 2007,[4] such an unqualified conclusion would lead to pure strict liability or liability for damage caused, which is not the system flowing from art 1902 or art 1903 CC.

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 11 June 2013
RJ 2013\4026

Facts

8 V, a 35-year-old carpenter with long professional experience, died while working in a house under construction. The instructions he had received were to seal the windows with silicon and for this reason he had to work from inside the house. However, V decided on his own to seal the windows from outside the house and went through one of them to climb onto the porch. Ice and moisture caused him to slip and fall from a height of three metres onto the scaffolding of the painter, which caused him serious injuries from which he died. His widow and children brought a claim contending, inter alia, that the defendant architect had failed to ensure the adoption of safety measures, such as installing nets or developing a Health and Safety Plan, even though the work was not completed and work at height had still to be performed in the building. Both the Court of First Instance and the Court of Appeal rejected the claim and found for the defendants. In particular, the Court of Appeal concluded that the existence of administrative infringements, such as the ab-

Chamber 20.1.2012 (RJ 2012\3633) held the defendant liable for mesothelioma resulting from exposure to asbestos of one of its workers, even when it had fulfilled all required preventive measures under the regulations in force at the time of exposure.

3 *M Martín-Casals/J Ribot*, Technological Change and the Development of Liability for Fault in Spain, in: M Martín-Casals (ed), The Development of Liability in Relation to Technological Change (2010) 227, 241f.

4 RJ 2007\7102.

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sence of a Safety and Health Plan at Work, had no causal connection with the accident. In the appeal before the Supreme Court, the claimants complained that the appealed judgment trivialised the importance of safety plans and regulations for the prevention of occupational hazards, but the Supreme Court dismissed the claim altogether.

Decision

The Supreme Court holds that the judgment of the trial court, not attributing responsibility for damage to any of the defendants, does not trivialise the Health and Safety Plan required by regulations for the prevention of occupational hazards nor does it consider it a mere formality. It only assesses the relevance of the worker's conduct as a determinant factor for the injuries suffered and which no security plan could have avoided, since the worker deviated on his own from the usual method of work and decided to work from the roof of the house rather than from the interior. **9**

Comments

The third case illustrates that even a proven infringement of legal or regulatory provisions does not necessarily lead per se to establishing the existence of fault. This conclusion depends on whether the purpose of the rules infringed is to prevent or avoid events such as those that occurred in the case at hand. STS 21 December 2005[5] stated, for instance, that the breach of the regulations for the erection of a crane does not automatically represent negligent conduct of the installer that thus gives rise to his liability in tort. In this case, the accident was the result of the collapse of a construction crane on surrounding homes. In the case of STS 15 January 2008[6] on the possible liability of the promoter of a construction, the court stated that starting work without a licence could result in administrative sanctions, but did not allow per se the attribution of liability for the death of a worker caused by a landslide during the work. Conversely, on the grounds of the purpose of the rules governing the unauthorised possession of weapons, STS 17 May 2007[7] ordered a company that had hired a private security guard who killed his wife and daughter with his service weapon to compensate for the harm done. **10**

5 RJ 2005\10147.
6 RJ 2008\1394.
7 RJ 2007\3542.

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11. Portugal

Tribunal da Relação de Porto (Porto Court of Appeal) 20 April 2010 (Guerra Banha)

Facts

1 On a summer day with excellent visibility, two vehicles driven, respectively, by A1 and A2 were stationary in the fast lane of a motorway due to having been involved in a crash. A short period of time after, so short that the drivers had not had time to properly signal the crash site with a warning triangle, they were hit by a third vehicle, driven by V, who left skid marks from braking, over a distance of 70 m towards the place of impact.

2 The crash took place roughly halfway up an uphill straight, with a length of between 400 and 500 m, and V had good visibility over the two stationary cars at more than 150 m of the place where the stationary cars were; he was driving on the left lane of the motorway (the fast lane), at a place where there were three lanes of traffic in his direction and the two lanes to his right were free, without any cars or other obstacles.

3 The driver V sought compensation from A1 and A2 for the damage suffered basing their liability on a violation of arts 87(2) and 88(1) of the Portuguese Highway Code (a provision related to the need for warning signs at accident sites and stationary cars on the road). A1 and A2 on the other hand contested this claim, saying that V was liable for the accident.

Decision

4 The court decided that the violation of arts 87(2) and 88(1) of the Highway Code by drivers A1 and A2 was not a decisive factor in the crash involving driver V because, taking into consideration the concrete conditions of visibility and the positioning of the cars on the road, the lack of a warning triangle (indicating danger), this violation could not have had a relevant role in causing the accident. The court also decided that V, by driving on the left lane of the motorway, while not performing an overtaking manoeuvre, clearly violated art 13(1) of the Highway Code, and, based on this fact, the court created a judicial presumption of fault (on the terms of arts 349 and 351 of the Civil Code), which V could not rebut. In these terms, and taking into consideration that the causal link between V's act and the production of the results was adequate, the court decided that he (and not A1 and A2) was liable for all the damage caused by the accident, in accordance with art 483 of the Civil Code. The court stated that this would be the case even if there was no judicial presumption, because V's behaviour was faulty based on the criteria of art 487(2) of the Civil Code. Given the generous distance and visibility that he had to assess the situation in front of him and the space that he had to safely stop the car or simply change lanes to avoid the crash, his driving was clearly below the standard required by the criterion

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of the reasonably cautious and diligent man, which is the basis upon which fault was evaluated.

Comments

Fault is usually presumed in our courts when the harmful event is caused by behaviour in violation of statutory norms,[1] such as those from the Highway Code, which were violated in this case. The judicial presumption (regulated in arts 349[2] and 351[3] of the Civil Code) is based on rules of experience and probability[4] and can be rebutted.[5] **5**

In this case we can clearly see the different consequences of a violation of statutory norms in the Portuguese legal system, regarding civil liability. The violation of statutory norms in the case at hand could either give rise to judicial presumptions against A1 and A2 or against V, because all of them violated legal provisions with a protective purpose contained in the Highway Code, but, when analysed in conjunction with the causation requirement, we can see that the violation of arts 87(2) and 88(1) of the Highway Code by A1 and A2 were not adequate to produce the harmful event, unlike V's violation of art 13 of the Highway Code that was an adequate cause of the event, because if he had driven on the right lane of the motorway, as that provision demands, the accident would not have occurred.[6] A violation of statutory norms per se does not give rise to liability but it can give rise to a presumption of fault that can ease the burden of proof which the victim has to bear when the agent has violated a statutory norm of protection of the legal good in question. In the case at hand, although V started the proceedings as the victim, it was concluded that he was the one liable for the damage caused not only to himself but also to A1 and A2, therefore the burden of proof for the prerequisites of V's liability was now to be borne by A1 and A2, and eased by the presumption of fault that emerged from V's violation of art 13 of the Highway Code. **6**

1 The violation of norms eases the proof of wrongfulness, *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 238.

2 'Presumptions are the conclusions that, either the law or the court, draws from one known fact to establish an unknown fact.'

3 'Judicial presumptions are only allowed in the same cases and on the terms in which testimonial evidence is admitted.'

4 For instance, the fact that driving under the influence of alcohol or other drugs increases considerably the risk of an accident, or the fact that the violation of *legis artis* by the doctor increases the probability of damage to the patient, can be the basis of a judicial presumption.

5 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 312 f.

6 The scope of protection of the norm must be in adequate connection to the damage produced: see *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 240.

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7 See also Supreme Court of Justice, 15 January 2002 (3d/11 nos 8–11) where a violation of statutory norms of the Penal and Civil Code was considered of relevance in assessing the liability of a building contractor for damages suffered by children playing on a construction site.

12. England and Wales

London Passenger Transport Board v Upson, House of Lords, 9 December 1948

[1949] AC 155

Facts

1 The claimant was a pedestrian who was seeking to cross the road at a designated crossing controlled by lights. The defendant was the driver of a bus. The driver approached the crossing, with the lights in his favour, at a speed of 15 mph (approx 24 km/h). He was prevented from having an uninterrupted view of the entire crossing, however, by a taxi that was parked there unlawfully. The driver consequently struck and injured the claimant as she emerged from behind the taxi to cross the road. She brought an action for negligence and breach of statutory duty. Regulation 3 of the Pedestrian Crossing Places (Traffic) Regulations 1941 read: 'The driver of every vehicle approaching a crossing shall, unless he can see that there is no passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing.' The claimant admitted contributory negligence.

Decision

2 The House of Lords ruled that the driver was not guilty of negligence as he was travelling at moderate speed and could not be expected to anticipate that anyone would cross in the presence of an adverse sign. However, it upheld the claim on the basis of the driver's breach of the applicable Regulations. It considered that the purpose of the Regulations was to protect life and limb, even of persons who may have been careless. To establish liability, it was not necessary for the claimant to prove negligence on the part of the driver or an aggressive act directed against her. On the facts, the driver was in breach of his statutory duty since it was impossible for him to see that there was no pedestrian on the crossing yet he did not proceed at such a speed as to enable him, if necessary, to stop before reaching the crossing. The evidence was that he saw her when she was 9 feet away (approx 2.74 m) and when he stopped the front wheels of the bus were on the crossing, supporting the conclusion that he did not proceed at such a speed as to enable him, if necessary, to stop before reaching the crossing.

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Comments

As the court pointed out in *Upson*, while breach of statutory duty resembles an action in negligence insofar as the claim is very often based on a breach of the duty to take care, the causes of action are different. As Lord Wright explained:[1] **3**

> '[A] claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law...'

Here, the relevant duty was clearly intended to protect a particular class of persons, namely pedestrians using the crossing. If it cannot be demonstrated that the duty was intended to protect a particular class, or if it appears that Parliament did not intend to confer on members of that class a private right of action for breach of the duty, then no private law cause of action can arise.[2] In fact, because many road traffic regulations can be construed as protecting the public as a whole in its use of the roads, rather than a particular class of the public,[3] the tort of breach of statutory duty has played only a rather minor role in motor vehicle cases in England and Wales.[4] **4**

In addition to (potentially) providing an additional cause of action, the statutory standard may also influence the court's assessment of the proper standard to apply in the tort of negligence. But breach of the statute is only *evidence of negligence* and not *negligence per se*.[5] Therefore, compliance with the statute does not *necessarily* prevent a finding of negligence; conversely, a breach of the statute does not mean that there must have been negligence.[6] That was in fact the case in *Upson*, where the defendant bus driver was acquitted of negligence but nevertheless found to have breached the Regulation that required drivers approaching a crossing to proceed at a speed that would enable them to stop before the crossing if necessary. Though it would have been open to the House of Lords to regard the statutory obligation as providing the content of the obligation arising at common law, the Law Lords proceeded on the basis that the statutory obligation was stricter than the standard of care in negligence; it was irrelevant that the driver was driving at a moderate speed for the particular road. What was relevant was that he could not see whether the **5**

1 [1949] AC 155, 168.

2 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731f per Lord Browne-Wilkinson.

3 See *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832.

4 *K Stanton et al*, Statutory Torts (2003) § 10.002ff.

5 See *M Lunney/K Oliphant*, Tort Law: Text & Materials (5th edn 2013) 615ff; *K Stanton et al*, Statutory Torts (2003) § 1.012ff.

6 Indeed, there are a number of judicial statements to the effect that exceeding the speed limit is not automatically civil negligence: see eg *Wreford-Smith v Airtours Holidays Ltd* [2004] EWCA Civ 453 at [44] per Potter LJ.

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crossing was clear and so committed an offence against the Regulations by not approaching with the caution needed (eg by moderating his speed further). Actions for beach of statutory duty are thus said to belong to the category of torts often described as imposing strict or absolute liability.[7]

13. Scotland

Mitchell v Campbeltown Shipyard Ltd and others

Unreported decision of the Outer House of the Court of Session, 3 March 1998

Facts

1 The pursuer was the widow of a man who died while he was working as a crane operator at the first defenders' shipyard in Campbeltown. The deceased died from injuries sustained when a steel fabricated section fell from the side of a lorry, crushing him. The pursuer sought damages from the defenders in respect of the death of her husband at common law and under two pieces of legislation, one of them the Management of Health and Safety at Work Regulations 1992 ('the 1992 Regulations').

Decision

2 The judge thought that the defender had stated a relevant case, and ordered a proof before answer (ie a trial of the facts, before a debate on the relevant law) to be held. However, he excluded from the pursuer's case any reference to the statutory standard set out in the 1992 Regulations, on the grounds that: (a) the regulations themselves precluded any civil claims being brought under them; and (b) the standard of conduct set out in them had no necessary connection with any duty of care imposed at common law. In relation to the second ground he remarked: 'As regards the suggestion that, in some way, the standard set by the Regulation might constitute a criterion by which common law fault might be judged, I consider that such an approach is fallacious. As was made plain in the case of *Bux v Slough Metals Ltd*,[1] it is a question of fact in every case whether a statutory duty is co-extensive with or more or less extensive than the common law duty. In other words, there is no necessary connection between a common law standard of care and a standard of care imposed by statutory provision.'[2]

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7 [1949] AC 155, 168 per Lord Wright. Obviously, this only applies where the statutory obligation is phrased as a strict obligation rather than in terms of reasonable care.

1 [1973] 1 WLR 1358, [1974] 1 All ER 262.

2 Per Lord Osborne. *Bux v Slough Metals Ltd* is reported at [1974] 1 All ER 262, [1973] 1 WLR 1358.

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Comments

This decision expresses the court's view that non-compliance with a statutory standard does not necessarily constitute wrongful behaviour for the purposes of a common law duty of care; whether it gives ground for a remedy under the relevant statute is determined by that statute (in this case the 1992 Regulations precluded the making of any civil claims in the event of their breach). If that is correct, then courts will have to consider whether, in a specific case, the extent of a common law and statutory duty are or are not co-extensive (bearing in mind that some statutory duties are framed so as not to give rise to any civil claims). In some cases (such as occupiers' liability, where the relevant statute simply enacts the common law duty of care within it), the relevant duties are co-extensive; but in others they will not be. **3**

Gilfillan v Barbour, Court of Session (Outer House), 12 August 2003

2003 SLT 1127

Facts

A police officer was driving a police car at approximately twice the speed limit, when his vehicle collided with a car driven by the defender (who, proceeding from the opposite direction, was attempting to turn right at a junction). The defender's wife was killed in the collision. The police officer claimed damages from the defender, arguing that he had suffered psychological injury and consequential loss of earnings as a result of the negligent driving of the defender. The defender counterclaimed for damages, arguing that the police officer had been negligent, and that the driver of an emergency vehicle was not in a 'privileged position' but was in the same position as any other driver if he caused injury to another road user. At a proof (ie a trial of the facts), the defender admitted his driving had been negligent. **4**

Decision

The judge held that the parties were equally liable for the accident, and awarded damages to each. It was not disputed that the defender had been negligent in making the manoeuvre he had, when he had heard the siren of an emergency vehicle nearby; as for the police officer, it was also undisputed that a police officer, like any other driver, owed a duty of care to other road users, but the standard of that care was not necessarily the same as that required of an ordinary driver on private occasions. The pursuer's driving failed to meet the standard to be expected of a reasonable driver, even in the circumstances of a police officer answering a call of some urgency. **5**

On the relevance of the statutorily imposed speed limit to the question of the negligence of the parties, the judge remarked: **6**

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> 'The ordinary driver of a motor vehicle on his private occasions will ordinarily meet the standard of care required of him ... if he keeps within the speed limit applicable to the road in question; although he will of course be expected to drive more slowly in particular circumstances where the reasonable man would do so ... If the ordinary driver breaks the speed limit, that is in itself a material factor in determining whether he has been negligent ... In the case of a police officer, on the other hand, in circumstances in which he is exempted from obeying the speed limit, no inference of negligence can be drawn from his driving at a speed in excess of the speed limit. The only question, as it seems to me, is whether it is reasonable for him in the particular circumstances to drive at a given speed, notwithstanding the risk of possibly injuring another road user. The answer to that question must depend on the circumstances, in particular those circumstances relevant to the urgency of the police business on which he is engaged, and those circumstances relevant to the degree of risk which he is taking.'[3]

Comments

7 Speed limits impose a rigid standard which must be obeyed by ordinary drivers in order to avoid criminal liability; in relation to emergency vehicles, statute provides an exemption from the requirement to obey such limits, under a specified condition.[4] But speed limits have no absolutely determinative relationship on the question of whether or not an individual has discharged the common law duty to take care when driving on public roads; driving above the speed limit does not invariably indicate the presence of negligence, nor does driving below it invariably indicate that a driver has been driving with sufficient care in the circumstances.

8 The judge's view on a driver travelling faster than the maximum limit stipulated for the road is that that is a 'material factor' in determining whether the standard of care to be expected of the driver has not been met. That does not tell us precisely to what extent the failure to comply with the statutory speed limit can be taken into account by a court, but it suggests that it may contribute to a reasonable inference of negligence. As for driving below the limit set by statute, the judge goes somewhat further when he says that this will 'ordinarily meet the standard of care required of him'. This creates, if not quite a presumption of carefulness, at least an expectation that in most cases such a conclusion is likely to follow from a driver's having stayed within the statutory speed limit (absent circumstances of heightened risk, such as icy road conditions). The difference in approach in relation to police officers who exceed the speed limit is clearly spelled out by the judge: 'no inference of negligence can be drawn from his driving at a speed in excess of the speed limit'. In the absence of any possible inference, courts are simply to have regard to the individual circumstances of the case in reaching a determination on the facts. In assessing such circumstances, risk of injury to members of the public can be balanced against

3 See judgment of Lord Reed, at para 30 f.

4 See Road Traffic Regulation Act 1984, sec 87.

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the degree of urgency of the business in which the officer is engaged, a consideration which seems not to apply to ordinary members of the public.[5]

The judgment is of interest in demonstrating that, for one class of person (the ordinary road user), failure to meet a statutory norm is a factor in making an inference that the standard of care to be expected in relation to a specific sort of conduct has not been met. It also indicates, however, that for another class (drivers of emergency vehicles) the statutory standard plays no part in any such inference: everything hinges on the specific circumstances of the case, which include consideration that an emergency was being responded to by the driver. **9**

14. Ireland

McDonald v Frossway Trading as Bleu, High Court, 2 November 2012

[2012] IEHC 440[1]

Facts

The plaintiff broke her ankle when she fell whilst attempting to descend a short flight of three steps in the defendant restaurant. She alleged negligence against the owners (both a company and an individual) and the architects who designed the interior of the restaurant in respect of the level of lighting and in the absence of a handrail alongside the steps. **1**

Decision

The lighting was found to have played no part in the accident. The absence of a handrail was negligent; all three defendants were liable. O'Neill J held that the need for a handrail should have been 'glaringly obvious' to an architect and to experienced restaurateurs; placing total reliance on the Building Regulations to determine what was necessary was inadequate. The owners could not plead reliance on the architect as an independent professional in respect of such an obvious risk. **2**

5 The judgment contains no statements supportive of the view, for instance, of a member of the public speeding to a hospital to take an injured passenger for emergency treatment would be entitled to take the benefit of such a balancing exercise, though perhaps, had the judge turned his mind to such a question, some sort of concession for such a case might also have been made.

1 Noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2012 (2013) 560 f.

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Comments

3 This is in line with an earlier *dictum* of Finlay CJ in the IESC, which stated that compliance 'with mandatory or minimal requirements imposed by national health authorities' will not necessarily suffice to meet the legal standard of care.[2] Failure to comply with statutory standards may be taken into consideration when deciding negligence cases, but is not necessarily determinative of fault.[3] Apart from negligence claims, other torts may be used in respect of violation of statutory provisions. The action for breach of statutory duty may be available; in such claims, the key factor is often whether the statutory duty is actionable as a matter of private law, rather than whether the defendant has violated the statutory standard.[4] A violation of a statutory provision may also constitute the 'unlawful' element in economic torts such as conspiracy or unlawful interference with economic interests. It may also constitute the relevant misconduct for misfeasance in public office.

4 It should also be noted that the defence of contributory negligence has a more restricted application in respect of breaches of statutory duty by defendants, so as not to diminish the effectiveness of the underlying protective policies in the relevant legislation.[5]

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2 *Best v Wellcome Foundation Ltd* [1993] 3 IR 421, 462 f.

3 The Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (SI No 17/2002) has been considered in some cases; sec 42(4) of the 1990 Act provides that such codes are admissible as evidence. See *Quigley v Complex Tooling and Moulding Ltd* [2008] IESC 44, [2009] IR 349; *Browne v Minister for Justice, Equality & Law Reform* [2012] IEHC 526 (which also had regard to the police finance code & disciplinary code). The relationship between statutory speed limits and negligence has been considered in numerous cases, including *McDermott v McCormack* [2010] IEHC 50 and *Callaghan v Bus Atha Cliath/Dublin Bus* [2000] IEHC 88.

4 On the relationship between the Occupier's Liability Act 1995 and Building Regulations, see *Newman v Cogan* [2012] IEHC 528 (7/14 nos 1–3 below).

5 See *Smith v HSE* [2013] IEHC 360, at [40] ff O'Neill J; *Fanning v Myerscough* [2012] IEHC 128; *Meehan v BKNS Curtain Walling Systems Ltd* [2012] IEHC 441; *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 21.56 ff; *E Quill*, Torts in Ireland (4th edn 2014) 137 f; *R Byrne/W Binchy*, Annual Review of Irish Law 1991 (1993) 408 f.

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15. Malta

Jesmond Bonello v Giulio Baldacchino (Court of Appeal – Qorti tal-Appell)
15 January 1997
Collected Judgments, Vol LXXXI, part II, 162

Facts

The plaintiff was driving on the main road, the defendant emerged from a side road and the two vehicles collided. The plaintiff sued for damages; the defendant pleaded that the plaintiff was driving at an excessive speed and the accident would not have occurred but for the plaintiff's breach of the road traffic regulations. 1

Decision

The first court found that the plaintiff's excessive speed was a contributing factor in the accident: had the plaintiff been driving at the proper speed, the defendant would have had ample time to get out of his way before the collision. The plaintiff was therefore to bear part of the blame, which the court apportioned as to one fourth (1/4) on the plaintiff and three fourths (3/4) on the defendant. 2

The plaintiff appealed and the Court of Appeal allowed the appeal. The direct cause of the accident was the defendant's negligence in emerging into the main road at the same time as the plaintiff was using it. He failed to keep a proper look-out because he either failed to see the plaintiff although he was in plain sight or, if he saw him, he wrongly thought that he would manage to avoid him but was misled because he miscalculated the plaintiff's speed. The plaintiff's speed would have been relevant if it were the immediate cause of the accident – eg if, due to his speed, the plaintiff appeared on the scene and became visible to the defendant only after the latter had emerged from the side road – or if it contributed significantly to the extent of the damage. In the present case the defendant alone was to blame. 3

Comments

Failure to abide by the law is in itself a wrongful act but whether in the circumstances it is also a blameworthy ground of liability depends on the outcome: the agent is liable if the wrongful act is a direct sole or contributory cause of the accident; he is not liable if the act is not a direct cause, even if, as in the present case, the accident possibly might not have occurred 'but for' that wrongful act (since the defendant might possibly have made it in time had the plaintiff observed the speed limit). The point being made here is that breach of a statutory norm is not an automatic ground of liability in the sense that one is not necessarily 'at fault' with respect to a particular accident merely because one has failed to observe the law. 4

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5 Incidentally, the court also observed that for the purposes of civil liability speed may, in the circumstances, be excessive even if it is below the statutory limits. In other words, assuming that the other elements of liability are present, observing the regulations is not necessarily a sufficient defence.

6 What is also of interest is the distinction made by the Court of Appeal between excessive speed as a cause of the accident itself and as a cause of more serious damage. If the speed is not a cause of the accident, the driver cannot be said to be at fault for the accident even if, because of his speed, the damage was greater. In such a case will he merely recover a proportionately decreased amount of his own damages or should he be made to pay a share of the other party's damages? The judgments consistently state that the plaintiff has a duty to minimise damages; if he fails in this duty, he will recover decreased damages but will not become liable for any damage suffered by the defendant, but these cases refer to the plaintiff's duty after the accident and bear no analogy to the present discussion where the plaintiff would have failed in this duty before the accident.

MCD v Director of Social Security (Court of Appeal – Qorti tal-Appell) 16 October 2008, Application no 75/2005

<http://www.justiceservices.gov.mt>

Facts

7 As a result of amendments to the Social Security Act, which came into effect on 6 January 1996, the plaintiff became entitled to an increase in her pension. However the Social Security Department continued paying the pension at the old rate, and it was only on 6 May 2000 that the plaintiff received the increase in arrears, as a lump sum. Since income tax was assessed on a 'when paid' rather than on a 'when due' basis, the lump sum was charged at a higher marginal rate than would have been applicable had the increased pension been paid when due and the income spread over four years. Alleging that the defendant's delay in implementing the new law had resulted in her incurring more tax than necessary, the plaintiff sued the defendant for damages. The defendant pleaded that the plaintiff should be non-suited because he was not responsible for the assessment or the collection of income tax, that the plaintiff had not followed the correct procedure to impugn her tax assessment and that in any case income tax cannot be considered as 'damages'.

Decision

8 The first instance court observed that the case was not about the validity of the tax assessment; it was a straightforward action in delict for the recovery of damages caused by the defendant's failure to abide by the law. All that the plaintiff had to prove was that the defendant was negligent and that he had taken an unreasonably

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long time to perform his duty under the law. On the facts, the court found that the defendant was guilty of mismanagement and there was no reasonable justification for the delay in payment. The defendant was therefore ordered to pay the excess tax liability incurred by the plaintiff.

The defendant appealed, arguing that he took such a long time to calculate the increase because it was worked out according to a complex formula which required that he obtain information from various sources, and his department was short-staffed. The Court of Appeal dismissed the appeal. The defendant was under a specific statutory obligation to pay the plaintiff's pension at the increased rate when it became due. The plaintiff sustained a loss because of the defendant's failure to abide by this statutory obligation; the defendant's omission was a direct cause of the plaintiff's loss. All the conditions for liability in tort were satisfied. 9

Comments

Whereas the first instance court considered the merits of the defendant's argument that, under the circumstances, he had processed the pension diligently, dismissing the argument on the facts, the Court of Appeal relied solely on the fact that the defendant had a specific statutory obligation which he failed to perform. In this case, therefore, the failure to abide by a statutory norm was, of itself, a sufficient ground for liability when it was the sole and direct cause of the loss. 10

Incidentally, this case also shows that the courts will provide a remedy even when the interest harmed is a pure economic one. 11

16. Denmark

Vestre Landsret (Western Court of Appeal) 7 May 1965

U 1965.702/3 V

Facts

An entrepreneur, A, had installed a heating system (based on gas) in a small cabin on a small boat which was being used to store tools and work clothes and which was not equipped with a ventilation system. The heating system had neither been inspected nor approved by the relevant public authorities. One morning a person, V, who was working on the boat, struck a match in order to light his pipe and consequently a gas explosion occurred. V was injured in the explosion and sued A for damages. 1

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Decision

2 The court held that the provisions of ministerial order No 253 (23 June 1952) regarding heating systems based on gas on board ships was applicable.[1] Pursuant to these provisions, the heating system had not been installed properly since, inter alia, the system should have been placed outside the small cabin. The court found that the contravention of the said ministerial order was the cause of the gas explosion and thus A was held liable for the personal injury sustained by V.

Comments

3 As developed above, pursuant to the objective test for *culpa*, the standard of care is determined by assessing what the proper conduct was in a certain situation according to a somehow objectively fixed norm. Such norms may be contained in legislation such as statutes, ministerial orders or some other type of regulation. Due to the authoritative nature of such norms, in most cases they will be applied directly (ie absent any discretion) by the courts when assessing the applicable standard of care.[2] The present case illustrates this very well since the tortfeasor, A, was held liable on the basis of the mere contravention of the said ministerial order. However, it should be noted that there are exemptions to this. Most notably the so-called protective scope (or *Schutzzweck*) of the norm which has been contravened must extend to the kind of damage incurred by the claimant.[3]

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 2 June 2008

Rt 2008, 184

Facts

1 A boy aged 17 was injured while using outdoor training equipment at a municipal playground. The accident happened while he was attending a physical education class at upper secondary school. During a break, he chose to use a rope swing on his own initiative. The playground was owned by the municipality and it had been built to promote physical training and the development of motoric skills among youngsters.

2 The boy swung on the rope, deliberately thrusting himself sideways at high speed. He did this several times at increasing speed and finally lost his grip, landing

1 Bekendtgørelse nr 253 af 23 juni 1952 om gasanlæg i skibe.

2 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 90.

3 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 92–95, 150 ff and 171–174.

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on his neck or head on a gravel surface. The accident caused several fractures to his neck and damage to the ligaments. The injury resulted in the boy being defined as 100% occupationally disabled. He claimed compensation for medical expenses, loss of income, pain and suffering and loss of future income.

Decision

The question before the Supreme Court was whether the municipality was liable in tort because of errors in the construction of the playground. Pursuant to skl § 2-1, an employer is liable for damage or injury caused negligently by an employee during the performance of work for the employer if the conduct displayed was not in accordance with the requirements that the claimant could reasonably expect of the service. The claimant argued that the standard required had to be high due to a statutory norm of 19 July 1996 § 11 which states that: 3

> 'Playground equipment shall be designed, constructed and placed in a manner that reduces to a minimum the risk of injury to a user or a third party as the result of a fall. It is a requirement for the use of playground equipment that the playground has a shock-absorbent surface in case of falls.'

The Supreme Court stated that it was not necessary to decide whether the statute was applicable to the equipment in question. The norms were vague and not necessarily decisive as regards the question of *culpa* in a concrete case. The court therefore rejected the claimant's assertion that, as a consequence of the existence of statutory norms for the safety standard of an installation, the required standard of conduct in cases of tortious liability should be higher than would be the case without the existence of such statutory norms. 4

The court pointed out that, due to the nature of the rope swing, it must have seemed obvious – especially to 17-year-old youngsters – that the rope should swing vertically in relation to the supporting bar and that users should not thrust themselves sideways. The accident therefore appeared to be the result of a very unusual use of the equipment. The court therefore concluded that the safety measures taken by the municipality to prevent the risk of injury could not be considered to be below the required standard of conduct with regard to 17-year-old youngsters. 5

Comments

In many areas of life, the *culpa* rule will represent the dividing line between right or wrong behaviour according to the demands of the legal order. There is no clear distinction between wrongfulness and fault in the Norwegian system. This might be reflected in the manner in which the Supreme Court of Norway decided this case, and the blurred line between concepts in Norwegian law might have resulted in a less principled development of Norwegian tort law than one might wish for. How- 6

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ever, in principle, an act may be wrongful in the sense of 'not in accordance with the law' without being faulty in the sense that liability arises.[1] Fault must cover the whole action leading to the damage. There is no concept of breach of duty in Norwegian tort law, but a failure to comply with a duty may constitute fault based on the concrete merits of the case. Moreover, the overall legal approach, which we referred to above, will subsume specific analyses of whether written rules or unwritten customs have been violated. Such violations are, of course, a strong indication of culpability, but not necessarily decisive. Nowadays, the conduct-based approach must be regarded as a potential argument relevant to the overall criterion of *culpa*. In this case, however, the Supreme Court seems to have gone too far in ignoring specific statues that were specifically motivated by the need to reduce the risk of injury due to falls from the equipment in question.

7 The concrete approach in this case may be criticised for being too pragmatic and placing too much weight on the behaviour of the claimant in the question of whether the conduct of the municipality's employee fell below the general required standard. In the effort to create and further develop a basis for tortious liability, one has, to a certain extent, to be objective as regards a legal standard. The concrete abnormal behaviour of a specific claimant should be assessed by other tort law rules, such as the adequacy rules, due to the lack of proximity between the defendant's duty and the damage caused in the concrete case.[2]

Høyesterett (Norwegian Supreme Court, Hr) 29 December 2012

Rt 2012, 1926

Facts

8 In 2007, a bank in Norway sold investment products – securities – to private customers. After the financial crisis in 2009, the securities were redeemed, and their value proved to be 88% lower than the sum invested. The customers claimed compensation for economic loss based on what a likely investment would presumably be expected to yield had the alleged misleading advice not been given. The question before the Supreme Court was whether the bank had informed the customers in a proper manner about the financial risk the products represented. The case was based on a class action and the parties had decided not to raise the issue of the individual differences among the claimants.

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1 On the historical development of this point, see *N Nygaard*, Skade og ansvar (6th edn 2007) 172–178.

2 Further on the reasoning in the case, *AM Frøseth*, Skadelidtes egeneksponering for risiko i erstatningsretten [Claimant's Self-Exposure to Risk in Tort Law] (2013) 100 f.

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Decision

The court stated that the Securities Trading Act (*Verdipapirhandelloven*)[3] would be the most appropriate point of departure when judging the duty that the bank owed in such a situation. The court noted that the Securities Trading Act is a public law statute. Duties described in public law cannot give rise to a private claim against the bank. In this case, however, the duties are an expression of the code of conduct that is relevant to the analysis of the *culpa* rule in both contract law and tort law. The core assessment under the guidance of this law was whether the bank had conducted the sale in accordance with the code of conduct that applies in this specific industry. The bank would have to give necessary information and the expectations of this information would depend on the customer's own knowledge and experience of financial products. Pursuant to the Securities Trading Act § 9-2, necessary information is information that is likely to influence a customer's decision on whether or not to invest in a product. The court stated that such information should concern the factors that influenced the securities' value at all times and the bank's possibility of terminating the securities. The court concluded that these factors were satisfactorily described in the information, which the customers were expected to read thoroughly and in full. **9**

Comments

This judgment is probably not the last word from the Supreme Court on this matter. It seems quite clear that general statutory public norms would not provide any substantial guidance in situations like this. It is even uncertain if the framework of statutory norms will represent any minimum standard of required conduct. The judgment leaves some doors open, for instance as regards the importance of individual customers' knowledge and experience of financial products. An interesting debate in the aftermath of this decision concerns the influence that consumer protection provisions in the law on sales and in EU regulations might have in the future as regards expectations of banks' financial counselling. Such statutory rules might have more influence on the assessment of the required standard of conduct in cases concerning liability for economic loss due to misleading information than the rules regarding securities and codes of conduct in the profession.[4] **10**

3 At the time of the alleged misconduct, *Verdipapirloven* was from 1997. A new law on securities, *Verdipapirloven* of 29 June 2007 No 75, has since been enacted. The code of conduct is described in slightly more detail in the new law, but it does not contain more stringent demands in general.

4 Further comments on the case in *AM Frøseth*, Skadelidtes egeneksponering for risiko i erstatningsretten [Claimant's Self-Exposure to Risk in Tort Law] (2013) 366 and in *JO Færstad*, Erstatningsansvar for villledende informasjon [Liability in Torts for Misguiding Information] (2014) 341ff.

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18. Sweden

Högsta domstolen (Supreme Court) 9 June 2005
NJA 2005, 462

Facts

1 The public prosecutor investigated a case against V for seven years (after communicating the suspicions to V) before trial. The seven-year period was partly due to the difficulties in investigating the affairs of the companies, partly due to periods of leave of absence by prosecutors or inactivity on the part of the prosecutors. As a result of the trial, V was acquitted. V consequently sued the state for damages, invoking both the Swedish Tort Liability Act (ch 3, sec 2, on the state's liability for negligent authorities) and the European Convention on Human Rights (art 6(1), on the right to fair trial in due time).

Decision

2 The court pointed out that a delay which constituted a violation of the European Convention also must be seen as an unacceptable delay when applying the Swedish Tort Liability Act. The criteria for 'unacceptable' delay required consideration of both the complexity of the case and the defendant's as well as the authorities' actions during the investigation. The court found that, in this particular case, an unacceptable delay was clearly reached after five years of proceedings. Compensation was awarded for both pecuniary and non-pecuniary loss.

Comments

3 Prior to this case, an often-expressed assumption among Swedish judges was that tort compensation based on a violation of the European Convention could only be awarded by the European Court according to art 41. The judgment gives clear evidence that this Swedish assumption was wrong – or at least, that it was altered. Since art 13 establishes a right to efficient remedies, we can indirectly reach the conclusion that national courts should provide opportunities for considering claims. One can argue that it would not be efficient if a plaintiff must first go to the European Court to gain clarity that the state had violated a Convention right. Since the European Court in many situations (for instance with regard to what should count as an unacceptable delay when applying art 6 ECHR) has an established practice, it could – in itself – be described as an 'unacceptable delay' if the individual plaintiff would have to go to this Court in each case to receive confirmation of the already known practice. In addition, since Sweden has implemented the European Convention as a national statute, the Swedish courts are obliged to apply the rights in the articles in the same way as all other national rules. Thus, the case can be interpreted

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as viewing the ECHR (and the standards of conduct clearly developed by the European Court) as statutory norms within the national order. If the states' conduct deviates from this standard and thereby is an infringement of the ECHR, then it is also seen as negligent (*culpa*) in Swedish tort law practice.[1] However, the ECHR standard is more binding than other Swedish statutory norms, so in other cases you cannot always infer negligence from such a deviation. The statutory standard may carry some weight in setting the required standard of conduct in tort, but it is not the decisive consideration but only one relevant factor.

19. Finland

Korkein oikeus (Supreme Court) KKO 2014:44, 26.6.2014[1]
<http://www.finlex.fi>

Facts

V worked for the state of Finland, first as a legislation expert from July 2007 to November 2007 and after that she was appointed to the office of assistant controller from November 2007 to the end of December 2012. V was on sick leave from April 2008 to the end of January 2009. She resigned from office in February 2009. 1

Immediately after V had been given the assistant controller's position, she was harassed and became a target of inappropriate behaviour from her boss, B. This caused harm and danger to her health with the result that she was forced to stay on sick leave from April 2008. She then claimed compensation for the damage that was caused by the employer. 2

Decision

The Supreme Court stated that, according to sec 8(1) of the Occupational Safety and Health Act, an employer is required to ensure the safety and health of their employees while at work by taking necessary measures. For this purpose, an employer should consider the circumstances related to the work, the working conditions and other aspects of the working environment as well as employees' personal capacities. 3

According to sec 28 of the Occupational Safety and Health Act, if harassment or other inappropriate treatment of an employee occurs at work and causes hazards or 4

1 The relationship between national and European standards is discussed in *H Andersson*, Ansvarsproblem i skadeståndsrätten (2013) 555 ff, 580 ff.

1 This is a summary of the report written by me, *P Korpisaari* in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 186, nos 2–24.

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risks to the employee's health, the employer, after becoming aware of the matter, should take all measures available to remedy that situation.

5 Liability was based on the TLA. Because the state's representatives had neglected to act in accordance with the measures in the Occupational Safety and Health Act's sec 28, the state was liable for the injury caused.

6 Taking into consideration the medical reports in the case, the Supreme Court stated that V had become depressed and had gone on sick leave because of the inappropriate behaviour towards her. Her depression continued because her employer had not taken measures to stop the inappropriate treatment.

7 First of all, the state was liable to compensate the loss of V's earnings for the time of sick leave from April 2008 to January 2009, which amounted to € 13,582. Second, the state was liable to compensate her € 8,846 for medicinal and medical costs incurred.

Comments

8 The evaluation of negligence is primarily based on legal norms.[2] The starting point is the responsibilities set by law, preparatory documents for legislation, case law and other legal sources. Infringement of a provision that is created to prevent danger, damage or injury creates a general presumption of non-compliance with the required diligence and hence a presumption of negligence.[3] In this case the state as an employer had not complied with the law so it had to compensate the damage that had been caused as a result thereof. Also traffic accidents are a typical example of negligence that is found when the perpetrator has not acted in accordance with the law.

9 It is important to note that in order for liability to be established, it is required that the purpose of the violated norm was to prevent the type of loss or damage which subsequently occurred. Moreover, there is no obligation to pay compensation if there was a legitimate reason for acting contrary to the norm.[4]

10 In some cases it is easy to say how a person should have acted according to the norms applicable in the case.[5] However, in other cases the legal norms can be so

2 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996) 94; *M Hemmo*, Vahingonkorvausoikeuden oppikirja (2002) 23 and *M Hemmo*, Vahingokorvausoikeus (2005) 33.

3 *E Routamo/P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2006) 94 and *M Hemmo*, Vahingokorvausoikeus (2005) 29. See also KKO 1990:48 concerning poison used in company's production activities and KKO 1982 II 40 on workplace air quality, which was below the recommended level.

4 *M Hemmo*, Vahingonkorvausoikeuden oppikirja (2002) 20 and *M Hemmo*, Vahingokorvausoikeus (2005) 29.

5 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996) 94. See also *J Hellner/M Radetzki*, Skadeståndsrätt: Åttonde upplagan, Norstedts Juridik 2010, 129–131 and *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 84 f.

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general or non-specific that they fail to provide precise requirements for performance. In such cases the behaviour or act in question has to be assessed on the basis of risk by examining both the nature of the risk of damage and the reasonableness of taking the risk into consideration.[6]

If more precise guidelines are lacking, the court can evaluate negligence by as- **11**
sessing how a careful person would have acted in such a situation, the importance of the violated interest, the extent of the risk of damage, the cost of taking precautionary measures,[7] well-established practice and the social utility of the activity.[8] Of relevance may also be which party is considered to be the more suitable bearer of liability, taking into consideration their financial resources and opportunities for foreseeing, preparing for or limiting potential damage.[9] A profit-making business can often be subject to more due diligence and risk prevention than a private person engaged in an occasional leisure time activity.[10] In borderline cases the possibility of insurance can also be of significance – especially concerning a business activity.

6 *M Hemmo*, Vahingonkorvauksen sovittelu ja moderni korvausoikeus (1996) 94 f. See also *M Hemmo*, Vahingonkorvausoikeuden oppikirja (2002) 19 and *M Hemmo*, Vahingokorvausoikeus (2005) 28.

7 *M Hemmo*, Vahingokorvausoikeus (2005) 27. The author refers here to the Principles of the European Tort Law art 4:102. Its first point reads as follows:
Required standard of conduct
(1) The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.
The severity and likelihood of the damage are also mentioned as assessment criteria in a government bill on criminal negligence (Hallituksen esitys 44/2002, 95; hereinafter: HE 44/2002).

8 HE 44/2002, 95. *J Häyhä*, Ankara vastuu ja vahingonkorvausoikeuden järjestelmä. Oikeustiede, Jurisprudentia 1999, 96 and *M Mononen*, Yritysten välinen tuotevastuu (2004) 162 also refer to the significance of well-established ways of practice. However, this has to be generally accepted before it could serve as a guideline for action.

9 *M Mononen*, Yritysten välinen tuotevastuu (2004) 94 and *M Mononen*, Huomioita sopimus- ja vahingonkorvausoikeuden johdonmukaisuudesta, Business Law Forum 2005, 101 and 105.

10 See *P Ståhlberg*, Ydinvastuusta. Vahingonkorvausoikeudellinen tutkimus erityisesti ydinvoimalaonnettomuudesta aiheutuvien vahinkojen kannalta (1993) 147–151; *J Häyhä*, Ankara vastuu ja vahingonkorvausoikeuden järjestelmä, Oikeustiede Jurisprudentia 1999, 121 and *M Mononen*, Yritysten välinen tuotevastuu (2004) 155.

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Korkein oikeus (Supreme Court) KKO 2013:58, 5.7.2013/1521[11]
<http://www.finlex.fi>

Facts

12 According to the Treaty of the European Union (TFEU), art 110 (formerly art 95 of the EC Treaty, which was amended by art 90) para 1, Member States shall not impose upon products from other Member States any kind of direct or indirect payments that are higher than those imposed directly or indirectly on similar domestic products. According to settled case law, this provision has direct effect and it establishes individuals' rights, which the national courts must protect.[12]

13 A limited liability company, which was not liable to pay value added tax (VAT), brought a used car from Belgium to Finland in 2003. In addition to the car tax, the company had been ordered to pay VAT that was based on the car tax. Company A appealed against the decision, but it was still considered to be liable to pay the VAT.

14 A claimed that the Finnish state should be ordered to return the VAT that it had been ordered to pay. The basis for the claim was that the VAT, based on the car tax, was discriminatory and in breach of European Union (EU) law. A argued that the Finnish state knew that this tax was problematic in relation to EU law, because a judgment in a similar case against Finland had already been passed by the European Court of Justice (CJEU C-101/00, *Siilin*). In addition to this, the CJEU had handed down a judgment in case C-10/08 (*Commission v Finland*), according to which, VAT based on car tax was considered discriminatory and in conflict with EU law, which contains a prohibition on discriminatory taxation (now art 110 TFEU).

Decision

15 The Supreme Court obliged the state to return the VAT paid to the company, on the basis of EU law on liability for damages and the prohibition of discriminatory taxation, as well as national tort law applied in the light of EU law.

16 The Supreme Court reasoned that a Member State of the EU is obliged to compensate damage that is caused by a breach of EU law if the norm that has been breached protected the rights of individuals, if the infringement of EU law is sufficiently serious and if there is a direct causal link between the damage and the breach of the Member State.[13] The principle of liability with those preconditions is a

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11 This is a summary of the report written by me, *P Korpisaari*/*S Hakalehto-Wainio* in: E Karner/BC Steininger (eds), European Tort Law 2013 (2014) 225, nos 24–33.

12 CJEU 57/65, *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis* [1966] ECR 205.

13 Eg CJEU joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v Bundesrepublik Deutschland* [1993] ECR I-4367 and C-224/01, *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

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well-established part of EU law. These conditions are necessary and sufficient in order to grant individuals a right to compensation that is based directly on EU law. However, the liability of a Member State can also occur under less strict national conditions.[14]

The EU law principle that Member States are obliged to compensate individuals for the damage that was caused by an infringement of EU law also applies when the infringement at issue stems from a judgment or decision of the Supreme Court (*Köbler*).[15] Taking into account the previous EU case law concerning the prohibition of discriminatory taxation and the views expressed in legal literature, the Finnish state authorities' failure was obvious. **17**

In conclusion, the Supreme Court considered that upon examination of the procedure followed by the state authorities as a whole, the breach of EU law was obvious enough to lead to the state to be held liable. **18**

Comments

The decision of the Supreme Court in this case was not particularly surprising because the rules and principles that led to the establishment of liability are a clear part of EU law. The judgment illustrates that the Supreme Court is willing to use arguments that have been stated in the European Union's court. The judgment reflects the EU's regulatory power and the crucial importance of an effectively functioning internal market in the EU.[16] **19**

20. Estonia

Tallinna Ringkonnakohus (Tallinn Circuit Court) 28 October 2011

Civil Matter No 2-09-32485

Facts

The plaintiff was riding a motorcycle on a road and hit cables that had fallen from the communication lines above the road. The motorcyclist lost control and fell. As a result of the accident, the plaintiff lost the little finger on his hand and was heavily concussed. The motorcycle and motorcycling equipment became unusable. The plaintiff requested from the owners of the road (defendant II) and the communica- **1**

14 Eg CJEU *Köbler* [2003] ECR I-10239, paras 51 and 57.

15 CJEU *Köbler* [2003] ECR I-10239, paras 39 and 59.

16 *Katri Havu* has commented upon this case in that way in *P Timonen* (ed), KKO:n ratkaisut kommentein II 2013 (2014) 47–650.

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tion line (defendant I) monetary compensation for pecuniary and non-pecuniary damage. Defendant II contested the action by claiming that it had been unaware of the fallen communication line and it was therefore unable to remove the obstacle in reasonable time. Defendant I contested the action by claiming that the communication line had been broken directly before the accident and was most likely caused by an oversized vehicle that had been driving on the road.

2 The Harju County Court dismissed the claim against defendant I and partially satisfied the claim against defendant II.

Decision

3 The circuit court annulled the decision of the county court and passed a new decision, satisfying the claims against both defendant I and defendant II. The circuit court found that defendant I had caused damage to the plaintiff by omission, which in this case amounted to a violation of the general duty to maintain safety. Bodily injuries per se and the causing of such injuries due to an omission of the defendant presents a ground to deem the act of the defendant unlawful pursuant to § 1045 (1) 2) of LOA. Defendant I was not exempted from liability due to the fact that an obligation to mark communication lines was not established clearly by law. Defendant I did not prove that it performed its general duty to maintain safety in a way that would have ensured the receipt of information concerning the broken communication lines in reasonable time, making it possible to prevent a dangerous situation from arising for road users. Therefore, defendant I did not prove, pursuant to § 1050 (1) of LOA that it had not been negligent.

4 The circuit court did not amend the decision of the county court regarding the part satisfying the claim against defendant II. The circuit court found that the county court justifiably based its decisions on the fact that defendant II caused damage to the plaintiff by violating § 37 (1) 2) of the Roads Act and that the conduct of defendant II was unlawful according to § 1045 (1) 7) of LOA. The circuit court admitted that defendant II was not obliged to immediately remove an obstacle that fell on the road and was dangerous to road users, but it is obligated to perform road maintenance works regularly. The defendant could not submit reliable proof which indicated when and what kind of road maintenance was performed before the accident occurred.

Comments

5 In this case, the circuit court found that, in order to deem the act of defendant I unlawful pursuant to § 1045 (1) 2) of LOA (causing bodily injury or damage to the health of the victim), defendant I did not have to have breached statutory norms. A violation of the general duty to maintain safety is sufficient. This concept is deemed equal to negligence and the negligence of the defendant was presumed under § 1050

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(1) of LOA. Such opinions are also acknowledged in legal literature[1] and in compliance with the practice of the Supreme Court.[2] In the case of defendant II, the courts established that it was liable not due to the unlawfulness arising from a violation of the general duty to maintain safety but due to unlawfulness arising from a violation of § 37 (1) 2) of the Roads Act and § 1045 (1) 7) of LOA, according to which, unlawfulness can result from a violation of protective statutes. The courts should have assessed, based on § 1045 (3) of LOA, whether prevention of damage for the plaintiff was at least one of the objectives of § 37 (1) 2) of the Roads Act.[3] Therefore, the courts did not resolve the issue of unlawfulness of the act of defendant II in a way prescribed by the law. It has to be said that the courts could also have assessed the liability of defendant II according to § 1045 (1) 2) and 5) of LOA. In order to do so, the courts should have assessed whether or not defendant II violated the general duty to maintain safety when causing bodily injury to the plaintiff and damaging his property. In such a case it would have been irrelevant whether defendant II had violated the provision established in § 37 (1) 2) of the Roads Act and whether such a violation is unlawful according to § 1045 (1) 7) and (3) of LOA.

Harju Maakohus (Harju County Court) 28 June 2013

Civil Matter No 2-13-10707

Facts

The plaintiff drove his car into a deep unmarked pothole in an area where road- **6**
works were being undertaken and damaged two of his tyres. The area of the roadworks in which the pothole was located had been marked with the signs 'Uneven road' and 'Roadworks'. The maximum speed in this area was restricted to 50 km/h. The pothole that caused damage to the plaintiff's car was more than 5 cm deep and had a diameter greater than 20 cm. The plaintiff requested the defendant who performed the roadworks at the place of the accident to compensate the pecuniary damage. The defendant contested the claim by finding that it had taken the necessary care under its duty to maintain safety by placing warning signs at the section of the roadworks notifying road users of potential unevenness of the road and possible potholes.

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1 *T Tampuu*, Lepinguväliste võlasuhete õigus [Non-contractual obligations] (2012) 238. About the general duty to maintain safety, see *I Nõmm*, Delictual liability based on the violation of the duty to maintain safety (Dissertation in Estonian, supervised by J Lahe, 2013).

2 See the Supreme Court 20 June 2013 Judgment on the case No 3-2-1-73-13 (3c/20 nos 1–6).

3 According to § 1045 (3) of the LOA: 'the causing of damage by the violation of a duty arising from law is not unlawful if the objective of the provision which the tortfeasor violates is other than to protect the victim from such damage.'

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Decision

7 The county court satisfied the claim, finding that the defendant had violated § 25 (6) of the Roads Act which establishes that the proper installation of traffic control devices and traffic safety measures during roadworks shall be ensured by the performer of the roadworks. The county court found that the measures taken by the defendant were not sufficient. A pothole that dangerous should have been marked with a separate warning sign. Such an obligation has been established by a regulation of the Minister of Economic Affairs and Communications on requirements on road conditions. The county court considered the conduct of the defendant unlawful according to § 1045 (1) 7) of LOA.

Comments

8 If the plaintiff had not based his claim on a violation of § 25 (6) of the Roads Act, the county court could not have satisfied the claim based on § 1045 (1) 7) and (3) of LOA, according to which, unlawfulness can result from a violation of protective statutes if the objective of the provision was to protect the victim from precisely such damage. In such a case, the county court would have had to decide whether to satisfy the claim pursuant to § 1045 (1) 5) (according to which the violation of ownership is unlawful) and § 1050 of LOA. The county court would have had to assess whether the defendant had violated its general duty to maintain safety with its insufficient measures. It should be added that the general duty to maintain safety can be even stricter than the explicit protective provision. It can be said, based on legal theory and case law,[4] that the act of the defendant – repairing the road – brought about a general duty for the defendant to maintain safety by doing everything reasonably possible to ensure that the users of the road under repair would not suffer damage due to the roadworks, although the defendant was not the road owner. The liability of the defendant in itself does not exclude the potential delictual liability of the road owner for the same damage. If the plaintiff had also sought damages from the owner of the road, the defendant and the road owner would have been solidarily liable according to § 137 (1) of LOA. This case could also qualify for 3f/20.

4 See the Supreme Court Judgment of 20 June 2013 on case No 3-2-1-73-13 (3c/20 nos 1–6). See also *I Nõmm*, Delictual liability based on the violation of the duty to maintain safety (Dissertation, supervised by J Lahe, 2013) 13 ff.

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21. Latvia

Vidzemes apgabaltiesa (Vidzeme Regional Court) No C23051112, CA-0016-14/9, 27 February 2014
Unpublished

Facts

The defendant was leasing premises in a warehouse building to the claimant who was using it as a mechanical workshop. An accidental fire originating from a room next to the leased premises began and an investigation confirmed that it had been caused by an electrical short-circuit. As a result, the warehouse burned down, completely destroying the property of the claimant and thereby causing damage. The task of fighting the fire was delayed because, contrary to laws and regulations, the building was not equipped with a fire alarm system and smoke detectors. Criminal proceedings were initiated but then terminated as the preconditions for a criminal offence were not established. 1

The claimant brought a claim before the district court for compensation of his loss, alleging that the defendant violated the relevant safety regulations as he failed to take the necessary measures to prevent a fire. The statement of claim referred to art 1084 of the CLL which states that every building owner is obliged to ensure public safety and maintain its building in a state that does not pose a hazard to others. Reference was made to art 1635 and other articles of the CLL concerning general rules on the right to claim compensation for damage. 2

The defendant argued that no competent authority found him guilty or liable for the fire. The Fire and Rescue Department inspected the premises on a regular basis and no violations were found. The defendant emphasised that the loss caused by the fire should be considered accidental, in which case the lessee would not be entitled to claim damages. 3

Decision

The court of first instance satisfied the claim partly, indicating that wrongfulness, damage and a causal link between them were established in this case. 4

The defendant filed an appeal, stating that the claimant stored valuable property in the leased premises such as computers, which was contrary to the purpose of the use of the premises set by the parties and repeated the initial counter-arguments. The court of appeals reviewed the case on its merits and maintained the position of the first instance court, satisfying the claim in the same amount. 5

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Comments

6 A loss shall be considered direct where it is the natural and inevitable result of an illegal act or failure to act; indirect where it is caused by an occurrence of particular circumstances or relationships; and accidental where caused by a coincidence or *force majeure*. According to art 1774 of the CLL, nobody has to compensate an accidental loss. In the case at hand, the defendant failed to prove that the damage was accidental in nature.

7 This case indicates the importance of the duty of safekeeping imposed upon an owner of premises and owed to the lessee of the premises set by art 1084 of the CLL. Certain fire safety regulations are normative in nature and if such regulations were not complied with, this could constitute unlawful conduct. Failure to meet the prescribed standard of conduct may constitute an illegal act (or an omission) as a precondition of liability if another person's rights are affected and may be subject to administrative liability regardless of whether the rights of another person have been violated. However, the damage and a causal link still have to be proved by the claimant. Mere negligence would not constitute misconduct unless another person's rights or legitimate interests are negatively affected by such negligence. The statutory regulations relating to fire safety serve to supplement the general duty of safekeeping, the aim of which is to protect third parties. In this case the failure to meet such a standard of conduct caused the defendant to be partially liable for the damage suffered by the claimant.

22. Lithuania

VP v DD, GŽ, EŠ, JM and VS, 3 March 2014

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-7-144/2014; <http://www.lat.lt>

1 For facts see 3c/22 nos 6–8.

Decision

2 The Lithuanian Supreme Court noted that defendant VS, the owner of a gun, breached the duty provided in art 32 of the Law on the Control of Weapons and Ammunition, which sets the general duty of owners of weapons to ensure the safety of possessed guns, and art 43 of Circulation Rules of Self-Defence Weapons of the Lithuanian Government indicating that self-defence weapons shall be kept in a manner which ensures that other persons do not gain access to the weapon. According to the Lithuanian Supreme Court, the very fact of losing a gun in itself indicates that the gun owner's duty, stated in the aforementioned article, was breached.

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Comments

The case demonstrates that the non-compliance with a statutory norm automatically entails a failure to attain the applicable standard of conduct and serves as a yardstick for an assessment of both unlawfulness and fault. Although the end result of the case is satisfactory, the reasoning of the Lithuanian Supreme Court, making a distinction between unlawfulness and fault,[1] would have been better had the court decided that the breach of the statutory rules suggests unlawfulness, while the keeping of the gun in a closet instead of a safe entails a breach of the *bonus pater familias* standard and therefore amounts to fault. **3**

23. Poland

Sąd Najwyższy (Supreme Court) 12 June 2008, III CSK 16/08
OSNC 3/2009, item 48

Facts

V claimed from a doctor (A1) compensation of non-pecuniary loss caused by the infringement of her privacy in a press interview that revealed confidential information on her pregnancy and the identity of the child's father. She also demanded compensation from doctors A1, A2 and A3 (or alternatively from the hospital, A4) for the infringement of her personal and patient's rights. All the defendant doctors refused to refer V for further genetic tests after the previous tests had proved a reasonable suspicion of Turner disease in the foetus. V alleged that she had been deprived of the information regarding the condition of her foetus due to the failure to refer her for prenatal tests. As a consequence, she had been deprived of her right to decide about terminating the pregnancy and was prevented from actually having this procedure performed as a result of a deliberate delay in the medical examinations. A1 was V's gynecologist. The foetus was diagnosed with Turner's syndrome, with which it was born, but all the doctors refused a referral for further genetic tests. **1**

The regional court awarded a low sum from A1 for the violation of the duty of medical confidentiality in a press interview, and dismissed all the other claims for the lack of proof of fault. The decision was affirmed on appeal. **2**

Decision

On cassation, the Supreme Court held that failure to provide a patient with necessary information, giving untrue or unreliable information, as well as the failure to refer a patient for special examinations in a situation where it is necessary to estab- **3**

1 1/22 nos 2 and 4.

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lish the condition of a patient or her unborn child constitutes a doctor's fault, (a tort per se). The right to prenatal tests does not flow from a right to a legal abortion, but from the statutory right of a pregnant woman to information concerning the health condition of the foetus, its possible diseases and defects, as well as the possibilities of curing them before the birth. The relevant statutory duties of doctors were violated at least negligently, if not intentionally (to be established on remand). Such an infringement entitled V to compensation for moral harm. The court disapproved of the lower courts' opinions that V suffered no moral damage and reversed the verdict.

4 On remand, the Krakow Court of Appeal[1] awarded compensation also from the other defendants. All defendants had been aware that time was of the essence in the availability of a legal abortion, but had failed to accelerate their decision-making process. As the University Hospital (A4) had a higher referral rate, its liability was more serious as a high level of professional skill could have been reasonably expected of it. V had legitimately expected that she would obtain diagnostic and therapeutic treatment of the requisite quality, whereas her case had in fact been handled with unjustifiable delays.

Comments

5 For the first time the Supreme Court said that a pregnant woman has a right to free prenatal tests and that the violation of this right by doctors per se constitutes her moral harm which entitles her to compensation pursuant to art 448 KC. The fault of the doctors consisted in the violation of their duties prescribed in the law on family planning and the law on the profession of physician. The violation of statutory norms is considered professional negligence. In such cases the courts sometimes evade the distinction between the objective (wrongfulness) and subjective (the allegation of a culpable behaviour) element of fault.

Sąd Najwyższy (Supreme Court) 3 March 1956, 166/56

OSP 7-8/1959, item 197

6 For facts and decisions see 2/23 nos 1–5.

Comments

7 It was never properly explained in the court's judgment which elements of this case constituted wrongfulness of the conduct and which constituted fault. The detailed description of the prerequisites of liability was given by the commentator (Adam

1 Judgment of 30 October 2008, not published.

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Szpunar), who – following the Germanic legal concepts – emphasised that the protective scope of the violated norm should be taken into account. However, this is not the dominant position of the Polish legal authority.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 January 2010

25 Cdo 2258/2008

Facts

The claimant demanded from the respondent, an insurance company, compensation for damage to health (aggravated social position), which was suffered by him as a result of a traffic accident in 2004 in which the driver of a car struck the claimant, who was riding a bicycle. The claimant was not wearing a helmet and consequently he was found liable for a certain part of the damage. **1**

The court of first instance came to the conclusion that the car driver was responsible for the damage to health that he caused to the claimant and awarded total damages in the amount of CZK 9.5 million (approx € 400,000). As to the amount of damages, it held that it was not possible to decrease the compensation amount due to the contributory negligence of the claimant under sec 441 CC as he had not violated a legal regulation. In addition, the court concluded that the claimant had acted in an appropriate manner given his long-term bicycling experience. **2**

The appellate court confirmed the decision but reduced the awarded damages to CZK 5 million (approx € 200,000). It concluded that the claimant was partly responsible for the damage caused because he was not wearing a helmet at the time of the accident although, as a result of his long-term bicycling experience, he should have known that he should have been doing so. **3**

Decision

The matter concerned the evaluation of the question as to whether the failure to wear a bicycle helmet by a cyclist over the age of 15 constitutes a violation of the preventive obligation according to sec 415 CC and if this could be a basis for the claimant's co-responsibility due to his contributory negligence to the occurrence of the damage within the meaning of sec 441 CC.[1] **4**

1 Section 441 CC: 'Where damage is also caused by contributory negligence of the aggrieved party, the aggrieved is liable according to his participation in the infliction of the damage; if the aggrieved caused the damage exclusively, then only he shall be held liable.'

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5 According to sec 415 CC, every person is required to act in such a way as to avoid any damage to health, property, nature and the environment. This regulation thus imposes liability on every person to ensure that their actions do not give rise to damage to health, property and other values under any and all circumstances. Nevertheless, the application of sec 415 can only be considered if there is no other legal regulation which concerns the actions the legality of which is questioned, which in this case refers to the act of riding a bicycle without wearing a helmet.

6 According to sec 58(1) of Act No 361/2000 Coll, the Road Traffic Act,[2] a cyclist under the age of 15 is required to wear a bicycle helmet of an approved type according to a special legal regulation and to have it on his head and properly fastened whilst cycling.

7 The existence of the legal rule, which directly governs the obligation of a cyclist under the age of 15 to wear a bicycle helmet, does not, however, exclude the application of sec 415 CC to the case under discussion. The case has to be regarded in view of the fact that the law unconditionally imposes on persons under the age of 15 the duty to wear helmets whilst riding a bicycle in order to protect them in any situation. However, for persons aged 15 and older the law leaves it to the individual to decide whether the wearing of a bicycle helmet is appropriate in a given situation or not. With regards to persons younger than 15, a particular legal application exists, and thus the application of sec 415 CC in such a case would not be called for, whereas the wearing of a bicycle helmet in the case of cyclists who are older than 15 is not governed by law, and thus sec 415 CC can apply.

8 Without a doubt, it is desirable that cyclists wear a helmet in traffic and that doing so is an appropriate means to avoid or at least reduce the occurrence of damage to health in the case of a traffic accident. Thus, the failure of a cyclist above the age of 15 to wear a bicycle helmet constitutes a violation according to sec 415 CC and can, to the extent to which it contributed to the incidence (increase) of damage to the health of a cyclist in a traffic accident, constitute a basis for contributory negligence under sec 441 CC.

Comments

9 This case is a mixed case involving the liability of the driver and the contributory negligence of the cyclist. However, in both cases Czech law evaluates the prerequisite for liability since contributory negligence is also a case of liability that requires wrongfulness.

2 Zákon č 361/2000 Sb, o provozu na pozemních komunikacích a o změnách některých zákonů (zákon o silničním provozu).

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When considering the liability of anybody in a similar case, based on a failure to carry out various duties, it is necessary to take into account sec 415[3] CC in particular, which sets out the duty to behave in such a manner that no damage to health, property or other value is inflicted. The breach of this legal duty consequently involves the liability of the wrongdoer for damage inflicted by the breach of duties pursuant to sec 420[4] CC. The Supreme Court considers this provision as a general norm for liability if no particular duty is set forth in another legal regulation. **10**

However, such an approach to sec 415 CC is incorrect given the fact that it should indeed be only a general declaration and not a legal norm within the meaning of *Schutznorm* (ie with a protective purpose), upon which liability can be imposed. **11**

This incorrect approach may be caused by the fact that the courts do not know this institute properly and instead of developing the proper relationship to operational and other objective duties, they regarded sec 415 CC as a protective norm. This is clearly shown in the present case. **12**

In this case, the cyclist did not meet the standard of care required for cyclists as road users, due to the existence of road traffic under hazardous conditions. Although the adult cyclist, in contrast to a minor, who is required by law to wear a helmet, is not subject to such a duty, he is obliged to obey safety rules. Consequently, he is subject to an analogous legal obligation as any cyclist under the age of 15. However, the courts merely considered a breach of a general prevention duty instead of developing any comparative analyses. **13**

The NCC contains a similar provision in sec 2900;[5] however, its interpretation within the meaning of sec 415 is questionable. Scholars opt for a narrower interpretation, but the case law will probably follow the traditional approach, which reflects a broad interpretation. **14**

3 Section 415 CC: 'Everybody is obliged to behave in such a way that no damage to health, property, nature and the environment occurs.'

4 Section 420(1) CC: 'Every person is liable for damage which he caused by breaching a legal obligation.'

5 Section 2900 NCC: 'If required by the circumstances of the case or the habits of private life, everyone is obliged to behave in his actions so as to avoid unreasonable harm to freedom, life, health or property of another.'

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25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 January 2010, Case No 25 Cdo 2258/2008-123

<http://novyweb.nsoud.cz/JudikaturaNS_new/judikatura_preved>

Facts

1 The claimant sought compensation from an insurance company for the harm to his health as a result of a traffic accident in which the driver of a motor vehicle crashed into the claimant who was riding a bicycle. The court of first instance ordered the defendant to pay damages. The court also explained that the compensation could not be reduced due to the contributory fault of the claimant, because the claimant had not violated any law. The appellate court concluded that the claimant breached his duty of preventive care when, with regard to his long time experience, he could have known that, by wearing a protective bike helmet, serious consequences of a possible traffic accident could be prevented. On this basis, the court determined the claimant's contributory fault at 10%. The claimant filed an appellate review against this decision, contending that the driver of the motor vehicle alone caused the accident, and that the claimant had not breached any statutory duty. The court of appellate review came to the conclusion that the appellate review was founded only in part.

Decision

2 The law imposing a direct duty on a cyclist younger than 15 years of age to wear a bike helmet (Act No 361/2000) should be regarded as a duty unconditionally imposed on persons younger than 15 who should be protected in every situation; existence of the special law excludes the application of § 415 of the Civil Code.[1] In the case of persons older than 15, the duty to wear a bike helmet is left to their own discretion and responsibility; the failure to wear a helmet represents a breach of the duty of preventive care under § 415 of the Civil Code.

Comments

3 Pursuant to § 441 of the Civil Code, if an injured person also contributes to causing the damage, the loss is to be borne proportionally; if the damage were caused exclusively by the fault of the injured person, he/she would have to bear the loss alone. The quoted provision applies in cases when the damage caused to the injured per-

1 § 415: 'Everybody is obliged to behave in a such way as to avert damage to health and property and the nature and the living environment.'

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son did not result in full from the conduct of the wrongdoer, but it was caused due to the contributory conduct of the former. Such conduct may also include a breach of the duty of preventive care under § 415 of the Civil Code. In the given case, it was necessary to determine whether or not wearing a helmet by a cyclist older than 15 constituted a breach of the duty of preventive care under § 415 of the Civil Code, as well as the circumstance constituting his contributory fault under § 441 of the Civil Code. The claimant argued by reference to a well-known opinion from civil law theory and practice,[2] according to which, the application of § 415 of the Civil Code is possible only when there is no law in relation to the conduct considered for unlawfulness. In the given case, riding a bicycle without a protective helmet was considered. According to the claimant, the law only imposes a duty to wear a helmet upon persons younger than 15 when riding a bike, which means, in the view of the claimant, that he did not breach any duty imposed by law. The Supreme Court did not agree with this approach. According to the court, the statutory rule relates to persons younger than 15, and, therefore, the application of § 415 of the Civil Code did not apply. On the contrary, wearing a helmet is not explicitly required by law in the case of persons older than 15, and so § 415 applied. Thus, if anyone older than 15 failed to wear a helmet, this would be considered as contributory negligence (§ 441 of the Civil Code). The court also based its decision upon the known fact that wearing a protective helmet in road traffic serves to efficiently, desirably and expediently avert or at least mitigate the consequences of harm to health resulting from traffic accidents.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 16 July 2008, Case No 25 Cdo 769/2006

<http://kraken.slv.cz/25Cdo769/2006>

Facts

In a judgment of the District Court, a duty to pay compensation for damage was im- **4**
posed.[3] The damage to the state (Czech Republic) occurred when the defendant company producing electrical power and heat discharged toxic substances (SO_2 and NOx) affecting the forest growth and soil. The court justified the duty of compensa-

2 Cf *J Švestka/J Spáčil/M Škárová/M Hulmák et al*, Občanský zákoník I, Komentář [Civil Code I, Commentary] (1st edn 2008) 1049. Also the decision of the Supreme Court of the Czech Republic of 16 May 2002, Case No 25 Cdo 1427/2001, published in the Collection of Decisions of the Supreme Court, vol 17, No C 1212.

3 Claimed CZK 791,681 (approx € 29,320) later wrongly reduced by the District Court to CZK 218,620 (approx € 8,100).

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tion for the damage by reference to § 420a of the Civil Code.[4] The defendant contended, among others, that the business activities were allowed by law, that the company had fulfilled its duties arising from administrative rules and had paid the administrative fines for producing the pollutants. The appellate court dealing with the issue of compensation for damage agreed with the decision of the court of first instance ordering the damage to be compensated. The defendant filed an appellate review against this judgment.

Decision

5 The purpose of statutory air pollution protection is to create a legal framework for the protection of air against pollution and harmful effects, because polluted air has a negative impact, not only on forest growth, but also on other growth, and on animal and human health as well. Therefore a body of duties is set for the operators of small, medium-size and large-sized sources of pollution, determining the pollution limits; and in addition to sanctions, the air protection authorities use control mechanisms. The system also includes air pollution administrative fees as instruments of complex air quality control. These financial resources create the national budget revenues. However, within these activities of the state in the form of duties imposed on air polluters, individual liability can also arise for the damage caused by emissions of harmful substances affecting the property of natural persons or legal entities. The purpose of compensation for damage, an institute of civil law, is to make up for the loss incurred by persons whose property or other values were damaged, and therefore, the addressees of such compensation (the aggrieved) are the persons whose property was negatively affected by such wrongful occurrences. This clearly shows that, when compared to compensation for damage, air pollution protection through administrative fees has a broad force as the interest protected by law, the monetary benefits of which are not received directly by injured parties.

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4 § 420a (1): 'A person shall be liable for damage which he causes to another person while operating a business (enterprise).'

§ 420a (2): 'Damage is considered to have been caused while operating a business (enterprise) if it was caused:

a) by any activity performed in the operation of the business, or by a thing used in such activity,
b) by the psychical, chemical, or biological effects of a business operation on the surroundings,
c) by the lawful performance, or the making arragements for such performance, of kinds of work which cause damage to someone else's real estate, or which substantially impede or make impossible the use of his real estate.'

§ 420a (3): 'A person shall be released from liability for the damage caused only upon proving that such damage was caused either by an unavoidable event not stemming from the operation of a certain business, or by the conduct of the person injured.'

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Comments

One of the issues of fundamental importance included in the appellate review was the reservation concerning the fact that the courts had imposed on the defendant duties which the defendant company had properly fulfilled by paying administrative fees for the air pollution as required by the Air Pollution Act, ie factually a lump sum compensation amount for the damage resulting from the discharge of harmful substances into the air. The defendant company argued that the company had also fulfilled other duties imposed by law in the framework of complex air pollution protection by investing financial resources into new technologies, and by keeping the emissions within admissible limits. According to the defendant, the imposition of another duty in the form of damages may be considered a denial of the right to be exercised under § 3 (1) of the Civil Code.[5] **6**

To a certain extent, the decision of the courts contradicts the opinion of an academic authority according to which 'the admissible operation of a source of pollution in a manner which is admissible by law represents the exercise of the defendant's right; anyone who has a right is entitled to exercise his right. And while exercising such right, the entity that has caused a pecuniary loss, is not liable to pay damages'.[6] **7**

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 909/08-2 of 23 February 2010

For facts and decision see 3a/26 nos 1–5. **1**

Comments

With respect to the relevance of statutory norms in establishing the unlawfulness of a tortfeasor's actions and accordingly its liability, this decision is illustrative in several respects. First, as is clearly demonstrated in the case at hand, in determining unlawfulness, as well as some other elements of tort law liability, such as fault or the standard of care, that the role of statutory norms regulating certain activities is of primary importance. In determining whether the tortfeasor acted unlawfully in **2**

5 § 3 (1): 'The exercise of rights and performance of duties arising from civil law relations may not, without legal grounds, enroach upon the rights and justified interests of others, and may not be inconsistent with the principles of good morals.'

6 See *M Holub*, Odpovědnost za škodu v právu občanském, pracovním, obchodním a správním (2004) 14 ff.

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the case at hand, the courts sought to establish whether the tortfeasor violated statutory norms which regulate road traffic. Furthermore, as is evident from that case, but also as can be seen from the position of the SCRC in judgment No Rev-1698/1996-2 of 31 May 2000,[1] the fact that a tortfeasor violated a particular statutory norm does not necessarily entail its liability. As the SCRC established in a number of cases, unlawfulness is merely one of the necessary conditions for the establishment of liability and, in order for liability to arise, all necessary conditions must be met in conjunction. Hence, when in a particular case a court finds that a tortfeasor violated a particular statutory norm, it will then examine whether this violation caused the damage, ie whether the sustained damage stands in a relevant causal relationship with the violation of a particular legal norm. Only if it finds that the violation of the statutory norm caused damage, will the court award compensation. If, on the other hand, it finds that damage is not casually linked to the violation of the statutory norm, a court will generally not hold the person who violated this statutory norm liable for the damage. This is exactly the line of reasoning employed by the courts in this case. In the course of the first instance proceedings, an expert witness established that, although the tortfeasor exceeded the speed limit, this was not critical for the occurrence of the damage since the accident could not have been avoided even if the tortfeasor had been driving within the permitted speed limit. Consequently, the courts held that the tortfeasor's violation of relevant statutory norms, consisting in exceeding the speed limit, did not cause the accident and the damage to the victim.

3 However, as is also evident from this case, a violation of any statutory norm, which stands in a legally relevant causal relationship with the sustained damage, will give rise to liability. In this particular case, the court did not hold against the tortfeasor the fact that he exceeded the speed limit but the fact that he failed to foresee the possibility of the occurrence of an obstruction on the road (in this case, the victim unlawfully crossing the road despite a red light) and the fact that he failed to adapt his driving accordingly, which he should have done pursuant to the relevant statutory norms which regulate road traffic. And for this specific violation of the road traffic regulation, and not for exceeding the speed limit, the courts held the tortfeasor partially liable for the damage thereby sustained.

1 See 2/26 nos 1–8.

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 70/2014, 25 September 2014

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113071913/> (25 February 2015)

For facts and decisions see 3a/27 nos 1–2. 1

Comments

When the behaviour of an individual conflicts with safety regulations that apply in a specific field, such behaviour is unlawful, since the purpose of these regulations is to prohibit behaviour that increases the risk of damage occurring. At the same time, these safety regulations determine the required standards of the duty of care. Behaviour in conflict with safety regulations that has a causal link with a damage event demonstrates the unlawfulness of this behaviour and also leads to a presumption of a lack of care.[1] 2

28. Romania

Tribunalul Arad (Tribunal of Arad) Criminal Section, Decision No 21 of 23 January 2014

<http://www.jurisprudenta.com>

Facts

The defendant, while driving his car under the influence of alcohol and while exceeding the speed limit allowed by law, caused a road accident in which one of the passengers died and others suffered personal injuries. The court of first instance of Arad established the fault of the driver and awarded both pecuniary and non-pecuniary damages to the victims. 1

Decision

The Tribunal of Arad established the liability of the car driver who caused personal injuries to the victims of the car collision on the basis of the general provisions on 2

1 *N Plavšak*, Krivdna neposlovna odškodninska odgovornost z domnevo krivde [Culpable non-business damage liability with presumed fault], in: N Plavšak/M Juhart/R Vrenčur, Obligacijsko pravo, Splošni del [Obligational law, General part] (2009) 510.

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tort liability – art 1349 of the new Civil Code. Wrongfulness was established from the infringement of the statute (Emergency Government Ordinance 195/2002). Exceeding the legal speed is an illegal act and makes the tortfeasor liable on the ground of his fault, subject to a causal link being established between the accident and the speeding and consumption of alcohol. His fault consists in the infringement of the statutory provision on speed limits and the prohibition on driving under the influence of alcohol.

Comments

3 It is interesting that the Tribunal of Arad decided this case on the basis of art 1349 of the new Civil Code, the general provision in tort liability, and not of art 1357 of the new Civil Code (liability for one's own acts) although the fault of the driver is a central pillar of the court reasoning and the tort committed by the defendant in this case constituted a criminal act, killing by fault. As mentioned earlier, Romanian courts do not yet make a distinction between the two provisions on tort liability, they either use them as a joint legal basis for establishing fault liability, or (as in the present case) they use them as alternative legal bases. Nevertheless, this judgment was issued before the highest court decision on art 1349 new Civil Code, which held that *culpa* is no longer a prerequisite of liability.[1]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Scenario 1

1 Over several years, the occupational health and safety authority has recommended in their safety regulations a maximum admissible level of titanium dioxide for workplaces. In one particular workplace, employer A has not taken effective measures to eliminate titanium dioxide in the air and the levels have continuously risen above the maximum level. Consequently, employee V contracts lung disease and is forced to change to a job with a lower salary. V claims compensation.[1]

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1 ÎCCJ (High Court of Cassation and Justice) Civil Section II, Decision no 2358, 24 June 2014.

1 Scenario of the Finnish case: Korkein oikeus (Supreme Court) KKO 1982 II 40, S 80/1265, 15.4.1982/4354, above 5/19 nos 1–7 with comments by *P Korpisaari*.

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Scenario 2

V, a young mother, undergoes a gynaecological operation in hospital A. The surgery has the aim of removing myomas from the uterus and is performed on V by a highly qualified doctor. At the end of the operation, when the doctor infuses oxytocin, it causes heart rate irregularities and high blood pressure. All rescue measures fail and V dies the day after the surgery. Later, the expert medical witnesses state that the complications in the operation were mostly caused by distilled water used during the operation. Though distilled water is in fact not prohibited for use in therapeutic operations and has been used in this and many other hospitals during such operations before the tragic accident, the European Society for Gynaecological Endoscopy and relevant scientific literature have recommended the use of safer solutions. According to the recommendations, distilled water can still be used during diagnostic operations, which last for a much shorter period of time than therapeutic operations. The medical experts state that some other hospitals are using safer solutions already.[2] **2**

Scenario 3

V, a young man, is riding his bicycle when he is hit by a car. At the time of the accident, he is not wearing a protective helmet. The relevant legislation prescribes that cyclists wear protective helmets. V claims compensation from the driver and keeper of the car and his insurance company.[3] **3**

Scenario 4

V makes a bet on a horse at a race. The horse, however, finishes badly and V loses his bet. He then sues the jockey, claiming that the jockey failed to exert adequate effort at the finishing straight and that this fault caused the horse to lose any chance of winning the race, and himself of winning his bet. The Horseracing Federation punishes the jockey for engaging in conduct which was prohibited by the 'horseracing code' (failing to 'exert effort' on the finishing straight when in the leading pack).[4] **4**

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2 Scenario of the Lithuanian case: *IJ, MČ and JČ v Vilnius University Hospital*, 6 February 2009, Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-96/2009, below 5/22 nos 1–6 with comments by *J Kiršienė*/*S Palevičienė*/*S Selelionytė-Drukteinienė*.

3 Inspired by the Czech case: Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 January 2010, 25 Cdo 2258/2008, above 4/24/1 with comments by *L Tichý*/*J Hrádek*.

4 Scenario of the French case: Cass civ 2 (Supreme Court, Civil Division) 4 May 1972, 71-10.121, Bull civ II, no 130, D 1972, 596, note *P le Tourneau*, below 5/6 nos 1–3 with comments by *J-S Borghetti*/*M Séjean*.

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Scenario 5

5 Look again at the cable case (above 3b/30 nos 1–25) and assume that a provision establishes criminal liability to whoever intentionally prevents, disturbs or endangers the operation of a facility or an installation distributing water, light, power or heat to the public.[5]

Solutions

a) Solution According to PETL

6 According to art 4:102(3) PETL, '[r]ules which prescribe or forbid certain conduct have to be considered when establishing the required standard of conduct'. These rules may have been enacted by public authorities in a formal legislative or administrative procedure. They may also very well have been issued by semi-public or private bodies such as 'technical and/or professional organisations and corporations',[6] including for example, guidelines, directives or deontological principles. Under the PETL, when it comes to describing a required standard of care, there is thus no fundamental difference between rules issued in a formal legislative or administrative procedure or by technical and/or professional organisations and corporations. Both types of rules 'have to be considered when establishing the required standard of conduct'. This is why this chapter deals with both situations.

7 The official commentary to the PETL states that 'norms containing a specific injunction or interdiction, prescribing or forbidding a certain conduct such as, for example, the provisions on road traffic (compare scenario 3), those applying to construction activities or contained in regulation on the preventions of (work) accidents (compare scenario 1).'[7] They may also be found in the Criminal Code (compare scenario 5), in the statutes of sports associations (compare scenario 4) or in international deontological principles of the medical profession, for instance (compare scenario 2).

8 In all five of the above scenarios, the person alleged to be liable violated the standards set in the relevant rules. The question therefore is whether non-compliance with a statutory or other norm (necessarily) entails a failure to attain the required standard of conduct for the purposes of tort law. The question under the PETL is whether non-compliance with these rules constitutes 'fault' as defined in arts 4:101, 4:102 PETL (or contributory fault, as could be the case in scenario 3 of the cyclist who did not wear a protective helmet).[8]

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5 This is the case in Switzerland, see the case: Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 2 March 1976, ATF 102 II 85, above 3b/4 nos 7–15 with comments by *B Winiger/A Campi/C Duret/J Retamozo*.

6 PETL – Text and Commentary (2005) art 4:102, no 20 (*P Widmer*).

7 PETL – Text and Commentary (2005) art 4:102, no 19 (*P Widmer*).

8 Compare PETL – Text and Commentary (2005) art 4:102, no 19 (*P Widmer*).

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In some tort law systems, the infringement of a relevant rule of conduct which results in damage is, *in principle*, sufficient to admit fault. In this case, the person alleged to be liable would be at fault in arguably all five of the above scenarios. **9**

In most jurisdictions, however, there is no strict link between the violation of a rule which prescribes or forbids certain conduct and subsequent fault in extra-contractual liability. Consequently, on the one hand, respecting the required standards does not necessarily protect oneself against liability;[9] on the other hand, violating these standards does not necessarily imply fault.[10] This is the law in many national systems, as well as under the PETL, in which art 4:102(3) provides that rules 'which prescribe or forbid certain conduct *have to be considered* when establishing the required standard of conduct',[11] that is, they have to be considered and are an indication for fault,[12] but they are not necessarily decisive in establishing fault.[13] **10**

In many systems as well as under the PETL, a further question is raised as to whether the rule which was violated aimed at protecting the particular victim against the type of injury he suffered, as opposed to exclusively protecting the general public interest.[14] Only if the infringed interest is within the 'protective purpose' **11**

9 See for example the French case: Cass civ 2 (Supreme Court, Civil Division) 14 June 1972, 71-11.318, Bull civ II, no 180, D 1973, jur 423, above 4/6 nos 4–6 with comments by *J-S Borghetti*/*M Séjean*: An agricultural cooperative sprays an insecticide on crops. Bees feeding on those crops die in great numbers. Two beekeepers bring a claim against the cooperative and its insurer. The fact that the cooperative respected all applicable regulations on the use of pesticides does not free them from liability; the Irish case: *McDonald v Frossway Trading as Bleu* [2012] IEHC 440, above 4/14 nos 1–4 with comments by *E Quill*: The plaintiff broke her ankle when she fell whilst attempting to descend a short flight of three steps in the defendant restaurant. The owners and the architects who designed the interior of the restaurant are held responsible. The fact that building regulations had been adhered to was not sufficient; the Dutch case: HR (Dutch Supreme Court) 5 June 2009, ECLI:NL:HR:2009:BH2815, NJ 2012/182 (De Treek/Dexia), above 4/8 nos 4–6 with comments by *SD Lindenbergh*: Several financial institutions sold a number of complex financial products to non-professional private investors who appeared not to be able to bear the eventual losses. It was held that the fact that the institutions complied with the standards set by public law regulations does not free them from liability.

10 See in particular cases of sport accidents. Violating the rules of the game in the heat of the action does not necessarily imply fault for the purposes of tort law, see for example the English case: *Caldwell v Maguire and Fitzgerald*, Court of Appeal 27 June 2001 [2002] PIQR P6: in a horse race, jockeys violated the rules of the race leading to a fall of another jockey which seriously injured him. No liability in tort; the German case: BGH (Federal Supreme Court) 10 February 1976, VI ZR 32/74, NJW 1976, 957, above 5/2 nos 1–4 with comments by *U Magnus*: A player violated the rules of the German Football Federation (against 'dangerous playing') leaving another player with a broken leg. The defendant was not held liable although his action violated a rule of the Football Federation.

11 Emphasis added.

12 PETL – Text and Commentary (2005) art 4:102, no 19 (*P Widmer*): 'Statutory Duties as Indication for Fault (Para. 3)'.

13 PETL – Text and Commentary (2005) art 4:102, no 24 (*P Widmer*).

14 PETL – Text and Commentary (2005) art 4:102, no 19 (*P Widmer*).

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of the rule which was violated is a person required to respect the rule vis-à-vis this particular victim (see art 3:201 PETL according to which 'whether and to what extent damage may be attributed to a person depends on factors such as … (e) the protective purpose of the rule that has been violated').

12 In the first of the above scenarios, the safety regulations of the occupational health and safety authority clearly aimed at protecting not only safety at the workplace in general, but had the further purpose of protecting each individual employee against the health dangers posed by high levels of titanium dioxide. The same is true for the recommendations of the European Society for Gynaecological Endoscopy in the second scenario and the legislation prescribing protective helmets for cyclists in the third. All of these sets of rules were aimed at protecting the individual victim against injury to his or her health.

13 In scenarios 4 and 5, this question is more difficult to answer. In scenario 4, the 'horse-racing code' prohibits jockeys at the front of the pack from failing to exert effort at the final straight. The provision clearly aims at guaranteeing fair competition and an unbiased spectacle for the crowd watching horse races. It is submitted that such a rule does not aim to protect horse owners because the latter have other (contractual) means of sanctioning their jockeys. Given that betting is very widespread at horse races and may indeed be an essential part of the event depending on the country, the provision may also aim to guarantee a fair betting market, including the protection of the individual participant who has placed a bet. The ultimate answer is, however, open.[15]

14 In the cable case in scenario 5, a criminal provision provides that 'whoever intentionally prevents, disturbs or endangers the operation of a facility or an installation for distributing water, light, power or heat to the public' is to be convicted of an offence. This provision clearly aims to protect the general interest in a reliable provision of water, light, power and heat. Whether it also envisages the protection of customers' private interests in being supplied with electricity is open for discussion.[16]

15 According to the official commentary to the PETL, it is not entirely clear as to whether the PETL adopt the position that (a) to establish fault it is sufficient that a relevant rule of conduct was infringed and that such infringement resulted in damage, or (b) the PETL further require that the rule which was violated aimed at protecting the particular victim against exactly this type of damage, as opposed to exclusively protecting the general public interest.[17] The official commentary further

15 In the French case which was used as source of inspiration for scenario 4, the claim succeeded.

16 The Swiss Federal Court answered this question in the affirmative in the case that inspired scenario 5, see Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 2 March 1976, ATF 102 II 85, above 3b/4 nos 7–15 with comments by *B Winiger*/*A Campi*/*C Duret*/*J Retamozo*.

17 PETL – Text and Commentary (2005) art 4:102, no 19 *in fine* (*P Widmer*).

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states that '[i]t is likely, however, that a differentiating view would be in conformity with the provision in Art. 3:201'.

16 Article 3:201 (on the 'Scope of Liability') in fact provides that '[w]here an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as ... (e) the protective purpose of the rule that has been violated'. The 'protective purpose' of the violated rule is thus expressly mentioned in the text of the PETL and 'plays a rather important role in relation to the scope of attribution' of damage under the PETL.[18] It is thus submitted that when determining the required conduct under the PETL, the 'protective purpose of the [statutory or other] rule' which was violated has indeed to be taken into consideration.

b) Solution According to the DCFR

17 The DCFR defines negligence and the required standard of conduct in art 3:102. According to this provision, '[a] person causes legally relevant damage negligently when that person causes the damage by conduct which either: (a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the person suffering the damage from that damage; or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. The provision thus makes an explicit distinction between (a) statutory provisions defining a precise required conduct and (b) 'the general precept of not harming another (*neminem laedere* ...)'.[19]

18 The term 'statute' as understood under art 3:102 (a) DCFR 'covers not only primary legislation [see in scenario 3 the legislation prescribing that cyclists wear protective helmets, or in scenario 5 the provision establishing criminal liability to whoever intentionally prevents, disturbs or endangers the operation of a facility or an installation distributing water, light, power or heat to the public], but also secondary legislation made by central and regional governments (regulations, etc) and by local authorities (e.g. by-laws)'.[20] The recommendations issued by the occupational health and safety authority regarding maximum admissible levels of titanium dioxide for workplaces (in the first scenario) are an example of the latter.

19 Any other rules (such as the recommendations of the European Society for Gynaecological Endoscopy and the rules of the horse-racing code prepared by the Horseracing Federation in the above scenarios 2 and 4) may be taken into consideration when defining the general required standard of conduct under art 3:102 (b) DCFR.

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18 PETL – Text and Commentary (2005) art 3:201, no 21 (*J Spier*).

19 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment A (p 3402).

20 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment B (p 3403).

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20 Under the PETL, it is uncertain as to whether liability requires that the violated rule be aimed at protecting the victim in question against the type of injury he suffered, as opposed to exclusively protecting the general public interest.[21] The DCFR, on the other hand, gives a clear answer to this question in art 3:102: misconduct triggers liability only if the behaviour '(a) does not meet the particular standard of care provided by a statutory provision *whose purpose is the protection of the person suffering the damage from that damage*'.[22]

21 As set out above in the first scenario, the safety regulations of the occupational health and safety authority aimed not only at protecting safety at the workplace in general, but had the further purpose of protecting each individual employee against the health dangers posed by high levels of titanium dioxide. The same is true of the legislation prescribing protective helmets for cyclists in the third scenario, which also aimed at protecting the individual victim against injury to his or her health.

22 In the cable case in scenario 5, a criminal provision providing that 'whoever intentionally prevents, disturbs or endangers the operation of a facility or an installation for distributing water, light, power or heat to the public' is to be convicted of an offence certainly aims at guaranteeing that the general interest of the public is protected. Whether it also envisages the protection of customers' private interests in being supplied with electricity is, however, up for discussion.[23]

23 Non-statutory duties do not fall under art 3:102 (a) DCFR but may be taken into consideration when defining the required conduct under art 3:102 (b). It is submitted that, here again, the protective purpose of the violated rule should be taken into consideration.

24 In the second scenario, the recommendations of the European Society for Gynaecological Endoscopy clearly aimed at protecting not only patients in general, but had the further purpose of protecting each individual patient against the health dangers posed by certain measures taken during surgery. Scenario 4, on the contrary, raises the question of whether the 'horse-racing code', which prohibits jockeys at the front of the pack from failing to exert effort at the final straight, also aims at protecting those specific individuals who place bets on the horse in question.

31. Comparative Report

1 All of the jurisdictions provided a report. This alone demonstrates that in general the violation of statutory norms (*Schutzgesetze*) can be seen to play a prominent role

21 Compare above, nos 15–16, with references.

22 Emphasis added. Compare *C v Bar/E Clive*, DCFR, art VI–3:102, Comment B (p 3406).

23 Compare Illustrations 7 and 8 in *C v Bar/E Clive*, DCFR, art VI–3:102, Comment B (p 3406).

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in identifying misconduct.[1] In many Continental European countries, there are even statutory provisions providing for this explicitly;[2] the same is true for the DCFR and PETL.[3] Viewed dogmatically, a protective statutory norm can be said to exist in particular where – as for example with the very common examples of breach of road traffic provisions[4] and health and safety regulations[5] – there is a concrete behavioural directive[6] which forbids particular conduct because of the abstract danger it represents,[7] or else requires certain conduct which avoids or reduces danger.[8] It should be emphasised that a statute in the narrow sense is not always required; rather, byelaws and administrative decisions can also be considered.[9]

Statutory norms regularly make it easier to establish misconduct, because the legislature (or other state authority)[10] has itself thereby explicitly given expression to the standard by which it judges misconduct.[11] Thus, for example, in France, Italy and Belgium it is stressed that the violation of a legal provision in itself constitutes fault[12] and elsewhere it creates a judicial presumption of misconduct;[13] in those cases, this is grounded in the understanding that the reasonable person necessarily will comply with legal requirements.[14] On the other hand, reference is made to the different interactions between statutory norms and the definitions of misconduct, **2**

1 Explicitly so Germany (4/2 no 6); Croatia (4/26 no 2); European Union (4/29 no 1); see further eg France (4/6 no 3); Belgium (4/7 nos 3, 5); Finland (4/19 no 8); Lithuania (4/22 no 3). Contrast – at least for road traffic accidents – England and Wales (4/12 no 4), but cf also Scotland (4/13 nos 4 ff, 7 ff).

2 See eg Germany (4/2 nos 2, 4): § 823 (2) BGB); Austria (4/3 no 3): § 1311 ABGB; the Netherlands (4/8 no 3): art 6:162 (2) CC; Portugal (4/11 no 4): art 483 CC; Estonia (4/20 no 4): § 1045 (1) 7) LOA.

3 Article 3:102 (a) DCFR and art 4:102 (3) PETL. However, in contrast to the DCFR, the PETL refer explicitly to all – statutory and non-statutory – rules which prescribe or forbid certain conduct and states that they 'have to be considered when establishing the required standard of conduct'. See PETL/DCFR (4/30 no 6 f).

4 Germany (4/2 no 1 ff); Austria (4/3 no 5); Switzerland (4/4 no 1 ff); Greece (4/5 nos 1 ff, 5 ff); Portugal (4/11 no 1 ff); England and Wales (4/12 no 1 ff); Scotland (4/13 no 4 ff); Malta (4/15 no 1 ff); Estonia (4/20 nos 1 ff, 6 ff); Croatia (4/26 no 1 ff); Romania (4/28 no 1 ff).

5 Belgium (4/7 no 1 ff); Italy (4/9 no 1 ff); Spain (4/10 nos 5 ff, 8 ff); Scotland (4/13 no 1 ff); Norway (4/17 no 1 ff); Finland (4/19 no 1 ff); Latvia (4/21 no 1 ff); Slovenia (4/27 no 1 f).

6 See eg Finland (4/19 no 10 f) and art 4:102 (3) PETL.

7 Cf Austria (4/3 no 3).

8 See Germany (4/2 no 3); Belgium (4/7 nos 4, 6).

9 Austria (4/3 no 5); Belgium (4/7 no 4), the Netherlands (4/8 no 3); Denmark (4/16 no 3).

10 See above, no 1 and fn 9.

11 Austria (4/3 no 3); see also eg Malta (4/15 nos 4, 10); Denmark (4/16 no 3); Lithuania (4/22 no 3).

12 France (4/6 no 3); Italy (4/9 no 3): *culpa in re ipsa*; Belgium (4/7 nos 3, 5, but see also no 7).

13 Portugal (4/11 no 4 ff); Finland (4/19 no 8); Slovenia (4/27 no 2); see also England and Wales (4/12 no 5): 'evidence of negligence'.

14 Explicitly Belgium (4/7 no 5).

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and the autonomy of judicial assessment of misconduct is emphasised.[15] In particular, this is also true for the Common law, where attention is drawn to the fact that non-compliance with a statutory standard does not necessarily constitute negligence for the purposes of a common law duty of care, nor compliance guarantee that behaviour is not negligent.[16] Thus, for example, in the Scottish case of *Gilfillan v Barbour* it is stressed that a speed limit represents a standard to be strictly obeyed by an ordinary driver, but that for a police officer its breach by no means automatically establishes negligence (depending on the circumstances).[17]

3 Of course, it must not be forgotten that in cases where a statutory norm is breached, the damage caused must also fall within that norm's scope of protection (*Schutzzweck der Norm*).[18] In that regard, a distinction is sometimes drawn between the personal scope of protection ('Who is protected?'), the substantive scope of protection (What damage should the norm prevent?), and the modal scope of protection ('What causal mechanisms are protected against?'). The approach to purpose is not consistent across the jurisdictions, however. In England and Wales, for example, the purpose of the statutory provision must be protection of a particular class of persons from the particular harm arising – this narrow conception of protective purpose often generally renders the institute inapplicable to traffic cases.[19] The tortfeasor is not responsible for damage which falls outside of the protective purpose of the norm.

4 Breach of a protective statute often leads to a stricter form of liability;[20] thus, for example, (natural) causation by the prohibited conduct may be presumed where precisely the type of damage against which the statute protects arises.[21] Moreover, in those systems which differentiate clearly between unlawfulness and fault, the relevant fault need only relate to breach of the statute, rather than the primary damage as is otherwise the case.[22] Further, the burden of proving fault is sometimes reversed,[23]

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15 See Spain (4/10 no 3 f); Norway (4/17 no 6): 'strong indication of culpability, but not necessarily decisive'; cf also Slovakia (4/25 no 4 ff) and below, no 3 (scope of protection) and no 5 (minimum standard).

16 England and Wales (4/12 no 5); Scotland (4/13 no 3).

17 Scotland (4/4 no 4 ff).

18 Germany (4/2 no 4); Austria (4/3 no 4); the Netherlands (4/8 no 2 f); Spain (4/10 no 8 ff); England and Wales (4/12 no 3 f); Denmark (4/16 no 3); Finland (4/19 no 9); Estonia (4/20 no 8), cf also Malta (4/15 nos 4, 10): 'if the wrongful act is a direct sole or contributory cause of the accident'; see also PETL/DCFR (4/30 nos 11 ff, 20 ff); the opposite is apparently held under the dominant Polish approach, see Poland (4/23 no 7).

19 England and Wales (4/12 no 4).

20 Cf England and Wales (4/12 no 5), but see also no 2 with fn 16.

21 See Austria (4/3 no 3).

22 Germany (4/2 no 4); Austria (4/3 no 3); cf also Belgium (4/7 no 7): sometimes foreseeability of the occurrence of harm abandoned.

23 Austria (4/3 no 3); cf also Portugal (4/11 no 4 ff).

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or the statutory breach is treated as prima facie evidence[24] or an indicator of fault.[25] Protective statutes can also – and this can certainly be seen as a pan-European phenomenon – ground liability in respect of legal interests which would not, or not so extensively, be protected by general tort rules. Examples from Irish law will arise in the context of misfeasance in a public office or the economic torts.[26]

Finally, it should be highlighted that behaviour can still be considered misconduct where the defendant has in fact complied with the protective provisions – as a form of minimum standard – but for other reasons or under the general tort rules he or she was still under a duty to avoid the harm.[27] This is shown, for example, in an Austrian case where an hotelier had complied with the building regulations for balconies but could have recognised that these were not demanding enough; a guest fell from the balcony as a result.[28] Further examples include a French case where damage was caused by a pesticide despite compliance with the statutory safety provisions,[29] as well as a Dutch case concerning financial products sold in a form compliant with the relevant public law standards.[30]

24 Germany (4/2 no 2).

25 Greece (4/5 no 3).

26 Ireland (4/14 no 3).

27 Germany (4/2 no 6); Austria (4/3 nos 1ff, 6); Greece (4/5 no 6f); France (4/6 no 5f); the Netherlands (4/8 no 4ff); Spain (4/10 nos 5ff, 7); Ireland (4/14 no 1ff); Estonia (4/20 no 8); see also England and Wales (4/12 no 5); Slovakia (4/25 no 4ff); cf further the case referred to for the Czech Republic (4/24 no 1ff) and Slovakia (4/25 no 1ff): contributory negligence of a cyclist in not wearing a helmet, despite the absence of a specific legal duty to do so.

28 Austria (4/3 no 1ff).

29 France (4/6 no 4ff).

30 The Netherlands (4/8 no 4ff).

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5. The Relevance of Non-Statutory Norms

2. Germany

Bundesgerichtshof (Federal Supreme Court) 10 February 1976, VI ZR 32/74

NJW 1976, 957

Facts

1 The claimant was the health insurer of a football player who was severely injured when playing in a league of the German Football Federation. The defendant was a player of the other team who jumped at the injured who at that moment had the ball. As a result of this attack, the injured's leg broke. The health insurer had borne the health costs and claimed compensation of them.

Decision

2 The defendant was not held liable. Although his action violated a rule of the German Football Federation (against 'dangerous playing'), he did not act with fault. A violation of the football rules as such (a foul) does not mean that the player acted negligently in the legal sense even if the action results in severe injuries to the other player. It is characteristic of football and similar sports that, in the height of the game, rules are neglected and injuries occur. Such neglect does not, however, qualify as fault as required by § 823 (1) BGB.

Comments

3 A violation of sport rules thus normally indicates the wrongfulness of the conduct of the actor but not the actor's fault. Fault is only given if the actor injured the other player or competitor intentionally or as a result of a grave neglect of the sport's rules.[1] The distinction between 'normal fouls' and 'grave unfairness' is a fine one and depends entirely on the individual circumstances of the case. The reason for an increased threshold for fault here is the fact that, in games such as football, handball, basketball, etc already the normal exercise of the sport almost unavoidably involves minor or sometimes serious injuries which can occur to each player. Fouls are normal and typical and are even regulated by specific rules according to which these games are generally played. The games would lose their sense and attraction if each injury could lead to a compensation claim. Therefore only very serious unfair conduct should trigger such consequence.

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1 See for instance OLG Saarbrücken NJW-RR 2011, 109; *E Scheffen*, NJW 1990, 2658, 2659; *H Sprau* in: Palandt BGB (73rd edn 2014) § 823 no 217.

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The violation of 'private' norms of conduct such as the football rules of the German Football Association have some but no formal and generally no decisive influence on the application of the general tort law. 4

3. Austria

Oberster Gerichtshof (Supreme Court) 16 June 1982, 1 Ob 639/82

JBl 1983, 258

Facts

The claimant and the defendant had a skiing accident and were both severely injured. The former was skiing at a moderate speed down a slope which was seldom used at the time of the accident. The latter was participating in a skiing class and skiing in the group on a slope separated from the other by a piece of forest. The group traversed the claimant's slope at right angles in the last section to get to their accommodation. The defendant crossed as one of the last at a moderate speed. Although visibility conditions were fine, both claimant and defendant only noticed each other when they could no longer stop and collided. The claimant sued for damages. 1

Decision

The Supreme Court awarded the claim in the amount of two-thirds. It held that the rules of conduct for skiers elaborated by various institutions and authors, such as FIS rules (rules of the International Ski Federation) and POE rules (rules of the Austrian Alpine Safety Board), are not statutory norms. However, they are a collection of the duties of care to be observed in everyone's interest while engaging in the sport of skiing. The obvious code of conduct while skiing dictates that everyone has to ski in a controlled manner, at appropriate speed and observe the terrain. FIS rule no 5, in its first sentence as well as § 8, second sentence of the POE rules contain the generally accepted duty of care that the skier who enters or traverses a slope must respect the priority of those already skiing downwards. The latter may rely on that fact. Nevertheless, the claimant should have observed the area. If he had been attentive, he would have noticed the group and would have had to adjust his skiing behaviour. The defendant, on the other hand, was not allowed to argue that skiing in a group relieved him of his responsibility for himself. His fault preponderates, as he created a particular danger by entering the slope blindly. 2

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Comments

3 Rules of conduct for skiers such as FIS rules are not protective statutes within the meaning of § 1311 ABGB[1] (on the relevance of protective statutes see 4/3 nos 3–6). This is also applicable to other sports rules, whereby liability would generally already be denied at the level of wrongfulness in the case of a slight and practically unavoidable breach of the rules.[2] They are nevertheless significant for the assessment of wrongfulness, as they are considered a collection of the general duties of care[3] and are handled in a similar fashion to statutory road traffic regulations.[4] The so-called ÖNORMEN (Austrian standards)[5] are not protective statutes either but instead non-binding standards issued by the Austrian Standards Institute and concerning, eg, construction,[6] or electrical or mechanical engineering. However, they may be declared binding by law.[7]

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 12 January 1982
ATF 108 II 59

Facts

1 V consulted Doctor A, who proposed that she undergo an operation to timely remove cysts in her breasts. During the operation, A found several cysts of different dimensions. Instead of interrupting the operation and informing V according to medical standards, V decided spontaneously to remove both breasts, which he replaced by two implants.

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1 *J Pichler/W Holzer*, Handbuch des österreichischen Skirechts (1987) 150 f; 1 Ob 16/12b = SZ 2012/30; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 4.

2 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4.

3 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1311 no 4; crit *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1297 no 7.

4 See on this *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 73 ff.

5 OGH 1 Ob 18/72 = JBl 1972, 569; on the 'state of the art' and its relation to technical standards such as the ÖNORMEN see *G Saria* in: G Saria (ed), Der „Stand der Technik", Rechtliche und technische Aspekte der „Technikklauseln" (2007) 68 ff.

6 See *G Karasek*, Kommentar zur ÖNORM B 2110, Allgemeine Vertragsbestimmungen für Bauleistungen – Werkvertragsnorm (2nd edn 2009).

7 OGH 5 Ob 662/82 = ZVR 1984/17.

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V suffered various complications and some months later A had to remove the implants. Later V had to undergo a number of other interventions in order to repair the results of A's unsuccessful operation. 2

V filed a claim against A seeking CHF 1,000,000 (€ 833,000). The cantonal court admitted the claim partially and ordered A to pay CHF 10,000 (€ 8,330) in moral damages. 3

Decision

The Supreme Court ordered A to pay V CHF 60,000 (€ 50,000), of which CHF 25,000 (€ 21,000) was for the moral damage suffered. 4

The Supreme Court stated that the medical 'rules of art' are deontological principles established by the medical sciences; these rules are generally known, accepted and followed by professionals. Even if they are not directly legal constraining rules,[1] judges decide on their own to integrate them into their reasoning. 5

A had not misused a surgeon's margin of discretion concerning the opportunity to intervene and concerning the technical means used. 6

However, A had an obligation to inform V of future intervention in such a manner that she could have given her informed consent.[2] When A decided during the operation to remove V's breasts entirely and to insert implants, he executed a more mutilating surgery than was initially envisaged and consented to. This amounted to a grave and irreversible violation of V's physical integrity. Instead, he should have informed V that he would recommend another type of intervention. The Supreme Court stated that, as a rule in such cases, a surgeon has first to seek a patient's consent, except if the intervention is urgent[3] and necessary, ie A should have interrupted the on-going operation, unless this would have been dangerous for the patient. 7

The entire intervention of A was considered as unlawful, even if technically he proceeded according to professional standards (*lex artis*). On the contrary, had he simply violated a single professional standard only, that would be considered as unlawful. 8

V had suffered not only because of A's failed intervention, but also because of her unforeseen and irreversible mutilation. Her personal liberty, physical integrity 9

1 See for instance, *M Cantero Perez Muller*, L'information sur les risques, in: D Manaï/C Burton-Jeangros/B Elger (eds), Risques et informations dans le suivi de la grossesse: droit, éthique et pratiques sociales (2010) 50 ff.

2 On the criterion of enlightened consent in Swiss law, see *O Guillod*, Le consentement éclairé du patient, autodétermination ou paternalisme? (1986).

3 On this main exception, see for instance, ATF 114 Ia 350 (1988) and *M Poggia*, Consentement du patient: D'où vient-on et où va-t-on? in: Droit de la responsabilité civile et des assurances – liber amicorum Roland Brehm (2012) 337.

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and femininity had been violated. Consequently, she was found to be entitled to CHF 5,000 (€ 21,000) for the moral harm she suffered.

Comments

10 The present case is based on a contractual link between V and A. However, art 99 al 3 of the Swiss Code of Obligations (SCO) states that tort law norms (art 41 ff SCO) apply to fault in contract. Consequently, the considerations of the decision are valuable in contract and in tort.

11 In the present decision,[4] A had failed to inform V properly. The doctor's obligation to inform is based on a contract of mandate (art 394 ff SCO) and on personality rights (art 28 ff of the Swiss Civil Code [SCC]).[5] As these are formulated in very general terms, jurisprudence has progressively clarified a physician's duties. These duties are also specified in the deontological 'code' of the Swiss Federation of physicians and the guidelines of the Swiss Academy of Medical Sciences.[6]

12 In addition to the obligation to inform, a physician has also to act in accordance with *lex artis*. Contrary to the legal duty to inform, *lex artis* is developed not by the legislator and the jurisprudence, but by medical professionals, who develop guidelines on how a good physician has to act, what technical means he has to use, etc. Comparable mechanisms exist for numerous other professions with dense professional rules, such as in engineering, architecture, the juridical professions, but also for leisure activities such as skiing, etc. According to the Supreme Court, the medical rules have been developed in accordance with medical science. A judge only takes them into account if they are generally accepted and followed by practitioners.[7] However, in order not to hinder medical progress, a judge should also admit practices, which are not yet generally established, provided there is serious scientific support in their favour. Simultaneously the rules on medical information have to be respected and the physician's obligation to inform the patient about the method he will apply should even be increased, because the practice is not (yet) commonly admitted.

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4 This decision is considered fundamental in Swiss medical law because it is the first one which recognises the responsibility of a physician for lack of information. See *D Manaï*, Droits du patient et biomédecine (2013) 81.

5 On the obligation to inform see also ATF 133 III 121, 129 c 4.1.2 (2007) at 6/4 nos 10–21, where the Supreme Court enumerates in detail the physician's obligation.

6 See art 10 of the Deontological Code of the Swiss Federation of physicians (6.12.2012) <http://www.fmh.ch/files/pdf9/Standesordnung_2013_04_01_frz.sc.pdf>; Website SAMS: <http://www.samw.ch/en/News/News.html>.

7 ATF 133 III 121, 124 c 3.1 (2007) at 6/4 nos 10–21.

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5. Greece

Areios Pagos (Greek Court of Cassation) 706/2009
Published at NOMOS

Facts
In the summer of 1998 the plaintiffs had moved their beehives to fields with cotton shrubs, in order for the bees to produce more honey. In July the defendants sprayed the cotton shrubs with fertilizers, which were toxic for the bees, without taking all the essential measures for the protection of the bees. As a result, most of the bees died, and this caused serious damage to the plaintiffs, who consequently filed an action against the defendants, which was accepted by the Court of Appeal. The defendants filed an appeal before the Court of Cassation. 1

Decision
The Court of Cassation, confirming the judgment of the Court of Appeal, held that it derives from the provisions of arts 298, 330 sent b and 914 GCC, that behaviour, be it a positive act or an omission, which breaches a rule of law is considered unlawful. However, it is not essential for the establishment of the unlawful character that a particular provision of law has been violated but the contradiction of the general spirit or the principles of the law suffices. Thus, the violation of the general duty of providence and safety within a transaction and generally in social interactions with persons, ie the violation of the obligation to take all essential measures in order to avoid damage to third parties, an obligation socially imposed and deriving from the fundamental principle of law which dictates prudent behaviour, is considered to have an unlawful character. 2

Areios Pagos (Greek Court of Cassation) 1227/2007
Published at NOMOS

Facts
On 21 March 2001, 36-year-old A was given a general anaesthetic for the removal of a cyst from her left ovary. Because of the choice of this method of anaesthetic by the doctors, it was considered necessary, to put an intratrachean tube (windpipe) in order to enable her breathing during the anaesthetic and the surgery. The tube was made of silicon and was sharp at the edge, which, because of the ineptitude of the anaesthetists in inserting it, caused the rupture of the trachea and the death of A. The anaesthetists acted grossly negligently and in violation of the commonly recognised rules of medical science, as they should and could have avoided this rupture because of their specialisation and according to the teaching of medical science. The 3

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plaintiffs, close relatives of A, sought compensation for pain and suffering from the doctors and the hospital.

Decision

4 Articles 298, 299, 330 sent b 914 and 932 GCC also apply to the tortious liability of doctors for harm caused by them when rendering their medical services. This liability, as far as certain (special) issues are concerned, is governed by art 8 of L 2251/1994 'on the protection of consumers'. For the establishment of the tortious medical liability, an unlawful and culpable provocation of damage is required. These two presuppositions (unlawfulness and culpability) simultaneously concur according to the theory of 'the double function of negligence', that is the consideration that negligence is both a type of fault and a type of unlawfulness. Therefore, if, while exercising a medical act, the rules and principles of medical science and experience and/or the obligations of care of the average prudent doctor of the tortfeasor's specialisation, which stem from the general duty of providence and care, are violated, then the said behaviour is unlawful and simultaneously culpable.

Comments

5 As mentioned above 1/5 no 2 Greek jurisprudence has broadened the meaning of the term 'unlawfully' in art 914 GCC, so as to include therein not only the violation of a prohibitory provision of the law but also a violation of the general duty of providence and care dictated by the principle of good faith.

6 As mentioned above (see under Areios Pagos 447/2000 NoV 49 (2001) 836 in 4/5 nos 5–7), especially in relation to car accidents, the Supreme Court has repeatedly pointed out that abiding by the minimum prerequisites imposed by the Highway Code on drivers of vehicles when they drive does not free such drivers from the obligation to go even beyond what is dictated by the said Code when this is necessary in order to avoid a detriment or in order to diminish the detrimental consequences of an act.[1]

7 Non-statutory norms are given particular consideration in order to determine the required standard of conduct especially in the field of medical liability and in cases involving the mass media.[2] A doctor, for example is liable for the damage to a patient, if, while performing his medical duties, he violates the obligation to act according to the fundamental principles of medical science even if there is no relevant

1 See AP 1500/2002 Ell Dni 44 (2003) 420 (for a brief summary of the facts of the case (in English) see *E Dacoronia*, Greece, in: H Koziol/BC Steininger (eds), ETL 2002 (2003) 231, no 11; 447/2000 NoV 49 (2001) 836 ff, followed by a note by *P Doris*, NoV 49 (2001) 839 f).

2 See also *I Karakostas*, Law of Torts (2014) 112.

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statutory norm. The fundamental principles of medical science suffice in order to determine the required standard of conduct the breach of which results in an obligation to pay damages.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 4 May 1972
71-10.121, Bull civ II, no 130, D 1972, 596, note *P le Tourneau*

Facts

The claimant had placed a bet on a horse at a race. The horse had a bad finish, however, and the claimant lost his bet. He then sued the jockey, claiming that he had insufficiently 'supported' his horse at the end of the race and that this fault had made him lose a chance to win his bet. The appellate court granted the claim and the case was brought before the *Cour de cassation*. 1

Decision

The *Cour de cassation* affirmed the appellate court's decision. The horseracing federation had punished the jockey for having engaged in behaviour prohibited by the 'horse-racing code' (ie failing to 'support' a horse that is competing for first place until the very end of the race) and the appellate court was right in ruling that this behaviour was also a fault under art 1382 (art 1240) of the *Code civil* that had caused the claimant a loss of a chance to win his bet. 2

Comments

This case illustrates how the violation of a non-statutory norm, here the horse-racing code, can be relevant in deciding on the existence of a fault.[1] There is actually no general rule in French law pursuant to which every violation of a non-statutory norm should be regarded as a fault. In most cases, however, the courts consider the violation of such a norm as a decisive element. 3

1 See *M Bacache-Gibeili*, Les obligations. La responsabilité civile extracontractuelle (3rd edn 2016) no 145.

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Cour de cassation, Chambre commerciale (Supreme Court, Commercial Division)
10 September 2013
12-19.356

Facts

4 An accountants' office had accepted new clients without informing the latter's, former accountants that they were taking over, in violation of the accountants' Code of Conduct (*Code de déontologie*). The former accountants regarded this as an act of unfair competition and brought a claim in damages on the basis of art 1382 (now art 1240) of the *Code civil*. The appellate court rejected the claim on that count and the case was brought before the *Cour de cassation*.

Decision

5 The *Cour de cassation* affirmed the appellate court's decision. It stated that the violation of a rule of professional conduct (*règle de déontologie*), whose purpose is to set the duties applying to the members of a profession and whose violation is punished by disciplinary sanctions, does not necessarily constitute an act of unfair competition. In the present case, the accountants' office had not solicited the clients to come to them and the fact that they had not sent an information letter to the former accountants before accepting these new clients was not enough to make this an act of unfair competition, even though it was a violation of the Code of Conduct.

Comments

6 Unfair competition is regarded under French law as a case of liability for fault and can lead to an award of damages on the basis of art 1382 (now art 1240) of the *Code civil*.

7 Case law has a tendency to regard a violation of a rule of professional conduct as fault under art 1382 (now art 1240). This is certainly the case in the field of medicine, where the Code of Conduct of Medical Practitioners (*Code de déontologie médicale*) has been inserted into the Public Health Code (*Code de la santé publique*).[2] The *Cour de cassation* also used to regard any violation of the rules of professional conduct of accountants as an act of unfair competition, ie as fault.[3] The present decision marks a reversal of its position, however.

8 This shows that a violation of non-statutory norms, such as rules of professional conduct, does not necessarily constitute fault. Although the *Cour de cassation* does

2 See *P le Tourneau* (ed), Droit de la responsabilité et des contrats (9th edn 2012) no 6770.

3 Cass comm, 9 April 1997, 94-21.42, Bull civ IV, no 111, D 1997, 459, note *Y Serra*, JCP 1997, I, 4068, no 1, obs *G Viney*.

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not explain the reasons for the reversal of its position, it probably considered that the rule that had been violated in this case was not intended to protect the former accountant against unfair competition. This does not mean, however, that a breach of this rule could *never* be regarded as fault under art 1382 (now art 1240).[4] In any case, the fact remains that the existence of such a breach will normally be taken into account by a judge when assessing the defendant's behaviour and will constitute a strong argument in favour of a finding of fault.

Cour de cassation, Assemblée plénière (Supreme Court, Plenary Assembly) 6 October 2006, Myr'ho

05-13.255, Bull ass plén no 9, D 2006, 2825, note *Viney*, JCP 2006, II, 10181, avis *Gariazzo* and note *Billiau*, RTD civ 2007, 123, obs *Jourdain*

Facts

The owners of a commercial building had leased it to Myr'ho, a commercial company, which later sublet the building to Bootshop, another commercial company. At some point, Bootshop brought a claim against the building owners, arguing that they were not maintaining the building as they should have under the contract with Myr'ho, and that this had a negative impact on Bootshop's business. The Paris appellate court awarded damages to the claimants and the landlords challenged this decision before the *Cour de cassation*. They argued that no delictual fault had been proven against them and that this was a necessary requirement of their being made liable, since they had no direct contractual relationship with the claimant and had not even been informed of the sub-lease. **9**

Decision

The *Cour de cassation* rejected the challenge and affirmed the appellate court's decision, stating that 'a third party to a contract may, on the basis of tortious liability, invoke a breach of contract whenever this breach has caused him harm' ('*le tiers à un contrat peut invoquer, sur le fondement de la responsabilité délictuelle, un manquement contractuel dès lors que ce manquement lui a causé un dommage*'). **10**

4 One could think of a case, for example, where the former accountant, not having been informed that another accountant had taken over his client, would make unnecessary work for the latter. In such circumstances, the former accountant might be able to claim damages against the new one, on the ground that, by violating the information duty set by the Code of Conduct, the new accountant had been at fault.

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Comments

11 The general principle set out by the *Cour de cassation* in this case is quite surprising, as it basically suppresses privity of contract. It has undergone strong, and sometimes even fierce, criticism[5] although some authors approve of it.[6] At any rate, it has been reaffirmed on several occasions since 2006.[7] Although its basis is open to discussion, the actual result of this principle is that any contract becomes a norm whose violation amounts to a fault. The *Cour de cassation*, for example, ruled that the parent company of a car dealer could claim damages against the car manufacturer which had abused its right to repudiate the contract with the car dealer.[8] In a recent case, it granted a claim brought by the owner of a commercial building damaged by fire against the security company that had been hired by the tenant to protect the building.[9]

12 These examples show how the principle set in 2006 basically suppresses privity of contract in certain circumstances. Some defendants are being held liable for damage they could hardly have anticipated, and the legitimate interest which someone may have in the performance of a contract to which he is not a party becomes a *protected* interest. One does not see how this solution could be maintained in the long term, but the *Cour de cassation* has shown no sign of reversing it so far.

7. Belgium

Cour d'appel (Court of Appeal) Ghent, 6 June 2005

NjW 2005, 1243

Facts

1 A business delivered and installed doors and windows. After a while, damage occurred due to a build-up of moisture and the customers filed a claim against the

5 See *P Ancel*, Retour sur l'arrêt de l'Assemblée plénière du 6 octobre 2006, à la lumière du droit comparé, in: Etudes offertes à Geneviève Viney (2008) 23; *S Carval*, La faute délictuelle du débiteur défaillant: quelques observations sur les pistes ouvertes par l'arrêt d'Assemblée plénière du 6 octobre 2006, in: Etudes offertes à Geneviève Viney (2008) 229–242; *X Lagarde*, Le manquement contractuel assimilable à une faute délictuelle, JCP G 2009, I, 200; *JS Borghetti*, Breach of contract and liability to third parties in French law: how to break a deadlock? ZEuP 2010, no 2, 279. See also the contributions gathered in RDC 2007, 537 ff.

6 *G Viney*, note under the case, D 2006, 2825.

7 See eg Cass comm, 6 March 2007, 04-13689, Bull civ IV, no 84; Cass civ 1, 15 May 2007, 05-16926, Bull civ I, no 193, D 2007, 2901, obs *P Jourdain*, JCP G 2007, I, 185, obs *P Stoffel-Munck*, RDC 2007, 1137, obs *S Carval*; Cass comm, 6 September 2011, 10-11.975, D 2011, p 2196, obs *E Chevrier*, RDC 2012, 81, obs *JS Borghetti*.

8 Cass comm, 21 October 2008, 07-18.487, JCP G 2009, I, 123, obs *P Stoffel-Munck*, RDC 2009, 504, obs *JS Borghetti*.

9 Cass civ 1, 10 July 2014, 12-28.116.

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company. The claim was rejected on the basis of a contractual clause contained in the invoice signed by the clients.

The unhappy customers contacted the editorial office of a television network, **2** which regularly broadcasts a programme intended to warn individuals about problems which might arise in their relationships with professionals. The editorial office then contacted the business which delivered and installed the doors and windows and invited it to take part in the programme it was preparing. The company management, however, refused to resolve the matter in the media and stated that it would prefer to deal with it in the courts.

Despite the company's refusal to take part in the programme, it was broadcast. **3** The company was particularly offended by the television programme's lack of objectivity, alleging that its right to reply was violated and it further claimed that its commercial image had been attacked. The company held the television journalists liable as it claimed they were at fault in the performance of their profession.

Decision

The Court of Appeal stated that any assessment of liability should be adapted when **4** the person accused of a harmful act has specific competences or belongs to a particular profession. According to the court, a journalist's behaviour must be assessed in the light of what a prudent and reasonable journalist would have done. The court added that, in making this assessment, it is appropriate to take professional codes of conduct and ethics into account. In this instance, the court held that the journalists were not at fault.

Comments

In their classic definition of 'fault', Dabin and Lagasse remind us that the general **5** duty of care and diligence, a breach of which is the basis for the existence of fault, 'has its origin ... in a series of rules applying to social life, morals, decency or style, which are not specified in legislation: loyalty, decorum, composure, prudence, diligence, vigilance, ability, professional conduct ...'.[1] It is understood that a rule, regardless of its type (standards, good practice, codes of conduct or style, etc), even if it is not recorded in a legal document, and is therefore not strictly speaking obligatory, can help a judge to decide what behaviour one has the right to expect from an ordinarily prudent and diligent person.[2] In this context, we note that certain rules of

1 Free translation of *J Dabin/A Lagasse*, Examen de jurisprudence (1939-1948). La responsabilité délictuelle et quasi-délictuelle, RCJB 1949, 50, no 10.

2 See in particular *Y Hannequart/P Henry*, Les rapports entre la déontologie et la responsabilité civile, in: Liber amicorum Jozef Van Den Heuvel (1999) 37 ff.

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conduct are made obligatory by inclusion in legal or regulatory texts. In such a case, a breach of the rule would constitute fault *per se*, subject to the reservations specified in relation to this point (see 4/7).

6 The above decision is a very good illustration of the preceding considerations in as much as, in order to assess whether the journalists had acted negligently by creating and broadcasting the programme, the Court of Appeal explicitly referred to the journalists' code of conduct (which is not obligatory). The previously commented decision (see 2/7 nos 6–9), relating to the skiing accident can also be referred to.[3] In order to decide upon the existence of fault and the liability of the skier coming down the mountain, the court expressly relied upon the infringement of skiing practice rules, which demonstrates the importance of non-legal rules, which allow the judge to assess the behaviour one is entitled to expect from the person committing the harmful act.

7 In short, we can assert that an ordinarily prudent and diligent professional complies with codes of conduct, and generally speaking whosoever engages in an activity, regardless of what it is, complies with the standards, good practices and customs which prevail in the relevant sector, or otherwise is considered to have behaved culpably.

8 We would add that the foregoing does not mean that compliance with codes of conduct necessarily excludes all liability. In reality, we are dealing with a 'minimum level of precautions which must be observed; however, particular circumstances can require action to be taken which goes beyond simple compliance with the rules'.[4] We have already observed (see 3f/7 no 6) that the same conclusion applies irrespective of the nature of the rules ie legal or regulatory.

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 2 March 2001, ECLI:NL:HR:2001:AB0377

NJ 2001/649 (Protocol)

Facts

1 A patient had an arthroscopy operation and suffered from thrombosis afterwards. Contrary to the hospital protocol, the surgeon had not given the patient an anticoagulant.

3 Court of First Instance of Liège, 30 April 2010, JLMB 2011, 274.

4 Free translation of *RO Dalcq*, Responsabilité quasi-délictuelle et normes techniques et professionnelles, in: Le droit des normes professionnelles et techniques (1985) 482.

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Decision

The failure to comply with the protocol was considered to be unlawful. It is to be expected of a hospital and a surgeon that they comply with requirements that they have agreed upon themselves. Any deviation from the protocol is only allowed when this is in the interest of good health care. As the surgeon in this case had simply forgotten to give the anti-coagulant, there was no reasoned derogation from the protocol. The hospital was held liable. **2**

Comments

This case shows that non-statutory norms are of certain relevance for a finding of (un)lawfulness. General practices in a particular branch, professional standards, and rules of the game (in sports) have been considered relevant indications for the question of the unlawfulness of certain conduct, but they are not considered to be decisive.[1] Cases from the world of sports, in which one sportsman was held liable by another for harming him during the game, illustrate this clearly. The sole fact that a rule of the game was infringed does not make the act unlawful. Nevertheless, the fact that a rule of the game was broken is a relevant factor for the decision on unlawfulness.[2] **3**

9. Italy

Corte di Cassazione Penale (Court of Cassation, Criminal Division)
21 January–9 April 2013, no 16237
Cass Pen 2013, 9, 2984, note by *C Cupelli*

Facts

During surgery for a herniated disc, the patient concerned suffered injury to the aorta and the iliac artery. Despite an emergency attempt at vascular repair, the patient died following a serious haemorrhage. The lay court and the Court of Appeal held the surgeon liable as he had violated the precautionary rule, stated in medical literature, not to operate at a depth of more than 3 cm to avoid damage to the blood vessels in the area of the surgery. **1**

1 See also *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser Serie 6-IV* (2015) no 79.
2 HR 28 June 1991, NJ 1992/622 (soccer) and 11 November 1994, NJ 1996/376 (judo).

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Decision

2 The *Corte di Cassazione* reached a decision in the light of the medical negligence regime introduced in art 3 of Law 189/2012. According to this article, if the professional follows the guidelines and accredited good practice, he will not be held criminally liable for minor negligence. Therefore this reinforces the need to assess the state of scientific literature on that point to understand whether the surgeon deviated from those practices, taking into account that, under the law, only gross negligence in the failure to observe guidelines and accredited practice can lead to a finding of criminal liability.

Comments

3 To establish whether A's conduct was negligent, the court examined A's actions against objective standards of prudence and diligence that are typical in that type of activity. In that sense, the non-legislative standards that are characteristic of the various types of human activity become the minimum level of care required of the persons concerned and are also standards with a preventive function in respect of the occurrence of the loss. The greater recognition that guidelines and good medical practice have had with the Law of 8 November 2012, No 189 on medical liability brought them recently to the centre of the debate, as it is the first time that Italy has passed legislation establishing that compliance with professional guidelines results in an exemption from criminal liability (Law of 8 November 2012, No 189, art 3; this text is now abrogated and substituted by the Law of 8 March 2017 No 24; that is, the medical liability regime now in force in Italy). At the moment, it is not yet clear how this rule will influence civil liability for medical malpractice more generally, although the assessment of damages under the new Law must take into account whether or not those guidelines were complied with.[1]

4 Non-statutory norms are also relevant in decisions on liability in other contexts. The violation of the rules of play in sports, for example, can lead to the establishment of the liability of an athlete for bodily harm caused to another athlete during a sports competition, as the violation of such rules can constitute negligence under art 2043 Civil Code.[2] Journalists are also bound to respect non-statutory rules concerning the publication of financial information.[3]

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1 *AM Principalli*, La responsabilità medica: da un sistema flessibile ad sistema rigido, in: U Carnevali (ed), Dei fatti illeciti, art 2043-96 cpc (2011) 486; *E Grasso*/*S Coppola*, La gestione dell'insuccesso medico (2014).

2 Cass 6 March 1998, no 2486, Resp civ 1999, 1099 (hockey stick used by an athlete in violation of the rules of the game).

3 See *M Franzoni*, L'illecito (2nd edn 2010) 345.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 9 March 2006

RJ 2006\1882

Facts

V died while he was playing golf at Golf Club A1 from the impact of a ball launched by another player, A2, who was playing on a different fairway separated by a grove. V's wife and children sued A1 and A2 and their respective insurers. Firstly, the claim was partially granted, but it was overturned on appeal, since it could not be established that A2 had acted negligently, not even to the slightest degree that was attributed in the first instance. The Supreme Court also rejected the appeal in cassation. 1

Decision

Every sportsperson knows that the practice of any sport entails the risk of injury, both by one's own action and by the activity of those who share the game, even when they are not playing together, as is the case in golf and, as such, he/she always accepts this risk as long as the other participants behave in a manner which respects the limits set by the rules of play. The attribution of responsibility must be carried out as a function of the sport and for the benefit of the commonly accepted sport practice. As a standard of care, it must take the conduct of the good sportsperson, which is not necessarily based on a judgment of quality but on a firm commitment to the rules of the game, and the respect to those who compete or play with him/her. It is a standard of care that must be required with the necessary rigour when the rules are breached, or, which is the same, when the possibility of suffering harm does not result from the usual conditions in which, according to its rules, the sport takes place, but from an abnormal heightened risk and the consequent neglect of prudential regulations that players should observe according to the specific characteristics of each sport. Therefore, a simple regulatory infringement cannot in itself serve as an argument for imposing any sort of responsibility that goes beyond a mere disciplinary sanction. 2

Golf is not a dangerous game, except in the risks resulting from malpractice in handling the golf club and the ball. The standard of conduct is that the player does not make a stroke without ensuring first that no one is near in a position to get hit with the club, the ball or a stone, branch or something similar, beyond a purely visual range or what could result from a known dangerous situation, not seen but warned about, due to the proximity of other players or third parties not involved. Nevertheless, this is always a risk that is within what is the common practice of the sport and which is disproportionate to its development. In this case, the group which the deceased was part of, and which, although it preceded the defendant's as 3

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regards the numbers of holes, was out of sight. The ball hit by the defendant on his fairway went straight and then made a left turn to go among the trees, without following the normal path and fatally hit the player located in the area adjacent to the grove. It was a technically incorrect drive due to the wind, as it did not reach the intended target, which was to enter or to approach the 10th hole. However, in no way was it a negligent one, in spite of the fact that the circumstances in which it occurred were adverse, since the wind was an event, known and accepted by both players, that could determine the effectiveness of the pitch but not prevent the practice of the sport. In no case may a standard of care which is different from the standard he adopted be required from the player and one cannot arbitrarily increase the standard in order to hold him liable for the result produced by the simple fact of having put the ball into play, since in such circumstances it could not be expected from an ordinary or common way of playing the game that such a harm would occur.

Comments

4 Although the judgment refers to the assumption of the risk inherent in the sport[1] it is also relevant from the standpoint of the defendant. The measure of the diligence of the sportsperson is different from the general standard of care insofar as it is linked to the ordinary compliance with the rules of the game and the adoption of the safety measures commensurate with the possibility of playing the game.[2] In the case under comment, the court also found for the golf course, considering that it had not been negligent by omission in the adoption of measures that could have prevented the harm, an issue that was raised again later on in a second case against the Spanish Golf Federation, which had authorised the design of the golf course and the safety measures applied at the scene.[3] On the other hand, official guidelines developed by the professional bodies are taken into account in practice by the assessment of expert witnesses' declarations in court about the appropriateness of a certain practice that leads to an injury. This is deemed a question of fact that is not dealt with by the Supreme Court unless the reasoning of the lower courts is considered irrational.

1 See also 14/10 no 6 f.

2 In this sense see STS 22.10.1992 (RJ 1992\8399). The specific analysis of case law on damage caused while practising sport activities demonstrated that, in sports involving reciprocal risks, the conduct of players amounting to slight negligence is tolerated and victims must thus bear the damage suffered. See *J Piñeiro Salgado*, Responsabilidad civil. Práctica Deportiva y asunción de riesgos (2009) 577.

3 STS 5.11.2008 (RJ 2008\5896) also finding for the Golf Federation.

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11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 24 May 2011 (Helder Roque)

Facts

On 18 August 2002 at around 8:30 am, V, the plaintiff, went to hospital (in Penafiel) after experiencing severe pain and swelling of the left testicle, accompanied by vomiting at night. He was seen by Dr A2, who asked for a urine test. V waited approximately four hours for the results of the test, which did not indicate any infection. Dr A2 questioned the correctness of the results and diagnosed epididymitis only based on palpation and observation. He decided to prescribe medication and told the patient that, if his condition did not improve, he should consult a urologist. On this day, the emergency department of the hospital did not have a duty urologist and the ultrasound service was not working. In the first 24 hours, V felt a slight improvement, but due to the persistence of symptoms, he decided to consult a urologist in Lisbon on 22 August 2002. This urologist ordered immediate tests, including a Doppler scrotal. As a result of these tests, V underwent surgery for the torsion of the testicle in a private hospital in Lisbon on 26 August 2002 and received a testicular implant. 1

There had been an error in the diagnosis of the patient, which resulted in the irreversible amputation of his left testicle. This result would have been avoidable if the surgery had been performed six to eight hours after the onset of the symptoms of the disease. The loss of the testicle caused V suffering and anguish, leading to doubts about his virility and a fear, for some time, of approaching and contacting members of the opposite sex. Consequently, V was no longer self-confident, lost his joy of life, and his interest in his studies, failing to enter higher education. He also felt uncomfortable when engaging in sporting activities as this could involve exposure in male locker rooms where he feared that others would know about his condition. The damage was permanent. 2

V sued hospital A1 and Dr A2, claiming compensation in the amount of € 1,700,000, due to the misdiagnosis given on 18 August 2002, and the resulting wrong prescription and treatment. The court of first instance and the Court of Appeal refused to order compensation. 3

Decision

The Supreme Court confirmed the judgment in its entirety, acquitting the defendants, based on the following grounds. In the case of public hospitals, the extra-contractual liability of the state and other public bodies applies (Law No 67/2007, 31 December). In tort, doctors are only subject to a general obligation of prudence and diligence, using their knowledge to obtain the healing of the patient, but without guaranteeing that this result is obtained. Therefore, they only assume particu- 4

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larly diligent behaviour, which should enable the correct diagnosis, thereby allowing the adoption of the most appropriate therapy.

5 The diagnosis is translated into a clinical framework based on a physician's subjective ability to interpret symptoms, according to the evidence gathered during the preliminary examination, supplemented by additional tests, if necessary, and the health condition of the patient. After this careful evaluation, the physician must form his opinion about the clinical pathology and initiate the best treatment.

6 There is no obligation to pay compensation regardless of fault. The plaintiff did not demonstrate that the ischemia necrosis of the testicle was caused by testicular torsion, as initially diagnosed, but rather epididymitis was the correct diagnosis and this may have caused thrombosis of the spermatic vessels which degenerated into ischemic necrosis. Thus the misdiagnosis of the defendant physician was not proved.

Comments

7 An error in diagnosis is very difficult to determine in court and often the defendant doctor and hospital are acquitted. In medical malpractice the non-statutory norms are of upmost importance. Article 4 of the Convention on Human Rights and Biomedicine, which is in force in Portugal, states (emphasis added): '*Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards*.' Thus, medical standards shall be considered in deciding upon misconduct of the health care service provider, both at the level of wrongfulness and fault.

8 One could question if there is not *faute du service*, since the hospital did not have a urologist on duty and the ultrasound service was not working. With more accurate examinations, the correct diagnosis would have been made. Therefore, the hospital could have been held liable, not based on the fault of Dr A2, but based on lack of necessary services to operate an emergency service. On the other hand, one could also argue that there was some fault on the part of the victim, since he took four days to consult a urologist and drove to a hospital which was located far from his residence although there were several other hospitals nearby.

Supremo Tribunal de Justiça (Supreme Court of Justice) 29 November 2005 (Salvador da Costa)

9 For facts and decision see above 3a/11 nos 1–4.

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Comments

In the above case compliance with the non-statutory norm was considered an important factor in deciding if the owner of the stadium was liable for the damage produced by the disc thrown in the hockey match. In that case the non-statutory norm was not violated, but, in spite of that, the owner of the stadium was still ordered to pay damages, because the interest protected by the non-statutory was still violated. Compliance with the requirements of the provision was required, but the agent (in this case the owner of the stadium) was not exempt from taking further precautions. 10

Supremo Tribunal de Justiça (Supreme Court of Justice) 15 January 2002

CJ-STJ, I (2002) 36

For facts and decision see above 3d/11 nos 8–9. 11

Comments

In this case a child was injured because he and some friends were able to break into a construction site because of the violation of safety rules by the contractor. The contractor was considered liable because of the failure to comply with those non-statutory norms, which resulted in the injury. 12

In fact, art 483(1) of the Civil Code establishes an obligation to compensate for damage caused whenever the 'rights of another' or any 'legal provision designed to protect the interests of others' has been unlawfully violated, with fault, as was the case of the contractor. The violation of abstract danger norms leads to a presumption of fault of the wrongdoer' if he has violated either a statutory or non-statutory norm.[1] The provision draws the attention of the agent (in this case the contractor) to risk factors that he will have to consider, and for which he may be held responsible if any injury results to the protected interests that those provisions aim to safeguard. 13

1 See *J Sinde Monteiro*, Responsabilidade por Conselhos, Recomendações ou Informações (1989) 265; in the jurisprudence, see Supreme Court, 21-2-1961 [BMJ, no 104, 417, 421] and Coimbra's Court of Appeal, 21-9-1993 [CJ, T-IV (1993) 37 f, 39].

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12. England and Wales

Bolam v Friern Hospital Management Committee, High Court (Queen's Bench Division) 26 April 1957

[1957] 1 WLR 583

Facts

1 The plaintiff, John Hector Bolam, sued the defendants claiming damages for negligence in the course of electro-convulsive therapy (ECT) treatment administered to him. In particular, his case was that the defendant hospital failed to warn him of the risks he was running when he consented to the treatment (ie bone fracture precipitated by convulsive muscular spasms); second, that they failed to administer a relaxant drug to him which, if used, would have excluded the risk of fracture to his pelvis that in fact materialised; third, if no relaxants were used, that some form of manual restraint should have been applied. One body of competent professional opinion supported the claimant's position and an equally firm body of opinion took a contrary view.

Decision

2 On all three grounds the jury found, with the assistance of the judge, that it had not been proved against the hospital that negligence was committed. McNair J held that the test of negligence, in a case that involves the use of some special skill or competence, is the standard of the ordinary skilled man exercising and professing to have special skill. It is sufficient if he exercises the skill of an ordinary competent man exercising that particular art. Not more. Where there are several standards accepted as proper by a reasonable body of men skilled in that particular art and he conforms with one of those, he is not negligent. If, on the other hand, he pig-headedly carries on with some old technique contrary to what is really substantially the whole of informed medial opinion, saying, 'I do not believe in anaesthetics. I do not believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century',[1] that clearly would be wrong. The jury returned a verdict for the defendants, having regard to the lack of standard settled techniques and the fact that as respects all three complaints they did what was in accordance with a practice accepted by responsible persons.

1 [1957] 1 WLR 583, 587 per McNair J.

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Comments

In determining the appropriate standard of care in a professional setting, the courts will look not to 'the conduct of the man on top of a Clapham omnibus'[2] – ie the ordinary man – but to an ordinary skilled man in that profession. Such a person will not only have textbook knowledge of his field but will also be informed by both legislative and non-legislative developments (including professional standards and codes of conduct) in his line of work. In the latter case, there is scope for genuine differences of opinion and the law is mindful not to penalise professionals for every risk that materialises from choosing one or other recognised school of thought.[3] Moreover, in determining whether the required standard was met, the courts will look to the practice accepted at the time as proper and not the non-statutory norm at the date of trial.[4] **3**

In the subsequent case of *Bolitho v City and Hackney Health Authority*,[5] Lord Browne-Wilkinson observed that McNair J's use of adjectives such as '*responsible* body of medical men'[6] and elsewhere in his judgment 'a standard of practice recognised as proper by a competent *reasonable* body of opinion'[7] showed that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis.[8] He added, however, that it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. This is so, as the assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. **4**

Although the *Bolam* test was developed in the specific context of medical negligence, it has now been applied to all professions or callings which require special skill, knowledge or experience[9] and indeed to skilled persons who are not members of a profession as such.[10] **5**

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2 [1957] 1 WLR 583, 586 per McNair J.

3 A judge should therefore avoid choosing one body of medical opinion over the other simply because he prefers it: *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635.

4 As Denning LJ put it in *Roe v Minister of Health* [1954] 2 QB 66, 84: 'We must not look at the 1947 accident with 1954 spectacles'. See 3d/12 nos 9–11 above.

5 [1998] AC 232.

6 [1957] 1 WLR 583, 587. Emphasis added.

7 Ibid, 588. Emphasis added.

8 For further analysis, see *H Teff*, The Standard of Care in Medical Negligence – Moving on from *Bolam* (1998) 18 OJLS 473; *M Brazier/J Miola*, Bye-bye *Bolam*: a medical litigation revolution? (2000) 8 Med L Rev 85; *R Mulheron*, Trumping *Bolam*: A Critical Legal Analysis of *Bolitho*'s 'Gloss' [2010] CLJ 609. As to the *Bolam* test's scope of application, see *Montgomery v Lanarkshire Health Board* [2015] AC 1430.

9 Eg solicitors: *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296.

10 See eg *Adams v Rhymney Valley DC* (2001) 33. HLR 41 (selection of window locks by local authority).

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Baker v Quantum Clothing Group Ltd, Supreme Court, 13 April 2011
[2011] UKSC 17, [2011] 1 WLR 1003

Facts

6 Between 1971 and 2001, Mrs Baker was an employee of Quantum Clothing Group Ltd, an employer in the knitting industry. The former had been exposed to noise levels between 85 and 90 dB(A) and sustained noise-induced hearing loss as a result. The appeal before the Supreme Court centred on whether Quantum Clothing was liable under common law and/or under sec 29(1) of the Factories Act 1961 ('... every place at which any person has at any time to work ... shall, so far as is reasonably practicable, be made and kept safe for any person working there') and, if so, the date on which such liability began. A Code of Practice on Noise published in 1972 stated that a level of 90dB(A) should not be exceeded 'if exposure is continued for eight hours in any one day, and is to a reasonably steady sound.' On 1 January 1990, the Noise at Work Regulations 1989 (SI 1989/1790) came into force, which provided, inter alia, that where the daily personal noise exposure of a worker was likely to exceed 85dB(A), personal ear protectors should be made available.

Decision

7 The Supreme Court ruled by a majority of 3:2 that Quantum was not in breach of its common law or statutory duty of care and therefore was not liable before 1 January 1990. The level of performance required of Quantum to discharge its duty to Mrs Baker to avoid injury from noise-induced hearing loss turned on the existence of a recognised and established practice. If one existed, the question was whether it knew or ought to have known it was 'clearly bad'. Alternatively, if the area was one where there was developing knowledge about the risks involved, the question was whether Quantum had acquired greater than average knowledge of such risks. Their Lordships had regard to the 1972 Code of Practice and the majority of the House concluded that, since the Code was an official and clear guidance which set an appropriate standard upon which a reasonable and prudent employer could legitimately rely in conducting his business, it followed that Quantum was not liable under common law before 1 January 1990, which was when the Noise at Work Regulations came into force.

Comments

8 In three other appeals heard together with *Baker*, the Supreme Court ruled on the liability of three other companies in the same industry, namely Meridian Ltd, Pretty Polly Ltd and Guy Warwick Ltd. As to the position under common law, a majority of 3:2 were of the opinion that the first two companies fell into a special category with the result that the trial judge's finding of liability in this regard was restored. In par-

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ticular, the majority concluded that employers must give positive thought to the safety of their workers *in the light of what they know or ought to know*. The unmistakable evidence before Meridian Ltd and Pretty Polly Ltd in 1983 was that some of their employees were at risk. Thus, both companies ought to have looked beyond the Code of 1972 by giving consideration to the risks posed to employees exposed to levels of noise between 85 and 90dB(A). If they had, they would have appreciated the real risk of significant hearing loss, which should (and perhaps would) have led to their making ear protectors available to their workforce. While this appeared to penalise employers with extraordinary solicitude for the welfare of his workers (ie those with safety departments and medical officers that take noise more seriously than others),[11] Meridian Ltd and Pretty Polly Ltd were nonetheless said to be liable from an earlier date, 1985. Thus, obedience to recommendations set by non-statutory practice will only afford limited protection to employers with above-average subjective knowledge.

9 The Supreme Court adopted the statement of the relevant principles advanced by Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*:[12]

> 'where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions.'

10 As the reference to 'clearly bad' practices makes clear, 'it is possible that [a] practice, however widespread, is carried on in disregard of risks that are obvious.'[13] In such a case, applying the common practice would itself be negligent.

11 An analogous position is occupied by the Highway Code, a non-statutory set of rules and guidance on the use of public roads. By Road Traffic Act 1988, sec 38(7):

> 'A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal ...) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings.'

11 See Lord Mance, at [25].

12 [1968] 1 WLR 1776, 1783.

13 *Paris v Stepney Borough Council* [1951] AC 367, 377 per Lord Simonds. In the medical context, *Hucks v Cole* [1993] 4 Med LR 393.

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13. Scotland

Morton v William Dixon Ltd, Court of Session (Inner House), 19 March 1909
1909 SC 807, 1909 1 SLT 346

Facts

1 A miner raised an action of damages against the mine owners, alleging that he had been injured by a piece of coal falling between the cage which took miners down to the coalface and the side of the shaft, and that his employers had been at fault in failing to provide protection against such accidents. The jury returned a verdict for the pursuer, and awarded damages. The defender sought to have the verdict set aside as being contrary to the evidence, and a new trial granted.

Decision

2 The court *granted* a new trial on the ground that negligence on the part of the defenders had not been proved, and that the verdict was contrary to the evidence. In considering whether the evidence supported a finding that the employers had been negligent in this case, the Lord President (Dunedin) made the following remarks:

> 'Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either – to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or – to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.'

3 The pursuer's failure to advance any such evidence was therefore fatal to his claim against his employer.

Comments

4 The above quoted remarks of the Lord President indicate that courts feel it appropriate to take into account the practice of other parties in the same business or trade as the defender when considering whether the defender has been negligent. That is not to say that, if a defender follows a commonly adopted practice, it cannot have been acting negligently: a court may conclude, in an appropriate case, that the common practice was not in keeping with common sense, in which event it may hold the practice to have been unreasonable. An example of a decision to that effect is the Northern Irish case of *Cavanagh v Ulster Weaving Co*,[1] a decision which has been

1 [1960] AC 145.

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cited approvingly in Scotland.[2] In *Cavanagh*, the existing practice in the building industry was to permit roofers to work on steep, pitched roofs whilst wearing rubbers boots that could cause a slippage when wet, and not to provide any sort of handrail to such workers. Despite such existing practice, applying the approach of Lord Dunedin quoted under no 2 above, the House of Lords held that the jury had been entitled to find the defendants negligent. Lord Keith noted that Lord Dunedin's test might equally be stated as being one of asking, in relation to a possible precaution against injury, whether: '"It would be stupid not to provide it," or "that no sensible man would fail to provide it," or "that common sense would dictate that it should be provided."'[3]

So, existing norms of a non-statutory nature are considered of relevance by courts, and should be pled by litigants if they wish to adduce them in evidence, but will not be determinative in the face of precautions against injury which courts consider to be dictated by 'common sense', and hence to be omitted only as a result of 'stupidity'. These are very broad criteria, allowing courts wide discretion in assessing whether carelessness has been showed by a defender. **5**

14. Ireland

Kennedy v Ireland High Court, 12 January 1987

[1987] IR 587

Facts

The plaintiffs' telephones were tapped and their conversations recorded by the police under a warrant issued by the Minister for Justice. The Minister failed to follow departmental guidelines on the issuing of such warrants.[1] **1**

Decision

Hamilton P found that there were violations of the plaintiffs' constitutional privacy rights. The violation of two of the plaintiff's rights was conscious and deliberate, whereas the violation of the third plaintiff's rights was 'incidental' (she was the wife **2**

2 As for instance in *McGinnes v Endeva Service Ltd* [2006] CSOH 41.

3 Lord Keith, [1960] AC at 165.

1 The power to issue warrants was contained in sec 56 of the Post Office Act 1908, but the operating guidelines were not contained in any statutory provision and were merely administrative procedures within the department.

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of one of the targeted plaintiffs). The first two plaintiffs were awarded £20,000 each, while the third plaintiff was awarded £10,000.

Comments

3 The case demonstrates that the violation of non-statutory rules can be relevant in determining unlawfulness; the degree of fault was deemed relevant to the measure of damages rather than part of the threshold question of whether there was an actionable wrong (claims for damages for violation of constitutional rights were in an early state of development at the time; the ruling indicates that negligence can be a sufficient wrong in respect of violation of privacy).

4 Examples of non-statutory norms being considered in respect of the standard of care in negligence cases include the Rules of the Road (a guidance booklet produced by the Road Safety Authority),[2] a governmental policy on care for the mentally handicapped in the community[3] and an employer's internal code of practice on bullying.[4] Professional guidelines may be relevant to setting the professional standard of care (see *Dunne v National Maternity Hospital* in 6/14 nos 1–5). Such norms, where they are of relevance to a case, are only one of a number of relevant factors (in conjunction with those already identified, such as magnitude of risk, burden of prevention and utility of conduct), but can have a significant influence in some cases.

15. Malta

Carmelo Micallef St John and Others v Richard Spiteri and Another (Court of Appeal) 15 January 2002, Writ no 205/1993

<http://www.justiceservices.gov.mt>

Facts

1 As part of his regular training V went running on a public arterial road. Since it was summer he started his training very early in the morning, before sunrise, in order to avoid the heat of the sun. The road was not very well illuminated. Moreover, it had no footway but V was running very close to the edge, on the left side of the road

2 *Davis v Jordon* [2008] IEHC 200; *Nolan v Mitchell* [2012] IEHC 151 (in both cases the Rules were used in determining whether there was contributory negligence on the part of the plaintiffs); in *Carr v Olas* [2012] IEHC 59 Hogan J emphasised that the Rules are neither binding, nor determinative, but can be of assistance in deciding on what is reasonable behaviour.

3 *Hay v O'Grady* [1992] 1 IR 210.

4 *Sweeney v Ballinteer Community School* [2011] IEHC 131. A defendant's own guidelines on other issues may also be relevant, see *Fitzsimons v Telecom Éireann*, case 3a/14 nos 1–11 above.

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with his back to oncoming traffic (traffic in Malta keeps to the left). The Highway Code (which is not a statutory instrument) states that pedestrians should avoid walking on arterial roads if no footway is available and that, in any case, where no footway is provided, pedestrians are to walk on the right side of the road facing traffic.

The first defendant, who was 17 years old and did not hold a driving licence, took his father's (the second defendant's) fast sports car for a ride without asking for permission. He happened to take the same route as V and at the same time. Although it was not yet sunrise, he did not turn the car's main beam on and he was driving with dimmed lights. He failed to see V and ran him over. Tragically, V died a few hours later. 2

V's heirs sued both the driver and his father, arguing that the driver was not keeping a proper look-out and that the father, the second defendant, had not taken proper precautions to prevent his son from taking his car. The first defendant pleaded that V was at fault because he had not observed the Highway Code; the second defendant pleaded that his son had taken his car without his knowledge and permission. 3

Decision

The first instance court found both the defendants liable. The defendants appealed but the Court of Appeal confirmed the reasoning of the first court and turned down the appeal. 4

The court observed that the fact that the first defendant did not have a driving licence was not necessarily relevant for the purpose of liability; it might have marginal relevance as evidence of lack of skill. However, it still had to be seen whether the first defendant was driving in an imprudent and negligent manner and whether this was the direct and immediate cause of the accident. The circumstances of the case showed that the first defendant was not keeping a proper look-out because otherwise he would not have failed to see V. 5

Turning to the plea that V was at fault or, at least, that he had contributed to the accident because he had not observed the rules of the Highway Code, the court said that it was true that, had V been facing oncoming traffic, he might have seen the approaching car and moved out of its way. This might have given him a 'slim chance' of saving his life. However, for the purpose of establishing liability, one has to see what was the immediate cause of the accident rather than whether, had one of the parties acted differently, the accident might have been avoided. The fact that one could, in 'the agony of the moment', have reacted in time to avoid the accident does not render him responsible or co-responsible if he failed to take that action. 'That possibility does not entail responsibility for an accident which, at that moment, had already been brought about through the negligence of the (first) defendant'. 6

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7 Turning then to the responsibility of the second defendant, the court observed that he could have foreseen that his son, at that age, might have been tempted to try out his father's fast sports car and would not have the patience to wait until he got his driving licence. He should therefore have taken precautions by locking away the car keys or keeping them where his son could not find them. His failure to take this simple precaution made him jointly responsible for the accident.

Comments

8 This judgment illustrates a number of points. In the first place it confirms that failure to abide by norms, whether statutory – driving without a driving licence – or not – failing to abide by the Highway Code – is not in itself a cause of liability unless there is a causal link between the failure and the harm. In this sense it can be said that the courts do distinguish between 'wrongfulness' – here understood as behaviour in breach of a norm rather than behaviour which causes damage *contra ius* – and fault, which is assessed in the light of the harmful result and not merely in the light of the wrongful behaviour in itself.

9 The judgment is also of relevance with regard to the weight given to the degree of fault for the purpose of the harm caused to others, on the one hand, and the harm caused to oneself, as a form of contributory negligence, on the other. It cannot be denied that the victim did indeed act with lack of prudence by running on an arterial road without a footway, in the dark and without wearing luminous or high-visibility clothes, and with his back to ongoing traffic. Yet this was not deemed sufficient for the court to apportion a share of the blame on him.

10 Finally, the judgment also illustrates the element of 'foreseeability' as an element of fault. The second defendant was liable because he could have foreseen that his son would give in to the temptation to drive his car and also because he could have foreseen that his son, through his lack of experience, could cause a serious accident. Although the second defendant's failure was by no means an 'immediate' cause of the accident but a rather remote one, he was still liable, under art 1034 of the Civil Code,[1] as the person having charge of a minor. An interesting question is whether the second defendant would still have been liable had his son been of age but still without a driving licence. Ought he still to have taken the precaution to hide the car keys because he could foresee that his son would now be subject to an even greater temptation to drive his car? Would his failure to take that precaution amount to a contributory cause of the accident?

1 Article 1034. Any person having the charge of a minor, or of a person with a mental disorder or other condition, which renders him incapable of managing his own affairs, shall be liable for any damage caused by such minor or such person, if he fails to exercise the care of a *bonus paterfamilias* in order to prevent the act.

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16. Denmark

Højesteret (Supreme Court) 23 June 1978

U 1978.653 H

Facts

A was acting as an accountant for a certain group of companies, including company S. In January 1974 A issued an unqualified audit report for S. A supplier, V, had delivered goods to a company, B, which was part of the same group of companies as S. However, V did not receive the due payments from B and therefore, V refused to continue delivering goods to B on credit. In April 1974 V was given the audit report of the company S and consequently V decided to deliver goods to S on credit. In July 1974 the said group of companies went into liquidation due to insolvency. S had become insolvent because it had agreed to guarantee B's debt. However, this guarantee did not appear on S's audit report which had been given to V. This led V to claim compensation from A for the losses he had sustained by relying on the audit report. **1**

Decision

The court said that in order to hold an accountant liable, he must have contravened the applicable standards for good auditing. A had not breached these standards and consequently he was acquitted. **2**

Comments

It is interesting that the court explicitly stated that, in order to be held liable, an accountant must have acted in contravention of the applicable standards for good auditing. First, this finding shows that a violation of non-statutory norms may be a requirement for the establishment of liability under Danish law. Second, on a more general level, the case highlights the fact that non-statutory norms are becoming increasingly important in the assessment of the required standard of care in modern tort law.[1] Examples of other potentially relevant norms could be certain standards of conduct adopted by private organisations such as The Danish Bar Association or perhaps even certain ethical guidelines.[2] Of course, the courts may censure such norms but if it can be demonstrated that they are generally accepted by a certain group of people and if they are reasonable, the courts will often not do so. **3**

1 *A Ehlers*, Blaming the Unblameable, NJCL 2014, 12–15.

2 *A Ehlers*, Blaming the Unblameable, NJCL 2014, 10–15.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 19 November 1987
Rt 1987, 1346

Facts

1 A 17-year-old boy attempted to make a ski-jump on ski-jumping-equipment in Granåsen, Norway. Steel pipes were a part of the construction to make it steeper, thus ensuring that the downhill ride before the jump was sufficiently steep and accordingly making the ride sufficiently fast for a long jump. Because there was only little snow, the young man's ski came into contact with the material underneath the snow, which led to him losing his balance and falling against the steel pipes on the right side of the downhill track. The man was severely injured and lost all of his capacity to work. There were national and international written regulations on safety regarding the building of such equipment. Because of the need to save money, the construction had not been built safely or in accordance with building regulations. This fact would have been irrelevant had there been enough snow to cover the pipes and other parts of the construction. The lack of snow, however, caused the young man to fall.

Decision

2 The ski clubs, which own the ski jump and the *Norges Skiforbund* (Norwegian Ski Association), were found responsible *in solidum* on the basis of the general *culpa* rule. The 14 steel pipes in the upper part of the downhill track (*nedfart*, *ovarrenn*) created a severe risk to ski jumpers when falling as long as the pipes were not covered with snow. The construction was built in accordance with Norwegian rules at the time it was built, but the owner should have understood that the installation should only have been used whenever there was sufficient snow. The installation did not comply with international rules for the construction of ski-installations decided at the FIS (International Ski Federation) ski-conferences in San Francisco in 1975 and in Nice in 1979. These rules prescribed that there should be no dangerous objects in the upper part of the equipment. The ski clubs, when applying for an international FIS-certificate (which they astonishingly had obtained after all), should have ensured that the ski jump complied with international rules. The court expressly pointed out that the ski clubs had a duty to seek knowledge of relevant rules when they decided to rebuild the downhill track. The ski association could not be held responsible for the conditions at the construction. The trainers, working for the ski association, should, however, have secured the steel pipes with physical obstacles or in other ways, to ensure the safety of those using the equipment. They should have recognised the obvious risk of the steel pipes if ski-jumpers fell. The failure to comply with international rules and the failure to react to the risk that was obvious to the trainers were equally weighted arguments for inferring that the representa-

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tives of both the ski association and the ski clubs had acted in a culpable manner. In fact, it was the combined culpable behaviour of both parties that caused the damage to the ski jumper.

Comments

The case illustrates that a party under Norwegian law is obliged to seek knowledge of all kinds of written regulations relevant to the activity that the party is engaged in. The fact that the people acting on behalf of the ski clubs were unaware of the regulations could not in any way excuse or exonerate the ski clubs. This way of reasoning has become more important over the years given the fact that many professional activities are heavily governed by prescriptions and descriptions of how to behave and all kinds of safety procedures. This has made the assessment of culpability more objective than it was 40 years ago, given the fact that prudent behaviour in various areas has been spelled out more positively than was previously the case. The question of misconduct is, accordingly, often decided by observing whether or not the party had complied with the procedures. A party that fails to comply with regulations or is even unaware of them is very likely to be held liable once an accident materialises. As for *culpa* on the part of the trainers, this is not tied to the lack of knowledge about international rules, rather the fact that the trainer did not react to a risk that was possible to see in advance. **3**

18. Sweden

Högsta domstolen (Supreme Court) 15 March 1983

NJA 1983, 232

Facts

Horses had broken out of a fenced pasture and caused an accident on a road 300 m away. The fence consisted of three rows of barbed wire attached to oak posts. This arrangement was, according to the standards of the Board of Agriculture, considered normally satisfactory as regards riding horses. The car owner sued the horse owner for damages. **1**

Decision

No damages were awarded. Instead of just relying on the conformity with the customary standard to justify the end, the court added that in the specific case 'there had not been any special circumstances' – as regards the pasture's surroundings, the dangerousness of the animals or any other conditions – that could justify imposing special requirements as regards the fence construction. **2**

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Comments

3 This reasoning shows that it is certainly possible – in other cases – to impose liability, although the defendant acted within the scope of the standard to be considered as safe. Thus, the evaluation of negligence is not completed just because the defendant acted in accordance with statutory or non-statutory standards. In short, the *culpa* standard is only partially based on an examination of the common standard of action. Central to the evaluation is, instead, to consider the actually generated risks rather than to determine what the habitual or stipulated course of action is.

19. Finland

Korkein oikeus (Supreme Court) KKO 1982 II 40, S80/1265, 15.4.1982/4354
<http://www.finlex.fi>

Facts

1 For several years the levels of titanium dioxide in a workplace had continuously been many times above the maximum level proposed by the occupational safety and health authorities in their safety recommendations. In the expert literature, levels of titanium dioxide could also only be proven non-hazardous up to the maximum level. The employer had not taken effective measures to eliminate titanium dioxide in the air and provide employees with protective equipment. Consequently, an employee contracted lung disease and was forced to change to a job with a lower salary. The employee claimed compensation for his economic loss.

Decision

2 The Supreme Court stated that the employer had failed to ensure safety at work, and this negligence had caused the employee's lung disease. The employer was thus ordered to compensate the employee for the economic loss caused by his having to take a job with a lower salary.

Comments

3 Non-statutory norms can also be of significance when the court assesses negligence.[1] Particularly in cases where the purpose of the norm is to avoid injuries or

1 See also case KKO 1992:44 at 6/19 nos 1–4, where the Supreme Court referred to the general rules of the Finnish Bar Association and the decision of the Ministry of Justice concerning their way of determining negligence and obliged an attorney to pay compensation for a third person who had suffered damage.

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other damage, deviation from the norm can indicate negligence, unless good reason can be shown for the deviation.[2] However, it is important to bear in mind that the court makes its decision independently. Deviation from non-statutory norms or guidelines do not always signify negligence, because the branch in question can demand higher standards than would be commonly expected.

Conversely, if the branch in question has its own regulations or guidelines and **4** the tortfeasor has followed them, it does not automatically signify the absence of negligence, if, for example, that sector's own regulations or guidelines require too little of the actors concerned. Hence, the sector itself cannot define the legally required standard of conduct.

In some cases, the purpose of self-regulation or guidelines is unconnected with **5** compensation interests, which is why acting against them does not always lead to a finding of liability. For example, the media's self-regulation (the 'Guidelines for Journalists' and the statements and opinions of Council for Mass Media (CMM)) and legal regulation operate according to two totally different regimes. If a journalist has been acting against the media's own ethical norms or in a manner that has been thought to be against good press ethical habits in the view of the CMM, one cannot automatically conclude that that journalist has acted unlawfully. Equally, it is possible that an instance of lawful behaviour runs counter to good journalistic ethics. The law and self-regulation are two distinct systems, with different functions.

According to the Finnish Guidelines for Journalists, their purpose is 'to support **6** the responsible use of freedom of speech in mass communication and encourage discourse on professional ethics' and they 'have been drafted specifically for the purpose of self-regulation' but are 'not intended to be used as grounds for determining criminal liability or damages.' Though at the beginning of this century (2000) there were a great deal of discussion about whether Finnish courts were using the Guidelines for Journalists or decisions of the CMM as grounds or as additional arguments for condemnatory judgments in tort or criminal law cases, it turned out there was no evidence for this, at least not on a wider scale.[3] For example, in case KKO 1991:79 (31.5.1991/1874), the Supreme Court referred to good journalistic practice as a reason for a finding of liability (being one factor in the evaluation of negligence and one part in evaluating especially weighty reasons that were required when the question was of compensating pure economic loss), but it seems that they did not set up their own judgment on Guidelines for Journalists or statements or

2 See also KKO 1992:44, at 6/19 nos 1–4 below where the Supreme Court referred to the general rules of the Finnish Bar Association and the decision of the Ministry of Justice concerning their method of determining negligence as a basis for liability.

3 This was observed in the author's dissertation in 2007 (*P Tiilikka*, Sananvapaus ja yksilön suoja: Lehtiartikkelin aiheuttaman kärsimyksen korvaaminen).

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opinions of the CMM, but made their own evaluation on how a careful and honest journalist carries out his/her tasks.

7 One further point to note when talking about the significance of self-regulation is that often a breach of the regulation does not cause damage or injury as such.[4]

21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-25/2012, 25 January 2012

<http://at.gov.lv/files/uploads/files/archive/department1/2012/25-skc-2012.doc>

Facts

1 An insolvency administrator acting on behalf of the claimant brought an action under art 169 of the Commercial Law[1] against the defendant – a former member of a management board – claiming damages in the amount of € 13,176. The claimant had, prior to becoming insolvent, when represented by the defendant, concluded a loan agreement with a US company and had transferred € 25,612 to the latter. The loan agreement was concluded contrary to the interests of the claimant four months prior to his *de facto* insolvency. No securities had been requested, agreed upon or provided, the applied interest rate of 2% was too low and it may have been impossible to have the debt paid in Latvia. The damages claimed consisted of the unreturned amount of the debt lent to the US company under the loan agreement entered into by the claimant's representative at the time – the defendant.

Decision

2 The court of first instance rejected the claim. The court of appeals also rejected the claim holding that neither the fact that the loan agreement was entered into four months prior to the *de facto* insolvency, nor the fact that the interest rate was only 2% was sufficient to conclude that the agreement was contrary to the interests of the claimant. In addition, the claimant did not take any steps to reclaim the amount due

4 For example, according to sec 16 of the guidelines, '[t]here must be a clear demarcation kept between advertising and editorial content. Surreptitious advertising must be avoided.' This rule is often violated, but a company could not obtain damages from a newspaper just because they published a hidden advertisement of a competitor.

1 Article 169 (1) mentions that a member of a management board or supervisory board of a company must exercise their duties as *bonus pater familias*. Article 169 (2) indicates that members of a management or supervisory board are jointly liable for the damage they have caused.

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from the US company. Failure to mitigate the loss, when possible, precludes liability for the alleged damage. The Senate of the Supreme Court reversed and remanded the decision of the court of appeals due to the failure to apply art 169 of the Commercial Law of Latvia specifying the duty of care owed to a company by the management and supervisory board members.

The aforementioned article sets a high (*bonus pater familias*) standard of care. If a claim for damages is brought and the claimant has demonstrated that the defendant's actions or omissions caused the damage, the board members are obliged to exculpate themselves by showing that the necessary standard of care was complied with. The law sets a higher standard of care for the defendant compared with the general rules of tort law and thus the defendant must act with utmost care on behalf of the company as he had been entrusted with the management of the claimant's assets. If a member of the board acts contrary to what can be considered as reasonable commercial practice and a company suffers damage, the member of the board is held liable regardless of the form of misconduct, ie, for a failure to act with utmost care. The court of appeals did not take the aforementioned considerations into account. **3**

Comments

The presented case is a landmark case concerning the liability of board members in Latvia under art 169 of the Commercial Law of Latvia. This would be regarded as liability in tort law rather than contract law as board members are legal representatives of a company despite any contracts that may or may not be concluded regarding their salary, benefits, etc.[2] The court expressly concluded that the rules of the CLL concerning tortious liability can be applied to board members for damage caused to third parties, but added that the Commercial Law, as *lex specialis*, sets a higher standard of care. **4**

Article 169 of the Commercial Law of Latvia refers to the required standard of *bonus pater familias*, but this decision goes even further by suggesting that no unlawful conduct must be established at all and the mere existence of damage to the company caused by a decision, action or omission of a board member could be the basis for liability, unless the latter proves with evidence that his behaviour was not the cause of the damage. Thus, the *onus probandi* (burden of proof) is shifted to the board member if a company suffers damage. Following this interpretation, it could be concluded that the liability of a board member bears a strong resemblance with strict liability and that this decision could lead to an opening of the floodgates of such claims brought by insolvency administrators against former board members. **5**

2 *A Strupišs*, Komerclikuma komentāri III. B daļa. Komersanti. XI sadaļa. Kapitālsabiedrības (134.-184.panti) (Riga 2003) 143–152.

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In another decision, the Senate of the Supreme Court indicated that the existence of the damage caused by actions or omissions of board members to the company must be supported with evidence first and only then will the burden of proof be shifted to the board member, thereby narrowing the interpretation implied by the analysed decision.[3]

6 The significance of the decision lies in the introduction of the criterion of reasonable commercial practice that, in addition to statutory norms, ought to be examined in order to conclude if the behaviour of the board members conforms therewith. To examine the performance of a board member, the criterion of a reasonable person in comparable circumstances or business environment must be taken into account as well as any deviations thereof. The amount of the transaction, the identity of the contractual party and the nature of the transaction together with other factors might provide an implicit indication of such deviations.

7 In addition to the standard of conduct specified in art 169 of the Commercial Law of Latvia, the legislator introduced amendments to the Insolvency Law (art 72[1]),[4] effective from 1 March 2015, obliging board members to be jointly liable for damage to the company in the amount of the claims of recognised creditors insofar as such claims are not covered in the insolvency proceedings for failure to submit comprehensible accounting information and documents to the insolvency administrator. The legislator also introduced a personal liability regime in the Law on Taxes and Fees (art 60),[5] effective from 1 January 2015, according to which, board members may be held jointly and personally liable for outstanding tax payments of a company subject to certain preconditions.

Augstākās tiesas Civillietu tiesu palāta (The Supreme Court's Chamber of Civil Cases) No C04338207, PAC-0068, 29 October 2012

Unpublished

Facts

8 The claimant was admitted to hospital (the defendant) after having been diagnosed with varicose veins in both legs. The next day, surgeon Z assisted another surgeon in performing an operation on the claimant's right leg. During the operation, one of the deep veins started to bleed heavily, and three more surgeons were invited to participate in the operation. The claimant was subsequently treated in the defen-

3 See decision of Senate of the Supreme Court, No SKC-101/2014, 15 January 2014.

4 Grozījumi Maksātnespējas likumā [Amendments to the Insolvency Law] available at: <http://m.likumi.lv/doc.php?id=269517>.

5 Grozījumi likumā 'Par nodokļiem un nodevām' [Amendments to the Law 'On Taxes and Fees'] available at: <http://likumi.lv/ta/id/271316-grozijumi-likuma-par-nodokliem-un-nodevam->.

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dant hospital on several occasions between 2000 and 2002. In February 2003, an expert's opinion concerning the quality of treatment was prepared by the Ministry of Health – Health Care and Working Capacity Quality Control Inspection (MADEKKI). It was found that the documentation which was provided by surgeon Z contained discrepancies (an erroneous description of the diagnosis, incomplete description of the activities and discrepancies in the instructions for further treatment), but no errors concerning the operation itself were identified.

The claimant, however, was convinced that the initial operation and the subse- **9**
quent medical care was of poor quality and led to a vein thrombosis, an inflammation of the wound, blood circulation problems and a non-healing trophic ulcer and claimed that this caused non-pecuniary harm. Hence, the claimant brought an action against the defendant claiming compensation in the amount of € 229,226, to cover additional medical expenses, compensation for loss of earnings, as well as compensation for non-pecuniary harm.

The defendant explained that the operations were carried out with the consent **10**
of the claimant. The deep vein rupture was considered to be a complication that was largely influenced by the claimant's anatomical peculiarities and pre-existing varicose veins. The errors made by the surgeon in handling medical records could not cause the harm in question. The defendant's expert's opinion was provided by a forensic investigation group, which consisted of four medical doctors and certified forensic experts, who explained that the operations were conducted in a professional manner and that there had been no medical malpractice. The experts further argued that the trophic ulcers were rather caused by the chronic venous disease rather than the surgery itself and that the vein rupture, which is a complication of such surgery, was properly dealt with.

Decision

The first instance court rejected the claim. The court evaluated the evidence, includ- **11**
ing the experts' opinions and witness statements in an attempt to assess whether the necessary standard of conduct was complied with. Some of these inquiries examined the issues of misconduct and causation. The court of appeals upheld the decision and the decision of the court of appeals was not further appealed. In the reasoning of the decision, it was stated that the medical personnel had not acted unlawfully. The patient's early discharge from hospital could have contributed to the further development of the disease, but it did not cause the trophic ulcer and loss of earnings, and the failure to prepare the necessary documentation could also not be considered as a cause of the harm.

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Comments

12 The case shows that the question of misconduct very much depends on an evaluation of the conduct of personnel per se, as well as on an assessment of whether there is a causal link between the treatment of a patient and the alleged injury.

13 The outcome of medical operations is quite often subject to dispute in medical negligence cases and claims are frequently brought because the patient believes that doctors ought to have been able to prevent a disease and treat age-related health problems. Special knowledge and skills are required to provide medical treatment and to evaluate the lawfulness and adequacy of the actions of medical professionals.[6]

14 In the case at hand, the courts of two instances analysed the factual circumstances of the dispute in detail and, based on the opinion and professional knowledge of the experts, found no grounds to establish liability for medical malpractice. However, there are some other cases where the court has established mistakes and the negligence of medical personnel.

15 The decision in the case does take into account existing medical standards which are not statutory norms, but which gain importance when the compliance with the necessary standard of conduct is evaluated in the particular set of circumstances. That is sometimes clarified by requesting an expert's opinion of the acts of the medical personnel in the particular set of circumstances. In some cases, if the conduct of the medical profession clearly differs to that which can be expected of a medical professional in a similar situation, this may lead to a finding of criminal liability for such conduct. The misconduct can be derived from an evaluation of the circumstances of the case,[7] but the presented case demonstrates a more complex evaluation requiring expert opinions.

22. Lithuania

IJ, MČ and JČ v Vilnius University Hospital, 6 October 2009

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-96/2009; <http://www.apeliacinis.lt>

Facts

1 The plaintiffs, the minor daughter and parents of the deceased, after an unsuccessful gynaecological therapeutic operation performed upon the woman, sued the Vilnius University Hospital for compensation of pecuniary and non-pecuniary damage.

6 *K Torgāns*, Saistību tiesības [Obligation Law] (Rīga 2014) 495.

7 Senate of the Supreme Court decision of 4 November 2011, case SKK-411/11.

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The aim of the surgery was to remove uterine fibroids, and was performed on the patient by a highly qualified doctor at the Vilnius University Hospital. At the end of the operation, when the doctor infused oxytocin, it caused a heart rate disorder and high blood pressure. However, all treatment measures failed and the patient died the day after the surgery. 2

The medical expert witnesses in the case stated that the complications in the operation were mostly caused by distilled water used during the operation. Although distilled water is in fact not prohibited during therapeutic operations and had been previously used by the Vilnius University Hospital in similar operations, the European Society for Gynaecological Endoscopy and the scientific literature recommend using more safe solutions. According to the recommendations, distilled water can still be used during diagnostic operations, which in fact last a much shorter time than therapeutic operations. Medical experts stated that another gynaecological department of another large Lithuanian hospital situated in the second largest Lithuanian city, Kaunas, was using safer solutions at that time. Moreover, it was established in the case that the Vilnius University Hospital had the required equipment to use safer solutions than that which was used in the case. 3

The court of first instance dismissed the claim stating that the use of the distilled water during such operations was not prohibited and the use of this solution during the operation was determined by the previous successful practice of the Vilnius University Hospital. 4

Decision

The Court of Appeal granted the claim and awarded damages. The court held that, although the use of the solution was not prohibited and even explicitly allowed by a Decree of the director of Vilnius University Hospital valid at the time of the operation, because the operating doctor did not use the safer solution recommended in the medical literature and by the European Society for Gynaecological Endoscopy, the defendant breached the standard of conduct prescribed for professionals. 5

Comments

The case demonstrates that non-statutory norms of a voluntary organisation serve as a yardstick for the high standard of care of medical personnel. The liability of the Vilnius University Hospital was established although it argued that the conduct of the doctor was not prohibited and conformed to the earlier successful practice of the hospital which did not correspond to the non-statutory norms. The findings of the court are not surprising because, in its vast experience with medical malpractice cases, the Lithuanian Supreme court has repeatedly stated that the 6

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slightest fault, error or failure to comply with professional rules and standards leads to liability.[1]

23. Poland

Sąd Najwyższy (Supreme Court) 1 December 2006, I CSK 315/06
OSNC 11/2007, item 169

Facts

1 V, a corporation, sued A, an auditing company with which they had a contract for auditing, for losses sustained due to the negligent breach of professional standards of chartered accountants and breach of the rules of proper auditing. The audit of the balance sheet proved to be insufficient when it was examined by the taxation office, which questioned the rate of VAT used by V in its business. V claimed compensation, which included the interest on due taxes paid and the remuneration for services. According to V, A did not perform his duties, because he examined the formal side of the report and failed to verify the basis of the financial statements even though he was required to do so under the law and the auditing rules.

2 The trial court dismissed the action entirely because the contractual claims were time-barred (two years) and no basis for the tort liability of the defendant was established. The court of appeals reversed this, holding the defendant liable in tort for negligent auditing (art 415 KC), and awarded compensation for the loss consisting of the due tax with interest.

Decision

3 The parties concluded a contract for auditing, which stated that the audit would be performed according to the requirements of accounting law and the standards set by the National Council of Chartered Accountants. Thus, the standard of care was both part of the contract and envisaged in the provisions of law. A chartered accountant is obliged to examine the balance sheet both as to its formal requirements and to its merits, which includes the way in which the company applies taxation rates. According to the Supreme Court, the key problem in this case was whether and under what conditions a breach of contract might constitute a tort and justify the choice of the regime (art 443 KC).

4 The court emphasised that a breach of contractual obligations did not per se constitute a tort. According to case law, the concurrence of causes of liability arises

1 See also 3a/22 nos 3–4.

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in a situation where the debtor not only defaults on his contractual obligations, but at the same time he breaks a legal rule to which he is bound regardless of the legal relationship between the parties (a general duty of care).[1] The conduct of the debtor is then considered a tort. The court stated that the rules provided in accounting law are addressed to accountants, and not to the public, thus they are not to be considered as generally binding legal standards of proper and careful conduct. However, the court agreed with the court of appeals that a breach of professional standards contained in the statutes and deontological rules may, under the given circumstances, create a tort and justify a claim *ex delicto*. A chartered accountant is entrusted with a public function and he must perform his duties pursuant to the rules of law and the rules of professional conduct regardless of whether a statutory or voluntary auditing is concerned, otherwise he commits a tort.

However, the court of appeals erred in basing A's liability on art 415 KC instead of art 430 KC (vicarious liability) or for an independent contractor (art 429 KC – liability for *culpa in eligendo*). 5

Comments

The court included deontological norms (professional standards) in the general notion of fault (art 415 KC), without differentiating between wrongfulness and fault *sensu stricto*. The fault of the auditor was established as a result of the breach of his professional duty. The court imposed a rather stringent standard of care as no gross negligence was established on the facts. The case reflects how the objectivisation of fault (care) undermines the dualist theory of fault (fault made of two elements – see 1/23 nos 2–5). 6

Liability for pure economic loss is likely to be established when the duties violated by the professional are of a general nature, hence binding regardless of any contractual bond, and when the actor was aware that the breach of such duties will likely cause damage to certain third persons. 7

Court of Appeals in Poznań, 9 May 2002, ACa 221/02

PiM 1/2004, 116

Facts

Vs claimed compensation for the infection with hepatitis B, transmitted to them by V's husband and father (X), who had been diagnosed with the virus in a public hospital. Vs were not informed by the hospital personnel about X's infection, despite 8

1 SN 28 April 1964, II CR 540/63, OSPiKA 1965, 197; SN 10 October 1997, III CKN 202/97, OSN 3/1998, item 42.

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other detailed information about his condition. In consequence, they failed to take precautionary measures to avoid the infection and acquired hepatitis. The regional court dismissed the suit, and Vs appealed.

Decision

9 The court held that medical personnel in a hospital have a duty to inform the relatives of a patient about his infection with a contagious virus. Such a duty, even if not explicitly written in the law, arises from the general rule that medical personnel in the public health care sector are obliged to undertake all possible actions, available according to the state of art, in order to prevent and reduce epidemiological risks. The duty embraces, in particular, the obligation to inform a spouse and family members, who are exposed to the risk of infection. A spouse is most often endangered by hepatitis B, since it is transmitted through intimate contact. The breach of the duty to inform about a contagious disease constitutes a tort. The information must be given in a comprehensible manner, inducing the family members to undertake precautionary measures.

10 The defence of the confidentiality of a patient's data is not a defence in this type of case. The obligation to maintain the medical secret is not absolute when keeping the secret may endanger other persons' health and life. As the court noted, on the facts the obligation to inform was even more self-evident as the wife of the patient infected by hepatitis B virus was authorised to obtain any information regarding his health condition. Reading between the lines of the opinion, one gains the impression that such a duty would also be expanded to partners who live with the sick person.

Comments

11 Particular obligations of professionals do not need to be envisaged in legal provisions. They can also stem from life experience and common sense, as well as from deontological norms (professional standards, usually incorporated in codes of ethics). The latter are typically included in the analysis of unlawfulness. It is an accepted tendency in Polish law that both the objective standard of care (art 355 § 1 KC) and the professional character of a given activity (art 355 § 2 KC) lead to the conclusion that negligence of a professional is established through the sole breach of his duty.[2] In this case, as in other cases related to medical malpractice, the court's interpretation of doctors' duties stems from the special character of the medical profession.

2 SN of 1 December 2006, I CSK 315/06, OSN 11/2007, item 169.

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24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 23 February 2005

25 Cdo 1506/2004

Facts

The first respondent, an armature professional skier, took part in skiing training on a slope where the public was also present. The training was organised by the second respondent, the trainer of the first respondent, who was in charge not only of organising the training but also of supervising the trail and signalling to the first respondent that she may pass the track. The training session took place despite the fact that the trainer had repeatedly been warned by the Mountain Rescue Service that it could be dangerous to hold such a training session when amateur skiers were also on the slope. 1

When the first respondent was skiing down the hill, she passed a piste with mounds (a 'mogul' piste) and collided with the claimant, who had taken a short break at the side of the slope before continuing skiing. The trainer did not warn the first respondent that an amateur skier was skiing below the moguls. 2

The court of first instance considered the matter under the application of secs 415 (duty of prevention), 420 (general liability clause), 422 (liability for minors) and 441 (contributory negligence) CC and the code of conduct for skiers of the International Ski Federation (FIS Rules) and concluded that the respondents were liable for the damage caused to the claimant. 3

The court of second instance did not hold the first respondent liable because she only took part in the organised training. However, in its opinion, the second respondent, ie, the trainer, breached the general prevention duty when he organised and held a training session while members of the general public were present and, therefore, he was fully liable for the damage caused. 4

Decision

In its reasoning, the Supreme Court repeated the argument of the court of second instance, without disputing any of the conclusions it had made, also those relating to an application of the FIS rules. 5

The first respondent violated the general prevention duty under sec 415 CC and the FIS rules, since before the mogul piste she did not slow down and did not check whether there was not another skier behind it. However, the claimant contributed to the damage to the extent of 50% as he violated sec 5 of the FIS Rules, because after his break, he did not check the situation before starting to ski again. The second respondent was held jointly and severally liable with the claimant under sec 422 CC, because the first respondent was a minor at the time when the accident occurred 6

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and he breached his duty to supervise, especially under the circumstances in which the training took place on slopes where members of the public were also present.

Comments

7 The application of the non-statutory norm with respect to the injured party occurred under consideration of sec 415 CC, which sets forth a general prevention duty. Nevertheless, the application of sec 415 can only be considered if there is no other legal regulation which concerns the conduct whose illegality is in question. In the given case, the only rules which were applicable were the FIS rules, which clearly describe the obligations of skiers when on ski slopes, ie the duty of awareness, fairness and safety.

8 Therefore, although the FIS rules do not present statutory norms due to their content, which is fully in compliance with the duty to prevent the occurrence of harm, they may apply as a secondary source of obligation.

9 This was expressed by the Czech Supreme Court in case 25 Cdo 1506/2004 when it considered the liability of a Czech skier under Italian law for an accident on a slope in Italy: 'Rules of conduct for skiers issued by the International Ski Federation, FIS, contain standards, the compliance with which should ensure the safety of users of slopes and serve the prevention of damage. Although they cannot be deemed not generally binding legal regulations, these rules are binding for downhill skiers, regardless of whether they are a source of law or not.'

10 The same argumentation applies to cases of other sports rules which are clearly stated and accessible for the public, such as those for football, ice hockey, etc.

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 30 October 2007, Case No 25 Cdo 707/2006

<http://kraken.slv.cz/25Cdo707/2006>

Facts

1 The defendant, who filled small balloons with hydrogen within his business activities, sold two such balloons to the claimants. After the claimants placed the balloons in the boot of their car, there was an explosion, the car was damaged and one of the claimants was injured. The District Court adjudicated on the duty to compensate the damage. The appellate court affirmed the decision of the court of first instance. Later the Supreme Court of the Czech Republic denied the appellate review. Based upon a constitutional complaint, the Constitutional Court quashed the decision of the appellate court on the grounds that the complainer's right to due process was violated. The appellate court re-examined the decision of the court of first instance and affirmed the duty to compensate the damage.

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Decision

The defendant was held liable for the damage resulting from his activities of consciously filling small balloons with an explosive mixture although he knew the balloons could be filled with a non-explosive mixture. Further it was found that he had failed to follow relevant technical standards and relied on the fact that, at that particular time, filling balloons with explosive gas was not prohibited by any binding statutory regulation. In addition to his non-compliance with the duty to inform the claimants, the defendant failed to act in a manner which could have prevented the damage and, therefore, the defendant, acted in breach of his duty of general preventive care under § 415 of the Civil Code and was to be held liable for the damage pursuant to § 420 of the Civil Code. He was not relieved of liability, as he failed to prove that the damage was not caused by his fault. 2

Comments

From the outset, the defendant was charged with violating the Consumer Protection Act, because a small balloon filled with hydrogen was defined as a dangerous product by technical rules. In the opinion of the Constitutional Court, the non-observance of technical standards cannot be identified as a breach of a statutory duty. The duty to compensate damage relied on the provisions of § 415 of the Civil Code. It was established that the defendant, a chemist by profession, consciously filled the small balloons with an explosive mixture, although he knew that they could be filled with non-explosive gases. In the view of the court, the defendant knowingly failed to follow technical standards, relying on the fact that at that time filling the balloons with explosive gas was not prohibited by a binding statutory regulation. 3

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 23 February 2005, Case No 25 Cdo 1506/2004

<http://kraken.slv.cz/25Cdo1506/2004>

Facts

The accident occurred on a skiing slope in Gitschberg. The court of first instance ordered the defendant to compensate the damage, when in violation of the FIS rules[1] she failed to adapt her speed and skiing mode to her personal abilities and the prevailing conditions, which she was required to do. While skiing, an obstruction 4

1 Skiing and snowboarding like all sports entails risks. The International Ski Federation (FIS) has developed 'Rules of Conduct' that apply to all who use the pistes – regardless of the equipment they are using. This 'highway code' helps everyone to stay safe on the slopes, and should be followed at

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appeared on the slope, as a result of which, she hit another skier from behind (the injured). The City Court, acting as the appellate court, affirmed the decision of the court of first instance. The Supreme Court held the appellate review inadmissible.

Decision

5 Downhill ski runs are open to the public, and skiers choose which route to take. Under Rule 3 of FIS Rules of Conduct for Skiers, a skier coming from behind must choose his route in such a way that he does not endanger skiers ahead.

Comments

6 In the given case, the courts dealt with a collision of two skiers. The court, applying the provisions of arts 2043, 1223, 1225 and art 1226 of the Italian Civil Code[2] and Rules 2, 3 and 4 of FIS Rules of Conduct for Skiers, concluded that the defendant had breached the duties set in these rules. The court did not agree with the defendant's contention that the claimant had failed to take into account the difficulty of the slope which was beyond his personal abilities, and that the claimant was required to react in an appropriate manner in order to prevent a collision. In her appellate review, the defendant argued that the principal issue was that the court considered her liability for damage on the basis of the FIS Rules, which are not a source of law. Although it is generally admitted that the FIS Rules are a customary norm, the defendant was of the view that these Rules cannot take precedence over statutory rules. According to the defendant, the courts failed to consider the issue of the contributory fault of the injured person. The Supreme Court affirmed that the damage was caused exclusively as a result of the defendant's conduct. As for the defendant's argument that the claimant had been skiing on a slope which did not correspond with his skiing abilities, and was skiing very slowly when practicing a move below a terrain drop, which was not visible, the court maintained that these circumstances were not the cause of his injury. Without the defendant hitting him from behind, no damage would have been caused. In the opinion of the Supreme Court, the FIS Rules of Conduct for Skiers contain the standards the observance of which is

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all time. The FIS 10 Rules for The FIS Rules must be considered an ideal pattern of conduct for a responsible and careful skier or snowboarder and their purpose is to avoid accidents on the piste. See <www.fis-ski.com>.

2 According to §§ 15 and 37 of the Act No 97/1963 Coll on International Private Law and Rules of Procedure as amended (the 'International Private Law Act'). § 15 states: Tort claims shall be governed by the law of the place where the damage of the harmful event occurred. § 37: Unless the subsequent Articles provide otherwise, Czech/Slovak courts shall have jurisdiction if the defendant has his residence or seat in the Czech/Slovak Republic or, provided property rights are involved, if he has property there.

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to ensure safety for skiing slope users, thus serving the purpose of avoiding damage legally related with liability. Although the FIS Rules do not represent generally binding law, they are binding on skiers on downhill slopes, irrespective of whether or not they represent a source of law.

Městský soud v Praze (City Court in Prague) 17 May 1978, Case No 10 Co 190/76

Collection of Judicial Decisions and Opinions – R 16/1980

Facts

The claimant demanded compensation for the damage caused by an opponent in a football game. The court of first instance decided that, according to §§ 415 and 420 of the Civil Code, the claim was reasonable. The appellate court confirmed this verdict. **7**

Decision

Non-compliance with the rules of a sport (eg football rules) consisting in the use of methods of play forbidden by the rules must be considered conduct contrary to the duty to act in such a way as to avert harm to health (§ 415 of the Civil Code). Consequently, this is a case of a breach of a statutory duty, which leads to liability for damage (§ 420 (1) of the Civil Code). **8**

Comments

In the hearing, the court confirmed that the defendant had indeed violated a legal obligation, since he failed to act in a manner that would prevent the damage from happening. Although the rules of a sports activity are not legally binding regulations, judicial experience has been observing the fact (see Decision No 15/1963) that breaking the rules of a sports activity is a type of conduct that breaches § 415 of the Civil Code. The rules of a sports activity are comparable to safety precautions and regulations, which also exist to establish order, as well as possible sanctions. However, breaking the rules of a sports activity is not regarded as a risk of the game. **9**

The court hearing also confirmed the defendant's fault. Being an experienced player, the defendant must have realised that the methods he used during the game were not permitted by its rules, but despite this fact, he acted in this manner. **10**

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26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No 917/1990-2 of 12 September 1990

<www.vsrh.hr>

Facts

1 V, a former nun, sued the Catholic Church in Croatia and the Sisters of the Sacred Heart of Jesus religious order for damage sustained due to her unlawful release from service. V submitted that, due to the unlawful release from service, her health deteriorated.

2 The court of first instance dismissed the claim and the court of second instance affirmed the first instance decision.

Decision

3 The SCRC affirmed both decisions. The SCRC first established that a deterioration of V's health generally can be regarded as damage. However, the court recalled that, in order for liability to arise, all necessary conditions must be met, the unlawfulness of the wrongful act being one of them. The SCRC opined that V's release from service (for violation of discipline) was conducted in accordance with the rules of the Sisters of the Sacred Heart of Jesus religious order. In this respect, the SCRC concluded that in the case at hand the defendant's conduct was neither unlawful nor causally related to V's damage.

Comments

4 It is an open question how the relationship between a nun and the Catholic Church should be defined; as a contractual, quasi-contractual or non-contractual relationship? The courts acting in this case did not explicitly address this issue. However, in resolving the case at hand, the courts employed tort law rules, thus obviously negating the contractual nature of the relationship between a nun and the Catholic Church.

5 One of the main questions in this case was, did the Catholic Church do anything unlawful, which could have caused the deterioration of V's health? In answering this question, the courts primarily relied on internal rules of the religious order to which V formerly belonged and ultimately concluded that there had not been a violation of these norms when releasing V from service. Hence, non-statutory norms contained in the internal rules of the religious order were the primary source of law, according to which the courts had assessed the appropriateness of A's conduct. Once the courts were convinced that A had acted entirely in accordance with its internal rules, they dismissed V's claim.

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Judgment of the County Court in Zagreb No Pn-7434/05 Gžn-1606/11 of 19 July 2011
Unreported

Facts

V was injured in the course of a football match, where he acted as a referee, when guest players attacked him during the match. V sued A, the host team which, according to V, failed to organise the match in accordance with the relevant rules. The court of first instance dismissed V's claim opining that A took all necessary measures provided by the rules of football matches issued by the Croatian Football Association and the rules of competition for the championship in the 1st, 2nd and 3rd leagues of Zagreb issued by the Zagreb Football Association, notably it organised a steward service consisting of ten persons, as was required by the said regulations, who promptly reacted to the attack. Hence, according to the court of first instance, A's actions were not unlawful since it acted precisely as was required by the said regulations. 6

Decision

The County Court in Zagreb reversed the first instance decision arguing that A has not acted entirely in accordance with the relevant rules. The County Court in Zagreb did not dispute that A had organised a steward service in accordance with the relevant regulations. However, the County Court in Zagreb also noted that the rules of football matches require organisers of football matches to conduct the organisation in accordance with the rules on 'peaceful public assemblies', which, according to the County Court in Zagreb, A failed to do. For this reason, the County Court in Zagreb held that A had violated the relevant regulations of national and regional football associations which rendered its conduct unlawful and consequently it awarded V damages. 7

Comments

The County Court in Zagreb and the court of first instance obviously disagreed as to whether or not V had acted unlawfully. However, there was no disagreement whatsoever between these two courts as regards which rules to apply in assessing whether A acted unlawfully; both courts employed the rules of football matches issued by the Croatian Football Association and the rules of competition for the championship in the 1st, 2nd and 3rd leagues of Zagreb issued by the Zagreb Football Association, hence, non-statutory rules issued by civil associations. By making use of these rules in the course of assessing the appropriateness of A's actions, the courts acknowledged that, when it comes to regulating actions of persons who take part in the organisation of football matches, the primary source of regulation are 8

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non-statutory rules issued by competent civil associations such as national and local football associations.

9 Even this case clearly shows how much importance Croatian courts attach to non-statutory rules when the appropriateness of people's behaviour is assessed. This trend should, however, come as no surprise. It only proves that nowadays in democratic societies the state does not attempt to regulate each aspect of social life but instead it leaves numerous social relations to be governed by non-statutory rules issued by the civil, non-governmental sector.

Judgment of the County Court in Zagreb No Pn-6472/00 Gžn-2882/07 of 15 September 2009

Unreported

10 For facts and decision see 2/26 nos 14–15.

Comments

11 A number of issues raised in this case concerning misconduct warrant comment.

12 First, as is clearly obvious, in the course of determining whether the hospital acted unlawfully, the courts made use of several legal, statutory and non-statutory sources. As the court of first instance determined (and the County Court affirmed), although the hospital never checked whether the blood transfused to V contained the hepatitis C virus, the hospital's conduct was assessed as appropriate since at that time there was no statutory obligation to test donated blood for hepatitis C. Hence, the courts held that the hospital acted in accordance with the legislation applicable at the time. The County Court, however, went even further and found that the hospital also acted in accordance with other legal sources, namely non-statutory rules of the medical profession. The County Court opined that, by transfusing blood acquired through regular channels of distribution (from the Institute for Blood Transfusion), the hospital acted in accordance with the rules of the medical profession. Hence, as was clearly demonstrated in the case, in determining whether a tortfeasor acted unlawfully or not, courts in Croatia do not only assess a tortfeasor's actions against the requirements of the applicable statutory rules but also check whether its actions corresponded to the requirements imposed by other, non-statutory rules, in this case the rules of the medical profession. Only if satisfied that a tortfeasor's behaviour corresponded to both governing statutory and non-statutory rules, will the court free a tortfeasor from liability due to a lack of unlawfulness of its conduct.

13 This position is rather common in Croatian law, since art 10, para 3 of the COA generally requires every professional to observe the respective rules of its profession in its conduct. However, this position is particularly strengthened in the medical

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profession where sectorial regulation specifically requires medical professionals to observe professional standards. Pursuant to art 2, point 5 of the Medical-Biochemical Profession Act,[1] medical professionals are required to promote dignity and responsible professional behaviour by respecting applicable regulations, rules of the profession and codes of medical ethics and deontology. Based on this, Croatian legal and medical theory is unanimous in its position that a doctor acts unlawfully if his/her actions are contrary to applicable regulations, rules of the medical profession and ethical and deontological standards accepted in the medical profession.[2]

14 Second, the decision of the County Court in Zagreb clearly shows that sometimes there is a thin line between unlawfulness and fault or that even sometimes this line is blurred.[3] The court of first instance established that there was no unlawfulness in the hospital's actions, since relevant statutory provisions had not required that the transfused blood be checked for the hepatitis C virus. In other words, the court of first instance established that the hospital had not violated any laws. The County Court in Zagreb upheld such reasoning but concluded that – due to the fact that the hospital acted entirely in accordance with statutory rules as well as non-statutory rules of the medical profession – there was no *fault* on the side of the hospital. Hence, it appears that the County Court in Zagreb equalised the observance of the relevant rules with a lack of fault. Although the County Court did not elaborate on this viewpoint any further, it seems that it resulted from an application of the concept of due care to the case at hand.

15 Pursuant to art 10 of the COA, which regulates a standard of due care, if a person acts in the field of his/her professional activity, he/she must observe the standard of a good expert, meaning he/she must act with increased care, in accordance with professional rules and practice.[4] The non-observance of the due care standard is defined as negligence, ie a type of culpable behaviour, and accordingly a person who does not observe the required standard of due care is deemed to have acted negligently.

16 The County Court's finding that there was no fault in the hospital's actions was most probably influenced by the court's conviction that the hospital observed all the

1 NG 121/03, 117/08.

2 *P Klarić*, Građanskopravna odgovornost za liječničku grešku [Civil Law Liability for Medical Errors], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 32 f; *J Škavić*/*D Zečević*, Komplikacija i greška – sudskomedicinski pristup [Complications and Errors – a Forensic Approach], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 24 f; *I Crnić*, Odštetno pravo [Tort Law] (2008) 396 f; *H Vojković*, Građanskopravna odgovornost za liječničku pogrešku – doktorska disertacija [Civil Law Liability for Medical Errors – doctoral thesis] (2013) 140 f.

3 See also 2/26 nos 9–13.

4 See 1/26 no 9.

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professional rules and practices, which, in other words, meant that it acted with due care. This position of the County Court resonates with the position taken in legal literature that, due to the above-mentioned particularities of the medical profession, in cases of medical liability, it is often difficult to make a distinction between unlawfulness in an objective sense from fault.[5]

17 Third, as already explained,[6] this case clearly suggests that the so-called *neminem laedere* principle, embedded in the COA, does not play a decisive role in determining whether a tortfeasor acted unlawfully, meaning that the mere fact that a person inflicted damage to another person will not automatically imply the liability of the former.

18 Finally, it must be recognised that this decision has not been particularly instructive as to the implications of the concept of 'medical profession'. The County Court found no liability on the side of the hospital because it established, amongst others, that the hospital undertook medical treatment which is 'accepted by the medical profession'. The County Court did not, however, explain this notion in any detail. For example, who defines which standards are accepted by the medical profession, and who is included in the term 'medical profession'? Furthermore, does the standard 'accepted by the medical profession' imply that particular medical treatment is accepted by the whole medical community, or is it sufficient that only a majority of the medical profession accepts this treatment? Moreover, what happens if medical treatment, which is accepted by only a minority of the medical profession is given? Finally, what if medical treatment commonly accepted by the medical profession does not meet the standards of safety of the community at large? Unfortunately, none of these questions were addressed in this decision. However, in addressing some of these issues, legal literature may be of assistance.

19 According to legal literature, doctors should first and foremost apply generally accepted rules of the medical profession, ie rules which are accepted by the majority of professionals. However, even the rules of the medical profession which are only accepted by a minority can be applied, provided that they are confirmed, attested and applied in medical practice.[7] If a doctor uses a method or applies professional rules accepted only by a minority, liability may arise only if legal causation between applying this method and the damage is established, ie if it is proven that damage occurred because of the application of exactly this method or professional rule.[8] A

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5 See also *H Vojković*, Građanskopravna odgovornost za liječničku pogrešku – doktorska disertacija [Civil Law Liability for Medical Errors – doctoral thesis] (2013) 129 f.

6 See 2/26 no 16.

7 *P Klarić*, Građanskopravna odgovornost za liječničku grešku [Civil Law Liability for Medical Errors], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 32 f; *I Crnić*, Odštetno pravo [Tort Law] (2008) 399 f.

8 *I Crnić*, Odštetno pravo [Tort Law] (2008) 398.

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doctor will undoubtedly have acted unlawfully if he/she uses a method which is unknown in medicine.[9] In the case of a plurality of available professional rules, a doctor should resort to the principle of 'safer way', meaning he/she should apply rules which are safer for the patient.[10] Finally, it is worth mentioning that applying commonly used rules or methods will not absolve a party from liability if it is proven that these commonly used rules and methods are 'substandard',[11] ie if they do not meet standards of safety of the community at large.

27. Slovenia

Judgment of the Higher Court in Celje (Sodba Višjega sodišča v Celju) Cp 378/2012, 4 October 2012

<http://www.sodnapraksa.si/?q=id:2012032113064321&database[SOVS]=SOVS&database[IESP]=IESP&database[VDSS]=VDSS&database[UPRS]=UPRS&_submit=išči&page=0&id=2012032113064321> (25 August 2015)

Facts

The plaintiff suffered material and non-material damage when the defendant, in a football game, tried to take the ball from behind him with a high kick. The defendant thus struck the plaintiff's leg with his foot, so that he suffered a fracture of the left shin. The court of first instance decided that the defendant's culpable liability was shown since he played contrary to the rules of play of football. Tackling with a high kick in the immediate vicinity of an opponent is not allowed by the rules of football, especially if an opponent's tackle can also be expected. 1

Decision

The higher court confirmed the judgment of the court of first instance. It stressed that the defendant played contrary to the rules of play of football. When, behind the plaintiff, he tried to take the ball from the rear with a high kick, he not only committed a football violation, he also played recklessly. The higher court stated that the 2

9 *P Klarić*, Građanskopravna odgovornost za liječničku grešku [Civil Law Liability for Medical Errors], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 33.

10 *P Klarić*, Građanskopravna odgovornost za liječničku grešku [Civil Law Liability for Medical Errors], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 32f.

11 *J Škavić/D Zečević*, Komplikacija i greška – sudskomedicinski pristup [Complications and Errors – Forensic Approach], in: Građanskopravna odgovornost u medicini [Civil Law Liability in Medicine] (Hrvatska akademija znanosti i umjetnosti 2008) 28.

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rules of football do not allow directing the ball with the sole of the foot, regardless of who has possession of the ball at the time. By playing in such a way, the defendant behaved negligently, because of which his culpable damage and liability arose.

Comments

3 In addition to legal rules, the standard of responsible behaviour is often defined by autonomous rules. Rules of sports adopted by various sports associations are typical examples of such rules. Although these rules only directly bind members of the sports association and cannot replace the law, they are a powerful indicator of how a careful sportsperson should behave. The purpose of the rules is mainly to ensure development of fair play in sport. They also serve the purpose of ensuring that the combatative element, an integral property of individual sports, is as well balanced as possible with protection of the life and health of players and to prevent injuries being caused by dangerous play, roughness and unsporting behaviour.[1]

28. Romania

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) Administrative and Fiscal Section, Decision No 366 of 2 February 2005

<http://legeaz.net>

Facts

1 A patient was brought to the cardiovascular emergency hospital of the city of Iași on 14 August 2009. The patient received medical treatment two and half hours after arrival and after 15 minutes of treatment he suffered cardio-respiratory arrest. After resuscitation, he was transferred to another ward in the hospital, where after two weeks of improvement, he suddenly presented signs of infection and his health drastically worsened. He unsuccessfully sought clarification of the causes of the deterioration in his health and the signs of infection on his skin. He was examined by a specialist only after 72 hours had passed and was diagnosed with severe sepsis. On 31 August the patient died of septic shock. The wife of the patient filed a complaint for malpractice at the Medical Association of Bucharest against the doctor who had treated her husband. The Medical Association of Bucharest rejected the complaint on the ground that such an illness as the patient had presents a high risk of mortality, according to medical literature. The wife appealed this decision at the Romanian Medical Association, but her appeal was rejected. This second profes-

1 *D Možina*, Odškodninska odgovornost za poškodbe pri športu [Damage liability for injuries in sport], in: V Bergant Rakočević (ed), Šport & pravo [Sport and law] (2008) 276.

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sional decision was appealed to the Tribunal of Bucharest, which declined its competence in favour of the Court of Appeal of Bucharest, which annulled the two professional decisions and ordered the Romanian Medical Association to re-examine the case. The Court of Appeal established that, according to art 666 of Law no 95/2006, damages cannot be sought for injuries suffered by the patient when medical assistance was provided in the interest of the patient absent complete investigations or lack of knowledge about the anamnestic data of the patient due to the emergency of the medical assistance and the patient was not able to cooperate during the medical assistance due to the circumstances. The Court of Appeal based its reasoning on the provisions of arts 655 and 666(1) and (2) of Law no 95/2006 and established that the defendant had complied with the requirements stemming from uniform therapeutic standards and standards of medical assistance in similar cases, emphasising that, during the provision of medical assistance, medical personnel are obliged to apply the therapeutic standards established in specialised practice guides approved at national level or, absent such guides, the standards accepted by the medical community of that area of specialisation. The wife of the patient challenged this finding before the highest court.

Decision

The ÎCCJ established that Law no 95/2006 contains distinct provisions and procedures on administrative liability (arts 422–451) and the civil law liability of medical personnel (arts 642 and 665). Whereas administrative liability is monitored by the Disciplinary Commission of the Medical Association, the Commission for monitoring the medical professional competence within the Ministry of Health examines malpractice cases. Thus, the plaintiff addressed the complaint for malpractice to the Medical Association, her intent being, in the opinion of the ÎCCJ, to establish the administrative liability (disciplinary liability) of the doctor. However, the Court of Appeal based its reasoning on the provisions of arts 655[1] to 665(1) and (2)[2] on civil **2**

1 Article 655 of Law no 95/2006 on reform of health care:
In providing health assistance/medical care, medical personnel are obliged to apply the therapeutical standards established by practice guidelines of the respective specialisation, approved at national level or absent such guidelines, the standards recognised by the medical community of the respective specialisation.

2 Article 665 of Law no 95/2006 on reform of health care:
(1) The rights of persons injured or killed as a consequence of inadequate medical assistance may be exercised against those involved directly or indirectly in the provision of the medical assisance.
(2) These rights may also be exercised against the legal persons who provided the equipment, medical tools and medicines used, within the limits of the instructions of use and qualified presciptions of application, according to their obligations undertaken in the supply agreements.

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liability for malpractice, although the plaintiff did not seek damages, meaning that the court in fact did not deal with the subject matter of the complaint – the issue of administrative liability. For this reason, the ÎCCJ returned the case to the court of first instance to re-analyse the case according to the claim submitted by the plaintiff.

Comments

3 Although the decision of the highest court clarified only procedural aspects and did not deal with the issue of damages, the case is more than suggestive for situations where neither the plaintiffs nor the courts are sure about the legal basis of cases on medical liability. It reflects the fact that there is not yet settled case law in Romania on medical liability, although the legal basis has been in force for more than ten years. The Romanian legislation on medical liability (art 655 of Law no 95/2006) integrates the norms of good practice as criteria to assess misconduct during the provision of health services.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

1 See above, 4/30 nos 1–24.

31. Comparative Report

1 As has been shown, an important role is played by statutory norms in establishing misconduct.[1] The same is also true for non-statutory norms, as demonstrated by the fact that all of the jurisdictions submitted reports on the issue and the relevance of these sorts of rules is frequently noted.[2] Estonia and – due to the nature of the very system – the European Union represent the only exceptions.[3]

2 Unlike statutory norms, by which a state authority determines what conduct it considers to be required,[4] non-statutory norms are in principle not rules which are

1 Comparative Report (4/31 no 1ff).

2 See eg Germany (5/2 no 3); Austria (5/3 no 3); France (5/6 nos 3, 7); cf also the Netherlands (5/8 no 3): 'not decisive, but a relevant indicator for unlawfulness'; Portugal (5/11 nos 7, 10); Denmark (5/16 no 3); Croatia (5/26 no 9).

3 Cf European Union (4/29 no 1).

4 See Comparative Report (4/31 no 2).

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legally binding,[5] but instead represent the sum of the expectations on conduct common in the relevant field of activity. Particular importance attaches to them in establishing the required standard of conduct for that very reason.[6] In respect of occupational standards particularly, this can be justified insofar as it seems entirely appropriate to hold people or industries to standards they themselves set, accept and/or claim to maintain.[7] Reference can be made, for example, to a reasonable and generally accepted practice;[8] a *lex artis* 'generally followed';[9] practice guides approved at national level;[10] or a reasonable body of professional opinion withstanding logical scrutiny[11] in identifying a relevant standard. Whatever defining limits are put in place, however, emphasis is also placed on the fact that room must sometimes be left for development, particularly in the interests of medical innovation and good care, for example.[12]

The relevance of non-statutory provisions is sometimes explicitly established by a statutory legal rule. This is true, for example, of Romanian medical liability, where legislation establishes that norms of good practice can be used for assessment,[13] but also for the PETL, given that 'rules' in the sense used in art 4:102(3) PETL must be understood to include both statutory and non-statutory norms.[14] Italian law exhibits a peculiarity in this respect, insofar as there is an explicit statutory rule that compliance with the guidelines on good medical practice excludes the possibility of criminal responsibility. It remains unclear at present whether and to what extent this will impact on civil law liability.[15] Often, however, non-statutory norms are incorporated without reference to an explicit statutory norm – see for example France,[16] Poland[17] **3**

5 Cf Germany (5/2 no 4): 'some but no formal and generally decisive influence on the application of general tort law'; Switzerland (5/4 no 5).

6 See eg Austria (5/3 no 3); Belgium (5/7 no 5 ff); cf also England and Wales (5/12 no 3 ff); Lithuania (5/22 nos 1 ff, 6); Slovenia (5/27 no 3).

7 Cf eg the Netherlands (5/8 no 2).

8 Cf Switzerland (5/4 no 12); England and Wales (5/12 no 7); Denmark (5/16 no 3); Latvia (5/21 nos 3, 6): 'reasonable commercial practice'.

9 Switzerland (5/4 no 12).

10 Romania (5/28 no 1).

11 England and Wales (5/12 no 4).

12 See Switzerland (5/4 no 12); the Netherlands (5/8 no 2); Finland (5/19 no 3): 'good reason ... for the deviation'.

13 Romania (5/28 no 3). Cf further Portugal (5/11 no 7): Convention on Human Rights and Biomedicine; Croatia (5/26 no 13): Medical Profession Act.

14 PETL/DCFR (4/30 no 6 f).

15 Italy (5/9 no 3).

16 France (5/6 no 3), though contrast, 5/6 no 7, the inclusion of the medical code of conduct in the Public Health Code.

17 Poland (5/23 no 11).

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or the DCFR.[18] Naturally, it is also conceivable that the legislature or some other (administrative) state authority could explicitly declare such non-statutory rules binding, and so convert them in practice into protective provisions.[19]

4 As regards relevant contexts, sports rules[20] – for example for skiing[21] and football[22] – and professional standards are of particular practical importance. As far as professional standards are concerned, those applicable to doctors and hospitals are accorded paramount significance.[23] Of course, such standards are also relevant in other professional contexts, including engineering, architecture, and the legal professions,[24] as well as accountancy,[25] company board membership,[26] and for journalists and the mass media[27] or professional jockeys.[28] It is also important to mention safety regulations[29] or technical directives, such as Austria's so-called ÖNORMEN (Austrian standards): non-binding standards issued by the Austrian Standards Institute and concerning eg construction or electrical or mechanical engineering.[30] Departmental guidelines and governmental policy rules are also relevant where breach of them can lead to liability.[31] In the absence of relevant statutory rules, non-statutory rules can also, lastly, determine the standard applicable to road users.[32] In this context, a Croatian case concerning a nun is also interesting – the lawfulness of her dismissal was evaluated for tort purposes by reference to the internal rules of her religious order.[33] To some extent the concept of a non-statutory rule is understood very broadly, and for example in Belgium it is noted that 'a rule, of whatever type' can be used to set the requisite behavioural standard.[34]

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18 PETL/DCFR (4/30 no 19).

19 See Austria (5/3 no 3); Belgium (5/7 no 5).

20 Switzerland (5/4 no 12): including rules for other 'leisure activities'; the Netherlands (5/8 no 3); Italy (5/9 no 4); Spain (5/10 no 1 ff); Norway (5/17 no 1 ff); Czech Republic (5/24 nos 7 ff, 10); (Slovakia 5/25 no 8 f); Slovenia (5/27 no 3).

21 Austria (5/3 no 1 ff); Belgium (5/7 no 6); Czech Republic (5/24 no 1 ff); Slovakia (5/25 no 4 ff).

22 Germany (5/2 no 1 ff); Slovakia (5/25 no 7 ff); Croatia (5/26 no 6 ff); Slovenia (5/27 no 1 ff).

23 Switzerland (5/4 no 1 ff); Greece (5/5 no 3 ff); France (5/6 no 7); the Netherlands (5/8 no 1 ff); Italy (5/9 no 1 ff); Portugal (5/11 nos 1 ff, 7); England and Wales (5/12 no 1 ff); Latvia (5/21 nos 8 ff, 15); Lithuania (5/22 no 1 ff); Croatia (5/26 no 10 ff); Romania (5/28 no 1 ff).

24 Switzerland (5/4 no 12).

25 France (5/6 no 4 ff); Denmark (5/16 no 1 ff); Poland (5/23 no 1 ff).

26 See Latvia (5/21 nos 1 ff, 6): taking into account 'reasonable commercial practice'.

27 Greece (5/5 no 7); Belgium (5/7 no 1 ff); Italy (5/9 no 4).

28 France (5/6 no 1 ff): 'horse-racing code'.

29 England and Wales (5/12 no 6 ff); Norway (5/17 no 1 ff); Finland (5/19 no 1 ff).

30 Austria (5/3 no 3).

31 Ireland (5/14 nos 1 ff, 4).

32 Ireland (5/14 no 4): Rules of the Road, a guidance booklet by the Road Safety Authority; Malta (5/15 no 1 ff): Highway Code, a non-statutory instrument.

33 Croatia (5/26 no 1 ff).

34 Belgium (5/7 no 5).

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In those jurisdictions in which a strong distinction between wrongfulness and fault is made, non-statutory rules only concern the question of wrongfulness;[35] failure to conform to non-statutory norms can there be indicative of wrongfulness.[36] Thus, even where there is a breach of a non-statutory rule, a claim can of course still fail for lack of fault. This is demonstrated by a German case in which it is noted that a breach of a rule is an indicator of the wrongfulness of the conduct, but that, for example, a footballer cannot be reproached for a slight breach committed without fault.[37] In Austria, by contrast, a claim would frequently already fail on the question of wrongfulness for a slight, practically unavoidable breach of the rules.[38] As with breach of statutory norms,[39] breach of non-statutory norms can, furthermore, lead to a presumption of fault.[40] In particular, breach of a non-statutory rule or custom is regarded as relevant to both the fault and wrongfulness questions in those jurisdictions where only a limited or blurred distinction is made between the two.[41] Where unlawfulness is not deployed as a separate concept, the non-statutory standard can relate only to fault, as for example in France and Belgium.[42] **5**

The relationship between statutory and non-statutory duties is also seen in quite different ways. Sometimes it is said that non-statutory duties should only be considered when there are no relevant statutory provisions.[43] Sometimes, however, it is said that liability is only denied where the defendant has complied with both the statutory and the non-statutory rules.[44] In a Slovakian case it is, moreover, explicitly noted that liability cannot be denied solely on the basis that the defendant had relied on there being no explicit statutory ban on his dangerous form of activity.[45] Finally, the court's margin of discretion is also highlighted – as for example in Finland[46] – alongside emphasis that the breach of a non-statutory norm does not always render a defendant liable,[47] nor compliance with such a norm always ex- **6**

35 Germany (5/2 no 2); Austria (5/3 no 3).
36 Germany (5/2 no 3): not fault, however.
37 Germany (5/2 no 3).
38 Austria (5/3 no 3).
39 See Comparative Report (4/31 no 4).
40 Portugal (5/11 no 13); contrast Germany (5/2 no 3).
41 See Greece (5/5 no 4); Portugal (5/11 no 7). Cf also Poland (5/23 no 6), where the court does not distinguish fault and wrongfulness for the application of a non-statutory standard, and Croatia (5/26 nos 14–16), with courts differing on fault or unlawfulness for the same facts.
42 France (5/6 no 3); Belgium (5/7 no 5).
43 Czech Republic (5/24 no 7). It must nevertheless be remembered that statutory norms are often only understood as minimum standards, see Comparative Report (4/31 no 5).
44 Croatia (5/26 no 12).
45 Slovakia (5/25 no 2).
46 Finland (5/19 no 3 ff).
47 This results in particular from the respective function of the non-statutory norm and its protective purpose, see no 7.

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clude liability.[48] All the same, non-compliance with non-statutory rules is often seen as a (strong) indicator of the relevant misconduct.[49]

7 Just as with statutory norms,[50] the protective purpose of the norm (*Schutzzweck*) must also be considered with non-statutory norms,[51] as the question concerns the teleological interpretation of the rule – that is, its aim – and the relevance of that interpretive technique is not, therefore, limited to statutory provisions. The significance of protective purpose is demonstrated exemplarily by a French case where a breach of the accountants' code of conduct in the case at hand could trigger disciplinary sanctions, but the rule did not have the purpose of protecting competitors from unfair business practices.[52] The report for Finland also makes plain reference to the diverse functions which non-statutory rules can serve in light of the 'Guidelines for Journalists', which explicitly state that they are not intended for use in determining civil liability.[53] Moreover, it should be noted that the relevance of non-statutory norms may be variable with the particular substantive context. This is very explicit in the French report: non-statutory norms are very important in the medical context, but the courts are more equivocal on their relevance in the field of accountancy.[54]

8 As with statutory norms,[55] compliance with the relevant non-statutory norms does not per se exclude the possibility of liability; in many cases they are instead to be understood merely as a minimum standard,[56] as, for example, where the rules in a particular industry set standards of conduct that are too low[57] or where a more demanding standard of conduct is determinative in the particular circumstances.[58] The latter may be the case, for example where the defendant possesses special subjective knowledge[59] or an overriding community standard of safety exists.[60]

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48 Instead these are often regarded as minimum standards, see no 8.
49 See eg Germany (5/2 no 3 f); France (5/6 no 3); the Netherlands (5/8 no 3); Norway (5/17 no 3).
50 See Comparative Report (4/31 no 3).
51 See eg Finland (5/19 nos 3, 5 f); Slovenia (5/27 no 3).
52 France (5/6 nos 4 ff, 8); cf also Malta (5/15 nos 6, 8): 'immediate cause of the accident'.
53 Finland (5/19 no 5 f).
54 France (5/6 no 7 f).
55 See Comparative Report (4/31 no 5).
56 Cf Italy (5/9 no 3).
57 Finland (5/19 no 4).
58 Belgium (5/7 no 8); Sweden (5/18 no 3); see also England and Wales (5/12 no 8 ff); Scotland (5/13 no 4 f); Norway (5/17 no 1 ff).
59 See England and Wales (5/12 no 7).
60 Eg Croatia (5/26 no 19).

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D. An Objective or Subjective Standard?

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6. Special Skill or Expertise

2. Germany

Bundesgerichtshof (Federal Supreme Court) 10 February 1987, VI ZR 68/85

NJW 1987, 1479 with note *E Deutsch*

Facts

The claimant injured his right leg when, on a Sunday, he was the goalkeeper in a football match. He was immediately brought to the defendant's hospital where a surgeon in his first year was on duty. He diagnosed a broken lower leg and administered the initial treatment but he omitted to take a specific measure which, in international medical literature, was recommended. Two days later, he operated on the leg under the supervision of an experienced surgeon. Due to an infection of unclear origin, the lower leg had to be amputated after several further operations. The claimant sued the hospital and its head doctor. **1**

Decision

The court, which remanded the case because of open facts, decided that the head doctor, whose direct involvement was disputed between the parties, would have been liable in tort (§ 823 (1) BGB) if he had seen the patient. He or, if he had delegated this task, his deputy doctor had in any event the duty to supervise the young surgeon and to control his diagnosis and first treatment on the next – Monday – morning. With respect to the fault standard, the court explicitly stated that the head doctor or his deputy had at least to have the knowledge and skills of an experienced specialist; if the head doctor personally possessed even more advanced knowledge and skills, they would form the standard to which the chief doctor had to conform. **2**

The court further stated that the hospital would be liable in tort for any error of the head doctor without any possibility of excuse because §§ 30–31 BGB applied to him. These provisions identify a corporation with its organs – allowing no excuse – and a head doctor holds the position of an organ of the corporation running the clinic. The hospital would also be liable in tort, however, for any error of a deputy doctor with the possible excuse that it had selected and controlled the deputy doctor in a sufficient way (§ 831 BGB). In contract, a hospital is held liable without excuse for errors of its staff members, however, at the time of the accident, only for the pecuniary damage.[1] **3**

1 This rule was changed by legislation in 2002 when non-pecuniary damage was no longer recoverable only in tort but also in contract.

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Comments

4 The decision raised the standard of care for persons with special knowledge and skills. They not only have to comply with the generally required standard of a reasonably experienced and capable person of the specific profession. They also have to meet their personally higher standard. Extraordinary specialists must observe a particularly strict standard of care.[2] On the other hand, the decision confirms that clinics have to organise reasonable supervision for beginners.[3] This requires a hierarchy of control where, on the lower levels, an excuse is possible if sufficient control can be proved, whereas on the top levels, no such excuse is admitted. Beginners themselves are liable if they take on tasks for which they know that they still lack sufficient knowledge and skills or where their knowledge is such that they could already foresee dangers for patients.[4] At the start of their careers, surgeons must always be assisted by an experienced surgeon.[5]

5 The main content of the decision is, however, to subject specialists to particularly strict duties of care.

3. Austria

Oberster Gerichtshof (Supreme Court) 18 October 2006, 9 Ob 98/06m
ecolex 2007/107

Facts

1 The claimant, a property developer, commissioned the defendant, a licensed builder, to plan a town house complex. The defendant suggested and ultimately implemented a thermo-roof, which was also intended to assume the function of the otherwise necessary 'under-roof'. Contrary to the builder's representations, however, this construction did not work as planned due to the special climatic conditions, resulting in water leaking into the roof construction. The claimant sought compensation for renovation of the housetop.

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2 Supporting this view: *E Deutsch* in a note to this decision; see further in this sense *S Grundmann* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB (7th edn 2016) § 276 no 56; *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 276 no 15; indirectly also BGH NJW-RR 1990, 406 (where the plaintiff did not allege special knowledge of the defendant).

3 See BGH NJW 1988, 2298; *H Sprau* in: Palandt BGB (73rd edn 2014) § 823 no 146.

4 See BGH NJW 1988, 248.

5 BGH NJW 1992, 1560.

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Decision

The case was remitted to the court of first instance for completion of proceedings. 2
The Supreme Court held that the defendant as a 'planning builder' was to be treated like an architect and subject to the expert's standard of care (§ 1299 ABGB), regardless of whether he actually had the qualifications of a builder or of an architect. He was responsible for the special skills necessary to fulfill the contractual obligations assumed. Thus, if the builder undertook the task of planning a roof construction, he must be deemed to possess the knowledge required for such a job, even if it was part of another specialist field and went beyond the typical work of a builder. Whether the average 'planning builder' should have had doubts concerning the omission of the 'under-roof' had yet to be assessed by the court of first instance.

Comments

As fault relates to a judgment of the specific tortfeasor, in principle a subjective stan- 3
dard must be applied (§ 1297 ABGB; see also 1/3 no 5). Hence, the affirmation of fault depends on whether the individual offender would have been able to act differently on the basis of his skills and knowledge.[1] However, according to § 1299 ABGB,[2] an objective standard of care is applied – in tort law as well as under contractual liability (as in the present case) – as far as experts are concerned: they are responsible for skills typical of their profession and may not argue that their personal abilities are below average. This is justifiable given the fact that, firstly, a person who carries out an activity requiring special skills, although he does not possess them, creates a particular danger for his contractual partners as well as third parties. Secondly, such an expert can be expected to avoid danger in the activity without greater difficulty and thirdly, the expert earns a profit through his activity. In this respect, the strict standard of liability serves deterrent and preventive purposes.[3] Yet even experts may

1 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 7; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/1; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 15 f.

2 § 1299 ABGB: 'Whosoever publicly professes an office, art, business or craft, or voluntarily and without necessity undertakes a task the execution of which requires particular expertise or extraordinary diligence, thereby holds himself out as capable of the necessary diligence and the extraordinary expertise required; he is therefore liable for their absence. If, however, the person assigning the task to him knew about his inexperience, or ought to have known about it had he exerted proper care, the latter is also guilty of negligence.' Translation by *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law, Basic Texts (2011) § 1299 Austrian Civil Code.

3 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 16 ff; *idem*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/89.

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prove that they were subjectively incapable of complying with the objective standard of care, eg due to unconsciousness.[4]

4 The term 'expert' is very wide. Whoever carries out an activity requiring special skills and knowledge,[5] eg even driving a car, is responsible for having the necessary abilities,[6] for instance those required to acquire the driving licence.[7] However, a higher standard applies to professional drivers.[8] The average abilities typical for the relevant profession are decisive, thus eg an ordinary physician and a specialist consultant[9] face different requirements in respect of the necessary skills, as do a professional fire officer and a volunteer for the fire brigade.[10] Exceptional abilities are not essential.[11] On the other hand – as in the present case – application of the objective standard does not depend on a person actually being an expert, but rather on his undertaking a corresponding activity.[12] A particular negligence in assuming the task (*Übernahmsfahrlässigkeit*) is not a prerequisite for liability.[13]

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 22 May 2007
ATF 133 IV 158

Facts

1 V1, who had a licence as a trainee pilot, was accompanied on a helicopter flight by the pilot inspector and commander on board, A1. The latter was at the same time director of the company, which operated the helicopter on a commercial basis. V2 and V3 were passengers. During the flight, a warning light indicating a problem

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4 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 1997) § 1299 no 5; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1299 no 1.

5 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1299 no 5 with further references.

6 See OGH 2 Ob 240/65 = SZ 38/139; OGH 8 Ob 1/87 = ZVR 1988/66; OGH 2 Ob 51/90 = ZVR 1991/5.

7 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1299 no 33.

8 Cf OGH 2 Ob 110/64 = ZVR 1964/285; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1299 no 5.

9 OGH 1 Ob 504/58 = JBl 1960, 188; OGH 14 Ob 140, 141/86 = JBl 1987, 670.

10 OGH 1 Ob 35/87 = SZ 60/236.

11 OGH 2 Ob 376/61 = SZ 34/153; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1299 no 2.

12 OGH 9 Ob 98/06m = ecolex 2007/107; OGH 6 Ob 282/70 = SZ 43/221; OGH 1 Ob 262/98f = NZ 2000, 236.

13 OGH 5 Ob 536/76 = SZ 49/47; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1983) 183; differing *F Harrer* in: M Schwimann (ed), Praxiskommentar zum ABGB VI (3rd edn 2006) § 1299 no 2 and OGH 8 Ob 651/89 = SZ 62/146 if exceeding professional competence.

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with the engine lit up. After landing at Sion Airport, A1 checked the engine. A2, the director of the company responsible for the maintenance of the helicopter, was absent from his office. A1 called him by telephone and asked him for advice. As recommended by A2, A1 correctly cleaned a part of the engine.

Some time after the new start and at a height of about 70 metres, the engine exploded. V1 and V2 required long-term medical treatment V2 suffered permanently injuries to her health. 2

The maintenance book of the manufacturer, which was available to V1 and A1, indicated that, after cleaning the engine and before a new start, it is necessary to keep the engine running for 30 minutes and to check whether the warning light lit up again. A2 had not informed A1 of this procedure and A1 had not respected it. 3

V1 and his daughter V2 filed claim against A1 and A2. The Penal Court of the Swiss Confederation found A1 and A2 guilty, but did not impose a punishment, rather ordering them to repair the entire damage V1 and V2 had suffered. 4

Decision

The Supreme Court rejected A2's appeal. 5

The Supreme Court stated that the duty of prudence is violated if a party could have realised that, at the moment of the facts, his behaviour could endanger someone. The court pointed out that the extent of the duty of diligence depends on the personal situation of the party, ie his knowledge and capacities. 6

In respect to A1, A2 held a position of guarantor. Based on the maintenance contract, he had a duty to protect A1's interests in the form of a duty to control. As he did not prevent A1 from continuing the flight, he violated his duty. A2 should have given A1 the information regarding the knowledge one could expect from a technician of his degree of professional status, or refuse to answer the questions A1 had asked him. When answering, A2 had to act with the care one could expect from a specialist. The judges added that, in matters of air safety, the duty of diligence is particularly high. 7

A2's argument that he had informed A1 in the course of the phone call that he did not have the manufacturer's maintenance book at hand does not diminish A2's liability. However, as the commander on board, A1 should have taken this information into account and he should have asked A2 to consult the book or he should have contacted another specialist. Not to have done so amounts to negligence on A1's part. 8

Comments

For comments see ATF 133 III 121 (2007) at 6/4 nos 17–21. 9

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Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 9 February 2007
ATF 133 III 121

Facts

10 In 1993, A successfully replaced the left hip of 58-year-old V. Three years later, A was instructed to replace V's right hip. During surgery, a nerve was damaged which led to a weakness of V's right leg. As a result, she had to use a crutch and could not stay on her feet for more than 45 minutes.

11 V filed a claim against A accusing him of having violated the *leges artis* and of failing to inform her sufficiently about the risks[1] of the operation. She sought compensation of CHF 595,000 (€ 496,000).

12 The two cantonal judges rejected the claim.

Decision

13 The Supreme Court rejected the claim.

14 The Supreme Court referred to the rules on due diligence required of a doctor. This duty is objective, but cannot be fixed abstractly. It depends on the particularities of the case, such as the nature of the intervention and its inherent risks, the margin of discretion, the time and means available, etc. Further, it depends on the particularities of the mandatory (ie the doctor), notably on his formation and his professional capacities. In any case the professional has to act according to the state of the art.

15 The Supreme Court added an interesting terminological remark at this point of the reasoning. The violation of a duty of diligence (*devoir de diligence*) is commonly, but improperly, called a professional fault (*faute professionnelle*). In fact, it is the non-execution or the improper execution of a contractual obligation, which corresponds in contractual law to an improper or a non-execution of a contract, and in tort law to an unlawful[2] act (*acte illicite*). The patient is entitled to damages if the professional 'fault' (unlawfulness) causes damage to the patient and if the physician is at fault. The Supreme Court added also that a doctor is liable for all kinds of fault; this liability is not limited to gross fault.

16 *In casu*, the Supreme Court did not reject the lower court's view, according to which, A had taken all the necessary precautionary measures and did not commit an inappropriate act. The damage caused to the nerve was not due to a professional fault, but rather to a risk inherent to the intervention.

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1 For a detailed article on information and risks, see *M Cantero Perez Muller*, L'information sur les risques, in: D Manaï/C Burton-Jeangros/B Elger (eds), Risques et informations dans le suivi de la grossesse: droit, éthique et pratiques sociales (2010) 45 ff.

2 *F Werro*, La responsabilité civile (2nd edn 2011) 117.

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Comments

The latter case is based on a contractual link between V and A. However, art 99 al 3 of the Swiss Code of Obligations (SCO) states that the tort law norms (art 41ff SCO) apply to fault in contract. Consequently, the considerations of the decision are valuable in contract and in tort. **17**

It is generally accepted and has been for a long time – and repeated in the latter case – that the level of duty of a professional depends on his training and professional capacities. According to an unpublished decision, it even seems to have been admitted since the 1970s that a specialist has to keep his professional training up to date.[3] **18**

The difficulty can arise in determining the required level of competence. It is admitted that a generalist has to have the skills of an average generalist in his field and a specialist the skills of an average specialist.[4] A judge imagines how a *bonus vir* would have acted, for example, if the injuring party were a surgeon, what a surgeon of his class would have done in the same situation, and compares it to the conduct of the injuring party. In penal law, the system is not incomparable.[5] The Supreme Court has, for example, acquitted a locksmith's assistant who had been accused of homicide, because his professional training was not sufficiently advanced to allow him to recognise the dangerousness of a door he had installed.[6] **19**

The comparison between a model and the actual injuring party is the most pragmatic and undisputed way to resolve the problem. However, there is a doctrinal debate on how this practice has to be qualified. Traditionally authors consider that it is a matter of fault.[7] This view is (correctly) contradicted by the present decision, which stresses that a violation of professional duties has to be considered in Swiss law as a problem of unlawfulness and not of fault, although jurists often improperly call such acts a 'professional fault' (*faute professionnelle*, etc). **20**

In fact, a judge treats the generally accepted professional practice which is followed by professionals as extra-statutory rules. These rules have a normative func- **21**

3 'Beim Spezialisten werden höhere Anforderungen gestellt. Der Spezialarzt ist verpflichtet, sich auf seinem Fachgebiet fortzubilden', see ATF 26.01.1971, Husy/X, n.p. cited by *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 213. See also arts 3 and 10 of the Deontological Code of the Swiss Federation of physicians (6.12.2012) <http://www.fmh.ch/files/pdf9/Standesordnung_2013_04_01_frz.sc.pdf>.

4 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 172; contra *C Chappuis*/*F Werro*, La responsabilité civile: à la croisée des chemins, in: SJV Schweizerischer Juristentag (2003, Heft 3) 329.

5 According to art 53 SCO, the civil judge is independent from the penal judge.

6 ATF 122 IV 145 (1996).

7 Among others *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 (4th edn 2013) art 41 nos 172–172a. Partially contra *W Fellmann*/*A Kottmann*, Schweizerisches Haftpflichtrecht I (2012) 184, no 526 ff.

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tion (*Verhaltensnorm*). Consequently, if the behaviour of the injuring party fell below the required standard (standard of a *bonus vir*), the act has to be considered as unlawful. In a second step only, the judge examines whether the injuring party did not conform to the *bonus vir* model due to fault.[8] For example, if an apprentice causes physical damage to a person, this damage would be considered as unlawful (*Erfolgsunrecht*); but if the professional standard of an average apprentice was met, a judge would consider that he was not at fault. In this sense, one could say that the judge applies rather a predominantly objective standard.

5. Greece

Polymeles Protodikeio Larissas (Larissa Multi-Member Court of First Instance) 191/2012

NoV 60 (2012) 1416 = TPCL 5 (2012) 723 = ChrID IB/2012 592 = EllDni 54 (2013) 1458 = Arm 66 (2012) 1256 followed by approving remarks by *S Koumanis*

Facts

1 During a gynaecological operation for the removal of a polyp, the patient's brain was starved of oxygen for 3–4 minutes causing irreversible harm to her, because the defendants (surgeon and anaesthesiologist) neglected to monitor the vital signs of the patient, such as the consistency of the oxygen in the blood, blood pressure, the functioning of the heart, etc. In addition to the lack of monitoring, the use of a pharmaceutical substance additionally contributed to the deterioration of the medical state of the patient, causing permanent and irreversible damage to her brain.

Decision

2 It was held that it was widely known to every doctor that, if one does not provide the brain with oxygen, permanent and irreversible damage occurs. It was also commonly accepted within medical circles that the connection of the patient to a monitoring device which controls their vital signs was absolutely necessary. Therefore, the failure to use such a monitoring device, an omission non-proportional with the experience and the abilities of the doctors, resulted in the patient falling into a coma. Consequently, the doctors were held liable in tort, because they were negligent rather than showing the diligence which an average prudent member of the medical profession should have shown in a similar case under the same conditions and with the same means.

8 For a comparable reasoning in criminal law see ATF 122 IV 145 (1996).

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An additional issue tackled by the court was whether a doctor is liable, al- 3
though he acted with the diligence required of a typical member of his profession, where the damage would have been avoided if he had acted with greater diligence. As stated by the court, it is commonly known that the patient is aware of the greater qualifications of a doctor and is willing to pay a higher remuneration. The court was of the view that the objective criterion must not be altered to a subjective one. Thus, the 'great performance' or the 'special capacities' of the particular natural person (doctor) are not to be taken into consideration. What is only to be taken into consideration is if the said doctor objectively, because of his further (theoretical and practical) specialisation, no longer belongs to the wider circle of doctors but to a smaller circle. If the patient has addressed the doctor not because of his 'exceptional personal capacities' but because of his special knowledge which can be objectively assessed (eg the doctor has titles of special training) or if the doctor himself bases his scientific, professional and economic success on this special knowledge, then, according to the court, the law of civil liability has no other choice but to try to even further specialise the objective criterion of diligence.

Comments

It is recognised in a series of decisions regarding medical malpractice[1] that an 'ob- 4
jective' standard applies, ie one based on norms of reasonable conduct of a person who has the characteristics of the defendant (eg if the defendant is a 'specialist', the characteristics of the average person belonging to the circle of specialists is to be taken into consideration),[2] independent of the characteristics and capacities of the individual defendant.

The Greek legal system follows the objective standard not only in respect of pro- 5
fessionals or experts but for everyone. If an ordinary person could not foresee the unlawful result, there is no unlawful, negligent act, even if the tortfeasor, because of his special capacities, could have foreseen the detrimental result of his behaviour.[3]

1 See, indicatively, AP 1270/1989 EllDni 32 (1991) 765; Athens Court of Appeal 197/1988 EllDni 29 (1988) 1239; Thessaloniki Court of Appeal 1212/1973 NoV 22 (1974) 946; Thessaloniki Adm Court of First Instance 2707/1999 DiDik 2000, 178; Athens Adm Court of First Instance 2628/2004 EpSygkD 2005, 50.

2 Athens Court of Appeal 197/1988 EllDni 29 (1988) 1239; 4964/2008 NoV 57 (2009) 523; Larissa Court of Appeal 554/2009, published at ISSOKRATIS; Thessaloniki Multi-member Court of First Instance 8413/2005 Arm 60 (2006) 1909; *I Karakostas*, Law of Torts (2014) 134.

3 See, among others, *S Koumanis* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 330 no 18; *id*, Arm 66 (2012) 1268.

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6. France

Cour de cassation, Chambre civile 1 (Supreme Court, Civil Division) 13 January 1993
91-11.864, RCA 1993, comm no 136

Facts

1 A young man was severely injured while wrestling with an experienced wrestler in charge of training him. He brought a claim for damages against this man and his insurer. The appellate court granted the claim and the insurer challenged the decision before the *Cour de cassation*, arguing that the experienced wrestler's fault had not been proven.

Decision

2 The *Cour de cassation* affirmed the appellate court's decision. The latter had noted that the older wrestler was very experienced and that he had had a hold on the young man that was not adapted to his skills and that could thus be dangerous. The appellate court had therefore correctly found the defendant to have been at fault.

Comments

3 This case illustrates how special skills or expertise is normally taken into account in assessing one's fault. The *Cour de cassation* and the appellate court suggest that, if the defendant had not been as experienced, to have such a hold on his partner might not have been considered a fault. Given his experience, however, he should have been aware of the risks and he had therefore been negligent.

7. Belgium

Cour d'appel (Court of Appeal) Brussels, 16 January 2003
JLMB 2003, 832

Facts

1 V, a person with a dental problem, more specifically periodontal disease, underwent two successive surgical operations in order to have two wisdom teeth extracted. In the short period of time separating the two operations, the patient expressed his concern to A, his dentist, regarding a loss of sensitivity in his tongue and his ability to taste. A reassured him, stating that such symptoms would disappear in a few months. Ultimately this was not the case and an expert concluded that the harm was caused by damage to the lingual nerve during the surgical operations. V filed a claim against A in order to receive compensation for the damage he suffered.

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Decision

The Court of Appeal of Brussels found A liable. It considered that his negligence in locating and protecting his patient's lingual nerve was indicative of faulty behaviour because it would not have been committed by an ordinarily prudent and diligent practitioner with the same speciality, under the same conditions. 2

Comments

By way of introduction, we may observe that the decision does not say whether contractual or non-contractual liability is at stake here. In the present case it is, however, irrelevant. In a case of medical malpractice, the judge refers indeed anyway to the conduct of an average, prudent and diligent practitioner placed in the same circumstances. 3

We have already been able to show that fault is assessed objectively, that is to say, without taking the personal characteristics of the person committing the harmful act into account. This rule is thought of as a principle of Belgian law. It involves a comparison of the behaviour adopted by the person who committed the harmful act, not with that of a person of the same age, education, intellectual capacity, experience, etc but with that of a person who is a 'concept',[1] the 'ordinarily' prudent and diligent person. 4

However, it is possible to take account of personal characteristics if they can be applied generally. In this regard, it is unanimously agreed that the standard of behaviour must be adapted when the defendant has a professional skill. In such circumstances, his expertise cannot be ignored, and we must ask how an ordinarily prudent and diligent person with the same expertise would have behaved. It is in this way that, for example, in order to determine whether a doctor is at fault, we examine how an ordinarily prudent and diligent doctor of the same speciality would have acted under the same circumstances. 5

The decision commented upon illustrates this since, in order to assess the existence of fault, the judge examined how a practitioner with the same skills would have acted. It is in the light of the knowledge and skills that one has the right to expect of a dentist, and not the average person, that the judge set the expected standard of behaviour. In this sense, professional skill is linked even more closely to the role rather than the personal skill of the person exercising it. Taking it into account is therefore compatible with the principle of the objective assessment of fault.[2] 6

Despite the principle of objective assessment of the fault, it is not unusual that judges, to a certain extent, take into consideration elements relating to the victim's skills and knowledge, especially experience (see 7/7) and age (see 8/7). 7

1 *RO Dalcq*, Traité de responsabilité civile, vol 1 (1967) no 262.

2 See *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 130 f.

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Tribunal de Grande Instance (Court of First Instance) Marche-en-Famenne, 13 December 1990
RGDC/TBBR 1991, 185

Facts

8 A intended to cut down a beech tree. When handling the tree, which is done in order to make it fall in the right direction, it snapped and crushed V, a work colleague.

Decision

9 The judge considered that A, despite the fact that he was a non-professional minor, acted negligently, taking into account his special knowledge regarding the subject of cutting down trees. In effect the judge took into account the fact that A was the son of a forester, and furthermore personally had access to various equipment to come to the conclusion that he undertook a task he knew or should have known to be awkward. In addition the judge decided that, in any case, A knew or should have known that it was necessary to turn the tree in order for it to fall in the right direction and that a leaf-covered tree of the type which was cut down could snap straight through in frosty weather.

Comments

10 It is not unusual to find similar decisions, where in order to assess the existence of fault, the judge takes the special knowledge, and even the ability of a person exercising a non-professional activity into account. We also note that the judgment above expressly refers to A's special knowledge and skills in assessing the precautions one could have expected him to take.

11 Another example is of a person who, in a professional garage, was injured by an explosion caused by inflating a tyre. The court hearing the claim for compensation took account of the fact that the victim had been trained as a car mechanic in order to conclude that there had been recklessness on his part (that of positioning himself close to where the work was being carried out), which made him partially responsible for the damage he suffered.[3]

12 It is important to highlight that, in a rigorous application of the principles, such solutions should not be allowed on the basis of the principle of the objective assessment of the behaviour of the reasonably prudent person. A tendency towards

3 Court of First Instance of Hasselt, 13 November 1995, Bull Ass/T Verz 1997, 317. See also Court of Appeal of Mons, 23 March 1976, Pas 1977 II, 50.

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making distinctions is, however, now emerging,[4] as demonstrated by the examples given above. We will also see (in 7/7) that the Belgian Supreme Court has itself made a significant dent in the objective assessment rule.

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 22 March 1996, ECLI:NL:HR:1996:ZC2021
NJ 1996/668

Facts

A public notary offered an immovable property at an auction as a plot with a 'commercial purpose'. The object had previously been used as a hotel. After the sale, the buyer discovered that the object could only be used as a private house. The question was whether the public notary should have conducted research on the purpose of the object prior to the auction. **1**

Decision

In light of the municipal powers relating to the use and appropriation of property, it is obvious that, before a public notary presents information to the public, he/she should contact the municipality in whose district the property is situated, or should consider the information he/she wants to give to the public as regards any possible objections which could be raised by the municipality. Accordingly, a public notary who fails to conduct such research does not meet the requirement of the high degree of care which is required of him/her. **2**

Comments

According to case law, a professional such as a public notary has to meet a high standard of care. It is, thus, clear that professional service providers must meet the increased standard of care applicable to their profession. This can, however, hardly be considered to be a subjective assessment of fault, because the standard is linked to the profession as such, and not to the actual abilities of the professional. Therefore, the average person in the category of the defendant ('average expert') is the yardstick. Dutch law is not exactly clear on the question of whether or not the standard of care is raised in the case of a person with special individual abilities. **3**

4 See *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 24, no 4.

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9. Italy

Corte di Cassazione (Court of Cassation) 20 February 1987, no 1840
Vita Notarile 1987, 388 and Rivista Notarile 1987, 814

Facts

1 A couple bought an apartment and a parking space for their car in Palermo from a company. The notary who was charged with writing the sale agreement omitted to certify in that same document the existence of a mortgage on the apartment. Shortly after, the buyers sued the notary and the company, asking the court to hold them jointly and severally liable for the expenses incurred in the cancellation of the mortgage. According to the claimants, the notary was liable for a violation of arts 1176 and 2236 of the Civil Code, while the company was liable for selling real estate without declaring the existence of a mortgage on it. Following the declaration of insolvency of the company, which sold the apartment, the claimants dropped the compensation action against them. Therefore, the notary was the only defendant in the case.

Decision

2 The *Corte di Cassazione* stated that the error of the notary, that is to say the omitted mention of the mortgage on the real estate sale agreement document, was not excusable. In its opinion, in fact, a notary must carry out his tasks with the average diligence of a knowledgeable and prudent professional. These duties include all the preliminary and following activities linked to the sale agreement, including the cadastral title search of the real estate, in order to precisely identify it and verify the presence of mortgages or other encumbrances over the property. The notary could be exempt from carrying out such duties only if the clients expressly agreed to do so.

Comments

3 Cases in which the special skill or expertise of the defendant is under discussion are generally cases of professional negligence. The Italian Civil Code provides special rules for the ascertainment of the contractual liability of those persons who, because of their profession, should possess special skills or expertise.

4 Article 1176 Civil Code provides that, while in general the debtor shall observe the diligence of a good *pater familias* in performing his obligation, when the obligation concerns the exercise of a professional activity, the diligence of the debtor shall be evaluated on the basis of the nature of the activity.[1] This rule governs contractual

1 Article 1176 Civil Code (Diligence in performance): 'In performing the obligation, the debtor shall observe the diligence of a good *pater familias*. In the performance of obligations inherent in the

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obligations, but nonetheless is considered to be relevant as a general criterion applicable to evaluate negligence also in cases of extra-contractual liability.

Italian law considers the obligation of the professional to be an obligation of means, that is to say, an obligation to perform a particular task (*obbligazione di mezzi*).[2] Whether the professional performed such task with due care is a question that cannot be decided on the basis of abstract criteria, but rather by taking into consideration the kind of obligation undertaken by the professional and the circumstances of the case.[3] The case under discussion was decided on the basis of this rule. **5**

As mentioned in the comment under the following case in 7/9 nos 1–9, where a question of professional negligence arises with respect to the solution of technical problems of special difficulty, the ordinary rules of negligence are relaxed under art 2236 Civil Code, to avoid a performance that involves taking exceptional risks being evaluated as if it were a routine task. **6**

Although the general rules presented above are well established, it is still possible to raise the question whether the special skill or expertise possessed by the defendant should be taken into account by the court in evaluating his/her conduct in the circumstances.[4] This possibility is admitted by some Italian cases. For example, an Italian court affirmed the liability of an amateur boxer of considerable experience for causing the death of a beginner by reacting wildly to a few blows.[5] On the other hand, the superior knowledge and experience possessed by the defendant does not necessarily lead the court to affirm his/her liability. The court may indeed be reluctant to second guess the choice made by a very experienced defendant under the circumstances.[6] **7**

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exercise of a professional activity, diligence shall be evaluated with respect to the nature of that activity'. (The translation of this and the following Italian Civil Code articles is by M Beltramo, GE Longo, JH Merryman – The Italian Civil Code [1969]).

2 Cass 29 September 1965, Foro It 1966, I, 182; Cass 22 March 1968, no 905, Giust Civ 1968, I, 1217.

3 Cass 9 March 1965, no 375, Mass Giur It 1965; Cass 17 February 1981, no 969, Mass Giur It 1981.

4 *M Bussani*, Problemi dell'illecito: superiorità soggettive e giudizio sulla colpa, in: P Cendon (ed), La responsabilità extracontrattuale (1994) 81 ff.

5 App Milano, 16 October 1960, Riv dir sport 1961, 162, affirmed by Cass 22 November 1962, Resp civ prev 1962, 507.

6 Trib Bolzano, 24 January 1977, Resp civ prev 1978, 459, annotated by *A Gambaro*, in tema di responsabilità della guida alpina.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 9 March 2011

RJ 2012\4868

Facts

1 Shipping company X leased some containers that were the property of V. X's poor financial situation caused the termination of contracts between the parties and V proceeded to claim back its containers at different ports in the world. Y, the consignee of the shipping company X, however, refused to give back all the containers it had because it had already acquired some of them in a notarial auction held by A1 and A2, public notaries, in payment for different credits that Y contended it had against the shipping company X. V urged judicial annulment of the auction, which it obtained, and subsequently filed a claim for professional negligence against notaries A1 and A2, for having committed serious formal defects during the execution of the auction, especially for not having notified and summoned V as owner of the containers that were auctioned. V claimed $ 652,034.59, corresponding to the losses it suffered for the days that the containers were unused and the amount of daily rent that could have been charged. The Court of First Instance upheld the claim in part, and held that the public notaries A1 and A2 had been negligent for breach of a requirement of the auction, which established the need to communicate with the owner about the auction of the containers, whom the notaries could have known, since the Bureau International des Containers' (BIC) code of the containers identified the owner. The Court of Appeal dismissed the appeal. The Supreme Court upheld the extraordinary appeal for procedural infringement and analysed the allegations of the defendant notaries. They contended that the degree of professional care that can be required of a Spanish notary does not include knowledge of the existence of the BIC and its registration rules, since this is a foreign private agency and, additionally, BIC does not allow a party to know with certainty who owns the containers and is not reliable in terms of the data that identify businesses and their headquarters.

Decision

2 The Supreme Court declared that art 146 of the Notary Regulations prescribes liability of the notary as regards damage caused by intent, negligence or inexcusable ignorance. It was required in this case to establish whether, having regard to the circumstances of the case, the conduct of the notaries met the required standard of care, taking into account, inter alia, the special degree of care imposed on notaries on the exercise of their functions and their high professional qualifications in a society where the increasing complexity and the proliferation of legal proceedings is notorious. The irregularity that was eventually spotted was predictable since

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examining the documentation provided by the applicant of the auction is part of the standard of care that can be required of notaries. Only in this way can they ensure the formal validity of the auction, especially when it was not performed on the grounds of the existence of a duly constituted pledge, but on the retention of the containers carried out by the applicant of the auction, a situation which required the notaries to be more cautious in all the measures they took. Moreover, it is not necessary to examine whether or not the defendants had a professional duty to know of the existence of the BIC and to understand the listings of acronyms that could identify the owner of the containers, since their standard of care was embodied in requiring the justification of the property of the auctioned goods from the applicant.

Comments

In general terms, pursuant to Spanish law, fault is not assessed according to a purely objective standard, but in relation to an 'objective-typical' standard, in the sense that the relevant standard of care will be that which can be required of the ordinary person who belongs to the relevant profession, age group, or who has physical or intellectual aptitudes that can be generalised.[1] Thus, in a given professional sector, the standard of due care is not that of the reasonable ordinary unskilled man but the standard 'that can and must be expected from a normally reasonable and sensitive skilled person'.[2] When the wrongdoer is a skilled person and damage occurs in the course of his/her professional activity, courts consider that the standard of care to be applied is not that of the reasonable person (*buen padre de familia*), but the higher standard that results according to his/her profession.[3] The application of the stricter standard is based upon the general provision (art 1104 CC) together with the statutory duties linked with the exercise of a profession (like notary, as in this case). **3**

1 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864.

2 STS 9.4.1963 (RJ 1963\1964).

3 In the same vein, STS 10.04.2012 (RJ 2012\9026) ordered two real estate agents to compensate the purchaser of an estate whose acquisition was frustrated because the seller was not the owner, an aspect that the agents had negligently failed to check before mediating in the purchase agreement. See further 1/10 no 3 above.

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Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 21 November 2008

RJ 2009\144

Facts

4 A acquired a product to eradicate insects from the apartment where she lived from a shop open to the public. An employee recommended an insecticide which was used as fumigant to disinfect cereal, consisting of a mixture of carbon disulphide and carbon tetrachloride. The employee calculated the dose required for the volume of the house and told her how to use it and the precautions to be taken. A bought 47 800 gramme cans of the product and poured the contents into 12 containers, distributed in the different rooms of the house with an approximate area of 115 square metres, and sealed the door frames and windows with tape. In the packaging, transversely and in a font size that was proportionately larger than the rest, was printed the word 'flammable'. At noon the next day there was an explosion in the house caused by inflammation of carbon disulphide vapour that was in the air of the rooms, giving rise to serious damage to the apartments in the same and adjacent blocks. The owners of the damaged apartments sued A and others in tort. The claim was granted by all instances and the appeal in cassation brought by A rejected.

Decision

5 The control of the situation lay with the person who purchased an undoubtedly harmful product and who, under normal circumstances, willingly decided to take the risk of manipulating it all by herself without requiring the help of an experienced person or company, in addition to which, hypothetically, the seller could have advised her. This behaviour does not correspond to the conduct that would be required of a reasonable and sensible person, because if she did not have the knowledge or experience that was adequate, a minimum duty of care required refraining from manipulating chemicals in large quantities. It is not very difficult to predict, even for a non-professional, that dumping 47 cans of a substance that expressly states in its labelling that is flammable and capable of exploding could actually cause an accident of the magnitude of the accident that took place here. It was reasonable and sensible to abstain from carrying out the operation alone without the help of an experienced person or company.

Comments

6 This case illustrates a situation where someone causes harm to others by performing an activity, which, by its nature, requires expertise, or professional knowledge that the person carrying it out does not possess. This is not a case where the person pretends to possess knowledge or skills that she does not have, but a case where she

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should have possessed them in order to carry out this activity and, since she undertook it without having them, she acted negligently and not 'reasonably and sensibly.' Legal doctrine states that in these cases the standard of care of a reasonable and prudent expert in the field applies to the person who acts as an expert even when he/she is not.[4]

Sentencia de la Audiencia Provincial Cantabria (Judgment of the Provisional Court of Cantabria) 8 March 2001

JUR 2001\185119

Facts

Together with some friends, V went to A1's stables to rent horses to ride for one hour. During the ride V was accompanied by her friends and A2, an expert rider who had also rented a horse and had volunteered to show them a path through the woods and then to the beach. When they had finished their route through the woods, V and another friend left the group and went galloping to the beach. V fell from the horse and suffered serious injuries. Neither V nor her friends wore the usual equipment for horseback riding which included helmet, boots, and special trousers. V sued stables A1 and the expert rider A2. The claim was fully dismissed in the first instance and also on appeal. **7**

Decision

Evidence presented has proven that V just hired a horse for an hour and not a horse riding excursion, the price and duration of which would have been different. On the other hand, there is no evidence that A2 accompanied her as a guide, nor is there any piece of evidence that proves A2 exercised or had assumed the status of guide, although he offered to accompany them because he considered that they were rather inexperienced. **8**

Comments

In this case, the court finds in favour of the defendant who has expert knowledge of the activity during which damage occurred. It does not raise the question of whether his personal qualities required from him conduct different to and more demanding than that adopted with regard to the injured victim, and which the court would probably have raised if A2 had acted as a tour guide. **9**

4 See *M Yzquierdo Tolsada*, Responsabilidad contractual y extracontractual (2001) 226.

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10 According to some authors, however, a higher standard of care can be demanded even when a skilled person acts outside his professional activity. Thus, it is submitted that the person who restricts himself to take the care due by an ordinary person is also at fault when possessing knowledge or skill that, given the circumstances of the case, allow him/her to foresee or prevent the damaging event in a way that is above the ordinary average.[5] To the extent that the objective standard of care aims at protecting the victim, it must be considered that persons who have skills that go beyond and above those of the ordinary man and that allow them to foresee and to prevent the damaging event, are at fault if they are happy enough to act as an ordinary unskilled person.[6]

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 12 September 2013 (Salazar Casanova)

Facts

1 V, feeling feverish, went to a hospital, where he was subject to blood sampling and received a saline solution. He was subsequently discharged. After being discharged from the hospital, V started to feel pain in the area where he was punctured in a vein and in which a rash appeared and quickly spread. V returned to the hospital and was hospitalised. After a series of painful procedures, V was diagnosed with an infection from dangerous, life-threatening, bacteria. V sought compensation for his pain and suffering from the hospital which he considered liable.

Decision

2 It was for the Supreme Court of Justice to decide if the proven facts were sufficient to qualify the behaviour of the hospital's personnel as faulty when blood was taken. The court took into consideration that fault should be assessed, in the absence of other legal criteria, by comparison to the standard of conduct of the averagely diligent and careful man, given the circumstances of the case at hand. Therefore, the

5 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864. Connecting the idea with the relevance of intent when assessing liability in tort, see *M García-Ripoll*, Ilicitud, culpa y estado de necesidad: un estudio de responsabilidad extracontractual en los Códigos Penal y Civil (2006) 52. According to the latter's view, acting according to a standard which is lower than the standard derived from one's individual skills would be a conscious disregard of the interests of the victim, and should be discouraged.

6 *F Peña*, La culpabilidad en la responsabilidad civil extracontractual (2002) 478 ff.

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court decided that fault should be assessed taking into consideration that the persons who treated V were professionals and had special knowledge and skill to perform such procedures.

Taking the special knowledge and skills as well as the simplicity of the procedure into account, the court decided that the unlawful act was the puncture itself because, if from its performance V contracted the infection, it was clear that there had been a violation of provisions the aim of which is to protect legitimate interests, the *leges artis*, because if blood is taken properly, this would not result in the transmission of bacteria to the subject. In this way, V was successful in proving that the procedure was poorly performed by the hospital, in particular by its employees. Because it was not proved that all the steps had been properly executed in the vein puncture, but it was proved that an adequate causal link existed between this intervention and the patient's bacterial infection, the court considered, in accordance with art 487(2) of the Civil Code, that there was fault, and consequently it held the hospital liable. **3**

Comments

In this case the court did not decide if the case should be considered from the perspective of contractual liability or tort law, because both were applicable. **4**

The question that the court had to decide was related to the method of assessing the fault of the hospital in face of the damage suffered by V as a consequence of the medical care received there, which is assessed in the same way in contractual liability and in tort law. Under the provision of art 487(1), the plaintiff has the burden of proving the fault of the author of the harmful act, which is assessed by the diligence expected from an averagely diligent and careful man, taking into consideration the specificities of the concrete case (art 487(2)). This criterion of assessment of fault is not absolutely inflexible. The assessment is made in the abstract, but it is adaptable to certain variants, taking into consideration some of the circumstances of the case in question.[1] Therefore, the assessment of fault takes into consideration, namely, the profession of the agent.[2] This is not a criterion adapted to the individual – the criterion continues to be abstract – but the behaviour of the agent is compared to the standard of conduct of an average man of the same profession and condition. In our case we have to take into consideration the expected behaviour of a medical professional or nurse of the same specialty as that being assessed, and in a similar situation but in addition an abstract comparison has to be made.[3] **5**

1 See *J Antunes Varela*, Das obrigações em geral, vol I (4th edn 2000) 576.

2 See *A Vaz Serra*, Culpa do Devedor ou do Agente [1957] BMJ no 68, 45; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 584.

3 See *A Dias Pereira*, Direitos dos Pacientes e Responsabilidade Médica, Dissertação de Doutoramento apresentada à Faculdade de Direito da Universidade de Coimbra (2012) 657 f.

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6 The negligence of a medical act results from failing to offer the care expected of an averagely diligent doctor, and imposed by the *leges artis*. For the determination of the expected behaviour of a doctor, it is fundamental to take into consideration the *leges artis* and medical routines. The violation of the *leges artis* can give rise to a judicial presumption of fault (in accordance with arts 349 and 351 of the Civil Code).[4]

7 In the case at hand, we know that the cause of the damage suffered by V was the infection contracted by the incorrect method of taking blood. The Supreme Court of Justice decided that this simple procedure can only be poorly performed by violating the *leges artis*, and, therefore, it concluded that the hospital should be held liable.

Supremo Tribunal Administrativo (Supreme Administrative Court) 29 November 2005 (Pires Esteves)

Facts

8 A patient, V, contracted an eye infection while in a hospital (in Lisbon). He became blind due to the 'serratia' bacteria. He was in a room where there was a high probability of developing infections and the hospital did not take all necessary measures in order to avoid infections. In fact, it was proved that the hospital used to take measures in order to avoid infections. However, in this particular situation, it was not proved that the hospital had taken all measures according to current knowledge and science ('state of the art') to eliminate the 'serratia' bacteria from its facilities. The lower court ordered compensation since the hospital was negligent by not using all known procedures to eliminate the bacteria in the room where the patient became infected in his left eye.

Decision

9 The Supreme Administrative Court upheld the decision. By not taking all known measures to avoid infection in the post-surgery period, the hospital was negligent and violated the *leges artis*, which is a violation of art 6 of Decree-Law No 48/051 of 21 November 1967 (on the liability of the state and public entities).

Comments

10 Nosocomial infections are worldwide one of the main causes of damage in hospitals. Because of the seriousness of this infection the court employed a particularly demanding criterion of the duty of care in the assessment of the hospital's fault (an

4 See *MA Carneiro da Frada*, Direito civil – Responsabilidade civil: o método do caso (2010) 115.

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objective or *social* fault).[5] The public hospital must respect the 'state of the art' otherwise it will be found liable for the damage. In fact, art 487(2) of the Civil Code states: 'Fault shall be assessed, in the absence of any other legal criteria, by reference to the diligence expected of a dutiful *pater familias*, having regard to the circumstances of each case.'

12. England and Wales

Bolam v Friern Hospital Management Committee, High Court (Queen's Bench Division) 26 April 1957

[1957] 1 WLR 583

For facts, decisions and comments see 5/12 nos 1–5 above. 1

Wells v Cooper, High Court (Queen's Bench Division) 5 May 1958

[1958] 2 QB 265

Facts

The claimant, Wells, was a fishmonger who, having delivered some fish to Cooper, the defendant, at his house, fell and injured himself on pulling the door shut. The handle had been fixed by Cooper himself, an amateur carpenter, some four or five months previously. However, it came away because the anchorage afforded by the $^3/_4$ inch screws attaching it to the door were not strong enough to withstand the force of the pull which Wells found it necessary to exert in order to shut the door properly. Wells sued Cooper for damages for personal injury. 2

Decision

The court unanimously found for the defendant. The real question was the standard of care to be demanded of the latter in relation to the fixing of the handle. The degree of competence which Cooper *personally* happened to possess was irrelevant otherwise the extent of protection that an invitee could claim in relation to the work done by an invitor would be as variable as the length of the foot of each individual and the defendant could free himself by showing he had done the best of which he was capable, however, good, bad or indifferent that best might be. Nor was the care and skill of a *professional* carpenter with reference to contractual obligations and 3

5 *I Gilead*, On the Justification of Strict Liability, in: H Koziol/BC Steininger (eds), European Tort Law 2004 (2005) 30.

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working for reward to be expected, as that would set the standard too high. Rather the degree of care and skill which a reasonably skilled *amateur* carpenter might be expected to apply was relevant. Given the work in question was not one that required highly specialised knowledge, the court ruled that the mere fact that the defendant did the work himself instead of employing a professional carpenter did not constitute a breach of his duty of care. As to the quality of the work done, the court concluded – on the basis of evidence put before the trial judge – that no reasonably competent carpenter, let alone an amateur, would have anticipated that ¾ inch screws, such as those used by the defendant, would not be adequate to fix the handle securely. This was especially so given it had been in constant use since it was replaced and there were no signs of looseness or insecurity.

Comments

4 The case attempted a balancing of interests to produce a fair standard of skill required for the sort of work that is done 'every day by hundreds of householders up and down the country.'[1] Though the defendant was not a professional, he was an amateur of some experience. Too high or too low a standard would have had lasting and significant consequences on whether future householders would continue to do such work, take out third-party insurance having done such work or contract-out altogether on the one hand or the frequency of visitations or need for first-party insurance on the other. The court adopted a standard somewhat reminiscent of that it adopts for children (see 8/12 below): not one of the average reasonable person; nor that of the particular person; but a level of skill normally possessed by persons in the group the defendant falls within.

5 An interesting question that arises in the context is in respect of the implications of a defendant with a higher level of care and skill than those in his field generally. As the editors of Clerk & Lindsell observed, referring to *Baker* (see 5/12 nos 6–11 above): 'The defendant's subjective level of *knowledge* can raise but not lower the standard. However, a subjective level of *skill* is irrelevant: the particularly skilled defendant only has to conform to the standard to be expected of the reasonably skilled person in the relevant situation.'[2] Thus, the skilled carpenter with above average knowledge of a particular area of his trade would be expected to discharge no less than that standard to rid himself of liability.

1 At 271 per Jenkins LJ on behalf of the court.

2 *A Dugdale/M Jones*, Clerk & Lindsell on Torts (20th edn 2013) para 8-412.

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13. Scotland

Hunter v Hanley, Court of Session (Inner House), 4 February 1955
1955 SC 200, 1955 SLT 213

Facts

The pursuer was injured when a hypodermic needle being used to give her an injection broke. She alleged that the accident had been caused by the fault and negligence of the doctor who had administered the injection. At the trial, the judge directed the jury in the course of his charge that the test to be applied was whether there had been such a departure from the normal and usual practice of general practitioners as could reasonably be described as gross negligence. The jury having returned a verdict for the defender, the pursuer enrolled a motion for a new trial on the ground of misdirection. **1**

Decision

The Inner House of the Court of Session held that the direction given by the presiding Judge had not set out accurately the legal criterion for liability and that there must be a new trial. The court specified a test to be applied in cases of professional negligence. That test, described by the Lord President (Clyde) with specific reference to the medical profession (but taken to be of general professional applicability), was stated in the following terms: **2**

> 'To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail.'[1]

The Lord President added that, if this standard was not met, it did not matter by how much (so that 'gross negligence' was not a necessary pre-requisite for a successful claim). **3**

1 At 206.

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Comments

4 This decision of the Inner House of the Court of Session is the foundational authority for the test for professional negligence in Scots law. The test contains a number of elements which must be noted: (a) There must be a normal practice from which a professional is alleged to have deviated. If there is no normal practice in relation to a specific task, then it might be taken by the court to indicate that there is no 'correct' way of doing something, and the professional is to have complete discretion as to how to undertake the task. However, a court might well feel that, even if there is no normal practice in relation to the task in question, if the third element of the test (that no professional person of ordinary skill would have behaved the same way if he/she had been acting with ordinary care) is met, then the defender has been negligent; (b) the requirement that it must be shown that *no other* practitioner would have undertaken the task in the same way is a high hurdle for a pursuer to jump. It exists, however, because it is accepted by the courts that there may often be a number of reasonable ways of undertaking a task. One of those ways may be favoured by a minority in a profession, but so long as the defender is not the only party who can be shown to have adopted the method of performance which he/she did, then he/she will not be deemed to have been acting negligently.

5 The test set out in *Hunter v Hanley* continues to be cited and applied frequently in the courts. The approach taken in *Hunter v Hanley* is broadly similar to that adopted in England and Wales, where the leading authority on the matter is the case of *Bolam v Friern Hospital Management Committee*,[2] in which McNair J, approving of Lord Clyde's approach in *Hunter*, stated a preference for expressing the appropriate test as being that a doctor 'is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.'[3] The reference to a 'responsible body' is suggestive of a somewhat higher hurdle for the professional than the *Hunter* requirement of identifying simply one other professional who would have behaved in the same way; in practice however, Scottish defenders will advance the testimony of witnesses who can also speak to an opinion held by a body of practitioners, even if simply of a minority view.

6 Conscious of the advantage which the test for professional negligence can give to practitioners (by allowing even minority views to determine the standard of care), the House of Lords in *Bolitho v City and Hackney Area Authority*[4] stressed that the evidence supportive of the defendant must be of a body of opinion which is 'reasonable and responsible' and which has 'logical basis'.[5] The 'Bolitho exception' has

2 [1957] 1 WLR 582. See 5/12 nos 1–5.

3 At 587.

4 [1998] AC 232.

5 See speech of Lord Browne-Wilkinson, [1982] AC at 242.

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been accepted in Scots law (as may be seen, for instance, in its application in recent cases such as *Honisz v Lothian Health Board*[6] and *Coyle v Lanarkshire Health Board*[7]).

In a recent significant development, the Supreme Court, in the Scottish appeal **7** *Montgomery v Lanarkshire Health Board*,[8] departed from the 'responsible body' of medical practitioners approach in relation to a case of non-disclosure of a surgical risk. A newer, patient-centred approach was adopted by the Supreme Court, which took the view that medical practitioners are under a duty to communicate to patients 'material risks' attendant upon treatment, the test for materiality being whether 'in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.[9] This new approach in cases of non-disclosure of risk adds a legal imperative to the existing medical practice of seeking to ensure that patients are informed partners in the process of determining the desirable course of medical treatment; following *Montgomery* doctors will doubtless wish to ensure that, if this was not previously the case, discussions with patients on the risks of treatment are properly documented.

14. Ireland

Dunne v National Maternity Hospital, Supreme Court, 14 April 1989

[1989] IR 91

Facts

The plaintiff was one of a set of twins; his mother went into labour two weeks early. **1** The defendant hospital's practice was to monitor only one of the two foetal heartbeats; the plaintiff was born with severe disabilities and his twin was still-born. A claim was brought on the plaintiff's behalf, asserting negligence by the hospital in the management of his birth. A jury in the IEHC found in his favour and awarded him £1,039,334 in damages. The defendant appealed to the IESC.

Decision

The IESC allowed the appeal and ordered a retrial. The standard of reasonable care **2** for doctors was articulated in a series of points adapting the general standard of care in negligence to the specific circumstances of medical care in a hospital. Firstly,

6 2008 SC 235.

7 [2013] CSOH 167.

8 [2015] UKSC 11, 2015 SLT 189.

9 Para 87 (judgment of Lords Kerr and Reed, with whom the other three justices agreed).

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the overarching test is whether the doctor is 'guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.' Secondly, deviation from general and approved practice is not negligent unless 'no medical practitioner of like specialisation and skill would have followed [the course taken] had he been taking the ordinary care required from a person of his qualifications.' Thirdly, following a general and approved practice will not discharge the requisite standard if 'such practice has inherent defects which ought to be obvious to any person giving the matter due consideration.' Fourthly, it is not negligent to prefer one course of action over another if there is an 'honest difference of opinion between doctors as to which is the better of two ways of treating a patient'. Fifthly, it is not for the court 'to decide which of two alternative courses of treatment is … preferable, but … merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant.'

3 Further clarification provided that, to be general and approved, a practice 'need not be universal but must be approved of and adhered to by a substantial number of reputable practitioners holding the relevant specialist or general qualifications.' The principles apply to diagnosis and treatment and they apply to medical administrators in respect of procedures 'for the carrying out of treatment or diagnosis by medical or nursing staff'. Furthermore, the application of the principles requires a balance between public policy goals of avoiding undue inhibition or deterrence of professional practice through too high a standard and insufficient protection of patients through too low a standard.

Comments

4 The principles set out in this case are the seminal statement of the standard of care in professional negligence in Ireland; although the language of the case focuses on medical negligence because of the factual background, the principles are used in respect of all professions.[1] The principles also apply to professional advice; but consent to medical procedures is based on a reasonable patient standard of disclosure, rather than the *Dunne* principles.[2] There is also a generally recognised need for professionals to keep up to date with developments in their field.[3]

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1 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 14.258 ff; *E Quill*, Torts in Ireland (4th edn 2014) 101 ff; *J Tully*, Tort Law in Ireland (2014) 92 f.

2 *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) §§ 14.95 ff & §§ 14.259 ff; *E Quill*, Torts in Ireland (4th edn 2014) 104 ff; *J Tully*, Tort Law in Ireland (2014) 101 ff; *Fitzpatrick v White* [2007] IESC 51; [2008] 3 IR 551.

3 *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) §§ 14.3 ff; *J Tully*, Tort Law in Ireland (2014) 100.

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If a professional has specialist knowledge beyond that held by other profession- 5
als in his field, this might be relevant to the evaluation of fault. The point has not arisen in a professional negligence case, but did arise in a traffic case where the court made a larger deduction for contributory negligence for an off duty Garda (police officer) not wearing a seat belt than would normally be made in cases involving failure to wear a seat belt.[4] In employment cases, the fact that a worker is highly experienced does not remove an employer's need to exercise care to protect him from risk,[5] though a greater deduction may be made for contributory negligence compared to cases involving inexperienced workers.[6]

Ward v McMaster, High Court, 26 April 1985

[1985] IR 29

Facts

The plaintiffs purchased a house built by the defendant, in which the defendant had 6
lived for three and a half years prior to the sale. The defendant was not a trained builder and had no experience in any building trade; he had had assistance from his father (described as a 'handyman' – implying a DIY enthusiast, rather than an experienced tradesman) and brother (a driver of mechanical equipment). After moving in, the plaintiffs soon discovered problems with the house. On further inspection it was determined that the house was structurally unsound and the plaintiffs had to abandon living in the house. The plaintiffs sued the defendant in tort.[7] They also sued the local authority which provided the financing for the purchase and the firm of auctioneers engaged by the local authority to value the house.

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4 *O'Sullivan v Ryan* [2005] IEHC 18; this has been criticised on the grounds that the driver was also a Garda and the criterion for apportionment is relative blameworthiness, so the additional expertise arising on both sides should cancel each other out; see *E Quill*, Torts in Ireland (4th edn 2014) 444 f.

5 *McSweeney v JS McCarthy Ltd* unreported IESC, 28 January 2000, analysed in *R Byrne/W Binchy*, Annual Review of Irish Law 2000 (2001) 418 ff; *Smith v HSE* [2013] IEHC 360.

6 *Adams v Galway County Council* [2008] IEHC 57; *Lendrum v Clones Poultry Processors Ltd* [2008] IEHC 412.

7 In Ireland, there is generally no contractual obligation of fitness or quality imposed on a vendor of realty; *McGowan v Harrison* [1941] IR 331, *Curling v Walsh* [1987] IEHC 35; *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 13.03 ff. The defendant's building work was not undertaken in pursuance of any contract with the plaintiff. The builder's duty is not confined to the first purchaser, but also extends to subsequent purchasers: *Colgan v Connolly Construction Co (Ireland) Ltd* [1980] ILRM 33.

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Decision

7 Costello J in the IEHC held the defendant liable; the duty owed and breached was that owed by a builder to a purchaser of a property in respect of defects not discoverable by the purchaser by an examination that could reasonably be expected of the purchaser prior to purchasing.

Comments

8 The decision makes clear that a person holding themselves out as having expertise in an area will be held to the standard of a reasonable expert. No allowance was made for the defendant's lack of expertise; his failure to meet the construction standards of a reasonable builder amounted to a breach of duty to the plaintiffs. The third defendant was not liable, as the representative that conducted the examination did not hold himself out as having any expertise or qualifications in respect of construction quality or standards. There was no evidence that the defects were ones that would have been noticed by a reasonable auctioneer.[8]

15. Malta

Victor Savona and Another v Peter Asphar (Court of Appeal – Qorti tal-Appell) 2 April 1951

Collected Judgments, Vol XXXV, part I, 55

Facts

1 The second plaintiff was a minor and the first plaintiff was his father. The defendant, a surgeon, operated on the boy's right foot and the operation was deemed successful. He visited the boy the following day and all seemed normal. A week later the boy's mother took him to the defendant's clinic because she noticed a sore on that part of the foot which was not covered by plaster. The defendant treated the foot for four months until the parents took the boy to another surgeon for a second opinion. When the second surgeon removed the bandages the foot amputated spontaneously. The plaintiffs then sued the defendant for damages.

8 As the examination was conducted on behalf of the local authority in respect of financing the transaction, discoverability of the defect by this examination would not remove the builder's duty to the purchaser.

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Decision

The experts appointed by the first court established that the harm was due to gangrene. The process had started immediately after the surgery because the constriction of the foot due to post-operative swelling within the rigid plaster cast impeded proper blood circulation. The fact that the defendant had not noticed this in the first days following surgery showed that he had failed to properly interpret the evident clinical signs of gangrene. **2**

The first instance court observed that an error of judgement or of interpretation does not entail responsibility for the consequences of that error unless it was due to negligence. In the present case the defendant's failure to notice the symptoms of incipient gangrene was evidence of negligence rather than of an error of judgement. This was compounded by his failure to keep the situation under review during the first critical days after surgery. The court therefore found that the defendant was at fault. **3**

The defendant passed away before judgment was delivered but his heirs appealed. The Court of Appeal observed that, although the action was based on the provision that whoever undertakes any work or service without having the necessary skill shall be liable for any damage caused due to his unskilfulness, the plaintiffs still had to prove fault. They must show that the error was not due to the objective imperfection or incompleteness of medical science but to 'manifest ignorance' or 'crass incompetence'. On the facts of the case, the court concluded that the defendant had indeed shown gross negligence and the appeal was therefore rejected. **4**

Comments

The ground of liability was not so much lack of skill as failure to properly exercise that skill. It was not alleged that the defendant lacked the necessary qualifications or expertise but, rather, that he failed to allow for the natural swelling after surgery, that he failed to notice, or, perhaps, that he dismissed too lightly, the evident signs of incipient gangrene and that he also failed to follow up the patient in the critical period after surgery. The court's insistence of the requirement of 'manifest ignorance' or 'crass incompetence' as evidence of fault creates a high threshold for malpractice suits and this may explain why, until recently, such cases were rare. As observed in *RG and Another v DF and Another*, in 3f/15 nos 1–11 above, more recent judgments have moved away somewhat from the 'crass incompetence' standard. **5**

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TE v Dr AC (Court of Appeal – Qorti tal-Appell) 28 May 2010, Writ no 2653/1999
<http://www.justiceservices.gov.mt>

Facts

6 The plaintiff was admitted to hospital for the removal of her ovaries due to suspected malignant cysts. During surgery the defendant, a gynaecological surgeon, encountered unexpected difficulties because of adhesions of the internal organs, including the intestines. She removed the left ovary and determined that the cysts were not malignant. In view of this, she concluded that the risk to the patient in continuing the surgery by dissecting the adhesions outweighed the benefits of removing also the right ovary. She therefore left the ovary in place. Post-operative recovery was normal and the plaintiff was discharged after a few days.

7 Two weeks later the plaintiff was readmitted to hospital complaining of pain and was diagnosed with possible intestinal obstruction. This diagnosis was later changed to possible peritonitis. The plaintiff was subjected to emergency surgery under a different surgical team. During this procedure the surgeon noted a perforation of the colon. He therefore removed the damaged part and performed a colostomy. The removed part of the intestine was later examined by a pathologist but no obvious perforation site was identified. A few months later a reversal of the colostomy was attempted but, because of the internal adhesions, this was not successful. The plaintiff now has a permanent colostomy. Alleging that this was due to damage to her intestines during the surgery performed by the defendant, the plaintiff sued for damages.

Decision

8 The experts appointed by the first court observed that the type of incision chosen by the defendant did not give adequate access to the internal organs. This fact, coupled with the amount of adhesions encountered, increased the risk of damage to the organs, which was always a possibility irrespective of the skill of the surgeon. Under the circumstances, the defendant ought to have called specialised surgeons (an intestinal surgeon and a urologist) for assistance. On the facts of the case, the court concluded that there was a high degree of probability that the intestine had been perforated during surgery and that the defendant had attempted to repair the damage herself instead of calling for specialised assistance. The sutures probably gave way after some days and this caused the subsequent complications and permanent harm to the plaintiff. The court therefore found the defendant responsible for the harm caused, not because she had damaged the intestine but because she attempted to repair the damage herself when she lacked the necessary qualification in intestinal surgery. Had the suturing of the intestines been carried out by a specialised surgeon, there would have been less chance of their giving way.

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The defendant appealed. The Court of Appeal observed that, since the consequences of a charge of professional negligence against a surgeon are more than usually serious, because such a charge affects professional status and reputation, the burden of proof is correspondingly greater than in a normal tort action. In the present case there was no 'clear certainty' that things had happened in the way that the first court had concluded, and therefore the plaintiff had failed to prove, to the degree required by law, that the defendant's actions were the cause of the harm she had suffered. Moreover, the evidence on whether there was a perforation of the colon was conflicting and the conclusion of the first court, based solely on the observation by the surgeon who had performed the emergency surgery, was unwarranted. The appeal was therefore allowed and the judgment overturned. **9**

Comments

This judgment again highlights the difficulties a plaintiff must face when attempting a medical malpractice action. Not only is no allowance made for the fact that it is more than usually difficult for the patient to produce evidence of what happened while he was undergoing surgery, but the threshold of proof is raised even higher, although the correctness of this practice is doubtful because there is no statutory derogation from the 'balance of probabilities' test in civil actions. In fact, the first court applied this test when, taking into account the known facts, it concluded that it was more likely than not that the defendant had damaged the colon, that she attempted to repair the damage herself, and that the sutures later gave way. Moreover, in view of the fact that the surgeon-patient relationship is considered to be contractual in nature[1] a moderation of the burden of evidence was justified[2] under the circumstances, although the first court did not really invoke this principle but applied the usual 'balance of probabilities' test. The Court of Appeal judgment shows that the outlook for plaintiffs in medical malpractice suits is bleak. **10**

16. Denmark

Højesteret (Supreme Court) 1 October 1991
U 1991.903 H

Facts

V contacted her trade union regarding the financial implications of her taking early retirement. V had mentioned to the caseworker that she was receiving a widower's **1**

1 See *RG and another v DF and another* at 3f/15 nos 8–10 above.
2 See *Lorenzo Buttigieg v Henry Hirst nomine* at 16/15 nos 1–5 below.

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pension already and the caseworker told her that it would be unproblematic to hand in her resignation as she qualified for an early retirement pension. Indeed it turned out that, due to other pensions that V was receiving, she did not qualify for an early retirement pension at all. The caseworker was not an expert on pensions specifically but was more akin to an office clerk. V sued the trade union, A, for the financial losses she had suffered by following the caseworker's advice.

Decision

2 The Supreme Court found that the caseworker had acted negligently by not investigating which (other) pensions V was receiving before advising her to hand in her notice of resignation. The trade union, A, being the caseworker's employer, was therefore found to be liable in tort towards V.

Comments

3 Under Danish law, liability for wrongful advice and consulting has normally been seen as a matter of tort law,[1] and is dealt with under the notion of professional liability. When acting within their professional capacity, professionals have to provide the standard of care which is generally to be expected from a diligent professional within the given trade; an objective criterion. This objective criterion applies even if the person in question is not equipped with the relevant skill. As a person advising on pensions in a professional capacity would be expected to carry out an independent evaluation of a client's financial status and existing pensions before advising the client, a caseworker providing such advice should carry out the same investigation. This applied even if the caseworker had no or little expertise in the matter. This objective approach of the Supreme Court, that if you seem to act in a professional capacity you will be judged as if you acted in a professional capacity irrespectively of a *de facto* lack of skill, has been followed in later cases.[2] The standard of care is that of a good professional working within the given trade and the obligation is to provide a good, professional service.[3] Thus it is not expected that any professional assistance in any given case leads to a good result. On the other hand, if a person is acting in a private capacity, his actions will be compared to the standards that apply

1 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 113 f.

2 See eg FED 1994.1612 V, FED 1994.1665 Ø, U 1995.84 Ø, FED 1997.820 V, U 2002.1868 V and U 2005.1044 V. There are ample scholarly writings on the issue especially regarding the liability of advisors such as lawyers and accountants, see *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 114 fn 32 for further references.

3 As a clear starting point, professional obligations under Danish tort law are obligations to provide a good effort (*obligation de moyen*) rather than a successful result (*obligation de résultat*).

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to people in general (*bonus pater*). See eg U 1995.737 H, as referred to under 13/16 nos 4–6: a person was doing welding work on his own car when the anti-rust agent with which the car had been treated caught fire. The flammability of anti-rust agents is well known amongst car mechanics but not known to the general public. As the tortfeasor was not a car mechanic, he could not be expected to know about this and consequently he was not held liable for the damage.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 24 June 1997
Rt 1997, 1081

For facts and decision see 3d/17 nos 3–4. 1

Additionally, the court found that the municipality was liable on the basis of *respondeat superior* because of a fault on the part of the gym teacher. When concluding that the teacher had acted in a faulty manner, the court put weight on the fact that she was an experienced teacher, implying that she had special advanced skills that made it easier for her to cope with the situation than less experienced gym teachers. Because of the fact that she did not react to the risk produced by the dangerous way of jumping somersaults, she was deemed to have been negligent. 2

Comments

This way of reasoning often comes to the fore whenever some professional party, typically an engineer, a lawyer or an auditor, is accused of negligence. There is, however, also some leeway for professionals, highlighted in other cases. It is important to note that the basis for liability is strict and that the requirements are imposed upon the enterprise as such and not the specific professional employed in the enterprise. As for the reasoning in this case, one may not infer that a less skilled teacher would not have been deemed to have been negligent under the same circumstances. Hence the expectations from society as regards the safety of the school environment must be rather objective and standardised, and by no means dependent on the individual skills of individual teachers. There are also implications following from the provision of *respondeat superior* in skl § 2-1, which reads that the required standard should be adjusted to the 'reasonable expectations of the potential victim'. In another subsequent case, referred to in Rt 2004, 2015 such an objective and standardised approach was applied, whereas no reference was made to the individual skills of the teacher. One may therefore perceive the reference to the teacher's skills in Rt 1997, 1081 as more of a supporting or reinforcing argument than anything else. 3

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18. Sweden

Högsta domstolen (Supreme Court) 27 March 2013

NJA 2013, 145

Facts

1 A 13-year-old girl set fire to a department store. The fire insurer sued the social authorities due to their supervisory responsibilities for the girl in the weekend the incident happened. The background to this weekend was that the girl had suffered some serious problems for two years; she had often escaped from the institutions which were trying to help her, and on certain occasions she had displayed some pyromaniac tendencies. On this particular weekend she had just left the state psychiatric institution for teenagers and the social authorities could not arrange a place at a municipality home at such short notice, so they allowed the girl to stay with her mother, who was given an assistant from the authorities.

Decision

2 The municipal social authorities were held liable for the fire. Since the mother had previously demonstrated a lack of care – and since the girl had shown both an ability to escape and pyromaniac tendencies – the court found that the social authorities had to 'exercise special supervision targeting the risk situation'. The court emphasised the importance of documenting these situations of decision making, in order to subsequently be able to make an assessment of whether the procedure followed was reasonable and safe. If such documentation is lacking – and if the situation is so acutely risky as in this case, where there would have been many alternative possibilities to take care of the girl – then 'it should, due to the circumstances, lead to a stronger or weaker presumption that if a decision had been made in good order, it would have resulted in the implementation of an adequate risk neutralising measure'. Since the authority, in connection with the decision to let the girl stay with her mother, had not made an adequate written evaluation of the present danger and how it could be countered by supervision, the presumption led to the establishment of liability.

Comments

3 The main message from this judgment is the issue of proof principles; the court established a presumption because of the municipality's lack of evaluation of both the risk position and possible neutralising actions in a case where the risk scenario was extremely urgent, concrete and tangible. In such cases – but only in such cases – the presumption will lead to the authorities being held liable. On the other hand, if a case involves a less acute risk or if the duty to maintain documentation on risk

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analysis is fulfilled by the authorities, the outcome will probably be no liability. As in all negligence tests, we cannot merely look at the risk and the damage done, since we must also evaluate if other actions were in fact legally required in the individual case. However, the case demonstrates that the expert authority (in this case concerning youth problems) has a specific obligation to exercise its expertise; due to this expert role, requirements can be made to keep records of its own investigations as well as the reasons for arriving at its decisions. Another aspect to these demands, concerning standards, is that formal deficiencies as regards fact-finding can lead to material conclusions as regards the negligence test.

19. Finland

Korkein oikeus (Supreme Court) KKO 1992:44, S91/483, 27.3.1992/1176
<http://www.finlex.fi>

Facts

An attorney had helped to sell assets and allocate the proceeds to a person named as a beneficiary in a testament later declared invalid. The rightful heir was in fact the biological mother of the deceased. The biological mother had given the deceased up for adoption many years before. However, she did not receive the inheritance because the beneficiary named in the testament no longer had the property or the money from its sale. Moreover, the attorney had not investigated the validity of the will before selling the assets. Consequently, the rightful heir sued the attorney for damages for the economic loss she had suffered. 1

Decision

The Supreme Court referred to the general rules of the Finnish Bar Association, according to which attorneys have a special obligation to act diligently. The attorney in this case had, in a biased manner, promoted his clients' interests, even though he should have also paid attention to the rights of the deceased person's relatives. As an attorney he enjoyed public confidence, but he had failed to comply adequately with the level of conscientiousness and fairness required of such a position. For these reasons he was ordered to compensate for the economic loss caused to the heir. 2

Comments

The personal ability or capacity of the person in question is not usually taken into consideration when evaluating whether that person has acted carefully or negligently. The evaluation is made by thinking how a normal person in the tortfeasor's 3

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position would have behaved. However, if the activity in question requires special or professional skills or involves an obvious risk of damage, the standards are higher.[1]

4 Higher standards are set for professional activities and the professionals performing them, while lower standards are set for ordinary people engaged in leisure time activities. Of significance is also whether the same kind of damage or injury has occurred before.[2]

Korkein oikeus (Supreme Court) KKO 1992:165, S89/1066, 18.11.1992/4037
<http://www.finlex.fi>

Facts

5 A bank lawyer failed to fulfil the mandate of the benefactor as requested, with the result that the deed of gift did not include a condition precluding the right of the recipient's spouse to remarry. As a consequence, the recipient was required to pay half the value of the gift to his then ex-spouse when they divorced, and the recipient subsequently sued the bank for damages.

Decision

6 According to the principles of contractual relationships, completion of the task entrusted to the bank also included the obligation to protect the recipient's interests. As the bank had been unable to demonstrate that it had acted with due care when carrying out the mandate, it was ordered to pay compensation to the recipient of the gift. The basis for liability was the contractual relationship between the benefactor and the bank. The lawyer – as an employee of the bank – who had attempted to fulfil the bank's contractual obligations was not required to pay any compensation.

Comments

7 The bank's contractual liability was extended to include more than the immediate contractual partner. The basis for this was largely the fact that membership in the Finnish Bar Association and acting in the role of an attorney created an expectation of a careful course of action when exercising this profession as an expert.

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1 See also KKO 1995:125 (10/19 nos 1–4), where the damage was caused by a person who had Down's syndrome.

2 Supreme Court 1989:114. See also good handbooks on Finnish tort law: *M Hemmo*, Vahingonkorvausoikeus (2005) 23–26 and *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013). On the subject of negligence see also *V Hahto*, Tuottamus vahingonkorvausoikeudessa (2008) 16 f.

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20. Estonia

Tartu Ringkonnakohus (Tartu Circuit Court) 10 May 2013
Civil Matter No 2-12-5593

Facts

The plaintiff, as a visitor to a nightclub owned by the defendant, became involved in a dispute with the club's security workers. A video recording showed that the plaintiff did not initiate the conflict. The security workers used quite extreme measures against the plaintiff: he was held by the neck by the security workers, his arms were held behind his back, handcuffs were placed and on two occasions the plaintiff was forced to the ground, applying pressure on him with feet at the same time. Doctors diagnosed a fracture of the left thumb bone and throat contusion. The plaintiff requested compensation from the defendant for non-pecuniary damage. The county court did not satisfy the claim. 1

Decision

The circuit court allowed the appeal of the plaintiff and annulled the county court's decision. The circuit court passed a new decision on the case by satisfying the claim and ordered the defendant to compensate the non-pecuniary damage suffered by the plaintiff in the amount of € 1,000. 2

The circuit court found that the conduct of the security workers during which bodily injury was caused to the plaintiff (fracture of the left thumb bone and throat contusion) did not comply with the provisions of the Security Act and further that the security workers had violated the necessary norms of care required to maintain safety when they caused such injuries to the plaintiff. § 22 of the Security Act (SA) establishes the requirements imposed on security workers and § 27 of SA stipulates the training for security workers in order to acquire the knowledge and skills needed in this profession. The above-mentioned provisions of the Security Act aim to ensure that security workers observe the required standard of care and that bodily injury to persons should be prevented. The admissibility of the use of handcuffs did not justify causing bodily injuries to the plaintiff, as could be concluded from the county court's decision. Since the defendant did not prove that its employees had acted with care on this occasion, it is culpable and liable for the damage caused. 3

The county court took the correct view that the security workers were not in a situation of self-defence and that such a claim by the defendant was unjustified. Based on the testimonies of witnesses and video recordings, the county court correctly established that there was no intensive and direct attack by the plaintiff that would justify the security workers causing him such bodily injuries. 4

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Comments

5 The main point of debate in this case was whether the employees of the defendant are culpable of causing bodily injuries to the plaintiff. Under Estonian law, the standard of care is in principle subjective (§ 1050 (2)) but more objective regarding professionals.[1] The circuit court found that the defendant did not prove the absence of his fault. In essence, the circuit court found that the personal characteristics and training of a security worker shall ensure an ability to prevent a violation of law without causing bodily injuries. Therefore, since the training of the security workers enabled them to place handcuffs without injuring the plaintiff, they had to use their respective special skills. Since they did not do so, they acted negligently. It should be added that in this case the discussion about the defendant's fault and liability was only related only to inflicting bodily injury on the plaintiff (not to the placing of handcuffs).

Tallinna Ringkonnakohus (Tallinn Circuit Court) 18 June 2010

Civil Matter No 2-08-13854

Facts

6 The defendant had spent time in a forest at a camping site with some people he knew. In the evening, the defendant wanted to go for a swim with a friend. In order to get to the swimming spot, the defendant drove across a bridge that was closed to traffic due to repairs. According to the explanations of the defendant, the friends decided to drive around in an unfamiliar neighbourhood after the swim, but got lost. Wanting to drive back, the defendant who was driving, turned onto a forest track. Due to the soft surface, the car got stuck and its silencer set the forest on fire. The defendant's car was not on a road at the time that the fire began, but in a natural area on the forest track, which is not designated for motor vehicle traffic. The Republic of Estonia, the forest owner (plaintiff), filed a claim against the defendant and requested compensation for material damage caused by the forest fire in the amount of € 3,230.

7 The county court satisfied the claim. The county court found that the defendant, who has worked as a chimney sweep daily for a long time, certainly has more knowledge than an average person on the circumstances that cause fires, ie, the defendant had to be aware of the thermal effect that a hot silencer has to combustible material, that is, dry turf and moss in a forest. The defendant was negligent in his conduct, causing damage to the property of the plaintiff and impairing the quality of the environment.

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1 See 1/20 no 6.

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Decision

The circuit court did not change the decision of the county court. The circuit court found that it had been proven that the defendant was driving by car in a forest area, which cannot be deemed lawful. The claim of the defendant that he was acting in a condition in which he was lost in a forest may be formally correct, but the way the defendant regarded these conditions cannot be ignored. According to the materials of the case, the defendant drove his car to a lake by driving over a bridge that was under repair (drove through the tape placed to prohibit crossing) and planned to look around the neighbourhood after that (in a car) at dusk (according to the statements given at the circuit court session, in the hope of finding some new company). Although these circumstances did not cause the forest fire, the county court had no reason to disregard them when assessing the subjective aspects of his conduct. The reference of the county court to the defendant's profession gives no reason to conclude that the county court based its decision on that fact in establishing the fault of the defendant. Rather, this reference was motivated by the view of the court that the defendant should be a person that has at least an average sense of duty and foresight. **8**

Comments

This case is a good example of how the circumstances surrounding the causing of damage may have an impact on the court's assessment to the violation of the standard of care by the defendant. In essence, the circuit court found that the defendant was culpable of causing the damage because he was driving by car in a forest area, which cannot be deemed lawful; he drove through the tape placed to prohibit crossing and he ended up in the forest area due to the decision to look around in the neighbourhood in darkness. The assessment of the courts as to the culpability of the defendant was not influenced by the fact that a forest fire that is started by a car's silencer is not a common phenomenon. **9**

The authors note that the general factors, which should be taken into account in deciding on culpability, are not clearly enumerated in court practice. For example, the Supreme Court explained that the more likely it is that the damage will occur and the lower is the effort and expenditure required to prevent the damage, the higher is the likelihood that there is a duty to maintain safety by taking measures to avoid or eliminate danger.[2] **10**

The courts also took into account the profession (chimney sweep) of the defendant when establishing the standard of care of the defendant. The county court found that the defendant must have better knowledge than an ordinary person on **11**

2 Supreme Court Judgment of 20 June 2013 on case No 3-2-1-73-13 (3c/20 nos 1–6).

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the matters of how a fire is started. Basically the county court said that the defendant's standard of care was higher because of his profession. According to the circuit court, however, the profession of the defendant only enabled the court to conclude that he had to have at least an average level of sense of duty and foresight in matters relating to fires.

12 The required standard of care may be higher (compared to ordinary care) in the case of professionals. For instance, the Supreme Court has stated in its assessment of doctors' liability that it has to be established whether the attending physician acted at least at the same level of professional quality as an experienced and educated doctor of the respective field. If the quality of the treatment provided by the attending physician is lower than that of an experienced and educated doctor of the respective field, there may be an error in treatment.[3] This position is supported also by legal literature.[4] But it is highly questionable whether the defendant was obliged to meet this higher standard of care in the given circumstances (because the circumstances of causing damage were not related to performing his profession).

13 This case could also qualify under 3a/20, 3d/20, 3g/20.

Harju Maakohus (Harju County Court) 29 August 2008
Civil Matter No 2-07-20851

14 For facts and decision see 3d/20 nos 5–6.

Comments

15 In this case the court deemed the defendant negligent because he was a professional in his field. A person operating in his/her line of work must observe the same care as an average reasonable and experienced representative of this field. Such a tortfeasor cannot prove the absence of his/her fault by referring to subjective circumstances (§ 1050 (2) of LOA). However, the court would likely also have found the defendant culpable if he had not been a professional but a normal person. The fact that branches may cause damage when falling should also be understandable to a normal reasonable person.

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3 Supreme Court Judgment of 2 October 2006 on case No 3-2-1-78-06.

4 *T Tampuu*, Lepinguväliste võlasuhete õigus [Non-contractual obligations] (2012) 237 f. See also *J Lahe*, The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective, RCEEL 2013, 153.

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21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-13, 9 January 2008
Unpublished

Facts

The claimant donated blood in a state-owned hospital (defendant A) where it was discovered that the claimant had hepatitis C. The claimant was not informed of this fact. The claimant discovered that he had hepatitis C only several years later, but since the infection was discovered so late, the course of treatment was unsuccessful. The claimant had annual medical examinations in another state-owned hospital (defendant B), which consistently indicated that the claimant was healthy even before defendant A discovered the hepatitis C. According to the claimant, the only place that he could have contracted hepatitis C was in a clinic that performed an appendectomy before receiving medical care by defendant A and defendant B. The only remaining option for treatment that he now had was to take Copegasys+Ribavirin, medicine that was quite expensive. The claimant brought an action inter alia based on art 1635 of the CLL (general norm) and other norms requiring specific conduct against both defendant A and defendant B claiming the medical expenses incurred to the extent that they were not covered by the government and lost earnings. 1

Defendant A argued that donating blood is not a medical service and its personnel were not charged with a duty to inform the claimant of his medical condition and perform procedures to prevent or treat it as prescribed by Epidemiological Safety Law. The personnel taking the blood were also only suspicious at the time the blood was donated that the claimant might have had hepatitis C. When it was confirmed later, defendant A informed the National Health Service. Defendant B argued that it was not obliged to perform an examination to establish whether someone had hepatitis C as the compulsory medical examinations do not include such examinations. In addition the supervisory authorities in the field of health care did not find any violation of the provision of health care to the claimant. 2

Decision

The court of first instance and court of appeals rejected the claim. The Senate of the Supreme Court reversed and remanded the decision. The court of appeals rejected the claim again. The Senate of the Supreme Court reversed and again remanded the decision of the court of appeals. The court of appeals reviewing the case on its merits for the third time satisfied the claim partly, awarding the claimant compensation for damage from defendant A. 3

The court of appeals argued that a person donating blood is considered a patient and thus protected under the Epidemiological Safety Law. The teleology of the law suggests that a person must be informed of an infectious disease in order to be 4

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able to exercise the rights granted in this law and the source of information may only be the medical personnel possessing such information. The duty to inform did not refer to the mere fact that the claimant had the hepatitis C infection, but rather concerned information on how the disease could spread and its treatment in order to protect others and to prevent the disease from spreading. The misconduct of defendant A was the failure to inform the claimant of his medical condition – the hepatitis C infection that caused the additional medical expenses. There would, however, be no basis for solidary liability between defendant A and defendant B, therefore the claim was rejected against defendant B.

5 The Senate of the Supreme Court upheld the decision of the court of appeals indicating that defendant A had a duty to inform the claimant of his medical condition. Failure to do so deprived the claimant of the knowledge of his medical condition and of the opportunity to take steps to treat it in a timely manner. If medical personnel have a reasonable suspicion of the existence of an infectious disease, the law obliges him/her to inform the patient. An adverse interpretation would contradict constitutional law and violate substantive rights of a person.

Comments

6 The case and the liability of defendant A were obviously subject to debate as the claim was rejected three times by courts of several instances. The arguments raised by the Senate did not address the misconduct in detail, but rather focused on the protected interests and the interpretation of statutory law containing a positive obligation to inform the patient of an infectious disease. The hospital could have discovered the infection and informed the claimant and thus could have prevented the spreading of his infection. The breach of such a statutory obligation entails liability for the damage caused. However, because a hospital can discover the infectious disease through its equipment, and the skills and knowledge of its personnel, liability is imposed for the negative consequences due to the infection. One could therefore argue that the outcome of the case would have been different if the defendant had been a doctor without the equipment necessary to discover that the claimant was infected with the hepatitis C virus. While the conduct is assessed using an objective yardstick, the special skill and expertise plays a decisive role in evaluating the conduct of defendant A as it would have been possible to discover the infection. Defendant A did in fact discover the infection, but failed to inform the claimant, thereby limiting his ability to receive treatment for it much earlier.

7 As regards the indication of the significance of the expertise to be expected of a person carrying out an activity set forth by art 4:102(1) of PETL, it may affect the required standard of conduct and thereby the liability of the particular person, but usually this argument is opposed to the more commonly observed approach that, when a person who is required to have a particular skill to perform the tasks entrusted to him/her lacks the necessary skill, experience or knowledge, he/she will

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nonetheless be held liable. The courts do not tend to refer to the PETL when deciding upon how well-founded a claim is, but the reasoning used by courts and the ideas expressed by the authors of PETL do overlap as in the case at hand. Even though the medical personnel probably had not been informed that, in the course of taking blood, they are obliged to act according to the Epidemiological Safety Law, the special expertise and the ability of the medical personnel to discover the hepatitis C infection and inform the patient thereof enabling him to commence any course of treatment available could have been a decisive factor in this case.

22. Lithuania

AS v Vilnius University Hospital, 20 March 2013

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-1067/2013; <http://www.apeliacinis.lt>

Facts

The plaintiff, who had a benign brain tumour, was operated on twice in two different hospitals. During the first operation, the operating doctor set two goals of the operation: 1) to remove as much tumour as possible; 2) to save the facial nerve, which was inextricably entwined with the tumour. During the operation the doctor diagnosed that a radical removal of the tumour would lead to the severe impairment of the patient's facial nerve and therefore he decided to leave part of the tumour, hoping that it would not recrudesce or would do so slowly. Unfortunately, six months after the first operation the tumour recrudesced, even exceeding its previous size before the first operation. A second operation was necessary, during which the whole tumour was removed, however with severe impairment of the facial nerve. 1

The plaintiff argued that the whole tumour could have been removed during the first operation and, if this had been done, he would have avoided all the suffering he experienced between the two operations and as a result of the second operation. He sought compensation of non-pecuniary damage from the Vilnius University Hospital. 2

The court of first instance dismissed the claim. 3

Decision

The Court of Appeal upheld the decision of the court of first instance. Both courts agreed that the operation was very complicated and the methods chosen by an extremely qualified and experienced operating doctor and his assistant were appropriate in the situation. The courts considered that the operating doctor has performed more than 800 neurosurgery operations, inter alia more than 370 operations 4

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on brain tumours and 270 brain blood-vessels operations, and that the assisting doctor, who was the head of the neurosurgery department, had a wide range of neurosurgery experience.

Comments

5 The Lithuanian legal system applies an objective yardstick referring to the *bonus pater familias* standard to establish whether or not the tortfeasor acted negligently.[1] The conduct of people engaged in activities requiring special skills, experience or training, such as doctors, lawyers, notaries, bankers, etc, is measured against the standards of reasonably skilled members of the same group. Although the latter standards are also objective, the commented case shows that individual abilities of the defendant that go beyond the average standard of a doctor are also taken into account, at least to reach the conclusion that a doctor with more than average knowledge and expertise conforms to the 'reasonable surgeon' standard. To our knowledge there are no cases dealing with the situation where individual characteristics and capacities of the defendant, going beyond the average standard, have been ignored by the defendant.

23. Poland

Sąd Najwyższy (Supreme Court) 10 February 2010, V CSK 287/09

OSP 2012/10/95

Facts

1 After a long period in labour, V was born with brachial plexus paralysis and restricted mobility of the right arm and shoulder, and as a result she became disabled. She had already undergone surgery in France, and in the future other treatments will be necessary.

2 According to the court of first instance, medical errors were the cause of V's injury. First, the doctors did not order an ultrasound examination and a fetal biometry examination. As a consequence, doctors did not know the weight of the foetus and did not consider carrying out a caesarean section, which should have been done. There was also a physical damage to the baby, which likely resulted from the procedure called a Kristeller's grip.[1]

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1 1/22 no 3.

1 This is an excessive pulling by a physician of an already naturally born baby's head, while applying pressure on the mother's uterus.

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A argued that the damage was caused by the outrageous behavior of V's mother and lack of her will to cooperate with the hospital staff while in labour. 3

Decision

The objective condition for establishing fault is wrongfulness and only if wrongfulness occurs can the court consider the subjective elements of fault, among which due diligence of professional health care provider is crucial. 4

In the light of art 355 § 2 KC, professional medical care should be sound and properly match the qualifications of the doctor (a team of doctors), his experience and the conditions of the provisions of the medical service. 5

Case law in this respect is long-established, requiring from medical staff due diligence higher than that which is normally required due to the object of medical staff's treatment of human beings and consequences that are often irreversible as well as maintaining a high level of ethics, resulting from the far-reaching effects of doctors' conduct.[2] 6

A's conduct should be assessed taking into account all circumstances existing at the time of medical treatment, and particularly the available and obtainable data. Even if the doctor was forced to use the abandoned method (the Kristeller's grip), he should have done it properly and with a very high standard of care. 7

A physician is liable for fault when his conduct during a medical procedure deviates from the abstract medical standard and the patient suffered an injury. The abstract standard (the duty of care) required of a physician is higher than the duty required of an ordinary person outside his/her profession and is based on objective criteria. Acting below that standard of a professional justifies a negative assessment of the conduct. 8

Fault of a doctor may consist not only in a lack of sufficient knowledge and practical skills required by the professional standard, but also in carelessness or unskilful performance of a procedure that reasonably should not have taken place. In this case, all conditions for establishing negligence are met according to art 355 §§ 1 and 2 KC in conj with art 415 KC. 9

Comments

In a presented case the Supreme Court explained that the due diligence required from doctors is higher than normally required from other professionals due to the specific subject of medical treatment and the potentially severe and irreversible consequences. On the other hand, a professional health care provider is a person 10

2 Citing the SN judgment of 7 January 1966, I CR 369/65, OSP 12/1966, item 278.

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possessing special skills and knowledge that obliges him/her to choose not only an effective treatment method, but also to provide this treatment in a manner that is in accordance with current medical knowledge. Failure to possess the skill or expertise or providing treatment in a careless way constitutes a doctor's fault. Doctors are required to continuously broaden their knowledge and be aware of the latest developments within their field.[3]

11 Wrongfulness (the objective element) consists in conduct contrary to the legal order, including the principles of community life. The latter principles contain the duty to perform medical interventions in conformity with the latest medical knowledge and with the highest diligence required from professionals. This higher standard excludes the possibility of accidental damage to an organ other than the one being operated upon.[4] The subjective element of fault (but generally assessed in an objective way[5]), called negligence or fault *sensu stricto*, is defined as a possibility to classify A's behaviour as improper.

12 The professional standard is built on various elements: qualifications (area of specialisation, scientific degrees), general professional experience and specific experience relating to certain medical procedures, the nature and extent of continuing education and training in new methods of treatment. Most of the criteria indicated by the court could also be applied to conducting other professional activities.

13 In general, fault will not be attributed to a person who, while theoretically capable of exercising the appropriate level of care, could not have acted in a required fashion because of the specific position he/she was in at the time, including information available to them and any circumstances limiting their free decision-making. If the person in question performs an activity in the course of a business, the standard of conduct should reflect this.

14 It is debated in the literature whether the 'highest professional diligence' should be treated as a part of wrongfulness or rather as an element of fault (subjective assessment).

15 In general, the courts consider that the higher the professional qualifications of a doctor, the higher the standard of care he/she is required to reach.

16 The Court of Appeals in Krakow ruled that the failure to act with highest diligence in carrying out a standard treatment or standard surgical procedures constitutes fault of a doctor.[6]

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3 See *M Nesterowicz*, Glosa do wyroku Sądu Apelacyjnego w Krakowie z dnia 9 marca 2001 r, PS 2002, no 10, item 132.

4 See SN 29 October 2003, III CK 34/02 OSP 4/2005, item 54.

5 See 1/23 nos 3 f and 7.

6 CA Krakow 12 October 2007, I ACa 920/07, PiM 1/2010, 151, noted by *M Nesterowicz*.

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Sąd Najwyższy (Supreme Court) 12 June 2002, III CKN 694/00
LEX computer database no LEX 57211

Facts

A notary drafted a preliminary contract for sale of a real estate in the form of a deed. **17**
The parties could not finalise the transaction due to some formal obstacles, and thus on the due date in the notarial office they both appointed the same person as a proxy, giving her a power of attorney to close on the real estate sale at a later date. The proxy concluded the said contract, however, acting *ultra vires*. Thus the seller obtained a judgment declaring the contract null and void. The buyer sued the notary for damages. The court of first instance found that the notary had drafted the powers of attorney in such a way that they were doubts as to the possibility of the proxy acting on behalf of both parties (art 108 KC). This contradicted art 108 KC and led to a void contract, for which the notary should be liable in tort. The appellate court reversed and the case reached the Supreme Court.

Decision

The court held that a notary is liable in tort for damage caused by the performance **18**
of his/her notary services, whether to his/her client or to a third person (art 415 KC). This liability arises because the duty of a notary to execute notarised deeds derives from art 91 of the Law on Notaries[7] and not from a contract. That provision is mandatory insofar as it states that a notary is obliged to carry out a notarial deed whenever the law so requires. The professional duties are described in detail in the Law on Notaries, which states that a notary is required to oversee the form, content and execution of notary deeds, to give necessary explanations, etc.

The court stressed that a notary is obliged by law to perform his/her duties with **19**
particular diligence. In the contemporary Notaries Act, art 49 provides: 'A notary is liable for damage inflicted when performing notarial activities based on principles specified in the Civil Code, taking into account the level of care a notary is obliged to observe when performing such activities'.

Hence, taking into consideration the objective standard of due diligence (art 355 **20**
§ 1 KC) and the professional character of the activity (art 355 § 2 KC), the negligence of a notary is established through the breach of this duty.

7 Law of 14 February 1991, DzU 2002, no 42, 369.

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Comments

21 As regards professionals, the Supreme Court has consistently held that particular care is required in the exercise of their profession by people who possess special, expert knowledge and thus there is a real possibility to predict the consequences of their conduct.

22 Similarly, failure to observe the relevant provisions regarding the effective creation of a specific property right in real estate that causes defectiveness of a notarial deed is not only an unlawful notarial act, but also a negligent act that proves the notary's ignorance of legal regulations that were fundamental for his professional activity (judgment of the Supreme Court of 23 January 2008, V CSK 373/07). The same may be said about a defective, hence negligent, transfer of a property right in real estate (judgment of the Supreme Court of 7 June 1997, II CKN 420/97, OSNC 1998, no 5, item 76).

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 26 February 2003

25 Cdo 1862/2001

Facts

1 In 1992 the claimant (then represented by the respondent) filed an action before the District Court in Havlíčkův Brod in which he asserted several claims arising out of a void contract for the purchase of property. The proceedings were later suspended by the court because of a lack of requirements for an action, and the respondent filed a blanket (unreasoned) appeal. As the respondent failed to raise the appeal within the time limit for the proceedings, the proceedings were stopped.

2 In assessing the liability of the respondent for damage, the court of first instance concluded that the respondent had not received sufficient evidence from the claimant to be able to amend and raise the appeal and to achieve the change in the judgment. Thus, he did not violate the obligations arising from the provisions of sec 725 CC.[1]

1 When carrying out the mandate, the mandatory must act according to his/her abilities and knowledge. The mandatory may deviate from the mandate only if it is in the mandator's interest and unless he/she cannot obtain his/her consent in a timely manner; otherwise, the mandatory shall be liable for damage.

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The appellate court changed the previous decision and concluded that the respondent had breached sec 16 of the Act on Advocacy.[2] The court argued that the court of first instance shifted the burden of proving facts that the respondent received sufficient evidence from the respondent to the claimant and such a change is inadmissible. 3

Decision

The regulation of a lawyer's liability is based on no-fault liability (so-called strict liability) and is based on the fulfilment of prerequisites, namely, the performance of the legal profession, the occurrence of damage, and a causal link between the performance of the legal profession and the damage. 4

The condition that the legal assistance was performed properly must be assessed in terms of the provisions of sec 16 of the Act on Advocacy, pursuant to which a lawyer is obliged to protect and promote the rights and legitimate interests of his client and follow his instructions. He is not bound by the instructions of the client if they conflict with the law or professional regulations. In the exercise of his profession, a lawyer is obliged to consistently use all legal means and work in the interests of his clients, by acting in a manner which is beneficial for the client. 5

Comments

It is generally acknowledged both by Czech theory and case law that an expert shall always be liable for a wrongfully established opinion or service provided. 6

This approach is confirmed in the current wording of the NCC, which states in sec 2912 on negligence that, if the wrongdoer possesses specific knowledge, abilities or skills or if he undertakes to perform an activity for which specific knowledge, abilities or skills are required, and he does not make use of these specific abilities, it shall be deemed that he acted carelessly. 7

The liability of lawyers is regulated in the Act on Advocacy, and the Supreme Court concluded that such liability must be deemed strict and no fault is required for establishing liability. Therefore, for the fulfilment of the facts of a particular case, just three prerequisites must be met: a legally specified event causing damage; 8

2 '(1) Lawyers shall be obliged to protect and enforce the rights and legitimate interests of clients and to follow their orders. The orders of clients shall not be binding if these are contrary to legal or professional regulations; a lawyer shall be obliged to reasonably notify his/her clients of this principle. (2) While practising the legal profession, a lawyer shall be obliged to act faithfully and with integrity; he/she shall be obliged to consistently use all legal measures and, within these measures, to apply everything in the interest of his/her client that the lawyer believes may be beneficial.' (<www.cak.cz>)

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damage; and causation between the incident and the damage incurred. As the liability of an expert is specifically regulated by the Act on Advocacy, he may exclude himself from liability only if he proves that such a breach was caused by circumstances excluding his liability, in particular that he exercised all due care which could be expected under the circumstances.

9 We are convinced that such a qualification of an attorney's liability is not correct. In the case of strict liability, the standard of care and its observance by the attorney should be irrelevant as the attorney shall be liable for any damage to his/her client, regardless of the standard of care required, ie, regardless of fault and wrongfulness. However, when establishing liability, the Act on Advocacy points to a lawyer's specific skills and professional performance and therefore lays down specific requirements for a lawyer's conduct.

10 As regards the current wording of the NCC, the NCC establishes a new provision in sec 2950 NCC on liability for counselling, which reads as follows: 'A person who presents himself as having a specific profession or occupation required for professional performance or otherwise claims to be an expert shall provide compensation for damage caused by his incomplete or incorrect information or harmful advice provided for a fee in a matter relating to his knowledge or skills. Otherwise, only damage caused intentionally by information or advice shall be compensated.'

11 The majority of scholars tend to understand this clause as a provision of strict liability. However, such a qualification would contravene both the standard understanding of similar cases in European laws and the general notion of liability in similar cases where no strict liability is deduced but only liability based on fault with a higher degree of standard of care or standard of care relating to a specific group of people, eg professionals.

12 The NCC does not stipulate whether the counselling shall be provided based on a contract or whether such liability also arises in the case of a non-contractual relationship. However, as the subject matter of the provision is rather broad and only sets forth that liability arises in cases when somebody claims to have special experience and knowledge, we conclude that the provision relates both to contractual and non-contractual liability.

13 Nevertheless, as there are specific rules under special laws (laws on advocacy, experts, architects, doctors, etc), the application of sec 2950 NCC will be possible only in those cases when no particular regulation exists.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 29 July 2008
25 Cdo 1417/2006

Facts

14 The claimant purchased roofing for his house and contacted a construction company supplying roofing systems, which ordered an opinion on building statics as

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regards the suitability of the purchased roofing for the claimant's house. Based on the expert's conclusion that the purchased roofing was inappropriate for the claimant's house, because the upper floor would not be able to carry its weight, the claimant returned the purchased roofing, however, at a loss, which, together with expenses for the claimant, equalled the sum of CZK 79,565 (approx € 2,800).

However, it was proven at a later stage that the expert opinion was incorrect and that the roofing was fully suitable for the claimant's property. The expert argued that he drafted his expert analysis on building statics based on the respondent's technical documents (measurement of the roof), supplied by the construction company, and thus he could not be held liable. 15

The court of first instance concluded that the respondent had breached his obligations under tort law as he incorrectly analysed building statics for the claimant's property. In particular, he did not measure the house, did not inspect the property, and the dimensions of the floor beams were dictated to him over the phone by the construction company. The liability of the respondent is therefore given pursuant to the provisions of sec 420 para 1 CC. 16

The appellate court refused the claim because it concluded that, because there was no contractual relationship between the claimant and the expert, the respondent could not become subject to a claim for damages. The court also pointed out that the main cause of the damage was the conduct of the claimant, who first purchased the roofing and only afterwards sought expert advice to determine whether the roofing was suitable for his house. 17

Decision

A prerequisite for civil liability under sec 420 CC is an unlawful act, ie conduct that is contrary to the law, the existence of damage (property damage), a causal link between the wrongful act (omission) and the occurrence of damage and fault, which is presumed. The first three elements are of an objective nature. 18

The fact that the documents, which served as a source for the expert opinion, were taken over by the respondent from another person does not mean that the submission of an incorrect opinion represented a violation of his obligations as an expert. Wrongfulness is an objective category. 19

The respondent breached his duty due to the fact that the conclusion of his expert opinion (ie his own professional assessment) was, based on the failure to carry out all necessary checks and analyses, completely wrong. Liability in this case was not strict but rather based on fault which consists in the failure to duly check the data upon which the expert opinion was based. 20

If this failure led to the claimant incurring unnecessary expenditure, the causal link between the respondent's unlawful conduct and the damage to the claimant is given. The causal link must then be evaluated in relation to each particular sum, the compensation of which is claimed. However, because of the unlawfulness of the 21

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respondent's conduct and the causal link with the damage suffered by the claimant, the reason or cause of the illegal action of the expert who caused the damage for which compensation is sought is not crucial.

Comments

22 Experts are obliged to personally carry out their task properly, within the prescribed time limit, in the area in question and within the parameters of the task for which they were appointed. Only where required by the nature of the matter is an expert entitled to hire a consultant to assess a specific topic. However, this fact, together with the reasons for doing so, must be stated in the report.[3]

23 These requirements are mirrored in the standard duty of care expected from an expert. This higher duty of care is based on the specific law and should arise only in cases when the expert opinion is established based on a contract.

24 In the present case the Supreme Court held that there had been a breach of the expert's duty to provide a correct opinion when he collected all the data for the opinion from his contractual partner and relied on it without checking it properly. This meant that the expert breached his duty to carry out his obligation in accordance with ordinary standards[4] and was found liable for damage caused by the opinion he rendered. In another case, the Supreme Court held that, as soon as an expert needs more information, he must request it. Failing to do so is itself a breach of his duty resulting primarily from Act No 36/1967 Coll, the Act on Experts.[5]

25 As regards liability for damage, the Act on Experts does not stipulate more detailed rules on liability. The damage resulting from the breach of an expert's duty is subject to the general regulation contained either in the Civil or Commercial Code. From this it follows that, after the adoption of the NCC, experts can be held liable either under sec 2950 NCC[6] if they provided their service for money or under the provision on contractual liability pursuant to sec 2913 NCC. With respect to third parties, the liability is based on sec 2910 NCC which provides that a wrongdoer who wilfully breaches an obligation set by law and thus interferes with an absolute right of the injured party shall compensate what he/she has caused by so doing. The duty to provide compensation also arises when a wrongdoer interferes with another right

3 The particulars of the expert opinion are specified in Decree No 37/1967 Coll.

4 NS ČR 9 December 2010, 3 Tdo 1493/2010.

5 NS ČR 18 August 2011, 29 Cdo 1693/2009.

6 'A person who presents himself/herself as having a specific profession or occupation required for a professional performance or otherwise claims to be an expert shall provide compensation for damage caused by his/her incomplete or incorrect information or harmful advice provided for a fee in a matter relating to his/her knowledge or skills. Otherwise, only damage caused intentionally by information or advice shall be compensated.'

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of the injured party by breaching a legally stipulated duty set by law for the protection of such right.

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 2545/1991-2 of 3 March 1992

<www.vsrh.hr>

Facts

V, a professional truck driver parked his truck at a parking lot. As V was stepping out of the vehicle, he noticed that the right rear wheel had fallen into a hole in the asphalt. He tried to move the truck forward in order to release the wheel from the hole. However, as the wheel rotated in place, it fell even deeper into the hole causing the whole vehicle to lean on one side. V tried the same manoeuvre once again but the whole vehicle toppled sideways into the side ditch. V sued A, the owner of the parking lot arguing that the damage to the truck was caused by the poor condition of the parking lot, notably the hole in the asphalt into which the wheel of his truck fell. A claimed that it was V and his careless driving that had caused the truck to topple. 1

The court of first instance partially accepted (to the extent of 40%) and partially dismissed (to the extent of 60%) V's claim. The court of second instance affirmed the first instance decision. 2

Decision

The SCRC partially reversed the lower courts' decisions and held A liable to the extent of 60% and ruled that V contributed to his own damage to the extent of 40%. In substantiating its decision regarding V's contribution to his own damage, the SCRC held that V, as an experienced professional driver on international routes, should have known that, after the first attempt to release the wheel of the truck from the hole had failed, attempting the same manoeuvre a second time would cause the vehicle to topple over. 3

Comments

In deciding on V's contribution to his own damage, the courts predominantly based their decision on V's special experience as a professional driver. As the SCRC reasoned, V's experience as a driver on international routes should have alerted him not to attempt the same manoeuvre, which led to the harmful event, a second time. Hence, it is obvious that in assessing the appropriateness of V's conduct, the SCRC predominantly took into consideration V's specific experience. Although in this case the appropriate- 4

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ness of the victim's actions was assessed, the same ratio no doubt would have been applied had the court assessed the appropriateness of a tortfeasor's behaviour.

5 As already explained, Croatian law recognises three standards of due care: the standard of care of a good master of a house, the standard of care of a good merchant and the standard of care of a good expert.[1] When a person acts in the field of his/her professional activity, he/she must observe the standard of a good expert, meaning he/she must act with an increased level of care, in accordance with professional rules and practice. And, as is evident from the case at hand and as will be later demonstrated in more detail,[2] in cases where tortfeasors acted within their professional activity, the appropriateness of their activities will be assessed in accordance with the standard of a good expert, which means that the special skills and expertise that they are supposed to have as experts in their field of activity will be taken into account.

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 70/2014, 25 September 2014

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113071913/> (25 February 2015)

1 For facts and decisions see 3a/27 nos 1–2.

Comments

2 Liability for damage caused by game is regulated by the Game and Hunting Act.[1] Under this law, in the case of damage to game and to a vehicle caused in a collision between game and a vehicle, the driver of the vehicle is liable if it is found that he was not driving in accordance with regulations. The administrator of the game reserve is liable if the damage occurred because of his activities. An administrator of a hunting reserve is liable for damage under the rules of fault with a reversed burden of proof, which means that an administrator of a game reserve must prove that the damage occurred without any fault on his/her part (para 1 art 131 of the Code of Obligations). When an administrator of a hunting reserve proves that he/she is not culpable, the state is liable for damage under the rules of strict liability (para 4 art 54 of the Game and Hunting Act).

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1 See under 1/26 no 9.

2 See in more detail judgment SCRC No Rev 400/1991-2 under 7/26 nos 5–10.

1 Uradni list RS (Official Journal) Nos 16/2004 – 46/2014.

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Courts, in judging whether culpable liability is shown, simply take into account all the circumstances of a case, for example the circumstances in which work was actually performed, circumstances about the specific risk of damage occurring, etc.[2] These criteria alleviate or make stricter the criteria for the judgement of care. It remains debatable in court practice though, in contrast with theory,[3] whether it is permissible to seek a criterion of care within the framework of the legal standard of a good professional or a good master or an average person, according to criteria of the narrower group to which the specific person belongs.[4] 3

Court practice has not dealt more extensively with cases in which someone without adequate professional knowledge undertakes a matter for which this knowledge is urgently required. It presupposes that, in a case when such a person does not meet an adequately strict standard of care, fault is established on the basis of the criterion that the causer of the damage set about the matter although he knew that he did not have the necessary knowledge. 4

Judgment of the Supreme Court II Ips 176/2011, 13 September 2011

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113048856/>
(25 February 2015)

Facts

In August 1996, the applicant was hospitalised in hospital A because of pneumonia. His histological finding, performed in hospital B, was positive and confirmed a diagnosis of undifferentiated macro-cellular carcinoma. The plaintiff was admitted to the University Clinical Centre with such a referral diagnosis. On 5 September 1996, a medical advisory council, in cooperation with the University Clinical Centre, proposed a surgical intervention. When part of the plaintiff's lung was cut open during the surgery, a histological examination of this tissue did not show malignant growth but rather chronic non-specific inflammatory changes. The plaintiff sued hospital A for compensation of damage due to the erroneous diagnosis, hospital B for false histological results and the University Clinical Centre because it operated unnecessarily. The court of first instance rejected the suit against hospital B in entirety and, 5

2 See the legal opinion of a plenary session of the Supreme Court, Poročilo VSS – Report of the Supreme Court 2/1992, 9.

3 *S Cigoj*, Odškodninsko pravo Jugoslavije (1972) 270; *N Plavšak*, Krivdna neposlovna odškodninska odgovornost z domnevo krivde [Culpable non-business damage liability with presumed fault], in: N Plavšak/M Juhart/R Vrenčur, Obligacijsko pravo, Splošni del [Obligational law, General part] (2009) 528.

4 *D Jadek Pensa*, 135. člen Obligacijskega zakonika (OZ) [Article 135 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 799.

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similarly, the plaintiff's appeal before a court of second instance was rejected in this part; in the part that related to hospital A and the University Clinical Centre, the case was returned for re-trial. The plaintiff did not file revision against the judgment in favour of hospital B, which became *res iudicata*. At retrial, the court of first instance also rejected the claim against hospital A and the University Clinical Centre. The court of second instance rejected the plaintiff's appeal against this judgment and confirmed the judgment of the first instance court. The plaintiff then filed revision, in which he expressed doubt about the correctness of the expert opinion.

Decision

6 The revision court was bound in its findings to the findings of the lower courts on the fact that the physicians of the University Clinical Centre had sufficiently reliable histological confirmation of the tumour (it was said to have been initial cancer, when the tumour was still very small and could not therefore be seen either on the RTG picture or on the computer tomography), which justified the operation; that the investigations performed sufficed to make a diagnosis; that the diagnosis was correctly made in view of the histological results, the anamnesis of long-term smoking, suspected RTG changes and suspected bronchoscopic results, and finally that the decision to operate was, from a professional standpoint, correctly taken as the best choice of treatment. In accordance with the finding of the actual condition and with the rules of the medical profession, which the expert witnesses communicated, in the judgment of the court the decision to operate was correct.

7 In the view of the revision court, a physician is obliged to examine a patient and perform investigations with diagnostic means and in this way to obtain the necessary results and an exact diagnosis. Errors can occur (in this part the claim against hospital B was already rejected *res iudicata*), by not exhausting all diagnostic investigations that are available (the expert witnesses denied this possibility), by mistaken judgement or by interpretation of selected results (the expert witnesses also denied this). Similarly, in the judgments of the lower courts, there was no finding as to whether any such changes occurred in the patient’s symptoms in the relatively short period from the histological examination at the time of taking tissue and the operation, an unexplained course of the illness that would dictate checking and, as necessary, a change of diagnosis.

8 In the judgment of the revision court, it would be too strict to require from a careful operator to recheck each individual result from a specialist, because this would mean that the operator would have to obtain each result himself. In this case, the physicians were qualified and the principle of trust applied among them. Everyone that cooperates in the treatment of the same patient can rely on all other members carrying out their duties professionally and with the necessary care. Only in a case, as derives from the reasoning of the revision court, in which another physician is clearly not up to his task (because of intoxication, illness, overwork, exhaustion)

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and is in a condition that no longer enables him to perform his duties, can trust change into doubt and distrust. In view of the findings in the courts of first and second instance, the revision court could not conclude that the University Clinical Centre was obliged to check the acts of hospitals A and B. In the University Clinical Centre, in the view of the revision court, they had to rely on the fact that the experts had properly fulfilled their responsible behaviour in hospitals A and B. In favour of this, in the opinion of the revision court, was also the opinion of the expert witnesses: the surgeon had a sufficiently reliable histological confirmation of a tumour, which justified an operation. He had the results of the pulmonologist, pathologist and radiologist and was not obliged to doubt the diagnosis, because it was convincing in relation to the histological findings. The revision court further reasoned that, although the histological findings after the operation did not confirm the diagnosis, this did not mean, as follows from the expert opinion, that there was no tumour (the expert witness stated that in taking samples from various parts, a pathologist can overlook minor tumoural changes in the mucous membrane or beneath it or that the bronchoscopist removed the whole tumour and it was no longer in the operational preparation).

Comments

Every doctor can, in principle, rely on the fact that all other physicians cooperating in the treatment of the same patient is an expert of equal worth and that they have performed their duties professionally and with due care. However, in a case in which another physician clearly is not equal to his task because of, for example, illness and no longer in a condition that enables him to fulfil his obligations, this trust must change into doubt and distrust, otherwise the physician or the hospital in which he is employed may be liable for damage that occurs. In addition, a physician who, despite illness, did not withdraw from work, or the hospital in which he is employed because work is not organised in such a way that overtiredness and exhaustion of its employees does not occur, could also be liable. 9

28. Romania

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) Civil Section II, Decision No 2136 of 30 May 2013

<http://legeaz.net>

Facts

The patient was involved in a road accident and was treated at the city hospital in Galați for ten days. Upon multiple investigations, the patient was diagnosed with multiple body injuries and was sent for further investigation, diagnosis and treat- 1

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ment to the Emergency Hospital in Iași. There, after a neurosurgical examination, doctor IM recommended that the patient be hospitalised in a neurosurgical health institution. However, upon hospitalisation, he was treated by another doctor CA, who did not follow the recommendations of the neurosurgeon and treated the patient in another ward under his own supervision. The patient was released from hospital after three days with the diagnosis that his condition had improved. On the occasion of a second hospital visit (after two weeks), the same doctor CA examined the patient without additional investigations and released him from the hospital on the same date. Due to further deterioration of his heath, the patient was hospitalised for the third time at the same hospital in Iași six weeks later, where he received treatment from the same doctor CA. After four days he was transferred to another hospital because of his very bad medical condition. Three hours later the patient died in the hospital to which he had been transferred.

2 The territorial commission for monitoring and professional competence established the malpractice of CA, who challenged this decision in court. At first instance the plaintiffs (the wife and children of the patient) sought pecuniary and non-pecuniary damages as compensation. It is worth mentioning that the tribunal established that the misconduct of CA consisted in ignoring the medical advice of the neurosurgical specialist (IM) to hospitalise the patient in a ward specialised in neurosurgery, refusing to cooperate with other medical services, keeping the patient in his ward, although the deterioration of his health demanded more complex investigations which could not be performed by him in the emergency ward. By so doing, in the opinion of the tribunal, CA exceeded the limits of his professional competence and his fault consisted in the professional error causing the damage. The tribunal thus established the medical fault of CA, which also implies the liability of the hospital and the application of the provisions of the old Civil Code, art 1000(3) on liability of the principal for the damage caused by its auxiliaries as well as art 1003 on joint liability. However, absent evidence on the pecuniary loss, the tribunal awarded the plaintiffs only non-pecuniary damages. Both parties challenged this decision at the highest court.

Decision

3 The ÎCCJ rejected the claim of the plaintiffs in which they sought reimbursement of judicial fees and only dealt with the grounds submitted by the defendant. The ÎCCJ confirmed the finding and reasoning of the tribunal which established that CA had exceeded the limits of his professional competence when he ignored the medical advice of the neurosurgical specialist (IM) to hospitalise the patient in a ward specialised in neurosurgery, refused to cooperate with other medical services, and kept the patient in his ward, although the deterioration of his health demanded more complex investigations which could not be performed by him in the emergency ward. In the opinion of the ÎCCJ, the fault of CA consists in his professional error as

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defined by art 642(1) (b) of Law no 95/2006 and, therefore, the conditions for the establishment of medical malpractice, defined in art 34(a), (b), (c) and (d) of Law no 95/2006, were fulfilled.

Comments

As mentioned in the introduction, the new Civil Code is based on a monistic approach. According to art 3 on the scope of application of the new Civil Code, it also applies to professionals. According to the new Civil Code, anyone who pursues an undertaking is a 'professional'. The pursuit of an undertaking consists, according to art 3(3), in the systematic undertaking by one or more persons of activities of production, administration or trade in goods, or provision of services, regardless of whether this is income generating or not. **4**

However, the standard of liability will be specific in the case of a professional. As art 1358 on the criteria establishing fault mentions: when establishing liability, account should be taken of the circumstances in which the damage occurred, outside the tortfeasor's control and, where appropriate, also whether the damage was caused by a professional in the course of a business operation. **5**

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

A is the son of a forester. He intends to cut a beech tree down. When manoeuvering the tree, it snaps and crushes V. A is a non-professional but, as the son of a forester, has special knowledge regarding the subject of cutting down trees. He also has access to various pieces of necessary apparatus. He knew that it was necessary to turn the tree in order for it to fall in the right direction and that a leaf-covered tree of the type which is cut down can snap straight through in frosty weather.[1] **1**

Solutions

a) Solution According to PETL

Article 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct'. Article 4:102(1) PETL further specifies that '[t]he required standard of conduct is that of the reasonable person in the circumstances'. **2**

1 See the scenario of the Belgian case: TGI (Court of First Instance) Marche-en-Famenne, 13 December 1990, RGDC/TBBR 1991, 185, above 6/7 nos 8–12 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*.

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The individual person has to behave like a 'reasonable person in the circumstances', independently of his or her individual capacities.[2] The PETL thus use, in principle, an objective standard of fault.

3 According to the official commentary to the PETL, the 'figure of the "*reasonable person*" may vary and is to be adapted *not* to the subjective characteristics of the person alleged to be liable, but to the objective category he represents. Thus, the standard can be different for a "reasonable" specialist in aesthetic surgery than for a "reasonable" general medical practitioner; it may be more severe for an architect or an engineer than it would be for a layman executing a repair on his own house; it will be "stricter" for a mountain guide than a tourist enjoying a hike'.[3]

4 In the above scenario, A is not a professional forester, and therefore, as a starting point, the standard of care expected from him may not be that expected from a professional. However, as the son of a forester he did in fact possess the expert knowledge necessary for him to cut down the tree safely and avoid causing damage to V. Although there is no special category for 'sons of foresters' with well-defined skills, this special knowledge may arguably still be taken into consideration under the PETL when defining the required standard of care expected of A.

5 What is more, cutting down trees is a dangerous activity which should be carried out only upon acquiring expert knowledge. Cutting down trees without expert knowledge 'above the ordinary level of the reasonable every- or nobody'[4] may indeed be regarded as a violation of the required standard of conduct. A did, in fact, possess this special knowledge, yet did not apply it when cutting down the tree. The outcome under the PETL may very well be therefore that he violated the standard of care required from someone in his position carrying out the activity in question.

b) Solution According to the DCFR

6 Pursuant to art VI–3:102(b) DCFR, conduct is negligent when it does not 'amount to such care as could be expected from a reasonably careful person in the circumstances'. Like the PETL, the general rule under the DCFR is therefore an objective standard of care.[5]

7 If a higher standard of care for particular activities is required by statute, art VI–3:102(a) DCFR applies, and the person engaging in the activity has to meet this standard.

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2 PETL – Text and Commentary (2005) Chapter 4, Introduction 65, and art 4:101, no 4 (*P Widmer*); see also above 1/30 nos 4–5.

3 PETL – Text and Commentary (2005) art 4:102 no 5 (*P Widmer*).

4 PETL – Text and Commentary (2005) art 4:102 no 9 (*P Widmer*).

5 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

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Regarding situations falling under the general rule in art VI–3:102(b), the official commentary to the DCFR focuses on situations where a person is lacking the necessary skills,[6] rather than addressing the situation that the person alleged to be liable has particular skills and expertise. **8**

However, it is submitted – and should go without saying – that under the DCFR, just as under the PETL and many national tort law systems, the figure of the 'reasonable person' varies and is to be adapted not to the subjective characteristics of the person alleged to be liable, but to the objective category he or she represents (such as, for example, surgeons, dentists, lawyers, architects, etc). **9**

What is more, and as set out above, cutting down trees may be seen as a dangerous activity which should be carried out only upon acquiring expert knowledge. It could thus be expected from any reasonably careful person in the circumstances to have some level of expert knowledge before engaging in cutting down trees. **10**

A did possess this special knowledge, yet did not apply it when cutting down the tree. The outcome under the DCFR may therefore, just as suggested under the PETL, very well be that he violated the required standard of care. **11**

31. Comparative Report

Except for Slovakia, all of the reports submit cases for this question. This shows very clearly that special skills or experience are consistently accorded importance in determining the standard of conduct. **1**

Whilst the determination of the (objective) standard of care or fault is ordinarily connected to a reasonable, ordinary person, specialist skill or expertise generally leads to the objective standard being adapted or raised. Responsibility is imposed in respect of all of the competencies which a relevant expert is required to demonstrate.[1] Professional status, standing, qualification and/or role are relied on to this end. Generally the focus is therefore on the behaviour of a reasonable member of the group in question; thus what might be termed an adapted objective or so-called 'objective-typical'[2] standard comes into play: the standard of the average person with the same, relevant specialism, skill or profession. Such an objective and higher **2**

6 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

1 Germany (6/2 no 4); Austria (6/3 no 3); Switzerland (6/4 no 18 f); Greece (6/5 no 4); the Netherlands (6/8 no 3); Italy (6/9 no 4); Spain (6/10 no 3); Portugal (6/11 no 5); Denmark (6/16 no 3); Estonia (6/20 no 15); Croatia (6/26 no 5); see also Czech Republic (6/24 no 6 ff), where in part this is construed as a 'strict liability'.

2 Term taken from Spain (6/10 no 3).

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standard of care is also to be found in those jurisdictions in which, as in Austria[3] and Estonia[4], one otherwise proceeds from a subjective concept of fault. Nevertheless, it is also emphasised in Austria, for example, that even experts may prove that they were subjectively incapable of complying with the objective standard of care, eg due to unconsciousness.[5]

3 In the PETL, the dangerousness of an undertaking, a person's expertise and the reliance he or she induces likewise raise the (objective) standard of care/fault. This not only applies to professionals, but to any person who undertakes an activity which requires special skill or knowledge. In such cases, though, it is still necessary that the non-professional could have recognised this and was thus at fault in undertaking the activity,[6] to which end an objective standard is again set, and even then the knowledge and skill of a trained professional can certainly not be required. The same could apply for the DCFR.[7]

4 As the basis for such stricter liability standards, the reports note in particular the ability to appreciate and/or to avoid the harm,[8] the seriousness of the consequences or increased danger,[9] the expectations of other parties[10] and public confidence[11], as well as any profit-making aim.[12]

5 Most of the cases described concern professionals[13], and amongst them in particular doctors and hospitals[14], notaries[15] and lawyers[16], builders[17], techni-

3 See Austria (6/3 no 4), where it is also emphasised that in this case no fault in undertaking the activity (*Übernahmsfahrlässigkeit*) is required. Cf in contrast and for example Germany (6/2 no 4), where an inexperienced surgeon is only liable where he or she could have understood that more experience was required; see also France (6/6 no 3) and Slovenia (6/27 no 4). On negligence in undertaking an activity generally, see Comparative Report (7/31 no 5).

4 Estonia (6/20 no 5).

5 Austria (6/3 no 3). See also Comparative Report (7/31 no 9): overriding excuses or justifications.

6 PETL/DCFR (7/30 no 5 ff). On the question of negligence in undertaking an activity (*Übernahmsfahrlässigkeit*), see also above fn 3 and Comparative Report (7/31 no 5).

7 PETL/DCFR (6/30 no 9 ff).

8 Austria (6/3 no 3); Spain (6/10 no 10); Poland (6/23 no 21).

9 Austria (6/3 no 3).

10 See below on the importance of the appearance, rather than actuality, of skill or experience.

11 Finland (6/19 no 2).

12 Austria (6/3 no 3). Cf the reference to profit for professional standards in England and Wales (6/12 no 3).

13 Explicitly Italy (6/9 no 3).

14 Germany (6/2 no 1 ff); Switzerland (6/4 no 10 ff); Greece (6/5 no 1 ff); Belgium (6/7 no 1 ff); Portugal (6/11 nos 1 ff and 8 ff), Scotland (6/13 no 1 ff); Ireland (6/14 no 1 ff); Malta (6/15 nos 1 ff and 6 ff); Latvia (6/21 no 1 ff); Lithuania (6/22 no 1 ff); Poland (6/23 no 1 ff), Slovenia (6/27 no 5 ff), Romania (6/28 no 1 ff).

15 The Netherlands (6/8 no 1 ff); Italy (6/9 no 1 ff); Spain (6/10 no 1 ff); Poland (6/23 no 17 ff).

16 Finland (6/19 nos 1 ff and 5 ff); Czech Republic (6/24 no 1 ff).

17 Austria (6/3 no 1 ff); Czech Republic (6/24 no 14 ff).

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cians[18] and sellers of dangerous products[19]. However, the professionals considered also include, for example, teachers[20], security personnel[21], (professional) truck drivers[22] and wrestlers[23]. Though the cases discussed thus regularly concern professionals, it is at points also emphasised that an occupational activity is not always the concern when raising the standard of care, but rather that the stricter standard can apply where a person conducts an activity which requires special knowledge or skill and thus creates particular risks. This is particularly clear in Austria, where every car driver – regardless of personal knowledge and skill – is responsible for having all of the skills required to obtain a driving license; from the Austrian perspective, driving a car is equally an activity requiring specialist knowledge and skill which thus demonstrates an increased potential for harm.[24]

6 It should also be highlighted that the key issue is often not whether someone is in fact a specialist, but rather whether that person appears as and undertakes the activity of a specialist. It is presentation in a specialist role which is determinative, rather than actually being a specialist.[25] Thus, for example, in Austria a builder who undertakes the work of an architect for which he or she is not qualified is judged according to the standards of an architect.[26] On the other hand, it is stressed that occupational knowledge alone will not raise the standard of care where there is no connection between the causation of damage and the relevant professional occupation of the tortfeasor.[27]

7 In assessing the (stricter) standard of care, knowledge, skills, experience, qualification, and whether a (business) undertaking is operated are used as defining factors for a skilled or specialist undertaking.[28] In the medical field, for example, narrow groupings are set around specialist practice and training.[29] There can also, conse-

18 Switzerland (6/4 no 1 ff).
19 Spain (6/10 no 4 ff).
20 Norway (6/17 no 1 ff).
21 Estonia (6/20 no 1 ff).
22 Croatia (6/26 no 1 ff) (concerning contributory fault).
23 France (6/6 no 1 ff).
24 Austria (6/3 no 4). Cf also Belgium (6/7 no 8 ff): non-professional activity; however, incorporating 'characteristics of general application' which are usually linked to a professional role is nevertheless still understood to infringe upon the rule of objective assessment (6/7 no 12); Italy (6/9 no 7): amateur boxer of considerable experience; and Romania (6/28 no 4): broad definitions centred on activities.
25 See eg Austria (6/3 no 4); Spain (6/10 no 6); Ireland (6/14 no 8); Denmark (6/16 no 3). See also Comparative Report (7/31 no 8): relevance of knowledge and expectations of the claimant.
26 Austria (6/3 no 1 ff).
27 See Estonia (6/20 no 6 ff). Contrast Spain (6/10 no 10).
28 See eg Poland (6/23 nos 12, 13 explicitly).
29 Focusing on a particular medical specialty and/or contrasting the 'wider circle' of general physicians, see eg Austria (6/3 no 4); Switzerland (6/4 no 19); Greece (6/5 no 3); Belgium (6/7 no 5); Portugal (6/11 no 5); Ireland 6/14 no 2); and Malta (6/15 no 8).

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quently, be multiple gradations of skill levels recognised within any practice area. In Austria, for example, reference is made in particular to the distinction between professionals and volunteers engaged in the same specialist undertaking – a volunteer firefighter and a professional firefighter need not attain the same standard of care.[30] The position in England and Wales is comparable where a compromise path is sought for amateurs who undertake various tasks; an attempt is made to avoid both a (professional) standard which is too high and a (average reasonable person) standard which is too low.[31] In Denmark, by contrast, a stricter conduct standard is generally reserved for persons acting as professionals. If a person undertakes a dangerous activity (such as welding) in a private capacity, he or she will only be subject to the standard of care generally expected of a reasonable person (*bonus pater*).[32]

8 Furthermore, it should be noted that the stricter standard of care applicable to specialists is often closely associated with collateral professional duties, for example to keep abreast of developments/update skills and expertise[33] or to make immediate requests for necessary additional information.[34] The same is true with duties of supervision, monitoring and training.[35]

9 Whilst in the Czech Republic the higher standard of care owed by experts is even construed as a form of strict liability,[36] in some jurisdictions – in medical liability particularly – a noteworthy and in our opinion questionable contrary trend appears. Thus, for example, in Malta concern for the serious impact a malpractice action can have on the professional concerned leads to a focus (albeit decreasing) on a standard of crass incompetence or manifest ignorance and an increase in the burden of proof placed on a claimant.[37] In Scotland, too, a doctor can accordingly only be found liable for a treatment where no person with the same skill and knowledge would have acted that way.[38] By the same token, in Ireland and Scotland it is stressed in support of limiting liability that protection of the patient must also at times be balanced against the needs of professional practice to act unhindered and to innovate.[39] Finally, in Italy the liability of professionals is also generally handled

30 Austria (6/3 no 4).

31 Eg England and Wales (6/12 no 4).

32 Denmark (6/16 no 3).

33 Ireland (6/14 no 4); Poland (6/23 no 10).

34 Czech Republic (6/24 no 24).

35 Eg Germany (6/2 no 4).

36 Czech Republic (6/24 nos 6–13). See also Slovenia (6/27 no 2ff): reversed burden to prove no fault.

37 Malta (6/15 nos 5, 10).

38 Scotland (6/13 no 4). This is now subject to the 'exception' that the opinion of other professionals relied on by the defendant doctor must be reasonable, responsible and have a logical basis (6/13 no 6).

39 See eg Ireland (6/14 no 3) and Scotland (6/13 no 4).

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with relative restraint and limited to instances of gross negligence and intentional misfeasance.[40]

The question whether a particularly high level of individual (subjective) skill or knowledge can raise the requisite standard of care as compared to the relevant comparator group receives different answers. Whilst in Austria and Greece, for example, specialists are only responsible for adhering to the average standard for their respective occupational groups,[41] in Germany and Spain specialists' conduct is equally careless/faulty where it meets the average standard but the damage could still have been avoided by the exercise of the defendant's particular, subjective skill/higher personal qualification.[42] The same seems to be true for Ireland: although subjective additional knowledge has as yet only arisen in contributory negligence cases, it seems that subjective knowledge beyond that of the average member of a group can be significant.[43] An interesting middle course is taken, by contrast, in England and Wales, some writers explicitly make a distinction between subjective knowledge, which can serve to raise conduct standards, and subjective skill, which cannot.[44] The UK Supreme Court's formulation of the standard of care for a doctor's duty to inform in the Scottish *Montgomery* case moves in the same direction: a doctor is required to communicate risks 'material' in the sense of important to the reasonable patient or which the doctor is or should be aware that the particular patient finds important. Not only does this define the objective standard with a locus external to the doctor, it introduces a subjective element focused on particular knowledge.[45] **10**

40 Italy (6/9 no 6) and (7/9 no 3 ff): the point is controversial and there is a contrary trend.
41 Austria (6/3 no 3); Greece (6/5 no 3 ff).
42 Germany (6/2 no 4); Spain (6/10 no 9 f). Cf Lithuania (6/22 no 5).
43 Ireland (6/14 no 5).
44 England and Wales (6/12 no 5).
45 Scotland (6/13 no 7).

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7. Inexperience or Lack of Skill

1. Historical Report

Gaius, D 9.2.8.1

Facts

1 Due to his inexperience, a muleteer was not able to control his mules. As a result, the mules ran over the claimant's slave.

Decision

2 Gaius[1] decided that the muleteer was liable under the *lex Aquilia*.

Ulpian, D 9.2.27.29 and D 19.2.13.5

Facts

3 The claimant handed over his glass cup for filigree work to a glass cutter. Subsequently, the glass cutter broke the glass cup due to lack of skill.

Decision

4 Ulpian[2] held that the glass cutter was liable under the *lex Aquilia*.

Comments

5 The cases raise the question of whether the muleteer and the glass cutter can successfully argue that they did not act in a reproachful way (ie with *culpa*) since they lacked the necessary skills for their jobs.

6 Both decisions illustrate the rather objective approach of the Roman jurists. Although because of their respective individual lack of skills both the muleteer and the glass cutter were not capable of preventing the damage, the jurists nevertheless imposed liability on them. Gaius and Ulpian did not assess *culpa* by subjective standards, ie the individual knowledge and skills of the defendant, but rather by objective ones.[3] The central question was what standards could reasonably be expected of

1 Only known by his first name, 2nd century AD.

2 Domitius Ulpianus, died 223 AD.

3 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 27; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1009; cf the formula of

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men of a certain profession. Thus, the standard for the muleteer was the diligent muleteer who would be able to control his mules. Likewise, a diligent glass cutter would not have broken the glass. A diligent doctor operates on his patients skillfully and prescribes the right medication.[4] As a consequence, if somebody caused injury in the course of an activity that required certain skills, he could not avoid liability by claiming that he did not possess the said skills.

The notion that the lack of necessary skills or experience counted as *culpa* was probably self-evident for Roman jurists because it was not a natural incapacity and therefore did not need explicit justification. However, the justification explicitly given by Gaius for treating physical weakness as *culpa* probably also provides the underlying rationale for inexperience:[5] nobody should undertake a job that he was not fit to perform in the first place and which he knew or could have known would endanger others.[6] Nevertheless, for the Roman jurists, inexperience *per se* constituted *culpa*, the question of foreseeability in the specific case did not need to be examined. Gaius summarised the principle as *imperitia culpae adnumeratur* (lack of skills constitutes fault).[7] **7**

2. Germany

Bundesgerichtshof (Federal Supreme Court) 15 June 1993, VI ZR 175/92

NJW 1993, 2989

Facts

The claimant was a patient of the first defendant's clinic where she underwent a nose operation. The anesthetic was administered by a young doctor in the first year of his training as an anesthetist. An experienced colleague was supervising him but was mainly engaged in an operation in the next room where he could have heard **1**

Quintus Mucius in D 9.2.31: 'culpam autem esse, quod cum a diligente provideri poterit, non esset provisum' at 3d/1 nos 1–7.

4 *Ulpian*, D 9.2.7.8; *Gaius*, D 9.2.8 pr.

5 *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 104.

6 Cf 9/1 no 4 below.

7 *Gaius*, D 50.17.132; *imperitia* reappears as an example for *culpa* in the Institutes of Justinian, Inst 4.3.7 and Inst 4.3.8; cf on this principle *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 246 ff, 324 ff; *G MacCormack*, Aquilian Culpa, in: A Watson, Daube Noster (1974) 201, 210 ff; *N Jansen*, Die Struktur des Haftungsrechts (2003) 254 f; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 103 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1009 and fn 73; *R Robaye*, Remarques sur le concept de faute dans l'interpretation classique de la lex Aquilia, RIDA 38 (1991) 333, 363 ff.

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any call for assistance. During a 15-minute period the intubation did not work correctly because the position of the claimant had been changed. As a result, the claimant's heart stopped beating and she stopped breathing. When this became apparent, experienced anesthetist reanimated her but she consequentially suffered from unresponsive wakefulness syndrome (a persistent vegetative state) and had to be cared for in a nursing home. Through a representative, she claimed damages from the clinic owner, the first defendant, and from the young doctor as second defendant.

Decision

2 The court reversed and remanded the decision of the lower court, which had refused the damages claim against both defendants. The BGH held the clinic possibly liable both in contract and tort. The clinic had violated its duty of organisation by employing a doctor who had (this was still open) no experience at all with the concrete type of operation and with its specific risks without supervising him. The clinic had the burden of proving that it had fulfilled its duty of organisation, that it was not at fault and that the claimant's damage was not the consequence of the inexperience of the young trainee doctor.

3 Moreover, the young doctor would be liable in tort if he had had no experience in performing the specific operation. If he lacked such experience, he would have a duty not to accept the sole responsibility for critical periods of the operation and would have been at fault in doing so.

Comments

4 The decision has to be supported.[1] A patient should be entitled to expect treatment by an experienced doctor.[2] The training of young doctors must not occur at the expense of patients. Therefore, the clinic has to ensure the reasonable supervision of young doctors by experienced colleagues in critical situations, in particular where it is the young doctor's first operation or first time that he/she performs treatment. This nevertheless allows the reasonable training of beginners. They themselves are obliged not to take on tasks which they have no prior experience of.

5 In general, everybody can expect that, regardless of the field, the other persons involved have to, and will, act with the ordinary skill and care of a reasonable member of that group, profession or trade to which they belong and as which they act. It is thus a generally objective standard of care that has to be applied (although special, individual skills can raise, but not lower this group standard). This is the gen-

1 In this sense also *A Laufs*, NJW 1994, 1562, 1564; *HW Opderbecke/W Weißauer*, MedR 1993, 447 ff.

2 See also BGH NJW 1987, 1479 with note *E Deutsch*.

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eral concept that underlies § 276 (2) BGB, which defines negligence as the neglect of the care necessary in the circumstances. This standard varies according to the situation and to which group, etc the actor belongs.[3]

The decision has great relevance for the organisation of clinics and their task of training young doctors and at the same time of treating patients. These different objectives have to be reasonably balanced. 6

3. Austria

Oberster Gerichtshof (Supreme Court) 30 November 1998, 1 Ob 293/98i

JBl 2000, 305

Facts

The claimant and the defendant – an enthusiastic alpinist experienced with regard to glaciers and climbing – went on a mountain hike. The claimant told the defendant truthfully that he had no experience with climbing or glaciers, while the defendant declared that he was a good mountain climber and had already taken other people on tours. The defendant provided the equipment and chose the route, considering the tour easy as weather conditions were good. In the course of the descent, they had to cross a steep snowfield. The defendant handed the claimant an ice pick to secure himself. The latter, however, was not able to make use of it for lack of practice, slipped off and hurt himself. Consequently, he sought compensation from the defendant. However, the defendant argued that he had not practised mountain climbing for several years before the accident, hence pleading lack of experience or inexpertness. 1

Decision

The Supreme Court granted the claim and held that the defendant was to be considered a 'de facto guide' with respect to the claimant, due to his better climbing skills, broader alpine experience and local knowledge. Moreover, the defendant made it clear from the beginning that he was willing to guide the claimant. The court initially highlighted the fact that a more experienced member of a group of people teaming up for a mountain hike cannot be held liable for all less experienced members of the group merely on the grounds that he took the lead or planned the venture, as self-reliance is necessary to mountain climbing. However, liability comes 2

3 See also *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 114; *B Dauner-Lieb* in: NomosKommentar zum BGB vol 2/2 (2nd edn 2012) § 276 no 13 f; *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 276 no 17.

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into question if someone assumes 'a guiding role as a courtesy' and withholds mention of, belittles or denies dangers possibly not foreseeable for more inexperienced companions. The Supreme Court stated further that the 'de facto guide' or 'guide by courtesy' is not subject to the standard of care applicable to a professional alpine guide; however, he must take the reasonable care expected of a comparable alpinist, thus the defendant's attempt to excuse himself by claiming a lack of practice was rejected. In the case at hand, the defendant should have considered the snowfield dangerous and should have taken the necessary safety measures, which he failed to do. On the contrary, he represented the descent as almost safe. Hence, the defendant breached his duties of care and was liable.

Comments

3 The decision at hand raises two interesting issues. Firstly, there is the aforementioned question of how a relationship of proximity or special reliance affects the required standard of care (see 3e/3 no 9). The Supreme Court initially emphasised that in the case of a joint mountain hike, the experienced climber's liability cannot be established solely on the grounds that he planned the route or took the lead. However, the court assumed that stricter rules may apply if someone consciously takes over leadership due to his broader alpine experience or encourages novices to place their trust in him. In such cases, the more inexperienced climber's trust is worthy of protection. The standard of care applicable to such a 'de facto guide' or 'guide by courtesy' may not be the same as the one applicable to a professional mountain guide. Even so, he must exercise the care objectively expected of a comparable alpinist.[1] What is decisive is how an averagely diligent and dutiful mountain guide would have acted in the particular situation.[2] Thus, a graded, objective standard of fault is applicable in accordance with § 1299 ABGB ('standard of care for experts', cf 6/3 no 3f). Specifically, a special relationship leads to a tightening of liability as compared with the general rules, according to which a subjective standard of fault applies (§ 1297 ABGB).

4 Secondly, the decision comprises another interesting aspect as the defendant argued that he had not practised mountain climbing for several years before the accident, hence pleading lack of experience or inexpertness. The Supreme Court did not accept this objection, since the defendant had acted like a 'de facto guide' and – according to § 1299 ABGB – his fault had therefore to be assessed in an objective way. It has to be stressed that liability does not depend on particular negligence in

1 On this see *A Michalek*, Die Haftung des Bergsteigers bei alpinen Unfällen: schadenersatzrechtliche Verantwortung in Gefahrengemeinschaften (2nd edn 1990) 197 ff; furthermore *J Stabentheiner*, Zum Tourenführer aus Gefälligkeit, JBl 2000, 273 ff.

2 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1299 no 2.

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assuming the relevant task (*Übernahmsfahrlässigkeit*) in such cases.[3] According to § 1299 ABGB it is rather sufficient that someone voluntarily engages in an activity requiring special skills (cf 6/3 no 4).

It should be noted that rigorous liability according to § 1299 ABGB is out of the question if a task requiring special expertise is not undertaken voluntarily but rather out of necessity.[4] Accordingly, the Supreme Court held that a municipal leader obliged to accept his election is not liable under § 1299 ABGB.[5] Likewise, a general practitioner performing surgery normally carried out only by a specialist due to imminent great danger to the patient does not have to possess a specialist's skills and knowledge.[6] 5

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 3 February 2009

ATF 135 IV 56

Facts

A1 was a member of a rifle club and owner of pistols. During a dispute with her boyfriend V, she pointed two different pistols at him successively. The police confiscated the arms and declared that they would only return them upon presentation of a medical certificate attesting that A1 was psychologically stable and represented no danger to herself or others. A1's psychiatrist refused to write such a certificate. She turned to general physician A2, who was at the same time a psychoanalyst. After a discussion of one hour, A2 handed out a medical certificate, which allowed A1 to have her weapons returned. 1

A short time later, A1 met V again. She pointed one of the pistols the police had sequestrated at him. She had another pistol in her bag, which had not been seized by the police. During the struggle between A1 and V, a shot went off and injured V in the stomach, liver and a kidney. His kidney had to be removed. 2

The cantonal judge condemned A1 and acquitted A2. 3

3 *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 183; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1299 no 5; dissenting *F Harrer* in: M Schwimann (ed), Praxiskommentar zum ABGB VI (3rd edn 2006) § 1299 no 2.

4 *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 183; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1299 no 1.

5 OGH Rv III 3/8 = GlUNF 4134.

6 OGH 1 Ob 504/58 = JBl 1960, 188.

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Decision

4 In this penal case the Supreme Court remanded the case to the cantonal judge for further investigation on the question of whether a qualified psychiatrist would have written a medical certificate, on the basis of which the police would have returned the firearms.

5 The Supreme Court stated the definition of negligence as an incautiousness contrary to one's duty to consider the consequences of one's behaviour (art 12 of the Swiss Penal Code [SPC]). The question is whether, based on the circumstances and his knowledge, the injuring party could or should have foreseen the endangerment of the victim's rights.

6 The judges considered that A2's medical certificate was causal to the return of the pistols and to A1's possibility to use this weapon against V. Certainly A1 could have used the other pistol she had in her bag and which had not been confiscated by the police. But this is irrelevant, as A1 *did* use the formerly confiscated weapon.

7 As to A2's competence to write a medical certificate in favour of A1, the judges stated that A2 had professional education as a general physician and psychoanalyst. As such, he had neither competence to evaluate the future risks concerning A1's behaviour with firearms nor experience in establishing criminal prognoses. He was satisfied with A1's explanations despite the fact that she had told him that she had been close to suicide in the past and that she had been going to psychotherapy for years. A2 should have refused A1's request to issue a certificate. By the mere fact of doing so, he violated his professional duties of care. He further violated his duties by failing to further investigate the case, which the *lex artis* would have required. Contrary to what he pretended in the medical certificate he issued, he did not perform a detailed analysis of A1.

8 The lower court would have to condemn A2 if the judges arrived at the conclusion that the police would, on the basis of a medical certificate of a qualified psychiatrist, have considered that it would be dangerous to give the arms back to A1.

9 For the comments see ATF 124 III 155 at 7/4 nos 18–19.

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 7 October 1997
ATF 124 III 155

Facts

10 A was a company counselling its clients in financial operations on the stock exchange. A proposed its services to the artisan V. A and V concluded two contracts and V invested CHF 125,000 (€ 104,000). A's employee, Z, advised V and proposed and executed commodity options. V had to pay a commission for each transaction concluded by Z. He signed a declaration saying that he was aware of the risks linked to the proposed transactions. A bought and sold numerous options and deduced from V's account remarkably significant commissions.

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One month later, V, who was not satisfied with A's transactions, ordered the dissolution of the two accounts he had opened with A. After the liquidation of the accounts, A paid him back about CHF 16,000 (€ 13,000). 11

V filed an action against A for CHF 110,000 (€ 92,000). The first two judges ordered A to pay CHF 108,000 (€ 90,000) to V. 12

Decision

The Supreme Court rejected A's appeal. 13

The Supreme Court's economic analysis is not relevant for the present purpose. As to the interpretation of the contract between A and V, the court concluded that the terms for the calculation of the commissions were not clear. 14

The court recalled the mandatee's exigent obligations in business investments.[1] A had a duty to inform, to counsel and to warn V. These obligations have a common root in the mandatee's duty of diligence and good faith;[2] simultaneously, the extent of these duties does not only depend on the competence of the client, but also on the complexity of the transactions. 15

The Supreme Court found that A had violated the contractual duty to counsel and inform V. 16

The Supreme Court followed the cantonal judge's opinion, according to which, the employer A is liable towards V for Z's deficient services resulting from her insufficient professional qualification (*Übernahmeverschulden*). A, who had presented herself to V as an investment specialist, cannot allege that V should have noticed Z's lack of professional competence. This argument could only be heard if V had in fact been aware of Z's incapacity and if he had consciously accepted the risks resulting from it. 17

Comments

The latter case is based on a contractual link between V and A. However, art 99 al 3 of the Swiss Code of Obligations (SCO) states that tort law norms (art 41 ff SCO) apply to fault in contract. Consequently, the considerations of the decision are valuable in contract and in tort. 18

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1 On the agency contract, see art 394 ff of the Swiss Code of Obligations (SCO).

2 On mandatory's duties of diligence and faithfulness, see mainly art 398 al 2 SCO:
The agent is liable to the principal for the diligent and faithful performance of the business entrusted to him.
For academic literature on these duties, see for instance, *W Fellmann*, Berner Kommentar, Art 394–406 OR (1992) art 398 no 16 ff; *RH Weber*, Basler Kommentar OR I, Art 1–529 (6th edn 2015) art 398 no 8 ff; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1–529 CO (2nd edn 2012) art 398 no 1 ff; *P Tercier/PG Favre*, Les contrats spéciaux (4th edn 2009) 760 ff, no 5071 ff.

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19 A main question in the latter case was, whether A could oppose to the argument that A's employee, Z, was inexperienced. The answer of the judges was clearly negative. A had taken the risk to employ the non-qualified Z and was responsible for his choice towards V. In Swiss law, this would be qualified as *Übernahmeverschulden*, which is defined as the culpable overestimation of one's own capacities, the culpable underestimation or a bad appreciation of the possible consequences of behaviour.[3] Had A acted by himself instead of his employee, the outcome would have been the same.

5. Greece

Efeteio Kerkyras (Corfu Court of Appeal) 41/2010

Not published (Facts found in AP 1265/2013 published at ISOKRATIS)

Facts

1 Two friends, V1, 17 years old and V2, 15 years old, were driving their motorcycles next to each other with no drivers' licenses, no insurance coverage and without helmets. The defendant A was driving a car on the same road but in the opposite direction under the influence of toxic substances in combination with alcohol. Therefore, his perception and ability were reduced, as a result of which he lacked the required attention and did not give priority to the motorcycles when taking a left turn at an intersection. The two motorcycles collided into the car causing V1's death and V2's severe injury. A only sustained material damage.

Decision

2 According to the court, the accident was due to the negligence of all three drivers. More particularly, A was found negligent to the extent of 80%. The two minors were held negligent to the extent of 20%, because, although they lacked experience (they both did not hold drivers' licences) and because of this they should have shown greater care and attention, they did not have their lights on and were driving at excess speeds (80 km/h), as a result of which they did not perceive A's maneuver in time, did not reduce their speeds and crashed into the car.

3 *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 171; *I Schwenzer*, Schweizerisches Obligationenrecht. Allgemeiner Teil (6th edn 2012) 149, no 22.19; *A Koller*, Schweizerisches Obligationenrecht. Allgemeiner Teil (3rd edn 2009) § 47, 721 f, no 27 ff; ATF 93 II 317, 324 c 2e bb (1967); ATF 124 III 155, 164 c 3b (1998).

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Comments

A lack of experience is not reflected in the standard of conduct required. A person should always behave according to the way the average prudent and conscientious person would have behaved in order not to be characterised as negligent. Furthermore, the court in the particular case presented considered that, when there is lack of experience, individuals must take greater care and be more attentive. 3

In general, when a person causes damage in the course of an activity which he/she should not have undertaken because of inexperience or lack of skill, negligence arises according to art 330 sent b GCC, which stipulates that: 'There is negligence when the care normally required in conducting business is not exercised'. The latter occurs, for example, when a young doctor, who is still in training, undertakes, without the existence of any emergency, to conduct a difficult delivery, as a result of which the foetus dies.[1] 4

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 8 June 1961
59-12.524, Bull civ II, no 432

Facts

Mrs Lebedel was injured when the car she was in, which was being driven by a young man, veered off the road. She brought a claim for damages against the young man and the appellate court found that the accident had been caused by the young man's fault. The case was brought before the *Cour de cassation*. 1

Decision

The *Cour de cassation* affirmed the appellate court's decision. The case had been rightly decided, as the young man had been negligent in his driving and he had driven too fast into a curve, given his lack of experience. He had therefore been at fault. 2

Comments

Both the appellate court and the *Cour de cassation* noted that the young man had been driving too fast given his lack of experience (there were no speed limits on French roads at that time). This shows how inexperience or lack of skill are normally 3

1 *I Karakostas*, Law of Torts (2014) 134.

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taken into account not to lower the defendant's duty of care, but on the contrary to raise it, since the inexperienced person must be extra careful in order to compensate for his inexperience. The rule therefore seems to be: both special skills and lack of skills create higher demands. More care is expected from defendants with special experience (see 6/6), but also from inexperienced defendants, who should be aware of their lack of skill and adjust their conduct accordingly.[1]

7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 5 June 2003

Pas 2003, 1125

Facts

1 A society organised a treasure hunt at a holiday camp for a group of around 20 young children. During the game, one of the children broke away from the group and ran across a road. He was knocked down by a car. The young boy's parents claimed that one of the supervisors was liable due to a lack of vigilance on his part.

2 The trial judge rejected the claim that the supervisor was liable, considering that he had not committed any fault in his supervision and had taken the precautions necessary to avoid an accident. In order to assess this fault, the judge stated that one cannot demand the same skill and authority from a young, volunteer supervisor as one has a right to expect from qualified teachers. In this regard he considered that the supervisor's behaviour had not diverged from that of an ordinarily prudent and diligent young, volunteer supervisor.

3 The claimant appealed to the Supreme Court, on the basis that the principle of the objective assessment of fault did not allow the personal characteristics of the person who committed the harmful act to be taken into consideration, particularly subjective elements such as age, training or experience.

Decision

4 The Supreme Court approved the trial judges' reasoning and rejected the appeal. It stated that a judge assessing whether or not an individual had acted culpably could take the behaviour of a person exercising the same functions and with the same qualifications as those of the person whose liability is being investigated as a term of reference.

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1 Such a case would now be dealt with under the strict liability regime created by *loi Badinter*, in which the defendant's fault is irrelevant.

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Comments

We have already indicated what is included in the principle of the objective assessment of fault (see 1/7 no 3 and 6/7 no 4). From this well-established starting point, a criterion such as the lack of experience of the person who committed the harmful act cannot be taken into account in assessing the standard of behaviour one had the right to expect from him. 5

The Supreme Court's judgment demonstrates the difficulty in establishing a clear and distinct boundary between an objective assessment, which excludes the consideration of the personal characteristics of the person who caused the harm, and a subjective assessment, which on the contrary invites us to take all factors into account. By considering that it is legal to adapt the standard of behaviour in the light of the lack of experience and voluntary character of his activity (but also his youth – see 8/7), the Supreme Court enlarged the field of criteria which can possibly be taken into consideration when assessing civil fault. 6

As a result of this decision, some have, quite rightly, maintained that today 'it seems from now on that only characteristics that are strictly personal to the defendant and therefore not of general application (intelligence, sensitivity, etc) are incompatible with the so-called "*objective*" assessment in civil matters'.[1] On the other hand, moving forwards we can consider the criteria which are of general application (such as, in this instance, a young volunteer's lack of experience, in comparison to the position of professionals) to be compatible with an objective assessment of fault. 7

It should also be noted that, outside of the assessment of whether fault occurred in the carrying out of a particular activity, it is possible that the simple fact of undertaking an activity in respect of which one does not have the necessary experience or skill constitutes negligent behaviour. It is not a question of taking inexperience into consideration in order to adapt the standard of behaviour, but of considering, in a general way, that an ordinarily prudent and diligent person would abstain from taking part in activities which he/she did not have the required skill for. Accordingly, recklessness was alleged on the part of a person who had given diving lessons without having the necessary qualifications, which led him to commit various errors and brought about the drowning of one of his pupils.[2] 8

Finally, we may recall that, under Belgian law, to say whether fault was committed or not depends on the sole question of whether the defendant behaved as a 9

1 Free translation of *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 24, no 4.

2 Military Court, 26 March 1981, RGAR 1982, 10534; see also regarding fault arising from the use of a firearm by an individual when he 'lacked training, was unfamiliar with handling firearms and ignorant of what were elementary precautions to be taken when confronted with the urgent need to use one', free translation of Court of Appeal of Mons, 4 June 1987, JLMB 1988, 175.

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reasonably prudent person would have in the same circumstances. The judge decides by reference to the standard conduct of the *bonus pater familias* (ie the reasonably prudent person). Consequently, there is no hierarchy among the criteria to decide whether a defendant's conduct constitutes fault and there is no case law illustrating the relationships between criteria (especially, those listed under 3a/7 to 3f/7). However, the Supreme Court (*Cour de cassation*/*Hof van Cassatie*) carries out an *a posteriori* marginal control on the criteria used by the trial judge. It checks whether they are consistent with an objective assessment of fault, as in the presently commented decision of 5 June 2003.

9. Italy

Corte di Cassazione (Court of Cassation) 26 March 1990, no 2428

Giur It 1991, I, 600 with note by *D Carusi*

Facts

1 The claimant underwent a surgical intervention, a laminectomy, that is, the removal of the posterior arch of a vertebra. A few years later, he sued the chief physician responsible for the surgical intervention and the public hospital where he underwent the surgery, seeking compensation for the injury to his spinal cord and the consequent damage he suffered. The claimant stated that, before the intervention, none of the required examinations and analyses had been carried out, that the chief physician did not possess the ability to perform such a difficult surgical operation and that therefore he had caused the lesion of his spinal cord. The defendant replied affirming that he was a skilled professional, with long-standing experience acquired at the university orthopaedic hospital in Bari and that the damage to the claimant's spinal cord was caused, not because of his fault, but by a compression of the spinal cord, a condition which the claimant had had for a long time.

Decision

2 The *Corte di Cassazione* held the defendants liable for gross negligence, as it was proved that the chief physician was a specialist in orthopaedic medicine and not in neurosurgery and that he had never performed a similar operation before. The court pointed out that the liability of a professional for damage caused by his professional activity must be ascertained on the basis of the duties related to that activity, and especially to the duty of diligence, which, as provided by art 1176 of the Civil Code, must be adequate to the actual activity.

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Comments

As mentioned in 6/9 no 6, art 2236 Civil Code provides that whenever a professional, **3**
ie an engineer, an architect, a physician, a lawyer, is required to render a performance involving the solution of technical problems of special difficulty, liability for non-performance is limited to the case of gross negligence, or intentional misfeasance.[1]

This provision was criticised by some scholars, because it introduced an advan- **4**
tage for professionals in precisely those cases where the presence of technical problems should require a greater degree of diligence and capacities.[2] Therefore, some authors opine that this provision is to be interpreted so as to reduce or limit the allegedly more favourable treatment of professionals in comparison to others.[3]

Judicial decisions generally followed this restrictive path, using a case-by-case **5**
approach to evaluate the actual existence of technical problems of exceptional and extraordinary difficulty,[4] therefore verifying only the skills of the professional and not his diligence and prudence.[5] As a consequence, art 2236 Civil Code is seldom applied to exclude liability, although there is a tendency to extend its application from the field of contractual liability to that of tortious liability.[6]

Besides, it is important to stress that, following the general increase in the level **6**
of risk due to technical and scientific evolution, although judges formally follow this provision of law, they substantially tend to substitute gross negligence/light negligence with professional negligence/risk.[7]

To conclude, a professional is liable to compensate damage suffered by another **7**
party only if he acted in violation of his duties to pursue the obligations provided for in the contract. Where the violation is the consequence of his inexperience or lack of skill, his negligence is labelled as *imperizia*, and it is traditionally described as the violation of the technical rules that should be adopted by the professional.[8] The capacity of the professional is acquired through study and experience, and should be

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1 The Italian 'prestatore di opera intellettuale' to whom art 2236 Civil Code refers is a professional person who is not an entrepreneur according to art 2135 Civil Code.

2 See eg *C Lega*, Le libere professioni intellettuali nelle leggi e nella giurisprudenza (1974); *E Bonvicini*, La responsabilità civile (1971); *P Rescigno*, Manuale di diritto privato (1973).

3 Among the others, *A Principalli*, La responsabilità del medico (1983); *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013).

4 Cass 23 May 1975, Arch Civ 1975, 1485; Cass 28 April 1978, no 1845, Resp civ prev 1978, 591.

5 Cass 13 October 1972, no 3044, Foro It 1973, I, 1170.

6 Cass SS UU, 6 May 1971, no 1282, Resp civ prev 1971, 523. On the issue, *F Cafaggi*, Responsabilità del professionista, in: Digesto delle discipline privatistiche: sezione civile, vol XVII (1998) 2138.

7 *F Cafaggi*/*P Iamiceli*, La colpa, in: P Cendon (ed), Il Diritto nella giurisprudenza, La responsabilità civile, vol IX (2001) 382.

8 *CM Bianca*, Inadempimento delle obbligazioni, in: Commentario del codice civile Scialoja-Branca (1979).

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applied at the right moment. His capacity must be distinguished from the quality of diligence, which consists in all those characters that permit the best use of the technical knowledge in each particular case.

8 The required level of capacity of the professional in cases of contractual liability is that of the professional who knows the scientific and technical solutions generally adopted. The ascertainment of his capacity must be made on the basis of a case-by-case examination. Where the professional does not possess professional experience adequate to the obligation he undertakes, he should suggest the name of another, more experienced, professional.

9 After clarifying these essential points, the question of whether the care due by the defendant under the circumstances should be tailored to take into account his inexperience or lack of skill remains – to an extent – very much open.[9] From a normative point of view, it is difficult to accept the idea that persons who lack experience or knowledge should suffer the consequences thereof if they had no possibility to control the consequences of acting under such shortcomings.

10. Spain

Sentencia de la Audiencia Provincial A Corunna (Judgment of the Provisional Court of A Corunna) 12 April 2013

JUR 2013\183085

Facts

1 A was walking her dog, a 57 kg Labrador and Mastiff cross, when the dog tugged, the hand strap slipped out of her hand and the dog ran away. At that time, V, with his son and a small dog, was coming out of his house. Both animals started to fight, without actually biting each other. A, who had neither the ability nor the strength to control her dog, asked V for help; V could control the dog, but suffered an injury to his finger that required surgery. V sued the insurer covering A's liability as owner of the dog. The defendant insurer objected that A had not committed any fault or had been negligent. The Court of First Instance ruled against the defendant and the Court of Appeal confirmed this decision in part.

Decision

2 Contending that A was not at fault or had not been negligent while walking her dog is legally irrelevant. Fault is not the ground for liability here, but strict liability pur-

9 Cf *M Bussani*, La colpa soggettiva: Modelli di valutazione della condotta nella responsabilità extracontrattuale (1991).

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suant to art 1905 CC. However, it must be emphasised that A recognised during the proceedings that her dog weighed at that time about 57 kg, that it is very big, and that she was not able to master it (this being the reason why she asked V for help). Accordingly, she was at fault. She has a pet in an urban environment that, as she recognised, she was unable to master. Nevertheless, she failed to take any specific safety measures. If she had used another type of collar or other containment measures, the dog would not have been able to run away. There is negligent conduct when a person, knowing that she cannot control her dog, creates a generic risk for other users of public paths and takes no action to prevent it.

Comments

The court decided the case according to strict liability rules (cf art 1905 CC, liability for animals) and, therefore, the assertion in the judgment is *obiter*. However, this case may illustrate the application of an objective standard of care as opposed to a standard taking into account the subjective circumstances of the tortfeasor, in this case her physical strength or skill. 3

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 4 October 2007 (Santos Bernardino)

Facts

V, a ten-year-old child, was run over by a car, driven by A, when, without giving way, she went onto the public road where the car was passing. A, an inexperienced driver who had only had her driving licence for six months, did not manage to avoid the accident, in which V suffered serious damage. 1

Decision

The Supreme Court of Justice ordered A to pay damages to V for the damage suffered by her. The court based its decision on the strict liability provision for accidents caused by vehicles (in art 503 of the Civil Code), which in the case at hand competed with contributory negligence (fault of the victim), and was enhanced by the inexperience of driver A. The inexperience of the driver was taken into consideration by the court, because it was highly likely that this fact increased the probability that the accident occurred and the severity of the damage suffered by V. The inexperience worked as a catalyst of the vehicle's inherent risk. The court emphasised that the inexperience of the driver could not be considered as a factor in fault, as this case was based on objective liability, therefore disregarding fault. The inexperience was 2

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relevant only in the discussion of causation. Therefore, although A's behaviour was not faulty, the truth was that a more experienced driver could have avoided the accident or diminished the severity of the damage.

Comments

3 Fault requires a subjective assessment of the injuring party's behaviour, regarded as the ethical and legal censure of the action or omission of the individual in question. It implies a judgment of the conduct in order to assess whether the individual could and should have acted differently. Fault is assessed, in the absence of other legal criteria, by the diligence of an average man (art 487(2) of the Civil Code): 'Fault shall be assessed, in the absence of any other legal criteria, by reference to the diligence expected of a dutiful *pater familias*, having regard to the circumstances of each case.' This model is based on the abstract criteria of assessment of fault (abstract but taking into consideration the cultural, social and professional environment in which the individual is placed).

4 In the analysis of the behaviour of the defendant, it is not relevant to assess the experience of the driver. It is the behaviour expected from the average man that is relevant and whether or not the concrete behaviour of the defendant meets that standard. It is irrelevant, as far as fault is concerned, to assess what made the behaviour meet or stray from the standard of conduct. In the case at hand, either the driver behaved with the diligence expected of an average driver or she did not, regardless of being influenced by inexperience, sickness or distraction.

5 Nevertheless, when we have a situation of strict liability based on risk, particularly when it is related to driving, we can consider the inexperience of the driver as a catalyser of the vehicle's inherent risk, which, in conjunction with contributory negligence, can influence the proportion of liability attributed to both parties.

12. England and Wales

Nettleship v Weston, Court of Appeal (Civil Division) 22 October 1970
[1971] 2 QB 691

Facts

1 The action was pursued by the claimant, Mr Nettleship, who had agreed to teach the defendant, Mrs Weston, to drive. The car belonged to Mrs Weston's husband. Mr Nettleship was assured that full comprehensive insurance had been taken out for the car that would cover passengers in the event of an accident. Although very receptive to instruction and a very good learner-driver, Mrs Weston froze on turning a corner on the third day of the lessons, resulting in the nearside of the car mounting a kerb. Mr Nettleship, who suffered injury to his knee-cap as a result, argued that

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Mrs Weston was well aware of her lack of skill and should be held to the standard of a qualified and experienced driver.

Decision

The Court of Appeal unanimously allowed the appeal. A learner-driver must attain the same objective standard of care to be expected of an experienced, skilled and careful driver. That standard applies towards all passengers in the car, including an instructor. Megaw LJ highlighted the disadvantages of having varying standards. These would result in unpredictability, uncertainty and indeed the impossibility of arriving at fair and consistent decisions. Moreover, the vagaries of a fluctuating standard could not logically be confined to the duty of care owed by learner-drivers. A similar doctrine would have to apply to holders of a full licence; equally, a young, newly qualified, surgeon or solicitor would also be held to a lower standard of skill and care. The defendant was thus found liable. **2**

Comments

The starting point is, therefore, that a uniform standard applies. In addition to the practical difficulties noted by Megaw LJ, a variation of standards would operate against the public need for activities to be conducted with a predictable degree of care. The court also had regard to the statutory obligation on motorists to take out liability insurance, which speaks in favour of an objective standard even though such a principle attributes tortious liability to one who may not be morally blameworthy. However, few English lawyers would go so far as to endorse the following dictum of Lord Denning MR: 'the injured party is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill to a high standard ...'.[1] **3**

Where the inexperience or lack of aptitude is attributable to age (see 8/12 below) or physical (see 9/12 below) or mental characteristics (see 10/12 below), however, a different approach tends to be taken. **4**

1 [1971] 2 QB 691, 699 f per Lord Denning MR.

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13. Scotland

Dickson v Hygienic Institute, Court of Session (Inner House), 4 February 1910
1910 SC 352

Facts

1 An action of damages was brought by the pursuer against the defenders, a company which employed persons who were not registered dentists to carry out dental treatment. The pursuer had been injured in an operation carried out by one of the non-dentally qualified employees. At first instance, the judge ordered a proof (ie a trial of the facts).

Decision

2 On an appeal to the Inner House of the Court of Session, the court held that the defenders had undertaken to conduct the operation with the ordinary skill possessed by practitioners of dentistry, and that, as they had failed to meet the level of skill to be exercised of such practitioners, they were liable in damages. The judge in the case (Lord Dundas) reached this decision by applying the view that 'any man who performs a service of art for another is responsible up to the limit of his own profession – that is, what he professes or announces to the employer.' This meant that an 'unregistered practitioner, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill of his profession'.[1]

Comments

3 This decision sets out two clear rules applicable to those professing a special skill: (a) practitioners of a particular skill will be held to the standard of the ordinary skill and care to be expected of a practitioner of that skill (this was an early formulation of the test later developed more fully in the *Hunter v Hanley* case discussed at 6/13 nos 1–7); and (b) those who profess to be practitioners within a particular field will be held to possess the skill pertaining to that field of practice even if in fact they are *not* practitioners of the art in question, and they will be required to act with the same standard of skill as one who does in fact possess the relevant skill.

1 The judge was quoting from the English text *Bevan on Negligence*.

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14. Ireland

Newman v Cogan, High Court, 5 December 2012
[2012] IEHC 528

Facts

The plaintiff was visiting the home of her partner's parents; when returning from the backyard, she came through a door with glass panels; her partner was coming in from the yard behind her; he stumbled on the way in and fell against the door; one of the glass panes shattered and a piece of flying glass hit the plaintiff in the right eye, resulting in the loss of the eye. The glass panel had been installed by the partner's father. The plaintiff sued her partner's parents under sec 3 of the Occupiers' Liability Act 1995, for failure to take reasonable care with respect to the safety of the premises. **1**

Decision

O'Neill J dismissed the plaintiff's claim; there was no flaw in the installation of the glass, so the only possible negligence was in the selection of the quality of glass. It was established that a professional glazier would not have installed the type of glass used. However, it was not reasonable to expect householders to be familiar with technical regulations pertaining to building standards in respect of a routine and minor repair. 'Thus, it could not be said that a householder, who was a reasonably competent glazier, such as the first named defendant, could not have reasonably believed that the glass chosen was suitable for this location.' **2**

Comments

This case demonstrates that a person's lack of skill does not necessarily render them liable if they have not held themselves out as having such skill. The task must be one that is suited to being carried out by an unskilled person and the level of care should be that of a reasonable unskilled person.[1] It was only a portion of the task that was subject to this standard (the selection of materials). **3**

1 The only case cited was *Wells v Cooper* [1958] 2 QB 265 (an English decision; see 6/12 nos 2–5), which indicated that the standard expected of a householder conducting simple DIY repairs was less than that of a tradesman acting for reward.

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15. Malta

Iris Cassar and Another v Francis Gauci (Court of Appeal – Qorti tal-Appell)
9 November 2012, Writ no 1249/1992
<http://www.justiceservices.gov.mt>

Facts

1 The defendant, the owner and operator of a supermarket, personally designed and installed a system of shelving for the storing and display of items on sale. Although he had some practical experience in the matter, he had no formal technical training and expertise. He failed to properly calculate the load bearing capacity of the shelves with the result that a section of shelves collapsed, grievously injuring the plaintiff. The plaintiff sued for damages.

Decision

2 The first court found for the plaintiff. The evidence showed that the collapse was due to the fact that the shelving was not professionally designed and was inadequate for the weight it carried. In designing such a system without professional help, the defendant had failed to exercise the prudence, diligence and attention of a *bonus paterfamilias*. The evidence also showed that, a few weeks before the incident, the shelves had started to sag and to emit unusual noises; it was therefore foreseeable that they were straining under the load.

3 Taking into account the physical and psychological harm suffered by the plaintiff, the court assessed damages at € 40,730.

4 The defendant appealed. The Court of Appeal rejected the appeal because, like the first instance court, it was of the view that the evidence showed amply that the defendant had acted negligently and with lack of prudence in designing the shelves without professional help.

Comments

5 This ought to have been a straightforward application of art 1038 of the Civil Code, which provides that whoever undertakes any work or service without having the necessary skill shall be liable for any damage caused due to his unskilfulness. Both the first instance and the appellate courts however made no reference to this article, relying instead on the general provision on negligence and foreseeability. This may suggest that art 1038 is only a specific application of a general rule. However, it should be possible for the plaintiff to rely solely on the defendant's lack of skill without having to provide further evidence of negligence. One may exercise the care which a reasonably prudent man would have exercised under the circumstances, and take precautions against all risks which a prudent man may foresee; still, if one

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lacks the skill required for the task and causes damage, one should be held responsible for that damage. A possible defence would be for the defendant to prove that the damage would have occurred even if the task had been undertaken by a properly qualified person; in such a case the 'lack of skill' would not have been the cause of the harm.

16. Denmark

Vestre Landsret (Western Court of Appeal) 19 June 1997
FED 1997.820 V

Facts

V agreed with A that A should dig an underground drain around V's house. The agreement had come about after V and A had met at a private function at a mutual acquaintance's house. A had made it his business to buy and repair used automobiles as well as other vehicles such as trenchers and diggers. A, however, had no training or experience in construction work. A had carried out the digging work using a rented trencher and lorry. During the digging work V's conservatory collapsed and V sued A for approx € 37,000. **1**

Decision

The City Court of Skanderborg found it to be proven that although A had no professional skill or expertise regarding construction work, he had appeared to be a professional to V. Consequently, A's actions were to be judged as those of a professional unless A had made his lack of skill explicitly known to V, which he had not. According to the finding of the court's expert witness, A's work had not been carried out in compliance with professional standards and A was consequently held liable towards V for the repair costs (which, however, were reduced somewhat). On appeal the Western Court of Appeal upheld the ruling. **2**

Comments

As V and A had entered into an agreement (if not a formal contract) that A should carry out the construction work, it may be argued that, strictly speaking, the claim was a claim under contract. However, under Danish law, the borderline between the two areas of law is a fine one[1] and the rationale applied by the courts in a case such **3**

1 *B Gomard*, Forholdet mellem Erstatningsregler i og uden for Kontraktsforhold (1958) 64 ff.

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as this where there are no specific contractual provisions is the same: A appeared to be a professional within his field and had not specified to V that he was not. Consequently, his actions should be viewed as the actions of a professional. A's actions were assessed by an objective standard, namely the standard of a professional construction worker, and the subjective argument that in fact A possessed no such skill was A's own risk. The case should be compared to FED 2003.1409 Ø where A was helping a friend, V, chop down trees as a favour. A tree fell at an unexpected angle and damaged V's tractor. V was aware of A's lack of professional skill. As A could not be expected to adhere to the professional standard for landscape gardeners as long as the task was carried out with reasonable care, which it was, V's claim for compensation was rejected.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 14 December 1994

Rt 1994, 1430

Facts

1 An inexperienced attorney-at-law, A, advised his clients (V1 and V2) to accept a settlement in a case before court. The case concerned a dispute between neighbours. V1 and V2 had sued a neighbouring company D for building too close to their property. The neighbouring company D then sued V1 and V2 in tort for an unfounded lawsuit. The claim was for approx € 225,000, whereas approx € 50,000 was offered as a settlement. The attorney A advised his clients to accept the offer instead of being sued for more money.

Decision

2 The court found that the attorney had not had sufficient information upon which to base his advice. The facts of the case on which he gave advice to his clients were not sufficiently investigated. There had also not been any relevant discussions of the legal basis for the liability of V1 and V2. The court put weight on the fact that the threshold for being held responsible for unfounded lawsuits is quite high. The fact that A was inexperienced was not taken into account. Once he had taken on the task of being an attorney, he was expected to perform prudently and with the same quality of service as is expected of more experienced lawyers.

Comments

3 The reasoning for this decision is well embedded in the doctrine. The fact that the attorney chose to perform as an attorney was decisive as regards what was required

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of him. This is very much in line with the general stance that the *culpa* evaluation is based on objective standards. This view is especially predominant in cases regarding different types of professionals. The general stance is reinforced by the fact that rules and standards of conduct are formulated in greater detail nowadays compared to two or three decades ago. In both theory and practice one uses the term 'professional liability'[1], an expression capturing the fact that objectively high standards apply to a professional engaging in an activity that requires professional skills, typically lawyers, engineers and surgeons. Once a professional assumes such roles, the corresponding objective standard applies.

Høyesterett (Norwegian Supreme Court, Hr) 26 September 1964
Rt 1964, 966

Facts

A crew member on a ship which sailed from Kirkenes in Norway to England fell ill on the way and died. The captain and the steersman chose to do nothing about the illness, in spite of the crew member suffering severe stomach pains and shortness of breath and producing blood in his saliva (*oppspyttet*). The descendants sued the ship owner, claiming compensation for loss of maintenance, NOK 250,000 (approx € 26,000). **4**

Decision

The majority of the court found that, on the basis of *Sjømannsloven* (the Act on Seamen), a ship's captain has a strict duty to ensure that the crew receives proper medical treatment. Hence it might be called into question whether the captain should have sought the advice of a doctor over radio, something which had not been done in this case. The judges found therefore that it was doubtful whether the said duty was fulfilled. They held, however, that in this area of life, there must be certain room for miscalculations. Accordingly, the majority of judges found that the captain had not acted negligently. The minority of judges found, however, that the captain had been negligent. The most important argument was that the crew member's symptoms must have been so alarming that at least contacting a doctor by radio would have been justified. The misconduct of the captain consisted, accordingly, of failing to take action to seek advice given the alarming symptoms of the patient. The **5**

1 See *P Lødrup*, Lærebok i erstatningsrett (6th edn 2009) 170 ff and *N Nygaard*, Skade og ansvar (6th edn 2007) 194 f.

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relevant fact that was excusable in the context was that the captain did not have sufficient skills for assessing medical conditions.

Comments

6 The decision could be interpreted as allowing room for excuses imbedded in the *culpa* norm. The fact that the judges were divided in their opinions shows that the margin for making mistakes, without being held liable, is quite narrow. Today's demands on enterprises to attain a professional level and the requirements from authorities that businesses and enterprises conduct general risk analyses for all types of risk situations that commonly may occur, make it probable that the decision might have been different today. The case is still interesting because it shows that it is possible that liability may not be established if it is shown that a mistake was made.

18. Sweden

Högsta domstolen (Supreme Court) 9 February 1966
NJA 1966, 70

Facts

1 A shooting training session was arranged by the Home Guard without adhering to security regulations. An outsider was hit by a ricochet and died of his injuries. The leader of the exercise had not undergone specific training for this type of role as head of a weapons exercise.

Decision

2 The court did not find that the leader had acted negligently. The regulations for this kind of exercise were considered as complicated, and since he had not obtained any instructions from the Home Guard, it was assumed that he could not have understood them even if he had consulted them. The shooting was performed in accordance with the standard that had prevailed for many years. The failure to take precautionary measures therefore was ascribed to organisational deficiencies within the Home Guard.

Comments

3 The judgment demonstrates that an individual who has been given a role that is beyond his experience level cannot always be regarded as negligent. In this case he dealt with the undertaking in accordance with standard practice, which had been

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followed for many years (when no accidents had occurred). If it were more obvious that the person has no experience at all – and if the risks were high – he would probably have been considered negligent, since his knowledge of his lack of skill should have told him not to participate in a risky activity. (Nowadays the situation in this old case would lead to the liability of the Home Guard, according to the rules on liability for employers).

19. Finland

Korkein oikeus (Supreme Court) KKO 1989:114, S88/750, 6.10.1989/2694

<http://www.finlex.fi>

Facts

A woman slipped and fell at an airport, causing a fracture in her right femur. Due to a prosthesis on her left leg, she was tired and therefore was walking with a limp before the accident. She had also been wearing heavy leather shoes with 3–3.5 cm heels. She subsequently sued the airport for damages for the cost of the treatment of the injury, loss of earnings due to sick leave, the pain and suffering caused, and permanent injury and harm incurred. 1

Decision

According to the Supreme Court, the airport company was required to compensate for the damage because the floor had been too slippery, which was obvious from the fact that 62 other falls had been reported that same year. In addition, the airport company should have allowed for the fact that the airport's customers also included persons who walked or otherwise moved in an atypical manner, due to illness, injury, mental handicap or any other reasons. Thus, the victim had not contributed to her injury to the extent that there was good reason to dismiss the claim or reduce liability. The Supreme Court ordered the payment of compensation for costs, loss of earnings and pain and suffering and dismissed the claim for compensation for permanent injury or harm because it had not been proven that such damage had occurred. 2

Comments

The owners of property have a high level of care to make sure that the areas are safe for everyone who moves there. The owner of a property has a duty to demonstrate that the premises are safe. This was also shown in case KKO 2001:11 where a pane of glass fell onto a person in a mall causing her personal injury. It was unknown why the glass fell. Because the owner of the mall, that was obliged to take care of the 3

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safety of the premises, did not prove that the glass breakage was due to any other cause, of which it was not obliged to take care, it was obliged to pay the victim for all damage caused by falling glass.[1]

4 In Finnish tort law it is commonly understood that inexperience or lack of skill of the injured party does not exempt the tortfeasor from tort liability. This general principle applies if the tortfeasor could or should have understood the risks related to the act or action in question and if he/she should not have engaged in the act or operation in question taking into consideration those risks and the potential lack of skills or knowledge of the participants in the activity in question. This means that when offering services to the public, the service provider has to take into account that among this group there can be persons with different kinds of abilities.

5 If the tortfeasor entered the situation involuntarily or if a situation that at first did not seem to contain risks, later turns out to be a potentially dangerous situation requiring special skills, negligence is not deemed to exist. We cannot blame an inexperienced or unskilled person who has acted to the best of his/her abilities and without negligence in a situation where he/she was involuntarily placed.[2] But as a main principle, it is negligent for someone to begin a task or function without sufficient knowledge or skills.

20. Estonia

Tallinna Ringkonnakohus (Tallinn Circuit Court) 13 December 2006

Civil Matter No 2-04-2133

Facts

1 The defendant organised the clearing of a forest near the border of the plaintiff's immovable property. According to the plaintiff, the defendant crossed the border of the immovable property and carried out cutting work at the immovable of the plaintiff. The plaintiff claimed that the defendant cut 77 spruces, 4 willows, 11 grey alders and 2 aspens on his immovable property. The damage caused according to the

1 In winter there are many injuries due to slipping in Finland because of ice and snow. In those cases the owners of property have to prove that all necessary snow shovelling and sandblasting operations have been done. In some cases the dangerous area has to be marked or isolated so that no one walks there. See KKO 1997:151 and KKO 2004:17.

2 From the criminal point of view, see HE 44/2004, 90 f. Criminal responsibility is deemed to exist even though the perpetrator was unaware of the possibility of the consequence of the act in question if he/she had had the opportunity and the ability to detect such a possibility and should have noticed it. In Finnish tort law, the presumption is – unlike criminal law – that the actor has normal skills and abilities.

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plaintiff's calculations was € 1,890. The plaintiff filed a claim against the defendant to receive compensation in that amount.

According to the arguments of the defendant, the forest track indicated by the plaintiff was considered when performing the cutting work. The plaintiff constantly monitored the cutting work but did not even know himself where the line between the immovable properties was. He did not explain to anyone that the track was not a border but merely made vague statements about it. The county court did not satisfy the claim. 2

Decision

The circuit court did not change the decision of the county court. The circuit court stated that, since the border between the immovable properties was not marked or identifiable, the defendant performed the cutting work, taking into consideration the borders shown by the plaintiff and under his supervision. There was no negligence, gross negligence or intent in the conduct of the defendant (LOA § 104 (2)). Considering the behaviour of the plaintiff, the occurrence of the damage could not have been reasonably foreseen. Although § 1050 of LOA does not distinguish between forms of culpability, sec 2 of the same paragraph states that subjective characteristics of the tortfeasor must be taken into consideration. The defendant was not the owner of the immovable at which it mainly performed the cutting. The immovable belonged to an aunt of the defendant who lives in Russia and who gave the defendant permission to carry out the cutting work. The defendant did not have special knowledge in the matters of land readjustment. The circuit court found that the defendant observed the requirement of necessary care by approving the boundaries with the plaintiff. The defendant had no reason to believe that the border between the immovables, indicated by the plaintiff, was not correct. Considering the above circumstances, it was not reasonable to demand from the defendant that he should have had the border determined and marked by an expert before commencing the cutting work to avoid causing damage, as the plaintiff avered. 3

Comments

Inexperience or insufficient skills of a tortfeasor can be taken into consideration in assessing his/her fault according to § 1050 (2) of LOA which provides that, among others, the situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration upon assessment of the culpability of the person. In principle, the circuit court took the position that since the defendant was not an experienced person in the field of forest cutting and he had no knowledge of land readjustment, he did not violate the care requirements. It may be assumed that, if the defendant had been a professional timber processer, the court may have found that the defendant had been negligent, eg he should have deter- 4

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mined the border of the immovables before commencing the cutting work and should not have based his decisions on the vague statements of the plaintiff alone.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 28 January 2003

25 Cdo 1094/2001

1 For facts and decision see 3d/24 nos 1–4.

Comments

2 In the present case, the respondent acted negligently because, without having sufficient grounds to do so, he did not meet his duties of care as a breeder and relied upon the fact that he would be able to manage any situation and that a stallion would not attack his mare. Therefore, he acted wrongfully and was held liable pursuant to sec 2910 NCC.

3 This breach of a legal duty might have been caused by his lack of knowledge or skills which are, however, expected of any breeder. It is the duty of each person who carries out a certain activity that he/she does not breach the general duty to act in such a way that nobody suffers damage.

4 The skills and their presentation directly influence the prerequisite for liability under the NCC. Unlike the former Civil Code, it provides a definition of negligence and it sets forth that, if a wrongdoer does not act in a way that could reasonably be expected of a person of average abilities in private relationships, it shall be deemed that he acted negligently. However, if the wrongdoer demonstrates specific knowledge, ability or skills or if he undertakes to perform an activity for which specific knowledge, ability or skills are required, and he does not make use of this specific knowledge, ability or skills, it shall be deemed that he acted negligently.

26. Croatia

Decision of the Supreme Court of the Republic of Croatia No Rev 258/02-2 of 7 July 2004

<www.vsrh.hr>

Facts

1 A, a driver of a military vehicle caused a traffic accident in which V was injured. According to an expert witness, A caused the accident when, due to exceeding the

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speed limit and not adapting his driving to the wet road conditions, he lost control of the vehicle in a sharp curve and crashed into the bus on the other side of the road. In the criminal proceedings A was found guilty of committing a crime against the safety of public traffic. V sued the Republic of Croatia as A's employer and obtained compensation. The Republic of Croatia subsequently filed a claim against A seeking indemnity for the compensation paid to V. Pursuant to relevant statutory provisions, an employer who compensates a victim for damage caused by its employee will be entitled to recourse against the employee if the employee acted intentionally or with gross negligence.[1] The court of first instance found that A had acted with gross negligence and accepted the Republic of Croatia's claim. The court of second instance affirmed the first instance decision.

A subsequently lodged a request for revision of the lower courts' decisions before the SCRC. In his request A disputed the findings of the lower courts that he had acted with gross negligence in the course of committing a traffic accident. In support of his request, A submitted that at the time of the accident he was young (19 years of age) and an inexperienced driver, that a superior officer, who supervised his driving, was seated next to him in the same vehicle and that these circumstances should have been taken into account in the course of the lower courts' assessment of the level of his fault. **2**

Decision

The SCRC dismissed A's request for revision and upheld the decisions of the lower courts. As to the arguments put forward by A regarding his personal characteristics, the SCRC ruled that the tortfeasor's youth and inexperience were of no importance in assessing the level of his negligence. Since Croatian tort law accepts an objective standard of negligence, the SCRC held that the tortfeasor's conduct should be compared against the conduct of an abstract average person. In this respect, held the **3**

1 See art 1061 of the COA which reads:
Employers' Liability
Article 1061
(1) The employer shall be liable for damage caused to a third party by an employee at work or in relation with work, during the time he is employed with the employer, unless it has been proved that there are grounds for exclusion of liability of the employee.
(2) An injured party shall also have a right to request a redress of damage directly from the employee if he has caused the damage intentionally.
(3) The employer who has redressed the damage caused to the injured party shall be entitled to ask for compensation for the redress of damage from the employee, if the latter has caused the damage intentionally or due to gross negligence.
(4) The right referred to in paragraph 3 of this article shall be prescribed six months from the day of redress.

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SCRC, in assessing the tortfeasor's conduct in the case at hand, the critical question was whether his conduct, regardless of his subjective characteristics, corresponded to the behaviour of an average driver or particularly prudent driver. Since in the given circumstances the tortfeasor did not act in a manner which corresponds to that which could be expected from an average driver, his conduct has to be assessed as grossly negligent, regardless of his youth and inexperience, held the SCRC.

Comments

4 It is evident that, regarding the impact of the particular tortfeasor's personal characteristics on the assessment of its fault, the SCRC took a rather straightforward, academically pure, position in this decision; since Croatian tort law accepts the objective concept of negligence,[2] any personal characteristics of a particular tortfeasor should bear no relevance in the assessment of this tortfeasor's conduct. And although this position perfectly resonates with the general concept of negligence accepted in the Croatian tort law system, it does not necessarily correspond to the SCRC's position in some other cases. For example, as can be observed in the judgment in case No Rev 2545/1991-2,[3] and the decision in case No 993/1994-2[4] in the course of assessing a person's conduct, the SCRC occasionally does take into consideration that person's subjective characteristics, such as experience, physical condition, fatigue, etc.

Judgment of the Supreme Court of the Republic of Croatia No Rev 400/1991-2 of 18 June 1991

<www.vsrh.hr>

Facts

5 A acted as a car body repairman and V entrusted him his car for repair. In fact, A was running an illicit and unregistered car body repair shop. Instead of repairing it, A ruined V's car and V sued A for damages. The court of second instance partially reversed the first instance decision and accepted V's claim in full. A filed a request for revision before the SCRC invoking V's contributory negligence. In support of his claim, A submitted that he was not a registered car body repairman and that he was not professionally active as a car body repairman, which V should have been aware of.

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2 See 1/26 no 9 for more detail.

3 See 6/26 nos 1–5.

4 See 12/26 nos 1–3.

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Decision

The SCRC dismissed A's request for revision and upheld the lower courts' decisions. **6**
Regarding A's submissions, the SCRC established that at the time that V entrusted his car to A, A's workshop was fully operational, A had all the necessary tools and consequently V could not have known that A was not capable of undertaking the requested repair. The fact that A's workshop had no business sign on it was of no relevance for a determination of V's contributory negligence, opined the SCRC. According to the SCRC, the issue of whether or not A acted as a registered craftsman or of whether he acted in the course of his professional activity was also of no relevance for the determination of the level of his misconduct. The only relevant issue, according to the SCRC, was whether or not A was capable of undertaking the repairs which he accepted to undertake. Since he was obviously not capable of undertaking the repairs, the court ordered him to pay for the damage inflicted thereby.

Comments

As in its Decision No Rev 258/02-2,[5] even in this case the SCRC took a rather straight- **7**
forward position regarding the influence of the tortfeasor's subjective characteristics to the assessment of his fault. By applying an objective standard for the assessment of the appropriateness of a tortfeasor's conduct, the SCRC refused any possibility of subjective characteristics of the actual tortfeasor influencing its decision as to the appropriateness of the tortfeasor's conduct. The only yardstick the SCRC accepted in this case was that of the 'conduct of an average car body repairman'.

Hence, since A acted as if he were a professional, the SCRC reduced its decision- **8**
making process to a very simple question; did A act as is expected of an average car body repairman, ie of a good expert? Since the answer was obviously in the negative, the SCRC decided that the tortfeasor should be held liable for the damage caused by his inappropriate conduct.

It is evident from the facts of this case that A attempted to transfer some of his **9**
liability to V, basically claiming that V should have been aware of his incompetence, since A had never run a registered car body repair shop, so that V should bear a portion of the risk of damage. Since the SCRC concluded that nothing in A's actions at the time he accepted the work suggested that he considered himself incompetent to perform the task, the SCRC dismissed this attempt. In doing so, the SCRC obviously found the fact that A was not registered for the activity he pursued of no importance. According to the SCRC, A acted as if he ran his car body repair shop as a professional and hence, his customers were entitled to expect from him the level of expertise and care that professionals in his trade are supposed to have.

5 See 7/26 nos 1–4.

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10 Finally it must be noted that although this case involved contractual liability, it also bears relevance for tort law cases. In the Croatian tort law system, the rules of tort law are general rules of liability which should also apply to cases of contractual liability unless other special rules on contractual liability exist.[6] Hence, when a court has to assess the appropriateness of a tortfeasor's behaviour, ie whether a tortfeasor acted with due care, the same standards should apply regardless of whether liability is of a contractual or extra-contractual (tortious) nature.

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 545/1997, 19 November 1998

<http://www.findinfo.si/judikati/KazaloSovs.aspx?Src=B6lUgg5e2NvZxL0gkNl1Qd6v31rMSv3m4flG3GQ4QDpq1GnsGHATJWyEJ4sjxSOR> (25 February 2015)

Facts

1 The plaintiff had just passed an exam in safety at work and was aware of the danger of machinery and of the professional rule not to touch the rollers of a particular machine during operation but nevertheless did so. Violation of the ban on touching the rollers during operation was the cause of the occurrence of the damage. The plaintiff, who was injured at work when a roller smashed his hand, claimed compensation from the employer for physical pain, for mental pain because of reduced life activities and disfigurement and compensation for the fear suffered.

Decision

2 The Supreme Court rejected a plea for a revision and confirmed the judgment of the court of lower instance. It stressed that strict liability applies for the defendant because the rolling machine is a dangerous object, although it agreed with the judgment of the lower court that the plaintiff, who had passed an exam in safety at work and who was aware of the danger of the machine and the professional rule not to touch the rollers during operation but nevertheless did so, also himself contributed to the occurrence of the damage. Violation of the ban on touching the rollers during operation was the cause of the occurrence of the damage. The Supreme Court also agreed with the judgment of the lower courts that the plaintiff's contribution to the occurrence of the damage was 40%. Such an assessment of the level of the plaintiff's con-

6 See art 349 of the COA, which reads: 'Unless the provisions of this section [on contractual liability] provide otherwise, the provisions of this law relating to compensation for non-contractual damage shall adequately apply to such damage [damage caused by breach of a contractual duty].'

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tribution to the occurrence of damage was a result of taking into account the plaintiff's youth and inexperience, otherwise the share of responsibility of the injured party would be greater.

Comments

Court practice also respects as one of the circumstances for a judgement of necessary care the inexperience of a responsible person. This circumstance in the above case, in which the court judged the contribution of the injured party to the occurrence of damage, alleviated the level of care. 3

However, as follows from the decision of the Higher Court in Ljubljana I Cp 3933/2009, 17 February 2010,[1] the victim does not contribute to the occurrence of the damage if the inexperience is a consequence of the victim not having passed a compulsory exam and therefore of not knowing how to assess the danger that threatens a driver when driving across a crossroads. In spite of the fact that the driver as victim did not have a driving licence, the court noted that his skills, relevant for assessing the question of his contribution to the damage, should be judged according to the standard of an ordinary driver with a driving licence. The court practice obviously takes into consideration inexperience and lack of skill of the victim when assessing his/her contribution to the damage, but it does not take into consideration inexperience and lack of skill of the tortfeasor. Slovenian law does not have an explicit rule to lower the standard of care in such cases. For the tortfeasor the usual standard of care is applied. 4

29. European Union

Court of First Instance, 24 October 2000

T-178/98, Fresh Marine Co A/S v Commission [2000] ECR II-3331

Facts

The Norwegian salmon producer, Fresh Marine, suffered harm due to the provisional imposition of anti-dumping and countervailing duties on certain salmon imports from Norway into the Community, which induced Fresh Marine to cease all exports into that market. As it turned out later, the anti-dumping measures were unfounded and consequently repealed. The reason for the adoption of such measures were errors made by the Commission when handling a report submitted by 1

1 Decision of the Higher Court in Ljubljana I Cp 3933/2009, 17 February 2010, <http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2010040815243206/> (25 February 2015).

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Fresh Marine containing its sales figures, of which the Commission had deleted several lines due to a misunderstanding of the submitted data.

Decision

2 After confirming that '[t]he nature – be it legislative or administrative – of a measure for which a Community institution is criticised has no bearing on the admissibility of an action for damages' (para 38), the CFI proceeded to hold that 'mere infringement of Community law will be sufficient, in the present case, to lead to the non-contractual liability of the Community' (para 61). It saw such unlawful conduct in the fact that 'when analysing [Fresh Marine's] report, the Commission committed an error which would not have been committed in similar circumstances by an administrative authority *exercising ordinary care and diligence*' (para 82, emphasis added).

3 The CFI next addressed the impact of Fresh Marine's own contribution to the loss that it had incurred and concluded that the claimant was 'not blameless either' (sic, para 84). 'In view of the complexity of its … report … [Fresh Marine], without being prompted, should have sent to the Commission, with the report, the explanations necessary in order to understand that report. By sending the … report without any comment to that effect, [Fresh Marine] was *guilty of negligence* which … confused the Commission's officials' (para 89, emphasis added).

4 As already argued by the Commission, the CFI confirmed that Fresh Marine's '*lack of relevant experience* did not excuse it from automatically appending to the … report the explanations required for a correct understanding of certain parts of it' (para 90, emphasis added).

5 In light of both side's contribution to the turn of events, the CFI found 'that the applicant and the Commission were *equally at fault* during the investigation' (para 91, emphasis added).

Comments

6 The decision was challenged by both parties, but its outcome confirmed by the ECJ on appeal, as presented below at 13/29 nos 1–5. One should note, however, that the ECJ rejected the CFI's reasoning with respect to the Commission's conduct and found that mere unlawfulness suffices to establish its non-contractual liability.

7 For the purposes of this question, it is still noteworthy, however, that the CFI had expressly denied that the claimant's inexperience in handling such matters was to be counted in its favour when assessing its own contribution.

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30. The Principles of European Tort Law and the Draft Common Frame of Reference

Various Cases

Facts

1. V and A meet at a mutual acquaintance's house. A has no education, professional skill or expertise in construction work but gives the impression that he is a professional in this field. His actual business is to buy and repair used automobiles, as well as other vehicles such as trenchers and diggers. V and A agree that A should dig a drainage trench around V's house. A carries out the digging work, renting a trencher and lorry. During the digging work, V's conservatory collapses and he subsequently claims damages. A's performance met the standards of an ordinary person carrying out home improvements, but was not carried out in compliance with professional standards.[1] **1**

2. In another case, a company employs persons who are not fully qualified dentists to carry out dental treatment which is usually carried out by fully qualified dentists only. One of the patients, who is not aware that his dentist is unqualified, is injured in an operation carried out by one of these persons. The latter had exercised all the care that he possessed. However, had a professional conducted the operation with the ordinary skill possessed by dentistry practitioners, the injury would have been avoided.[2] **2**

3. In yet another case, a company organises a treasure hunt for a group of young children at a holiday camp. A young volunteer supervisor is in charge of the group. During the game, one of the children breaks away from the group and runs across a road. He is knocked down by a car. The young boy's parents claim that the supervisor is liable due to a lack of vigilance on his part. A qualified teacher would most likely have managed to avoid the incident.[3] **3**

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1 See the Danish case: V (Western Court of Appeal) 19 June 1997, FED 1997.820 V, above 7/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*. The following analysis will be limited to extra-contractual (as opposed to contractual) liability.

2 See the Scottish case: *Dickson v Hygienic Institute*, 1910 SC 352, above 7/13 nos 1–3 with comments by *M Hogg*.

3 See the scenario of the Belgian case: Cour de cassation/Hof van Cassatie (Belgian Supreme Court) 5 June 2003, Pas 2003, 1125, above 7/7 nos 1–9 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*.

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Solutions

a) Solution According to PETL

4 Article 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct', the required standard of conduct being 'that of the reasonable person in the circumstances', cf art 4:102(1) PETL.

5 Under the PETL, a person also violates the required standard of conduct if he 'engages in an activity of which the actor should know that he lacks the competences to carry it out properly' (so-called *Übernahmeverschulden*).[4] Further, 'someone who purports to carry out a [potentially] "dangerous" activity knowing that he does not have the necessary ability, commits a fault on embarking on the activity disregarding his insufficient "expertise" and leading others to believe (falsely) that he is able to accomplish his task'.[5]

6 Construction work, in particular, requires special skill and knowledge. In the first of the above scenarios, A did not have any formal training, professional skills or expertise in construction work, but pretended to be a professional in this field. His business was, in fact, to buy and repair used automobiles, trenchers and diggers. He was able to perform construction work according to the standards of an ordinary person carrying out home improvements, but not in compliance with professional standards – contrary to the expectation he had created. Under the PETL, his act would constitute *Übernahmeverschulden* and be in violation of the required standard of conduct. Under the PETL, the required standard of conduct would, again, be an objective one, ie that of a reasonable person in the circumstances.

7 The result would be different had A informed V of his skills and the parties had still agreed that he should carry out the work (in that case: with the skills of an ordinary person carrying out home improvements).

8 The same applies to the second scenario. The company carried out dental work which was usually only carried out by fully qualified dentists. The employees did not possess the necessary skills, a fact which was unknown to the patients. Despite the fact that the employee had exercised all the care he possessed, he was still in violation of the required standard of conduct under the PETL, ie the standard expected of a reasonable person in the circumstances, since he engaged in an activity whereby he ought to have known that he lacked the necessary skill to carry it out properly (*Übernahmeverschulden*).[6]

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4 PETL – Text and Commentary (2005) art 4:101 no 19; see also art 4:102 no 5 (*P Widmer*).

5 PETL – Text and Commentary (2005) art 4:102 no 9 (*P Widmer*).

6 Compare the reasoning of the Scottish Inner House of the Court of Session in the case that served as example for the above scenario (fn 2): an 'unregistered practitioner, if not known to the person operated upon to be unregistered, must attain the standard of skill of the registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then the skill of his profession'.

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The third scenario is more difficult to solve under the PETL. It is arguably not unusual to employ volunteer supervisors at holiday camps for young children. Provided that the young supervisor possessed the skills that were in general necessary to supervise the group of children, that he did apply all the skill and care he possessed, and that his conduct did not diverge from that of an ordinarily prudent and diligent young volunteer supervisor, he may be found not to have violated the required standard of conduct under the PETL, even if a professional supervisor would most likely have managed to avoid the accident. 9

b) Solution According to the DCFR

The DCFR defines negligence in art VI–3:102 as 'conduct which ... (b) does not ... amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. Like the PETL, the DCFR thus uses an objective standard of care.[7] 'Conduct is negligent when it does not satisfy the care which must be exercised under the circumstances of the case by a reasonably prudent person'.[8] The standard 'does not turn on the individual abilities of the person acting, rather it is based on what can be reasonably expected of that person'.[9] 10

In the first two of the above scenarios, the person acting did not have the skills one would expect from a reasonably prudent person engaging in the respective activity (construction work in the first scenario and dentistry in the second). According to the commentary to the DCFR, 'a dentist cannot escape liability by claiming to be a slow learner and very forgetful',[10] nor can he do so by claiming that he is not fully qualified. The same is true of someone doing construction work. In both scenarios, the person acting thus failed to meet the objectively required standard of conduct. 11

The third scenario is likewise more challenging under the DCFR. According to the official commentary, '[p]ersons commencing their professional lives must ... live up to the standards of the competent professional (and likewise the newly qualified driver must reach the standard of the more experienced), although it would be wrong to measure them to the standard of the most capable'.[11] 12

In this scenario, a professional supervisor would most likely have managed to avoid the accident. The volunteer supervisor did not meet the standards of the competent, experienced professional and, for this reason, he might be regarded as having breached the required standard of conduct under the DCFR. The outcome would 13

7 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).
8 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).
9 Ibid.
10 Ibid.
11 Ibid.

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however be different if the relevant group for determining the standard were taken to be that of young volunteer supervisors.

31. Comparative Report

1 All of the jurisdictions submitted reports for this question, except the Netherlands, Latvia, Lithuania, Poland, Slovakia and Romania.

2 The question of whether inexperience or lack of skill on the part of the tortfeasor is relevant to his or her liability is dependent, first and foremost, on whether the relevant legal regime assesses the standard of care/fault objectively (average reasonable person), or else does so subjectively such that liability depends on whether the particular actor could appreciate the wrongfulness of the conduct in light of his or her personal knowledge and capabilities and act accordingly. Protection of the injured party is one argument for the objective approach and it is also emphasised that variations of the standard of care would operate against the public need for activities to be conducted with a predictable degree of care.[1] A subjective assessment of fault, however, follows from the – in the opinion of the reporters preferable – ethical principle that a person can only be reproached for fault where he or she personally could have behaved differently.

3 The great majority of European legal systems follow an objective approach and do not make an exception or lower the standard of care on the basis of inexperience or lack of skill.[2] The tortfeasor cannot, therefore, rely on inexperience or the insufficiency of his or her skills. On the other hand, a number of legal systems do in fact raise the standard of care in the case of above-average individual knowledge or ability.[3]

4 Sometimes a complete lack or an insufficiency of experience is even treated as a factor which serves to increase the burden on the tortfeasor. Thus in France, for example, a lack of experience is seen to raise the necessary level of care insofar as the inexperienced actor must try to make up for his or her lack of experience with greater care. Counterintuitively, then, holding a special skill or being too unskilled both create stricter liabilities.[4] Equally, it is emphasised in the Greek report that a

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1 England and Wales (7/12 no 2f).

2 Germany (7/2 no 5); Belgium (7/7 no 5ff; however, the objective standard is seen to be comprised by the trend to account further factors, see also Belgium (6/7 nos 5f, 12); Spain (7/10 no 3); Portugal (7/11 no 3f); England and Wales (7/12 no 1ff); Scotland (7/13 no 3); Malta (7/15 no 5); Norway (7/17 no 3), Finland (7/19 no 4); Croatia (7/26 no 4); Slovenia (7/27 no 4); European Union (7/29 no 1ff); see also the Historical Report (7/1 no 6). At least aside from cases involving professionals, the question seems to be open in Italy (Italy 7/9 nos 3ff, 9).

3 See Germany (7/2 no 5), as well as Comparative Report (6/31 no 10).

4 France (7/6 no 3).

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person lacking skill and experience must act particularly carefully for that reason.[5] In an interesting Norwegian decision concerning a ship captain's failure to call for medical assistance, by contrast, it is noted that there is a margin of error where no liability can attach; a mistake or incorrect decision is not necessarily culpable. That margin of error is said to be very slim, however.[6]

It should also be noted that in many cases the judicial decisions presented concern specialists,[7] for whom in general a higher (objective) standard of care determined by the standards of their occupational group will be applicable.[8] This was, incidentally, already the position under Roman law.[9] Liability is also supported on the basis of the concept of *Übernahmefahrlässigkeit* (negligence in undertaking an activity), whereby a breach of the objective standard of care is identified in the undertaking of an activity for which the defendant lacked sufficient knowledge or skill.[10] In this context, an Irish case is interesting for relying – despite the objective standard – only on the perspective of the 'reasonable unskilled person' where the defendant did not hold himself out as having the particular knowledge and skill required.[11] **5**

An objective approach is followed by the PETL and DCFR, such that a lack of skill or experience cannot discharge a defendant of liability.[12] Here, though, it should still be highlighted that under the PETL a person violates the required standard of conduct if 'he engages in an activity of which the actor should know that he lacks the competences to carry it out properly'. Equally here, then, it is an *Übernahmeverschulden* which is determinative and for which an objective standard of assessment is again adopted.[13] **6**

Finally, it is noteworthy that whilst an objective standard of care is used to judge the defendant's conduct, some legal systems nevertheless show a tendency to account for a lack of knowledge or skill in assessing any contributory fault on the part of the injured party. This is true of Slovenia,[14] where inexperience or lack of skill in the claimant may be used in assessing the claimant's contribution to the damage through misconduct, though inexperience may not be used to lower the **7**

5 Greece (7/5 no 1 ff).

6 Norway (7/17 nos 4–6).

7 See Germany (7/2 no 1 ff); Switzerland (7/4 nos 1 ff, 10 ff); Italy (7/9 no 1 ff); Scotland (7/13 no 1 ff); Denmark (7/16 no 1 ff); Norway (7/17 no 1 ff); Finland (7/19 no 1 ff), and Croatia (7/26 no 5 ff).

8 See, comprehensively, Comparative Report (6/31).

9 Historical Report (7/1 no 1 ff).

10 Switzerland (7/4 nos 17, 19); Belgium (7/7 no 8); see also Germany (7/2 no 3), Greece (7/5 no 4) and Comparative Report (6/31 no 2 fn 3).

11 Ireland (7/14 nos 1 f, 3).

12 See PETL/DCFR (7/30 nos 4 ff, 10 ff).

13 See PETL/DCFR (7/30 no 5 ff).

14 Slovenia (7/27 nos 2, 4).

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standard of conduct expected of the defendant tortfeasor. Such unequal treatment of the tortfeasor and the injured party seems questionable, however. It is therefore more consistent when, for example, under EU law a claimant's inexperience is not accounted in assessing contributory negligence.[15]

8 A contrary position, using a subjective assessment of fault, is adopted in Austria[16] and Estonia,[17] however. Insufficient competence and experience can, therefore, in principle excuse the defendant. In that respect, though, there is a presumption in Austria that every mentally competent person possesses an average level of knowledge and skill, such that the defendant bears the burden of proving that this is not true of him or her personally.[18] It must also be remembered that a liability for negligence in undertaking an activity (*Übernahmsfahrlässigkeit*) can be considered where the defendant has undertaken a course of action despite being subjectively capable of recognising that his or her knowledge and skills are insufficient.[19] Moreover, an objective standard is also employed in Austria[20] and Estonia[21] as soon as a professional is involved. This objectivity is also particularly far-reaching in Austria insofar as it encompasses every person who conducts an activity which requires particular knowledge or skills.[22] This is, for example, the case with an amateur alpinist defendant who was identified as (and so held to the standard of) a 'de facto guide' by virtue of superior experience to the claimant and the creation of a false understanding of dangers. The vulnerability and expectations of, and reliance by, the claimant again alter the identification of the defendant's role, which is in turn used to set a higher objective standard.[23] The defendant can thus also not be discharged here on the basis of a lack of skill or knowledge.

9 Even where an objective standard is used, however, the standard of care may be lowered or liability reduced on the basis of particular circumstances pertaining to the injured party. Accordingly, what the claimant knew or was entitled to expect about the defendant's lack of skill or experience is also significant in setting the standard of behaviour required; where the claimant is not relying on the defendant as a professional or skilled person the standard can be lower[24] or contributory negli-

15 EU (7/29 nos 4, 7).
16 Austria (1/3 no 5).
17 Estonia (1/20 no 5 and 7/20 no 4).
18 See Austria (1/3 no 8).
19 Cf Austria (7/3 no 4): insofar as § 1299 ABGB (objective standard of fault for experts) is applicable, there is of course no need for reference to negligence in undertaking the activity.
20 Austria (7/3 no 3).
21 Estonia (7/20 no 4).
22 Comparative Report (6/31 no 5).
23 Austria (7/3 no 1 ff).
24 See Denmark (7/16 no 3); cf also Ireland (7/14 nos 1 f, 3).

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gence might come into play.[25] Moreover, holding a defendant to an objective standard which excludes their inexperience or lack of skill is generally subject to overriding excuses or justifications. This applies, for example, to situations of necessity or emergency[26] and to involuntariness.[27] A similar point can also be made in respect of a Swedish decision concerning a shooting instructor who was not properly informed by the organiser of an event about quite complicated safety regulations (which he could not have understood on his own):[28] a defendant cannot necessarily be considered negligent when placed by another in the position which is beyond his or her competence and experience.

25 Cf Croatia (7/26 no 5 ff).

26 See eg Austria (7/3 no 5); Greece (7/5 no 4).

27 See eg Austria (7/3 no 5); Finland (7/19 no 5). Cf Norway (7/17 no 3) on the relevance of the defendant having made a positive choice to undertake a skilled activity.

28 Sweden (7/18 no 1 ff).

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8. Age

1. Historical Report

Ulpian, D 9.2.5.2

Facts

1 Hypothesis 1: A child under the age of seven inflicted damage upon the claimant.
Hypothesis 2: The damaging party was close to the age of puberty.

Decision

2 In hypothesis 1, Ulpian[1] held that the child should not be liable. In hypothesis 2, Ulpian affirmed that the injurer should be liable if he was already capable of realising the wrongfulness of his conduct.

Comments

3 The decision demonstrates that Roman jurists did not only assess *culpa* based on objective criteria but – at least to a certain extent – also took into account subjective factors such as the tortfeasor's age.[2] Thus, an *infans* (a child up to the age of seven[3]) was not liable under the *lex Aquilia*. The legal situation was different for the *impubes*, persons who have not yet reached the age of puberty.[4]

4 Ulpian first cited the decision of Labeo[5] that an *impubes* can be liable for *furtum* (theft) and therefore also for damage to property under the *lex Aquilia*.[6] He then confirmed Labeo's opinion but added an important modification: the *impubes* could only be liable on the precondition that he was already capable of realising the wrongfulness of his conduct (*si sit iam iniuriae capax*). In this way, Ulpian extended

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1 Domitius Ulpianus, died 223 AD.

2 Cf *B Perrin*, Le caractère subjectif de l'iniuria aquilienne à l'époque classique, in: Studi in onore di Pietro de Francisci, Vol IV (1956) 271, 278 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 110 f; *G MacCormack*, Aquilian Culpa, in: A Watson, Daube Noster (1974) 201, 219; *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 219, 270 ff.

3 For the age of seven see *Ulpian*, D 26.7.1.2.

4 According to Roman Law, girls reached puberty at the age of 12 and boys at the age of 14 (following the prevailing opinion of the so-called Proculian school, cf Gaius Inst 1.196; Just Inst 1.22 pr).

5 Marcus Antistius Labeo, died 10 or 11 AD.

6 In this sense also *Julian*, D 47.2.23.

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the subjective character of Aquilian *culpa*, not only requiring an age close to puberty but also the subjective capacity to realise *iniuria*.[7]

2. Germany

Bundesgerichtshof (Federal Supreme Court) 29 April 1997, VI ZR 110, 96

NJW-RR 1997, 1110

Facts

The claimant was six years old, the defendant was seven and a half. Both were cared for in the afternoon by a public after-school club, which they both regularly attended. When they were in a group-room, the defendant was peeling an apple with a knife that the children were allowed to use. Other children in the room warned that a bee or wasp was flying around. When the insect came close to the defendant, he tried to defend himself with the knife but instead accidentally thrust it in the claimant's eye. The claimant subsequently lost this eye and demanded DM 100,000 as compensation for pain and suffering as well as a statement that the defendant would be liable for any further damage in the future. The court of first instance had refused the claim; the court of second instance had supported it in principle but had decided to remand the case for further consideration of the amount of compensation. The defendant appealed against this decision. **1**

Decision

The BGH remanded the case. The lower court had correctly decided that the reaction of the defendant was a willful action and that the defendant had the necessary tortious capacity, which requires that he could understand that he should not injure another person. However, the lower court had not given sufficient reasons to classify the defendant's behaviour as culpable. In this respect it was doubtful whether seven and a half year-old boys generally are able to realise that they may injure a bystander when they want to defend themselves against a bee or wasp with a knife. The BGH doubted that they already have the ability to react in such a situation according to that insight. The experience of daily life would rather militate against this assumption. In order to reach its contrary solution, the lower court should have called upon an expert to address this question. **2**

7 *B Winiger*, La responsabilité aquilienne romaine (1997) 111.

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Comments

3 In German tort law children under the age of seven are not held responsible for any damage they cause.[1] This fixed age applies without exception. Only in rare specific cases can equitable indemnification (not full compensation) for such damage be granted, namely if equity so requires because the claimant is poor and the defendant rich.[2] If the damage was related to a traffic accident, even children under the age of ten are not held responsible.[3] Children between the ages of seven (or ten in the case of traffic accidents they caused) and 18 are held liable under the general tort provision of § 823 BGB only if they had the sufficient insight into the wrongfulness of their conduct[4] and if they were at fault, ie acted at least negligently.[5] The insight into wrongfulness is judged according to an objective standard that is adapted to the age group to which the child belongs. What boys of the same age are normally able to realise as wrong is relevant. Boys of seven or eight normally have the insight to realise that holding a knife close to another person could hurt this person. The sufficient insight, ie delictual capacity, is presumed but can be rebutted by proving that the child lacks this insight because of personal mental deficits, in particular because of a retarded individual development. The burden of proof lies with the minor.[6]

4 Besides capacity also fault is required for liability to be established pursuant to § 823 BGB. Again, the standard of necessary care is objective, however this standard is specific to the age group to which the child belongs.[7]

5 The decision shows that in German tort law young age is a decisive factor in determining liability.

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1 § 828 (1) BGB: 'Minors (1) Persons below the age of seven are not responsible for loss they inflict on other persons.'

2 See § 829 BGB: 'Duty to compensate loss for equitable reasons. Whosoever bears no responsibility for loss caused in a case specified in §§ 823 to 826 because of the rules in §§ 827 and 828, nonetheless has to compensate the loss – unless compensation can be obtained from a third person who was under a duty to supervise – to the extent that equity requires such compensation under the circumstances, having regard in particular to the entirety of the circumstances of the parties, provided he is not deprived of the means which he requires for reasonable subsistence and the performance of any obligation to pay maintenance.'

3 § 828 (2) BGB: 'Minors (2) Persons who have reached the age of seven, but have not yet reached the age of ten, are not liable for loss they inflict on other persons in an accident involving a motor vehicle, a railway or a cableway. This does not apply where the loss was inflicted intentionally.'

4 See § 828 (3) BGB: 'Minors (3) A person who has not yet reached the age of 18 is, to the extent that his responsibility is not excluded under subsection (1) or (2), not responsible for damage he inflicts on another person if, when committing the damaging act, he does not have the insight required to recognise his responsibility.'

5 § 823 BGB.

6 BGH NJW 2005, 354.

7 BGH VersR 1953, 28; BGH VersR 1984, 641 (642).

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Where children are liable for very high damages because they had the necessary insight and acted with fault, courts have raised doubts as to whether their full liability is constitutional. A number of courts have held that a probably lifelong debt as a consequence of slight negligence in early youth would violate a child's rights under arts 1 and 2 of the German Constitution (human dignity and personality right). Therefore very high damages claims have been either reduced or even rejected.[8] This reduction of full liability under constitutional and human rights aspects is however – and should be – rarely applied. 6

In legal literature it is argued that the advanced age of old people should also be taken into account when deciding on the standard of care they have to observe.[9] 7

3. Austria

Oberster Gerichtshof (Supreme Court) 23 March 1999, 4 Ob 65/99h

JBl 1999, 604

Facts

The eight-year-old defendant and the four-year-old claimant helped the claimant's mother carry wood from a hay barn to the washhouse. When the mother went back into the house to put her other son to bed, the boys discovered an axe in a chopping block inside the barn. When the axe fell off the block, the defendant wanted to drive it back in and asked the claimant to step aside. The latter did as he was told but put his hand on the chopping block at the very last moment. The defendant was not able to stop the blow and injured the claimant's hand severely. The claimant sued for damages. There was a third party liability insurance policy covering the defendant. 1

Decision

The Supreme Court found in favour of the claimant although the defendant was only eight years old and thus in principle presumed not to be responsible for his tortious behaviour. It held the defendant liable under § 1310 third case ABGB: firstly, there was no person in charge who violated his duty of supervision of the defendant. Secondly, all legal prerequisites for a damages claim were fulfilled except for a lack of culpability, thus a person already capable of tortious liability who acted like the 2

8 See BGH NJW-RR 2012, 404; BVerfG NJW 1998, 3557; LG Bremen NJW-RR 1991, 1432; OLG Celle NJW-RR 1989, 79.

9 See *R Schulze* in: BGB, Handkommentar (7th edn 2012) § 276 no 14; *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 118; *S Grundmann* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB (7th edn 2016) § 276 no 66; *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 276 no 17.

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defendant would have been responsible. Thirdly, there was a third party liability insurance policy to the benefit of the defendant. § 1310 third case ABGB provides for liability in equity under consideration of the economic circumstances of both the tortfeasor and the victim. To this end, liability insurance is to be taken into account, resulting in the case at hand in the liability of the defendant.

Comments

3 Fault signifies that the tortfeasor is to blame for misconduct. Hence, the concept of fault involves judgment of the specific perpetrator,[1] whereas wrongfulness involves an assessment of conduct. Consequently, only such persons can be blamed for their conduct as are in possession of the necessary powers of discernment, ie who are in a position to recognise the wrongfulness of their conduct and to behave duly and properly: the subjective abilities of the defendant are in principle decisive.[2]

4 § 176 ABGB sets out the rebuttable presumption that persons over 14 years of age have the essential powers of discernment to be fully responsible for their tortious behaviour, whereas persons under the age of 14 are presumed incapable of fault. If proven otherwise however, even a minor under the age of 14 may be held liable (see 8/3 no 6 below).

5 If the tortfeasor is under 14 years of age, damages may be recovered from his parents or other persons in charge if such have neglected their duty of supervision of the child (§ 1309 ABGB). The required intensity of supervision depends on the age, character and stage of development of the child as well as on the living conditions of the person under obligation. Dangerousness of the particular situation and prior wrongdoing must also be taken into account.[3]

6 § 1310 ABGB provides for subsidiary liability in equity of the minor in cases where the victim – as in the case at hand – cannot obtain damages from the aforementioned persons (parents, supervisors) for legal or factual reasons.[4] In this re-

1 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 7.

2 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/76; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 15 f.

3 OGH 8 Ob 532/77 = EvBl 1978/52; 2 Ob 2027/96; 2 Ob 209/61; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1309 no 5; *S Hirsch*, Children as Tortfeasors under Austrian Law, in: M Martín-Casals (ed), Children in Tort Law, Part I: Children as Tortfeasors (2006) no 164 ff.

4 § 1310 ABGB: 'If the person harmed cannot obtain compensation in such a manner, the judge shall award complete compensation, or an equitable part thereof, taking into account whether some fault can be imputed to the injurer under the particular circumstances notwithstanding the fact of him normally not having capacity; or whether the person harmed refrained from a defence out of consideration for the injurer; or, lastly, the financial means of the injurer and of the

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spect, the responsibility of the minor depends on three criteria, namely whether the concrete minor might have had enough judgement due to their individual abilities to be held responsible for their actions in the individual case, secondly, whether the victim did not defend himself out of consideration for the minor tortfeasor and thirdly, who can better bear the damage with respect to the pecuniary circumstances on both sides. Depending on their intensity, the presence of one criterion or a combination of two or three criteria is a prerequisite to establish liability.[5] When it comes to the comparison of pecuniary circumstances, settled case law counts third party liability insurance as part of the tortfeasor's resources, though this opinion is criticised by some scholars, who argue that liability insurance aims at covering the liability of the insured party not at establishing it.[6]

As addressed in the decision at hand, liability in equity under § 1310 ABGB, **7** however, only comes into question if a responsible person would have been liable for the loss, hence only if the conduct was ultimately wrongful: § 1310 ABGB does not provide for an extension of liability but for a limitation in favour of the minor.[7] Accordingly, the judge may award damages to their full extent or to an amount considered equitable with regard to the degree of discernment and the minor's pecuniary circumstances.[8]

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 28 October 1976
ATF 102 II 363

Facts
A 14-year-old college student V went to school by train every day. One morning, **1** when she was late, she jumped on the already departing train, holding in one hand

person harmed.' Translation by *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law, Basic Texts (2011) § 1310 Austrian Civil Code.

5 *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 312.

6 In favour of an inclusion OGH 7 Ob 200/98g = ZVR 2000/25 et al; *D Rubin*, Billigkeitshaftung Deliktsunfähiger und Versicherungsschutz, in: KG Koban/D Rubin/A Vonkilch (eds), Aktuelle Entwicklungen im Versicherungsrecht (2005) 98 ff; approving of this *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/178; contra *F Kerschner*, Vermögen und Haftung – unter besonderer Berücksichtigung des Versicherungsschutzes, in: S Perner/D Rubin/M Spitzer/A Vonkilch (eds), Festschrift für Attila Fenyves (2013) 233 ff.

7 Cf OGH 4 Ob 65/99h = JBl 1999, 604; 2 Ob 40/93 = ZVR 1994/149; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1310 no 6.

8 *S Hirsch*, Children as Tortfeasors under Austrian Law, in: M Martín-Casals (ed), Children in Tort Law, Part I: Children as Tortfeasors (2006) nos 3, 7 f.

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her school bag and an envelope. She fell on the rail and her two legs were cut below the knees.

2 V brought a claim against the railway company for CHF 430,000 (€ 360,000) as compensation of the damage and CHF 30,000 (€ 25,000) for the moral harm suffered.

3 The cantonal court rejected the claim.

Decision

4 The Supreme Court accepted V's claim, but reduced its quantum by 75%.

5 The Supreme Court recalled that, according to the Federal Railway Liability Act (art 1 LCdF), the railway company is liable for human death or harm, except if it proves that the damage was due to *force majeure*, third parties' fault or the fault of the victim.

6 *In casu*, the only factors to take into account are the normal dangerousness of the railway activities, on the one hand, and the contributory negligence of the victim, on the other. The question is whether the contributory negligence admitted by the victim is so preponderant that the dangerousness of the railway activity is no longer an adequate cause of the damage.

7 The jurisprudence has regularly considered that jumping on or off a moving train or tramway constitutes gross contributory negligence, which generally excludes the railway company's liability. However, such an exclusion of liability supposes that the victim had a sufficient capacity of discernment.

8 *In casu*, it is true that V is an intelligent person accustomed to travelling by train. But this does not mean that she had a plain discernment, when she jumped on the train. According to art 16 of the Swiss Civil Code (SCC), a person has the capacity of discernment (*urteilsfähig*), if he/she is able to act reasonably.[1] It is generally known that children of V's age tend to lose their head when they are late, and to commit dangerous acts in these kinds of situations. This was the case with V, who had to catch the train at any price in order to reach school on time. If she risked jumping on the train despite the danger she was aware of, her conduct cannot be imputed her to the same extent as to an adult person. Her degree of discernment has rather to be considered as reduced at the moment of her act.

9 It is true that arts 16–19 SCC distinguish only between ability and inability to judge.[2] But this does not mean that there are not intermediate degrees such as a re-

1 For more details on the so-called capacity of discernment in Swiss civil law, see 4C.278/1999.

2 See for instance, *M Bigler-Eggenberger/R Frankhauser*, Basler Kommentar Zivilgesetzbuch I, Art 1–456 ZGB (5th edn 2014) art 14 no 41; *F Werro/I Schmidlin*, Commentaire Romand, Code civil (CC) I, Art 1–359 CC (2010) art 16 no 5 who uphold the 'all-or-nothing principle' (*Alles-oder-Nichts-*

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duced ability. In particular concerning juridical consequences in tort law, the quantum of damages can depend on the degree of fault; and in order to establish the degree of fault, one has to take into account the degree of ability to judge. As a consequence of a reduced ability to judge, damages can be reduced or even denied. A diminished ability to judge can also lower the consequences of contributory negligence.

Given V's young age, her contributory negligence is not important enough to consider her conduct as an adequate cause of the damage. V's age, intelligence and the fact that she was used to travelling by train justify a reduction of 25% in the damages to be paid by the railway company. 10

Comments

For comments see Tribunal cantonal du Valais, TC, 21 février 1957 (Bruttin c/Ravaz) at 8/4 nos 20–21. 11

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 21 January 1964
ATF 90 II 9

Facts

A1 had erected a power pole in the Alps for a power company V. As A1's employees had omitted to properly affix screw-nuts, V asked A1 repeatedly and without any success to fix them more solidly. Months later the 12-year-old A2, passing by during a school-walk, unscrewed the screw-nuts manually without any equipment. During the following windy night, the power pole fell to the ground and was destroyed. V ceded his rights to A1 who filed a claim against A2 for damages amounting to CHF 31,000 (€ 26,000). 12

Decision

The Supreme Court admitted the claim partially. 13

The court stated that the capacity to judge is generally presumed in Swiss law; a person who is not able to judge has to prove this. However, the younger a person is, the weaker is the presumption, which disappears entirely below a certain age. Judges analysed in detail the capacity of A2 to commit a fault. They stressed that he is a normally developed but mediocre college boy able to understand what a screw-- 14

Prinzip, Principe du tout ou rien). However, other authors recognise reduced liability in tort law. In this sense, *E Bucher*, Berner Kommentar, Art 11–26 (3rd edn 1976) art 16 no 4a.

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nut is and its function. As such A2's fault would be grave; but given his age it has to be considered as light. In contrast A1's professional fault is inexcusable, notably because he had installed the power pole without the necessary equipment to secure it correctly. Consequently, the judges apportioned the damages and ordered A1 to pay 5/6 and A2 to pay 1/6.

Comments

15 For comments see Tribunal cantonal du Valais, TC, 21 février 1957 (Bruttin c/Ravaz) at 8/4 nos 20–21.

Tribunal cantonal du Canton du Valais, TC, 21 February 1957 (Bruttin c/Ravaz)

Rapport du Tribunal cantonal du Canton du Valais sur l'Administration de la Justice pendant l'année 1957, 23–26

Facts

16 The four-year-old V went with her sister and two other children to keep near the village two goats and a billy goat. On the way, V was hit on the head by a stone, which had been rolled by the seven-year-old A while herding a cow and a goat. The place of the accident was separated from A's place by a 15 m terrace and a coppice.

17 V filed a claim against A.

Decision

18 The cantonal court rejected the claim.

19 The cantonal court recalled that, at the age of seven, intelligence and the capacity to reason develop quickly. What an eight-year-old boy will be able to understand can possibly not be understood at the age of seven. The danger of the rolling stones was not immediately perceivable. A could have thought that the coppice would stop them and he ought to have reflected and reasoned to realise that they could roll so far, travers the plants and cause damage. He was unconcerned as children are often not aware of the danger. As a consequence, the court admitted that A did not have the necessary capacity to understand the dangerousness of his acts, denied that his act was unlawful in the sense of art 41 of the Swiss Code of Obligations (SCO) and declared him not liable.

Comments

20 In the college student case (ATF 102 II 363), the Supreme Court explained in detail the criteria it uses to assess the degree of discernment and fault and the damages. It focuses on the individual specificities of the person. Not only the age, but also the

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intelligence[3] of the person (had she not been intelligent, the judges could have taken this fact into account), her habits – she took the train everyday – and the precise circumstances – she was in a hurry and worried about being late for school – are criteria to be examined before arriving at a judgment. The outcome is consistent with earlier decisions and notably the famous *Zuffrey* case (see at 8/4 nos 12–15), where a 12-year-old (mediocre) college student (as explained in the general overview, Swiss law does not fix a minimum age for the establishment of liability) had unscrewed the screw-nuts of an electrical tower, provoking its downfall. Given the gross negligence of the company, which had failed to fix the screws properly, given that the student's negligence would have been gross had he been an adult, but given his young age, the Supreme Court reduced the damages the student had to pay by about 85%.[4] In the present case, the seven-year-old A did not possess sufficient capacity of reflection and reasoning to perceive the dangerousness of his acts.

The cases mentioned here concern children of 15, 12 and seven years of age. In **21**
the first two cases, the consequence of the young age was that the damages are reduced. This is true not only for the victim, who receives less damages (as in the first case), but also for the injuring party, who has to pay less damages (as in the second case). In the third case A's liability was entirely denied and the damaging act was (astonishingly) considered as not unlawful.

5. Greece

Areios Pagos (Greek Court of Cassation) 1743/2007

Published at ISOKRATIS = NoV 56 (2008) 700 (summary)

Facts

A, while driving his car at a normal speed, suddenly noticed that V, an eight-year- **1**
old boy who was cycling, entered the road in the opposite lane, totally lacking control of his bike. A immediately braked and steered his car to the left, thus entering the opposite traffic lane, endangering his own life, in an attempt to avoid a collision with the minor. Despite A's attempts, a collision could not be avoided, as V did not take any action in order to avoid the collision. V crashed into the front part of A's car and was injured.

3 In fact, in Swiss law, the ability to act reasonably is always analysed according to an intellectual element (consciousness) and a voluntary element (will). See *H Deschenaux/PH Steinauer*, Personnes physiques et tutelle (4th edn 2001) 24 ff, no 76 ff.

4 ATF 90 II 9 (1964). See also ATF 89 II 56 (1963); ATF 104 II 184 (1978).

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Decision

2 The Athens Court of Appeal held that the minor was exclusively at fault for the accident and that the driver of the car was not liable. The Court of Cassation, however, quashed the above decision on the ground that, although the minor was exclusively at fault, the fault cannot be imputed to him according to art 916 GCC,[1] which applies per analogy in cases of contributory negligence,[2] as is the case here, as he was under the age of ten. As a consequence A cannot be exempted from the strict liability provided by L 3950/1911 on Liability for Automobiles.[3]

3 In particular, arts 4 and 5 of L 3950/1911 provide that the driver of a car is strictly liable for any damage caused to third parties from its operation and is exempt from the obligation to pay damages only if he proves that the accident was due to *force majeure* or the fault of the victim or it was the result of a culpable act of a third party not relating to the operation of the car. According to the Court of Cassation, a driver cannot be exempted from his liability when the fault cannot be imputed to the victim due to his young age (under the age of ten).

Efeteio Thessalonikis (Thessaloniki Court of Appeal) 2524/1999

Arm 44 (2000) 625 ff

Facts

4 A, while driving his car, turned left at an intersection when the traffic light was flashing amber, instead of giving priority to the motorbike which also entered the same road from the other direction. As a result, the two vehicles collided and 13-year-old V, who was on the motorbike together with another minor, was severely injured. The motorbike was ridden by 16-year-old C who did not have a driving licence and V had not been wearing a helmet.

Decision

5 The court found that V also contributed to his severe injury by 30%. In particular the court held that V, being 13 years old and socially aware, knew his obligations re-

1 For the text of art 916 GCC see below fn 7.

2 It is accepted (*M Stathopoulos*, in: A Georgiadis/M Stathopoulos, Civil Code II (1979) art 300 no 8) that it derives from the aim of art 300 GCC that whatever applies to the liability of the tortfeasor will also apply per analogy to the 'joint liability' of the victim. See also, indicatively, *A Georgiades* in: A Georgiades/M Stathopoulos, Civil Code IV (1982) art 916 no 2; *G Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 916 no 2.

3 The force of L 3950/1911, as amended by subsequent laws, has been extended across the entire Greek state according to art 114 of the Introductory Law of the GCC.

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garding motorbikes (ie that it is forbidden to ride as a passenger on a motorbike ridden by a 16-year-old minor who does not have a driving licence and that he should wear a helmet) and the unlawfulness of his act and, therefore, he acted knowingly and could not be exempted from liability (contributory negligence) according to art 917 sent a GCC[4] which also applies in the case of concurrent fault (art 300 GCC).[5]

Comments

According to Greek law, culpability is of importance only when the culpable person has the capability of perceiving the just or unjust character of his/her behaviour; when this capability exists, the culpable act can be imputed to the person who acted and there is 'fault' as a necessary presupposition for tort exists.[6] **6**

As a rule, all persons are capable of having 'fault' imputed to them. However, as mentioned above, the Civil Code (arts 915–917)[7] considers certain persons as lacking the capacity of imputability. These persons are those who lack lucidness (persons unconscious of their actions or were in a state of psychological or mental disturbance, which diminished their judgement and will) or are very young (under the age of ten); a person who is older than ten but below 14 is liable for the damage he has caused unless he acted without the necessary mental maturity which would enable him to understand the unlawful character of his behaviour.[8] The ability of 'discretion' is examined on the basis of the particular facts of the case and depends on the degree of the spiritual and mental development of the particular minor as well **7**

4 For the text of art 917 GCC see below fn 7.

5 See also *A Georgiades*, Introductory Remarks to Arts 914–938, in: A Georgiades/M Stathopoulos (eds), Civil Code (1982) art 917 no 3; *M Stathopoulos* in: A Georgiadis/M Stathopoulos, Civil Code II (1979) art 300 no 7.

6 See, among others, *I Karakostas*, Law of Torts (2014) 156 f; *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 II 513 ff.

7 Article 915 GCC: 'Cases of non-imputability. Whosoever has caused damage to another without being conscious of his actions, or while he was in a state of psychological or mental disturbance which decisively diminished the functioning of his judgement and will, is not liable.
If, at the time the damage was caused, that person had put himself in such a state through the use of alcoholic beverages or other means, he is liable for the damage caused unless he reached that state through no fault of his own.'
Article 916 GCC: 'Whosoever has not yet completed his tenth year of age is not liable for the damage he has caused.'
Article 917 GCC: 'Whosoever is above the age of ten but below 14 is liable for the damage he has caused unless he acted without having the mental maturity in order to understand the unlawful character of his behaviour. The same rule applies to deaf-mute persons.'

8 AP 731/2008, published at ISOKRATIS and NOMOS; *I Karakostas*, Law of Torts (2014) 160; *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 VI 514.

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as on the nature of the act.[9] The standard of conduct expected of a child who is able to understand the unlawful character of his behaviour is the standard of an average child of his age.[10]

6. France

Cour de cassation, Assemblée plénière (Supreme Court, Plenary Assembly) 9 May 1984, *Lemaire*

80-93.031, Bull ass plén no 2, JCP éd G 1984, II, 20256, note *Jourdain*, D 1984, jur 525, concl *Cabannes*, note *Chabas*, Defrénois 1984, 557, note *Legeais*, GAJC no 193

Facts

1 A company had been called to do some electrical work in a stable. Ten days later, a 13-year-old boy was mortally electrocuted while trying to screw a bulb on a lamp in that stable. The boy's parents brought a claim for damages against the company's employee who had performed the work. The lower court granted the claim, but held that the boy's contributory fault reduced the defendant's liability by 50%. The parents brought the case before the *Cour de cassation*.

Decision

2 The *Cour de cassation* affirmed the lower court's decision, stating that the latter did not have to check if the boy was capable of perceiving the consequences of his act and that contributory fault could be established in that case.

Comments

3 This decision by the plenary Assembly of the *Cour de cassation* is very important, as it departed from the traditional rule, according to which children could not be at fault, as long as they could not be aware of the consequences of their acts. The rule is now reversed: fault should be assessed regardless of the person's awareness of the consequences of his actions. This means that the standard of fault is now purely objective: it is the lack of care as compared to the care that a reasonable adult should have demonstrated. This may seem quite harsh, and some decisions have shown that judges can be reluctant to recognise a child's fault, even though he did

9 Larissa Court of Appeal 225/2007, published at NOMOS; *I Karakostas*, Law of Torts (2014) 161. See also AP 1410/2006 NoV 55 (2007) 335.

10 *K Christakakou-Fotiadi*, Liability in Tort of Minors and their Parents or Guardians (2008) 44.

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not demonstrate the same degree of care as an adult.[1] Such decisions remain isolated, however, and the rule set in the *Lemaire* case is still regarded as good law.[2]

It must be noted that it was the victim's fault that was discussed in the *Lemaire* case. Of course, the purely objective approach to fault that was adopted in this case also applies to the defendant's fault.[3] The case actually shows how cruel the rule can be: it not only opens the possibility of younger and weaker people being held liable to others because of their fault, but it also makes their contributory negligence easier to establish, thus reducing their compensation. This appears to be a major inconsistency of French law: in order to protect 'victims', it adopts an objective approach to fault, but this leads to weaker victims being undercompensated. **4**

In practice, however, the rule set in the present case has been to a large extent neutralised in the case of traffic accidents by art 2 of the Act of 5 July 1985 (*loi Badinter*), which provides that the victim's fault has no impact on compensation if the victim is under the age of 16.[4] Given that traffic accidents are a major, if not the first, source of serious damage, especially for children, the objective conception of fault adopted in 1984 now has a limited impact when contributory negligence is at stake.[5] **5**

7. Belgium

Cour d'appel (Court of Appeal) Mons, 9 March 1976

RGAR 1976, 9676

Facts

While work was being undertaken, the company in charge of the works constructed a mobile walkway to ensure that pedestrians could cross the construction site. A 63-year-old woman walked on it and slipped, which caused her harm. **1**

1 See eg Cass civ 2, 4 July 1990, 89-15.177, Bull civ II, no 167.

2 See Cass civ 2, 28 February 1996, 94-13.084, D 1996, 602, note *F Duquesne*; D 1997, Sommaire 28, obs *D Mazeaud*. See, more generally, *P Brun*, Responsabilité civile extracontractuelle (4th edn 2016) no 303.

3 See eg Cass civ 2, 12 December 1984, 82-12.627, which found that a seven-year-old child, who had pushed and injured a schoolmate, could be found at fault regardless of whether or not he could have been aware of the consequence of his conduct.

4 And if the victim is not himself a driver, which will normally be the case for someone under 16. The same rule applies to victims who are over 70 or suffer from a handicap.

5 Nevertheless, the draft reform project of civil liability law published in April 2016 suggests a general reversal of the rule set in *Lemaire* as far as contributory negligence is concerned. Articles 1242 and 1245 maintain the objective approach to fault but reject comparative negligence as a defence when the plaintiff is a child or a disabled person.

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2 The woman blamed the company for the unusually slippery condition of the walkway, which was covered with a fine layer of frost at the time.

Decision

3 The Court of Appeal held that the lighting was excellent at the location of the fall, and that the fine layer of frost could be seen at first glance.[1] In that regard, the court stated that the victim's fall was due to a lack of care on her part, and an absence of caution or judgement or even the poor balance of a 63-year-old woman. She should have taken her weakened physical abilities into account given her age, and should therefore have taken more care.

Comments

4 Reflection always begins from the same principle: the objective assessment of the fault does not, as a rule, take the age of the person into account in requiring more or less care on their part. The Supreme Court furthermore expressly stated this in a judgment dated 24 October 1974,[2] in which it reproached the trial judge for having taken the youth of the person who committed the harmful act into account in an assessment of the negligent character of that act.

5 That being said, we should note that numerous decisions allow the age of the person who committed the harmful act to be taken into consideration, and this occurs on two levels. In certain cases, case law associates age with inexperience and arrives at the conclusion that fault is present for that reason. Elsewhere we have examined (see 7/7 nos 1–9) the Supreme Court's judgment dated 5 June 2003 approving the Appeal Court's reasoning, which had decided that the volunteer had not acted with fault, particularly in the light of his youth.[3] In other instances, age is more synonymous with a certain weakening of physical ability, which should mean that the defendant ought to increase his prudence and vigilance. The decision we have commented upon serves as an illustration: the Court of Appeal considered that

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1 The court therefore dismissed the existence of a defect in the walkway, which would have (objectively) engaged the liability of its caretaker (art 1384, 1, of the Civil Code).

2 Cass, 24 October 1974, Pas 1975 I, 237. In this case, four children between the ages of seven and eight were playing with a bow and arrows. The game was to launch an arrow as high as possible. When it fell, one of the arrows flew in the eye of one of the children. The trial judge considered that nobody was at fault considering the game has to be seen as a normal and innocent activity for a group of boys of that age.

3 See again for instance Court of First Instance of Leuven, 25 March 1987, Dr circ/Verkeersrecht 1988, 49, regarding an accident which occurred between a vehicle and young cyclists (aged 11 and 14 years). According to the judge, one could not expect from cyclists of those ages the same level of experience, knowledge and ability in traffic as adults.

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the 63-year-old woman should have taken account of her age and the difficulty which she might encounter in crossing a walkway and been even more careful. A parallel must be drawn with what has been said regarding the impact of an illness upon standards of behaviour (see 9/7).

Cour d'appel (Court of Appeal) Mons, 28 June 1994

JLMB 1996, 91

Facts

A 13 and a half year-old boy, A, was playing with his cousins on a public road. By chance, the group of children found firecrackers abandoned by an unknown person. There were no recommended instructions for use on them or indications about their dangerousness. The children took them and A, who intended to destroy one of the firecrackers, struck it with a hammer. The firecracker exploded and A's cousin, V, suffered a severe injury to her right eye. V's parents brought a lawsuit against A's father. By way of defence, A claimed that he did not know that his conduct was likely to cause harm and, therefore, he did not act negligently. 6

Decision

To decide whether A acted negligently and whether the damage was foreseeable, the Court of Appeal of Liège considered that it had to refer to the objective conduct of the reasonably prudent person placed in the same circumstances. On that point, the court said that the defendant's age was not a relevant element to determine the behaviour that one could expect from him. It also considered that a prudent and careful person would not have struck a firecracker with a hammer and that the circumstances in which the object was found should have prompted A to be cautious. According to the Court of Appeal, A should have foreseen the dangerousness of his conduct for himself and for the others, and the possible occurrence of any kind of damage. Taking into account these considerations, the Court of Appeal was of the opinion that A acted with fault; A and his father were found liable. 7

Comments

As a rule, age is not taken into consideration in assessing what would have been the standard conduct. The commented decision illustrates this rule as the judges compared the child's conduct to that of a reasonable and careful person. 8

That said, it is clear that children often engage in activities and games which are not those in which adults participate and, in respect of which it would be absurd to ask ourselves what the abstract, diligent and prudent person's behaviour would be. 9

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In such circumstances, the 'only useful reference group appears to be children of a similar age'.[4]

10 Besides, it is essential to distinguish the harmful act committed by a child, in respect of which we must assess whether it corresponds to the standard of behaviour required, from accountability (the subjective or moral aspect of fault), which only relates to the child's ability to assess the harmful consequences of his behaviour. In this last respect, it is necessary to engage in a subjective assessment of the child's situation, taking particular account of his physical and intellectual development.[5] Belgian law has not fixed an age at which a child may be held liable for his/her acts. At most, a general trend can be observed in the case law not to consider children under the age of six as being capable of judgement and to consider capable of judgment children older than the age of ten.[6]

11 Finally, we have to say that art 1384 of the Civil Code establishes a specific liability regime for parents, which is applicable in the case of damage caused by their minor child. When a minor child acted with fault and causes harm to a third party, parents are presumed to have committed fault, causally linked to the damage, in the supervision or in the education of the child.[7] In the commented case, the lawsuit against A's father was precisely based on this provision of the Civil Code.

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 12 November 2004, ECLI:NL:HR:2004:AP1662
NJ 2005/138 (sneeuwballende kinderen)

Facts

1 A five-year-old boy threw a snowball in the face of a nine-year-old girl. The girl approached the boy and made him fall. The boy suffered a severe injury. The question was which yardstick must be applied to determine the strict liability of her parents under art 6:169 CC. This article bases liability for unlawful acts of children which, according to art 6:164 CC, cannot be attributed to the child because of their age to parents. The defendant (girl) argued that her act should be tested according to the

4 Free translation of *B Dubuisson*/*V Callewaert*/*B De Coninck*/*G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 27, no 8.

5 *RO Dalcq*, Traité de la responsabilité civile, vol 1 (1967) no 2306.

6 *B Dubuisson*/*V Callewaert*/*B De Coninck*/*G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 37, no 22.

7 About that specific liability regime, see *H Bocken*, Aansprakelijkheid van en voor minderjarigen, Bull Ass/T Verz 2006, 309–318.

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question of whether the act would have been unlawful if committed by a 14-year-old.

Decision

The rules on liability of a child under 14 (art 6:164 CC[1]) and of the child's parents (art 6:169 CC[2]) are complementary which means that no case can arise in which neither the child nor the child's parents are liable. Therefore, it must be assumed that the consequence of the hypothetical measure referred to in art 6:169 CC is that whether the conduct would have been regarded as a tortious act if it had been carried out by an adult should be examined. Thus, in the case of an act committed by a child, the act should be completely abstracted from the age of the child. 2

Comments

Unlawful acts of children under the age of 14 are not attributed to them (art 6:164 CC). These acts can, however, be considered to be unlawful. Unlawful acts committed by children under the age of 14 create the strict liability of their parents under art 6:169(1) CC as art 6:169(2) refers to children who are already 14 but not yet 16, in which case the parents' liability (jointly and severally with the child) is based on fault with a reversal of the burden of proof. This decision stresses that, in order to decide on the (un)lawfulness of an act, it should be abstracted from the age of the person who committed the act. 3

9. Italy

Corte di Cassazione (Court of Cassation) 19 November 2010, no 23464

Leggi d'Italia (<http://www.leggiditaliaprofessionale.it/>)

Facts

In the course of a dispute on a school bus, a ten year-old pupil attacked another pupil, who was two years younger, hitting him on the back with his schoolbag several 1

1 Article 6:164: 'The conduct of a child under 14 years of age cannot be attributed to him as a tortious act.'

2 Article 6:169(1): 'A person who exercises parental authority or legal guardianship over a child under 14 years of age is liable for damage caused to a third person by the affirmative conduct of that child, provided that that conduct would have been regarded as a tortious act of a child but for his age.' Article 6:169(2): 'A person who exercises parental authority or legal guardianship over a child who is 14 years of age, but not yet 16 years of age, is liable for damage caused to a third person by the child's fault, unless he cannot be blamed for failing to prevent the child's tortious act.'

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times and causing him a lesion of four vertebrae, with consequent permanent invalidity of 18%. The parents of the injured child sued both the Municipality, which organised the school bus, and the parents of the aggressor, for the compensation of the damage.

Decision

2 The *Corte di Cassazione* affirmed the liability of the Municipality, for a violation of its duties of vigilance provided for by art 2047 Civil Code in cases of minors 'unable to understand and intend' the consequences of their actions. In the opinion of the court, the older pupil in fact lacked this capacity when he caused harm to the younger child because he was not able to understand that his action was against the law and that that it could entail severe consequences. His incapacity could be assessed on the basis of what actually happened and on common knowledge and experience, without any further psychological investigations.

Comments

3 For comments see 8/9 nos 6–13 below.

Corte di Cassazione (Court of Cassation) 20 April 2007, no 169509

Resp civ prev 2007, 7–8, 1706

Facts

4 During a tennis training session, a 12-year-old minor hit another minor with a tennis racquet in an unpredictable way, causing two teeth to break and an injury to his lip. The parents of the victim sued the parents of the aggressor for compensation for the damage suffered by their son, stating that they should be held liable for the damage their son caused because they did not raise him properly or supervise their son.

Decision

5 The *Corte di Cassazione* affirmed the joint and several liability of the parents of the aggressor for 70% of the damage (as in the opinion of the court the victim negligently concurred in the causation of the damage). In the opinion of the court, where art 2048 Civil Code applies, parents can free themselves of liability only if they can prove that they could not have prevented the illicit act of their underage son, who was able to understand and intend. The proof normally consists in the demonstration that they raised the minor in a manner adequate to their social and family conditions and to have properly supervised their son, having regard to his age. In this

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case, that demonstration was made impossible by the fact that the boy went from his home to the tennis club alone, he entered the tennis club alone, without any permission, and played tennis with no supervisor or trainer.

Comments

In Italy, majority is reached at the age of 18. Cases relating to underage persons causing damage are governed by two different provisions, depending on the state of capacity or incapacity of the minor.[1] The different treatment of the two distinct cases was introduced in the 1942 Civil Code, as the previous Italian Civil Code, dated 1865, did not draw similar distinctions.[2] **6**

Article 2046 Civil Code provides that a person who is incapable of understanding or intending at the time he committed the act causing injury is not liable for his/her consequences, unless the state of incapacity was caused by his own fault.[3] This capacity is called 'natural capacity' and its existence is a precondition for a holding of liability. To be held liable for damage, A must therefore have acted following an impulse of free will. These rules differ from those applicable to contracts where the capacity to act is dependent on the existence of some specified age (in most cases, the age of majority). **7**

An important issue discussed by Italian scholars is that of the relationship between fault and attributability of the injury. A person not able to understand or intend is considered by some scholars as not able to understand and disobey an order,[4] or psychologically participate in the violation of the rule of conduct.[5] Such a condition, described as the lack of 'natural capacity' would exclude fault and the responsibility of the agent.[6] Others have affirmed instead that fault and capacity are distinct and autonomous[7] and that that distinction is especially clear in cases of persons suffering mental disability.[8] Lastly, a third group of scholars argue that the at- **8**

1 Cass 18 May 1953, no 1812, Foro It 1953, I, 1451; Cass 10 August 1964, no 2291, Giust Civ 1964, I, 2190; Cass 10 April 1070, no 1008, Giust Civ 1964, I, 2190; *M Pogliani*, Responsabilità e risarcimento da illecito civile (1969) 130; *G Alpa/G Bessone*, I fatti illeciti, in: P Rescigno (ed), Trattato di diritto privato (1982) 323; *S Patti*, Famiglia e responsabilità civile (1984) 248.

2 *A De Cupis*, Il danno, Teoria generale delle responsabilità civile, vol II (1979) 140.

3 Article 2046 (Persons not chargeable with injury): 'A person who was incapable of understanding or intending at the time he committed the act causing injury is not liable for its consequences, unless the state of incapacity was caused by his own fault.'

4 *G Cian*, Antigiuridicità e colpevolezza. Saggio per una teoria dell'illecito civile (1996) 388.

5 *R Scognamiglio*, Responsabilità civile, in: Nov dig it, vol XV (1968) 643.

6 *P Trimarchi*, Illecito (diritto privato), in: Enciclopedia del diritto, vol XX (1970) 110.

7 *M Franzoni*, Dei fatti illeciti, in: Commentario del codice civile Scialoja-Branca (1993) 124 ff.

8 *P Cendon*, Infermità di mente e responsabilità civile (1993) 50.

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tributability of the wrongful acts should be evaluated on the basis of the level of capacity of the person.[9]

9 Italian courts never developed general rules to ascertain the natural capacity of a person who caused injury, rather preferring to apply criteria on a case-by-case basis, although it is generally held that the capacity to understand and intend mentioned in art 2046 of the Civil Code essentially consists in the ability to adequately understand and discern the consequences of one's conduct and in the capacity to make autonomous decisions.[10]

10 By virtue of art 2047 of the Civil Code, if damage is caused by a person 'incapable of understanding or intending', those who were charged with the supervision of the incapable person are liable for the compensation of that damage. They can discharge themselves from liability only if they can prove that the harmful act of the incapable person could not have been prevented. Where the victim is unable to secure compensation from the person charged with the supervision of the person lacking capacity, the court, considering the financial situation of the parties, can order the person who caused the injury to pay equitable compensation.[11]

11 Cases related to damage caused by the unlawful actions of underage persons, who are nonetheless 'able to understand or intend', are instead governed by art 2048 of the Civil Code,[12] providing for the liability of parents, tutors and teachers for the damage committed by a minor with whom they cohabit. They can discharge themselves from liability only if they can prove that they were unable to prevent the damage caused by the minor. In these cases, therefore, V could claim compensation from the minor who is 'able to understand and intend', but the parents or guardians can also be liable for their own conduct, which did not meet the standard of care

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9 *M Bussani*, La colpa soggettiva: Modelli di valutazione della condotta nella responsabilità extracontrattuale (1991) 32.

10 *A Venchiarutti*, La protezione civilistica dell'incapace, in: P Cendon (ed) Il diritto privato oggi (1995) 321.

11 Article 2047 (Injury caused by person lacking capacity): 'If an injury is caused by a person incapable of understanding or intending, compensation is due from those who were charged with the custody of such a person, unless they prove that the act could not have been prevented.
If the person injured is unable to secure compensation from the person charged with the custody of the person lacking capacity, the court, considering the financial conditions of the parties, can order the person who caused the injury to pay equitable compensation.'

12 Article 2048 (Liability of parents, guardians, teachers and masters of apprentices): 'A father and mother or guardian, are liable for the damage occasioned by an unlawful act of their minor not emancipated children, or of persons subject to their guardianship who reside with them. The same provision applies to a parent by affiliation.
Teachers and others who teach an art or profession are liable for the damage occasioned by the unlawful act of their pupils or apprentices that are under their supervision.
The persons mentioned in the preceding paragraphs are only relieved of liability if they prove that they were unable to prevent the act.'

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required under the law to prevent their children from causing damage. In this case, parents would be jointly and severally liable with the child.

The liability of parents for compensation arises under arts 2047 and 2048 Civil Code for different reasons. In the case of underage children 'unable to understand and or intend' the parents are liable if they cannot prove that the act of the minor could not have been prevented, while in the case of underage children 'able to understand or intend', parents are liable if they cannot prove that they discharged their duties to supervise and raise their children adequately (so-called *culpa in vigilando* and *culpa in educando*).[13] 12

Regarding the liability of elderly persons, no special provision exists in Italian law and, to our knowledge, no special exception due to a defendant's old age has ever been made by Italian courts to exclude or diminish their liability. If old age is the cause of a serious diminished physical and/or mental capacity of the person, and the old person is legally declared partially or totally incapable, the same provisions as those which apply to children apply. 13

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 10 November 2006

RJ 2006\7170

Facts

The father and legal representative of V sued A's parents for compensation for the damage suffered by his underage son V as a result of the sexual assault perpetrated by their son, A, a few years older but also a minor. A had already been subjected to forced confinement in a closed regime for one year, by agreement of the competent organ of the juvenile court. The Court of First Instance decided in favour of the claimant, but the Court of Appeal reversed this taking into consideration that the child's mother, since she was unable to control her unruly son, had repeatedly requested, with the knowledge and consent of the father, the help of several public institutions. However, these public institutions, with clear neglect and carelessness, had failed to provide the requested assistance and had not taken any steps to address the manifest social dangerousness of the child resulting from his obvious behavioural disorder. V's father appealed in cassation alleging the infringement of arts 1902 and 1903 CC, in relation to art 20 CP. The Supreme Court quashed the 1

13 See eg Cass 13 February 1970, no 348, Giur It 1979, I, 1, 1034 and Cass 1 April 1980, no 2119, Mass Giur It 1980, 531.

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judgment of the Court of Appeal and ordered the defendant parents jointly and severally to pay € 42,070.85 to the claimant.

Decision

2 The mother of the child who committed the assault who, as well as his father, knew of the long-term behavioural disorders suffered by her son, sought the help of public institutions for treatment. These conducted a psychological monitoring of the child and, at the mother's request, submitted a report to request the committal of the child to a psychiatric institution. However, the duty of care requiring a *bonus pater familias* to avoid damage cannot end here. Damage itself shows that the measures taken by the parents were insufficient since, if they felt unable to control the behaviour of their child, it was in their hands to promote a prompt solution from the public institutions for what was a clear case of a maladjusted and socially dangerous personality. It cannot be said they had required the action of public bodies promptly and with due emphasis, since from the time the child attended the Mental Health Centre in April 1993 until July 1994 when, after the occurrence of facts he was confined to a juvenile institution, no measures were taken other than having agreed to monitoring by a psychologist of the school the child was attending, in spite of the fact that during this time there were multiple school incidents caused by the passivity, apathy, disobedience and aggressiveness of the child.

3 Regard must be given to the constant legal doctrine of this court stating that liability for others, as provided in art 1903 CC, is direct and 'quasi objective'. Although this provision follows art 1902, which establishes liability for fault, it does not mention fault and, therefore, it has been argued that it provides for liability for risk or 'quasi objective' liability, justified by the transgression of the duty of supervision that parents have upon the children they have under their authority. It includes, therefore, a presumption of fault of the person who holds parental responsibility, and the inclusion of this objective nuance in this type of liability, which depends no less on criteria of risk than on subjective criteria of fault. In this case one cannot rely on the fact that the child's conduct, due to his young age and immaturity, cannot be considered negligent, because liability arises from the keeper's own fault for failure to provide supervision.

Comments

4 Spanish tort law, by contrast to Spanish criminal law – see art 19 CP[1] – has not established an age limit below which a person should be excluded from liability re-

1 'Minors under 18 shall not be liable according to this Code. When a minor commits a criminal act, he or she shall be deemed liable according to the provisions of the Act concerning the Criminal li-

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gardless of his/her actual mental capacities and abilities.[2] Insofar as he/she has tortious capacity, the child may be held liable for his/her wrongful act, normally together with his/her parents or tutors. The child will only be considered liable if his/her conduct is negligent when compared with the standard of care that a minor of the same age and in similar circumstances of time and place would normally display. The standard of care applicable to children is thus *objective* but needs to be adapted to the single particular situation by taking into account the circumstances of persons, time and place in which the conduct took place.[3]

If the child has no capacity, he will not be liable for want of one of the fundamental conditions for establishing liability. In this case liability rests solely on his parents or tutor (art 1903.II and III CC),[4] unless they show they had acted with the standard of care of a reasonable person (art 1903 VI CC).[5] In practice, however, this system of fault liability with a reversal of the burden of proof is watered down to a great extent, since courts render it impossible to escape liability by proving that the parents who are held liable for the acts of their children met the required standard of care. The practical impossibility of rebutting the burden of proof provided by art 1903 CC makes the parents liable in cases where they could have hardly fulfilled their duty of supervision, either because there were important reasons that justified that they were not present when the act that caused the damage was performed, or because, if they had been, they could not have avoided it.[6] In spite of the wording of

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ability of the minor.' This Act is the Organic Act on Criminal Liability of Minors (Ley Orgánica 5/2000, of 12 January, *reguladora de la responsabilidad penal de los menores* [hereafter LORPM]) (BOE no 11, 12.1.2000). Article 1.1 LORPM provides that the Act is applicable to criminal and civil liability arising from crimes or misdemeanours of persons under the age of 18 but over 14.

2 See *M Martín-Casals*/*J Ribot*/*J Solé Feliu*, Children as Tortfeasors under Spanish Law, in: M Martín-Casals (ed), Children in Tort Law I (2006) 369 ff and more references therein.

3 *M Martín-Casals*/*J Ribot*/*J Solé Feliu*, Children as Tortfeasors under Spanish Law, in: M Martín-Casals (ed), Children in Tort Law I (2006) 374. See also 1/10 no 3 f.

4 Article 1903 II CC provides that: 'Parents are liable for damage caused by their children who are under their custody' and art 1903 II CC adds that: 'Guardians are liable for damage caused by minors or incapacitated persons under their authority who live with them.'

5 In this sense, art 1903 VI CC provides that: 'Liability according to this provision will cease when the persons it mentions prove that they have acted with all the diligence of an orderly paterfamilias to prevent the damage from occurring.' See *M Martín-Casals*/*J Ribot*/*J Solé Feliu*, Children as Tortfeasors under Spanish Law, in: M Martín-Casals (ed), Children in Tort Law I (2006) 388 f. Concerning liability of parents or tutors, a distinction must be drawn between the behaviour of the child that also qualifies as a crime or a misdemeanour and non-criminal harmful acts of children. In the first case, parents are strictly liable (art 61.3 LORPM), whereas in the second case art 1903 CC applies and, according to the wording of the last part of this provision, they are liable unless they can prove to have acted with all due care to avoid the harm caused by the child.

6 When assessing their liability, case law does not usually take into account circumstances such as the age of the minor, the activity that he was carrying out when he caused the harm, the personal circumstances of the parents – such as their job or the number of children being raised – or their

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the Code, in practice parents are held liable even without fault. An ever-increasing number of decisions even refer to 'risk' as the grounds for liability of parents in art 1903 CC.[7]

6 In the case under comment, it is submitted that the statement in which the parents did not exhaust all the measures required to avoid the harm caused by their child, is seriously flawed. In fact, the child could not have been placed in a specialised centre against his consent. Without proactive help from the public bodies, the parents lacked the economic and personal means to control the child's aggressive inclinations. The social services and the school authorities, however, acted slowly and unsupportively.[8] From this standpoint, the Supreme Court's assertions about the parents' misconduct, as well as the case's final outcome, are hard to accept.

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 30 June 2009
RJ 2009\4451

Facts

7 A six-year-old girl died from a blow to her head suffered during school recess, after being pushed by a schoolmate who made her lose her balance and hit her head against a bench, thereby sustaining a fracture on the left side of her skull. At the time of the injury, since it was raining, there were about 300 children under the supervision of three teachers in a covered L-shaped corridor of approximately 200 m^2. The girl's parents sued the school and its insurer. The claim was dismissed at first instance, but on appeal it was upheld in part and the defendants were ordered to pay compensation solidarily, on the grounds that the care and attention had not been sufficient and that the teachers and the school administration had failed to prove due care. The Supreme Court rejected the appeal for infringement of arts 1902 and 1903 CC and confirmed the decision of the Court of Appeal.

Decision

8 The proof of due care to which the last paragraph of art 1903 CC refers and which is imposed on the owners of educational centres must be connected with the measures they must adopt regarding organisation. These measures must obviously be based

attitude with regard to the child who caused the damage. Moreover, decisions holding the parents responsible for acts of children who are close to coming of age are not rare. For instance, see STS 7.2.1991 (RJ 1991\1151).

7 *M Martín-Casals/J Ribot/J Solé Feliu*, Children as Tortfeasors under Spanish Law, in: M Martín-Casals (ed), Children in Tort Law I (2006) 390.

8 In this sense, see the comments on this case by *M Martín-Casals*, CCJC 75 (2007) 1191, 1204–1207.

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on the activity of the pupils at all times and, therefore, on the greater or lesser risk that such activity entails for them. Although it is true that, in principle, recess in a covered space while it is raining does not involve a particular danger for children of a kindergarten and primary school, it is not less true that if this space is an L-shaped corridor of 200 m^2 and if in such a space there are about 300 children under the supervision of only three teachers, the risk of an occurrence of events such as those examined here is more than evident, due to both the very inability of the teachers to monitor so many children in such a small space and to the probability that such an extensive concentration of children can give rise to aggressive reactions or to conduct that would not occur in another situation. Rain did not necessarily mean that children of various groups had to concentrate on the common indoor space. An alternative was for each group to have enjoyed a corresponding recess in the classroom under the supervision of the teacher in charge or of another teacher who could have replaced him/her during the time that he/she needed to rest. In fact, it was the responsibility of the educational institution to address the necessary organisation for such an alternative solution.

Comments

If damage is caused by children while engaged in school activities or in those complementary thereto, liability falls upon the persons or entities that own the educational institution (art 1903 CC) or upon the relevant administrative body, in the case of public schools. In this respect, case law has established that this liability rules out the liability of the parents. **9**

In contrast to the liability of parents, in the case of liability of schools and teaching staff, the courts in practice do accept lack of fault as a defence and it cannot be said that in this case liability has undergone a process of 'objectification'.[9] Moreover, in a number of cases involving schools and children injured in the playground or on other school premises, the Supreme Court has concluded that the liability of the educational institution could not be established either because the damage incurred by the victim was due to unforeseeable events the occurrence of which the teaching staff could not have avoided or because the damage arose as a consequence of normal activities of children that did not involve any kind of special risk or that would be unreasonable to prevent. **10**

As in the case under comment, the practice of the courts shows that a school must increase its supervision depending on the characteristics of the place where there are pupils. However, courts also weigh up the intrinsic dangerousness of the activity performed against the age of the children who take part in it, especially in **11**

9 See 8/10 fn 5 above and corresponding text.

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order to find in favour of the defendant school when an accident occurs in the course of children's games that are not dangerous[10] or when they result from risky activities (like PE), but which are aimed at developing the skills of the children. With regard to the first group of cases, it is worth quoting STS 27 September 2001,[11] which dealt with an accident on the premises of a private school and resulted in the exoneration of the defendant institution. In the case, a five year-old child suffered injuries when, for unknown reasons, some of her friends fell upon her while they were playing a game called 'choo-choo train'. The Supreme Court qualified the incident as accidental, stressing that the game '[is] innocuous, for it needs no further element and does not entail any kind of physical force', and therefore '[the] result that occurred is to be deemed an unexpected and unforeseeable event'.[12] Regarding the second setting, STS 17 February 2009[13] dismissed the claim brought by a pupil who fell badly and was severely injured while performing jumps on a mini trampoline during the PE class. The court disregarded as circumstantial the omissions attributed to the teacher by the Court of Appeal and declared instead that such an accident 'was a natural risk of the educational process aimed at developing the physical activity of the pupils, from which no liability can be derived.'

11. Portugal

Supremo Tribunal de Justiça (Supreme Court of Justice) 15 November 2012 (Maria dos Prazeres Pizarro Beleza)

Facts

1 V, a six-year-old minor, and A, eight years old, were playing on a carousel while they waited for transportation to return to school after having lunch in the facilities

10 *M Martín-Casals/J Ribot/J Solé Feliu*, Children as Tortfeasors under Spanish Law, in: M Martín-Casals (ed), Children in Tort Law I (2006) 411 and more references therein. See also STS 10.6.2008 (RJ 2008\4244) (concerning a self-injured five year-old child while playing in the playground with a rake).

11 RJ 2001\8155.

12 See also STS 28.12.2001 (RJ 2002\3094) (excluding a school's liability concerning an accident which occurred during rope-jumping in the playground). Some scholars notice that the Supreme Court might have decided the first case in an entirely different way had the accident happened in a setting other than during school activities 'even though the first argument – the lack of fault of the child – would have been applicable as well.' See *E Gómez Calle*, Responsabilidad de padres y de centros docentes, in: F Reglero Campos (ed), Tratado de responsabilidad civil II (5th edn 2013) 254. But see the references compiled in *J Ribot/J Solé Feliu*, Spanish case note, ERPL 4 (2005) 735f (concerning damage caused by children while taking part in sports or games).

13 RJ 2009\1494.

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of the defendant, B. Due to a strong push of the carousel by A, who had been warned by C (B's employee) to push it gently, V fell from the carousel. From this fall V suffered serious damage and claimed compensation.

Decision

The Supreme Court of Justice decided that the causal link between the act of A and **2** the damage suffered by V was proved. According to art 488(2) of the Civil Code, minors younger than seven years of age are presumed not imputable.[1] However, the court decided that it was not possible in the case at hand, to assess the fault of the minor, A, because it cannot be expected that an eight-year-old child could predict the damage that could result if he pushed the carousel with more force. Bearing this in mind, the court decided that C, as a supervisor obliged to look after the children, could be held liable under the terms of art 491 of the Civil Code.[2] Therefore, C was held liable for the damage suffered by V, unless she managed to prove that she had fulfilled her duty of supervision or that the damage would have taken place even if she had. In the case at hand, however, this was not examined, because an averagely careful and diligent person, in the position of C, could not be sure that an eight-year-old child would push another child in a safe manner, nor could they trust that the same child would obey her order to push the carrousel gently.

In conclusion, the court decided that C was liable for the accident for failing to **3** meet, with the expected level of care and diligence, her duty of supervision. B was also held vicariously liable (art 500 of the Civil Code[3]).

Comments

One of the requirements to arrive at the conclusion that a given behaviour is faulty **4** is the imputability of the injuring party,[4] that is, the natural capacity to predict the consequences of the acts and to evaluate that conduct in accordance with the

1 '(1) A person who, when the event occurred, was incapable, for any reason, of understanding or determining his actions shall not be liable for the consequences of the injurious event, unless he wilfully caused himself to be in that condition, and that condition was temporary.
(2). Persons who are aged less than seven years or are subject to a psychiatric disorder shall be deemed not to bear liability.'

2 'The persons who, by virtue of law or contract, are obliged to supervise others, due to their natural incapacity, are liable for damage the latter cause to parties, except if they prove that they fulfilled their duty of supervision or that the damage would have arisen even if they had fulfilled such a duty.'

3 'A person who directs another to perform a certain activity shall be liable, irrespective of fault, for the damage caused by such agent, provided that the latter is also liable.'

4 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580.

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judgement made from those facts.[5] Thus, conduct cannot be imputed to a person who is not capable of wanting or predicting the damage[6] (art 488(1) of the Civil Code), or to a minor under the age of seven[7] (art 488(2) of the Civil Code). In the case at hand, the minor who pushed the other causing him to fall, A, was eight years old and, thus, was not presumed to be lacking imputability. Nevertheless, this does not mean that the person cannot be considered non-imputable by the court,[8] which is in fact what happened. Given the lack of imputability of A, we can only analyse if the supervisor[9] (on the terms of art 491 of the Civil Code) was liable for the accident that harmed V.[10] The law establishes a presumption of fault of the supervisor, which results in an inversion of the burden of proof (on the terms of art 350 of the Civil Code).[11]

5 If children who have reached the age of eight were to, otherwise, be considered imputable, they would be liable for the damage caused. Nevertheless they would not be liable to pay damages alone because, as a minor and, therefore, not legally capable, their parents would have to take on the obligation of paying damages because of their parental responsibility (art 1881 of the Civil Code).

6 Therefore, if the supervisor wants to be relieved of liability, she has to either prove that she complied with her duty to supervise diligently, or prove that even if she had complied with it, the same result would have taken place.[12] C did not prove these exceptions in the case at hand.

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5 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 563.

6 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580.

7 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 563; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580.

8 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 490.

9 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 564.

10 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 571 and 575.

11 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 584.

12 Authors such as *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 494, think that we are in this last chance (the proof that the damage would have happened if the behaviour of the supervisor had not taken place) faced with a case of negative relevance of the virtual cause. But this is not our opinion on the subject. To us the presumption of fault (and consequent inversion of the burden of proof) also leads to the presumption of the existence of causation. That is, if the agent should have predicted and prevented the event, it is because the fact is adequate to the production of the damage. In this way art 493 allows liability to be set aside by proving that there is no causal link (see *H Sousa Antunes*, Responsabilidade civil dos obrigados à vigilância de pessoa naturalmente incapaz (2000) 272). Now, the removal of cause and the negative relevance of the virtual cause are different things: although in both cases a comparison of the real and the hypothetical situation takes place, the negative relevance of the virtual cause presupposes two different causes (as happens, for example, in the case of art 807(2) Civil Code – a debtor in delay has to prove that, even if he had paid his dues on time, the damage would have occurred because of another fact); whereas to rebut the presumption of causation, the defendant shall prove that the damage would have occurred because of the same event. (See *Sousa Antunes* (supra) 284).

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Let it be noted that the care demanded from persons with a duty of supervision is assessed taking into consideration the circumstances of each individual case, account also being taken of dominant conceptions and customs.[13] 7

Article 491 lists all those who, by law or contract, are obliged to fulfill duties of supervision (in the case at hand the obligation was based in contract, specifically the contract that C had with his employer, B), and states that they are personally, and not vicariously, liable. If fault cannot be imputed to an individual, the law presumes the omission of adequate supervision *(culpa in vigilando)*.[14] This presumption of fault is meant to protect the harmed party because, on the majority of occasions, when the harmful acts are performed by individuals to whom no fault can be imputed, those acts only took place as a result of inadequate supervision; additionally it serves the purpose of stimulating the compliance of the duties of vigilance.[15] 8

Supremo Tribunal de Justiça (Supreme Court of Justice) 3 February 2009 (Helder Roque)

Facts

A group of children was playing football on a small road without traffic. When one of the boys, A, kicked the ball and his friend could not control it, the ball bounced onto the main road, situated approximately 40 m away. The plaintiff was driving his motorcycle at 40 km/h and, because of the ball, he fell, suffering several injuries to his arm and body. He had to be assisted in hospital and for six months he could only move at first with a wheelchair, and crutches afterwards. On the date of the case, the plaintiff still suffered some pain and had reduced capacity (10%) in his right hand. The plaintiff argued that the parents of the minor, A, were liable because art 491 Civil Code prescribes a presumption of fault of people obliged to supervise others, which is the case for parents towards their children (art 1878(1) Civil Code). Therefore, the plaintiff claimed, from the parents of minor A, compensation for pecuniary and non-pecuniary damage. The parents of three other children were also joined in the procedure by A's parents. The court of first instance condemned as jointly liable all parents in that procedure for a part of the damages sought by the injured party 9

13 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 584; *A Vaz Serra*, Responsabilidade de Pessoas Obrigadas à Vigilância [1959] BMJ no 85, 426.

14 See *A Vaz Serra*, Responsabilidade de Pessoas Obrigadas à Vigilância [1959] BMJ no 85, 398; See *J Sinde Monteiro*, Hipóteses típicas de responsabilidade civil, Revista Jurídica da Universidade Moderna, ano 1, no 1 (1998) 27.

15 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 491, 590; *A Vaz Serra*, Responsabilidade de Pessoas Obrigadas à Vigilância [1959] BMJ no 85, 396.

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which was € 25,512 in total. The Court of Appeal upheld that decision. The defendants appealed to the Supreme Court.

Decision

10 The Supreme Court of Justice denied compensation and considered that the interpretation of the rule prescribed in art 491 Civil Code must take into consideration the 'new family' whereby parents do not have effective control, and a real physical presence near their children; there is a 'softening of parental authority and a faster acquisition of maturity of children that imposes an interpretation of the norm contained in art 491 in accordance with practice.' The adolescent is regarded as having an enlarged sphere of self-determination. Moreover, such presumption of fault is *tantum iuris*, ie, can be overruled by proof that the parents took all necessary diligence and attention of a *bonus pater familias* and art 491 shall not be confounded with a case of strict liability. The Supreme Court also pointed out the importance of physical exercise of adolescents for their physical and emotional well-being; parents shall not be blamed for letting children play on the street! Thereinafter, the Supreme Court considered that the parents were not to blame for the accident, and the presumption of fault was overruled, since, *even if the parents had been present, supervising the children, the unpredictable and non-expectable movement of the ball could not have been avoided*. That is, the damage would have arisen even if the parents had fulfilled their duty. This excludes liability, according to art 491, *in fine*.

Comments

11 Article 491 Civil Code states: 'Persons who, by virtue of law or contract, are obliged to supervise others due to their natural incapacity, are liable for the damage these cause to third persons, except *if they demonstrate that they fulfilled their duty of supervision* or *that the damage would have arisen even if they had fulfilled that duty*.' That is, art 491 Civil Code establishes a presumption of fault of supervisors of persons lacking natural capacity for the damage caused to others. 'Natural incapacity' is a concept different from tortious incapacity. It means the incapacity of self-determination. An example of this difference would be the case of minors. Minors of seven or more years of age, although incapable of ruling their lives, can, nevertheless, be held tortiously liable, according to art 488(2) Civil Code.

12 This situation is deemed as a case of liability for one's own acts. In general, courts accept the idea of *culpa in educando*, which shows that the judgement of fault might in some cases relate to facts previous to the act (of the direct agent, the minor). However, in this case, the Supreme Court made two important statements: (a) it is not incorrect (ie *wrongful*) to let children play football on a small almost traffic-free road, 40 m away from a main road; and (b) even if parents had been supervising their children, the accident would have happened anyway. Considering the

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first argument, at a time where liability is growing in every field of activity, at a time when children are pushed to in-door activities, at a time of hyper-regulated free-time, it is inspiring to read such a 'romantic' conception of the Supreme Court towards education and leisure activities of young boys and girls, as in the 'good old days of free childhood'. Considering the second argument, art 491 provides a presumption of causation. It was considered that the supervisor should have predicted and prevented the event, because he was obliged to survey the activity of children. But, in some cases, the harmful event is completely beyond one's capability to predict and prevent the harmful event. In these cases the person obliged to supervise may prove that the harmful event would have taken place even if he had done everything that he could, therefore not being liable pursuant to art 491. It is clear that we have here a legal presumption of causation that inverts the burden of proof (arts 349 and 350 of the Civil Code).[16] The position of the victim was disregarded by this decision. Some will conclude that drivers of motorcycles should contract into self-insurance policies, since it becomes – according to this decision – a risk of traffic to be directly or indirectly injured by balls with which children are playing.

12. England and Wales

Mullin v Richards, Court of Appeal (Civil Division) 6 November 1997

[1998] 1 WLR 1304

Facts

The claimant (Teresa Jane Mullin) and the defendant (Heidi Richards) were friends of 15 years old, who engaged in a play sword fight with plastic rulers. One of the rulers snapped and a fragment of plastic flew into Teresa's eye, partially depriving 1

16 Some authors like *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 494 would say that we are in this last chance (the proof that the damage would have happened if the behaviour of the supervisor wouldn't have taken place) faced with a case of negative relevance of the virtual cause. But this is not our opinion on the subject. To us the presumption of fault (and consequent inversion of the burden of proof) also leads to the presumption of the existence of causation. That is, if the agent should have predicted and prevented the event, it is because the fact is adequate to the production of the damage. In this way art 491 allows liability to be set aside by proving that there is no causal link (see *H Sousa Antunes* Responsabilidade civil dos obrigados à vigilância de pessoa naturalmente incapaz (2000) 272). Now, the removal of the cause and the negative relevance of the virtual cause are different things: although in both cases a comparison of the real and the hypothetical situation takes place, the negative relevance of the virtual cause presupposes two different causes (as happens with, for example, in the case of art 807(2) Civil Code – a debtor in delay has to prove that even if he had paid his dues on time, the damage would have taken place because of another fact); whereas to rebut the presumption of causation, the defendant shall prove that the damage would have taken place because of the same event. (See *Sousa Antunes* (supra) 284).

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her of sight. She brought proceedings against Heidi, alleging negligence. It was accepted that there was a sufficiently proximate relationship to give rise to a duty of care and that causation existed. The only live ground was whether there was a breach of duty and in particular whether Heidi committed an act which was reasonably foreseeable to cause injury to Teresa.

Decision

2 The Court of Appeal ruled that the standard of care to be applied was objective. The test, however, was not whether Heidi's actions were such as an ordinarily prudent and reasonable adult in Heidi's situation would have realised gave rise to a risk of injury; it was whether an ordinarily prudent and reasonable 15-year-old schoolgirl would have appreciated that, by participating to the extent that Heidi did in a play fight, a risk of injury to Teresa of the same general kind as she sustained might arise. Foreseeability was to be judged against the fact that fencing with rulers was not discouraged in any way and indeed was prevalent, there was no evidence as to the propensity or otherwise of such rulers to break or any history of their having done so and none of there having been any previous injury as a result of it. On the facts, the court ruled unanimously that in no sense did Heidi behave culpably. Although conceivable that some unlucky injury might happen, the injury actually sustained was not foreseeable.

Comments

3 A similar conclusion was reached in the Court of Appeal in the case of 13-year-old school boys in *Orchard v Lee*, Walker LJ noting that 'it would be a retrograde step to visit liability on a 13-year-old for simply playing a game in the area where he was allowed to do so.'[1] It can thus be seen that, while the objective test 'eliminates the personal equation',[2] an element of subjectivity may intrude to allow for the *joie de vivre* of the young. This does not only come into play insofar as the age of the defendant is concerned, however, but is also relevant where the defendant has a physical (see 9/12 below) or mental (see 10/12 below) disability. It is, however, important to emphasise that it is the idiosyncrasies of the *class* to which the defendant belongs that are relevant and not the latter's personal idiosyncrasies, hence the reference to only 'an element of subjectivity' above (emphasis added).

4 Section 1(1) of the Family Law Reform Act 1969 and sec 105 of the Children Act 1989 define a child as a person who has not yet attained the age of 18. Certain statu-

1 [2009] EWCA Civ 295, at [19].

2 *Glasgow Corporation v Muir* [1943] AC 448, 458 per Lord Macmillan. See 3d/13 nos 1–7.

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tory provisions make specific allowance for children.[3] However, there is no minimum age below which a child may not be found liable in tort. Questions of *capacity* are considered on a case-by-case basis.

There is a general reluctance to apply the defence of contributory negligence to very young children.[4] But a finding of contributory negligence may be appropriate where the child is of such an age as to be expected to take precautions for his own safety.[5] 5

Broadly speaking, claims in respect of children's games will not give rise to liability,[6] but that is not to say that childhood is a defence. As Dyson LJ pointed out in *Blake v Galloway*, a case on 15-year-olds, the victim will have a remedy if he 'can show that the injury has been caused by a failure to take care which amounts to recklessness or a very high degree of carelessness, or that it was caused deliberately (ie with intent to cause harm).'[7] Further, where a child voluntarily engages in an adult activity, 'the standard of care remains that of an ordinarily prudent and reasonable child of the defendant's age; [but] the steps necessary to discharge the duty are the same as those required of an adult.'[8] 6

The position of the aged has attracted less attention, but it seems that a parallel approach should prevail. In *Daly v Liverpool Corpn*,[9] dealing with the issue of contributory negligence, Stable J observed: 'I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk.' However, where an old and infirm person continues to drive without the competence the law requires, this does not satisfy the objective standard of care and may give rise to liability.[10] 7

3 Occupiers' Liability Act 1957, sec 2(3)(a), for example, reads: 'an occupier must be prepared for children to be less careful than adults'.

4 Among other authorities, *Gardner v Grace* (1858) 1 F & F 359; *Harrold v Watney* [1898] 2 QB 320; *Gough v Thorne* [1966] 1 WLR 1387.

5 *Gough v Thorne* [1966] 1 WLR 1387, 1390 per Lord Denning MR and 1391 per Salmon LJ.

6 *Blake v Galloway*, [2004] 1 WLR 2844, at [25] per Dyson LJ.

7 [2004] 1 WLR 2844, at [25].

8 *K Oliphant*, Children as Tortfeasors under the Law of England and Wales, in: M Martín-Casals (ed), Children in Tort Law: Part I: Children as Tortfeasors (2006) no 16.

9 [1939] 2 All ER 142, 143.

10 *Roberts v Ramsbottom* [1980] 1 WLR 823, per Neill J. See 9/12 nos 1–4 below.

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13. Scotland

McKinnell v White, Court of Session (Outer House), 2 July 1971
1971 SLT (Notes) 61

Facts

1 A five-year-old child was seriously injured when he ran out into the road and was struck by a car. His father brought an action in damages against the driver of the car. The defender denied that the accident was caused by his negligence and argued that it resulted wholly, or at least in part, from the negligence of the child.[1] A proof (ie a trial of the facts) was ordered.

Decision

2 Following the proof, the judge, Lord Fraser, held that the pursuer had established that the accident was caused to some extent by the negligence of the defender but that the child was guilty of contributory negligence. He apportioned blame equally between the defender and the child. As to the question of whether youthfulness might render a child incapable of being negligent, the judge took the view that 'it is a matter of circumstances in each case whether the child has been guilty of contributory negligence,'[2] thus avoiding any judicial view that there is an invariable minimum age below which a person cannot be sufficiently aware of the risks inherent in life to appreciate the need to behave carefully in order to avoid injury to him/herself or to others.

Comments

3 The case raises the question of whether a young child can be held to have behaved negligently. The court in this case holds that the child was indeed negligent (a position which other courts have taken on the facts of cases involving children of around the same age). On the facts of the case at hand, the judge thought that 'the danger of running across a main road was very obvious, and it must, in my opinion, have been within the understanding of [the injured child]'.[3] It is not clear from the

1 The report of the case is somewhat cursory, so it is unclear why the defender did not seek to argue that the parents of the child were negligent in their supervision of the child (the facts narrate only that the child 'had been with his elder brother, until he suddenly let go of his hand and ran off along the pavement').

2 At 61.

3 Ibid.

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report of the case whether the child was the subject of any questioning at the proof which would have enabled the judge to reach a view on this matter.

So, the rule is that the mental capacity required to find that the fault necessary for misconduct was present is a question of fact. In reaching his decision on this question of fact, the judge seemed willing to draw inferences about what this particular child must have known from his beliefs about what children of the child's age might generally be expected to know: he commented that 'I would have been inclined to hold that any child of five living in an urban area would be bound to be aware by the age of five of the danger of traffic'.[4] These remarks seem indicative of a willingness on the part of the judge to avoid a detailed examination of the actual mental capacity and awareness of the child in question, and it may be questioned whether they are consistent with other cases in which it has been suggested that the issue of a child's alleged negligence invariably depends upon the individual circumstances of the child.[5] **4**

The various authorities regarding the capacity of children to behave in a culpable fashion are often referred to by commentators discussing the potential liability of a mentally disabled adult to act in a culpable fashion for the purposes of delictual liability.[6] This practice suggests that the cases of both children and mentally disabled adults may be part of a broader rule, stating that, in every case, it is a question of fact whether a person possesses sufficient mental capacity to be aware of the potentially harmful consequences of conduct. As was said in a case concerning the alleged contributory negligence of a four-year-old child, 'Negligence implies a capacity to apprehend intelligently the duty, obligation or precaution neglected, as well as the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact in the individual case'.[7] **5**

4 At 62.

5 See for instance the comments of Lord Justice Clerk Moncreiff in *Campbell v Ord & Maddison* (1873) 1 R 149, at 153 quoted at 13/13 no 6.

6 In relation to the capacity of mentally disabled adults, reference is also made by commentators to a text of the Digest of Justinian holding that insanity provides a complete defence to any action of delict: Dig 9.2.5.2 (Ulpian). See 10/1 nos 1–4.

7 Per Lord Justice-Clerk Moncreiff in *Campbell v Ord & Maddison* (1873) 1 R 149, at 153.

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14. Ireland

McNamara v Electricity Supply Board, Supreme Court, 30 July 1974

[1975] IR 1

Facts

1 The plaintiff was an 11 year-old boy, living in Limerick city. He was seriously injured while playing in an electricity sub-station near his home, to which he had gained access by climbing over an inadequate fence. The plaintiff had previously played there and had been told to keep away from there by passers-by and by his father, but the reasons for keeping away were not explained to him. He was able to read and had seen warning notices posted around the sub-station, but had not read them. Therefore, the plaintiff knew that he should not be in the sub-station, but was unaware of the danger which it posed to him. He sued the electricity company for failing to adequately fence the installation so as to keep children out. A jury in the IEHC found in favour of the plaintiff and found no contributory negligence on the plaintiff's part; the defendant appealed.

Decision

2 The IESC allowed the appeal and remitted the case to the IEHC. On the standard applicable to the question of contributory negligence by a child, the applicable standard was held to be that of a reasonable child of the same level of development and understanding as the plaintiff. The majority view was that although the plaintiff was subjectively unaware of the risk of electrocution, he was capable of reading and comprehending the warnings; consequently his failure to do so could not be excused.

Comments

3 The standard is a mixture of objective and subjective considerations; it takes account of the actual level of ability and development of the individual child, but measures the behaviour against what can objectively be expected of a child with the same level of understanding of risk. O'Byrne J in *Fleming v Kerry County Council* expressed it as follows: 'In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case.'[1] In that instance a nine-year-old was held capable of being responsible for contributory negligence (though was not so found by the

1 [1955-6] Ir Jur Rep 71; that case precedes the introduction of apportionment for contributory negligence.

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jury). Younger children have been regarded as capable of being responsible for contributory negligence.[2]

Young children can be liable as defendants (though such claims are exceedingly rare as there is no general concept of parental vicarious liability in Ireland).[3] In *O'Brien v McNamee*[4] a seven-year-old was held liable for trespass to land (no malice or intent was required for liability in trespass). 4

16. Denmark

Højesteret (Supreme Court) 15 February 1963

U 1963.303 H

Facts

A nine-year-old boy, B, had been sent to buy some things from the local shop. His three-year-old sister, A, wanted to go with him and he held her by the hand as they walked along the pavement towards the shop. As they were waiting at the edge of the pavement, about to cross the road, A freed herself from B's grasp and ran into the road. A motorcyclist, V, with a passenger on the back, had to swerve to avoid running A over. The passenger escaped with minor bruising, however V was severely injured. He suffered, inter alia, a broken neck and was paralysed from the neck down. V raised a claim against A for his injuries. A's parents had taken out liability insurance for the whole family and, therefore, if A were found liable, V would be compensated in full. 1

Decision

The Eastern Court of Appeal, ruling as first instance, held that irrespective of A's behaviour, she could not be held liable towards V due to her age. On appeal the Supreme Court upheld the ruling. 2

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2 In *Brennan v Savage Smyth & Co* [1982] ILRM 223, a seven and a half year-old was found responsible for contributory negligence (25% responsibility was allocated to him); his knowledge of the particular hazard, his knowledge of the wrongfulness of his actions and the fact that he concealed his behaviour from the defendant were taken into account (at 227 per O'Higgins CJ; 232 per Henchy J). In *O'Donovan v Landy's Ltd* [1963] IR 441, 449 Kingsmill-Moore J, *obiter*, stated that a six and a half year-old could be responsible for contributory negligence.

3 Parents and other adults in control of children may be liable under a direct duty to control the child, see *Curley v Mannion* [1965] IR 543; *Law Reform Commission*, Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (1985) (LRC 17–1985). There are no cases imposing liability on the basis of a more general failure to educate a child sufficiently.

4 [1953] IR 86.

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Comments

3 As a rule, under Danish tort law, the age of the tortfeasor is not to be particularly considered when assessing whether misconduct amounts to negligence in the eyes of the law. Thus, an elderly person is liable under tort law rules to the same extent as a person in his/her prime.[1] This is also the starting point as regards children: as a point of departure, children are liable as tortfeasors to the same extent as adults. This follows directly from the Damages Act sec 24a, 1st sentence, according to which '[c]hildren under the age of 15 are liable [in tort] according to the same rules as persons above that age.' However, Danish courts recognise that children under a certain age simply lack the mental capacity to understand the consequences of their actions. Thus, it is not possible for them to act 'negligently' in the eyes of the law as it cannot be expected of them that they are capable of making an evaluation of what is the correct way to act in a given situation in the same way as an adult can.[2] This applies even if the child knows it is not *allowed* to do something; A in the above case was perfectly aware that she had been forbidden from running into the road. Knowing that something is wrong does not amount to an understanding of potential consequences. Until today, the courts have acquitted children of three years of age and below for tortious liability for incidents connected to traffic accidents,[3] whereas children of the age of four have been found liable in some cases[4] and not in others, depending on the type of the action concerned.[5] Still, Danish courts take the age of the child into account when assessing if a child of that age ought to have understood the potential risks that could materialise from its actions, see 8/16 nos 4–6 below regarding FED 2001.2682 Ø. In conclusion, also regarding age, the standard of evaluation of any misconduct is objective – the object for comparison being children of a similar age. The remainder of the Damages Act sec 24a provides for a potential reduction of the child's liability under certain conditions. According to this provision, a child may not be held liable, or only partially liable if this is considered to be 'reasonable' taking into consideration eg lack of development in the child, the na-

1 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 119 f.

2 *E Andersen*, Personretten som indledning til formueretten (2nd edn 1977) 70.

3 See U 1959.755 Ø (Eastern Court of Appeal Ruling of 29 May 1959): a boy aged 3 years and 10 months who ran into a road causing a moped to crash was found not liable towards the driver of the moped who suffered a concussion. See on the contrary U 1951.1096 Ø where a boy of 3 years and $11^1/_2$ months was found to be liable. See further on these cases *B Gomard*, Børns erstatningsansvar (1980).

4 See U 1941.1054 H (Supreme Court Ruling of 29 August 1941): during an argument with B, A, who was $4^1/_2$ years old, lost her temper and threw a stone at B's face from a short distance. B's glasses splintered, and some of the splinters entered B's eye, forcing the eye to be removed. The Court found that A, who according to her age must have been able to understand the likelihood that such action would cause the particular type of injury, was held liable for B's injuries.

5 See *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 130.

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ture of his/her actions and 'the circumstances as such, including in particular the ability of the tortfeasor and the injured party respectively to shoulder the loss and the possibility of having the loss compensated by others'. Thus, if the child is a 'late developer', the courts might take this into consideration when deciding on the quantum of damages and thus provide for some subjective considerations. Finally, in order to better understand the position of Danish tort law on the issue of the tortious liability of children, it should be noted that parents are not under a duty to supervise their children at all times. Parents are – from a tort law perspective – allowed to let their nine-year-old child run errands even if accompanied by a younger sibling. Certainly, there is a duty for parents to provide some supervision; however, as far as may be seen, a breach of this duty as a basis for liability towards third parties has not been successfully argued before the Danish courts since the 1970s.[6] In Denmark, most children are now covered by liability insurance in their own right so the need to look for joint tortfeasors in order to ensure that the injured party is compensated has simply ceased to exist.

Østre Landsret (Eastern Court of Appeal) 21 December 2001

FED 2001.2682 Ø

Facts

During a game of crazy golf, V was hit in the eye by a ten year-old in A's children's golf club when A wanted to show her a particular golf stroke. The stroke splintered V's glasses and one of the splinters entered the retina of V's left eye which was permanently damaged. V sued A for compensation for her injuries. 4

Decision

The Copenhagen City Court found it to be proven that just before the incident V had been walking behind A to better see his golf stroke. Thus, V was standing only 1.5 m behind A when the stroke was made. Considering these circumstances and consider- 5

6 Parents found to be liable in U 1928.162 Ø (Eastern Court of Appeal Ruling of 4 November 1927); U 1937.979 Ø (Eastern Court of Appeal Ruling of 22 June 1937); U 1944.392 Ø (Eastern Court of Appeal Ruling of 30 December 1943); U 1951.894 V (Western Court of Appeal Ruling of 25 June 1951. A three and a two and a half year-old had been chasing chickens. 250 chickens died. The parents were found liable for lack of supervision); U 1970.864 Ø (Eastern Court of Appeal Ruling of 18 June 1970. The parent failed to supervise two 12-year-old twins playing with an air rifle). Parents acquitted of liability in U 1926.160 Ø (Eastern Court of Appeal Ruling of 22 December 1925) U 1928.825 Ø (Eastern Court of Appeal Ruling of 10 May 1928); U 1932.418 Ø (Eastern Court of Appeal Ruling of 23 January 1932); U 1956.130 V (Western Court of Appeal Ruling of 20 October 1945); U 1956.635/2 H (Supreme Court Ruling of 26 April 1956; eye injury ensued after an eight-year-old played with a bow and arrow).

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ing also that A was 10 years old, the court did not find that A had been negligent. This applied even if A's stroke had been more powerful than anticipated by V. On appeal the Eastern Court of Appeal upheld the ruling in its entirety.

Comments

6 As mentioned above, the starting point of Danish tort law is that children below the age of 15 are liable for tortious actions to the same extent as individuals above that age. Still, when the courts evaluate the actions of a child in order to determine whether or not any misconduct amounts to negligence, their point of departure will be a child of the particular age of the tortfeasor. For liability to be incurred, the child must have acted in a way different to what one would expect of a child of a similar age. As for the ruling of the court in the case, one must note that rulings of Danish courts are traditionally very brief (indeed the above few lines are more or less a verbatim translation of the entire ruling of the court). Taking this into consideration, the fact that A's age was mentioned at all is significant. The courts do not expect the same vigilance of a child as of an adult, and even if his stroke was rather powerful, it could not be expected of him to have anticipated that he could have injured V whilst pulling his children's golf club back. Even if an adult golf player under similar circumstances would probably have been found liable towards V,[7] A could not be expected to have foreseen the risk of the injury, which therefore – in the eyes of the law – was to be considered an accident. This was further supported by the fact that V, an adult, had walked behind A just before the golf stroke was to take place. Hence, she too had been in position to evaluate the situation.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 8 March 2000

Rt 2000, 433

Facts

1 An 11-year-old boy A was cycling approx 5 m behind a friend B of the same age on their way to school. They were cycling at about 25 km/hour. B, the boy who was cycling in front, passed a pedestrian walking by the side of the road. A tried to pass the

7 See Western Court of Appeal Ruling of 12 January 2012, FED 2012.3 V: during a bachelor party A, who had only played golf once before and had never received any instructions in golf, hit V, who was sitting on a terrace in front of the golf club, in the face with his golf ball. V suffered a severe concussion. A was held liable towards V for her injuries.

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pedestrian too, but hit her, so that she was injured. She sued the boy (his liability insurer), claiming compensation.

Decision

The majority of judges found that the boy had not acted negligently because of his young age and low level of maturity. According to the general opinion in studies on child psychology, it was held that it was natural for an 11-year-old to follow the path that a friend in front had chosen. Given the traffic situation one could not expect the boy to have evaluated the situation in a more complex manner due to his age. Therefore a majority of four judges found that he had not acted in a culpable manner. A minority of one judge, however, held that the boy should have braked and rang his bell in order to warn the pedestrian. Hence the minority found that the boy had acted negligently in spite of his age. 2

Comments

The decision is in line with the development in theory and practice to put weight on expert opinions regarding a child's psychological development. In skl § 5-1, regarding a claimant's contributory negligence, the age of ten is stated as relevant for the contributory negligence of minors to be established. The compensatory award may be reduced proportional to the contributing, culpable act. In the mentioned case, the Supreme Court noted that the age limit should be approximately the same when the question of a child's liability arises as long as fault was in play as a requirement for negligence and legal consequences in tort law. In the preparatory works regarding contributory negligence, it is noted that one should be careful in considerations of reducing the award on the basis of children's fault also for children younger than 13 years of age. In theory it is suggested that weight should not be put on the contributory negligence of children under the age of 14 when the harm is caused in a traffic situation due to the complexity of the factors in play. 3

Høyesterett (Norwegian Supreme Court, Hr) 14 December 2004
Rt 2004, 1942

For facts and decision see 3c/17 nos 4–8. 4

Comments

The case shows that the Supreme Court adjusts its assessment of culpability to the age of the alleged tortfeasors. As mentioned above in 3c/17 nos 4–9 children may be liable in damages for intentional or careless acts if this seems reasonable taking 5

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their age, development and behaviour into consideration. The Supreme Court points out in an instructing way that an assessment has to take into account reasonable expectations of children of the defendant's age. A decisive point in this assessment is whether the child is able to understand the nature of the risk of damage in question. In this case the children were 15–16 years old, something that made it possible to perceive their acts as grossly negligent. The general stance on children's liability is that children below the age of ten do not have the ability to act negligently, but the decision has to take into account the nature of the risk as well as the social and psychological aspects of the situation and the complexity of the risk factors at play in each concrete case.

18. Sweden

Högsta domstolen (Supreme Court) 3 February 1977
NJA 1977, 186

Facts

1 A boy aged 3 years and 2 months threw a 20 cm long metal piece with sharp edges at another boy's head. This caused injuries to one of his eyes, which had to be surgically removed.

Decision

2 The boy was not held liable,[1] since the court found that a child of this age had not reached such level of maturity and had not acquired such judgement and insight that must be presupposed in order to view the action as negligent.

Comments

3 In the Tort Liability Act ch 2, sec 4, there is no lower limit apropos age, so this judgment is a reduction of the rule's application area.[2] This case shows that, in order for a court to evaluate negligence at all, the alleged tortfeasor must be at least approximately four years of age. (A practical remark to the 1977 case is that, although no liability can be forced, every insurance company also includes the injuries caused

1 In the court of first instance, the mother was sued too, but she was not found negligent.

2 Tort Liability Act ch 2, sec 4 reads: 'Anyone who in cases provided for in [the previous paragraphs concerning the *culpa* rule] causes damage before he is 18 years of age shall pay compensation to the extent that this is reasonable in view of his age and development, the nature of the act, current liability insurance and other economic conditions and relevant circumstances.'

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by children under the age of three to four years; ie Swedish insurers do not use this opportunity to reject liability).[3]

Otherwise the Act is to be interpreted as an objective *culpa* standard. With respect to minors (ie over the age of about four), which means that, if an adult would have been held liable on objective grounds, *culpa* is also established for minors (whereby the subjective issue of actual insight can be downplayed). After satisfying this objective *culpa* test, a reasonableness test follows, the aim of which is to assess whether or not the minor should be held liable; in this respect it can be noted that, if the child is covered by liability insurance, it is regarded as reasonable that liability will occur.[4] **4**

19. Finland

Korkein oikeus (Supreme Court) KKO 1983 II 26, R81/382, 4.3.1983, 884/82

<http://www.finlex.fi>

Facts

A, 15 years old, had intentionally shot at V with an air rifle. The pellet hit V, blinding him in one eye. A was convicted of aggravated assault committed by a minor. V also claimed compensation for personal injury. **1**

Decision

The Supreme Court was of the opinion that in view of the intent and quality of the act, as well as the fact that A had been able to understand the consequent risk of injury, compensation was not to be adjusted; instead, A was required to pay for the damage he had caused V in full. **2**

Korkein oikeus (Supreme Court) KKO 2003:36, R2001/678, 8.4.2003/811

<http://www.finlex.fi>

Facts

A 17-year-old tortfeasor had caused damage by hacking into a bank's database. The damage consisted of the increased cost of information security and the salaries and fees the bank had been required to pay its employees and outside experts for in- **3**

3 *B Bengtsson/E Strömbäck*, Skadeståndslagen (5th edn 2014) 83.

4 *B Bengtsson/E Strömbäck*, Skadeståndslagen (5th edn 2014) 77 ff and *J Hellner/M Radetzki*, Skadeståndsrätt (8th edn 2010) 261 ff.

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vestigating the crime. The amount of damages claimed was FIM 150,000 (approx € 25,228) in total.

Decision

4 The Supreme Court stated that the amount of damages was FIM 75,000 (approx € 12,614) in total, and even though the claim for damages was large in proportion to the tortfeasor's economic situation, the tortfeasor was still obliged to compensate for the entire damage caused.

5 This was a criminal case where the tortfeasor was convicted of attempted computer hacking. The Supreme Court emphasised that the crime was committed on purpose and that the perpetrator was an expert in computing.

Comments

6 There is no age limit for tortious liability. According to the TLA ch 2, sec 1: if the injury or damage has been caused by a person under 18 years of age, he/she shall be liable for damages to an amount that is deemed reasonable in view of his/her age and maturity, the nature of the act, the financial status of the person causing the injury or damage and the person suffering the same, and other circumstances.

7 In such cases, the yardstick is how carefully a normal person of the same age and level of development would have behaved. There is negligent behaviour if the perpetrator acts in a blameworthy manner compared to other persons of his/her age.[1]

8 Both in the former and latter case the court put much weight upon the fact that the perpetrators acted on purpose. In both cases it was a question of a criminal act and the conditions for criminal liability were met. In the latter case, the damage resulted from the increased cost of information security, including, for example, the renewal of the bank's security arrangements and security system, an increased need for monitoring and investigating the potential harm done by the intrusion. In the author's opinion many of the costs were not a direct result of the hacking, because a bank should always ensure that its computer security and alarm systems are at a high enough level.[2]

1 *P Ståhlberg/J Karhu*, Suomen vahingonkorvausoikeus (2013) 109.

2 See also KKO 1984 II 93, S83/217, 23.5.1984, 4230/83, where some seven-year-old children started a fire where they were playing. They had to pay a combined sum of FIM 20,000 (approx € 3,333) for the damage they had caused, damage which totalled FIM 250,268 (approx € 41,711).

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20. Estonia

Pärnu Maakohus (Pärnu County Court) 18 December 2009
Civil Matter No 2-09-56593

Facts

Defendant I broke into a shop-storehouse of the plaintiff on 4 and 5 January 2009 and stole various alcoholic beverages and cigarettes. The damage caused to the plaintiff, including the broken lock was € 324. On 23 April 2009, defendant I broke the door window of another shop belonging to the plaintiff with the aim of stealing alcohol. The total damage caused to the plaintiff (stolen beverages and broken glass) was € 48. **1**

Defendant I turned 14 on 5 January 2009. **2**

Decision

The court found that since defendant I had no fault capacity at the time of the offence committed on 4 and 5 January 2009, he could not be found liable for damage according to § 1052 (1) of LOA. § 1052 (1) of LOA clearly states that a person under 14 years of age shall not be liable for damage caused by himself/herself. § 1053 (1) states that the parents or guardian of a person under 14 years of age shall be liable for damage unlawfully caused to another person by the person under 14 years of age regardless of the fault of the parents or guardian. Defendant II is the mother of defendant I, thus a parent who, regardless of her own fault, must compensate the damage caused by the unlawful act of her child. **3**

However, at the time of the damage caused on 23 April, defendant I had fault capacity and could be held liable for the unlawfully caused damage. Since according to LOA § 1053 (2), the mother is liable for the damage in the amount of € 48, the amount of € 48 shall be solidarily paid by the defendants to the plaintiff.[1] **4**

1 LOA § 1053 (1) provides: 'The parents or guardian of a person under 14 years of age shall be liable for damage unlawfully caused to another person by the person under 14 years of age regardless of the culpability of parents or guardian.'
LOA § 1053 (2) provides: 'The parents or guardian of a person of 14 to 18 years of age shall also be liable for damage unlawfully caused to another person by the person of 14 to 18 years of age regardless of the culpability of the parents or guardian, unless they prove that they have done everything which could be reasonably expected in order to prevent the damage.'

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Comments

5 Due to the unambiguous nature of the regulation, the liability of those under the age of 14 is also not problematic in practice. However, such a minor may nevertheless be held liable under so-called equitable liability[2] (LOA § 1052 (3)), as well as the provisions of strict liability (LOA §§ 1056 ff) and product liability (LOA §§ 1061 ff).

6 The young age of a tortfeasor can be taken into consideration in assessing his/her fault according to § 1050 (2) of LOA which stipulates that, among others, the situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration when assessing the fault of the person. Therefore it is possible to impose a standard of care that differs from that applicable to adults to a minor who has fault capacity. In principle, § 1050 (2) of LOA can also be applied when assessing the fault of tortfeasors of very high age. The authors could not find the respective court decision.

7 It should be added that, in the author's opinion, the court erred by finding that on 5 January 2009 the defendant did not have fault capacity. According to § 136 (7) of the General Part of the Civil Code Act: 'If a due date is specified by a particular date or time or the occurrence of a particular event, the due date arrives on such date, at such time or upon the occurrence of such event.' Therefore, on 5 January 2009 the defendant was 14 years old.

Harju Maakohus (Harju County Court) 12 December 2008

Civil Matter No 2-07-20281

Facts

8 A person under the age of 14 broke a window of a kiosk belonging to the plaintiff on two occasions. The amount of damage caused to the plaintiff was € 429. The plaintiff filed an action against the parents of the tortfeasor to receive compensation for damage.

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2 LOA § 1052 (3) provides: 'A person who, pursuant to subsections (1) or (2) of this section, is not liable for damage shall nevertheless be liable for damage caused by himself/herself if it would be unjustified with regard to the victim to release the person from liability considering the tortfeasor's age, state of development and mental state, the type of act, the financial situation of the persons concerned, including existing insurance or insurance which such persons could normally be presumed to have, and also other circumstances.' On the 'equitable liability' and parental liability in Estonia see: *J Lahe*, The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective, RCEEL 2013, 141 ff.

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Decision

The court decided that the damage should be compensated in full. The unlawfulness of the tortfeasor arises from the provisions of § 1045 (1) 5) of LOA, according to which the causing of damage is unlawful if, above all, the damage was caused by a violation of the right of ownership or a similar right or right of possession of the victim. The matter of fault is not important as regards the conduct of the defendants since the parents or guardian of a person under 14 years of age shall be liable for damage unlawfully caused to another person by the person under 14 years of age regardless of the fault of the parents or guardian. Therefore the plaintiff's claim was justified and the defendants were ordered, solidarily, to compensate for the pecuniary damage caused to the plaintiff in the amount of € 429. **9**

Comments

In this case, the plaintiff was correct to file a claim against the parents of the tortfeasor because a person under 14 years of age is generally not liable for the damage he/she causes (LOA § 1052 (1)). In this case, only the so-called equitable liability of a person non-capable of guilt under § 1052 (3) of LOA could be considered. **10**

The parents or guardian of a person under 14 years of age shall be liable for damage unlawfully caused to another person by a person under the age of 14 (LOA § 1053 (1)). If damage is caused by someone under the age of 14, the fault of the parents is not a precondition for the establishment of their liability. However, it has to be verified also pursuant to § 1053 (1) of LOA whether the minor caused unlawful damage to the victim. Although we cannot in principle talk about culpable behaviour of those under the age of 14, it has been found in legal literature that the precondition of parents' liability stipulated in § 1053 (1) of LOA should still be the objective or abstract fault of the minor.[3] The question arises as to whether a decision as regards objective fault and the behaviour of the minor who caused the damage should be compared to the behaviour of a reasonable minor of the same age or behaviour of a reasonable person who has fault capacity. Estonian case law has not provided an answer to this yet.[4] **11**

3 See *P Varul et al*, Võlaõigusseadus III. Kommenteeritud väljaanne [Law of Obligations Act III. Commented edition] (2009) 681.

4 In legal literature it has been found that: 'the yardstick for assessing such an objective fault should be the reasonable behavior of persons with full fault capacity in a similar situation.' See *J Lahe*, The Concept of Fault of the Tortfeasor in Estonian Tort Law: A Comparative Perspective, RCEEL 2013, 161.

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21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) No SKC-553, 28 October 2011

Unpublished

Facts

1 Three children broke into a house where they damaged, destroyed and stole property that belonged to the claimants. Criminal proceedings were initiated against the children, but since two of them were minors and therefore could not be held liable for their criminal acts,[1] the criminal proceedings were terminated. Since the third child was older than 14, but still younger than 18, corrective measures were ordered instead of imposing criminal liability.

2 The owner of the property that was destroyed, damaged and stolen (the claimant) brought a claim against the parents of all three children claiming compensation for the damage caused by the children.

Decision

3 The first instance court rejected the claim. The court of appeals split the amount of damages into three equal parts and held both parents of each child jointly liable for the respective part. The court argued that the misconduct at the same time constitutes a crime and the liability arises from the unlawful conduct – intentionally causing damage to another's property subject to criminal liability. Since art 177 of the CLL expressly obliges parents to supervise their children, the misconduct of the parents was not extensively analysed by the court. The Supreme Court indicated that, in accordance with art 1637 of the CLL, children under the age of seven are not liable for damage, but this does not exempt the parents charged with duties of supervision from being held liable for the damage caused to the claimant. Therefore, the Supreme Court did not initiate the cassation proceedings and the decision of the court of appeals became effective.

Comments

4 The fact that the children acted in a way that obviously deviates from any standard of conduct applicable to an adult did not lead to any controversy or debate insofar as the unlawful conduct was concerned. The presented case merely illustrates the liability regime in cases where the tortfeasors are children. The law does not provide

1 The person must be 14 years old, according to art 11 of the Criminal Law.

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a different standard of conduct applicable to children and the age should not affect the standard of care to be expected from a person insofar as the person can be held responsible for his/her conduct according to the law. It is possible that the court takes into account the fact that the person is either too young or too old to meet the required standard of conduct, for example when determining the amount of compensation for non-pecuniary damage, but it would not be a valid point according to the law to refer to this in the decision.

According to art 1780 CLL, children under the age of seven can be held account- 5
able for the damage they cause and the damage is to be compensated by the children insofar as it does not preclude them from covering their living expenses.[2] The article is also applicable to people with a mental disorder if damage has been caused to another. Provided that the persons addressed by the said article do not usually have any assets, art 1780 of the CLL is not often invoked as in the presented case. Article 1780 does not affect the right to bring an action against the parents (the supervisors), who are responsible jointly, unless the duty of care and supervision is assigned to only one of the parents. According to art 1780 of the CLL, the children would be liable based on equity only if the supervisors are not liable for their failure to duly exercise their duties of supervision (*culpa in vigilando*) or are not solvent.

22. Lithuania

RK, AK, ŽK v EK, AK and Kaunas S Daukantas Secondary School, 30 April 2012

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-202/2012; <http://www.lat.lt>

Facts

The claim was brought by the minor ŽK and his parents for the compensation of pe- 1
cuniary and non-pecuniary damage against the parents of ŽK's classmate and the Kaunas S Daukantas secondary school solidarily. The damage occurred when the claimant ŽK and his classmate, who is the son of the defendants, EK and AK, both younger than 14, were playing games in the corridor of the school during the break between the classes. The son of EK and AK accidentally kicked his classmate ŽK while, asked by ŽK, demonstrating combat elements of martial arts. As a result, the claimant ŽK fell, broke his tooth and cut his lip. It was established that a duty teacher was at the other end of the corridor at the time of the event where he was involved in a conflict between other pupils.

2 The article is further addressed in 10/21 nos 1–6.

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2 The court of first instance partly granted the claim, holding all defendants solidarily liable. The appellate instance court upheld the decision of the court of first instance.

Decision

3 The Lithuanian Supreme Court in essence agreed with the decision of the lower instance courts and awarded additional compensation of the expenses incurred by the parents of the victim after the decision of the first instance court. According to the decisions, the parents and the school are solidarily liable for the damage negligently caused at school by a minor below the age of 14. The courts took into consideration the form of fault of the minor tortfeasor (negligence) and awarded only LTL 1,000 (€ 289) in non-pecuniary damages.

Comments

4 According to art 2.7 CC, 14 is a fixed age limit, below which a minor lacks legal capacity. Therefore, under no circumstances may a minor younger than the age of 14 be held liable in tort for damage caused. Article 6.275(1) CC provides that parents or guardians of a minor under the age of 14 are held liable for compensation of damage caused by such a minor unless they prove that the damage was inflicted not through their fault, which is understood either as the lack of supervision or due upbringing. Similarly art 6.275(2) CC provides that a training or education institution, as well as a medical treatment institution or any institution of social care will be held liable for compensation of damage caused by a minor under the age of 14 who was under their supervision when the damage was inflicted, unless they prove that the damage was not caused through their fault.

5 The case is a good example that, although theoretically the liability of the parents of a minor under the age of 14 (or of the institutions mentioned above) is liability for presumed fault, in practice it is very difficult or even impossible to escape liability. In this case the damage was caused accidentally while two young boys were playing. The gross negligence of the teacher was not established. However, both parents and the school were held liable. Interesting enough, the parents were also held liable although the damage occurred when their child was at school and there was no evidence of a lack of parental upbringing. Therefore, according to the authors, this form of liability can be classified as standing between liability based on fault and strict liability where fault due to a failure to take sufficient care and control is presumed but the possibility to exercise one's right of rebuttal is hardly viable in practice.

6 It is worth of mentioning that, although the minor, who was under the age of 14, lacked legal capacity, the courts took a rather peculiar attitude by taking the degree of his fault into account in the determination of the amount of non-pecuniary dam-

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ages according to art 6.250(2) CC. Such approach lacks support and raises another peculiar question, ie whether the courts should also apply the contributory negligence rule contained in art 6.282(1) CC[1] in the case of damage suffered by a minor. There is no settled case law on the issue. In one case the Lithuanian Court of Appeal accepted as contributory negligence the fault of the mother of a minor aged 11 who suffered damage when he fell from the roof of a building under construction.[2] In the latter case the Lithuanian Court of Appeal refused to take into account the fault of the minor himself because of his inability to understand the consequences of his behaviour and evaluate the dangers that may occur.

ŽK v TŽ, VŽ and ZŽ, 8 November 2010

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-434/2010; <http://www.lat.lt>

Facts

The mother of the 13-year-old victim filed a claim against the 15-year-old defendant and his parents for compensation of pecuniary and non-pecuniary damage suffered by her son due to intentional head injuries during a New Year's celebration in the playground of their school. 7

The first instance court in essence satisfied the claim and the district court agreed, although it reduced the non-pecuniary damages. The district court took into consideration the negligent behaviour of the victim himself, as his nose was broken by the defendant when he himself accidentally kicked the defendant in his back and though provoked his sudden reaction by hitting the victim. The Lithuanian Supreme Court annulled the decision and ordered a retrial. 8

Decision

The Lithuanian Supreme Court decided that, although a 15-year-old minor is liable for the damage himself (art 6.276(1) CC), according to art 6.276(2) CC both the parents of the minor and the educational institution, when the damage was inflicted by the minor under the supervision of the institution, are subsidiary liable for the dam- 9

1 Para 1 of art 6.282 reads: 'If the aggrieved person's gross negligence contributed to causing or increasing damage, depending on the degree of the aggrieved person's fault (and on the degree of the fault of the tortfeasor, in the event of the existence of such fault), the extent of the compensation of damage can be reduced or the claim for the compensation of damage may be dismissed unless the law provides for otherwise.'

2 *Prosecutor of Kaunas regional prosecutor office and RP v Kaunas City Municipality*, CoA 2 May 2012, case No 2A-178/2012.

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age unless they prove that the damage was not caused through their fault. According to the Lithuanian Supreme Court, since the damage was inflicted during an event which was organised by the school, it decided that the courts of lower instances should have investigated the possible lack of supervision of the school.

Comments

10 The case follows the general statutory rule established in art 6.276(1) CC that the liability of a minor between the ages of 14 and 18 is based on the general liability rules. However, according to art 6.276(2) CC, in cases where a minor between the ages of 14 and 18 does not have enough assets or earnings to compensate the damage, the corresponding part of the damage shall be compensated by his/her parents or guardians unless they prove that the damage was not caused through their fault. The same legal effects occur if a tortfeasor between the ages of 14 and 18 was under the supervision of a training institution, an education institution, a medical treatment institution or social care institution at the time when the damage was caused. The liability of the parents or the above-mentioned institutions is subsidiary.

11 Hopefully, the courts shall not take into consideration the behaviour of a minor victim lacking capacity with respect to the intentional actions of the defendant.

AK v JG, MA and Čiobiškis Children Socialization Centre, 20 November 2009

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-497/2009; <http://www.lat.lt>

Facts

12 The plaintiff brought an action for compensation of damage due to the theft of her valuables by JG and MA who were accomplices in the crime, and the Children Socialisation Centre, which was the custodian of the minor defendant (MA). MA was older than 14 years of age at the time of the crime.

13 The court of first instance ordered JG and MA to pay damages solidarily and dismissed the claim against the custodian as it established that, at the moment of the theft, the minor MA while on vacation was staying with his mother. The Court of Appeal partly changed the decision and ordered the whole damages from both JG and AM, as well as from the custodian subsidiarily. The Court of Appeal noted that the minor MA had been separated from his mother who had been a bad influence on him and, therefore, the custodian had no right to allow the ward to stay with her on vacation. Therefore, referring to art 6.276(2) CC,[3] the Court of Appeal decided that the custodian could not rebut the presumption of fault to escape subsidiary liability.

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3 8/22 no 10.

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Decision

The Lithuanian Supreme Court in essence agreed with the decision of the Court of Appeal. However, it noted that, according to art 6.276(2) CC, the liability of a custodian for the damage caused by a minor between the ages of 14 and 18 is subsidiary and, according to art 6.276(3) CC, the obligation ceases to exist as soon as the tortfeasor attains the age of majority or when he/she, before attaining majority, acquires assets or earnings sufficient to pay the compensation. It also noted that, pursuant to art 6.280(3) CC, neither the parents (guardian) nor the custodian have a right of recourse against a minor under the age of 18. According to the Lithuanian Supreme Court, the cited provisions suppose that the institution is only to be held liable only for the part of the damage caused by its ward instead of the full amount caused by several tortfeasors. The share of its liability shall be determined by the gravity of fault of the ward. 14

Comments

The case follows the statutory regulation providing for the liability of minors between the ages of 14 and 18 as they have limited legal capacity. The case also reflects the fact that, according art 6.280(3) CC, neither the parents (guardian) nor the custodian have a right of recourse against a minor under the age of 18, even if the damage was caused by a minor between the ages of 14 and 18 intentionally or with gross negligence. 15

23. Poland

Sąd Najwyższy (Supreme Court) 11 January 2001, IV CKN 1469/00
OSNC 2001/9/129, OSP 6/2002, item 81

Facts

A, a boy, was playing with two other friends in a public place, when he fired at first two firecrackers, and then one more that struck a passer-by, the plaintiff (a girl), in the eye. A was then aged 13 years and 6 days. The girl (V), who was around the same age, partially lost vision in this eye and underwent medical treatment for three years. V sued the wrongdoer and his parents jointly and severally. 1

The first instance court dismissed the lawsuit against the parents and ordered A to pay partial compensation, establishing his liability for future consequences of the tort. The court emphasised that A, being over 13 at the time of the accident, can be found liable for damage on the basis of fault. His fault consists in acting recklessly in continuing to fire the firecrackers after two had exploded. The court applied *a contrario* art 426 KC, according to which: 'a minor who has not attained the age of 13 years is not liable for any damage he causes'. 2

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3 The Court of Appeal partially reversed the judgment with respect to other issues. However, the court pointed out that art 426 KC does not give rise to the *a contrario* argument. Moreover, the Court of Appeal established that V's conduct could be qualified as negligence and not recklessness.

Decision

4 On cassation, the Supreme Court observed that two opposing theories emerged as regards the interpretation of art 426 KC[1] in the Polish academic literature.

5 According to the first theory (that reflected in the judgment of the first-instance court) art 426 KC read *a contrario* provides a basis for the establishment of a rebuttable legal presumption that a minor who has turned 13 is sufficiently mature to bear the responsibility for his own fault. Therefore, once it is established at trial that A was aged 13 or above at the time of injury, the burden to rebut the presumption by demonstrating that at the time of the accident he/she has not yet reached an adequate level of intellectual development rests on the defendant. Lacking such evidence, A shall be deemed capable of bearing liability based on fault. According to the second theory (referred to by the Court of Appeal), art 426 KC does not establish any such presumption.

6 The Supreme Court adhered to the second opinion without much explanation. The court ruled that art 426 KC could not be interpreted in the way that every minor over 13 was capable of being held civilly liable. As the court emphasised, proving the level of mental development of a minor over the age of 13 determines whether his/her liability may be based on fault. Hence, it was V's obligation to prove that A, at the time of the tort, was mature enough to comprehend his acts.

Comments

7 Under Polish law, it is clear that minors under the age of 13 cannot be held liable based on fault. The rationale for such a legislative solution is the fact that, due to the degree of psychological and physical development, minors under the age of 13 are not able to properly control their behaviour. This clear-cut rule was not present in the Code of Obligations, under which regulation a court had to assess whether a minor has the mental capacity to commit fault.

8 Article 426 KC applies solely to tort liability based on fault. It does not give any basis for the construction of a presumption. It should be seen solely as a provision defining the lower limit of delictual capacity.

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1 Article 426 KC: 'A minor who has not attained the age of 13 years is not liable for any damage he causes.'

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The controversy regarding the burden of proof is the following: does V need to prove that a defendant minor was mentally mature enough to understand the nature of the misconduct or does the defendant need to prove that, although he was over 13 at the time of the incident, he had not achieved an adequate level of intellectual development? The reasoning adopted by the Supreme Court does not seem accurate. Article 426 KC should not be interpreted in isolation from the other provisions establishing grounds for tortious liability. According to art 425 KC, 'a person who for whatever reason is in a state that prevents him from making a conscious or free decision and from expressing his will is not liable for damage caused when in such state'. Article 425 KC does not enumerate reasons, but focuses on the effect – state of mental disability. Thus, under the said rule, insufficient understanding (as a consequence of young age) may result in the exclusion of consciousness in the decision-making process and the expression of will, being one of the reasons of mental disability. The burden of proving 'insufficient discernment' resulting from young age, or non-appropriate physical or mental development lies with the wrongdoer (art 6 KC). **9**

Arguing in favour of the second approach, we can say that mental disability or immaturity has always been treated as a defence, and not as a structural element of a civil claim. Thus, if we treated minors who cannot properly control their behaviour and mentally disabled persons alike, we would have to admit that proving lack of mental or physical capacity lies with the defendant. **10**

Theoretically, there could be some other grounds for assigning liability for the accident described in the above case. One of them could be the liability of the parents who failed in their duty to supervise a child. According to art 427 KC, a person who by virtue of a statute or a contract is obliged to supervise a person who, due to his age or his mental or physical condition, cannot be deemed to be at fault, is obliged to redress damage caused by that person, unless he/she has complied with his duty of supervision or the damage would have been caused notwithstanding diligent supervision. The provision shall also apply to persons who, without a statutory or contractual obligation, take permanent care of another person, who due to their age or mental or physical condition, cannot be deemed at fault. Nevertheless, the claim against the parents was dismissed in this case. The court did not find that all the prerequisites of the supervisor's liability were present. **11**

The other possibility is to assign liability based on equity. According to art 428 KC, where a perpetrator is not liable for damage due to his/her age or mental or physical condition, and there are no persons responsible for his/her supervision, or when redress for the damage cannot be obtained from them, the injured person may demand complete or partial redress for the damage from the perpetrator himself/herself if it follows from the circumstances, in particular from a comparison of the financial circumstances of the injured person and those of the other person, that the principles of community life so require. **12**

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Sąd Najwyższy (Supreme Court) 24 September 2009, IV CSK 207/09
OSNC 4/2010, item 58

Facts

13 V, a 14-year-old boy climbed the ladder on a high-voltage post, was electrocuted and fell down from a height of 17 metres. The post was in a good technical condition and as it was not surrounded by any fence, an adequate warning was placed on it. V suffered severe irreversible injuries and became quadriplegic. He claimed damages from the electric power plant (A).

14 The court of first instance established A's strict liability in a preliminary judgment. V proved the cause in fact between the operation of A's enterprise and the damage, and A did not prove any exonerating fact. On the facts, the expert psychologist testified that V, despite his basic knowledge of electricity, was not entirely aware of the consequences of his conduct; moreover, he was generally an overactive person. A's appeal was dismissed and the cassation to the Supreme Court followed.

Decision

15 Principally, the extent of a wrongdoer's fault is assessed in the same way as that of the injured when we consider his fault as an exonerating event. The term 'fault' refers both to a deviation from the required standard of care and to the subjective element. Subjective fault is based on a defined mental relationship of a person to his/her own conduct. Factors such as free will and foreseeability should be examined. Persons who are mentally incompetent and minors under the age of 13 are expressly exempt from tort liability (see arts 425 and 426 KC). On the facts, V was not mentally competent because of deficiencies in his mental process and his flawed understanding of the consequences of his conduct to a degree sufficient to exclude his fault.

16 In this case, however, the lack of mental competence excluded the possibility to assign fault to V and therefore the exonerating event described in art 432 § 1 was not established. V was finally found as not having acted contributorily negligently and received full damages.

17 Compensation may be reduced when the injured is contributory negligent (art 362 KC).

Comments

18 Although this case concerns contributory negligence and fault as a defence to strict liability, the court's statement applies to the fault of a tortfeasor. As the Supreme Court emphasised, whether or not the fault exists has to be measured by the same rules both for the tortfeasor and the victim when we assess contributory negligence or exonerating events (damage caused solely due to the fault of the injured person).

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Hence, the prerequisites of fault (certain age and mental competence) are relevant in both cases.

Exclusive fault in the meaning of art 435 § 1 KC exists when the negligent conduct of the victim constituted the sole cause of the accident. V was of an age (14) at which he could have been held negligent. The court, however, did not establish his fault. It is disputed in doctrine whether minors over the age of 13 are in principle usually capable of bearing liability based on fault or whether this matter should be established at trial by the victim. As mentioned in the comment to the previous case, mental disability or immaturity has always been treated as a defence, and not as a constituent of a civil claim. Thus, proving lack of mental or physical capacity lies with the defendant. **19**

The decision also shows that, although fault cannot be imputed to children under the age of 13 and mentally or physically disabled persons, the courts have accepted the contributory negligence of those categories of persons, in particular when the responsibility of the tortfeasor is based on risk. This interpretation is possible because art 362 KC does not limit contributory conduct only to the victim's fault; objectively improper (wrongful) conduct will suffice. **20**

Sąd Najwyższy (Supreme Court) 12 May 1972, II CR 95/72
OSNC 2/1973, item 28

For facts and decision see 3e/23 nos 1–7. **21**

Comments

The subjective element of fault was not discussed in the decision. In my view A's egregious conduct as well as the enormous degree of personal injuries suffered by the minor victim sufficed to hold A liable, albeit his liability was limited. **22**

Although minors over 13 can be held liable for fault, this does not mean that their liability should be full as if they were adults. **23**

It is widely agreed in case law and doctrine that children between the ages of 13 and 18 may be unable to consciously and freely make decisions and determine the implications of their actions, however this is a matter for the court to determine in each particular case. While the latter does not mean the courts have a duty to examine the position in each case, courts certainly may ex officio examine the issue if they deem it justified.[2] **24**

2 *P Machnikowski*, Odpowiedzialnosc za własne czyny, in: System Prawa Prywatnego (2009) 411.

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24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 February 2003

25 Cdo 1333/2001

Facts

1 The respondent, a minor, shot an airgun from the building where his family lived in the direction of the claimant. Although a third party noticed his dangerous behaviour, the minor did not stop shooting and he hit the claimant in the eye, causing him to lose his sight in this eye. The parents of the respondent were not present in the building at the time of the incident and were not aware that their 15-year-old son had an older and non-functioning air gun as well as another airgun which he had borrowed from his friend in his possession.

2 The court of first instance concluded that the minor, who was able to control his conduct and determine for himself its consequences, caused damage to the claimant through his behaviour and that he shall be held liable for such damage to health. Pursuant to Czech law concerning the liability of minors, persons who exercise supervision over minors are held jointly liable together with the minor unless they can prove they exercised due care. The court decided that, considering all the circumstances of the case, the parents had not breached their duty to properly supervise the child in accordance with sec 422 para 2 CC, because it is not possible to require that they supervise the child on a constant basis, even if they had circumstantial evidence of the son's wrongful behaviour. Therefore, they were not held liable in this case. The appellate court confirmed the first decision.

Decision

3 The Supreme Court, contrary to both previous instances, considered this case differently. The parents of the minor defended themselves by arguing that they had not been aware that their son had an air gun and could not suppose that he would try to shoot people while using it. This fact should exculpate them from liability based on sec 422 CC.

4 However, sufficient and proper supervision does not only mean preventing a person from committing or prohibiting a wrongful activity, when such activity threatens to happen or has already happened. It also means a complete approach by the parents to the education of the minor and their influence on him, which should ensure that any wrongful behaviour will be prevented. For an examination of the sufficiency of the supervision, the circumstances of the particular case relating to the minor are also important, eg his age, character and behaviour, and the circumstances of the occurrence of damage. If the minor had a previous history at school of poor discipline and lying, it would be apparent that his character and his recent be-

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haviour required more intensive supervision, control and educational influence from his parents, especially if they knew about his interest in guns, even if non-functional, and were aware that he had actually obtained one.

The fact that they had not discovered the functioning gun that their son had borrowed from a friend and that they were unable to predict that he would hurt another person reveals that they did not have sufficient control over his behaviour and failed to adequately supervise him. Therefore, they were held jointly and severally liable with the minor. 5

Comments

This case deals with the issue of liability of minors and of those who supervise them for their behaviour under sec 422 CC which is strongly influenced by the delictual capacity of a minor. 6

As regards the liability of minors, under sec 420 CC and newly under sec 2920 NCC, a minor who has not gained full legal capacity which they acquire at the age of 18 or anyone who suffers from a mental disorder shall compensate damage caused if he/she was able to influence his/her actions and consider their consequences. This means, that everyone gains full capacity for liability on his/her 18th birthday and this capacity may be disputed only if it is proven that the person in question was not able, due to mental disorder, to consider the consequences of his/her action or he/she was not able to influence his/her action. However, anyone can be held liable also before the age of 18 if the person in question was able to influence his/her actions and consider their consequences in the particular case. 7

Thus, any consideration about liability of a minor and any supervising person must take into account the capacity of the minor in question. However, whether or not the minor possesses the respective capabilities is a difficult issue which must be answered with respect to the individual ability of the minor. 8

The court recalled in its ruling the principle that the exculpation of the supervisor cannot be reasoned by the fact that he/she was not aware of certain circumstances: in other words, that he/she had no knowledge but must, to adequately fulfill his/her duty, properly and sufficiently exercise supervision. By virtue of this rule, if a child showed signs of behaviour which could give rise to worries that he/she could cause damage, parents have to adapt their educational methods and the intensity of supervision. 9

In considering whether persons with a duty to supervise had neglected their duty, it is necessary to also take into account the circumstances relating to the person who has a duty to supervise. The fundamental provision concerning the liability of minors is secs 2920–2922 NCC whose importance lies in the fact that it supposes the joint and several liability of persons with a duty to supervise the child – in the present case, his parents – with the minor who caused the damage. These persons may free themselves from the imposed liability if they prove that they did 10

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not breach the duty to supervise the child. However, the supervisor bears the burden of proof.

25. Slovakia

Městský soud v Praze (City Court in Prague) 21 May 1973, Case No 9 Co 266/73
Collection of Judicial Decisions and Opinions – R 44/1974

Facts

1 The court of first instance fully granted a claim of compensation for damage suffered by the minor claimants as a result of injuries caused by an explosion of powder they had received from the minor defendant. The court found both the minor defendant and his parents, who neglected the proper supervision of their minor child liable. The defendants appealed against the decision, arguing that the parents of the minor claimants knew that their children were playing with the powder at home, and, therefore, they were fully liable for the damage, or at least they were jointly liable. The appellate court accepted the appeal in part.

Decision

2 If the minor children's parents neglected the supervision of their children who were harmed by another minor person, this fact cannot be considered the contributory fault of the minor injured persons. In such a case the minor children's parents share liability for the damage with those who caused the damage in proportion to their share in the damage caused.

Comments

3 The liability for damage caused by minor children (under the age of 18) is based on the rule that such persons are liable for the damage they caused, provided they possessed the necessary degree of intellectual and moral capacity.[1] The evidence proved that the minor defendant aged 15 had been interested in chemical experiments already for some time. According to evidence, the defendant asked the par-

1 § 422(1): 'A minor or a person suffering from a mental disorder is liable for damage he causes if he is capable of controlling his own conduct and judging its consequences, while anyone who has a duty to exercise supervision over the person shall be jointly and severally liable with him. If damage is caused by a person who, due to his age or a mental disorder, is incapable of controlling his own conduct or judging its consequences, liability for such damage shall be borne by the person whose duty it was to exercise supervision over him.'

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ents of the injured children in advance if he could give explosive material to their children. Considering the nature and circumstances of the damage caused, the court admitted that the defendant had the capacity to know that such conduct was unlawful, that he understood the consequences of such conduct, and that he was also able to control his conduct. These facts led the court to believe that the liability of the minor for the damage was established pursuant to § 422 (1) first sentence of the Civil Code.

The defendant's parents knew that their 15-year-old son had conducted chemi- 4
cal experiments causing explosions in the past. The defendant's father himself warned his son of the possible chemical reaction. The defendant's parents neglected, in the court's view, to adequately supervise their son, and were jointly and severally liable together with their son.

The court found no grounds for the determination of contributory fault of the 5
minor injured persons (11 and 10 years old), and so they could not be considered intellectually mature enough as to be aware of the unlawfulness of their conduct by breaching the duties stated in § 415 of the Civil Code.

Upon challenge, the court also considered the possibility that the parents of the 6
injured children were at fault due to their lack of supervision. It was proven that the defendant gave the powder to the injured party only after their father expressly gave his consent; and their mother was also aware of the powder. The father of the injured party even asked the defendant for some explosive balls to take with him on holiday. In the view of the court, the parents of the injured party failed in their duty to supervise and their duty was to instruct the children not to have contact with the defendant, and not to take the explosives from him. The parents were required to ensure that this did not happen. They breached their duties, and accordingly they were held liable under §§ 420 and 438 (1) of the Civil Code.

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 23 October 2003, Case No 25 Cdo 214/2002

<http://kraken.slv.cz/25Cdo214/2002>

Facts

The court of first instance ordered the defendant to pay compensation for the dam- 7
age caused, basing its decision on the fact that the defendant's minor son caused damage to the claimant's property while driving his motor vehicle. The court explained why it found the defendant and his son jointly and severally liable. In the opinion of the court, the defendant neglected to fulfill his duty to supervise his son, making it possible, due to his own negligence, for the son to take his keys and to use the car on a public road. The appellate court affirmed the decision of the court of first instance. In his appellate review the defendant argued that the claim should be brought exclusively against his son, who, at the age of 17, was fully capable of con-

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trolling his conduct and understanding its consequences. The defendant argued he did not neglect to supervise his son, because his son took the vehicle deliberately at a time when the defendant was at work, and objectively he could not have supervised his son at this time.

Decision

8 If the defendant is the parent of a 17-year-old boy who was used to a situation in which the vehicle was used by the family, did not think that his son could use the vehicle and drive it, facilitated such use during his absence by leaving the car and the car keys freely accessible, it is correct to conclude that the defendant facilitated the use of the vehicle due to his negligence. As for the provision of § 430 (1)[2] second sentence of the Civil Code it is sufficient that negligence is *culpa neglignetia*.

Comments

9 Liability for damage caused by the operation of motor vehicles represents strict liability with a possible release of liability. The subject of liability is principally the keeper of the means of transport, also if the keeper was not driving the vehicle. Only if the means of transport was used without his knowledge or against his will, will the person who used the means of transport be held liable. There is an exception to this principle where the operator facilitated the misuse of the means of transport due to his negligence. According to judicial practice, the law does not expressly require the keeper to have breached any legal duty. However, the keeper will be held jointly and severally liable with the tortfeasor also when he negligently chose the method of securing the vehicle, which was not inconsistent with law, but which, with regard to the circumstances, seemed to be insufficient and thus facilitated misuse of the means of transport.

2 § 430 (1): 'A person using a means of transport without the knowledge or against the will of the keeper shall be liable instead of the keeper. The keeper shall be jointly liable with the said person if the keeper's negligence facilitated such use of the means of transport.'

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26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev-x 570/09-2 of 17 February 2009

<www.vsrh.hr>

Facts

V, a minor under seven years of age, was injured when A, a minor between seven and 14 years of age, shot him in the eye with a gas gun and caused blindness in one eye. V claimed compensation from A and his parents, whose liability was joint and several. The court of first instance accepted V's claim. The court of second instance upheld the first instance decision as to the merits but reversed it as to the quantum of damages by increasing the awarded amount. A filed a request for revision before the SCRC disputing his liability and invoking V's contributory negligence. With respect to V's contributory negligence, A claimed that V sometimes joined A and older children when they were playing outside with a gas gun, and hence he should have been aware of a danger associated with this kind of object. **1**

Decision

The SCRC dismissed A's request for revision and upheld the lower courts' decisions. With respect to A's liability, the SCRC opined that at the time the tort was committed, A was capable of making judgments and should have been aware of the danger associated with playing with a gas gun. As to V's contributory negligence, the SCRC opined that V, who at the time of the incident was under seven years of age, due to his age could not have been aware of the danger associated with a gas gun since children of that age have not yet developed awareness of what is right and what is wrong or what is dangerous and what is not and nor do children of that age act according to the logic inherent in adults. **2**

Comments

Pursuant to art 1051 of the COA,[1] a minor under seven years of age cannot be held liable for damage and a minor between the ages of seven and 14 is in principle **3**

1 Article 1051 of the COA reads as follows:
Liability of a Minor
Article 1051
(1) A minor under seven years of age shall not be liable for damage.
(2) A minor over seven years of age and under 14 years of age shall not be liable for damage, unless his capacity to make judgements on the occurrence of damage has been proved.

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not liable, unless his capacity to make judgements at the moment of damage occurrence has been proved. Pursuant to art 1056 of the COA,[2] parents are strictly liable for damage caused by their children under the age of seven and, for damage caused by their children above the age of seven, their liability is fault-based. Where a child is liable for damage in addition to his/her parents, pursuant to art 1057 of the COA,[3] their liability shall be joint and several. The law does not impose any limitations on the liability of the parents.

4 As is evident from the cited provisions of the COA, due to mental limitations inherent in their age, children are in principle not liable for damage until the age of 14, when they acquire full delictual capacity. However, with respect to minors between seven and 14 years of age, their unaccountability is rebuttably presumed. Hence, it can be proved in a particular case that a minor over seven years of age had capacity to make judgements, which will render him/her liable for his/her wrongdoings. And this is exactly what the courts established in the case at hand. The tortfeasor was obviously a minor older than seven years of age and the courts established that at the time the tort was committed, his mental capacity was such as to enable him to realise and understand the danger associated with the object he was playing with. For this reason, the courts held the minor tortfeasor jointly and severally liable with his parents. On the other hand, it is irrefutably presumed that children under seven years of age are not able to make proper judgements, and for this reason they are held unaccountable. Because of this, the SCRC dismissed the tortfeasor's claim that the victim had been contributory negligent.

5 As is clear from this case and the cited provisions of the COA, Croatian law does take into account a tortfeasor's age as an important factor in assessing the blame-

(3) A minor of 14 years of age and over shall be liable under general rules regulating liability for damage.

2 Article 1056 of the COA reads as follows:

Liability of Parents

Article 1056

(1) Parents shall be liable for damage caused to another person by their children under seven years of age, regardless of their fault.

(2) They shall be exonerated from liability if there are grounds for exoneration them from liability under the rules concerning liability, regardless of fault.

(3) They shall not be liable if the damage was caused at the time their child was entrusted to another person and if that person is liable for the damage.

(4) Parents shall be liable for damage caused to another person by their minor children under seven years of age, unless they have proved that the damage did not occur as a result of their fault.

3 Article 1057 of the COA reads as follows:

Joint and Several Liability

Article 1057

Where a child, in addition to his parents, is liable for damage, their liability shall be joint and several.

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worthiness of a tortfeasor's conduct. In some cases, as for example with minors, limitations on a tortfeasor's liability due to their age are specifically provided in statutory rules, notably arts 1051, 1056 and 1057 of the COA. In other cases, for example in the SCRC's judgment No Rev 909/08-2 of 23 February 2010,[4] these limitations are construed by the courts, based on the application of the concept of due care.[5] Hence, in determining whether a person acted with due care, and consequently whether that person should be held responsible for his/her actions, the courts will also take into consideration limitations resulting from that person's age.

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 882/2008, 8 March 2012

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113042994/> (25 February 2015)

Facts

In the courtyard of a kindergarten, a girl was drawing in the sand with a sharp branch of a shrub, approximately 20 cm long and 1 cm thick. While doing so, she injured the eye of a four-year-old girl, V, who suffered a transverse wound to the right eye with damage to the iris and lens of the eye. The girl V claimed compensation from the kindergarten for non-pecuniary damage. The court of first instance judged that the carer neglected her duty of care because she was 3–4 m from the girls, although prior to the incident, she had seen that the girls were drawing in the sand with a stick. It awarded the girl V non-pecuniary damages of € 50,075. The court of second instance rejected the appeal of the defendant and confirmed the judgment of the first instance court. **1**

Decision

The revision of the defendant was rejected as unfounded, since the Supreme Court judged that the court of second instance had reached a proper conclusion in substantive law that the defendant was liable for damages caused by its carer, since it did not succeed in showing that it performed careful supervision or that the damage would also have occurred with careful supervision, which, in compliance with **2**

4 See 3a/26 nos 1–7.

5 See in more detail about the concept of due care under Croatian law in the comments on the County Court in Zagreb Decision No Pn-6472/00 Gžn-2882/07 under 5/26 nos 11–19.

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art 144 of the Code of Obligations (former art 167 of the Law of Obligations), would exclude the alleged liability of the kindergarten.

Comments

3 When the causer of harm is a child, the crucial question for a judgement of her/his tortious liability is whether such a child is in general responsible in law. Law namely derives from the unchallengeable presumption that children below the age of seven are not of sound mind and thus not responsible in law (para 1 of art 137 of the Code of Obligations). A child below the age of seven years cannot therefore be liable for damage that he/she causes. With a child over the age of seven but under 14, the law derives from the challengeable presumption of not being of sound mind. The plaintiff (injured party) must challenge the presumed inability to make a sound judgement with evidence that the young person was of sound mind at the time of the impermissible behaviour that caused the damage (para 2 of art 137 of the Code of Obligations). A young person who has already reached 14 years of age is fully responsible in law and answerable under the general rules of damage liability (para 3 of art 137 of the Code of Obligations). His/her possible youthful inexperience in such a case is not dealt with within the framework of special rules but only as one of other circumstances for the judgement of care. The question of inexperienced persons has already been discussed in 7/27 of this contribution under the heading Inexperience or Lack of Skill.

4 Parents are generally liable for damage caused by a child (art 142 of the Code of Obligations). Their liability for a child up to the age of seven is strict, then for a child over seven it is based on fault with a reversal of the burden of proof. If the damage occurred when the child was entrusted to someone else (guardian, school or other institution), the parents are not liable if this other person is liable. The liability of this other person exists in a case of culpable violation of a duty to supervise. When, in addition to the parents or such another person, the child is also liable for the damage, the liability is joint and several. On the basis of the rules of joint and several liability, an injured party generally decides to file suit against the parents or other person to whom the child was entrusted for supervision, so the question of the child's liability is not raised in practice but in these cases the crucial judgement is the liability of the parents or other person who was responsible for supervising the child.

5 The old age of a causer of damage is judged similarly to the question of youth. This can be a result of physical disability or lack of culpability because of age-related mental disturbance, which is presented in 10/27. If it is shown that a person of advanced age is not responsible in law, the person who had a duty of supervision by decision of a competent official body or by contract is held liable (first para of art 141 of the Code of Obligations).

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30. The Principles of European Tort Law and the Draft Common Frame of Reference

Various scenarios

Facts

V, a minor, is injured when A, another minor of 6/9/14 years of age, shoots him in the eye with a gas pistol,[1] an air gun[2] or an arrow[3] and causes him to go blind in one eye.[4] **1**

In other cases, minors of 6/9/14 years of age set fire to a building when playing, causing considerable damage to property belonging to a third party.[5] **2**

In yet another case, the six-year-old V and eight year-old A, are playing on a carousel. Due to a strong push by A, who has been warned about pushing others, V falls from the carousel. V suffers serious damage and claims compensation.[6] **3**

Solution

In most, if not all jurisdictions, the courts have had to deal with cases in which a minor, while playing, caused another minor to lose an eye.[7] Just as frequent in practice are cases in which minors play with fire and cause considerable damage to the property of others.[8] **4**

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1 See for example the Croatian case: Supreme Court of the Republic of Croatia, No Rev-x 570/09-2 of 17 February 2009, above 8/26 nos 1–5 with comments by *M Baretić*.

2 See for example the Czech case: Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 20 February 2003, 25 Cdo 1333/2001, above 8/24 nos 1–10 with comments by *L Tichý*/*J Hrádek*.

3 See for example the Swiss case: BGR (Swiss Federal Supreme Court of Justice) 10 March 1977 (*Perruchoud v Praz*) ATF 103 II 24, or the Austrian case: OGH (Supreme Court) 18 December 2009, 2 Ob 83/09h.

4 See also the Estonian case: Judgment No 2-09-55061 of the Tartu Circuit Court, 13 May 2012, above 14/20 nos 1–8 with comments by *J Lahe*/*T Tampuu* (loss of an eye caused by a mobile phone being thrown).

5 See for example the Swiss case: BGR (Federal Supreme Court of Justice) 6 December 1974 (*Barbey v Denoréaz*) ATF 100 II 332; the German cases: BGH (Federal Supreme Court of Justice) 28 February 1984, NJW 1984, 1958 and OLG (Court of Appeal) Brandenburg 25 February 2010, 12 U 123/09; the Austrian cases: OGH (Supreme Court) 20 October 1988, 7 Ob 36/88 and OGH 17 October 1993, 1 Ob 546/94; the French case: Cass (Court of Cassation) 9 May 1984, no 82-92.934; or the Norwegian case (on the liability of parents): Hr (Norwegian Supreme Court) 14 December 2004, Rt 2004, 1942.

6 See the Portuguese case: Supremo Tribunal de Justiça (Supreme Court of Justice) 15 November 2012 (Maria dos Prazeres Pizarro Beleza), above 8/11 nos 1–8 with comments by *A Pereira*/*S Rodrigues*/*P Morgado*.

7 References above fn 1–4.

8 For references, see fn 5.

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5 Practically all codified systems of law contain specific provisions on the liability of minors.[9] Many use age limits providing that minors below a certain age (which may be set at 5, 7, 10, 13 or 14 years) are immune from tort liability.[10] Beyond that age, they are liable if they had the capacity to appreciate the consequences of their acts. Some jurisdictions presume that this capacity is lacking for certain age groups, others do not.[11] Yet other jurisdictions do not use fixed age limits below which liability is excluded but instead look at the minor's capacity for judgement.[12] Finally, some jurisdictions use a general test of reasonableness when addressing the liability of minors.[13]

6 Wherever a minor is deemed for the purposes of these criteria to be exempt from liability, many jurisdictions may still require the payment of equitable compensation when the parties' economic situation so requires or justifies.[14]

7 One jurisdiction treats minors like adults in defining the required standard of conduct.[15]

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9 See for the liability of minors in comparative law: *M Martín-Casals* (ed), Children in Tort Law, Part I: Children as Tortfeasors (2006).

10 Immune from liability if under 5 years: US Restatement, § 10 (b); if under 7 years: § 828 (1) of the German Civil Code (BGB); art 137 (1) of the Slovenian Code of Obligations; art 1637 (1) of the Latvian Civil Code; art 488 (2) of the Portuguese Civil Code; some jurisdictions in the USA ('rule of sevens'); 7–10 years for damage suffered in motor traffic accident: § 828(2) of the German Civil Code; under 10 years: art 916 of the Greek Civil Code; under 13 years: art 426 of the Polish Civil Code; under 14 years: art 6:164 of the Dutch Civil Code; § 1052(1) of the Estonian Code of Obligations; art 1073 f of the Russian Civil Code.

11 USA: over 5 years, Restatement, § 10 (a) and (b); some US jurisdictions: from 7–14 years, lack of capacity presumed; over 14 years: capacity presumed; Slovenian law: 7–14 years, lack of capacity presumed, art 137 (2) Code of Obligations; Greek law: 7–14 years, capacity presumed, art 917 Civil Code; Romanian law: under 14 years, lack of capacity presumed; over 14 years, capacity presumed, art 1366 (1) and (2) Civil Code; Austrian law: under 14 years, §§ 176 and 21 (2) Civil Code; German law: 7–18 years, § 828 (3) Civil Code.

12 Articles 16, 18, 19 of the Swiss Civil Code; art 2047(1) of the Italian Civil Code; art 47 (1) of the Bulgarian Law on Obligations and Contracts; art 422 of the Slovakian Civil Code. See for English law the case: Court of Appeal, *Mullin v Richards*, 6 November 1997, [1998] 1 All ER 920, and, for example, *A Mullis*/*K Oliphant*, Torts (4th edn 2011) Chapter 8: Breach of the duty of care 8.2.

13 § 24a of the Danish Liability for Damages Act (possibility to reduce or exclude liability for minors under 15 years of age); § 2 of the Finnish Tort Liability Act (general reasonableness test for minors under 18 years of age); § 4 of the Swedish Tort Liability Act (general reasonableness test for minors under 18 years of age).

14 Article 54 (1) of the Swiss Code of Obligations; § 829 of the German Civil Code; § 1310 3rd alt of the Austrian Civil Code; art 2047(2) of the Italian Civil Code; § 1052(3) of the Estonian Code of Obligations; art 428 of the Polish Civil Code; art 918 of the Greek Civil Code.

15 See for example the French cases: Cass Ass plén (Court of Cassation, Full assembly) 9 May 1984, no 82-92.934, Bull crim 1984 n° 162 (arrêt Djouab/*Djouab case*); Cass (Court of Cassation) 12 December 1984, no 82-12627, Bulletin 1984 II N° 193 (arrêt Molina/*Molina case*).

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Solutions

a) Solution According to PETL

Article 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct'. Article 4:102(1) PETL further specifies that '[t]he required standard of conduct is that of the reasonable person in the circumstances'. This standard is set independently of the individual's real capacities.[16] The PETL thus use, in principle, an objective standard of fault. **8**

However, 'the Principles reserve the possibility, in para. 2 of Art. 4:102, though only for a particular type of wrongdoers and for "extraordinary circumstances", that the objective notion of fault – based on the objective standard of conduct – may be tempered in order to avoid an excessive "hardship" in the evaluation of a person's effective possibilities to behave as the standard would have required. … In the first place, the provision mentions expressly the age of the tortfeasor'.[17] Article 4:102(2) PETL thus provides that the required standard 'may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it'.[18] **9**

However, even then the applicable standard of care remains an objective one with respect to the relevant group of tortfeasors. The PETL thus require that a minor respects the standard of care that can be expected from minors of his age, as opposed to looking into his particular subjective state of development. **10**

Contrary to many of the national tort law systems mentioned above, the PETL do not fix a specific age limit below which a minor is exempt from liability. Instead, they use a 'flexible system' according to which 'the question whether or not a person had sufficient insight and control of his or her behaviour has to be answered from case to case, according to the concrete mental development of that person'.[19] **11**

In the first of the above scenarios, a minor of 6/9/14 years of age shot one of his friends in the eye with a gas pistol, an air gun or an arrow, and caused him to go blind in one eye. In the following scenario, minors of the same ages set fire to buildings when playing and caused considerable damage to property belonging to a third party. The official commentary to the PETL sets out that '[g]enerally speaking, and in the absence of special disabilities, one can normally assume that a child of 14, and even one of nine years, is capable to realise the danger of playing with matches, while a six-year-old child is not'.[20] The commentary further states that '[t]here are situations – like **12**

16 PETL – Text and Commentary (2005) Chapter 4, Introduction 65, and art 4:101, no 4 (*P Widmer*); see also above 1/30 nos 4–5.

17 PETL – Text and Commentary (2005) art 4:102, nos 14, 15 (*P Widmer*).

18 Emphasis added.

19 PETL – Text and Commentary (2005) art 4:102, nos 15, 27 (*P Widmer*).

20 PETL – Text and Commentary (2005) art 4:102, no 27 (*P Widmer*); see also art 4:101, no 21 with example.

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e.g. playing with matches or fireworks or other dangerous toys (such as "airsoft guns" or even handmade bows and arrows) or the manner in which one has to behave on streets and places open to the traffic – where even relatively young children are normally aware of the risk and able to act in consequence of such insight'.[21]

13 According to the commentary, in the above scenario, the minors of 14 and 9 years of age would very likely be taken to have violated the standard of conduct required from them under the PETL, whereas the six-year-old child would arguably not be held to have violated the standard required from an average child of his age.

14 In the third of the above scenarios, in which an eight-year-old, despite being warned not to push, strongly pushes another child, causing him to fall from a carrousel and sustain injuries, is arguably a borderline case under the PETL.

15 As stated above, in situations in which a minor who caused damage is not liable due to a lack of capacity to foresee the consequences of his acts, in many jurisdictions he may still have to pay (some) compensation if this is deemed to be reasonable, when taking into consideration both parties' economic situations.[22] The PETL do not contain a similar rule.

b) Solution According to the DCFR

16 Pursuant to art VI–3:102(b) DCFR, conduct is negligent when it does not 'amount to such care as could be expected from a reasonably careful person in the circumstances'. Whereas the DCFR uses, like the PETL, in general an objective standard of care[23], art VI–3:103 DCFR deals specifically with liability of persons under 18. According to para (1) of this provision, a 'person under eighteen years of age is [in principle] accountable ... only in so far as that person does not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case'.[24] Pursuant to para (2) of the same provision, a 'person under seven years of age is not accountable for causing damage intentionally or negligently' at all.

17 In accordance with many national tort law systems,[25] the DCFR therefore uses (a) a fixed age limit, set at seven years, below which liability of the minor is altogether excluded,[26] and (b) adapts the required conduct, for minors between the age of 7 and 18, to that of a 'reasonably careful person of the same age'. The rationale for

21 PETL – Text and Commentary (2005) art 4:102, no 15 (*P Widmer*).

22 Above no 6.

23 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

24 Emphasis added.

25 See the references above, fn 10–11.

26 Even if, in the particular case, the individual child may have been capable of acting negligently, compare *C v Bar/E Clive*, DCFR, art VI–3:102, Comment A (p 3402f).

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these provisions is to protect children from 'premature liability'.[27] Pursuant to the commentary to the DCFR, '[s]uch protection is indispensable in order to prevent minors from later entering adulthood with a burden of debt, which makes future considered life choices impossible'.[28]

18 In the above scenarios, the minor of 6 years of age who causes damage to his friend or to a third party is undeniably exempt from liability under the DCFR, regardless of his individual capacity to be aware of the consequences of his harmful acts. The liability of the 9 and 14 year olds depends on the conduct that 'could be expected from a reasonably careful person of the same age in the circumstances of the case'.

19 As set out above, in cases in which the minor causing the damage is not in principle liable due to his or her lack of capacity to foresee the consequences of his or her acts, in many jurisdictions he may still have to pay (some) compensation if deemed reasonable taking into consideration both parties' economic situations.[29] The DCFR contains a similar rule in art VI–3:103(3), which states that the exemption from liability does not apply 'to the extent that (a) the person suffering the damage cannot obtain reparation under this Book from another; and (b) liability to make reparation would be equitable having regard to the financial means of the parties and all other circumstances of the case'. The commentary gives the example of a case in which 'a child (e.g. as a result of an early inheritance) is readily in a financial position to provide reparation for damage done, whereas the injured person may be in a position of financial difficulty and may be unable to bear the burden of the damage alone'.[30] However, '[w]here the injured person is sufficiently insured through personal injury insurance cover, equity and fairness do not justify pursuit of the child'.[31]

31. Comparative Report

1 All the reporters submitted cases, with the exception of the ones reporting for Malta, Romania and the European Union.

2 The question in this category is whether the author of a tort can invoke his/her young or old age in order not to be held liable for the damage he/she caused. Dogmatically the question above all refers to the notion of fault, which is generally a requirement for liability (except for objective or strict liability). To be at fault sup-

27 *C v Bar/E Clive*, DCFR, art VI–3:103, Comment D (p 3425).
28 Ibid, and Comment E (p 3426).
29 Above no 6.
30 *C v Bar/E Clive*, DCFR, art VI–3:103, Comment E (p 3426).
31 Ibid, Comment E (p 3427).

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poses that the author was able to understand his/her act and could have behaved differently. It could be argued that young and old persons do not have the necessary capacities to understand, evaluate or control their acts, and that, thus, they are not capable of being at fault and not capable of being liable.

3 *General remarks*: as a general rule, one could say that age is very largely accepted as an argument against liability. A second point is that most cases focus on children and young people.[1] Decisions concerning aged persons are much less frequent. However, this does not mean that old people unable to understand or control their acts would be considered as liable.

4 Age plays a role in all the countries which submitted reports in this category, except in France.[2] In particular, children may be exempted from liability because of their incapacity to (fully) understand their acts. But also the age of an eldery person can be taken into account, notably their physical (in)ability to do certain things.[3]

5 *Legal age limit*: some legal orders fix an age. This may be a minimal age (around 4–14 years) below which the child's liability is excluded[4] (in certain countries, particular age limits may exist for *leges speciales*[5]); or there may be a rebuttable presumption that persons over a certain age (around 14) are able to understand their acts and, thus, are liable (and consequently, that those under that age are not).[6] Inversely there may be a rebuttable presumption that persons are not accountable between the ages of 7 and 14.[7]

6 *No legal age limit*: other legal orders do not fix any age. The judge determines the ability to understand the act individually for each person, based on the age, intelligence, life experience, the precise factual circumstances, etc.[8] The degree of li-

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1 See *M Martín-Casals* (ed), Children in Tort Law, Part I: Children as Tortfeasors (2006); *idem*, Part II: Children as Victims (2007).

2 France (8/6 nos 3–5), where the new rule is that fault has to be assessed regardless of the person's awareness of the consequences of his acts.

3 Belgium (8/7 no 5); Italy (8/9 no 13); England and Wales (8/12 no 7); Scotland (8/13 nos 3–5); Denmark (8/16 no 3) though *in principle* the age of the tortfeasor is not to be considered in the assessment of negligence; Slovenia (8/27 no 5).

4 Historical Report (8/1 no 2f); Germany (8/2 no 3); Netherlands (8/8 no 3); Portugal (8/11 no 4); Denmark (8/16 no 3); Norway (8/17 no 3) in case of contributory negligence; Sweden (8/18 no 3); Estonia (8/20 nos 3, 5, 10); Latvia (8/21 no 3, but see also no 5); Lithuania (8/22 no 4); Poland (8/23 no 7); Croatia (8/26 no 3); Slovenia (8/27 no 3); DCFR/PETL (8/30 no 17).

5 Eg Germany (8/2 no 3) for traffic accidents.

6 Austria (8/3 no 4).

7 Croatia (8/26 no 4) and Slovenia (8/27 no 3).

8 Switzerland (8/4 no 20f); Greece (8/5 no 6f); despite the general rule that age is not taken into account in assessing what the standard of conduct should have been, Belgium (8/7 nos 5, 8, 10); Italy (8/9 no 7); Spain (8/10 no 4); England and Wales (8/12 no 3); Scotland (8/13 nos 3–5); to some extent Denmark (8/16 no 3); Norway (8/17 no 3) except for contributory negligence; Sweden (8/18 no 3) as far as the Tort Liability Act is concerned, while the judges reduce the rule's area of applica-

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ability (and consequently the amount of damages) may then depend on the degree of maturity of the person.[9]

Standard of care: within a certain category of age, the standard of necessary care is mostly objective,[10] the liability of children is often assessed more leniently.[11] **7**

Equity: certain countries take equity into account. They may admit liability despite the young age of the tortfeasor if equity so requires,[12] for example if the tortfeasor is poor and the victim rich,[13] or if the victim cannot be awarded damages from the parents or supervisors.[14] Equity considerations also allow the rejection of liability for actors who were able to understand their act if the amount of damages is particularly significant and would lead to a lifelong state of indebtedness; however such an exclusion based on constitutional and human rights should rarely be applied.[15] **8**

Parents' or other supervisors' liability: even if it is not mentioned in all reports, probably in most countries, parents may be held liable, under specific circumstances, for the acts of their children. Certain reporters stress that, instead of the child, his parents may be liable,[16] if they have neglected their duty of supervision.[17] The fault of the parents or supervisors (eg educational institutions) is sometimes presumed, but the latter have the possibility to prove that their supervision was sufficient (reversal of the burden of proof).[18] In Italy, if the parents prove that they could not have prevented the damage and if the child was able to understand his act, the victim may claim damages from the underage tortfeasor.[19] **9**

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tion; Finland (8/19 no 6), even if the Tort Liability Act distinguishes between adults and persons under 18; Estonia (8/20 no 6); Czech Republic (8/24 nos 2, 4, 6); Slovakia (8/25 no 3); DCFR/PETL (8/30 nos 9, 11, 17).

9 Switzerland (8/4 no 20 f); England and Wales (8/12 nos 3, 5); Ireland (8/14 no 3).

10 Germany (8/2 no 4); Greece (8/5 no 7); Belgium (8/7 no 9); Spain (8/10 no 4); England and Wales (8/12 no 3); Scotland (8/13 nos 3–5); Ireland (8/14 no 3); Denmark (8/16 no 3); Norway (8/17 no 5); Sweden (8/18 no 4); Finland (8/19 no 7); possibly Estonia (8/20 no 11); DCFR/PETL (8/30 no 15).

11 Eg Austria (8/3 no 5); England and Wales (8/12 nos 2 f, 6).

12 Estonia (8/20 nos 5, 10); Poland (8/23 no 12); see also DCFR/PETL (8/30 no 19).

13 Germany (8/2 no 3).

14 Austria (8/3 no 6 f); Italy (8/9 no 10).

15 See in particular Germany (8/2 no 6).

16 Latvia (8/21 nos 3, 5).

17 Austria (8/3 no 5); Belgium (8/7 no 11); Denmark (8/16 no 3); Poland (8/23 no 11); Slovakia (8/25 nos 4, 6); Croatia (8/26 no 3); Slovenia (8/27 no 3).

18 Netherlands (8/8 no 3); Italy (8/9 no 10); Spain (8/10 no 5) where the liberating proof for the parents is almost impossible, while proof is easier for educational institutions Spain (8/10 no 9 f); Portugal (8/11 no 4); Lithuania (8/22 no 4), but the liberating proof is almost impossible; if youngsters between 14 and 18 have the capacity for liability, but do not have the economic means to pay damages, their parents or guardians can be sued instead (nos 10, 15); Czech Republic (8/24 nos 2, 4, 10).

19 Italy (8/9 no 11).

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9. Physical Disability

1. Historical Report

Gaius, D 9.2.8.1[1]

Facts

1 Due to his physical weakness, a muleteer was not able to control his mules. As a result, the mules ran over the claimant's slave.

Decision

2 Gaius[2] decided that the tortfeasor was liable under the *lex Aquilia*.

Comments

3 The case raised the question whether the muleteer could successfully argue that he had not acted in a reproachful way (ie with *culpa*) on account of his physical weakness.

4 The decision further illustrates the objective approach of the Roman jurists. Although based on his individual physical constitution the muleteer was not able to prevent the damage, the jurist nevertheless imposed liability on him. As with inexperience,[3] Gaius did not assess *culpa* by a subjective standard, ie the individual physical shape of the tortfeasor but rather by an objective one. Again, the question at stake was what standards could reasonably be expected of men of a certain profession.[4] Therefore, the standard for the muleteer was the diligent muleteer who possessed the necessary strength needed in order to control his mules. However, it seems from the text that Gaius realised that weakness differed from inexperience. Inexperience is not a natural incapacity and can easily be treated as *culpa*. Physical weakness on the other hand is an incapacity which the defendant cannot himself help.[5] Gaius anticipated this argument by adding a justification for his opinion: nobody should undertake a job that he was not fit to perform in the first place and

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1 Cf already on this text 7/1 no 1f.

2 Only known by his first name, 2nd century AD.

3 See 7/1 no 2.

4 *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 27; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1009.

5 *G MacCormack*, Aquilian Culpa, in: A Watson, Daube Noster (1974) 201, 211f; *R Robaye*, Remarques sur le concept de faute dans l'interpretation classique de la lex Aquilia, RIDA 38 (1991) 333, 365; *B Winiger*, La responsabilité aquilienne romaine (1997) 126.

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which he knew or could have known would endanger others. Thus, the notion of foreseeability obviously played an essential role for Gaius' decision.

As a consequence, if somebody caused injury in the course of an activity that required certain physical abilities, the tortfeasor could not escape liability by invoking his lack of said abilities. The jurist summarised the principle as *infirmitas culpae adnumeretur* (weakness constitutes fault).[6] 5

2. Germany

Bundesgerichtshof (Federal Supreme Court) 1 July 1986, VI ZR 294/85

NJW 1987, 121

Facts

The claimant was the victim of a road accident. Her husband had been driving the car in which she was sitting when suddenly an oncoming car left its lane and hit the front of their car. The claimant suffered severe injuries. She claimed compensation for pain and suffering and sued the insurer of the other car whose driver died after the accident on the way to hospital. 1

Decision

The court reversed the judgment of the lower court, which had awarded compensation for pain and suffering. The defendant had argued that the deceased (oncoming) driver was unconscious – probably due to a heart attack – when he left his own lane. According to § 827 BGB, this would exclude his liability because then a willful action would have been absent and this is required for the establishment of liability under § 823 (1) BGB. (At the time of the accident compensation for pain and suffering could only be claimed if the requirements of § 823 BGB were met). The BGH stressed that the defendant had to prove that internal events affected his consciousness and reactions. Although the lower court had applied these rules, it had not fully examined the evidence. For this reason the case was remanded. 2

6 *Infirmitas* reappears as an example for *culpa* in the Institutes of Justinian, Inst 4.3.8; cf on this principle *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 246 ff; *G MacCormack*, Aquilian Culpa, in: A Watson, Daube Noster (1974) 201, 210 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 125 f; *N Jansen*, Die Struktur des Haftungsrechts (2003) 254 f; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 104 f; *R Robaye*, RIDA 38 (1991) 333, 364 ff.

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Comments

3 Present German law has considerably simplified the situation of traffic victims when they are injured by drivers for whom it is unclear whether they acted willfully or were unconscious. Since a reform in 2002 the statute on traffic accidents, which provides for strict liability for damage caused by cars, also allows the compensation of non-pecuniary damage (§ 11 sent 2 *Straßenverkehrsgesetz* – Road Traffic Act [StVG]). Therefore, lack of consciousness is no longer relevant for a compensation claim for pain and suffering in road traffic accidents.

4 However, in cases not covered by a strict liability statute, the decision remains relevant. It is the general principle that a tortfeasor cannot excuse a failure to reach the required standard of care because of personal handicaps unless they are entirely unforeseeable and unavoidable.[1] Thus, the driver of a car cannot be heard with the excuse that he had a visual defect because he must have been aware of his insufficient sight.[2] The same is true for reduced abilities because of age or illness.[3]

3. Austria

Oberster Gerichtshof (Supreme Court) 18 December 1980, 8 Ob 216, 274/80

ZVR 1982/22

Facts

1 The claimant was driving her car towards an intersection; the traffic lights showed green. However, the driver in front of her braked suddenly because the defendant, a pedestrian, had abruptly stepped onto the road and started to cross it although the pedestrian traffic light showed red. The claimant could not stop her car in time and thus collided with the car in front of her. Subsequently, the claimant sued the defendant pedestrian for the damage resulting from the collision. On appeal to the Supreme Court, the defendant argued that he could not have recognised the colour of the pedestrian traffic light due to his diabetes and it was therefore not possible for him to behave in an appropriate manner.

Decision

2 The Supreme Court held the defendant liable. It stated that § 76 of the Road Traffic Act (*Straßenverkehrsordnung*, StVO), which forbids crossing a road if the traffic light shows red, is a protective statute within the meaning of § 1311 ABGB. The violation

1 *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 119.

2 BGH JZ 1968, 103.

3 BGH NJW 1988, 909.

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of such a protective statute gives rise to liability for damages if the tortfeasor acts culpably. However, according to established legal practice, § 1298 ABGB, which provides for a reversal of the burden of proof regarding fault, is applicable if a protective statute is violated and the tortfeasor must thus assert and prove that he did not act in a culpable manner. Moreover, according to § 1297 ABGB, it is presumed that every sane person over the age of 14 years is in possession of the average skills and capable of acting with the average amount of diligence and attention. It is therefore up to the claimant to prove that he did not act culpably due to the impairment of his health. However, the claimant did not reveal his physical incapacity until the proceedings before the Supreme Court, where this argument was no longer admissible. It therefore could not be taken into account and the defence had to be rejected.

Comments

Regarding fault, the tortfeasor's subjective skills and knowledge are in principle decisive (cf 1/3 no 5 and 8/3 no 3).[1] Although the victim must prove the perpetrator's fault under §§ 1296, 1297 ABGB sets out the presumption that everyone possessing the necessary powers of discernment also has the average abilities to comply with the diligence objectively due.[2] Hence, it is incumbent upon the offender to give evidence of his lack of average abilities. In this context, § 1297 ABGB thus provides for a partial reversal of the burden of proof and makes it easier for the claimant to prove the damaging party's fault.[3] With regard to the case at hand, it follows that – irrespective of § 1298 ABGB – if the objection had still been procedurally admissible, the defendant would have had to show that he did not have average abilities in the particular accident situation due to his diabetes. **3**

Even if the exonerating evidence had been successfully provided according to § 1297 ABGB, the defendant would still have to prove that he was not to blame for engaging in an (dangerous) activity of which he was not capable (*Übernahmsfahrlässigkeit*).[4] However, simply taking part in social life as such cannot be con- **4**

1 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 15 f; *idem*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/81.

2 § 1297 ABGB: 'It is also presumed that every person of sound mind is capable of exerting the degree of diligence and care that can be applied by a normally competent person. Whosoever fails to attain this degree of diligence and care in the course of acts causing prejudice to another person's rights is guilty of negligence.' Translation by *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law, Basic Texts (2011) § 1297 Austrian Civil Code.

3 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 16; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1297 no 1 f; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 177.

4 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1297 no 3; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1297 no 12.

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sidered blameworthy even if a lack of abilities is given. Besides this, liability in equity analogous to § 1310 ABGB (cf 8/3 no 6f) would have to be considered: although this provision is in principle only applicable to cases of permanent lack of culpability, an extension to temporary irresponsibility is necessary to avoid inconsistencies.[5]

5 Despite the subjective assessment of fault, an objective standard is applied with respect to the degree of diligence and care. Furthermore, the standard of fault is always objectified when it comes to the liability of experts: average professional abilities are irrefutably presumed; hence evidence to show these are lacking is inadmissible (cf 1/3 no 5).

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 29 May 1979
ATF 105 II 209

Facts

1 V, assistant of the Federal Institute of Technology in Zurich (ETHZ), was travelling in his employer's car between Sargans and Chur. Suddenly, V's car swerved into the opposite lane and collided with A's fully loaded lorry. While A remained unharmed, V died instantly.

2 V had not committed any human error and his vehicle was fit. At the moment of the accident, he was not attempting to overtake another car, he was neither overtired, nor intoxicated and there was no indication of suicide. But the medical expert indicated that an inflammation of the myocardial muscle, which had in the meantime healed, could have caused V to lose consciousness. He admitted with 'some probability' (*einiger Wahrscheinlichkeit*) that this could be considered as the cause of the accident. There was no proof that V was judicious (*urteilsfähig*) at the moment of the accident.

3 ETHZ paid to the assistant's widow V1 and child V2 the sums fixed by law and was subrogated in their rights towards A's insurer. ETHZ filed a claim against the insurer for CHF 430,000 (€ 360,000).

4 The cantonal judge ordered the insurer to pay half the sum, ie CHF 215,000 (€ 180,000).

Decision

5 The Supreme Court rejected the insurer's claim.

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5 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) nos 5/41, 7/5.

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The Supreme Court stated that the registered keeper of a car is liable if a person was killed by his vehicle (art 58 of the Federal Road Traffic Act [LCR]). However, the keeper is not liable if he/she proves that the damage had been caused by *ius maior* or the gross negligence of the victim or a third person, provided that he/she (or a third person under his responsibility) was not culpable and that his/her vehicle was not defective (art 59 LCR). The judges considered that A was not at fault and that his vehicle was not defective. 6

Objectively V violated a traffic rule. Subjectively, he was not necessarily aware of this infringement. He could only have committed a fault if he had been able at the moment of the accident to evaluate his acts. As V's ability of judgement at the moment of the accident was not established, A failed to prove V's fault. 7

If several vehicles are involved in an accident, the keepers are solidarily liable (art 60 LCR). As neither of the two drivers was culpable, and as the operational hazard of A's fully loaded lorry was comparatively higher, the Supreme Court confirmed the decision of the lower court to apportion the damages equally between the two parties. 8

Comments

This case illustrates that disability can be taken into account in certain circumstances. The argumentation mainly turns on the question of fault. The central question was whether the assistant, who had unlawfully swerved into the opposite lane, was at fault. As the medical expert[1] did not find any better explication for V's behaviour than the hypothesis of a dizzy spell, the judges deducted that the assistant was at the moment of the accident deprived of his faculties to act reasonably. According to art 16 of the Swiss Civil Code (SCC), persons in such a condition are not capable of discernment.[2] In tort law this means that the V could not be at fault.[3] If this case were ruled by the general provisions of art 41ff of the Swiss Code of Obligations (SCO) and their cumulative conditions of unlawfulness and fault, the judges would probably have denied the assistant's fault. But *in casu* the judges had to apply the Federal Road Traffic Act with its regime of no-fault liability. As not only one vehicle was implicated in the accident, the judges had to consider the two actors as solidarily liable and to apportion their liability according to their degree of fault. As neither 9

1 On the rule of such expertises regarding proof in Swiss tort law, see *C Chappuis/B Winiger* (eds), La preuve en droit de la responsabilité civile (2011).

2 For more details on the so-called capacity of discernment in Swiss civil law, see 4C.278/1999.

3 On this principle, see mainly art 18 SCC:
Lack of capacity of judgement.
A person who is incapable of judgement cannot create legal effect by his or her actions, unless the law provides otherwise.

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of them had acted with fault and because only V's vehicle had violated the legal order, while A's lorry represented a higher risk than the assistant's car, the Supreme Court apportioned the damages in two equal shares.

5. Greece

Eirinodikeio Polykastrou[1] (Polykastro Magistrate's Court) 5/1989

Arm 43 (1989) 969

Facts

1 A, who is deaf and dumb, and his friend B, both minors, entered C's house from the kitchen window, violently pushed C's 11-year-old daughter, who was alone at home and stole the amount of 100,000 Greek drachmas, € 293. A knew that the money, which had been earned due to the recent sale of sheep, was in the house because he was acquainted with C.

Decision

2 The court found that A had the ability to understand the unlawful character of his act, ie he knew that his behaviour was unlawful, irrespectively of whether he had the ability or not to behave according to this assessment. Thus, A could not invoke art 917 sent b GCC and be exempted from liability, as he acted with the necessary mental maturity which enabled him to understand the unlawful character of his behaviour. The court was led to this judgment after an examination of A's behaviour (A knew of the existence of the money and he had mentioned this and the fact that there was only his underage cousin in the house to his friend; he entered the plaintiffs' house from the kitchen window, whereas, if he had believed that his act was lawful, he would have used the main entrance, as he had done previously every time he had visited them).

Comments

3 GCC provides in art 917 sent b that deaf-mute people are liable for the damage they cause unless they acted without the necessary mental maturity which enables them to understand the unlawful character of their behaviour. The notion of deaf-mute is the same as in Penal Law; a deaf-mute individual is someone who has been deprived either from birth or from early infancy of the ability to hear and, accordingly,

1 Polykastro is a city in Kilkis, Central Macedonia, north of Thessaloniki.

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he has not been able to develop the capacity of speech. The loss of these two capacities or of one of them at a later stage does not suffice in order to qualify a person as deaf-mute. As a consequence, persons who are only deaf or only mute or who became deaf-mute after infancy are in principle (unless art 915 GCC can apply) fully capable of being imputed in tort[2] and thus liable to pay damages. This explicit assimilation of deaf-mute people to minors of 10–14 years old regarding imputability is based on the previous thinking that whosoever had the misfortune to be deprived very early of the two most important means of communication, ie hearing and speech, usually shows a handicap in his mental development, so as to be considered as having limited capacity as regards imputability in tort. This approach, however, is outdated. Today deaf-mute people, with the help of special teaching systems, which are constantly being improved, become mentally mature and they can communicate with the environment to such a degree that they are not mentally inferior to other people.[3] Thus, it has been argued[4] that the *de lege ferenda* proposal of the penologists that deaf-mute people should be liable should also be adopted in the civil law. One has to admit, however, that although more than 30 years have elapsed since the said proposal, the Greek legislator has not acted accordingly and has not amended art 917 GCC.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 11 October 1956

Bull civ II, no 511

Facts

A deaf cyclist was killed in a collision with a car when he suddenly crossed a main road, turning left to take a small path, without checking that there was no car coming. His widow brought a claim for damages, which was turned down by the appellate court. The case was brought before the *Cour de cassation*. 1

2 *A Georgiades* in: A Georgiades/M Stathopoulos, Civil Code (1982) art 917 no 7; *G Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 917 no 10.

3 *A Georgiades* in: A Georgiades/M Stathopoulos, Civil Code (1982) art 917 no 8; *G Georgiades* in: A Georgiades, SEAK I (2010) 917 no 11.

4 *A Georgiades* in: A Georgiades/M Stathopoulos, Civil Code (1982) art 917 no 8; *G Georgiades* in: A Georgiades, SEAK I (2010) 917 no 11.

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Decision

2 The *Cour de cassation* affirmed the appellate court's decision. The cyclist, who should have been especially careful because he was deaf, had nevertheless suddenly crossed the main road without checking that there was no car coming. His fault had therefore been unforeseeable for the driver of the car who had collided with him. The car driver was thus not liable for his death.

Comments

3 This case illustrates how physical disability, just like inexperience or lack of skill (see 7/6) does not normally lower the standard of care. Quite the contrary, a disabled person must be more careful in order to compensate for his disability. The idea behind this solution, though not expressed by the *Cour de cassation*, is probably that the general public should be protected against the extra risk which persons with lower skills or abilities create in society.

4 It can be noted that contributory fault was discussed here, but there is little doubt that fault would have been found exactly in the same way if the handicapped person had been the defendant, and not the victim. One's fault is actually a heavier burden to bear for the victim who contributed to his own damage, as this would lead to a reduction of the amount of damages, than for the tortfeasor, who more often than not has insurance, and will therefore not have to personally pay for the consequence of his fault. The reasons for raising the standard of care are therefore stronger when the person whose behaviour is scrutinised is the plaintiff, rather than the defendant.

7. Belgium

Cour d'appel (Court of Appeal) Brussels, 27 October 1981
RGAR 1983, 10608

Facts

1 A was driving his vehicle when, suddenly, he suffered a heart attack which killed him, causing a traffic accident.

2 V tried to establish that the deceased driver was liable, invoking the fact that A had had a busy professional life and had undergone a heart examination every three months. According to V, A had known or should have known that he could not drive a vehicle without being a danger to other road users.

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Decision

In its assessment of A's liability, the Brussels Court of Appeal distinguished the case of a sudden and unexpected heart disease, in which the driver could not be held liable, from a case where the same driver had prior knowledge of his weak heart. In the latter situation, the driver acted negligently by taking the risk of driving a vehicle despite having a serious heart condition. 3

In this case, the court held that the heart condition was not sufficiently serious that A should have abstained from driving. It considered that it could not conclude from the fact that A underwent a cardiac assessment every three months that his heart condition was particularly serious, such that it was likely to lead to a violent accident, and added that, in undergoing such examinations regularly, A was maximising his chances of not being a danger to others, by comparison to someone who neglected his health. 4

Comments

It appears to be difficult to require the same standard of behaviour from both a person in perfect health and one who demonstrates a physical weakness. In reality, illness must, in certain cases, prompt additional prudence. The average person can therefore freely engage in certain activities that a person suffering from illness must approach more cautiously, taking into account the risks which the practice of that activity might present in his condition. 5

The fact of not adapting one's behaviour to a physical weakness can therefore constitute fault. The Brussels Court of Appeal highlighted this perfectly in the above decision. It explained that a driver who is aware of his risky heart condition must take it into account and, where appropriate, avoid driving. There are, however, multiple examples and the majority of judges agree on the fact that an ordinarily prudent and diligent man must take his handicap or weaknesses into account and adapt his behaviour on the basis of his situation.[1] 6

In the light of these developments, we understand that a person can never be held liable for damage caused owing to his illness alone. Recklessness is sought in the defendant's attitude prior to taking the decision (whether negligent or not according to the judge's assessment) to undertake an activity which is inadvisable in view of his handicap. 7

Given the foregoing, when a person loses control of his actions due to a sudden medical accident which he/she could not have foreseen, and which he/she was unable to prevent, we cannot impute liability to him/her since he/she could not have changed his behaviour earlier.[2] Such a situation takes us back to the issue of causes 8

1 *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 132, no 183.

2 *L Cornelis*, Principes du droit belge de la responsabilité extra-contractuelle, vol 1 (1991) 30, no 17.

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and justifications and their consequences upon the liability of the person invoking them (see 12/7 and 14/7).

9. Italy

Corte di Cassazione (Court of Cassation) 5 December 1988

Arch Civ 1989, 550

Facts

1 A person affected by a severe form of diabetes, was driving his car on a very hot day, while being 'very tired'. A fatal incident occurred because the driver fell unconscious and lost control of his car.

Decision

2 The court affirmed the liability of the defendant, who was aware of his state of health but decided to drive nonetheless.

Comments

3 Cases of damage caused by a person with a physical disability in Italy are governed by the general rules on extra-contractual liability. Therefore, a defendant suffering from a physical disability shall be held liable for the compensation of the damage caused if he/she acted with negligence, namely without taking into consideration the limits imposed upon his/her actions that are due to his/her disability.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 3 April 1998

RJ 1998\1873

Facts

1 A disabled person, who only had one arm, lost the other arm and one foot when he fell on railway tracks while trying to board a train that was already moving.

Decision

2 The Supreme Court upheld the opinions of the lower courts when it held that: 'in causing the harmful result, there was some degree of negligence of the claimant, as he should have been more attentive to the train departure and especially when, be-

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cause of his disability, he had more difficulties than other people climbing into the train'.

Comments

The standard of care that Spanish law requires is the abstract and objective standard of the reasonable person acting in a similar situation (art 1104 CC). The fact that by his constitution someone reacts more slowly than other persons is irrelevant, because, as said, the standard of care is not subjective that is, it is related to the ordinary care that a person takes in his own activities (*diligentia quam in suis*). An objective standard of care, in the above mentioned 'typological' sense,[1] implies that the care of persons that belong to a certain social category that can be generalised will be assessed taking account of the characteristics, physical and intellectual aptitude, prudence, and so on that are normal among the ordinary person who belongs to the same category.[2] Some authors mention that this can also be said about groups of persons with diminished physical abilities or powers.[3] No reported case, however, deals with the issue of whether the physical disability of the defendant is considered to exonerate, or at least partially reduce, his liability towards the victim. It often occurs, however, that the victim is deprived of all or part of the compensation because he/she contributed to the injury suffered and this was determined by his/her impaired condition. For this reason, the hypothetical is a case about contributory negligence. The courts tend to assume that victims took risks that, considering their own personal condition, they should not have taken.[4] Accordingly, the law requires victims affected by any sort of disability to maintain a prudent balance between their skills and the circumstances, thereby taking possible alternatives.[5] **3**

Some authors conclude that this case law shows that persons with physical disabilities must behave just like any other persons.[6] Although they admit that this could give rise to a certain sort of injustice, since this means that it is easier to comply with the rules for some persons than for others, this lack of equality does not affect tort liability and does not infringe the constitutional principle of equality.[7] **4**

1 See 1/10 no 4.

2 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864.

3 *F Pantaleón Prieto*, Culpa, in: Enciclopedia Jurídica Básica II (1995) 1864.

4 Emphasis added. STS 4.10.2002 (RJ 2002\9254) also ruled in favour of the railway company who had been sued for the death of a 66-year-old passenger who, because he could only move slowly, had no time to get off the train during a stop, and tried to do it when the train was beginning to move, thereby falling and being hit by the last carriage.

5 This is the case, for instance, when they have access to facilities or to transportation. SAP Sevilla 24.4.2007 (JUR 2008\26542).

6 *M García-Ripoll*, La antijuridicidad como requisito de la responsabilidad civil, ADC 2013, 1586.

7 *M García-Ripoll*, La antijuridicidad como requisito de la responsabilidad civil, ADC 2013, 1587.

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However, we consider that the contrary opinion, which holds that the constitutional principle of equality requires treating cases that are unequal unequally and therefore taking into account the physical, psychical or even educational condition of the actor,[8] rests on better grounds. Nevertheless – and this is in our opinion what the case law is pointing at – the judge must take into account 'the awareness of the actor as regards his weakness, which must caution him to refrain from certain activities where he cannot deploy the skills of a normal subject'.[9] Indeed, when accidents occur with automatic devices such as escalators, automatic gates and the like, it is not uncommon to attribute liability on the basis that, although a fall occurs because of the disability affecting the victim, the person responsible for the device should have foreseen how people with such disabilities would have access to the mechanism, and the specific risk that the device could present to them, in contrast to the risk to which the public is generally exposed.[10]

12. England and Wales

Roberts v Ramsbottom, High Court (Queen's Bench Division) 7 February 1979

[1980] 1 WLR 823

Facts

1 The defendant, Ramsbottom, a 65-year-old retired accountant, collided head-on with the first claimant's car, damaging it beyond repair. Only the second claimant and her daughter (the third claimant), who was with her in the car, were injured. Ramsbottom argued that he was not negligent because shortly before the accident he had suffered a stroke, which so impaired his consciousness that, from that moment, he had been, through no fault of his own, unable to control his car properly or to appreciate that he was no longer fit to drive. Shortly before colliding with the first claimant's car, Ramsbottom had already struck a parked van and knocked a boy off his bicycle though there had been plenty of room for him to pass.

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8 *F Peña*, La culpabilidad en la responsabilidad civil extracontractual (2002) 491.

9 *F Peña*, La culpabilidad en la responsabilidad civil extracontractual (2002) 489.

10 STS 23.12.2004 (RJ 2005\82), concerning an accident suffered by a person with a physical disability who, accompanied by his wife, was on the escalator of a station which suddenly stopped and that, on restarting, caused the couple to fall over and to suffer injuries. In the same vein, in the traffic liability area, and with regard to drivers' liability, art 11.1 Royal Decree 339/1990, of 2 March, provides that driving should adapt to the specific risks that the reactions of certain people can generate, mentioning 'children, elderly, blind or in general terms, disabled persons with mobility problems.' On occasion, the courts use this rule to increase the driver's duties of diligence in relation to the running over of a child in the vicinity of a school, STS 27.9.2013 (RJ 2013\6403).

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Decision

The court held that, to rebut the *prima facie* case of negligence, the driver would have to establish that his actions had been wholly beyond his control, which the law recognises as automatism. If he retained some control, albeit imperfect, and his driving, judged objectively, was below the required standard, he remained liable, in the same way as a driver who was old or infirm. As medical evidence confirmed that the defendant's movements in driving were deliberate movements and that to drive along the route which the defendant followed involved purposeful acts, the court concluded that the defendant was liable to all three claimants. That he was in no way morally to blame was irrelevant to the question of legal liability. Alternatively, the court found that Ramsbottom should not have continued to drive when he was unfit to do so. He should have been aware of his unfitness as he was aware of his disabling symptoms, having confirmed he was feeling queer after his first collision. **2**

Comments

It is the court's alternative ground for its decision – that the defendant continued to drive when he should have been aware he was unfit – that must now be regarded as its *ratio decidendi* as the argument based on automatism was rejected by the Court of Appeal in *Mansfield v Weetabix* (nos 5–8 below). However, it is clear that automatism is at least *sufficient* to negate tortious liability. **3**

As the courts have said, '[i]t is a matter of human experience that the mind does not always operate in top gear.'[1] An impairment of judgment alone, however, does not provide a defence. What is required is complete loss of consciousness or automatism. It has been observed that '[i]t is ... a question of law what constitutes a state of automatism ... This expression is no more than a modem catchphrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person.'[2] In the context of criminal law, further guidance was given in *R v Spurge* which no doubt would apply in a tortious action too: **4**

> 'If ... a motor car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame – if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public ... It would be otherwise if he had felt an illness coming on but still continued to drive, for that would have been a manifestly dangerous thing to do.'[3]

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1 *R v Isitt* [1978] RTR 211, 216.

2 *Watmore v Jenkins* [1962] 2 QB 572, 586.

3 [1961] 2 QB 205, 210. See also *Hill v Baxter* [1958] 1 QB 277. In another civil case, albeit in a different context, the Court of Appeal has applied the test of whether the defendant's disability has the

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Mansfield v Weetabix, Court of Appeal (Civil Division) 27 July 2011
[1998] 1 WLR 1263

Facts

5 The second defendant, Mr Tarleton, was an employee of Weetabix, the first defendant. He drove his company's lorry into the claimant's shop. Unbeknown to him, Mr Tarleton suffered from malignant insulinoma that manifested itself at the time of the incident. Owing to the hyperglycaemic state brought about by the condition, his brain was starved of oxygen and he was unable to function properly. Incidentally, Mr Tarleton had also been involved in two minor incidents on the day of the crash.

Decision

6 Leggatt LJ ruled that a driver will be able to escape liability if his actions at the relevant time were wholly beyond his control. The standard of care is that which is to be expected of a reasonably competent driver unaware that he is or may be suffering from a condition that impairs his ability to drive. To apply an objective standard in a way that did not take account of Mr Tarleton's condition would be to impose strict liability and that is not the law. The court thus concluded that Mr Tarleton was in no way to blame; he was not negligent.

Comments

7 The court rejected the proposition that a mental disability will only prevent liability arising for a failure to exercise reasonable care if it amounts to automatism. *Roberts v Ramsbottom* (nos 1–4 above) was wrongly reasoned on this point, but correctly decided on the alternative ground.

8 Although the court agreed that the shop owner was deserving of compensation, redress regardless of the question of fault would require a change in the law and that was a matter for Parliament.

effect of entirely eliminating any fault or responsibility for the injury: *Dunnage v Randall* [2016] QB 639.

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13. Scotland

Waugh v James K Allan Ltd, House of Lords, 4 June 1964
1964 SC (HL) 102, 1964 SLT 269

Facts

The defenders were the employers of a deceased lorry driver who had died at the wheel of his lorry, having suffered a coronary thrombosis. The sudden thrombosis had caused him to become unconscious and collapse, his lorry in consequence mounting the pavement and striking the pursuer, a pedestrian, who was severely injured. The deceased driver had been generally in good health prior to the accident, except that he suffered from occasional bouts of gastritis, which made him feel nauseous. Prior to the accident, before he entered the cab of his lorry, he had suffered from such a bout of nausea, causing him to vomit and sweat, symptoms which might have suggested to him that the cause was his gastritis. The pursuer claimed damages from the defenders, arguing that the deceased ought to have known that, on account of his symptoms, he was unwell and therefore unfit to drive, and that the defenders were vicariously liable for the consequences of the deceased's negligence. At first instance, and on appeal to the Inner House of the Court of Session, the defenders had been held not liable for the pursuer's injuries. The pursuer further appealed to the House of Lords. 1

Decision

Their Lordships upheld the decisions of the lower courts, and absolved the defenders from liability for the harm caused by their deceased employee. The symptoms from which the employee had suffered shortly prior to his death were not such as could reasonably have led that employee to conclude that he was unfit to drive, and therefore he could not reasonably have foreseen the sudden onset of the thrombosis while at the wheel. The court thought that matters may have been different had the deceased continued to suffer from a headache or mental fatigue, but this had not been so. 2

Comments

The decision considers the effect which transient physical disability may have upon potential liability for breach of duty in delict. In the House of Lords, their Lordships located the answer to the question of liability in whether the defender could reasonably have foreseen that disabling symptoms would constitute an ongoing or recurring incapacity to undertake contemplated conduct (in this case, driving). This may be seen in portions of the speeches of Lords Reid, Evershed, Guest, and Upjohn. More specifically, their Lordships felt that, in order to discharge the duty incumbent 3

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upon someone who is about to drive, that person must reasonably consider whether they are fit to drive; in this case, the evidence was that a reasonable decision as to that question had been reached by the deceased. Had the deceased continued to feel unwell, the likelihood is that the decision would not have been in his favour.

4 It is also worth adding to the above comments that an earlier claim by the pursuer of negligent driving by the deceased was abandoned, it being conceded that, at the time of the accident, the deceased was 'so completely disabled by the sudden onset of coronary thrombosis from which he subsequently died as to have ceased to have any control over the lorry's movements'.[1] This reflects the view of the law that conduct can only be culpable if it is voluntarily undertaken; the collision between the lorry and the pedestrian, however, occurred after the deceased lost consciousness, and the effects of unconscious conduct are not considered to demonstrate voluntariness.

14. Ireland

Counihan v Bus Átha Cliath (Dublin Bus), High Court, 2 March 2005

[2005] IEHC 51, [2005] 2 IR 436

Facts

1 The plaintiffs were seriously injured when their car was struck by a bus belonging to the defendant. The collision resulted from the bus driver suffering a blackout, caused by a latent health condition of which he was unaware and which was unlikely to have been discovered by any prior testing. The plaintiffs claimed damages for their injuries.

Decision

2 Clarke J rejected the plaintiffs' claim. There was no breach of the standard of reasonable care by the driver, as he neither knew nor could reasonably have known of his condition.

Comments

3 Such cases are rare,[1] but the general principle is that a person subject to a disability which impairs their ability to exercise the normal standard of care in respect of an

1 As narrated in the speech of Lord Guest.

1 See also *Flynn v Bus Átha Cliath* [2012] IEHC 398; *O'Hara v Eirebus Ltd* [2011] IEHC 450.

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activity is only negligent if they know of their impairment and can foresee that their participation in the activity is unduly hazardous to third parties, but persist with the activity. If a person is not aware of their condition prior to engaging in an activity, but becomes so aware while performing the activity, they must take any reasonable opportunity to desist from the activity.[2]

18. Sweden

Högsta domstolen (Supreme Court) 14 August 1948

NJA 1948, 489

Facts

A person with hearing loss was shovelling snow from a sidewalk, when a pedestrian arrived from behind. The pedestrian spoke to him, and since he seemed to stop shovelling snow, she thought he had heard her, whereby she continued walking beside him on the narrow pavement. Due to his hearing loss, the man had actually not heard her. Suddenly he continued the shovelling, and hit the pedestrian in the side so that she fell and injured her arm. **1**

Decision

The court emphasised the narrowness (1.4 m) of the pavement; due to this fact and the nature of the work, the man shovelling snow could assume that anyone coming from behind would not try to pass by without first being sure that he had noticed them. Therefore, he had not acted negligently. **2**

Comments

Unlike the lower courts, the Supreme Court did not come to the conclusion that the man – due to his hearing loss – should have taken more precautions. Nevertheless, this case does not mean that every person with physical disabilities will always be excused. A specific evaluation will have to be performed in the individual case, concerning the risk factors and who is to be responsible for paying attention to and avoiding them. In this case the risks were obvious to outsiders; consequently the worker could assume that pedestrians coming from behind would not continue walking on the narrow pavement if they were not sure that he had seen them. If the risks are higher than in this case, and if the activity is of a more advanced nature **3**

2 *O'Brien v Parker* [1997] 2 ILRM 170 the driver was found to have had sufficient advance warning of his illness and so ought to have stopped driving.

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and requires some special skills or knowledge, it can be regarded as negligent to engage in such activities if one's physical disabilities contribute to the total risk level. Of course it is never negligent per se to have a handicap, but if this disability will enlarge the risks in a foreseeable way – or reduce the options to supervise the risks – it can be negligent to choose to engage in such an activity.

23. Poland

Sąd Najwyższy (Supreme Court) 5 February 2002, V CKN 644/00 (sudden and unexpected)

OSNC 12/2002, 156

Facts

1 V's taxi was damaged when another car ran into it after V had pulled over for a few minutes to let the passenger and his luggage out of the vehicle. The man who drove the car that hit the taxi had suffered from heart and brain failure and he died soon after the accident. V sued the insurer of the dead driver for compensation. The court of first instance awarded V damages. The insurer appealed, alleging that the rule of strict liability should not apply. The higher court found that the event was a collision and exempted the insurer from liability due to lack of fault.

Decision

2 Under Polish law, the liability for damage caused by the movement of a motor vehicle is strict and borne by the possessor of the vehicle (art 436 § 1 KC). However, in the case of a collision of means of transport, liability for damages is based on fault (art 436 § 2 KC). The person who is at fault for the collision shall compensate all direct and indirect damage, but the injured person may bring an *actio directa* against the insurer. The court held that V's car had been run into and the liability for his damage was based on risk. Thus, the defendant insurer had to pay damages.

3 Although the Supreme Court stated that the liability of the wrongdoer is strict, it also considered the possibility of the wrongdoer's liability being based on fault. In this situation, fault could not have been assigned to the driver's conduct, as the exclusive cause of the accident was his heart and brain failure.

4 The result is reached through manipulating the meaning of the word 'motion' or 'a vehicle in motion', which determines whether we classify an accident as a collision (hence, liability is based on fault) or a simple 'running into another car not in motion' (hence, liability is strict).

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Comments

The court first assumed that the driver could not be considered to be at fault. Hence, the court focussed on interpreting the Civil Code rule in a way which allowed strict liability to be imposed on the possessor (insurer). In consequence, the decision was favourable to the plaintiff. 5

26. Croatia

Judgment of the County Court in Zagreb No Gž 176/88-2 of 12 January 1988
Unreported

Facts

V was injured when A hit him with his car while he was crossing the road on a zebra crossing. At the time of the accident, A was exceeding the speed limit while V was intoxicated and had a plaster cast on his leg. 1

Decision

The County Court in Zagreb distributed liability among the tortfeasor and the victim equally. In deciding on V's contribution to his own damage, the court assigned a considerable weight to the fact that, although he was crossing the road on the designated place, V was at the relevant moment considerably physically impaired due to the plaster cast on his leg. Since V disregarded his reduced mobility, the County Court qualified his actions as careless and held him accountable for his own damage to 50%. 2

Comments

Although this case involves contributory negligence, it is also illustrative with respect to the heading, physical disability, because, as explained earlier,[1] in order to attach contributory negligence to a victim, courts will primarily be required to establish whether the victim violated a certain legal rule. 3

This decision clearly shows that, in assessing whether a person acted properly, not only his/her mental, but also his/her physical disability will be taken into account. In the case at hand, the court decided that V had acted carelessly since, when crossing the road, he disregarded his reduced mobility caused by the plaster cast on his leg. For this reason and due to his intoxication, the court decided that V contributed to the occurrence of the harmful event to 50%. 4

1 See 2/26 nos 4–8.

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5 In this case V's actions were qualified by the County Court as careless because, when he decided to cross the road, V failed to take into account his reduced mobility and thus obviously misjudged his ability to cross the road safely. It is, however, an open question how the court would have qualified V's reactions had V unexpectedly found himself in a situation where he had to move quickly in order to avoid injury and was unable to do so because of his physical impairment. Although judging from reported case law courts in Croatia do not appear to have dealt with such a hypothetical situation yet, it seems safe to say that in such a case V's responsibility would most probably be significantly reduced, if not excluded all together.

6 In deciding on V's responsibility for his own damage, the Country Court had obviously employed the standard of due care and concluded that V had failed to act as an average person. It could hardly be convincingly argued that an average person should also take into account a possibility that unexpected events would occur. However, as already explained, Croatian law also recognises the so-called simple negligence standard, ie standard of due care according to which a person fails to act as a particularly prudent person.[2] In this respect, it is rather an open question whether a particularly prudent person in the same situation would also be expected to take into consideration the possibility that an unexpected event could occur and to adjust his/her actions to avoid injury in the event of the occurrence of such an unexpected event even with his/her reduced mobility caused by a plaster cast on his/her leg. If the answer were positive, V's conduct would still be qualified as negligent, but due to the lower level of his negligence (ie simple negligence), his contribution to his own damage would be reduced. If the answer were negative, V would be freed from any responsibility for his own damage. If the ratio employed by the Country Court in Zagreb in Decision No Pn 1995/85 Gž-13/88 of 13 January 1988[3] were to be employed even in this hypothetical case, the answer to this question would be negative.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 A is driving his vehicle when, suddenly, he suffers a heart attack which causes him to lose consciousness, resulting in a traffic accident which causes both personal damage and property damage to V. Before the accident, A led a very busy profes-

2 See 1/26 no 9.

3 For more detail see 3d/26 nos 3–6.

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sional life and undertook a cardiac assessment every three months which did not reveal any reason not to drive.[1]

Solutions

a) Solution According to PETL

Article 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct'. According to art 4:102(1) PETL, '[t]he required standard of conduct is that of a reasonable person in the circumstances'. This standard applies independently of the individual's real capacities. The PETL consequently use, in principle, an objective standard of fault.[2] **2**

However, 'the Principles reserve the possibility, in para. 2 of Art. 4:102, though only for a particular type of wrongdoers and for "extraordinary circumstances", that the objectivated notion of fault – based on the objective standard of conduct – may be tempered in order to avoid an excessive "hardship" in the evaluation of a person's effective possibilities to behave as the standard would have required'.[3] Article 4:102(2) PETL thus provides that the required standard 'may be adjusted when due to age, mental or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it'.[4] **3**

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1 See the Belgian case: Cour d'appel (Court of Appeal) Brussels, 27 October 1981, RGAR 1983, 10608, above 9/7 nos 1–8 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*; the Swiss case: Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 29 May 1979, ATF 105 II 209, above 9/4 nos 1–9 with comments by *B Winiger*/*A Campi*/*C Duret*/*J Retamozo*; the Austrian case: OGH (Austrian Supreme Court) 21 November 1968, 2 Ob 336/68, SZ 41/16, above 12/3 nos 4–6 with comments by *E Karner*; the English case: *Mansfield v Weetabix*, Court of Appeal (Civil Division) 27 July 2011, [1998] 1 WLR 126, above 9/12 nos 5–8 with comments by *K Oliphant*/*V Wilcox*; the Scottish case: *Waugh v James K Allan Ltd*, 1964 SC(HL) 102, above 9/13 nos 1 – 4 with comments by *M Hogg*; the Irish case: *Counihan v Bus Átha Cliath* (Dublin Bus) [2005] IEHC 51, [2005] 2 IR 436, above 9/14 nos 1–3 with comments by *E Quill*; the Polish case: SN (Polish Supreme Court) 5 February 2002, V CKN 644/00, OSNC 12/2002, at 15, above 9/23 nos 1–5 with comments by *E Bagińska*/*I Adrych-Brzezińska;* the Lithuanian case: *AS v EM*, 8 January 2003, Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-18/2003, above 10/22 nos 6–9 with comments by *J Kiršienė*/*S Palevičienė*/*S Selelionytė-Drukteinienė*. See also the further Austrian case: OGH (Supreme Court) 22 April 2010, 2 Ob 33/10g, JBl 2010, 653, above 12/3 nos 1–3 with comments by *E Karner*: The helmsman of a cargo ship (more precisely a towboat, *Schubverband*), has no signs of any disease in the days leading up to his assignment, or when he starts work, but feels a sudden discomfort during the trip (shivering, pain in the limbs and nausea) and loses consciousness. When passing out, he touches the helm and knocks the convoy off course, causing a collision with a railway bridge. The railway company seeks compensation.

2 PETL – Text and Commentary (2005) Chapter 4, Introduction 65, and art 4:101, no 4 (*P Widmer*); see also above 1/30 nos 4–8.

3 PETL – Text and Commentary (2005) art 4:102, nos 14, 15 (*P Widmer*).

4 Emphasis added.

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4 In the above scenario, A suffered a heart attack which caused him to lose consciousness, leading to a traffic accident. If a person suffering from a physical disability has reason to doubt his capacity to engage in an activity which may risk causing damage to others, he is required to act with particular care[5] or if, due to his incapacity the risk is unavoidable, to refrain from such activity. Had there been any previous symptoms that would have caused a reasonable driver in A's position to doubt his capacity to safely drive a car, he would thus have been required to refrain from driving.

5 In the above scenario, A had regular check-ups on his heart which had not revealed any reason for him to assume that he was impaired from driving a car safely. The sudden attack was totally unforeseeable to him, as it would have been for anyone else in the same circumstances. Under these conditions, it could not have been expected for him, or any reasonable and competent driver in his position, to abstain from using a car. Under the PETL, driving thus did not violate the required standard of conduct. To hold him liable under these conditions would require a regime of strict liability. Under the PETL, it is thus material whether the disability was a pre-existing or foreseeable condition, or was sudden and unexpected.

6 In most Continental jurisdictions, at least for personal injury caused to third parties, A would be liable according to the rules on strict liability for traffic accidents.[6] Article 5:101 PETL, on the contrary, limits strict liability to 'abnormally dangerous activities' which are not 'a matter of common usage'. Strict liability as provided by the PETL does not therefore cover damage suffered in traffic accidents.

b) Solution According to the DCFR

7 The DCFR defines negligence in art VI–3:102 as 'conduct which ... (b) does not ... amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. Like the PETL, the DCFR thus uses an objective standard of care.[7] The standard 'does not turn on the individual abilities of the person acting, rather it is based on what can be reasonably expected of that person'.[8]

8 According to the official commentary to the DCFR, '[p]hysically disabled persons are subject to the same requirements of due care as physically able persons, to the extent that they are aware of their physical disability, and their conduct must be adjusted accordingly. ... A person who must anticipate sudden but short-lived

5 Compare for example the comments on French law by *J-S Borghetti*/*M Séjean*, above 9/6 no 3 f.

6 For numerous references and relevant texts translated into English, see *T Kadner Graziano*, Comparative Tort Law – Cases, Materials and Exercises, Chapter 4 (forthcoming).

7 *C v Bar*/*E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

8 Ibid.

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losses of vision due to a chronic circulatory disorder is not permitted to sit at the wheel of a car',[9] for example.

However, negligence as defined by art VI–3:102 DCFR requires human 'conduct', that is, an action controlled by human will. An unconscious act is not 'conduct' within the meaning of arts VI–3:101 and VI–3:102.[10] 9

If the driver of a car suffers a sudden and unforeseeable brain haemorrhage that renders him unconsciousness, then the conduct is not one controlled by human will. The driver cannot therefore be regarded as being in violation of the required standard of care under the DCFR and would not be accountable for having negligently caused damage. 10

As mentioned above, the result differs where he 'should have anticipated having such episodes or reflex actions as a consequence of a physical problem and therefore should have refrained from the activity in question in advance', whereby he would be accountable for his conduct.[11] 11

Should the driver also be the keeper of the car, he would be liable without negligence under the rule on strict liability for loss suffered 'in a traffic accident which results from the use of a vehicle', pursuant to art VI–3:205 DCFR. 12

31. Comparative Report

Only 15 reporters submitted cases on physical disability. 1

In this category the main question is whether the tortfeasor can say that he/she is not liable because of a physical disability. This issue often relates to the question of fault. If the author was not physically able to behave in a certain manner or to control his behaviour, it might be that he/she would not be at fault and thus not liable for the consequences of his/her acts (or omissions). Already in Roman law doubts arose as to whether or not a person can be blamed for misbehaviour due to physical weakness. After all, it is not the person's fault that he/she has a weak constitution. But already the Roman *jurisconsultes* said that a person had to take his/her weaknesses into account and to act accordingly. This argumentation can still be found in modern law.[1] 2

9 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment A (p 3403).

10 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment A (p 3402); art VI–5:301, Comment B (p 3691).

11 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment B (p 3691) and Illustration 2.

1 See for example Historical Report (9/1 no 4); Switzerland (9/4 nos 7, 9); France (9/6 no 3); Belgium (9/7 no 6); Italy (9/9 no 3); Spain (9/10 no 3); England and Wales (9/12 no 2); Sweden (9/18 no 3); Croatia (9/26 nos 4, 5).

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3 *Criteria of liability*: the answers to the question depend on different criteria, such as the standard of care imposed on the tortfeasor, his skills, awareness and foreseeability of the disability, etc.

4 *The standard of care*: the standard of care is generally considered by the judge as the model behaviour of a *bonus vir* in a given situation. In most legal orders the tortfeasor has to meet an objective standard of care.[2] In France and Belgium disabled people even have to be particularly careful in order to compensate for their disability, ie refrain from activities they are not able to embark on safley.[3] In England and Wales to apply an objective standard of care (in a traffic accident) without taking into account the tortfeasor's condition 'would be to impose strict liability and that is not the law'.[4]

5 *The assessment of fault*: according to certain reports, the assessment of fault is subjective and adapted to the person's individual abilities.[5] It may also depend on the question of whether the tortfeasor had to be aware of his disability and anticipate its consequences. The fact of not adapting one's behaviour to a physical weakness can constitute fault (sometimes called *Übernahmeverschulden*).[6] In Austria the tortfeasor has to prove that he/she is not to blame for having undertaken the activity for which he/she turned out to be unable.[7] Certain reports say that the tortfeasor is not considered to be at fault if the disability was (entirely) unforeseeable and unavoidable.[8]

6 *The degree of disability*: several reports mention that physical disability can only be taken into account if it was such that it prevented the tortfeasor from behaving in an appropriate way.[9] Liability may then be admitted on equity grounds.[10]

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2 Historical Report (9/1 no 4); Germany (9/2 no 4); Austria (9/3 no 5); Switzerland (9/4 no 7); Greece ((9/5 no 2); France (9/6 no 3); Spain (9/10 no 3); England and Wales (9/12 no 2); Ireland (9/14 no 2); Croatia (9/26 no 6); DCFR/PETL (9/30 nos 2, 7).

3 France (9/6 no 3); Belgium (9/7 nos 5, 6).

4 England and Wales (9/12 no 6).

5 Austria (9/3 no 5); Switzerland (9/4 no 9); Greece (9/5 no 3); DCFR/PETL (9/30 nos 3, 9).

6 Historical Report (9/1 no 4); Switzerland (9/4 nos 7, 9); Belgium (9/7 no 6); Italy (9/9 no 3); Spain (9/10 no 3); England and Wales (9/12 no 2); Sweden (9/18 no 3); Croatia (9/26 nos 4, 5); DCFR/PETL (9/30 no 11).

7 Austria (9/3 no 4).

8 Historical Report (9/1 no 4); Germany (9/2 no 4); Belgium (9/7 no 8); Scotland (9/13 no 3); Ireland (9/14 no 2); Poland (9/23 no 3); Croatia (9/26 no 5).

9 Austria (9/3 no 3); with a legal restriction to deaf-mute borne people, Greece (9/5 no 3); England and Wales (9/12 nos 2, 3); Scotland (9/13 no 3).

10 Eg Austria (8/3 no 6).

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10. Mental Disability

1. Historical Report

Ulpian (Pegasus) D 9.2.5.2

Facts

A mentally disabled person (*furiosus*) inflicted damage upon the claimant. 1

Decision

Ulpian[1] agreed with the opinion of Pegasus[2] that the mentally ill person should not be liable. 2

Comments

The decision further demonstrates that the Roman jurists did not only assess *culpa* based on objective criteria but – at least to a certain extent – also took into account subjective factors such as the injurer's mental capacity.[3] Thus, just as the *infans*, the *furiosus* who did not have the ability to reason was not liable under the *lex Aquilia*.[4] For Ulpian, the case was not different than the case of damage caused by cattle or a roof tile inflicting damage to somebody. 3

As the *lex Aquilia* was not only directed towards the compensation of losses but also had a penal character,[5] Ulpian probably did not want to punish those who were not able to act according to the law because of their mental incapacity.[6] 4

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1 Domitius Ulpianus, died 223 AD.

2 Only known by his cognomen, 2nd half of the 1st century AD.

3 Cf *B Perrin*, Le caractère subjectif de l'iniuria aquilienne à l'époque classique, in: Studi in onore di Pietro de Francisci, Vol IV (1956) 271, 275 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 110 f; *G MacCormack*, Aquilian Culpa, in: A Watson, Daube Noster (1974) 201, 219; *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 219, 270 ff.

4 The text famously asks 'quae enim in eo culpa sit, cum suae mentis non sit?'.

5 Cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 973 ff.

6 *B Winiger*, La responsabilité aquilienne romaine (1997) 111.

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2. Germany

Bundesgerichtshof (Federal Supreme Court) 25 January 1977, VI ZR 166/74

VersR 1977, 430 = BeckRS 1977, 30383514

Facts

1 The claimant and the second defendant, who were travelling in opposite directions, collided causing slight damage to their cars. Since the second defendant did not immediately stop, the claimant left his car in order to pursue the other car on foot. When crossing the road, he ran into the first defendant's car and was severely injured. The claimant sued both defendants for compensation of his pecuniary and non-pecuniary damage.

Decision

2 The Federal Supreme Court reversed the decision of the lower court for procedural reasons but upheld its substantial findings. The BGH decided that the second accident was still the consequence of the first and, therefore, the second defendant was in principle liable for these consequences – as well as the first defendant. The BGH also upheld the finding of the lower court that the claimant contributed negligently to his own damage. The claimant had argued that, in the first accident, he bumped his head against the door-frame of his car, thereby suffering a contusion which impaired his consciousness so much that he acted without responsibility when he decided to cross the road in order to pursue the second defendant. The BGH agreed with the lower court that the claimant had the burden of proving his impaired consciousness. However, because the claimant failed to prove this, he was held to have been negligent and had to bear 40% of his damage.[1]

Comments

3 A German case where the tortfeasor suffered from a disability (a sudden heart attack) has already been reported above in 9/2 nos 1–4. Here the case concerns a disability of the victim. However, the principles that are applied in both situations are identical.

4 In order to incur liability under the most general norm of German tort law (§ 823 BGB), an action that is governed by the free determination of the actor is required. A mere unintentional natural reaction does not constitute such an action and does not entail liability under § 823 BGB. Also a person who acts in a state that fully impairs

1 The defendants were liable according to the strict liability statute (§ 7 StVG) regardless of fault.

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his/her conscious and reasonable willful acting is not held responsible (§ 827 BGB).[2] Even such a person (if not unconscious in the strict sense) can act willfully and not only by way of an unintentional natural reaction. However, a slight or medium impairment of the state of free determination does not exclude responsibility[3] and it does not reduce the fault standard, which uses the conduct of a reasonable (unimpaired) person in the same circumstances as a yardstick. A state of full impairment can be the consequence of a permanent mental illness or congenital incapacity but also of an incident of a temporary nature, for instance a shock.[4] However, a state of full consciousness is presumed and, in particular where it is claimed that a temporary event occurred, convincing proof is required to rebut this presumption.

3. Austria

Oberster Gerichtshof (Supreme Court) 29 April 2003, 5 Ob 278/02x

ecolex 2003, 298

Facts

In September 1996 the defendant entered into a framework agreement with the claimant on the provision of a mobile telephone connection. For the period from October 1996 to March 1997 the defendant was charged a telephone fee of approximately € 6,550 (88,529 Austrian Schillings). These costs mainly resulted from the consumption of value-added services via the telephone. Because the defendant did not pay the telephone bills, the contractual relationship was dissolved in May 1997. On 27 February 1998 the District Court ordered that the defendant be placed under guardianship concerning all financial matters exceeding standard living requirements. The court stated that the defendant had a mental defect which makes it impossible for him to think and act in a future-oriented manner. 1

2 § 827 BGB: 'Exclusion and limitation of responsibility. Whosoever inflicts loss on another person while in a condition of severely diminished consciousness or a state of pathological disturbance of his mental capacity is not responsible for the loss inflicted. If such person induced a transitory condition of this sort through alcoholic beverages or similar means, he is liable for the loss that he unlawfully causes while in that condition to the same extent as if he had acted negligently; this responsibility does not arise where the condition was induced without his fault.'

3 See also BGH NJW 1970, 1681 (there a slightly mentally impaired person was held to be able to validly conclude easy transactions of daily life).

4 See BGH VersR 1966, 458; also utmost excitement can suffice: see BGH NJW 1958, 266.

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Decision

2 The Supreme Court held that, due to the fact that the defendant was not placed under guardianship until 27 February 1998, the presence of partial legal incapability before that time had to be analysed in a case by case assessment. Therefore, the question was whether the defendant had been able to foresee the significance and consequences of the contractual relationship at the time. According to the findings of the first instance, he was incapable of thinking and acting in a future-oriented manner. Hence, the framework agreement was void due to his lack of legal capacity. The question of whether the defendant had been capable of entering into a contract in the very moment he had made use of the value-added services was therefore no longer of relevance. A potential tortious liability of the defendant was not addressed by the Supreme Court. However, the Court of Appeal pointed out that, due to the partial legal incapacity of the defendant, his liability had to be assessed on the basis of § 1310 ABGB. This provision provides for a comparison of the pecuniary circumstances of the injuring and the injured party. As the claimant was only the recipient of unemployment benefit, it would be inappropriate to hold him liable.

Comments

3 As regards legal capacity, a distinction must be made between contractual capability and capacity for tortious liability. The former is the ability to create rights and obligations through contractual action; the latter is the capacity to become liable for damages due to one's own wrongful conduct. In the case of contractual incapability, a special guardian may be appointed to deal with all or only certain affairs of the ward. However, this has no influence on the capacity for tortious liability; here, the actual mental state in the individual case is decisive.[1]

4 Although the decision at hand mainly deals with the topic of contractual capability, it also shows that exemption from legal responsibility is not only possible on the basis of age and physical disability (cf 8/3 nos 3–7 and 9/3 nos 3–5) but also of mental disorder. Thus, the Appellate Court discussed the issue of the defendant's potential pre-contractual liability or tortious liability under § 1310 ABGB. In general, liability in equity according to § 1310 must be considered if the tortfeasor is in principle legally irresponsible and damages may not be recovered from a supervisor (§ 1309 ABGB). If the comparison of pecuniary circumstances leads to the conclusion that it is more reasonable for the tortfeasor to bear the damage than for the victim, this may substitute the lack of culpability and establish partial or even full liability (cf 8/3 no 6f).[2]

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1 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/20.

2 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 16; *idem*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 312; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1310 no 5.

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4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 23 August 1976
ATF 102 II 226

Facts

Farmer A concluded a contract with architect V selling him 42,000 m² of his land for CHF 720,000 (€ 600,000). Before the execution of the contract, A contested its validity, alleging that it had been concluded under the influence of a heat shock, alcohol and partial invalidity. V insisted on the execution. During the following lawsuit, the authorities declared A incapable and appointed him a legal guardian (*Beirat*). 1

V filed a claim for the repayment of the amounts already paid to A and for damages. 2

The cantonal court declared the contract void (*nichtig*) due to A's incapacity and rejected V's claim. It ordered A, on the basis of unjust enrichment, to refund V (CHF 131,000 ie € 109,000) and to pay him damages of CHF 52,000 (€ 43,000) according to art 54 of the Swiss Code of Obligations (SCO).[1] 3

Decision

The Supreme Court rejected A's claim and confirmed the cantonal decision. 4

According to the Supreme Court, the question is whether, based on the equitableness of art 54 al 1 of the Swiss Code of Obligations (SCO), a non-recognisably incapable (*urteilsunfähige*) person, who has concluded a contract, has to make good a loss caused to the other party. 5

The judges asserted that art 54 SCO,[2] which is part of tort law, is also applicable to breaches of contracts by an incapable person. This rule provides for a causal (ie non fault) liability based on equitableness. The incapable individual is responsible for the dangers his condition represents for his environment. The risk that an incapable person causes damage to third persons is not lower in contract than in tort law. The protection offered by art 54 SCO[3] in tort law is also required in contract law. Consequently, based on equity considerations, a judge has to decide if and to what 6

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1 Article 54 al 1 SCO. On the basis of equitableness, the judge can also order an incapable (*nicht urteilsfähig*) person to repair the caused damage partially or fully.

2 Article 54 SCO:
Liability of persons lacking capacity to consent
[1]On grounds of equity, the court may also order a person who lacks capacity to consent to provide total or partial compensation for the loss or damage he has caused.
[2]A person who has temporarily lost his capacity to consent is liable for any loss or damage caused when in that state unless he can prove that said state arose through no fault of his own.

3 See also art 14 al 3 of the Swiss Civil Code (SCC).

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extent an incapable person has to repair the damage caused (without fault) in tort and in contract.

7 When deciding in equity, a judge has to take into account, among others, the financial situation of the parties. *In casu*, A as an architect was feeling the effects of the (then existing) crisis, while V was the owner of a large farm.

Comments

8 The present decision shows that Swiss law is extremely flexible concerning incapable persons. The general principle is stated in art 16 of the Swiss Civil Code (SCC): a person is considered to be capable except if the person is too young, mentally or psychologically disabled, intoxicated or otherwise incapable.[4] This has an influence on their capacity to act with fault and the logical consequence is that they are not liable for their acts.[5] The legislator wanted to correct this consequence at least partially and for tort cases. Article 54 SCO states that even incapable persons can be obliged to repair the damage caused by them if it is justified in terms of equity.

9 The problem the Supreme Court had to resolve was whether a not recognisably incapable person, who had concluded a void (*nichtig*) contract, had to repair the damage for equity reasons. In other terms, the question was whether art 54 SCO, which belongs to the chapter of tort law, was also applicable in contract. The Supreme Court decided that art 54 SCO also protected those who had entered into a contract.[6] The main argument was that the risks for a third person to be damaged by an incapable person was the same in tort and in contract, and that there was no reason to offer a better protection in one of the two fields.

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4 For more details on the so-called capacity of discernment in Swiss civil law, see 4C.278/1999.

5 On this principle, see mainly art 18 SCC:

Lack of capacity of judgement

A person who is incapable of judgement cannot create legal effect by his or her actions, unless the law provides otherwise.

6 *MA Kessler*, Basler Kommentar OR I, Art 1-529 (6th edn 2015) art 54 no 2; *F Werro*, Commentaire Romand, Code des obligations (CO) I, Art 1-529 (2nd edn 2012) art 54 no 3; *H Deschenaux/PH Steinauer*, Personnes physiques et tutelle (4th edn 2001) 90, no 293. See also the opinion of *H Honsell*, Schweizerisches Haftpflichtrecht (1995) 108 ff.

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5. Greece

Efeteio Thessalonikis (Thessaloniki Court of Appeal) 570/2006

Arm 62 (2008) 600

Facts

A, suffering from a mental disease and more particularly from a paranoid form of schizophrenia due to which she was not aware of the right or wrong of her actions, killed her sister who was the wife of the defendant, using a knife. As far as tort law is concerned, she was not able to perceive the unlawfulness of the homicide and to act according to this perception. She constantly heard voices instructing her to act in a particular way. On the day she committed the homicide, she was in a state of schizophrenia. **1**

Decision

The court held that, in view of A's mental state, fault could not be imputed to her according to the explicit provision of art 915 GCC. As a result, A was exempted from tort liability. **2**

Comments

Where the person causing harm lacks the necessary physical or mental capacity due to age, disability, insanity or the like, the Greek jurisdiction negates fault (arts 915–917 GCC).[1] See also comments in 8/5 no 6 f. **3**

According to art 918 GCC, however, a person who has caused damage but is not liable according to the provisions of arts 915–917 GCC may be condemned by the court, after assessing the position of the parties, to pay reasonable damages if the damage caused cannot be compensated in some other way. **4**

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 4 May 1977

75-14.473, Bull civ II, no 113, D 1978, jur 393, note *Legeais*, RTD civ 1977, 772, obs *Durry*

Facts

Mrs Molly had been hurt when the underground train in which she was travelling came to a sudden halt, because Mr Pecquigney, in a state of madness, had thrown **1**

1 See, among others, *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 512 ff.

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himself in front of the train. She brought a claim against Pecquigney and his insurer. The appellate court awarded her damages and the insurer brought the case before the *Cour de cassation*.

Decision

2 The insurer claimed that the insurance contract only covered Pecquigney for liability arising out of damage caused by his fault (art 1382, now art 1240 *Code civil*), whereas in this case he had been found liable not because of his fault, but on the basis of the special liability regime created by art 489-2 *Code civil*, which states that: 'a person who has caused damage to another when under the influence of a mental disorder nonetheless has the obligation to compensate it'. The *Cour de cassation* turned down the challenge, however, stating that art 489-2 (now art 414-3) did not create a liability distinct from the one mentioned art 1382 (now art 1240). The appellate court had therefore been right in finding that Pecquigney had been at fault and that his insurer should guarantee him.

Comments

3 It was the traditional rule under French law that persons with a mental disability, as well as young children (see 8/6), could not be at fault, because they lacked consciousness of what they did. This meant, however, that persons suffering damage because of the abnormal behaviour of mentally disabled persons could usually not be compensated, at least under the rules of tort law. This situation came to be regarded as unsatisfactory and the legislator introduced a new provision in the *Code civil* in 1968, art 489-2 (this provision has been renumbered art 414-3 since 2007, but its content remains unchanged). Two interpretations of that text were possible. According to the first, it created a new liability regime, distinct from the liability for fault regime, and made people with a mental disorder strictly liable for the damage they caused. According to the second interpretation, art 489-2 (now art 414-3) was to be read in connection with art 1382 (now art 1240) and did not create a new liability regime; rather, it abolished the requirement that the defendant should be aware of his actions and turned fault into a purely 'objective' notion, consisting in abnormal behaviour, regardless of the defendant's awareness of what he was doing.

4 Although the first interpretation was probably more true to the drafters' intention, the *Cour de cassation*, in the present case, adopted the second. It decided that a state of mental disorder did not exclude the defendant's fault. It thus disconnected fault from the defendant's psychical state or ability.

5 This evolution of fault was confirmed seven years later, when the *Cour de cassation* ruled, in the *Lemaire* case, that a child could be at fault, regardless of his being aware of the dangerousness of what he was doing (see 8/6).

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7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 29 November 1984
Pas 1985 I, 399

Facts

A, whom an expert subsequently certified to have been depressed at the time of the harmful act, which rendered him unable to control his own actions, set fire to a building he was (sub-)letting. 1

The trial judge held him liable under contract, regarding the failure to perform his obligation to return the leased asset to the lessor, V. 2

Decision

The Supreme Court stated that the act of a person who, at the moment the act is committed, is in a severe state of mental imbalance rendering him incapable of controlling his actions, cannot be considered to have taken place due to fault on the part of that person and so cannot, as a result, engage contractual liability on his part. 3

Comments

In 1/7 we specified that the harmful act, even if it is in the range of acts which a reasonably prudent person would not do, does not necessarily render the person who did it liable. It is also necessary for the offending act to have been freely and knowingly undertaken. We discussed the accountability condition, which refers to the defendant's capacity to judge the damaging consequences of his acts. Typically, insanity asserted at the time of the tort deprives the defendant of his free will and judgement, such that he/she cannot be held responsible. We can include temporary insanity in the scope of insanity, subject to what has been said relating to the particular care which should be taken by a person who knows he/she suffers from medical problems (see 9/7). 4

The conflict between fault and insanity therefore occurs in respect of the moral element (the capacity of judgement) and not the material aspect of fault. In this sense, it has no impact upon the standard of behaviour which remains that of an ordinarily prudent and diligent person. 5

It therefore follows from the above that the victim of an act committed by a person suffering from insanity cannot claim compensation on the basis of the general liability clause (art 1382 of the Civil Code),[1] save where he/she can show that the act 6

1 The commented decision was given on a contractual matter (failure to perform the lessee's restitution obligation), however the solution would have been identical if it had been a tortious matter.

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was committed in a period of lucidity, as it is evident that the state of insanity or mental imbalance must have existed when the harmful act was carried out.[2]

7 In this context, in order not to leave the victim without recourse, the Act of 16 April 1935 introduced art 1386*bis* into the Civil Code, which applies both to tortious and contractual matters,[3] providing that: 'when a person who is in a state of insanity, severe mental imbalance or mental deficiency rendering him incapable of controlling his actions, causes damage to another, the judge can oblige him to make all or part of the reparations which he/she would be compelled to make if he/she had been in control of his actions'.[4]

8 As far as the field of application of this provision is concerned, case law specifies that it is sufficient that, at the time of the facts in question, a serious reduction in control over acts or a change in behaviour existed, which leads to seriously diminished control.[5] It is obvious that the defendant must not have put himself in that state through his own fault.[6] In this regard, the Supreme Court had the opportunity to specify that temporary loss of consciousness could not be included within the scope of insanity, severe mental imbalance or mental deficiency rendering a person incapable of controlling his actions (see 12/7 nos 1–5).[7]

9 Furthermore, contrary to what we might be tempted to believe after a brief reading of this provision, it does not sanction an 'objective' liability regime, which strays from the requirement of fault. In reality that is still necessary, but only regarding the material element. We are talking about an 'objectively illegal act', namely an act which, if it had been carried out by a person capable of judgement, would have been considered faulty.

10 In addition we note the prerogative which art 1386*bis* allows, namely that the judge can derogate from the principle of complete reparation, para 2 specifying in this respect that he/she 'rules on an equitable basis, taking into account the parties' circumstances and situation',[8] namely, for example, their economic situation or whether they have private insurance.[9]

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2 *RO Dalcq*, Traité de la responsabilité civile, vol 1 (1967) no 2327.

3 *R Kruithof*, De buitencontractuele aansprakelijkheid van en voor geesteszieken, RGAR 1980, 10179.

4 Free translation.

5 See for instance Court of Appeal of Liège, 27 January 1993, JLMB 1993, 1030.

6 *L Cornelis*, Principes du droit belge de la responsabilité extra-contractuelle, vol 1 (1991) 31, no 17.

7 See also Cass, 20 June 1979, Pas 1979 I, 1217.

8 Free translation.

9 *R Kruithof*, De buitencontractuele aansprakelijkheid van en voor geesteszieken, RGAR 1980, 10179.

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9. Italy

Tribunale di Aosta (District Court of Aosta) 22 January 2013

Leggi d'Italia (<http://www.leggiditaliaprofessionale.it/>)

Facts

A guest of a hotel in the Italian Alps refused to leave his room despite the fact that he had been notified that the room was already booked by another person. During his stay, he attacked hotel employees, throwing dishes and other objects at them and destroyed and dirtied the furniture of the room. Only the (late) intervention of the emergency health services ended that situation. The owners of the hotel sued the guest before the *Tribunale di Aosta*, for the compensation of the damage (cleaning and refurbishing costs, damage to their reputation and health damage of the manager, for the stress and shock of the situation). The defendant replied stating that he could not be held liable on the basis of the provision of art 2046 Civil Code, as he suffered from a bipolar syndrome and that, when he was a guest at the hotel, he experienced a pathological episode, which resulted in him losing control completely. 1

Decision

The court affirmed that the defendant was to be considered as 'unable to understand and intend' when he caused the damage because, on the basis of the medical opinion of an expert, when the incident occurred, the defendant was not conscious of his pathological state, which led to him losing his grasp on reality and he was therefore unable to critically judge his actions. This state could not lead to a finding that the defendant had been at fault. Therefore the *Tribunale* stated that the defendant was not liable for the compensation of the damage on the basis of the provisions of art 2046 Civil Code. Nonetheless the same court stated that in that case the second paragraph of art 2047 Civil Code applied, and therefore the defendant was held liable for the payment of equitable compensation of some of the damage he caused, taking into account his personal economic situation (a former member of the Italian Parliament and University professor) and the amount of the damage that the claimants were able to prove. 2

Comments

For comments see 10/9 nos 6–8 below. 3

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Corte di Cassazione (Court of Cassation) 20 June 2008, no 16803

Nuova giur civ comm 2009, 1, 1, 57 with comment by *A Venchiarutti*

Facts

4 Following the death of their son and brother, respectively, who was stabbed to death in his own bar by a mental patient who had been acquitted in criminal proceeding due to his mental condition, the claimants sought compensation of their pecuniary and non-pecuniary damage from the Local Health Unit of the National Health System, which had been treating the patient for his psychiatric disorders or, if the Local Health Unit did not pay the compensation, the payment of equitable compensation from the murderer.

Decision

5 The *Corte di Cassazione* affirmed that the laws providing the rules on the treatment and care of persons suffering mental disorders and illnesses establish that those persons can be treated both at home and in hospitals, and could be restricted to open or closed treatment facilities. However, this restriction of the mentally disturbed could only be temporary because its sole aim is to protect and treat the mentally disturbed, and not to protect the general public against unstable or violent patients. Therefore a Public Health Local Unit of the National Health Service could be held liable for the damage caused by a psychiatric patient on the basis of art 2047 Civil Code, only when the patient is in a hospital.[1] Moreover, the doctors who were in charge of the patient in this case could not be held liable for the damage on the basis of art 2043 Civil Code as the murderer did not show any problematic behaviour in the period before the crime. Therefore it ordered the defendant murderer to pay a limited indemnity of € 2,500.

Comments

6 The general rules provided by arts 2046, 2047 and 2048 of the Civil Code and described in 8/9 nos 1–13 and 9/9 nos 1–3 above also apply to cases of injuries caused by mental patients. Law 180/1978, which shortly afterwards was incorporated into Law 833/1978, greatly changed the approach of Italian legislation to the mentally disabled. While the previous laws presumed that persons suffering from psychiatric diseases were a danger to society and favoured the retention of the patients rather than their medical treatment, the laws since 1978 favour the treatment of psychiatric patients, in the respect of their freedom and dignity. Patients are therefore free to

1 Of the same opinion, Cass 16 June 2005, no 12965, Giust Civ 2006, I, 72; Cass 3 August 2007, no 17066, Mass Giur It 2007.

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choose to be treated by doctors, and only in severe cases can they be restricted in their freedom. In any case, mental patients can only be deprived of their liberty due to compulsory treatment in Italy on a temporary basis.

7 The capacity of a mental patient is ascertained on a case-by-case basis, because a person who was declared incompetent by a court may experience a lucid interval, or may be capable of deciding on a particular course of action, and understand the consequences of his/her acts and omissions. In this case, a person assisted by a guardian or curator may be held liable for damage caused to a third party.[2] If, on the contrary, the mental patient was incompetent at the relevant time, his/her guardian alone shall be liable for damage on the basis of art 2047 Civil Code.

8 This regime has been criticised by some scholars, who pointed outthat art 2046 Civil Code does not properly protect the interests and rights of third parties in cases of damage caused by a person suffering from psychiatric diseases. Similarly, art 2047 on the vicarious liability of guardians is not easily applied, as the laws on the treatment of the mentally disabled do not seem to establish any duty of surveillance of persons working for the psychiatric public services toward their patients, except for the brief period of time during which they undergo compulsory treatment in hospitals.[3] It is therefore not surprising that some scholars have proposed to reform art 2046 Civil Code, stating that, within this framework, it is not reasonable to exempt the naturally incapable from liability for the damage they cause.[4]

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2 *P Cendon*, Il prezzo della follia. Lesione della salute mentale e responsabilità civile (1984); *G Lisella*, Interdizione 'giudiziale' e tutela della persona. Gli effetti dell'incapacità legale (1984); *C Salvi*, La responsabilità civile dell'infermo di mente, in: P Cendon (ed), Un altro diritto per il malato di mente, Esperienze e soggetti della trasformazione (1988) 815; *G Visintini*, Imputabilità e danno cagionato dall'incapace, Nuova giur civ comm 1986, II, 116.

3 *A Venchiarutti*, La responsabilità per danni cagionati dall'infermo di mente, Nuova giur civ 2009, 1, 1, 57, 61; *P Cendon*, La responsabilità dei servizi psichiatrici, in: P Cendon, Persona e danno, vol V (2004) 5031ff; *A Petrelli*, Questioni aperte in tema di responsabilità civile, in: G Ferrando (ed), L'amministrazione di sostegno (2005) 179ff. Cf, however, Cass 16 June 2005, no 12965, Giust Civ 2006, I, 72. Cass 12 April 2005, no 7529, Rep Foro It 2005, voce 'Sanità pubblica', no 398 (affirming the liability of the defendants on the basis of their general duty to take care of the mentally disabled).

4 *P Cendon*, Infermi di mente e altri 'disabili' in una proposta di riforma del codice civile, in: Politica del diritto (1987) 621; *A Venchiarutti*, La responsabilità per danni cagionati dall'infermo di mente, Nuova giur civ 2009, 1, 1, 57, 61.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 5 March 1997

RJ 1997\1650

Facts

1 A, who was of age and lived with his parents, left home armed with the service gun of his father, who was a *guardia civil*. Once outside, he began to shoot those who were there, three children and one adult. The children were killed and the adult suffered injury when trying to overcome him. In criminal proceedings, A was exempted from criminal responsibility, since he suffered from paranoid schizophrenia. In civil proceedings, the parents of the deceased children and the injured adult sued A's parents. The Court of First instance dismissed the claim on the procedural grounds of lack of compulsory joinder of defendants, since A had not been called to process, and found for the defendant parents without going into the merits. On appeal, however, the Court of Appeal reversed the judgment, considering that there was not such a lack of compulsory joinder of defendants, and, going into the merits, also decided in favour of A's parents. The Supreme Court upheld the ruling of the Court of Appeal and dismissed the appeal of the claimants in cassation.

Decision

2 The defendants alleged there was no breach of their legal duty in respect of the incapacitation of their son who was of age and who had been living with them since they found out about his persistent mental abnormalities. However, the parents lacked the sufficient and necessary information to treat their son, and certainly, to submit him to a psychiatric facility for a condition which no one – and certainly not the physician – had told them about. If anyone were liable, it would be the physician, since he neither informed them of the kind of disease that A suffered from, nor advised them on A's admission to such a centre.

Comments

3 This case reflects the more generalised view in legal doctrine and case law. The starting point in this regard is that a person who suffers a sufficiently serious mental disorder lacks capacity to understand and appreciate the nature of his actions, which is needed to allow fault to be attributed and, therefore, liability. Procedurally, this means that he should not even have been called to the proceedings dealing with the damage caused, for which, pursuant to art 1903 CC, only his parents or guardians could be held liable on the basis of a rebuttable presumption of fault. For this to happen, however, the tortfeasor should have been incapacitated. If the subject is not incapacitated, art 229 CC allows an alternative basis for the action insofar as it

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makes liable those obliged to supervise an insane person for the damages resulting from their omission.[1] This was also the approach of the judgment of the Court of First Instance but the Supreme Court eventually confirmed the position of the Court of Appeal, which held that the defendants did not have enough information about the legal procedure and the requirements for treating their son, and accordingly to be in breach of their legal duty. Besides that, in Spanish civil law there is neither subsidiary liability of the incapacitated person in the case of absence or insolvency of the person responsible under art 1903 CC, nor a direct liability based on equitable grounds.

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 30 April 2003

RJ 2003\3739

Facts

A, a *guardia civil* stationed in Ibiza, went to a bar while he was off duty and, after having dinner and consuming several alcoholic drinks, suddenly and without any apparent grounds, fired five shots with the gun he was carrying, which was his service weapon, causing instant death to one person and injuring another. Subsequently, outside the bar, he committed suicide by shooting himself in the head. During the time he was in the police academy, A was diagnosed with a possible schizoid and character disorder. These disorders were not included, however, in the list of exclusions for service in the police force. The widow and children of the deceased sued the public authorities and A's heirs. In both instances, all the defendants were held solidarily liable and in cassation the Supreme Court dismissed the appeal of the defendant public authorities. **4**

Decision

It is clearly established here that this is a case of misuse of a firearm, since there is a disproportionate and unjustifiable conduct of the person who fired the shots. The conduct of the *guardia civil*, with fatal outcome, corresponds with liability for fault as provided by art 1902 CC and fault also extends to public authorities, since they have a duty regarding the supervision and safety of bodies, and members of the State Security, which are always considered to be permanently in service, even when they are free from their regular service. **5**

1 The lack of action of those who are legally required to file the corresponding incapacitation claim has been established as the grounds for the attribution of liability for damage caused by an incapable person who has not been incapacitated (STS 3.8.1984 [RJ 1984\2114]).

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6 The deceased was not in a completely normal situation, since he suffered from irregular behaviour resulting from an atypical mental disorder. This shows that, from the beginning, there was a risk known and authorised by the commanders responsible for the *guardia civil* and, where appropriate, by the competent authorities of the Ministry of Interior, who did not restrict him from carrying firearms at all by taking the appropriate measures, not even outside official service. That is, the actor was virtually authorised to carry the gun he used to commit the acts in his time off, and thus, given his deviant personality, the possibility of improper or abusive use was not excluded at any time, which is what eventually happened.

Comments

7 This case is an exception to the usual practice – illustrated by the case examined before – since it holds that a person who could not be subject to criminal responsibility on the grounds of mental disability is nevertheless liable in tort. This is consistent with a special rule, applied in the so-called cases of 'civil liability resulting from a crime or misdemeanour', and laid down by the CP. This rule is totally different from the general rule applicable in civil matters: according to art 118.1 CP, a person suffering from an abnormality or mental disability, who commits a crime or misdemeanour, will be liable in tort, without further prejudice to the possible legal liability of his/her legal or *de facto* guardians. Note that Spanish penal law entails the direct liability (in tort) of an insane person although he/she is released from criminal responsibility, and there is no need to assess whether or not civil fault existed.[2]

11. Portugal

Tribunal da Relação de Coimbra (Coimbra Court of Appeal) 24 September 2008 (Belmiro Andrade)

Facts

1 A, who suffered from a psychiatric abnormality, left a candle burning on top of a table in the living-room of the house where she lived. The candle fell and a fire broke out in her absence. A lived alone and nobody was responsible for her supervision. The fire spread to the adjacent residence, producing serious damage. The owner of that house, V, sought compensation.

2 See STS Criminal Section, 17.7.2008 (RJ 2008\5159) and 25.4.2011 (RJ 2011\3484). *F Yáñez Vivero*, Culpa civil y daño extracontractual originado por persona incapaz. Un análisis en el marco del Derecho europeo de daños (2009) 119 f.

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Decision

The court decided that A, not being imputable, cannot, in principle, be considered liable for the damage. However, art 489 of the Civil Code allows such individuals to be held liable, for reasons of equity, in damages for the harm caused, when it is not possible to obtain them from people obligated to supervise, and if the minimum standard of living is not affected as a result. This right to damages can have its foundation not in unlawfulness and fault, but in the necessity to offer protection to the harmed party. As nobody was obliged to supervise A, the court had to evaluate if, in the case at hand, the compensation calculated on the basis of art 489 of the Civil Code, that is compensation *ex aequo et bono*, should apply. Taking into consideration that the plaintiff lived in a situation of economic deprivation, the court decided that this would be the case and that, therefore, A should compensate V. 2

Comments

Imputability is one of the requisites of fault,[1] and can be described as the natural capacity to predict the consequences of one's actions and to adjust one's behaviour accordingly.[2] Therefore, a person is considered not imputable if he cannot predict the consequences of his actions and make decisions accordingly[3] (art 488(1) of the Civil Code). The lack of imputability is legally determined for persons interdicted due to psychiatric abnormality (art 488(2) of the Civil Code). In this case, the defendant suffered from psychiatric abnormality. As the presumption of lack of imputability was not rebutted, A was not to be considered at fault and, therefore, was not held liable pursuant to art 483 of the Civil Code. 3

Consequently, if the plaintiff wanted to be compensated, she would need to base her claim on the liability of the person obliged to supervise A (pursuant to the terms of art 491 of the Civil Code),[4] but in this case there was no one obliged to do so. A lived alone, was left to herself, and for this reason the court, taking into consideration the possibility of V – who had economic difficulties – being left uncompensated, decided that, for reason of *fairness*, A would have to be ordered to pay compensation to B pursuant to the terms of art 489.[5] This article expressly states that this equity-based compensation can be ordered when the person obliged to super- 4

1 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580; See *A Mafalda Barbosa*, O papel da imputabilidade no quadro da responsabilidade delitual – breve apontamento, Boletim da Faculdade de Direito, no 82 (2006) 501.

2 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 563.

3 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 580.

4 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 564.

5 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 581.

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vise is not liable. The Supreme Court of Justice decided, in previous cases,[6] that this shall be extended to cases where no one is obliged to supervise the tortfeasor (as in this case).

5 This compensation is, for that reason, a subsidiary form of liability that can only be applied when it does not endanger the minimum standard of living of anyone to whom fault cannot be imputed.[7] It is worth noting that this compensation is not mandatory for the court to award, as it will only be awarded when fairness so demands it.[8] This type of liability is not strict; it is to be applied as a liability for unlawful acts based on fault ('fictional' fault), otherwise the situation to which the person to whom fault cannot be imputed would be more serious than that to which he would be submitted if he were imputable, and that would be contradictory to the intention of the legislator.[9] The payment of this compensation cannot hamper with A's right to subsistence. The relevant period of time for the assessment of the A's imputability is the time when the harmful event took place, whereas the relevant period of time for the assessment of his economic situation (whether or not his right to subsistence is hampered by the payment of compensation) is the final moment of the court's decision.[10]

12. England and Wales

Morriss v Marsden, High Court (Queen's Bench Division) 25 March 1952

[1952] 1 All ER 925

Facts

1 The action was one for damages for assault and battery against the first defendant, a mentally disabled man who violently attacked the claimant, and for negligence and breach of duty against the second defendant, his mother. The mother had discharged her son and undertook to be responsible for his proper care and treatment.

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6 See Acórdão do Supremo Tribunal de Justiça, de 20/04/1994, Colectânea de Jurisprudência, Acórdãos do Supremo Tribunal de Justiça, ano II, tomo II, 190 ff.

7 Ibid.

8 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 490.

9 *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 564.

10 *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 565; *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 106.

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Decision

The court found the first defendant liable and his defence of insanity did not stand. **2** Stable J accepted that the latter was 'a catatomic [sic] schizophrenic and a certifiable lunatic who knew the nature and quality of his act, but whose incapacity of reason arising from the disease of his mind was of so grave a character that he did not know that what he was doing was wrong'.[1] He came to the conclusion that the basis of liability depends, not on the injury to the victim, but on the culpability of the wrongdoer; a capacity to know the nature and the quality of the act was sufficient. It was thus immaterial that 'the mind directing the hand that did the wrong was diseased'.[2] On the other hand 'if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable. In the same way, if a sleepwalker inadvertently, without intention or without carelessness, broke a valuable vase, that would not be actionable.'[3] On the facts, he found that the defendant was not in the above state at the time of the attack. As to the second defendant, Sable J concluded that there was no evidence to support the action.

Comments

The authorities on this subject are few.[4] One who has a mental disability is liable for **3** his torts (even if he does not know that what he is doing is wrong) unless his disability is of such a grave degree that he does not know what he is doing. In that case, his mental disability will negate the intention that is a prerequisite of particular torts. For causes of action where intent is established by the physical act in question (eg trespass), the disability is unlikely to relieve the defendant of liability unless it can be proved that it was so severe as to deprive him of deliberate choice.[5] Such a defendant may also be held to be contributorily negligent such as to reduce another person's liability.[6] Moreover, a finding that the disabled person's mental state would absolve him from responsibility in a criminal charge does not mean he would be equally absolved in a civil court.[7]

1 [1952] 1 All ER 925, 926.

2 [1952] 1 All ER 925, 928.

3 [1952] 1 All ER 925, 927.

4 For a review and discussion, see *J Goudkamp*, Tort Law Defences (2013) 101–103, 166–184.

5 *A Dugdale/M Jones* (eds), Clerk & Lindsell on Torts (20th edn 2013) 5–59 and the case mentioned therein.

6 *Widdowson v Newgate Meat Corporation* [1998] PIQR P138.

7 *Morriss v Marsden* [1952] 1 All ER 925, 927 per Stable J.

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14. Ireland

Donohue v Coyle, Circuit Court, 28 November 1954

[1953–4] Ir Jur Rep 30

Facts

1 The defendant attacked and injured the plaintiff, while suffering from a mental illness. He admitted remembering some details of the attack, but claimed that he had no genuine intention of behaving wrongfully.

Decision

2 Judge Sheehy, in the IECC held that the defendant was liable; knowledge that what he was doing was wrongful was not required; knowledge of the nature and quality of the act was sufficient.[1]

Comments

3 Like *O'Brien v McNamee* (discussed in 8/14 no 4), this proceeds on the assumption that trespass is actionable once the defendant is acting voluntarily; the same approach would be applicable to strict liability torts, but there are no cases. There is a lack of authority in respect of cases requiring intent or negligence also, but it is generally accepted that some allowance would have to be made for the defendant's mental condition (in cases of contributory negligence, it would be the plaintiff's mental condition), though there is no consensus on what level of allowance should be made.[2]

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1 *Morris v Marsden* [1952] 1 All ER 925, followed. The judgment in *Coyle* is a mere two sentences; the result is criticised by *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 40.45.

2 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) §§ 40.38 ff (they note that options include making no allowance, following the *Donoghue* and *Morris* approach, applying criminal insanity principles or following the LRC recommendations; no view is expressed on which approach is best, though more space is devoted to the LRC recommendations); *E Quill*, Torts in Ireland (4th edn 2014) 488 ff (the author also sketches some options without expressing a preference); *Law Reform Commission*, Report on the Liability in Tort of Mentally Disabled Persons (1985) (LRC 18–1985). The report suggests a definition of voluntariness based on a substantial lack of capacity to act freely; on the question of departure from the objective standard for negligence, a complex set of proposals is made, focusing on serious disability precluding the attainment of ordinary care.

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15. Malta

Ronald Steele on behalf of the Air Ministry v Joseph H Xuereb on behalf of another (Civil Court, First Hall – Prim'Awla tal-Qorti Ċivili) 24 June 1950

Collected Judgments, Vol XXXIV, part II, 590

Facts

In the course of his employment as an accounts clerk with the plaintiff, the defendant falsified financial records and misappropriated money belonging to the plaintiff. At the time of his employment the defendant was civilly interdicted for 'prodigality'.[1] The plaintiff sued for the recovery of the money; the defendant pleaded that he suffered from prodigality as a result of a mental condition and therefore, in terms of art 1035 of the Civil Code, he was not bound to make good any damage caused by him. 1

Decision

Article 1035 exempts from liability 'persons with a mental disorder or other condition, which renders them incapable of managing their own affairs, children under nine years of age, and, unless it is proved that they have acted with a mischievous discretion, children who have not attained the age of 14 years'; persons interdicted are not included in this list. Only those who are incapable of malice because they lack the use of reason are exempt from liability. By falsifying financial records, the defendant showed amply that he is capable of malice since he acted with fraudulent intent. The defendant's plea was therefore rejected. 2

Comments

The test for mental disability does not necessarily depend on the formal status of the defendant as interdicted or otherwise, although possibly interdiction may crease a rebuttable presumption. Likewise, not any form of medically certified mental disability is a defence. The degree of disability and its effect on the subject must be taken into account, considering also the nature of the damaging act. In the present case, the defendant's act in falsifying financial records showed a relatively high level of ability although as a prodigal his inhibitions in performing the wrongful act were presumably lower. Since lack of 'mischievous discretion' is an element of the 3

1 Civil interdiction (as distinct from criminal interdiction, which is a form of punishment) is a measure for the protection of the interdicted person. Persons who, because of a mental disorder or other condition which renders them incapable of managing their own affairs, or who are insane or prodigal, are interdicted by court decree cannot perform acts of civil life except through a curator.

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defence of mental incapacity, it would appear that the defence is less likely to succeed where the harm is caused intentionally (as in the present case) than when it is caused through negligence.

16. Denmark

Vestre Landsret (Western Court of Appeal) 24 October 2007

U 2008.322 V

Facts

1 A was 24 years old and suffering from Down's Syndrome. His cognitive development equalled that of a three-four-year-old child. The City Court of Esbjerg had found A guilty of a severe degree of indecent exposure and violence towards a five-year-old boy, V. As A was unable to understand the consequences of his actions, he had been sentenced to psychiatric treatment and institutionalisation rather than imprisonment. Further, A had been found liable to pay approx € 2,500 to V in compensation for hardship. A appealed the ruling as regards the compensation, claiming that, as he had the mental capacity of a three-four-year-old, he should be treated as a three-four-year-old also in the eyes of tort law rules (leading to him not being held liable in tort, see the comments regarding U 1963.303 H under 8/6 no 3), alternatively that the compensation should be reduced under the Damages Act sec 24b, subsec 2, according to which courts may reduce the damages payable by persons with a mental disability or insanity, based on a general evaluation of the circumstances as such.

Decision

2 The Western Court of Appeal rejected A's argument and upheld the ruling of the City Court of Esbjerg in its entirety. Consequently, considering in particular that V had been subjected to a severe degree of indecent exposure, which included having an item inserted into his anus, and that V had been removed from the playground by force by A, whom he did not know, A was liable to pay compensation to V for hardship. There was no reason to reduce the compensation under the Damages Act sec 24b.

Comments

3 It is a basic principle of Danish tort law that persons who are less capable than others due to eg disability, insanity or age are liable for their actions to the same extent and according to the same rules that apply to others. This follows directly from the Damages Act sec 24b, subsec 1, 1st sentence. Allowances as to the assessment of whether an action is negligent are made for young children (as seen above in 8/16)

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but the disabled, insane or elderly have to adhere to the same rules in society as others do and are subject to the same scrutiny. As a point of departure, a tortfeasor carries the burden of his/her own disadvantage – not the injured party. Summing up, the standard when evaluating the liability of disabled persons is mainly objective and the object of comparison is a healthy person. However, according to the Damages Act sec 24b, subsec 1, 2nd sentence, there is a possibility to reduce liability in financial terms if this is deemed reasonable based on a balancing of interests and considering 'the person's state of mind, the nature of the action or any other circumstances, including in particular the ability of the person who caused the damage or injury to carry the loss compared with the ability of the person who has suffered the injury or whose property has been damaged and the prospects of having the loss covered by others'. The provision is applied restrictively by the courts. As per the wording, the focus of the provision is particularly on the ability of the tortfeasor and the injured party respectively to carry the loss and the possibility to have the loss covered by third parties; in particular insurers. Thus, the provision should be seen as a reflection of the meta-legal consideration that a risk should be borne by the party who is best equipped to shoulder it.[1] Thus, the approach is still mainly objective, even if under the provision, regard may also be had to the person's state of mind. Considering that A had violated a small child, the balancing of interests was in favour of V who was awarded full compensation for hardship.

Vestre Landsret (Western Court of Appeal) 21 May 2010
FED 2011.57 V

Facts

V had left his van with the keys in the ignition. A stole it and subsequently crashed it. The van was considered a total loss. A had suffered from a brain tumor and the tumor and the operation to remove it had left A with a brain injury causing him to be acquitted of penal liability due to insanity. The question remained, however, of the extent of A's tortious liability. The question was particularly to the point for the parties as both A's liability insurer and V's car insurer had refused to pay for the loss incurred in connection with the crashing of the car. **4**

Decision

The City Court of Sønderborg found that A had been *non compos mentis* at the time of the act. Consequently, he was covered by the wording of the Damages Act **5**

1 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 49.

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sec 24b. However, considering that A had stolen the vehicle and that A had not proven to be without means to pay the damage to the van, A's liability was not reduced under sec 24b, subsec 2. On appeal the Western Court of Appeal upheld the ruling.

Comments

6 As mentioned above, it follows directly from the Damages Act sec 24b, subsec 1, 1st sentence that persons who for some reason are *non compos mentis* are liable under tort law rules to the same extent as persons of sound mind. However, according to the Damages Act sec 24b, subsec 1, 2nd sentence, the courts may reduce the liability if doing so is reasonable considering all the circumstances of the case, see further above regarding the comments under U 2008.322 V in 10/16 no 3. As neither V's nor A's insurer wanted to pay for the loss, the court had to choose which of the two would ultimately shoulder the loss. The court relied on the main rule and refused to reduce the compensation. As a starting point, it is the insane person, and not his/her victim, who bears the risk connected with the insane person's actions.

Vestre Landsret (Western Court of Appeal) 8 April 2014

U 2014.2197 V

Facts

7 A was sailing his pleasure boat on a summer evening. Suddenly he noticed water in the bottom of the boat. A tried to pump out the water with the pump in his boat but it did not seem sufficient. A therefore called the emergency services and requested assistance to pump the water out of his boat. The emergency services considered that A might be in immediate danger and sent a helicopter belonging to the Coast Guard, V, to assist A. Upon arriving at the scene it turned out that the water in the boat was caused by a leak in the vessel's water tank and consequently that the boat had not been leaking. A was a manic depressive and it turned out that he was in a severe manic state at the time of the incident; indeed A was admitted to the restricted section of a psychiatric hospital immediately after the event. The Coast Guard sued A claiming that A should cover the costs of the rescue mission (approx € 21,700) as it had been unnecessary. It was not disputed between the parties that A's (over-)reactions were due to his manic state.

Decision

8 The Western Court of Appeal stressed that, under the Damages Act sec 24b, subsec 1, 1st sentence, even if A was *non compos mentis*, his actions should be judged by the same yardstick as those of people of sound mind and, consequently, that he

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was liable in tort towards the Coast Guard as he should have investigated the source of the water leak before calling the emergency services. Having evaluated the specific elements of the Coast Guard's claim, the court found that A should not be liable for the salaries of the rescue party as these were not extra costs. That notwithstanding the court estimated that the loss amounted to approx € 13,400, for which A was liable. However, considering that A had been in a severely manic state, that no actual harm apart from extra costs had followed from A's actions, that the overall efficiency of the Coast Guard had not been weakened during the incident and that A was not working but on benefits due to his illness, and that the Coast Guard was better suited to carry the financial loss, the majority of the Court of Appeal (ie two judges) found that the compensation due from A should be reduced to nil and A was acquitted. The remaining judge also supported an acquittal as he found that A had not been negligent in failing to investigate the source of the water before alarming the emergency services.

Comments

The case provides a very clear example of the two-step evaluation of liability for **9** torts committed by persons who are not of sound mind under Danish law. The starting point is a strictly objective test according to which the tortfeasor's actions are compared to the actions that one should expect of a person of sound mind under similar circumstances. If the actions would be regarded as negligent, were they committed by a person of sound mind, they are also negligent when committed by persons who are *non compos mentis*. However, the liability may be reduced or completely extinguished if this is seen as reasonable considering 'the person's state of mind, the nature of the action or any other circumstances, including in particular the ability of the person who caused the damage or injury to carry the loss compared with the ability of the person who has suffered the injury or whose property has been damaged and the prospects of having the loss covered by others'.[2] In the case before the court, it was the tax-financed Coast Guard which had incurred unnecessary expenses. Considering this as well as the limited extent of A's negligence and that A was not earning, A's liability was extinguished altogether.

2 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 49.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 8 February 2005
Rt 2005, 104

Facts

1 A psychotic man stabbed a victim several times in his face and in his neck. The injuries were serious, but the victim was quickly brought to hospital for treatment, and survived. The victim claimed compensation for non-pecuniary loss from the attacker.

Decision

2 The question for the court was whether the tortfeasor could be liable for non-pecuniary loss under the head of damages called *oppreisning* (pain and suffering), under skl § 3-5, in spite of his psychotic state of mind. Skl § 3-5 (1) states that: 'A person who intentionally or by gross negligence: (a) injures any person; or (b) is guilty of an offence or misconduct as mentioned in § 3-3 may, regardless of whether compensation is paid for loss of amenities pursuant to § 3-2, be ordered to pay the victim (in the form of a lump sum) the amount the court finds reasonable as compensation for non-pecuniary loss.'

3 Pursuant to skl § 1-3, the general rule is, as mentioned above, that the mentally disabled, persons who lack mental capacity due to physical weakness or drugs or disturbed persons are liable to compensate the damage or injury caused by their actions, provided that such liability is considered reasonable. The court must take into account the tortfeasor's conduct and financial means and possibly put weight on other circumstances. The principle question was whether the requirement in § 3-5 – that compensation for pain and suffering (non-pecuniary loss) must be based on personal guilt – was an obstacle to ordering mentally disabled people to pay compensation. The court debated different statements in the preparatory works shedding light on the question. The court found that a tortfeasor might be liable for compensation for *oppreisning* even though the damaging act was motivated by the psychotic state of mind as long as he knew to a certain extent what he was doing. The court also put weight on the fact that the tortfeasor knew that he had repeatedly stabbed another human being. The fact that he was psychotic resulted in a reduction of the amount of damages.

Comments

4 The case shows the pragmatic attitude of the Norwegian Supreme Court. Although the principle that a psychotic perpetrator may not be punished according to the same rules that apply to other individuals, the mentally disabled must, to a certain

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extent, pay compensation for the specific harm related to pain and suffering to victims of personal injury. This is also the case when the compensation to some extent is motivated on punitive grounds. The reason for this solution is probably that compensation for pain and suffering is in accordance with the general view that justice must be seen to be done in society. Over the last 25 years the opinion has shifted from the idea that *punishing* is the main motivation for compensating pain and suffering, to the idea that non-pecuniary loss can also fulfill the function of restitution of immaterial damage. Hence the Supreme Court now openly motivates its decisions by pointing to the goal of compensating the victim, even though the preparatory works of the statutory provision in skl § 3-5 does not mention compensation as a reason for the enactment. It is interesting to note that the reasoning was repeated and even more clearly articulated in a judgment of the Supreme Court in 2010.[1] The psychotic man in this case had murdered one person and his next of kin claimed compensation for pain and suffering. One slight difference is that the court put more weight on the consideration that compensation pursuant to skl § 3-5 was intended as a punishment and an articulation of society's disapproval of the criminal act. The compensation to each next of kin was reduced to 10% due to the tortfeasor's financial situation which persisted on a long-term basis. The court stated, nevertheless, that the reduction would have no effect for the victims, as they were entitled to compensation from the state fund of compensation to victims of violence and abuse.[2] The damages would, however, have been reduced if the state had exercised its right to claim recourse from the tortfeasor.

18. Sweden

Högsta domstolen (Supreme Court) 11 April 2001

NJA 2001, 234

Facts

A 12-year-old mentally handicapped boy was playing indoors with matches; he started a fire by kindling flammable material under a writing desk. In an insurance case, the issue of whether the boy had been grossly negligent arose The court had to answer the legal question if the boy could be excused on subjective grounds or if the evaluation should be objective. **1**

1 Rt 2010, 1203.

2 Cf the Norwegian Act on Compensation for Violent Criminal Offences (*Voldsoffererstatningsloven*, 20 April 2001 no 13).

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Decision

2 The court found that, when evaluating the *culpa* rule in a case such as this, one should not take into account subjective factors such as the boy's age and serious mental disability. If this objective method were used, the court stressed that there would be more cases leading to liability. Nevertheless, the court stated that this objective method could be seen as less intrusive to the child personally, than the subjective method.

Comments

3 Due to the procedural circumstances, this was the only message from the court. However, the implications are clear (ie in this case the liability insurer had to cover the damage, although the boy was so mentally retarded that he had no ability to recognise the risk of fire). The Tort Liability Act ch 2, sec 5 deals with mental disability in the same way as ch 2, sec 4 deals with children's liability;[1] an objective risk evaluation, then the reasonableness test is performed, and if the person is covered by liability insurance, liability is regarded as reasonable.[2] Thus, with this objective method, the liability issue has no moralising or stigmatising undertones, ie no subjective individual evaluation of the tortfeasor and why he is 'to blame', etc.

19. Finland

Korkein oikeus (Supreme Court) KKO 1995:125, R94/558, 29.6.1995/2596

<http://www.finlex.fi>

Facts

1 The defendant, who was 29 years old, but whose mental age was that of a six/seven-year-old, due to a congenital chromosomal disorder (Down's syndrome), had put a burning cigarette into a litter bin. The rubbish in the bin subsequently ignited and spread to an adjacent kiosk causing it to burn down. The insurance company that had compensated the kiosk owner for the damage consequently claimed compensation from the tortfeasor.

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1 Tort Liability Act ch 2, sec 5 reads: 'Anyone who in the cases provided for in [the previous paragraphs concerning the *culpa* rule] causes damage while under the influence of a serious mental disorder, or another mental disorder which is not self-inflicted and temporary, shall pay compensation to the extent that this is reasonable in view of his state of mind, the nature of the act, current liability insurance and other economic conditions and specific circumstances.'

2 *B Bengtsson/E Strömbäck*, Skadeståndslagen (5th edn 2014) 83 ff and *J Hellner/M Radetzki*, Skadeståndsrätt (8th edn 2010) 270 f.

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Decision

The Supreme Court decided that the tortfeasor was not only liable but had also acted out of gross negligence, because he had performed the same act once before. All this despite the fact that the defendant's estimated IQ was equivalent to that of a six or seven-year-old. However, the crucial point was that the tortfeasor had also been warned many times before about setting fire to litter bins. Consequently, he understood how dangerous the action was. The tortfeasor was thus ordered to pay an adjusted sum of FIM 25,000 (approx € 4,205) to compensate for the damage; the total damage amounted to FIM 500,448 (approx € 84,169) (split decision 3-2). The reason for the adjustment was the tortfeasor's mental disability. **2**

Comments

According to ch 2, sec 3 of TLA an insane, retarded or mentally disturbed person shall be liable for damages for injury or damage that he/she has caused to an amount that is deemed reasonable in view of his/her condition, the nature of the act, the financial status of the person causing the injury or damage and the person suffering the same, and the other circumstances. However, a temporary, self-inflicted mental disturbance of the person causing the injury or damage shall not in itself be deemed a reason for reducing his/her liability for damages. The last sentence means that, for example, self-induced intoxication is not a reason to adjust damages. **3**

In the case at hand the defendant was guilty of negligently lighting the fire, but the lower courts did not convict him of a criminal offence on the grounds of diminished responsibility. A criminal evaluation of the case was not considered at the Supreme Court. However, all instances ordered the tortfeasor to pay compensation, which indicates that criminal and tort law responsibilities are evaluated differently. **4**

20. Estonia

Tallinna Ringkonnakohus (Tallinn Circuit Court) 5 May 2010
Civil Matter No 2-07-35047

Facts

The plaintiffs and the defendant were living in supported accommodation for adults with a mental disability due to their mental health condition. The plaintiffs had accounts with Hansapank and entered into Internet bank agreements in 2002. In the summer of 2002, the defendant used the bank cards and PIN codes of the plaintiffs and transferred money to a bank account of a third person from their accounts. The third person had allowed the defendant to use his bank account and € 511 was deposited in his bank account from plaintiff I, € 648 from plaintiff II, and € 626 from **1**

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plaintiff III. The person withdrew these amounts from an ATM and gave the money to the defendant. It was discovered in June of the same year that the account balances of the plaintiffs were lower than they should have been. The plaintiffs requested the payment of the above-mentioned amounts from the defendant.

2 The defendant suffers from a learning disability in the form of mild intellectual disability that prevents him from fully comprehending the implications of his actions or being able to control them (proven by a forensic psychiatric examination report). The report indicated that the defendant suffered a birth trauma with the result that his mental and physical condition was lower than others of his age. The defendant had restricted active legal capacity and a need for guardianship. The county court satisfied the claim under § 1043 of LOA.

Decision

3 The circuit court did not change the decision of the county court. The circuit court stated that, in accordance with the definition of fault capacity as regulated by § 1052 (2) of LOA, a person's ability to understand the unlawfulness of his/her act must be assessed. Capacity for fault must be assessed separately from active legal capacity, which means that a person with restricted active legal capacity within the meaning of § 13 (1) of the General Part of the Civil Code Act, does not always have to be non-capable of fault. In this case, the court rejected the defendant's claim that he did not understand that, when he transferred the money from the plaintiffs' accounts, this was unlawful. The court found that the facts of the case and the way the act was performed by the defendant indicate sufficient intellectual capability to realise that taking someone else's money is unlawful.

Comments

4 § 1052 (2) sent 1 of LOA provides that a person shall not be liable for damage caused by himself/herself if he/she caused the damage in such a condition that he/she could not understand the meaning of or control his/her acts. Such a condition means that the person is subjectively incapable of acting with fault. Non-capacity of fault generally rules out the person's liability under general delictual liability (LOA § 1043 ff), but not under strict liability (LOA § 1056 ff) and product liability (LOA § 1061 ff) since the fault of the tortfeasor is not a precondition for liability in these forms of liability. A person lacking fault capacity may also be liable under so-called equitable liability (LOA § 1052 (3))[1]. For damage caused by a person non-capable of

1 LOA § 1052 (3) provides: 'A person who, pursuant to subsections (1) or (2) of this section, is not liable for damage shall nevertheless be liable for damage caused by himself or herself if it would be unjustified with regard to the victim to release the person from liability considering the tortfeasor's

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fault in the meaning of § 1052 (2) sent 1, his/her guardian (LOA § 1053 (5)) is liable and in the absence of a guardian, the local government as the guardianship authority.[2]

In deciding on fault capacity, an assessment must be made as to whether the mental state of the person enabled him/her to understand the meaning of his/her acts and to direct those acts. In this case, the court found that, regardless of the defendant's state of mind, he had sufficient intellectual capacity to realise that taking someone else's money is not allowed. It has to be emphasised that the circuit court reached this decision regardless of the fact that an expert evaluation had verified that the defendant was unable to fully comprehend the implications of his acts or to direct them. **5**

It should also be mentioned that a person who is not freed from liability under § 1052 (2) sent 1 of LOA (eg for the reason that his mental health condition is not serious enough to be deemed non-capable of fault), can still escape liability under § 1050 (2) of LOA which obliges a court to consider the situation, age, education, knowledge, abilities and other personal characteristics of the defendant when deciding on his/her negligence. **6**

21. Latvia

Rīgas pilsētas Ziemeļu rajona tiesa (The Northern District Court of Riga) No C32311812, 20 June 2013

Unpublished

Facts

The defendant drove his car and collided with two other vehicles and fled the scene of the accident. Traffic police identified him, and learned that, at the time of the accident, he was under the influence of intoxicating substances. The owners of the other two cars involved in the traffic accident received an insurance indemnity for losses, in accordance with art 31 of the Compulsory Civil Liability Insurance of Owners of Motor Vehicles Law. The insured thereby subrogated the claims for damages and brought a recourse action against the defendant, indicating that, in accordance **1**

age, state of development and mental state, the type of act, the financial situation of the persons concerned, including existing insurance or insurance which such persons could normally be presumed to have, and also other circumstances.'

2 LOA § 1053 (5) sent 1 provides: 'The guardian of a person with restricted active legal capacity who has been placed under guardianship due to mental disability shall be liable for damage unlawfully caused by the person to another person, unless the guardian proves that he/she has done everything which could be reasonably expected in order to prevent causing damage.'

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with art 41(1) of the above Law, the insurer is entitled to bring such action against the person who caused the road traffic accident if the person was under the influence of drugs, psychotropic or other intoxicating substances, as well as if the person fled the scene of the accident.

2 It was pointed out that the defendant was suffering from a mental health disorder at the time of the accident which, in accordance with art 1637 of the CLL, constitutes a basis for exemption from liability. This article stipulates that children up to the age of seven, as well as people with mental or other health problems who have not been able to understand and control their conduct, are not liable for the violation of another person's rights. The day after the accident, the defendant was once again admitted to a mental health clinic due to personality and behavioural disorders.

Decision

3 Having reviewed all the evidence and arguments presented by the parties, the court satisfied the claim. The decision acknowledged that the defendant had already been admitted to a mental health institution before the accident, then again – the day after the traffic accident. There was no evidence presented supporting that the defendant had been prescribed medicine suitable for the defendant's mental health condition that contained any psychotropic substances. The court concluded that, although from the case materials it was shown that the defendant has a mental health disorder, due to the use of psychotropic substances, the defendant himself caused his inability to avoid the accident. The court indicated that mental disorders per se do not exempt an individual from liability if the person aggravated his condition intentionally or contributed thereto by using intoxicating substances.

Comments

4 In some cases a person's legal capacity may be reduced due to a mental disorder and a person charged with duties of supervision may be appointed by a court decision. This is subject to detailed procedural rules under sec 33 of the Civil Procedure Law.

5 The decision confirms the interpretation of art 1780 of the CLL that generally the liability of a person with a mental disorder for the damage caused by him/her is not excluded completely. If a person charged with duties of supervising such persons and preventing damage to third parties acts negligently, the former will be liable for such damage and the person with the mental disorder would be liable only insofar as the person charged with the supervision duty is not able to compensate the damage.

6 The article in question was amended on 29 November 2012 rephrasing art 1780 of the CLL and replacing the term 'mentally ill person' with 'person with mental dis-

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order'. Further art 1780 of the CLL now provides that a person with a mental disorder who cannot understand the nature of his/her conduct or cannot control it or a capable unconscious person or a capable person who could not understand the nature of the conduct or could not control it, is liable for the damage to a limited extent. The extent of the liability is limited by the amount required to cover living expenses. This limit does not depend on the misconduct and is not affected by the degree or form of misconduct, but rather serves to protect the person with limited capabilities providing something akin to social protection rather than being a reflection on the person's conduct. The conduct of the mentally disabled person does not create a basis for liability if general defences are available that exclude general civil liability, ie a mentally disabled person would not be held liable for damage that a reasonable person acting in the same way in the given set of circumstances would not be liable.

22. Lithuania

SP v RL, the Republic of Lithuania and Vilnius City Municipality, 13 February 2013

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) Civil Case No 2A-18/2013; <http://www.apeliacinis.lt>

Facts

The facts of this case are set out above (3d/22 nos 7–10). Additionally it may be stated that the plaintiff filed a claim for compensation for pecuniary and non-pecuniary damage against the defendant, RL, even though he was mentally incompetent at the time of his actions. The defendant argued that he was not liable for the damage under art 6.268(1) CC. **1**

The court of first instance in essence granted the claim and awarded LTL 4,000 (€ 1,158) in pecuniary and LTL 150,000 (€ 43,443) in non-pecuniary damages from the mentally incompetent RL on the basis of art 6.268(2) CC establishing liability on equity grounds. **2**

Decision

The Court of Appeal essentially agreed with the decision of the district court. However, the court disagreed with the court of first instance on the amount of compensation and reduced the award of non-pecuniary damages to LTL 15,000 (€ 4,344). As the defendant RL died during the trial, the damages were awarded from his inheritor, the state. According to the Court of Appeal, the court of first instance erred because it did not take into account the poor financial status of the tortfeasor (only LTL 20,182 (€ 5,845) of his savings were inherited by the state) and the financial status of the plaintiff. **3**

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Comments

4 Article 6.268(1) CC provides that a person who was mentally incompetent at the time of conduct causing legally relevant damage is not to be held liable.[1] However, according to art 6.268(1) CC, a person will not be exempted from liability if he/she inflicted the state of incapacity upon himself/herself due to the use of alcoholic drinks, narcotic or psychotropic substances, or in any other way. Article 6.278(1) CC provides for the liability of the guardian of a mentally incompetent person who was officially declared legally incapable before the commission of the tort. According to art 6.278(1) CC, the guardian will be liable for his/her fault, which is presumed according to the art 6.248(1) CC and art 6.278(1) CC.[2]

5 The annotated case follows the statutory regulation on the exceptional liability of mentally incompetent persons established in art 6.268(2) CC. According to art 6.268(2) CC, a court may order a person who was mentally incompetent at the time of conduct causing legally relevant damage but had not been officially declared legally incapable to pay full or partial compensation to the victim, if damage is inflicted to the health or life of the victim. The rule requires the court to take into account the financial means of both the victim and the mentally incompetent person, the criteria of good faith and reasonableness, and all other relevant circumstances of the case. A comparable rule is set out in art 6.278(3) CC.

AS v EM, 8 January 2003

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-18/2003; <http://www.lat.lt>

Facts

6 The plaintiff filed a claim against the defendant for compensation of pecuniary damage caused when the defendant crashed into his car and damaged it. It was established that the defendant was mentally ill at the time of the traffic accident. Medical experts established that, although the defendant was capable of understanding and controlling his actions in the course of his illness, there were moments of sudden exacerbation of his illness. According to the medical experts, the defendant was not capable of understanding and controlling his actions at the time of the traffic accident.

7 The court of the first instance and the appellate instance court awarded the claimant damages.

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1 This article is applicable when the tortfeasor has not been officially declared legally incapable before the commission of the tort.

2 1/22 no 5.

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Decision

The Lithuanian Supreme Court agreed with the decisions of the lower instance courts. Since the damage occurred as the result of the interaction of two objects of a higher danger, the general delictual liability provisions requiring fault had to be applied instead of the strict liability rule.[3] According to the Lithuanian Supreme Court, although the defendant was not capable of understanding and controlling his actions at the time of the traffic accident, generally he was mentally competent during his illness of which he was aware and also knew of the risk of a sudden exacerbation of his illness. Since he had not refused to drive a car in such a state, he assumed the risk of causing damage. **8**

Comments

The Lithuanian Supreme Court did not make any statement regarding whether or not the defendant, who was mentally incapable at the time of the traffic accident, was at fault for causing the damage. Instead the court stated that the defendant was at fault for driving a car while aware of the fact that he suffered from a mental illness, which could suddenly exacerbate. It seems that, according to the court, such a fault is sufficient to establish his liability. As the issue has not been discussed in Lithuanian legal doctrine, it is difficult to say how such a case would be resolved if a driver was unaware of his medical condition. **9**

23. Poland

Sąd Najwyższy (Supreme Court) 24 February 1962, II CR 363/61

OSNC 6/1963, item 124

Facts

A mentally ill patient jumped out of a psychiatric hospital window and was severely injured (inter alia, his leg had to be amputated). He stated that he had become stressed by the news of his planned transfer to another ward of the same hospital that would enable him to perform temporary works. The window had no bars installed. The patient sued for compensation based on negligent absence of supervision and the failure to restrain him physically. **1**

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3 The old Civil Code of 1964 was applied in the case. Nevertheless, the rule on liability of an object of higher danger where the damage occurred as the result of the interaction of two or more objects of a higher danger was comparable to the rule established in art 6.270(5) of the new CC. See 2/22 fn 15.

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2 The psychiatric hospital was one of the most modern facilities in Poland at the time. However, there was lack of personnel, because only five nurses took regular care of 110 patients during the day and only one nurse was on duty at night.

3 The patient had neither shown any suicidal inclinations nor attempted to kill or injure himself.

Decision

4 The Supreme Court held that, although the concrete patient (V) had not shown any suicidal inclinations or injurious inclinations, such tendencies in the behaviour of mentally ill patients were foreseeable and A should have applied general appropriate preventive means, such as proper monitoring of the patient and the control of all possible exits, including windows. The lack of personnel did not absolve the hospital from taking preventive means such as better organisation of care over patients and removing handles from unbarred windows.

5 V, on the other hand, was not at fault because, although he may have been aware of his action, he could not, being mentally sick, comprehend its consequences. The court emphasised that non-negligent conduct might still be seen as contributing to the damage. Contribution and fault have different meanings as one may contribute to damage without being at fault. In consequence, the court found A liable for V's damage, as A did not provide adequate care and supervision to the patients of the hospital. Nevertheless, the court also found that V was contributorily negligent and decided to reduce compensation by 50%.

Comments

6 Mentally incompetent persons are expressly exempt from tort liability by art 425 KC.

7 The same arguments as above were reiterated in a case which concerned a patient who had left psychiatric hospital facilities by using a regular exit and then committed suicide on railway tracks.[1]

8 In principle, such persons may not be deemed as victims contributing to their damage. Already in a judgment of 30 April 1952,[2] which concerned the death of a two and a half year-old, the Supreme Court held that not every behaviour of the victim could be considered as having contributed to the accident. In particular, 'it cannot be said that the victim contributed to the damage if he had no ability of reaching a reasoned decision as to the manner of acting'. The liberal methods of modern psychiatric treatment by no means absolve psychiatric facilities from a duty of supervision over their mental patients. This duty is of particular importance when the pa-

1 SN 16 December 1967, [1968] OSN 167; 19 November 1969, [1970] OSPiKA 249.

2 C 290/52, OSN 1953, item 99, on the basis of art 158 of the Code of Obligations (1933).

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tients pose a danger to themselves or to others. Therefore, the 'liberal' methods of treatment in fact enhance the liability of medical facilities.

This decision has been followed in other similar cases, ie cases where patients of psychiatric hospitals caused damage after having left the hospital premises without permission. Doctrine approves of this approach. 9

It is well established in Polish jurisprudence that the duty of supervision is an obligation to exercise due diligence. A person under such a duty must prove that they did everything possible to prevent the harm. The scope of duty depends on the circumstances of the case, including the defendant's status, the physical and mental condition of the supervised person, his/her behaviour, etc. Particular care should be taken of adults of unsound mind and the disabled.[3] 10

See also SN 24 September 2009, IV CSK 207/09 at 8/23 nos 13–20. 11

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 16 May 2002

25 Cdo 1427/2001

Facts

The claimant, on the recommendation of another hospital, was admitted for hospitalisation due to an acute psychotic disorder and mild mental retardation. Afterwards he tried to escape; however, he did not succeed and was confined to bed. After calming down, he dined with other patients, expressed interest in watching television in the living room, and then again tried to escape. He jumped from an upper window in the living room and suffered a fracture of the right leg, ribs and contusions on other parts of his body. 1

The court of first instance concluded that the respondent had not violated any preventive or other legal obligations, as the psychiatric ward was properly secured also for the case that a patient would attempt to escape, as it was locked and all windows were equipped with technical means of protection against opening. During his escape, the claimant had to overcome guards. There was a sufficient number of guards in the ward. 2

The appellate court confirmed the previous decision and concluded that the claimant was also obliged to prevent damage pursuant to sec 415 CC. 3

3 SN 16 March 1964, ICR 251/63, [1965] OSN 63.

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Decision

4 Based on the facts, particularly with regard to measures to ensure patient safety, to prevent the possibility of their escape and the way in which the claimant left the building, the liability of the hospital for damage to the claimant's health cannot be inferred, even in terms of an infringement of prevention duties (sec 415 CC).

5 The argument of the claimant that he was in a state of mental instability must be rejected. If the damage was caused solely by the fault of the injured party, the injured party shall bear full liability (sec 441 CC). Under consistent case law, this conclusion also applies where damage occurred as a result of conduct of the injured party that, absent his ability to control his behaviour and assess its consequences, could not be considered as faulty (R 3/1984).

Comments

6 In the current case, the issue of wrongfulness did not relate to damage caused to a third party but to damage inflicted to the claimant himself under the notion of contributory negligence.

7 As regards contributory negligence, the same rules as for liability apply. Therefore, in order to hold the injured party liable, the person must be able to influence his/her actions and consider the consequences thereof, ie when the party has delictual capacity. Should this not be the case, his/her guardians and/or legal representatives may be found liable for not taking sufficient care of him/her. The burden of proof on capacity is reversed.

8 The conclusion of the court is based on the basic principle currently laid down in sec 2920 NCC that anyone who suffers from a mental disorder shall compensate damage caused if he was able to influence his actions and consider their consequences.

9 From the facts of the case, it was not apparent whether the ability of the injured party to control his behaviour and assess its consequences was limited or fully excluded. When assessing the delictual capacity of a person, it must be assessed whether he was able to consider and control his behaviour with respect to the particular case.

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25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 16 May 2002, Case No 25 Cdo 1427/2001

<http://kraken.slv.cz/25Cdo1427/2001>

Facts

The court of first instance dismissed the claim of an injured person against the defendant concerning compensation for harm caused to his health, which was allegedly caused when the claimant jumped out of the ventilation window in the common room of the psychiatric department of the defendant hospital. The claimant had been admitted to hospital for an acute psychotic disorder and slight mental retardation, as medically recommended. The appellate court affirmed the judgment of the court of first instance, and agreed with the opinion that the defendant hospital had not breached its duty pursuant to § 415 of the Civil Code. The claimant filed an appellate review against this judgment. The Supreme Court ruled that the appellate review was inadmissible. **1**

Decision

The provision of § 415 binds every person to behave, with regard to the actual circumstances, in such a way so as not to cause damage; its application is possible when there is no law in relation to the conduct considered to be unlawful. As for the contention of the injured person arguing he was mentally instable, it is necessary to mention that, where the damage was caused exclusively by the fault of the injured person, such person must bear the entire loss himself (§ 441[1]), and, pursuant to established case law, the same also applies if the harm resulted from the conduct of the injured person, whose fault cannot be imputed to his inability to control his conduct or to understand the consequences of his conduct. **2**

Comments

In the given case, the courts considered the possible liability of the defendant, and also the possible contributory fault on the part of the claimant. The responsibility of the injured person was established according to § 441 of the Civil Code and previous case law.[2] The established case law does not exclude culpable conduct (if this con- **3**

1 § 441: 'If the damage caused was also the fault of the person injured, he bears corresponding responsibility for the damage. If the damage was exclusively his own fault, he alone bears the responsibility.'

2 See Decision of the Supreme Court of CSSR, published under R 3/1984.

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duct exclusively caused the damage) of the injured person, although, due to his mental illness, he was unable of controlling his own conduct or he was not capable of understanding the consequences of his own conduct.

4 As a second problem, there was no evidence of a breach of duty on the part of the defendant. It was found that the psychiatric department was properly secured also against patients' attempted escape, it was properly locked, and the windows were technically secured against opening. The claimant had to overcome obstacles during his escape (the ventilation window was 2.5m above the floor), all of them objectively sufficient. In the view of the court, a hospital cannot be hermetically sealed in order to prevent similar conduct to that chosen by the claimant and it was further found that the claimant tried to escape from the hospital in an unpredictable manner.

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No 599/07-2 of 6 June 2007

<www.vsrh.hr>

Facts

1 A attacked V, his daughter-in-law, with an axe and caused her severe head injuries. In criminal proceedings A was found incapacitated due to his mental condition and sentenced to compulsory psychiatric treatment. Subsequently V filed a claim for damages against A. The lower courts established that when the attack occurred, A was mentally disabled and for that reason legally incapacitated. However, the lower courts accepted A's claim on the basis of the principle of fairness, enshrined in the general rules of tort liability.

Decision

2 The SCRC upheld the lower courts' decisions. In its judgment the SCRC first upheld the lower courts' position regarding the defendant's legal incapacity due to mental disability. The SCRC also upheld the lower courts' position regarding the application of the principle of fairness. The SCRC recalled that art 169, para 1 of the COA 1991, which was in force at the time damage occurred, provided a victim with a possibility to claim compensation for damage from an incapacitated person if compensation could not be obtained from those who were responsible to supervise the incapacitated person and if fairness so required, especially in view of the financial position of the incapacitated tortfeasor and victim. The SCRC held that the principle of fairness referred to in art 169, para 1 of the COA 1991 should be applied to the case at hand especially bearing in mind the severity of the injuries that A caused V and the

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financial position of both parties. In this respect the SCRC found to be of particular importance the fact that the tortfeasor was a wealthy person who owned a number of immovables, whereas the victim had no regular income, received only social assistance, had no assets and was diagnosed with a 90% permanent health impairment due to the injuries caused by A.

Comments

This SCRC decision is illustrative with respect to the treatment of damage inflicted by mentally disabled persons in the Croatian tort law system. Generally speaking, mentally disabled persons cannot be held liable for damage. As provided in art 1050, para 1 of the COA, a person who, due to mental illness or mental deficiency or for any other reason, is not capable of making judgements, will not be held liable for damage inflicted upon another person. 3

Of course, this does not imply that damage inflicted by a person who is incapacitated due to mental illness or disability cannot be recovered at all. Pursuant to art 1055 of the COA, liability for damage inflicted by an incapacitated person shall be assumed by the person who was responsible for supervising the incapacitated person. A responsible person can be exonerated from liability if he/she can prove that he/she exercised supervision properly or that the damage could not have been prevented even with due care in exercising supervision. 4

Even if damages cannot be obtained from a person responsible for supervising an incapacitated person, either because there is no such person or that person was not held liable, relevant provisions of the COA provide a victim with a possibility to obtain compensation from an actual tortfeasor, ie an incapacitated person, if the principle of fairness so requires. Pursuant to art 1060, para 1 of the COA, where damage was caused by an incapacitated person and compensation cannot be obtained from the person responsible for supervising the incapacitated person, the court can order a tortfeasor to compensate the damage, partially or in full, if the principle of fairness so requires, and especially in view of the relative financial positions of a victim and a tortfeasor. And this possibility, provided for in art 1060, para 1 of the COA (formally art 169, para 1of the COA 1991), is exactly what the courts in this case made use of in accepting the victim's claim. 5

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27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 388/2004, 10 November 2005

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/9970/> (25 February 2015)

Facts

1 The plaintiffs claimed compensation because of the death of their mother and daughter, who was murdered in her sleep with numerous stab wounds. The defendant had suffered an acute schizophrenic episode four months before the event, because of which a psychiatrist had advised hospitalisation a good three months before the event but the defendant refused. Similarly, the defendant did not take the prescribed medication and, despite the finding that excessive alcohol consumption triggers such episodes, consumed alcohol. The courts of first and second instance found the defendant liable because they considered that he had not succeeded in proving that he was not culpable due to being in a state of unsoundness of mind.

Decision

2 The Supreme Court rejected revision as unfounded, since it judged that the court of second instance had reached a proper conclusion in substantive law, when it considered that the already established existence of insufficient due care by the defendant in relation to being *non compos mentis* at the time that he caused the damage was sufficient for the establishment of tortious liability.

Comments

3 *Compos mentis*, which is the basis of responsibility in law, is presumed unless the contrary is proved. A defendant (causer of the damage or his/her representative who calls on it, must prove that he/she was *non compos mentis*). Successful evidence that a person who caused damage was *non compos mentis* at the time of causing the damage because of disturbed mental development, mental health difficulties or any other cause, results in the person not being held liable for the damage because he/she is not responsible in law (para 1 of art 136 of the Code of Obligations). This does not apply if the damage was caused in a state of *non compos mentis* to which a person came by their own fault. Fault is presumed and, therefore, a defendant must prove that he/she was not to blame for being in a *non compos mentis* state (para 2 of art 136 of the Code of Obligations).

4 In cases where the defendant is *compos mentis* but has a disability that prevents him/her from acting with the degree of care or skill of an ordinary person, Slovenian law does not have an explicit rule to lower its expectations of what is required of

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him/her (ie lower the standard of care). In such a case the usual standard of care is applied.

28. Romania

Tribunalul Neamț (Tribunal of Neamț), Criminal Section, Decision No 17/RC of 9 January 2012

<http://www.jurisprudenta.com>

Facts

A nine-year-old child was killed by suffocation by a mentally ill person. Shortly after the incident, the Tribunal of Neamț ordered the hospitalisation of the killer in a psychiatric hospital. The mother of the victim claimed both pecuniary and non-pecuniary damages from the mother of the person who killed her child on the ground that the defendant was aware of the psychical problems of her adult child and she was negligent and careless in supervising him. The plaintiff founded her suit on the provisions of the old Civil Code on the liability of parents for the acts of their minor kids (art 1000), in force at the time of the crime. 1

Decision

The Tribunal of Neamț considered that, in this case, the issue was not the liability of parents for the acts of their children since the crime and damage were committed by an adult tortfeasor. The tribunal stated that the provisions on liability for one's own acts (art 998f of the old Civil Code) should apply to this case. However, the court considered that the conditions for the establishment of the liability of the tortfeasor's mother were not fulfilled because parents cannot be held liable for the acts of their adult children. 2

Comments

This case is interesting because the tortfeasor/killer, although without discernment, did not have legal incapacity at the time of the crime. The court established the lack of fault of the mother but did not enter into an analysis of the issue of who is liable for the acts of the mentally ill person who was not deprived of legal capacity and not supervised in a psychiatric hospital. Under art 1368 new Civil Code, the tortfeasor would be obliged to pay damages according to the new subsidiary liability of persons without discernment in case the liability of the person who, according to the law, has an obligation to supervise such person cannot be established. 3

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30. The Principles of European Tort Law and the Draft Common Frame of Reference

Various Scenarios

Facts

1 A1, who is suffering from a form of depression which leaves him unable to control his own actions, sets fire to a building.[1]

2 A2 attacks his daughter-in-law V with an axe and inflicts severe head injuries. He is found to be unable to control his actions due to his mental condition and sentenced to compulsory psychiatric treatment.[2]

3 A3 is treated in a local hospital for his psychiatric disorders. When in town, he stabs a man to death. The parents and brother of the victim claim compensation. A3 is acquitted during criminal proceedings because he is not liable by virtue of his mental condition.[3]

4 A4, a psychotic man, stabs another man several times in his face and neck. The stabs are serious, but the victim is rapidly brought to hospital for treatment and survives. The victim claims compensation for non-pecuniary loss from the attacker.[4]

5 A5, who is 29 years old but has the mental age of a six or seven-year-old due to a congenital chromosomal disorder (Down's syndrome), puts a burning cigarette into a litter bin. The rubbish in the bin ignites and spreads to an adjacent kiosk causing it to burn down. He has committed similar acts before and has been warned many times before about the dangers of setting fire to litter bins.[5]

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1 See the Belgian case: Cour de cassation/Hof van Cassatie (Belgian Supreme Court) 29 November 1984, Pas 1985 I, 399, above 10/7 nos 1–10 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*; see also the Portuguese case: Tribunal da Relação de Coimbra (Coimbra Court of Appeal) 24 September 2008, above 10/11 nos 1–5 with comments by *A Pereira*/*S Rodrigues*/*P Morgado*.

2 See the Croatian case: Supreme Court of the Republic of Croatia No 599/07-2 of 6 June 2007, see above 10/26 nos 1–5 with comments by *M Baretić*.

3 See the Italian case: Cass (Court of Cassation) 20 June 2008, no 16803, Nuova giur civ comm 2009, 1, 1, 57, above 10/9 nos 4–8 with comments by *N Coggiola*/*B Gardella Tedeschi*/*M Graziadei*.

4 See the Norwegian case: Hr (Norwegian Supreme Court) 8 February, Rt 2005, 104, above 10/17 nos 1–4 with comments by *AM Frøseth*/*B Askeland*.

5 See the Finnish case: Korkein oikeus (Supreme Court) KKO 1995:125, R 94/558, 29 June 1995/2596, above 10/19 nos 1–4 with comments by *P Korpisaari*; compare the Danish case: V (Western Court of Appeal) 24 October 2007, U 2008.322 V, above 10/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*.

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Solutions

a) Solution According to PETL

The above scenarios have in common that the person who caused the damage was unable (first four scenarios) or had limited capacities (last scenario) to control his own actions. 6

As set out above,[6] in arts 4:101, 4:102(1) the PETL establish an objective standard of fault. Many national jurisdictions expressly provide in their civil codes that persons lacking the capacity to control their own actions are exempt from liability. The PETL do not contain such a decisive rule, but state in art 4:102(2) that the required standard '*may be adjusted* when due to age, *mental* or physical disability or due to extraordinary circumstances the person cannot be expected to conform to it'.[7] Much like minors,[8] disabled persons benefit from a 'flexible system' under the PETL according to which 'the question whether or not a person had sufficient insight and control of his or her behaviour has to be answered from case to case, according to the concrete mental development of that person'.[9] The PETL thus reserve 'the possibility, in para. 2 of Art. 4:102, though only for a particular type of wrongdoers and for "extraordinary circumstances", that the objective notion of fault – based on the objective standard of conduct – may be tempered in order to avoid an excessive "hardship" in the evaluation of a person's effective possibilities to behave as the standard would have required'.[10] 7

In those of the above scenarios in which the tortfeasors were in a state of mental disability whereby they were unable to control their own actions, the required standard of conduct may thus be lowered under the PETL to the point where the tortfeasor is held not to have been at fault at all.[11] In the last of the above scenarios, the decision will depend on the particular circumstances of the case and the reasoning will arguably be similar to that regarding minors of six or seven years of age.[12] 8

If a mentally disabled person cannot be held liable for fault due to a lack of capacity to foresee the consequences of his acts, in many jurisdictions he may still have to pay equitable compensation if deemed reasonable when taking into consideration both parties' economic situation.[13] The PETL do not contain such a rule. 9

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6 Above 1/30 nos 4–8.

7 Emphasis added.

8 Above 8/30 nos 1–19.

9 Text and Commentary (2005) art 4:102, no 15 (*P Widmer*).

10 Text and Commentary (2005) art 4:102, nos 14, 15 (*P Widmer*).

11 Compare PETL – Text and Commentary (2005) art 4:102, no 26 (*P Widmer*).

12 Compare above 8/30 nos 1–19.

13 See for example art 54(1) of the Swiss Code of Obligations; § 829 of the German Civil Code; § 1310 of the Austrian Civil Code; art 2047(2) of the Italian Civil Code.

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b) Solution According to the DCFR

10 As set out in the previous chapters, the DCFR defines negligence in art VI–3:102 as 'conduct which … (b) does not … amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. Like the PETL, the DCFR thus uses an objective standard of care.[14] In principle, the standard 'does not turn on the individual abilities of the person acting, rather it is based on what can be reasonably expected of that person'.[15]

11 However, contrary to the PETL, the DCFR contains a special provision on 'mental incompetence'. Pursuant to art VI–5:301(2) DCFR, '[a] person is to be regarded as mentally incompetent if that person lacks sufficient insight into the nature of his or her conduct, unless the lack of sufficient insight is the temporary result of his or her own misconduct'. A person is mentally incompetent if 'he or she is not in a position to grasp the nature of his or her conduct (act or omission), i.e. to foresee its possible consequences and to understand how society judges it in general. Typically the issue is that the person in question is not in a position to differentiate between right and wrong'.[16] The official commentary to the DCFR explicitly mentions schizophrenia as a case falling under art VI–5:301 DCFR.[17]

12 A mentally incompetent person is unable to act 'intentionally' within the meaning of art VI–3:101 (Intention).[18] He may, in principle, still be liable for 'negligence' within the meaning of art VI–3:102, the required standard of care being, in general, that which 'could be expected from a reasonably careful person in the circumstances of the case'.

13 However, the DCFR restricts the accountability of mentally incompetent persons. According to art VI–5:301(1) DCFR, '[a] person who is mentally incompetent at the time of conduct causing legally relevant damage is liable only if this is equitable, having regard to the mentally incompetent person's financial means and all the other circumstances of the case. Liability is limited to reasonable recompense'.

14 The DCFR thus (i) explicitly addresses the accountability of mentally incompetent persons and (ii) takes a middle position between jurisdictions that do not take mental incompetence into consideration at all and jurisdictions that entirely exempt the mentally incompetent from liability. The provision is based on the idea that, for damage caused by a mentally incompetent person, 'a balancing between the interests of the injuring person and the injured person is necessary'.[19]

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14 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).
15 Ibid.
16 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment B (p 3690).
17 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment C, Illustration 3 (p 3692).
18 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment A (p 3690).
19 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment A (p 3689 f).

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In the first four scenarios above, the person who caused the damage was unable to control his own actions due to depression, psychosis, or another long lasting mental condition that deprived him of the capacity to differentiate between right and wrong and act accordingly. 15

Under the DCFR, these individuals would not have to pay full compensation but may be held liable if requiring the individual to pay compensation 'is equitable, having regard to the mentally incompetent person's financial means and all the other circumstances of the case'. The provision restricts liability in three respects: (a) it is limited to the duty to pay money from available assets; (b) the person is not liable for full compensation but has to pay a reasonable recompense; and (c) liability has to conform to equity and fairness under the circumstances, which would be the case, for example, if liability could easily be borne by the mentally incompetent person because of his favourable financial situation.[20] 16

In the fifth scenario, the person who caused the damage had the mental age of a six or seven-year-old due to a congenital chromosomal disorder (Down's syndrome). He was arguably not entirely unable to grasp the nature of his conduct, to foresee its possible consequences, and to differentiate between right and wrong. He was therefore not mentally incompetent in the sense of art VI–5:301(2) DCFR, but might be treated instead according to the rules on children of the same age.[21] 17

31. Comparative Report

All the reporters submitted cases, except for the ones reporting for the Netherlands, Scotland and the European Union. 1

General remarks: in this category the central question is whether the tortfeasor may say that he/she is not liable because of his/her mental disability. Mental disability is intimately connected to fault. If a mentally impaired person is not able to understand his/her act and/or its consequences, he/she cannot be considered to be at fault. And if the person is not at fault, in many legal systems he/she is not considered to be liable. This confronts the legislator with alternatives. Either it maintains a fault-based liability system with the consequence that the mentally disabled person is not liable; or it abandons liability for fault with the consequence that even mentally disabled persons are liable. The former system is rather in favour of the tortfeasor, while the latter offers better protection to the victim. A third way would be to mix the two systems by saying that even a mentally disabled person who, in the 2

20 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment A (p 3690).

21 See above, 8/30 nos 1–19.

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specific case, did not understand his/her act, can be at fault. At first sight this solution, adopted by the French *Cour de cassation*,[1] seems to be contradictory, as it admits fault even if the actor was not able to comprehend his/her behaviour. A fourth possibility can be observed in northern Europe (Denmark, Finland, Norway, Estonia and Lithuania). Instead of focussing on fault, the judge makes an *all round assessment* of all the circumstances of the case in order to decide on who has to bear the damage (see no 9 below). As to contractual liability, we can add that mental disability can impede the contractor to freely form his/her will with the consequence that the contract is not concluded.

3 *General rule*: as a general rule, one could say that full impairment of an individual's mental abilities excludes liability,[2] while partial impairment or a foreseeable sudden incapacity[3] does not necessarily exclude it.[4]

4 *Exceptions*: however there are exceptions or variations to the general rule. The most noticeable exception is France, where liability is explicitly maintained even for impaired persons (eg persons with a mental disorder).[5] Variations can be found, for example, in England and Wales; if the tortfeasor acted intentionally, it is unlikely that he/she will be relieved of liability even if he/she did not fully understand his/her act.[6] It is sufficient that the tortfeasor knew the 'nature and quality of his act', even if 'he did not know that what he was doing was wrong'.[7] In Ireland, if the tortfeasor acted voluntarily, it is admitted that some allowance has to be made for his/her mental condition.[8] The reports from Malta and Denmark state that judges take into account the degree of disability.[9] In Slovakia a mentally ill person unable to control her own behaviour and inflicting harm to herself in a psychiatric hospital can be considered to be at fault.[10] In Romania, according to the new Civil Code, a

1 France (10/6 nos 3–5).

2 Historical Report (10/1 no 2f); Germany (10/2 no 4); Austria (10/3 no 4); Switzerland (10/4 no 8); Greece (10/5 no 4); Belgium (10/7 no 4); Italy (10/9 no 2); Spain (10/10 no 3, but see also no 7); Portugal (10/11 no 2); England and Wales (10/12 no 2f); Ireland (10/14 no 2f); Malta (10/15 no 2); differently Denmark (10/16 no 3); Estonia (10/20 no 4); Latvia (10/21 no 2); Lithuania (10/22 no 4); Poland (10/23 nos 5f, 8); Czech Republic (10/24 no 7); Croatia (10/26 nos 1–3); Slovenia (10/27 no 3).

3 Lithuania (10/22 no 9); DCFR/PETL (10/30 no 7).

4 Germany (10/2 no 4); England and Wales (10/12 no 2f); Norway (10/17 no 4); Estonia (10/20 no 3) and (nos 3, 6); Latvia (10/21 no 6); Czech Republic (10/24 no 8f).

5 France (10/6 no 2).

6 England and Wales (10/12 no 3); see also Ireland (10/14 no 3); for malice see also Malta (10/15 no 2).

7 England and Wales (10/12 no 2); see also Norway (10/17 no 3).

8 Ireland (10/14 no 3); see also Norway (10/17 no 4).

9 Malta (10/15 no 3); Denmark (10/16 no 3).

10 Slovakia (10/25 no 3).

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cognitively impaired tortfeasor can be obliged to pay damages if it is not established who should have supervised him.[11]

Standard of fault: in a significant number of countries, impairment does not reduce the fault standard; this means, that the fault standard of disabled persons is the same as that for fully able persons.[12] 5

Permanent or temporary impairment: the impairment can be permanent or temporary,[13] for example due to a (physical) blow in an accident. The Belgian report underlines that impairment must have existed at the moment when the tortfeasor acted;[14] this might well be true for all the legal orders even if it is not expressly mentioned. 6

Presumptions: though it must be the general rule for most of the legal systems under analysis, only the German and Slovenian reports expressly mention a presumption of full capacity;[15] the disabled individual has to prove their handicap.[16] In Slovenia, in the case of damage, fault is even presumed and it is the tortfeasor who has to prove that he/she is not to blame.[17] Instead of a presumption, other legal orders exclude liability for certain categories such as young, mentally or psychologically disabled or intoxicated persons, etc (see above ch 8).[18] 7

Equity and fairness: an important number of countries, under certain conditions, decide on the question of liability taking equity or fairness into account.[19] This allows the judge to adapt his decision to the specific circumstances of the case. Article VI–5:301(2) DCFR is a special norm concerning mentally incompetent persons. Such a person is unable to act intentionally and has to redress damage only if equity requires so.[20] 8

Some reports mention a particularly interesting form to appreciate the specificities of the case. In particular the reports from Denmark, Norway and Finland, as well as Estonia state that judges make an overall evaluation of the case taking into account the mental ability of the tortfeasor, his/her age, his/her financial situation 9

11 Romania (10/28 no 3).

12 Germany (10/2 no 4); see also Belgium (10/7 no 5); Denmark (10/16 nos 2f, 6, 8); *in casu* the Swedish Court found that one should not take subjective factors like the author's age or mental disability into account, Sweden (10/18 no 2); Slovenia (10/27 no 4).

13 Germany (10/2 no 4); in principle Belgium (10/7 no 4), but see also no 8; Italy (10/9 nos 2, 7); probably Lithuania (10/22 no 4); different DCFR/PETL (10/30 no 7).

14 Belgium (10/7 no 6).

15 Germany (10/2 no 4); Slovenia (10/27 no 3); differently Portugal (10/11 no 3).

16 Germany (10/2 no 4); Slovenia (10/27 no 3).

17 Slovenia (10/27 no 3).

18 Switzerland (10/4 no 8); Malta (10/15 no 2).

19 Austria (10/3 no 4); Switzerland (10/4 nos 6f, 9); probably Greece (10/5 no 4); Belgium (10/7 nos 7, 10); Italy (10/9 no 2); Portugal (10/11 nos 2, 4); Estonia (10/20 no 4); Croatia (10/26 nos 1f, 5).

20 DCFR/PETL (10/30 nos 11–13).

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compared to the victim's, intent, negligence, etc. Most clearly this appears in the Danish report, according to which, the *ratio legis* of the Damages Act is that the risk of carrying the loss should be borne 'by the party who is best equipped to shoulder it'.[21]

21 Denmark (10/16 no 3); see also Norway (10/17 no 3) and Finland (10/19 nos 2–4) with the criteria of reasonableness; Estonia (10/20 no 6); Lithuania (10/22 no 5).

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11. Incapacity due to Drugs or Alcohol

2. Germany

Bundesgerichtshof (Federal Supreme Court) 22 February 1989, IVa ZR 274/87

NJW 1989, 1612

Facts

The claimant was the owner of a car for which he had all-risks insurance cover with the defendant insurance company. The claimant caused a traffic accident when he negligently disregarded the fact that another driver had the right of way. At the time of the accident, the claimant had a blood alcohol level of 2.23. He sued the defendant for compensation of the damage to his own car. The defendant refused any payment because the claimant had been grossly negligent by driving while intoxicated. The claimant argued that he was not responsible for his – own – damage because he had been in a state that excluded his free determination because of a pathological disturbance of his mental capacity. He had been under strong mental pressure because his wife had left him; he had been receiving anonymous phone calls and had been under stressful employment conditions. When he came home on the day of the accident, he had received another anonymous phone call, which had greatly upset him. He had drunk alcohol and taken Valium and could not recollect what had happened afterwards. Originally he had not intended to drive and he could not have expected that he would still drive after drinking. **1**

Decision

All three instances refused the claim. According to German insurance law, an insured person loses the right to claim the insurance sum from the loss insurer if the person caused the loss with gross negligence or intent.[1] The BGH and the lower courts held the claimant grossly negligent. Although the claimant had been influenced by the considerable alcohol level and his ability to react and behave reasonably was greatly reduced, he was still able and had to be able, to realise that he should not drive while intoxicated. Moreover, he could not prove that he was in a state in which he lacked complete responsibility for his actions. Thus, the claimant's behaviour freed the defendant from its obligation to pay. **2**

1 § 81 Insurance Contract Act (VVG). At the time of the BGH decision § 61 VVG was the relevant provision.

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Comments

3 According to § 827 BGB, a person is not responsible for damage if he/she acted in a state of pathological disturbance of the mental capacity which excluded their free determination. However, if a person enters into such a state by drinking or taking drugs and then causes damage, he/she remains liable as if the person acted negligently (or even grossly negligently).[2] An exception applies only if the person entered into such a state without fault,[3] for instance if somebody else secretly administered the alcohol or drug.[4]

4 The decision shows that consumption of alcohol or drugs or both in almost all situations does not exempt an individual from liability even if the ability to react reasonably is drastically reduced by the misuse.

3. Austria

Oberster Gerichtshof (Supreme Court) 23 September 2004, 2 Ob 178/04x
ZVR 2004/105

Facts

1 The claimant's husband – a passenger in the defendant's car – was killed in a road accident caused by the defendant, who was under the influence of alcohol at the time. As a result of the loss, the claimant suffered from psychological impairment with pathological significance for several months and required treatment; accordingly, she claimed damages for pain and suffering. The defendant objected citing contributory negligence of the claimant's deceased husband: he argued that the latter had been aware of his inebriation and nevertheless had decided to entrust his safety to him. The car ride had in fact been preceded by extensive joint alcohol consumption.

Decision

2 The defendant, who had caused the accident under the influence of alcohol, was held liable. The Supreme Court upheld the decisions of the lower courts to the effect that the contributory negligence of the deceased must be considered when assessing compensation for the pain and suffering of relatives: as the status of a family mem-

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2 § 827 sent 2 BGB.

3 § 827 sent 2, 2nd half BGB.

4 *H Oechsler* in: J von Staudingers Kommentar zum BGB – Buch 2: Recht der Schuldverhältnisse (2013) § 827 no 41; for further cases see *G Wagner* in: Münchener Kommentar zum Bürgerlichen Gesetzbuch vol 5 (6th edn 2013) § 827 no 12.

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ber is decisive for the justification of a compensation claim for pain and suffering in this context, such contributory negligence must also be taken into account when assessing the extent of compensation. Consequently, the essential question was whether the deceased relative (the claimant's husband) had been able to realise that the defendant was drunk and if not, whether he could have foreseen at the time he started drinking that he might later be given a ride by an unfit driver. In both cases, he would have acted with contributory negligence. Due to the lack of substantial statement of facts regarding this question, the Supreme Court set aside the judgment under appeal and remitted the case to the court of first instance.

Comments

According to § 1307 ABGB, whosoever culpably puts himself in a condition of necessity or mental disorder is liable for the damage he causes unlawfully in this condition.[1] It is not required that the tortfeasor could have foreseen the endangerment of someone else's interests, rather the risk created by his putting himself in a state of mental disorder suffices to establish liability and fault merely has to relate to this act.[2] If the tortfeasor inculpably places himself in a state of mental disorder, eg if he did not know or could not have known of the intoxicating effect of a drink, he is not liable under § 1307 ABGB. However, liability in equity according to § 1310 ABGB (cf 9/3 no 4) would come into question.[3] **3**

§ 1307 ABGB is particularly relevant in cases of driving under the influence of alcohol or drugs:[4] car drivers who are culpably intoxicated are liable for damage inflicted, even if they did not anticipate that they would drive a car after consuming the alcohol. **4**

As the decision at hand shows, § 1307 ABGB is also applicable in cases of contributory negligence (§ 1304 ABGB) if the victim was in a condition of mental disorder when contributing to his damage. However, unlike under the direct scope of application on the tortfeasor's side, contributory negligence regularly depends on **5**

1 § 1307 ABGB: 'If a person culpably places himself in a state of mental disorder or necessity, the damage he causes in such state is also attributed to his fault. The same applies to a third party who has culpably caused the injurer to be in such a state.' Translation by *BC Steininger*, Austria in: K Oliphant/BC Steininger (eds), European Tort Law Basic Texts (2011) 1 ff.

2 OGH 2 Ob 380/70 = SZ 43/231; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/19; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1307 no 1; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 227 ff.

3 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1307 no 5.

4 OGH 2 Ob 380/70 = SZ 43/231; 7 Ob 49/88 = SZ 61/259.

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whether the dangerous situation was foreseeable for the victim, which is of importance especially in cases of intoxication and drug abuse.[5]

4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 13 May 1958
ATF 84 II 292

Facts

1 Architect A, and Police Director V1 went out for dinner together. Afterwards A and V1 were intoxicated. On their way back in the foggy night A, who was driving, drifted to the left side of the road and collided at low speed with the lorry of B, who was also under the influence of alcohol, but who had perfectly adapted his behaviour before and at the moment of the collision. V1 died in the accident.

2 V1's widow V2 and his son V3 filed a claim against A for loss of support and compensation for moral damage.

3 The cantonal court allowed the claim, but reduced V2's and V3's damages by 25% because of V1's contributory negligence. A filed a claim to the Supreme Court.

Decision

4 The Supreme Court allowed the claim. It fixed the reduction of V2's and V3's damages at 30%.

5 A knew that he would have had to drive his car after dinner. Consequently, he should not have drunk alcohol at all or should have done so very moderately. He should have been particularly cautious, given that the weather was bad and that he did not like to drive at night. As a consequence of the alcohol, A was not sufficiently attentive during the drive and caused the accident. His excessive consumption of alcohol amounted to gross negligence. Due to the fact that he had driven despite the objectively unfavourable circumstances and the warnings of his colleagues, A had to assume full responsibility for the accident.

6 However, as V1 was aware of A's intoxicated state and had still accepted to ride with A, the judges accepted a 30% reduction of the damages. As to B, despite the alcohol he had consumed, his behaviour was correct and not causally linked to the damage. Consequently, B was not found liable.

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5 Cf 2 Ob 178/04x = ZVR 2004/105; 8 Ob 89/90 = ZVR 1981/191; 8 Ob 118/83 = ZVR 1985/30; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1304 no 3; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1304 no 18.

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Comments

The Federal Road Traffic Act (LCR) has, among others, the function of preventing incapable persons from driving. For example, driving under the influence of all forms of drugs is prohibited or strongly restricted. The law even goes so far that persons known for their drug dependency can be submitted to a particular test, establishing their capacity to drive (art 15d al 1b LCR).[1] 7

The LCR today fixes alcohol limits (between 0 and 0.5/00, depending on the category of the driver). Even without an accident, an intoxicated driver can be sanctioned, for example by confiscating his driving licence.[2] The severity of the sanction depends largely on the degree of the alcohol level (art 16 ff LCR). 8

As a general rule, Swiss courts admit that intoxication is imputable to a car driver if he gets into this state intentionally or by negligence. It is considered as a fault to drive after excessive alcohol consumption. As a justification, the legislator indicates the generally known danger resulting from such driving. The same rule applies to other drugs and medication. In particular, motor vehicle drivers have to pay attention to the fact that they should only drive when they are fit. Besides car driving, anyone who causes damage when they are culpably under the influence of alcohol or drugs has to repair the damage. 9

5. Greece

Efeteio Patras (Patras Court of Appeal) 203/2003

Achaiki Nomologia 20 (2004) 628

Facts

A attempted to murder V and V brought an action for damages against A. The latter claimed that during the commission of the damaging act (attempted homicide), he was intoxicated, which decisively diminished the functioning of his judgement and free will and that, as a consequence, he could not be held liable. 1

Decision

If the damaging act or omission cannot be imputed to the tortfeasor as a product of his free will, the element of liability, which is a necessary presupposition for the commission of a tort, does not exist. Such a case of non-imputability exists, according to art 915 § 1 GCC, when the tortfeasor, during the commission of the act, was not 2

1 On the consequences of intoxication while driving, *R Brehm*, La responsabilité civile automobile (2nd edn 2010) 180 f, no 467 f and 185 f, no 479.

2 See for example ATF 127 II 122 (2001).

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conscious of his acts. A lack of consciousness is considered a severe disorder of the regular psychological relationship between the 'ego' and the external world, a consequence of which is the loss of 'auto-consciousness'. This disorder of the consciousness usually arises in situations of extreme intoxication, created by the use of alcoholic or other toxic substances. Consequently, the defendant's allegation that during the commission of the damaging act he was unable to differentiate between right and wrong due to being intoxicated and as a consequence the damaging act could not be imputed to him constitutes an objection, which, if proven could lead to a rejection of the plaintiff's claim. However, the Court of Appeal rejected the defendant's allegation, as he had not made the said allegation (ie that due to alcohol consumption the functioning of his judgement and free will was decisively diminished) in his pleadings before the Court of First Instance.

Comments

3 According to art 915 § 2 GCC if, at the time damage to another was caused, the person who caused the damage was not conscious of his acts, or he was in a state of psychological or mental disturbance which decisively diminished the functioning of his judgement as a result of the use of alcoholic beverages or other substances, he is liable for the damage caused if he had put himself in such a state; he is exempted from liability only if he had reached the state of unconsciousness or severe disturbance through no fault of his own. The court did not tackle the issue of whether the particular tortfeasor had put himself in such a state of drunkenness through his fault or not. The court would have tackled this issue only if it had accepted that A had been in a situation of intoxication due to alcohol consumption, which decisively diminished the functioning of his judgment. This allegation had been rejected by the Court of Appeal, as it had not been presented before the Court of First Instance. As a consequence there was no ground for the application of art 915 § 2 GCC.

Efeteio Athinon (Athens Court of Appeal) 2172/2004
Published at ISOKRATIS

Facts

4 A leased a car from company V for his private use, fraudulently concealing from the latter's legal representatives his intention to use the leased car for the commission of the punishable action of drug trafficking. A knew that drug trafficking constituted a prohibited action of the aforementioned lease and falsely stated that he would make use of the car for his legitimate, personal needs (for a wedding). A was arrested for drug trafficking while using the car and, as a result, the car was confiscated. V filed an action in tort seeking damages for lost profits as well as pecuniary compensation for moral damage due to the diminution of its trade credit and its pro-

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fessional reputation in trade circles. A denied liability alleging that he was a drug-addict at the time.

Decision

The court held that A's objection, had to be rejected as: (a) A did not claim lack of consciousness due to the consumption of drugs which would justify non-imputability and, as a consequence, lack of liability for the damage caused (art 34 of the Greek Penal Code (hereinafter GPC) and art 915 GCC); and (b) it was not proved, during A's arrest, that he was under the influence of drugs which eliminated consciousness of his acts (art 915 GCC). 5

Comments

For comments see 11/5 no 3. 6

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 15 December 1965

64-10.901, Bull civ II, no 1023, RTD civ 1966, 533, obs *R Rodière*

Facts

Soulaine, who had been drinking excessively, shot twice at Morin. The appellate court ordered Soulaine to fully compensate Morin for his injuries. It ruled that Soulaine suffered from mental problems, but that he should have undergone treatment and that he was therefore at fault for not having done so and for having drunk excessively. Soulaine challenged the decision before the *Cour de cassation*. 1

Decision

The *Cour de cassation* affirmed the appellate court's decision. It ruled that, even though Soulaine might not have been conscious and at fault when he fired the shots, his decision not to undergo treatment and to keep drinking, despite his poor mental state, was a fault that had caused damage. 2

Comments

This decision was taken at a time when consciousness of one's act was still a necessary element of fault (see 10/6 nos 1–5). The shooting itself could therefore not be considered as a fault. But this decision clearly recognises that to drink excessively 3

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constitutes fault, which is a direct cause of whatever damage might result from the state of intoxication.

4 Since 1977 (see 10/6 nos 1–5) and the setting of the new rule according to which a state of 'mental disorder' does not prevent the finding of a fault, as long as the damaging act does not meet the standard of a reasonable person's careful behaviour, incapacity due to drug or alcohol has no impact on the existence of fault.

7. Belgium

Juge de police/Politierechter (Police Judge, Pol) Dinant, 10 June 2002

Dr circ/Verkeersrecht 2002, 314

Facts

1 After getting drunk in a bar, V1 and V2, in a state of intoxication, rode a tandem bike with poorly functioning lights, at night, on an unlit road. A car on the road did not see them in time and crashed violently into the bike, killing V1. The civil liability insurer, in order to avoid having to compensate the damage, argued that the cyclists were guilty of inexcusable fault,[1] ie that of having mounted the tandem despite the problem with its lights, which was evident when they left the bar and took a road which they should have known was not itself lit.

2 As fault assumes judgement on the part of the tortfeasor, this poses the question of whether the alcohol intoxication had deprived V1 and V2 of their judgement.

Decision

3 The judge considered that, even assuming a lack of judgement, it is not possible for a drunk person who commits an act of exceptional seriousness, exposing himself without a valid reason to a danger he/she should have been aware of, to be able to claim that the intoxicated state in which he/she previously voluntarily placed himself renders his/her behaviour involuntary.

1 This decision was made in the context of the application of an automatic compensation scheme for vulnerable users (a category into which the cyclists fell) who are victims of a traffic accident, provided for by art 29*bis* of the Act of 21 November 1989 relating to mandatory insurance for liability in automotive vehicle matters. Until 2001, such victims were deprived of indemnity when they were guilty of an 'inexcusable' fault, namely an exceptionally serious intentional fault which exposes its perpetrator, without any valid reason, to a danger he should have been aware of, and when that fault is the sole cause of the accident.

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Comments

From a theoretical point of view, it is impossible to consider that a person committed a fault when he/she is not (sufficiently) capable of controlling his/her acts, whatever the cause of the loss of control (including the consumption of drugs or alcohol), in as much as, deprived of judgement, and free and conscious will, he/she is unable to determine the harmful consequences of his/her acts. In other words, the moral element for the fault is missing. 4

It is necessary from the beginning to be attentive to the fact that the consumption of alcohol or drugs does not necessarily deprive a person of his judgement, which is not rendered absent simply because it is reduced.[2] This is a matter for assessment left to the judge's complete discretion, which will take into account the particular circumstances of the case. 5

Furthermore, if the act which caused the harm cannot be classified as a 'fault' on the part of the person carrying it out when the lack of judgement is taken into account, it can be as regards the earlier behaviour which placed him/her in that state. Academic literature and case law consider that one cannot be exempt from liability if the mental change is due to the tortfeasor, particularly when he/she has abused alcohol or drugs.[3] In such a situation, it is this breach of the duty of care and diligence, with a causal connection to the ultimate damage, which will be the basis for tortious liability. The Supreme Court clarified this in a judgment handed down in a criminal matter, in which it stated that 'the state of drunkenness does not constitute a ground for justification when the perpetrator of an offence has voluntarily placed himself in that state'.[4] 6

Conversely, if the consumption is not intentional (particularly in situations where a substance is ingested by a person unknowingly), no further blame can *a priori* be allocated to the person who commits the harmful act. 7

9. Italy

Tribunale Genova, Sezione II (District Court of Genova, Second Division) 23 February 2006

Leggi d'Italia

Facts

An intoxicated woman completely lost control of the car she was driving, bumping into seven parked vehicles. The owner of the car she was driving was a third person, 1

2 *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 148 f, no 206.

3 *R Kruithof*, De buitencontractuele aansprakelijkheid van en voor geesteszieken, RGAR 1980, 10179.

4 Free translation of Cass, 14 November 1975, Pas 1976 I, 186.

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who lent it to her although it was clear that she was in a state of alcoholic intoxication. Both the driver and the owner of the car were sued for compensation of the damage caused to one of the vehicles. The driver asked to be exempted from liability under the provisions of art 2046 Civil Code because, due to her intoxication, at the moment of the incident, she was 'incapable of understanding and intending'.

Decision

2 The *Tribunale* refused the request of the driver to be exempted from liability. In the opinion of the judge, in fact, the defendant driver was to be held liable for the damage, jointly and severally with the owner of the car, because her condition of intoxication was the consequence of her negligent behaviour.

Comments

3 Pursuant to the provision of art 2046 Civil Code, a defendant is liable when his/her incapacity is the consequence of his/her own fault. This kind of liability is traditionally justified by speaking of *actiones liberae in causa*.[1] To be held liable in these cases, it is not necessary that the person intended to commit the injurious act, but it suffices that he/she put himself/herself in the state of incapacity.[2]

10. Spain

Sentencia de la Audiencia Provincial Guipúzcoa (Judgment of the Provincial Court of Guipúzcoa) 3 April 2000

ARP 2000\185

Facts

1 Late at night, A was taken to hospital by some relatives due to his violent state of agitation resulting from an intake of alcohol and drugs (marihuana, cocaine and amphetamines). In the emergency department, a physician sought the help of two security guards to secure A on a stretcher while he took a blood sample. Suddenly, A bit the hand of one of the guards and caused the partial amputation of his little finger. The next day, A did not remember anything about what had happened. He was convicted of a crime of injury and the victim filed a claim asking him to pay damages of € 18,321.

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1 *L Devoto*, L'imputabilità e le sue forme nel diritto civile (1964) 63; *P Rescigno*, Capacità di agire, in: Nov dig it, vol II (1950) 861ff.

2 Cass 12 December 1977, no 5411, Giur It 1978, I, 1, 1481.

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Decision

The court considered that A had his capacity to understand fully nullified due to the consumption of alcohol and drugs. Accordingly, it decided to exempt him from criminal liability on the basis of his incapacity. It also considered that the defendant could not have foreseen that the consumption of drugs and alcohol would induce him to perpetrate the aggressive act because not every instance of intoxication leads to such acts and the defendant had not behaved aggressively when he was drunk or took drugs previously. The acquittal, however, did not exclude the duty to compensate for the damage. As a consequence, the court ordered him to pay € 5,000 in damages. **2**

Comments

In Spanish law a direct legal reference to incapacity due to drugs or alcohol is only made regarding criminal liability. Pursuant to art 20.2 II CP, when such incapacity prevents someone from understanding the unlawfulness of one's conduct or adapting one's conduct to such understanding, the perpetrator is released totally or partially from criminal liability unless he sought this state to perpetrate a crime or should have foreseen that it would lead to the commission of a crime (*actio libera in causa*).[1] Such exemption, however, concerns criminal liability only, as long as art 118.1 2 CP provides that those under the influence of drugs and alcohol are nonetheless civilly liable vis-à-vis the victims of their unconscious criminal acts. **3**

As regards civil liability, legal scholarship concludes that the tortfeasor will be liable both when he drank alcohol or took drugs with the aim of causing harm,[2] or when he should and could have foreseen that harm would result from the disturbance of his physical or psychological faculties.[3] Moreover, it is expected from a reasonable and prudent person to foresee that the fact of being intoxicated or taking drugs will diminish his perception and his abilities to react before future events (although these future events could not have been foreseen initially). Accordingly, if one voluntarily made up his mind to drink, being conscious of the situation in which he was placing himself, and when drunk, acted in such a way that can objectively be considered negligent, his conduct can be found negligent regardless of **4**

1 When the defendant placed in one of these conditions acts with intent or he/she should have foreseen the possible consequences of intoxication and recklessly disregarded them, he/she is responsible both criminally and civilly. See for instance STS Criminal Section 11.5.2005 (RJ 2005\5137: 'The defendant had to foresee the violence of his conduct before intake of alcoholic beverages').

2 *F Yáñez Vivero*, Culpa civil y daño extracontractual originado por persona incapaz. Un análisis en el marco del Derecho europeo de daños (2009) 108 f.

3 *F Peña*, La culpabilidad en la responsabilidad civil extracontractual (2002) 330.

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such 'unconscious fault'. The distinction between 'conscious' and 'unconscious' fault has no legal consequences in both cases and the tortfeasor is liable.[4]

11. Portugal

Tribunal da Relação de Coimbra (Coimbra Court of Appeal) 8 May 2012 (Francisco Caetano)

Facts

1 V was run over by a car driven by A, who was driving under the influence of alcohol, with a blood alcohol concentration (BAC) level of 1,05g/l. V suffered serious damage in the accident, which was compensated by A's insurance company. The insurance company, B, now sought to retrieve the amount paid to V from A based on the fact that A was driving under the influence of alcohol.

Decision

2 The court decided that the BAC of 1,05g/l did not in itself prove a causal link between the drunk driving and the production of the accident. Nevertheless, it is known that such a high BAC affects the senses and perception essential to driving, and is, in addition a violation of art 81 of the Highway Code, a fact that is sufficient to create a *judicial presumption* that the accident was caused due to the influence of alcohol. Therefore the court ordered the driver to compensate the insurance company for the costs associated with the accident.

Comments

3 In Portugal, legal proceedings relating to civil liability for traffic accidents whose damages do not exceed the minimum value of the obligatory insurance cover for liability, are filed against the driver's insurance company and not against the driver. When the accident has been caused by a driver under the influence of alcohol, the insurance company has to pay compensation to those harmed (if the requirements of liability are proved), but then the insurance company has a right of recourse against the driver; this is due to the fact that the insurance company is not required to bear the costs of an accident caused by behaviour not covered by the insurance policy – in this case, driving under the influence of alcohol (art 27(1)(c) of the

4 See *M Martín-Casals/J Solé Feliu*, Fault under Spanish Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 259 and more references therein.

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Decree-Law No 291/2007 of 21 August). In the Portuguese legal system, the consumption of alcohol or other drugs is only considered as a state of legal incapacity in terms of contractual capacity.[1] As regards civil liability for unlawful acts, the intoxication does not reduce fault. Fault is intended as an assessment of the agent's behaviour, in the light of the ethical and legal censure of the action or omission of the individual in question. It implies a judgement of the conduct in order to assess if the individual could and should have acted differently.

Driving under the influence of alcohol is an unlawful act, in violation of art 81(2) of the Highway Code (because of the negative effects that it has on the senses and perception essential to driving), and the average individual knows that, after drinking alcoholic beverages, he cannot legally drive. Therefore, the behaviour of the person who drives under the influence of alcohol is always faulty, unless he could not have known that he was under the influence, for example if someone drugged him. It is not relevant, for this assessment, if the driver knows that he was going to drive when he drank the beverages or not. It is common knowledge that driving under the influence of alcohol is illegal, thus being clear that it qualifies as unlawful and faulty behaviour. The fact that the driver was under the influence of alcohol is also relevant to the assessment of causation. **4**

Because of the difficulty in proving the causal link between the influence of the alcohol and the accident, and because of the known effects of alcohol on the senses and perception essential to driving, Portuguese courts usually create a judicial presumption[2] of causation pursuant to arts 349 and 351 of the Civil Code.[3] The judicial presumption works as an element to ease the burden of proof of the party burdened with it (unlike the legal presumption which outright inverts the burden of proof). This easing of the burden of proof facilitates proof of the causal requirement (the causal link between the driver's faulty behaviour and the production of the damage to the plaintiff), whilst not encumbering the defendant with a full inversion of the burden of proof. If the driver wishes to avoid liability for the damage, he has to raise reasonable doubt about the validity of the presumption in the concrete case. Whereas if the burden of proof were inverted, he would have to outright prove that the damage was not caused by the fact that he was driving while intoxicated. **5**

1 See *C Mota Pinto*, Teoria Geral do Direito Civil (4th edn 2005) 538.

2 See *P Lima/A Varela*, Código Civil Anotado, vol I (4th edn 1998) 312f.

3 See *J Sinde Monteiro*, Seguro Automóvel Obrigatório – Direito de Regresso, Cadernos de Direito Privado no 2 (April/June 2003).

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12. England and Wales

Morris v Murray, Court of Appeal (Civil Division) 3 August 1990
[1991] 2 QB 6

Facts

1 Mr Murray, who had a pilot's licence and kept a light aircraft, offered to take the claimant and his friend on a flight. Flying conditions were poor. The flight was short and chaotic. Mr Murray was killed and the claimant was severely injured. The autopsy on Mr Murray showed that from the concentration of ethanol in his body and from his blood alcohol content he had consumed the equivalent of 17 whiskies. The concentration of alcohol was more than three times the limit prescribed for a car driver. The claimant had also been drinking heavily, though he was not so drunk as to be incapable of appreciating the nature and extent of the risk involved in flying with the deceased. (He was 'merry' but not 'blind drunk'.) The present action was an appeal by the defendants, an administrator (father) and administratrix (partner) of Mr Murray, against an award of £ 130,000 in damages for personal injuries.

Decision

2 The Court of Appeal rejected the claim, applying the maxim *volenti non fit injuria* (voluntary assumption of risk). The claimant had embarked upon the flight without compulsion and with knowledge of the risks involved. The danger involved in embarking upon a flight with a pilot he knew to be drunk was obvious and the claimant was not so drunk as to have been incapable of appreciating the nature and extent of the risk involved.

Comments

3 Intoxication through drink or drugs will not normally serve as a defence to tortious liability or, in the case of an intoxicated claimant, prevent the court from reducing the damages for contributory negligence or finding that the claimant assumed the risk of harm that eventuated (*volenti non fit iniuria*). If the intoxication is so extreme as to cause a total loss of consciousness or control, it may be, however, that a defence of automatism would apply.

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13. Scotland

Currie v Clamp's Executor, Court of Session (Outer House), 27 February 2001
2002 SLT 196

Facts

A passenger in a car was injured in an accident in which the driver died. The driver and passengers had been drinking alcohol over a prolonged period, and all were drunk at the time of the accident. In an action of damages by the passenger, the vehicle's insurers argued that the deceased had owed no duty of care to the passenger because the passenger was engaged in a criminal offence under the Road Traffic Act 1998, in that he had allowed himself to be transported in a vehicle knowing that it had been taken by and was being driven by the deceased without the consent of the vehicle's owner.[1] The car was owned by the mother of another passenger of the car. **1**

Decision

The judge continued the case to allow the insurers time to pay the pursuer, having held that: (a) even if there had been a technical breach of the criminal law, it could not be considered a serious breach; (b) the courts adopted a pragmatic approach as to whether participation in criminal conduct disabled an injured party from recovering damages, and on the facts the deceased owed the pursuer a duty of care and the pursuer was not disabled from recovering damages for his injuries caused by breach of that duty; (c) as the pursuer knew or ought to have known that the deceased had been drinking heavily and was clearly unfit to drive, he was contributorily negligent to the extent of one third (and recoverable damages were reduced accordingly). **2**

Comments

This case illustrates two points of law relating to wrongfulness in delict: (a) no account is taken, when assessing the standard of care, of the fact that a defender is voluntarily intoxicated at the time he causes harm[2] – in this case, the judge (Lord Clarke) clearly found the deceased to have been negligent, and made no concession for his impaired judgement; (b) knowledge by an injured party that the driver of a vehicle in which he is a passenger is drunk will constitute contributory negligence on his part – as the judge said in this case, '[a]s the pursuer had been one of the deceased's companions throughout the night, I am satisfied that the pursuer knew, or **3**

1 The vehicle was owned by the mother of one of the other passengers.

2 Though conceivably a defence of necessity might be pleadable were harm necessarily to be caused while the perpetrator was intoxicated.

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ought to have known, that the deceased was clearly unfit to drive and that given his condition there was a serious risk of his being unable to keep the car under proper control'[3] (no concession was made for the pursuer's own diminished capacity for judgement due to his own intoxication).

4 The facts of this case differed from previous cases where injured parties had actively encouraged dangerous criminal activity by defenders which had resulted in injury, thereby precluding them from claiming in delict for their injuries,[4] as the pursuer in this case had not been actively encouraging the commission of a criminal offence by the driver.

14. Ireland

Boyne v Bus Átha Cliath, High Court, 11 April 2002

[2002] IEHC 135

Facts

1 The plaintiff was intoxicated when he took a bus home at approximately 22.30. Shortly after alighting from the bus, the plaintiff stumbled and fell; as the bus pulled away from the stop the rear wheel rolled over his right leg, leaving it virtually useless. The plaintiff sued the bus company and driver. They pleaded contributory negligence.

Decision

2 Finnegan J apportioned 25% responsibility to the plaintiff for his injuries: he held that a plaintiff's intoxication is relevant to the existence and the extent of a defendant's duty of care, but added that:

> 'In assessing the Plaintiff's conduct for the purposes of contributory negligence his intoxicated state is to be disregarded and this is so whether notwithstanding his intoxicated state he knew or ought to have known of the risk which he was running or was incapable of so knowing.'

Comments

3 Voluntary intoxication does not relieve a person of responsibility for contributory negligence. Thus, if in a drunken state, a person takes a risk that would be treated as contributory negligence if undertaken by a sober person, a reduction in damages

3 Para 22.

4 One such previous case is the English case of *Pitts v Hunt* [1991] 1 QB 24. In that case the defendant successfully pled the defence of illegality.

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will be made without any allowance for the plaintiff's condition. The same approach is applicable to an intoxicated defendant; choosing to engage in a risk generating activity while voluntarily intoxicated is regarded as negligent and no allowance in the standard of care for the performance of the activity will be made for the defendant's intoxicated state.[1]

The decision also makes it clear that the defendant's knowledge of the plaintiff's intoxication is relevant to the existence and extent of the duty owed. Because contributory negligence involves relative blameworthiness, the defendant's knowledge and level of obligation are critical to determining the correct apportionment. The amount of deduction varies with the circumstances.[2] 4

16. Denmark

Østre Landsret (Eastern Court of Appeal) 2 February 1987

U 1987.587 Ø

Facts

A had attended a school ball at which alcohol was served. Considering that A had had rather too much to drink, the rector of the school told A to go home and arranged for two of A's friends to escort him there. A suddenly ran into the road and was run over by a car. A was injured and the car was damaged and had to be repaired. The car insurer sued in recourse for approx € 1,980, claiming that A's actions had been grossly negligent and therefore that A was liable for the damage to the car under the Damages Act sec 19, subsec 1.[1] 1

1 In *Devlin v Cassidy* [2006] IEHC 287 the intoxicated owner of a car allowed an intoxicated friend to drive the car; he was held liable for the injuries suffered by a third occupant of the car – the plaintiff.

2 In *McKevitt v Ireland* [1987] ILRM 541 the IESC held that where a plaintiff deliberately started a fire in a police cell, causing himself injury, the defendant could not be more than 50% responsible (case remitted to IEHC). In *Devlin v Cassidy* [2006] IEHC 287 a 50% deduction was made as the plaintiff was aware that the driver was also intoxicated.

1 Under Danish law, the driver of the car would have been strictly liable towards A for any personal injury A might have suffered due to the incident under the general rule in the Traffic Act sec 101, subsec 1. However, in the case of gross negligence, the Damages Act sec 19, subsec 1 provides that claims for the repair of the car may be directed against the person who caused the accident.

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Decision

2 The Eastern Court of Appeal found that A had run directly into the road without looking and that the driver of the car had no chance of avoiding hitting A. Under these circumstances A was considered to have acted grossly negligently and A was held liable towards the insurance company for the repair costs.

Comments

3 As an absolute point of departure, self-intoxication does not provide a ground for escaping or reducing a tortfeasor's liability under Danish tort law rules. Indeed, it is particularly pointed out in the Damages Act sec 24b, subsec 2, that if the person who caused the damage or injury has put himself/herself into a state of *non compos mentis* by the abuse of intoxicants or the like, his/her liability under tort law rules will not be reduced. Instead, the tortfeasor's actions will be judged as if he/she were sober. Indeed, the court in the above case did not even mention A's condition in the ruling: they simply noted that he ran into the road without having looked first. The stringent approach to self-intoxication is strictly followed in Danish case law and it seems that even being intoxicated in the first place in itself provides for not only misconduct in the form of negligence but as a starting point also amounts to gross negligence under Danish tort law rules.[2] In this way the objective starting point regarding the evaluation of misconduct is also maintained regarding cases of intoxication.

Østre Landsret (Eastern Court of Appeal) 28 May 1997

FED 1997.569

Facts

4 Driving in clear and dry conditions on the motorway, A collided with the car driving in front of her. She lost control of her car which continued into a nearby field and was damaged. The insurance company refused to pay out the insurance claiming that the incident was caused by self-intoxication and/or gross negligence, which, according to the insurance policy, was a reason for refusing payment of the insurance sum. A had been coughing all night and had taken a cough mixture (Norwegian Chest Drops) which contained alcohol. The cough mixture was marked with a red triangle indicating that it might affect the consumer's ability to drive or use machinery. Furthermore, she had consumed a dram of spirits (Old Danish), before de-

2 See eg U 1988.786 V (Western Court of Appeal Ruling of 1 January 1994), FED 1995.1349 V (Western Court of Appeal Ruling of 22 December 1995) and U 2008.67 Ø (Eastern Court of Appeal Ruling of 13 September 2007).

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parting, to keep the cough at bay. A was not feeling particularly well due to the lack of sleep and the cough. A blood test showed that A had a blood alcohol content of 1.26. A was fined for driving under the influence but, as she was unaware of the extent of her alcohol intake as she did not realise that the cough mixture contained alcohol, she was only fined according to one of the lesser provisions in the Road Traffic Act. A sued the insurance company for approx € 22,000, claiming that it was obliged to pay under the terms of the insurance policy.

Decision

The City Court of Glostrup found that A had been both grossly negligent, due to the fact that she chose to drive in her weakened state, and that A's intoxication should be considered as self-intoxication. An appeal to the Eastern Court of Appeal overruled the City Court decision on both issues finding that A's consumption of the cough mixture and the dram was not to be considered as self-intoxication under the insurance policy, as it had taken place just before departing and thus that A's blood alcohol content would have been rather lower than 1.26 at the time of the accident. Also, the Eastern Court of Appeal did not find that A's decision to drive despite feeling ill amounted to gross negligence. **5**

Comments

The case provides an example that, although it is a starting point that self-intoxication is not only seen as negligent, but generally even as grossly negligent by Danish courts, exceptions may be made under special circumstances where the intoxicated person was unaware of his/her intoxication. However, contrary to U 1987.587 Ø presented at 11/16 nos 1–3, it is noteworthy that the case shows the conflict between A's insurance company and A and not the conflict between A and a potentially injured third party. Considering the weight that Danish courts place on risk distribution and dissemination,[3] it cannot be held for certain that the result would have been the same in a potential conflict between A and the owner of the car she crashed into. Also, notably, the courts did not find that A had not been negligent. They simply found that under the particular circumstances the negligence had not been gross. **6**

3 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 49.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 30 January 2004
Rt 2004, 165

Facts

1 A 22-year-old man set a home for elderly people on fire. He acted in this manner due to a sudden impulse in a state of confusion caused by his continuous use of drugs. The inhabitants were luckily saved, but the incident caused damage to property amounting to NOK 1.5 million (approx € 170,000). An insurance company paid for the cost of repairs and subsequently filed a recourse claim against the tortfeasor.

Decision

2 In the lower courts the defendant was convicted of wilful destruction of property pursuant to the Norwegian Criminal Act § 291. Voluntary intoxication is neither a defence nor an excuse under Norwegian criminal law or Norwegian tort law. Skl § 1-3 states that if a person who causes damage or injury has brought himself/herself temporarily into a state of mental deficiency, he/she will be liable to such extent as follows from the general rules on compensation for damage. The defendant will be judged as if he/she had full mental capacity. On the basis of this principle, the defendant was ordered to pay damages of NOK 1.5 million. In skl § 5-2 there is, however, a legal basis for reducing the amount of compensation, which can be applicable even if the damaging act was carried out intentionally. The issue before the Supreme Court was whether this reduction clause could be applicable. The rule represents an exception to the principle that a tortfeasor shall restore the loss in full. The 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, the insurance situation and possibilities for insurance, blameworthiness and other circumstances.

3 Firstly, the court considered whether the compensation represented an oppressive burden, taking into account the defendant's financial situation. The court noted that the defendant had no job or education and that he probably would have problems finding work upon his release from prison. The court recognised that there could generally be good reason to take into account the defendant's possibility for rehabilitation if he/she was not burdened with a high debt. The court also pointed out that it could be questioned whether the insurance company should be awarded huge damages that the defendant would never be able to pay. On the other hand, such considerations should not conflict with the need for a deterrent effect. In criminal cases the courts should place decisive weight on the blameworthiness element in order to deter others. The reduction of damages should be even more exceptional in cases where liability arises as a result of a criminal act, and in most cases a

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reduction will be out of the question where the criminal act was a planned act of grave criminality. Still, the court put decisive weight on the fact that the defendant had committed the act in a state of confusion caused by his continuous use of drugs. The court therefore concluded ('having serious doubts') that the total sum of damages would be an unreasonable burden to the tortfeasor. Accordingly, the court reduced the sum to NOK 700,000 (approx € 85,000).

Comments

It is important to note that there were several reasons for the reduction in the amount of damages, which shows that this is a very special case. The tortfeasor was a young man with no assets or insurance, and it would have been totally impossible for him to pay the award in full, whereas the victim was an insured public institution, a home for the elderly, owned by the municipality. The fact that the claimant was actually an insurance company claiming recourse probably made it easier for the judges to find reasons for a reduction. Only in light of these circumstances can we understand why the Supreme Court was willing to deviate from an otherwise important and necessary principle. One should note that there was no doubt concerning the fact that the tortfeasor was liable, but 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 cases based on criminal acts. The case only illustrates how skl § 5-2, a rule that is very similar to the ad hoc reduction rule in art 10:401 Principles of European Tort Law (PETL), can be applied in some rare cases in Norwegian court practice. Hence the decision has no bearing on the question of whether incapacity due to the use of drugs or alcohol affects the question of liability. The decision may, on the other hand, give an impression of how the Norwegian Supreme Court considers misconduct under the influence of alcohol or drugs. **4**

19. Finland

Korkein oikeus (Supreme Court) KKO 1999:93, R97/806, 6.9.1999/2247

<http://www.finlex.fi>

Facts

Some young people in a town were competing over who could drive a certain distance the fastest. Since V had been consuming alcohol, he placed his car in the charge of A. During the drive, V suggested that A try to reach their destination in five minutes, as there had been a rumour that somebody had driven that distance in five–six minutes. V also suggested that A drive at the car's top speed. During the **1**

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trip, he encouraged A to maintain a speed far in excess of the speed limit by monitoring the time on the clock and reporting their speed times.

2 The speed limit for the relatively narrow and winding road on which they were travelling was 100 km/h, but on several occasions the car exceeded 250 km/h. There were five passengers in the car. At a bend, A lost control of the car and it skidded off the road and rolled over several times. V and another passenger were killed and three other passengers were injured. As a result, A was convicted of several crimes. In addition, V's estate claimed compensation from V's motor vehicle insurance company for the funeral costs.

Decision

3 The Supreme Court ruled that continuous speeding at over 200 km/h with a speed that at times reached 250 km/h, posed a serious risk of an accident on that road. This V had certainly understood, despite being slightly under the influence of alcohol. V had caused the injury by his gross negligence in acting as the initiator of the time trial and encouraging the driver to drive at exceptionally high speed. Other conditions did not affect the injury. Because V had caused the injury by his own gross negligence, the claim against the motor vehicle insurance company was dismissed.

Comments

4 V's own contribution to the accident was obvious. The fact that V was slightly drunk did not reduce his liability.[1]

Korkein oikeus (Supreme Court) KKO 2002:83, 2001/458, 15.10.2002/T:2729
<http://www.finlex.fi>

Facts

5 A was driving a car at an excessively high speed while drunk and lost control. As a result, the car collided with V, who was cycling on the right side of the white line marking the edge of the carriageway. V died as a result of the accident. V's depend-

1 See also KKO 1996:24, which concerned drink driving where the part-owner of a car (B) allowed an intoxicated person to drive. The driver had been very drunk (2.47 mg/ml) and the car was a write-off. The co-owner of the car, A, had to compensate the insurance company for the costs the company had to pay to the estate of the deceased who owned the car with B. This was due to B's negligence because he allowed such an intoxicated person to drive.

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ent children and his mother claimed compensation for the mental suffering caused them by V's death.

Decision

The Supreme Court held that A had caused V's death through gross negligence and that V's dependent children and his mother were entitled to compensation for the suffering caused by the death. 6

Comments

It is a common principle that the tortfeasor cannot free himself/herself from liability for negligence by invoking incapacity due to the consumption of drugs or alcohol (TLA ch 2, sec 3 which is cited in 1/19 no 11 and 10/19 no 3). Only if drugs had been consumed unknowingly is it possible to consider that there was no negligence. 7

21. Latvia

Rīgas pilsētas Ziemeļu rajona tiesa (The Northern District Court of Riga)
No C32311812, 20 June 2013
Unpublished

For facts and decision see 10/21 nos 1–3. 1

Comments

Although, alcohol, drugs or other intoxicating substances might lead to a certain incapacity and inability to comprehend or control one's behaviour and to meet the required standard of conduct, the legislator has made it clear that insofar as the person put himself/herself in such a condition, the person would be liable for the harm caused to others in that case. Article 1637 therefore *expressis verbis* addresses the issue of incapacity due to alcohol or other substances. The issue would not be so clear if the incapacity were caused as a side-effect of prescribed medicine or the drugs were taken by the person unconsciously. 2

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23. Poland

Sąd Najwyższy (Supreme Court) 22 May 2002, I CKN 127/00 (chronic disease)

Lex 75254

Facts

1 A, while driving a car on a public road, unexpectedly pulled into the left lane hitting V's car that was driven properly. It was established at trial that the accident was caused by a sudden loss of consciousness by A, which was the result of degenerative changes in his spine and the drugs he had taken. He could not have predicted the side effects of the drugs because of the lack of proper information and medical experience.

2 The conclusions of two medical experts, however, were based only on the likelihood of an episode of losing consciousness due to degenerative changes of the spine. The experts confirmed A's ability to drive, despite the degenerative changes. The district court, as well as the Court of Appeal, dismissed the case. V filed a cassation, questioning the established cause of the accident.

Decision

3 Under the Civil Code, in the case of collision of vehicles, their possessors (most often car owners) are liable to each other on the basis of fault (art 436 § 2 in conjunction with art 415 KC).

4 In view of the fact that the collision was caused by A who unexpectedly drove into the left lane and directly into the car driven properly by V in the opposite direction, it was beyond doubt that A was at fault.

5 A violation of the principle of 'right-hand traffic' specified in the Road Traffic Law is equivalent to a breach of duty of the driver driving on a public road. V was not required to present any further evidence relating to A's fault, since *res ipsa loquitur* applied. The Road Traffic Law refers specifically to the mental condition of drivers and obliges them to predict factors that may affect the safety of other traffic participants. The use of certain drugs (causing eg headaches, dizziness, drowsiness) cannot be seen as a formal factor for a driving ban. A driver of a car on a public road has to be sure that he does not pose any threat to other people. Hence, if having learnt about a possible side effect that may affect the ability to drive safely, yet relying on his/her own experience the driver continues to use the vehicle, or if he/she chooses not to become familiar with information in the leaflet relating to medication, he/she acts recklessly. Recklessness means that the driver equates the statistically low likelihood of the side effects of an accident occurring with the conviction that the adverse effects observed during the drug's development would not happen to him.

6 Moreover, financial liability is covered by mandatory insurance.

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Comments

The actual cause of the car accident was never established by the required standard of proof (ie with certainty) at trial. Were it not for the *res ipsa loquitur* doctrine, it would be much more difficult for V to prove A's fault. Wrongfulness concerned the fact that A's car unexpectedly switched lane and was driving on the left lane until it hit V's car and caused the accident. Fault concerned different aspects of A's conduct. As the court noted, A behaved recklessly because he was fully aware of his health condition, notwithstanding he decided to drive a car. Moreover, he had been taking the same medicine regularly and even then he did not familarise himself with knowledge of the influence the drug had on the ability to drive a vehicle. All these elements allowed the court to establish the defendant's liability based on art 436 KC. 7

According to art 425 § 1 KC, a person who, for whatever reason, is in a state which prevents him from making a conscious or free decision and from expressing his will, is not liable for damage caused when in such a state. But there is an exception to that rule in § 2 KC, according to which, a person who has been subjected to a disturbance of mental functions due to the use of intoxicating beverages or other similar substances is obliged to redress the damage, unless the state of disturbance was caused through no fault of his own. 8

Hence the tortfeasor is fully liable for the damage caused if his impaired mental condition was caused by intoxication or taking other substances such as drugs or medicine. The consumption of intoxicating substances does not have to be continuous; it can also be a unique event. The cited provision imposes the burden of proof on the tortfeasor. He/she can prove that he/she consumed the substances unintentionally or that, despite due care, he/she was not aware of the consequences of such consumption or that he was forced to use them (by threat or physical violence). 9

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 27 October 1971

2 Cz 34/71, Rc 24/72

Facts

The claimant sought compensation for damage caused by an assault on her husband, who died as a consequence of the attack. The respondent who committed the assault was not sentenced in criminal proceedings initiated against him as, due to the consumption of alcohol, he lacked the ability to control his behaviour and assess its consequences. 1

Based on an expert's opinion, the behaviour of the respondent was influenced by pathologic intoxication which was the first time that the respondent had ever 2

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experienced this; thus, he had neither experience with the consequences nor was he able to assume the change which occured in his state of mind.

Decision

3 Pursuant to sec 423 CC, a wrongdoer is obliged to compensate damage which he/she caused in a state in which he/she was not able to control his/her behaviour and assess its consequences if he/she caused that state by his/her fault. It is not sufficient to deduce a causal link between the consumption of alcohol and the occurrence of the state, but the prerequisite of liability is that the person who consumed alcohol caused the state of mind.

4 The conclusion whether or not the claimant was able to assume the occurrence of his inebriated state is not subject to expert opinion but to a court's consideration pursuant to the Civil Procedural Code.

5 Nobody who consumes alcohol in the amount which is usually able to cause a state of at least minor intoxication can rely on the fact that, in his case, only a minor state of drunkenness will follow in which the ability to consider the situation fully remains unchanged. However, he must know that in his case, he will become intoxicated and he will not be able to control his behaviour and assess its consequence. If the person does not take into account such possibility and relies on the fact that such a state will not occur, he acts at fault.

Comments

6 In this case the respondent claimed that he should not be held liable for the state of intoxication which he objectively caused to himself. His excuse was based on the fact that he suffered from pathologic intoxication, ie a state of total inebriation that is caused after consumption of only a small amount of alcohol.

7 Pathologic intoxication causes a state which cannot be expected under normal circumstances. However, the court correctly pointed out that nobody can rely on the fact that, after consumption of a small amount of alcohol that only a minor state of drunkenness actually follows.

8 This conclusion is also consistent with the current provision of sec 2922 NCC, which states that a person who by their own fault is in such a state that they cannot govern their own actions or consider their consequences shall compensate damage caused while in this state. Those who brought him into such a state shall be jointly and severally liable to compensate damage.

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Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 24 February 2011
25 Cdo 91/2010

Facts

The respondent drove a car under the considerable influence of alcohol (3.26 per thousand) and significantly exceeded the speed limit for driving in a village and crossing a railway crossing, as laid down by Act No 361/2000 Coll, the Road Traffic Act. As a result of the respondent's conduct (in the Czech Republic, no alcohol is allowed when driving), an accident occurred in which the claimant as a passenger suffered serious injuries. 9

The court of first instance inferred a causal link between the respondent's unlawful conduct and the damage to the claimant's health based on the judgment in criminal proceedings, where the respondent was found guilty of a criminal offence of bodily harm and endangerment under the influence of drugs. The existence of a causal link was concluded by the court despite the fact that the claimant was not wearing a seatbelt required by the Road Traffic Act. However, it was proven that, without such unlawful behaviour of the claimant, the damage to his health would have been significantly less than it was in reality. Consequently, the court, in determining the extent of the liability of the respondent, took into account the degree of contributory negligence of the claimant. 10

The court of appeal changed the previous decision and established another level of contributory negligence of the claimant. It stressed that the respondent's manner of driving was the fundamental cause; however, taking into account other circumstances (not wearing a seatbelt, consciously driving with respondents who had consumed alcoholic beverages, opting to stay in the car with a driver driving in a risky manner) concluded that both parties contributed equally to the occurrence of damage to the claimant's health. 11

Decision

If damage is also caused by acts of the victim, the wrongdoer is not liable to the extent attributable to the victim. This conclusion is reasoned by the fact that one of the basic elements of liability for damage is missing, namely the causal relationship between the occurrence of the damage and unlawful conduct of the wrongdoer (Judgment of the Supreme Court, No 25 Cdo 657/2006 and No 25 Cdo 1500/2006). 12

When considering the distribution of damage between the wrongdoer and the injured party, such consideration is based on the relationship between the conduct of the victim and wrongdoer and consideration of all facts which have contributed to the damage. All causes that led to the injury must be taken into account, also in the case of the wrongdoer. This means that only such behaviour of the injured which was at least one cause of the damage will be taken into account. Final con- 13

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sideration about the share of the victim's contribution to causing the damage depends on a comparison of the wrongdoer's and victim's behaviour.

14 According to the case law of the Supreme Court, when the damaged party deliberately drove in a vehicle that was driven by a person whose driving skills were significantly affected by alcohol, the victim significantly contributed to the occurrence of the harmful consequence, and the share in the damage suffered can be as much as 50%.

Comments

15 This case presented a revolutionary conclusion of the Supreme Court in cases of damage caused under the influence of drugs and alcohol. Meanwhile, whilst the older cases tended to conclude that causing damage under such substances leads to the sole liability of the wrongdoer, the court concluded that driving in a car with such a driver must lead to the contributory negligence of the victim.

16 The court deduced that, taking into account the particular circumstances of the case, the liability of the victim for damage caused may be up to 50%.

25. Slovakia

Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Socialist Republic) 27 October 1971, Case No 2 Cz 34/71

Collection of Judicial Decisions and Opinions – R 24/1972

Facts

1 After consuming an amount of alcohol corresponding to slight to moderate intoxication, the defendant inflicted injuries on the claimant's husband resulting in his death. The defendant argued that he could not have foreseen that, after consuming the amount of alcohol as ascertained, he would be in a pathological state of intoxication, in which he was not capable of fault. Both the court of first instance and the appellate court ordered him to pay compensation for the damage under § 423 of the Civil Code.

Decision

2 Any person who has caused damage when intoxicated is liable under § 423 of the Civil Code if, due to his own fault, he brought himself into this intoxicated state, also when the intoxication has a great influence on his body than is usual.

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Comments

As provided in § 423 of the Civil Code, a tortfeasor is liable to compensate damage which he caused in a condition in which he was incapable of controlling his conduct or of understanding its consequences. It does not suffice that there was a causal relationship between his alcohol consumption and the existence of such condition. For liability to arise, the law requires that the intoxicated person placed himself in such a condition due to his own fault. The defendant argued that he could not have foreseen the consequences of consuming a small amount of alcohol. In his defence, he relied on the provisions of the Criminal Code, according to which, a defendant could not be considered negligent if he knew that, by his conduct, he could bring himself into a condition in which he was incapable of controlling his conduct or understanding its consequences, believing, without appropriate grounds, that he would not bring himself into such a state. Similarly, although he did not know he could bring himself into such a state by his own conduct, with regard to the circumstances and his personal conditions, he should and could have known better. According to the Supreme Court, there was no ground to apply, by analogy, the provisions of the Criminal Code. According to the court, a person who consumed an amount of alcohol which would normally lead to a state of slight intoxication, but did not believe that he would become only slightly intoxicated, also has to reckon with the possible state of complete insanity. As stressed by the court, the purpose of § 423 of the Civil Code is to show that also where the intellect or the capability to control one's conduct (one is drunk) is reduced, it is just and fair for a person to bear the consequences for bringing himself into such a condition. It would not be just if the damage fell on those who were affected. 3

Okresní soud Trenčín (Trenčín Regional Court) 12 June 2006, Case No 17 Co/376/2005

Available in *K Nemcová/P Vojtko* (eds), Judikatúra vo veciach náhrady škody (2011) 49 ff.

Facts

The court of first instance decided on the duty to compensate harm to the claimant's health, which was caused after the claimant met the defendant at a party and asked him to give him a ride home in his car. The claimant mentioned that he saw the defendant drinking alcoholic beverages. When driving the car, the defendant failed to adjust his speed to his abilities and crashed into the fence of a family house. At that time, he had a blood alcohol level of 1.8 per thousand. The appellate court affirmed the judgment of the court of first instance. 4

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Decision

5 If the harm were also caused by the fault of the injured person, the compensation would be reduced in proportion to the extent of this contributory conduct. In order to arrive at a conclusion on the fault of the injured person, all requirements set by law for the liability for damage to arise must be satisfied, ie unlawful conduct (also a breach of § 415 of the Civil Code), the existence of harm and their causal relationship. The conduct of the injured person breached § 415 of the Civil Code, when he voluntarily and upon his own request got into the motor vehicle driven by the driver under the influence of alcohol, of which the injured was aware.

Comments

6 In the present case, the defendant undoubtedly caused the harm. As provided by § 423[1] of the Civil Code, any person who brought himself into a condition in which he was incapable of controlling his conduct or of assessing its consequences has to compensate the damage he caused in such a condition.[2] In this case, the courts also considered the issue whether, by his conduct, the claimant satisfied the elements defined in § 441 of the Civil Code concerning the contributory fault of the injured party. When deciding on the duty to compensate the damage, the possible contributory fault of the injured may result in a reduction of the wrongdoer's liability. The court considered the claimant's conduct as a breach of the duty in § 415 of the Civil Code (rule of general preventive care) and reduced the amount of compensation sought by 20%, which was, according to the court, appropriate in proportion to the contribution of the injured person in causing his harm.

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1 § 423: 'Any person who is guilty of having brought himself into a state in which he is incapable of controlling his conduct or judging its consequences must provide compensation for the damage he causes while he is in such condition. Persons who have intentionally put him into such condition shall be liable jointly and severally with him.'

2 See also the evaluation of judicial decisions of the courts in the Slovak Socialist Republic considered and approved by the Supreme Court of the Slovak Socialist Republic of 25 November 1976, Case No Pls 2/76, R 27/1977. The decisions states: In cases in which damage was caused under the influence of alcohol, but the wrongdoer was not in a condition in which he was not capable of understanding the consequences of his conduct and/or to control his conduct, the courts followed the general provisions without applying the provision of § 423 of the Civil Code, which was correct.

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26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev-916/1999-2 of 27 May 2003

<www.vsrh.hr>

Facts

A filed a recourse claim against B for damages which it had paid to V. V's vehicle was damaged when B, A's employee, driving a vehicle belonging to A, collided with V. The lower courts established that when the collision occurred, B was mildly intoxicated (0.49 g/kg), which was within the legally permitted blood alcohol level, and classified B's behaviour as simple negligence. 1

Decision

The SCRC dismissed A's request for revision and upheld the decisions of the lower courts, including their arguments. 2

Comments

Generally speaking, a person who inflicts damage while intoxicated will be held liable for such damage. Hence, temporary incapacity resulting from intoxication with drugs and alcohol generally will not absolve a tortfeasor from liability. This position clearly stems from the relevant black-letter rules. Pursuant to art 1050, para 2 of the COA, a person who has caused damage to another person in a state of temporary incapacity will be liable for that damage, unless he proves that the incapacity was not caused by his fault. There are no reported cases where a tortfeasor has been successful in proving that his/her temporary incapacity was caused without his/her fault. 3

The sole fact that a person was intoxicated when a harmful event occurred does not necessarily imply that person's liability. In order for a person to be held liable for damage caused while under the influence of drugs or alcohol, it must be established that that damage resulted from the intoxication, hence that there is a legally relevant causal link between a tortfeasor's intoxication and the damage sustained. This is the position taken, for example, in the decision of the County Court in Zagreb No Pn 1995/85 Gž-13/88 of 13 January 1888 (3d/26 nos 3–6). This case concerned a car accident in which an intoxicated person was involved. An intoxicated driver (V) was hit by another driver (A) who entered a crossroad despite the traffic lights being red. A claimed that V should be held liable for the accident and damage sustained, solely based on the fact that V was driving while intoxicated. The court however found that there was no legally relevant relationship between V's intoxication and the accident and consequently dismissed A's claim. 4

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5 Finally, intoxication as such does not necessarily imply a higher threshold of blameworthiness. Hence, as is evident from the judgment of the present SCRC No Rev-1916/1999-2 case, even if a person is only mildly intoxicated, that person's actions can still be qualified as simple negligence.

6 Temporary intoxication must, however, be distinguished from chronic alcoholism as a permanent condition. As will be demonstrated in the decision of the SCRC No Rev-740/93-2 below, chronic alcoholism may take the form of a permanent condition and consequently influence a person's delictual capacity.

Decision of the Supreme Court of the Republic of Croatia No Rev-740/93-2 of 25 January 1995

<www.vsrh.hr>

Facts

7 A attacked and injured V. In the first instance proceedings, A was diagnosed with 'chronic alcoholism with a psycho-organic syndrome and alcoholic psychosis'. In the course of the proceedings it was also found that, at the moment of the attack, A was heavily intoxicated.

Decision

8 The SCRC found that A cannot be held liable for the damage inflicted upon V due to his incapacity. This court held that 'chronic alcoholism with a psycho-organic syndrome and alcoholic psychosis', with which A was diagnosed, represents a long-lasting process which is similar to permanent mental illness. Consequently, when a person commits a tort in a state of incapacity due to permanent mental illness, pursuant to relevant legal provisions, that person cannot be held liable for the damage thereby inflicted. Furthermore, the SCRC held that the fact that A was heavily intoxicated when he committed the tort was of no relevance for the assessment of his liability. As the SCRC explained, when a person is incapacitated due to a permanent mental illness, additional amplification of the existing incapacity due to intoxication has no impact on the overall assessment of that person's liability.

Comments

9 If a person suffers from chronic alcoholism, so that the condition takes the form of a permanent mental illness, they will generally not be held liable for their conduct. The position taken by the SCRC in this case is perfectly in line with relevant black-letter rules. Pursuant to art 1050, para 1 of the COA, a person who, due to mental illness or deficiency or for any other reason, is not capable of making judgements, will not be held liable for damage inflicted upon others.

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What is, however, particularly interesting in the SCRC's position taken in decision No Rev-740/93-3 is the court's view that, in the case of chronic alcoholism, which takes the form of a permanent mental illness and which therefore makes a tortfeasor incapacitated, the fact that a tortfeasor committed a tort under the influence of alcohol will not render that person liable for the damage thereby sustained. The logic behind this position is that if a person is permanently incapacitated, that person cannot be temporarily incapacitated at the same time. Consequently, that person's liability should be assessed on the basis of the rules on liability of permanently incapacitated persons and not on the basis of the rules on liability of temporarily incapacitated persons. 10

27. Slovenia

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 244/2011, 28 August 2014

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113071115/> (25 February 2015)

Facts

The plaintiff was involved as a passenger in a traffic accident caused by the driver of a car in a state of intoxication. The plaintiff suffered serious physical injury in the accident, because of which he claimed compensation for pecuniary and non-pecuniary loss. In the civil case for compensation, the defendant referred to the plaintiff's 50% contribution to the damage; specifically, 25% because the plaintiff travelled with an intoxicated driver and 25% because the plaintiff was not wearing a seatbelt. The plaintiff was also himself seriously intoxicated and therefore put forward the defence in the civil case for compensation that he was unable to judge whether the defendant was intoxicated or whether driving with him was safe. The courts of first and second instance assessed the plaintiff's contribution at 35%; 25% because of driving with an intoxicated driver and 10% for not wearing a seatbelt. 1

Decision

The Supreme Court confirmed the judgment of the first and second instance courts by which the plaintiff shared responsibility for the injuries that occurred because he was travelling with a seriously intoxicated driver. The decision of an injured party to travel with an intoxicated driver falls within the behaviour of an injured party that under para 3 of art 153 of the Code of Obligations has as a consequence partial relief of liability of the owner of the motor vehicle (The driver, as an operator of a dangerous object, is strictly liable, but on the basis of para 3 of art 153 of the Code of Obligations he can be partially relieved of strict liability if the injured party contributed 2

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to the occurrence of the damage). The Supreme Court found that the plaintiff had himself become intoxicated and, similarly, his capacity to judge when he was not intoxicated did not deviate to a major extent from the capacity of judgement of a normal sober adult. It is possible to expect an averagely careful person to judge whether travelling with another driver is safe. If he himself reduces, or even entirely deprives himself of the capacity for such a judgement (eg he becomes so intoxicated that he cannot judge whether the driver with whom he intends to travel is so seriously intoxicated that travelling with him would be unsafe), the application of para 3 of art 153 of the Code of Obligations is not excluded. The essential fact is that the plaintiff was not in a state in which he could soberly consider whether to travel with an intoxicated driver and that he put himself in such a state. The Supreme Court therefore confirmed the first and second instance judgment that the plaintiff's contribution to the injuries amounted to 25%. The Supreme Court did not deal in the judgment with the plaintiff's 10% contribution because he was not wearing a seatbelt since the plaintiff admitted that contribution.

Comments

3 Presumed soundness of mind at the time of causing damage, which is a precondition for responsibility in law, can be successfully refuted only by a person who proves that he/she caused the damage in a *non compos mentis* state caused by the consumption of alcohol or drugs, for which he/she was not to blame. A person who by proving unsoundness of mind for which he/she was not to blame is not liable for damages (para 2 of art 136 of the Code of Obligations). In such a case the person who put the defendant in a *non compos mentis* state, for example by slipping a mixture of various drugs into a drink unnoticed, is liable for damages (para 3 of art 136 of the Code of Obligations).

28. Romania

Tribunalul Arad (Tribunal of Arad) Criminal Section, Criminal Decision No 21 of 23 January 2014

<http://www.jurisprudenta.com>

1 For facts and decision see 4/28 nos 1–2 above.

Comments

2 It is interesting that the Tribunal of Arad decided this case on the basis of art 1349 (general provision on tort liability) and not of art 1357 (liability for one's own acts) although the fault of the driver is a central pillar of the court's reasoning and the tort

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committed by the defendant constituted a criminal act, killing by fault. Exceeding the legal speed is an illegal act and makes the tortfeasor liable on the ground of his fault, subject to the establishment of a causal link between the accident and the excessive speed and consumption of alcohol. His fault consists in the infringement of the statutory provision on driving within the speed limit and the prohibition from driving under the influence of alcohol. As mentioned earlier, Romanian courts do not make a distinction between the two provisions on tort liability; they either use them as a joint legal basis for establishing fault liability, or (as in the present case) they use them as alternative legal bases. Nevertheless, this judgment was issued before the highest court decision on art 1349 of the new Civil Code. Article 1367[1] provides that a person who commits damage is not liable if, at the moment of the tort, he was even temporarily mentally incapacitated due to which he/she could not realise the consequences of his/her acts. However, the person who commits a tort when the temporary state of mental incapacity has been voluntarily induced by the tortfeasor by consuming alcohol, drugs or other substances will be found liable. Thus in the cases above, the court established liability under the rules on tort liability for one's own acts (art 1357 of the new Civil Code).

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Scenario 1

A attacks and injures V. At the moment of attack, A is heavily intoxicated with alcohol to the point that he is unable to control his actions. He is diagnosed with 'chronic alcoholism with psycho-organic syndrome and alcoholic hallucinosis'.[1] **1**

1 New Civil Code, Chapter IV (Civil Liability), Section 3 (Liability for Own Acts) art 1367 on liability of persons without discernment:
(1) Whosoever caused damage will not be liable if at the moment in which he committed the tort he was, even if temporarily, incapacitated due to which he could not realise the consequences of his acts.
(2) However, whosoever caused the damage will be liable, if he/she caused his/her temporary incapacity by consuming alcohol, drugs or other substances.

1 See the Croatian case: Supreme Court of the Republic of Croatia No Rev-740/93-2 of 25 January 1995, above 11/26 nos 7–10 with comments by *M Baretić*.

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Scenario 2

2 A, who is 17 years old, attends a school ball at which alcohol is served. Considering that A has drunk too much, the head teacher tells him to go home and arranges for two of A's friends to escort him. A suddenly runs into the road and is run over by a car. He is injured and the car is damaged and needs to be repaired.[2]

Scenario 3

3 A is coughing all night and takes a cough mixture which contains alcohol. The cough mixture is marked with a red triangle indicating that it might affect the consumer's ability to drive or use machinery. In the morning, she is not feeling particularly well due to the lack of sleep and the cough, and takes more medicine before setting off to work. She is unaware of the extent of her alcohol intake as she steps into her car, since she did not realise that the cough mixture contained alcohol. When driving in clear and dry conditions on the motorway, she loses control of her car and ends up in a nearby field where the car is damaged. A blood test shows that A has a blood alcohol content of 1.26. Her insurance company refuses to pay out the insurance claiming that the incident was caused by self-intoxication and/or gross negligence, which, according to the insurance policy, are reasons to refuse payment of the insurance sum.[3]

Solutions

a) Solution According to PETL

4 In the first scenario, the tortfeasor was intoxicated with alcohol to the point that he was unable to control his actions. If his chronic alcoholism, which led to psycho-organic syndrome and an alcohol-related psychosis, can be assimilated to a state of mental disability, the solution would be similar to that of the cases presented in Chapter 10.[4] Taking into consideration his mental disability, the required standard of conduct may then be lowered to the point that the tortfeasor is held not to have been at fault at all.

5 If, in the second scenario, A was still capable of discernment, he was required to know that one should not suddenly run into the road since there was a danger of

2 See the Danish case: Ø (Eastern Court of Appeal) 2 February 1987, U 1987.587 Ø, above 11/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*.

3 Scenario inspired by the Danish case: Ø (Eastern Court of Appeal) 28 May 1997, FED 1997.569, above 11/16 nos 4–6 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*.

4 Above, 10/30 nos 1–17.

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being run over and causing damage to a car.[5] He would therefore have been at fault under the PETL. If, on the contrary, he was drunk to the point that he was unable to foresee the potential consequences of his acts at the very moment he acted, he will still be held to have been at fault (either for negligence or for *dolus eventualis*) assuming that he foresaw or could have foreseen that, when drunk, he might commit any acts that cause damage to others.[6]

In the third scenario, A did not consume any drinks at all but took a cough mixture containing alcohol. When she consumed alcohol she was not positively aware of it. The mixture was, however, marked with a red triangle indicating that it might affect the consumer's ability to drive or use machinery. The outcome of the case under the PETL would depend on whether a 'reasonable person in the circumstances' in the context of art 4:102(1) PETL would have seen and understood the warning, and subsequently decided not to drive. If this is the case, which is rather likely given the express warning, A would have violated the standard of conduct required under the PETL. **6**

b) Solution According to the DCFR

The DCFR defines negligence in art VI–3:102 as 'conduct which ... (b) does not ... amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. The DCFR thus uses an objective standard of care.[7] However, the DCFR contains a special provision limiting the accountability of 'mental incompetent persons'. Pursuant to art VI–5:301(2) DCFR, '[a] person is to be regarded as mentally incompetent if that person lacks sufficient insight into the nature of his or her conduct, unless the lack of sufficient insight is the temporary result of his or her own misconduct'. According to art VI–5:301(1) DCFR, '[a] person who is mentally incompetent at the time of conduct causing legally relevant damage is liable only if this is equitable, having regard to the mentally incompetent person's financial means and all the other circumstances of the case. Liability is limited to reasonable recompense'. **7**

The official commentary to the DCFR sets out that '[t]he lack of sufficient insight can be either temporary or permanent. However, where the lack of sufficient insight **8**

5 Compare the example provided by *P Widmer*, PETL – Text and Commentary (2005) art 4:102, no 28.

6 Compare PETL – Text and Commentary (2005) art 4:102, no 28 (*P Widmer*). The latter analysis may differ where a person consumes only a small amount of alcohol which nevertheless, due to this person's particular physical conditions, has unforeseeable strong, incapacitating effects on him. Compare the facts of the Czech case: Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 2 Cz 34/71, Rc 24/72, above 11/24 no 1f with comments by *L Tichy*/*J Hrádek*.

7 *C v Bar*/*E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

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is only temporary, … [c]onsideration must be given to what that person has done to bring about the condition and whether this amounts to misconduct. Thus an alcoholic who has suffered brain damage and has a permanent deficiency of insight into his or her conduct will fall under VI.–5:301, whereas a mentally fit and healthy individual who embarks on a one-off 'bender' and so puts himself or herself beyond proper self-control will not have a defence under this Article for damage caused during the drunken escapade'.[8]

9 If, in the first scenario, the tortfeasor's chronic alcoholism, his psycho-organic syndrome and his psychosis can be assimilated to a state of mental disability, the solution would be similar to that of the cases presented in Chapter 10.[9] He may subsequently be liable 'only if this is equitable', having regard to his 'financial means and all the other circumstances of the case' and 'limited to reasonable recompense'.

10 If, in the second scenario, A was still capable of discernment, he was required to know that one should not suddenly run into the road since there was a danger of being run over and causing damage to a car. He would therefore have been negligent under the DCFR. If, on the other hand, he was drunk to the point that he was unable to foresee the potential consequences of his acts, he would not benefit from the defence under art VI–5:301(1) DCFR but be held liable for bringing himself into a state in which he might cause damage to others.

11 The third scenario is arguably a borderline case under the DCFR. It seems possible to analyse A's temporary lack of insight under art VI–5:301(1) DCFR.[10] In that case, consideration must be given to whether A's driving of her car under the influence of alcohol contained in the cough mixture amounted to misconduct. This in turn depends on whether a reasonable person in the circumstances would have seen and understood the warning and subsequently decided not to drive. Given the express warning this is rather likely. In this case, A would not be excused and will have violated the standard of conduct required under the DCFR.

31. Comparative Report

1 All the reporters submitted cases in this category except those with responsibility for the Historical Report, the Netherlands, Malta, Sweden, Estonia, Lithuania and the European Union.

2 The cases supplied, and the comments on them, reveal a very strong congruence of approach across distinct legal traditions. In general, while it is accepted that a person is not responsible for damage caused while suffering from mental incapac-

8 *C v Bar/E Clive*, DCFR, art VI–5:301, Comment B (p 3691).

9 Above 10/30 nos 1–17.

10 Compare above 10/30 nos 1–17.

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ity, if the mental incapacity itself resulted from the voluntary ingestion of drugs or alcohol, then liability can still be imposed.

Code provisions expressing – at least in broad terms – these basic principles are **3** to be found in several legal systems. The historic models are perhaps § 1307 ABGB and § 827 BGB.[1] Similar provisions are now to be found in the civil codes or other legislation of Greece (art 925 §1 CC), Italy (art 2046 CC), Spain (art 118.1.2 CP), Finland (TLA ch 2, sec 3), Latvia (art 1637 CLL), Poland (art 425 § 1 KC), Czech Republic (art 423 CC and sec 2922 NCC), Slovakia (art 423 CC), Croatia (art 1050 para 2 COA), Slovenia (art 136 para 2 CO) and Romania (art 1367 CC).[2] Even in the absence of specific legislation, however, very similar principles are applied by the courts, as the analysis below will demonstrate.

Two main scenarios recur commonly in the cases submitted. A first example is **4** drunken driving.[3] Broadly the same issues arise whether it is a claim *against* a drunken driver, in which it is sought to prove the latter negligent or grossly negligent, or a claim *by* a drunken driver, in which case it may have to be addressed whether there should be a reduction in damages for contributory negligence.[4] A related scenario is where there is a claim by a drunken *passenger*.[5] As may be ex-

1 See respectively Austria 11/3 no 3 and Germany 11/2 no 3.

2 See respectively Greece 11/5 no 3; Italy 11/9 nos 1, 3; Spain 11/10 no 3; Finland 11/19 no 7; Latvia 10/21 no 2 and 11/21 no 3; Poland 11/23 no 8; Czech Republic 11/24 nos 3 and 8; Slovakia 11/25 no 3; Croatia 11/26 no 3; Slovenia 11/27 no 3; Romania 11/28 no 2.

3 Austria 11/3 no 1 ff; Switzerland 11/4 no 1 ff; Italy 11/9 no 1 ff; Portugal 11/11 no 1 ff; Denmark 11/16 no 4 ff; Finland 11/19 nos 1 ff and 5 ff; Czech Republic 11/24 no 9 ff; Slovakia 11/25 nos 4 ff and 6; Croatia 11/26 no 1 ff; Slovenia 11/27 no 1 ff; Romania 11/28 no 1 ff (referring to 4/28 no 1 ff). See also Poland 11/23 no 5 (sudden loss of consciousness while driving after taking medication for back problems).
Whether a driver's intoxication amounted to gross negligence or inexcusable fault may be relevant in determining an insurer's recourse rights against him, or his own entitlement to claim under his own insurance, or the application of the defence of contributory fault, and the courts in several countries have made findings to this effect: Germany 11/2 no 1 ff; Belgium 11/7 no 1 ff; Finland 11/19 no 1 ff (contributory fault) and no 5 ff (compensation for mental suffering); Croatia 11/26 no 1 ff (employer's recourse claim against employee: but cf ibid no 5: mild intoxication has been found to be only simple negligence). See also Portugal 11/11 no 1 ff: drunken driving not covered by insurance, so insurer – though obliged to compensate the victim – has a right of recourse against the drunken driver. But cf Denmark 11/16 no 4 ff: A not grossly negligent where she had taken cough drops which she did not know contained alcohol.

4 Austria 11/3 no 2 (accepted in principle, though not proven on the facts before the OGH); Switzerland 11/4 no 6; Scotland 11/13 no 2; Ireland 11/14 no 2 ff; Czech Republic 11/24 no 12 ff; Slovakia 11/25 no 5; Slovenia 11/27 no 2. As regards contributory fault by other road user, see Belgium 11/7 no 1 ff (V riding bicycle while drunk).

5 Austria 11/3 no 1 ff; Switzerland 11/4 no 1 ff; Scotland 11/13 no 1 ff; Ireland 11/14 no 1 ff (injury after alighting from bus that ran him over); Finland 11/19 no 1 ff; Slovenia 11/27 no 1 ff. A further variation would be a claim against a pedestrian who causes an accident by running drunkenly onto a road: see Denmark 11/16 no 1 ff (liability for gross negligence on the facts).

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pected, legal systems are not generally very receptive to pleas in exculpation of this nature. In the passenger scenario it is immaterial that, due to intoxication, the passenger's own ability to assess whether the driver was safe to drive was impaired: he should not place himself in such a state.[6] As regards the driver, it is equally immaterial that, at the time of consuming alcohol, he may not have anticipated driving while under the influence.[7] However, the mere fact that a driver was drinking does not necessarily make him responsible for an accident in which he was involved: this could have come about coincidentally without the intoxication playing any role at all.[8]

5 A second common type of case is alcohol- or drug-fuelled violence.[9] The cases submitted universally focus on the liability of the attacker as tortfeasor.

6 In all situations, intoxicated persons who wish to deny responsibility for the harm they cause while under the influence must usually satisfy two conditions. First, it is generally necessary to demonstrate that the intoxication resulted in a total lack of consciousness or capacity at the time of causing the harm; a mere reduction in consciousness or capacity is not enough.[10] Secondly, the intoxication must be involuntary. *Voluntary* intoxication is effectively regarded as a form of culpability in which the 'reference point' of the fault is the intoxication, rather than the consequences of the intoxication.[11] Thus, it is enough that the defendant intentionally consumes the intoxicant and irrelevant that he does not, or perhaps could not reasonably be expected to, foresee the injury he causes unintentionally while intoxicated.[12]

7 While it is accepted in principle that the involuntariness of the intoxication acts as an exculpation, often on the basis of explicit Code provision[13] – otherwise, recognised judicially or in the literature[14] – it is notable that no cases were supplied in which it was found on the facts that the intoxication was actually involuntary and so eliminated legal responsibility.[15] An oft-cited hypothetical example of involuntary

6 Slovenia 11/27 no 2.

7 Austria 11/3 no 4; Portugal 11/11 no 4. See also France 11/6 no 1ff; Belgium 11/7 no 1ff. But note that, so far as the drunken passenger is concerned, the question is whether he was able to realise that the driver was drunk and, if not, whether he could have foreseen at the time he started drinking that he might later be given a ride by a drunken driver: Austria 11/3 no 2.

8 Croatia 11/26 no 4, referring to 3d/26 nos 3–6.

9 Greece 11/5 no 1ff; France 11/6 no 1ff; Spain 11/10 no 1ff; Norway 11/17 no 1ff (arson attack); Czech Republic 11/24 no 1ff; Slovakia 11/25 no 1ff; Croatia 11/26 no 7ff.

10 Belgium 11/7 no 5; England and Wales 11/12 no 2.

11 Austria 11/3 no 3; Italy 11/9 no 3; Spain 11/10 no 4.

12 See eg Czech Republic 11/24 no 1ff (the first time A had experienced pathological drunkenness after consuming alcohol). The same case is reported in Slovakia 11/25 no 1ff.

13 Germany 11/2 no 3; Austria 11/3 no 3.

14 Belgium 11/7 no 7; Finland 11/19 no 7.

15 Explicitly: Croatia 11/26 no 3. Cf Denmark 11/16 no 4ff (ignorance of alcohol in cough mixture meant there was no *gross* negligence).

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intoxication is the unknowing consumption of an intoxicating substance.[16] But this should be considered in the light of cases in several jurisdictions which have rejected exculpatory pleas based on extreme and allegedly unforeseeable reactions to the voluntary ingestion of a small amount of alcohol[17] or even a medically prescribed drug.[18]

8 However, a person's chronic alcoholism may constitute a permanent mental illness and if he commits a tort while in a state of incapacity resulting from that illness, this may provide grounds for an exemption from liability. This was the outcome of a case in Croatia, in which the court ruled that it was immaterial that the tortfeasors was also heavily intoxicated with alcohol at the time of committing the tort: the permanent mental disability is the decisive factor in such a case, not the temporary intoxication, and the latter has no effect on his liability.[19]

16 Belgium 11/7 no 7; Finland 11/19 no 7; Poland 11/23 no 9; Slovenia 11/27 no 3; cf Latvia 11/21 no 2 ('not so clear'). A person who intentionally 'spikes' the drinks of another may be liable for damages on that account: Slovenia 11/27 no 3.

17 Slovakia 11/25 no 1ff.

18 Spain 11/10 no 1ff (alcohol and recreational drugs); Poland 11/23 no 1ff (D's failure to inform himself about the possible impact of the drug on his ability to drive). Cf Latvia 11/21 no 2 ('not so clear'). Note also the converse case of the failure to take medication for known mental health problems: see France 11/6 no 1ff.

19 Croatia 11/26 no 7ff (violent assault).

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12. Incapacity due to Other Transient Factors

2. Germany

Bundesgerichtshof (Federal Supreme Court) 16 March 1976, VI ZR 62/75

BGH NJW 1976, 1504

Facts

1 The first defendant was driving his car, which was insured with the second defendant insurance company, on the motorway at a speed of 90 km/h when, for unknown reasons, the left rear tyre suddenly burst with a loud explosion-like noise and the car swerved to the left. The first defendant's sister and her husband, the claimant, were passengers in the car. Terrified by the situation the driver (the first defendant), slammed on the brakes, which resulted in the car sliding into the path of another car. In the collision, the driver's sister was killed and her husband and the driver were severely injured. The husband claimed compensation for the burial costs of his wife, costs for the employment of a home help and a reasonable sum for his pain and suffering from the driver and his insurance company.

Decision

2 The lower courts had granted the claim; the BGH denied the fault of the driver's pursuant to § 823 BGB, which at that time was necessary to found a claim for compensation of pain and suffering.[1] The court argued that, under the pressure of the situation, the driver was not at fault for failing to react as taught in driving schools, namely not to brake. In the situation, the driver had no time to consider how he should react. He reacted rather instinctively though a more rational driver may not have applied the brakes. However, this could not be expected of the average driver. Since the driver was not held liable under § 823 BGB, his insurer was under no obligation to pay compensation.

Comments

3 Despite the legislative changes introduced in 2002 (previously, in road traffic accidents, claims for compensation of pain and suffering required fault) the BGH decision is still valid and applicable to situations where fault continues to be relevant. In extreme situations, which occur unexpectedly and suddenly for an actor, an under-

1 Only in 2002 did the legislator extend the right to claim non-pecuniary damage to situations of strict liability; see for road accidents § 11 Road Traffic Act (StVG).

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standably wrong decision or reaction does not qualify as fault.[2] The fault concept takes into account that even a normal reasonable person could panic and make mistakes.

3. Austria

Oberster Gerichtshof (Supreme Court) 22 April 2010, 2 Ob 33/10g

JBl 2010, 653

Facts

An Austrian railway company sought compensation for damage to a railway bridge caused by a large cargo ship, more specifically a so-called pusher tug (*Schubverband*) that collided with a bridge pier. The helmsman of the pusher tug, who had not had any symptoms of a disease when he had started working, or in the preceding days, felt a sudden discomfort (shivering, pain in his limbs and nausea) and lost consciousness. As he passed out, he touched the helm and by so doing knocked the convoy off course. Without this abrupt change in direction, the pusher tug would have passed the bridge without incident. 1

Decision

The Court of Appeal had dismissed the railway company's claim for damages in the absence of unlawful and culpable conduct by the helmsman. The Supreme Court confirmed this decision and rejected the appeal. It held that sudden unconsciousness, which the defendant did not have to foresee, excluded his culpability. Hence, the question of whether the helmsman's conduct was even wrongful was no longer decisive. Furthermore, the Supreme Court dismissed a claim against the ship's keeper (*Halter*) based on a strict liability regime in accordance with settled case law: there is no specific provision regarding strict liability for ships, nor was there a suitable basis for strict liability based on analogy. In particular, the established strict liability regimes only apply to terrestrial vehicles and aircraft (cf Railway and Motor Vehicle Liability Act [*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG], Aviation Act [*Luftfahrt-* 2

2 See, for instance, most recently OLG Düsseldorf 12 October 2011, I-18 U 216/10, BeckRS 2013, 18320 (it was still a fault of the pilot when he did not open the cockpit for his accompanying passenger of a crashing airplane that had lost one wing. Because of this omission, the other passenger could not leave the plane and was killed in the crash whereas the pilot rescued himself by jumping out and opening his parachute; when the pilot could rescue himself despite the panic situation, the court expected him to rescue the passenger also); see also OLG Hamburg VRS 1984, 173, OLG Karlsruhe VersR 1987, 693; *C Grüneberg* in: Palandt BGB (73rd edn 2014) § 276 no 17.

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gesetz, LFG]); any analogous application to water crafts would extend strict liability to an entirely new transport area and generally involve considerable difficulties and uncertainties.

Comments

3 See below 12/3 nos 9–12.

Oberster Gerichtshof (Supreme Court) 21 November 1968, 2 Ob 336/68
SZ 41/160

Facts

4 The defendant had a fainting fit while driving. This led to an accident in which the claimant was injured. Since approximately one year before the accident, the defendant had experienced irregularly occurring sudden pain in the lower abdomen accompanied by occasional slight dizziness due to a diaphragmatic hernia. Even on the day of the accident, the defendant had had afflictions of this type while driving. He stopped the car, but – after the pain had passed – continued driving at a reasonable speed. Shortly after that, however, he lost consciousness and caused the accident.

Decision

5 In contrast to the lower courts, the Supreme Court held that finding the defendant to be at fault could not be based solely on the fact that he drove a car despite occasional health problems. In fact, imputation of blame would require that the tortfeasor should have taken into account the possibility of unconsciousness. As the decision of the first instance lacked substantial findings regarding the degree of foreseeability of the fainting fit for the defendant, the Supreme Court set aside the judgment under appeal and remitted the case to the court of first instance to complete proceedings. However, the Supreme Court confirmed the opinion of the lower courts regarding strict liability under the Railway and Motor Vehicle Liability Act (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz,* EKHG) in the case at hand. Although the fact that the defendant had been unconscious at the time of the accident ruled out fault on his part, he was nevertheless held strictly liable according to the abovementioned law: a fainting fit – although unforeseen – does not constitute an unavoidable event within the meaning of § 9 EKHG resulting in relief from liability.

Comments

6 See below 12/3 nos 9–12.

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Oberster Gerichtshof (Supreme Court) 30 January 1861, No 13365
GIU 1269

Facts

The defendant – a servant to the claimant – was supposed to tend the claimant's animals in a field at night. Due to his fatigue from the day's work for the claimant, he was not able to stay awake and fell asleep. In the meantime, two foals were killed by wolves. Consequently, the master sued the servant for compensation. 7

Decision

The Supreme Court held that the defendant had not acted culpably and therefore was not liable, as he complied with the ordinary standard of diligence and effort. To prevent himself from sleeping at his stage of tiredness would have required exceptional exertion; a failure to comply with this extraordinary standard does not establish fault but has to be considered an accident within the meaning of § 1311 ABGB. 8

Comments

As already discussed, imputation of fault in principle depends on the tortfeasor's subjective abilities (cf 1/3 no 5f, 8/3 no 3).[1] Hence, someone who was subjectively not able to comply with objectively due diligence is basically not liable under the regime of fault-based liability. However, the ordinary skills necessary to meet the objective standard of care are presumed; the tortfeasor must prove their absence (§ 1297 ABGB, cf 9/3 no 3).[2] 9

In all three cases at hand, the defendants' actions or omissions at the time the damage was inflicted cannot even be considered governed by their will since they were either unconscious or asleep.[3] Nonetheless, liability could be attributed if the tortfeasors could be accused of negligence in assuming their tasks because they should have realised that they were not able to fulfil their undertakings owing to their physical indispositions (*Übernahmsfahrlässigkeit*). However, this was rejected by the Supreme Court in the cases of the driver and the helmsman. As far as the servant is concerned, this issue was not discussed; by today's standards the supposi- 10

1 *H Koziol*, Basic Questions of Tort Law from a Germanic Perspective (2012) no 6/76; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 15 f.

2 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 16; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1297 no 1f; *M Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992) 177.

3 *K Larenz/C-W Canaris*, Lehrbuch des Schuldrechts II/2 (13th edn 1994) § 75 II 1; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 1.

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tion of negligence when taking on the task of tending the animals seems possible, as the servant should have noticed the incipient tiredness much earlier and should have reported it. Even so, nowadays the servant's misconduct would presumably be classified as an 'excusable mistake' (*entschuldbare Fehlleistung*, *culpa levissima*) within the meaning of the Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*, DHG), which came into force in 1965.[4] The so-called *entschuldbare Fehlleistung* is the slightest degree of negligence which generally is sufficient to establish liability but in such cases leads to the employee's exemption therefrom in relation to the employer (cf § 2 subs 3 DHG).[5]

11 In the cases concerning the pusher tug and the car driver, the issue of strict liability was also addressed. The Railway and Motor Vehicle Liability Act (*Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*, EKHG) provides for liability regardless of wrongfulness and fault.[6] Relief therefrom is only effective in the case of an 'unavoidable event' (*unabwendbares Ereignis*) within the meaning of § 9 EKHG. This requires the sphere of the keeper or the person driving with his permission to be completely free of defects, which is not the case if the driver loses consciousness according to settled case law and prevailing doctrine.[7] Hence, the car driver was strictly liable under the EKHG.

12 By contrast, there is no strict liability regime for water crafts. Austrian courts do accept an analogous application of strict liability laws in principle. However, they are rather cautious in actually affirming it in concrete cases:[8] when it comes to ships, eg, settled case law does not accept an analogy from other strict liability regimes such as the aforementioned EKHG or the Aviation Act (*Luftfahrtgesetz*, LFG).[9]

4 BGBl 80/1965.

5 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 12; *F Kerschner*, Dienstnehmerhaftpflichtgesetz (2nd edn 2004) § 2 no 40.

6 *P Apathy*, Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (1992), § 1 no 2 ff; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 6/5; *BA Koch*/*H Koziol*, Strict Liability under Austrian Law, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 13, 17.

7 OGH RIS-Justiz RS0058212; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 546 f, 555 f; *P Apathy*, Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (1992) § 9 no 4; *K-H Danzl*, Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (9th edn 2013) § 9 231 f.

8 *BA Koch*/*H Koziol*, Strict Liability under Austrian Law, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 14; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 575 ff.

9 Cf OGH 2 Ob 33/10g = JBl 2010, 653 and the decisions quoted there.

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5. Greece

Efeteio Larissas (Larissa Court of Appeal) 25/2012
Published at ISOKRATIS

Facts

A, while driving his car, exceeded the allowed speed limit, although the road had lots of bends and there was reduced visibility. As a consequence, he lost control of his vehicle due to the lack of attention which he had the obligation and capacity to show, exited the road, entered a side parking lot and after that, making a U-turn, entered the opposite traffic lane and crashed into a car moving normally on the road. V, a passenger in the second car was severely injured and died, as a result of the injuries he sustained in the accident, ten days later. V's brothers filed an action seeking pecuniary compensation for pain and suffering because of the death of their beloved sister. A alleged that the accident was due to *vis major* and especially to the sudden blowing of the front, right tyre of his car. 1

Decision

The court rejected the defendant A's allegation as not legally based, on the ground that *vis major* can be every unpredictable fact, foreign to the person who caused the damage or to the function of the damaging thing whose damaging activity cannot be prevented even with the most prudent and indicated by the circumstances diligence, whereas in the said case, the tyre blowing was not foreign to the function of the damaging car; furthermore, according to the findings of the court, it was not proven that the tyre had actually blown. 2

As a consequence, the court found A exclusively liable on the ground that he had not shown the due attention and diligence which he was obliged to show as an average, prudent driver, given the circumstances. Thus, taking into account the family relationship between the plaintiffs and the deceased, the age of the victim (64 years old), the conditions of the accident, A's exclusive liability, the extent of the grief and sorrow each and every plaintiff endured as well as the financial and social situation of the litigants, the court awarded each plaintiff the amount of € 10,000 which it considered reasonable for their pain and suffering because of the loss of their sister. 3

Comments

In order to be characterised as being at fault, a person should have the required freedom of will at the moment of the act; absent free will, there can be no discussion 4

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about fault.[1] There is a lack of free will in the case of *force majeure* (*vis major*), which basically includes the extreme cases of those events which cannot be averted by human powers, or, at least, of which it is more difficult to avert than other chance events.[2] *Force majeure* according to Greek law, constitutes a ground that can be invoked by the defendant in order to avoid liability. *Force majeure* can also be invoked, according to one view, in order to justify the lack of causality whilst, according to another view, in order to justify the lack of unlawfulness.[3] If the damage caused could have been predicted and avoided, there is no *vis major*, even if the damaging fact by itself is considered unpredictable and sudden.

5 The court follows the 'objective theory', according to which, only facts 'external' to the debtor constitute *vis major*. According to the 'subjective theory', however, whether the fact is or is not outside the field of the personal activity of the person is not taken into consideration for the characterisation of a fact as *force majeure*.[4] If the 'subjective theory' had been followed in the commented case, the court would only have examined whether or not the tyre blowing suddenly could have been predicted and prevented, even with the measures of extreme diligence and caution.

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 26 October 1961

60-10.017, Bull civ II, no 706

Facts

1 Chamot was carrying Mesnil on his bicycle when he left the road. Mesnil was hurt and claimed damages from Chamot and the latter's insurer. The appellate court granted the claim and the case was brought before the *Cour de cassation*.

Decision

2 The *Cour de cassation* affirmed the appellate court's decision. The accident had been caused by Chamot's falling asleep while riding, which appeared to be a result of his having worked very late over the previous three days. Riding while being in a state

1 *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 II 1 513.

2 For *force majeure* and the theories taught for the delimitation of the cases that fall under this category see, among others, *M Stathopoulos*, Law of Obligations, General Part (2004) § 6 no 97 ff; *M Stathopoulos*/*A Karampatzos*, Contract Law in Greece (in English) (2014) no 258 f.

3 *P Kornilakis*, Law of Obligations, Special Part I (2002) § 87 6 II 1 513.

4 According to *I Karakostas*, Law of Torts (2014) 148, the 'subjective theory' is more correct.

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of limited abilities was a fault, however, and the appellate court therefore found Chamot liable for the consequences of the accident.

Comments

This case shows that incapacity due to transient factors does not lower the standard against which fault is assessed. As in the case of lower skills or inexperience (see 7/6), the defendant must be extra careful in order to compensate for this potential weakness. 3

7. Belgium

Tribunal de Première Instance, Chambre Criminelle (Criminal Court of First Instance) Veurne, 23 May 2007

CRA/VAV 2007, 356

Facts

A, who was obviously sleep-deprived, drove a vehicle and lost consciousness at the wheel, which caused harm. 1

Decision

After certifying that the loss of consciousness was caused by a lack of sleep, the court decided that A had acted negligently because he knew or should have known that a lack of rest necessarily leads to a loss of or reduction in attention. In this case, the fatigue impacted on his driving skill, which was foreseeable. The court therefore considered that the accident was attributable to A, taking into account the lack of care which he demonstrated in driving. 2

Comments

Fatigue can constitute one of the circumstances which, like a health accident, can suddenly deprive a person of control over his actions, even his consciousness, in a temporary manner which removes the moral element, which is indispensable for the determination of the existence of fault, from the harmful act. As has already been indicated, it is important to examine the attitude of the injuring party prior to this loss of consciousness, in order to determine whether he/she was at fault in omitting to take the necessary precautions and adapting his/her behaviour, taking into account the risk his/her personal situation presented. 3

Generally, circumstances which reduce a person's capacity for the purposes of tort must be unforeseeable for the person to be exempted of all liability. Otherwise, 4

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it is indispensable for the person to adapt his behaviour in order to prevent the risk occurring, as a reasonably prudent person would. Judicial decisions recording an absence of unforeseeability, and therefore driver recklessness, are abundant.[1]

5 The foregoing should of course be corrected when the tortfeasor finds himself/herself in a state of necessity, within the conditions and limits defined hereinafter (see 14/7).

Juge de police/Politierechter (Police Judge, Pol) Brugge, 10 December 2003

RW 2006–2007, 534

Facts

6 While a motorcyclist was travelling along a road, he was startled by a dog, which appeared suddenly and unforeseeably. His reflex was to brake sharply and he fell, causing himself harm. He argued that the animal's owners were liable. They claimed that the victim was contributorily negligent, in order to render him partially liable for his damage.

Decision

7 In assessing whether fault existed on the part of the motorcyclist, the court held that, without braking, he would have risked colliding with the animal which could have entailed more serious consequences. The judge therefore considered that the avoidance manoeuvre was the kind of reaction an ordinarily prudent and diligent person would have done in the same circumstances and therefore, it would be difficult to consider the behaviour faulty, even if after the fact it appeared that the reaction had not been ideal. According to the judge, it was not possible to blame the motorcyclist for not having taken the same decision he would have taken had he had more time to analyse the situation. The owners of the dog were held liable for the damage and had to fully compensate it.

Comments

8 The objective assessment of fault is not incompatible with taking consideration of the external circumstances which led to the damage occurring.[2] The sudden appearance of an obstacle can constitute one such circumstance.

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1 See in particular the survey carried out by *B Dubuisson/V Callewaert/B De Coninck/G Gathem*, La responsabilité civile. Chronique de jurisprudence 1996-2007, vol 1: Le fait générateur et le lien causal (2009) 428 ff.

2 *RO Dalcq*, Traité de responsabilité civile, vol 1 (1967) nos 263, 317.

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Based on this line of thinking in the decision discussed, the judge considered that the motorcyclist's reaction was not faulty. In the case in question, it would have been possible to assess the motorcyclist's conduct from another angle, and consider that, in reality, he had been deprived of his free and conscious will for an instant, under pressure from an external force, which he was unable to resist. The outcome would have been the same, namely the absence of fault on the motorcyclist's part, but due to the lack of a moral element and not the absence of the material component of the faulty act. 9

9. Italy

Corte di Appello di Genova, Sezione I (Court of Appeal of Genova, First Division) 22 November 2005

Leggi d'Italia

Facts

A woman in labour in hospital, assisted by a nurse and a midwife, after trying to bite the hand of the nurse, pulled and twisted the thumb of the right hand of the midwife with violence, causing her an injury to the joint. The midwife sued her for compensation of the damage. 1

Decision

The *Corte di Appello* rejected the claim. In the opinion of the court, according to the medical expert, the defendant was not in a state of total incapacity at the moment of the injury, and art 2046 could not therefore be applied to the case. Nonetheless, as the harmful action of the defendant was neither intentional nor negligent, the defendant could not be held liable for the compensation of the damage caused to the midwife. 2

Comments

The rules applied are, as in the previous cases, those contained in art 2046 Civil Code. A defendant who anticipated that he could lose consciousness is fully liable for the compensation of the damage caused because of the occurrence of the state of incapacity,[1] while when his temporary loss of consciousness was not predictable, he shall not be held liable for the damage caused by his unconscious action. Nonetheless, art 2047 provides that, in the latter cases, the person that caused the damage 3

1 Cass 16 January 1978, Resp civ prev 1978, 959.

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can be ordered by the court to pay an equitable indemnity to the damaged person. For further references, please see 8/9 no 10 above.

14. Ireland

Carr v Olas, High Court, 15 March 2012

[2012] IEHC 59

Facts

1 The plaintiff motorcyclist believed that the first defendant impeded him in traffic; the plaintiff pursued the first defendant and when he caught up with the first defendant's car, he struck the driver's window two or three times and attempted to wrench the driver's wing mirror. The first defendant's car veered towards the centre of the road, striking the motorcycle which went out of control and struck a car coming in the opposite direction. The plaintiff instituted claims for negligence and trespass against the first defendant and a claim in negligence against the second defendant (the driver of the oncoming car).

Decision

2 Hogan J held that the slight swerve by the defendant was an instinctive reaction to the threat posed by the plaintiff banging on the window; it was not a deliberate attempt to force him away or injure him; neither was it a breach of the duty of care, since the standard of reasonable driving would have to take account of the emergency situation.[1] Likewise, the second defendant was not negligent; her swerve away from the drivers approaching her probably assisted the plaintiff in that he struck the side of her car, rather than hitting it head on and that was as much as she could do when faced with an emergency.

Comments

3 This case gives an indication of the general approach to a defendant's reaction to an unexpected event (which would include transient incapacity); if the reaction is simply a reflex, it is not regarded as voluntary – a core prerequisite for tort liability (even strict liability requires voluntary conduct by a defendant); if there is some limited degree of volition, then the standard of care in negligence must take the emer-

1 The adapted standard was based on *McComiskey v McDermott* (3g/14 nos 1–4).

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gency or incapacity into account as a relevant circumstance – liability will still be imposed if the behaviour is judged unreasonable in light of the emergency.[2]

16. Denmark

Højesteret (Supreme Court) 21 August 1972

U 1972.866 H

Facts

Having otherwise had a blameless career, the first mate of a large passenger ferry going from Oslo to Copenhagen with 600 passengers on board went on duty at 4 o'clock in the morning. In the days leading up to the incident he had worked excessively and had not had enough sleep; indeed he had not gone to bed before going on duty that day at all. Further, he had had a single drink before going on duty. His fellow officers on the bridge first noticed nothing unusual, however when the ferry was supposed to change course, the first mate seemed distant. An able seaman assisting him noticed that he was behaving oddly and warned him that the ferry was off course. In the end the ferry went aground sailing into a rocky formation off the Norwegian coast. **1**

Decision

The Maritime and Commercial Court of Copenhagen found that the first mate ought to have realised that, under the above circumstances, he was unfit for duty. The offence was seen as particularly grave considering he was the navigational officer on duty on a large passenger ferry being responsible for 600 passengers. He was sentenced to 20 days in prison and was deprived of the right to serve as first mate for one year. On appeal the Supreme Court upheld the ruling of the Maritime and Commercial Court, and agreed that the first mate ought to have realised that he was unfit for duty. The Supreme Court added that, taking this into consideration, the first mate was considered to have negligently caused the ship to run aground. With this in mind, the Supreme Court increased the penalty to 40 days in prison. **2**

Comments

There do not seem to be published cases concerning tort law rules where transient factors other than the above have been put to the test. In criminal law, however, **3**

2 See *Donoghue v Burke* [1960] IR 314; two drivers found negligent – one was dazzled by headlights of an oncoming vehicle and found 25% responsible.

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especially lack of sleep has been tested as a reason for breach of criminal law rules, especially under the Seaman's Act, the Criminal Code and the Road Traffic Act.[3] The approach in those cases is on a par with the test applied when establishing misconduct under Danish tort law rules, namely that the person at the helm of a vessel or at the wheel of a car is responsible for being in a state where doing so is safe and reasonable. Indeed, considering in the above case that the court expressed itself in terms of what the defendant first mate 'ought to have realised' and since the Supreme Court qualified the actions of the first mate as negligent, this corresponds very well with what one would expect the court to find in a potential tort law claim based on the same circumstances. Also in these cases, the objective approach is applied. In the above case it is illustrated by the fact that the circumstance alone that the defendant first mate ought to have realised that he was not fit for duty and thus could not perform his duties as well as he (or any other professional first mate) would normally have done, amounted to negligence.

17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 9 June 1956

Rt 1956, 656

Facts

1 A was steering a cargo ship in the fjords of Norway during the war. He had planned to deliver a concrete machine (*sementblander*) to Kvalavåg. When the boat arrived at Kvalavåg, the captain was told by the German occupants that the boat was to be used to transport 20 workers from Kvalavåg to Vikene. A journey by sea was chosen as, due to the presence of landmines, the trip on land would have been too dangerous for the workers. Many passengers on the boat went into the cockpit (*bestikklugar*) of the boat. Inside the cockpit there was a bucket filled with paraffin. One of the workers lit his smoking pipe and threw the matchstick in the bucket afterwards, believing it to be filled with water. This caused a minor fire on the boat, which was rapidly extinguished. The worker with the pipe got severely burnt, mostly on his hands and arms, but also elsewhere. He sued the ship helmsman for damages.

Decision

2 The question for the court was whether the helmsman of the boat should have warned the workers about the bucket of paraffin. The court put weight on the fact that the

3 See TfK 2000.103/3 V (Western Court of Appeal Ruling of 11 November 1999).

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men came on board without any prior notice, and that the helmsman was solely and exclusively occupied with the task of starting the engine and manoeuvring the boat. He was not used to transporting passengers, and the cockpit was his private chambers. Under the circumstances he could not be blamed for not thinking about the danger of fire or be expected to warn the workers about the contents of the bucket.

Comments

The decision is important because it states that a wrongdoer may be exonerated if the damage is caused by a lack of attention, or more precisely; choosing the wrong object of attention. The case is an example where 'grounds of excuse' come into play, leaving a margin for error without being held liable. This is an important feature of the *culpa* rule as a 'subjective' rule, not a mere 'objective' rule. The mere cause of damage is not enough as a basis to establish liability. The rule of *culpa* only applies where the tortfeasor can be blamed for causing damage. The reasoning of the Supreme Court was oriented towards motivating why there was nothing that the helmsman could be blamed for. 3

22. Lithuania

UAB 'Sinėja' v AN, Siauliai District Court 30 October 2013

Šiaulių apygardos teismas (Šiauliai District Court) Civil Case No 2A-577-210/2013; <http://liteko.teismai.lt/viesasprendimupaieska/>

Facts

The plaintiff, a cargo transportation company, filed a claim against its employee driver, AN, who failed to deliver cargo intact because he decided to stop in a parking lot which did not have a guard. The defendant argued that he was driving a truck loaded with bottles of brandy from France to Lithuania. As he had been constantly encouraged by his employer to deliver cargo as soon as possible, he had decided to disregard the rules relating to work and rest times. However, because he experienced extreme fatigue 30 km from the destination, he decided to stop and a have a rest in a car park next to a petrol station, which had surveillance cameras. While he was sleeping in the cabin of the truck, unidentified thieves ripped the truck's tarpaulin and stole part of the cargo. 1

Decision

The first instance court in essence satisfied the claim and the district court agreed. The courts decided that the defendant was liable to his employer on the basis of the contract on full material liability, which had been concluded by them. According to 2

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the courts, the employee had failed to follow the rules relating to work and rest hours and had breached instructions to stop only in guarded car parks included in the special list as prescribed by the employer.

Comments

3 Labour law was applied in the case. However, the case was included because the notions of unlawfulness and fault are in essence the same in tort law and labour law. The case demonstrates that fatigue of the defendant caused by his decision not to obey rules relating to work and rest hours, does not affect the applicable standard of conduct.

23. Poland

Sąd Najwyższy (Supreme Court) 30 April 1962, II CR 391/61 (extreme physical exhaustion)
OSNC 1964/3/46

Facts

1 V was properly driving a horse-drawn vehicle on a public road when A's tractor with a trailer ran into him causing serious personal injuries. It was established that the cause of the accident was A's extreme physical exhaustion, which led him to fall asleep. V sued A and his insurer for damages.

2 The court of second instance awarded compensation from the insurer, while dismissing the claim against A. The main argument was that A was not at fault. The court referred to the earlier criminal proceedings against A in which A's mental impairment at the time of collision was established. The civil court, however, established that A had a reduced capability to manage his conduct as a result of physical numbness and haziness. This condition in the court's opinion occurred without A's fault. A did not show any signs of mental illness or mental retardation, but at the time of the accident was in a position of extreme physical and mental exhaustion, and therefore had a significantly reduced ability to understand the nature of his conduct.

Decision

3 On appeal, the Supreme Court reversed the judgment and ruled that continuing to drive a vehicle in a state of exhaustion was not allowed, as it constituted reckless exposure to danger of both the driver and others. Hence, it constituted fault. The court also noted that A had been fully aware of his physical and mental condition before the accident happened, and hence he should have also been aware of the

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danger he created by driving a tractor. A causal link between the wrongful behavior and the accident was obvious.

In this situation, A could not rely on the defence which would exclude his liability for damage caused in a state of impairment of mental capacity or the provision of art 138 § 2 Code of Obligations (presently art 425 § 2 KC).[1] 4

Comments

The courts had opposing views as to the fault of the driver. The Supreme Court focused on the overall situation, and not on the moment of collision. Since A was fully aware of his physical condition (extreme exhaustion) and still he decided to drive a tractor on a public road, he should be burdened with injurious consequences to other users of the road. The Supreme Court judgment was correct. 5

26. Croatia

Decision of the Supreme Court of the Republic of Croatia No 993/1994-2 of 31 August 1995

<www.vsrh.hr>

Facts

V was injured at work. He worked with a heavy hammer on the alignment of a main ship engine. His task was to hammer on a spanner placed on a screw which held the main ship engine together and thus moved the engine until it was aligned. This was the first time that V had used this type of tool and therefore he was supervised by an experienced worker. V worked with the hammer for an entire day and, due to his weak physical condition and clear signs of fatigue that, according to his superior's testimony, V was beginning to show, he at one point missed the spanner and caught his finger between the spanner and the hammer's handle. V sued his employer for the damage sustained. Pursuant to special regulations concerning protection at work, an employer's liability can be reduced or excluded if the damage was caused by a worker's intentional wrongdoing or gross negligence. The defendant claimed that in the course of his work V acted with gross negligence, which led to the damage. The lower courts accepted the defendant's argument and dismissed V's claim. 1

1 Article 425 § 2 KC: 'However, a person who has been subjected to a disturbance of mental functions due to the use of intoxicating beverages or other similar substances is obliged to redress the damage, unless the state of disturb-ance was caused through no fault of his own.'

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Decision

2 The SCRC quashed the lower courts' decisions and remanded the case for re-examination. The SCRC established that in reaching their decisions the lower courts had failed to take into consideration all the relevant circumstances of the case. In this respect, the SCRC held that in the case at hand several factors were of crucial importance; the fact that when the accident happened the claimant was working for the first time with this type of hammer and therefore was supervised by an experienced worker; the fact that the harmful event took place at the end of the working day and that the claimant had been using the heavy hammer all day; the fact that the claimant was physically weak and the fact that, as his superior testified, when the accident occurred, he was showing clear signs of fatigue. On the basis of these findings, the SCRC ruled that the accident was a result of a combination of 'such objective-subjective circumstances, such as the claimant's inexperience, weak constitution and fatigue, which cannot be characterised as the claimant's negligence'.

Comments

3 Evidently, in assessing the claimant's conduct in this case, the SCRC relied heavily on the claimant's subjective characteristics and certain transient factors. In this respect, this decision might be seen as somewhat peculiar as generally, appropriateness of a person's conduct is assessed against an objective yardstick.[1] Indeed, in some cases, for example in decision No Rev 258/02-2,[2] the SCRC was quite strict in rejecting any possibility for a person's conduct to be assessed against that person's subjective characteristics. And yet in this case, in assessing the claimant's conduct, the SCRC took into consideration his inexperience, his physical condition but also some transient factors such as his fatigue. Hence, the inexperience of the worker and his fatigue were elements which crucially influenced the SCRC's decision as regards the appropriateness of that worker's conduct.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 A, first mate of a large passenger ferry with 600 passengers on board, goes on duty at 4 o'clock in the morning. Up until now A has had a faultless career, but in the last few days he has worked excessively and has not had enough sleep; indeed he be-

1 See 1/26 no 9.

2 See 7/26 nos 1–4.

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gins this shift having not slept at all. The ferry which he should have had under his control goes aground, sailing into a rocky formation.[1]

Solutions

a) Solution According to PETL

Article 4:101 PETL defines fault as an 'intentional or negligent violation of the required standard of conduct'. Article 4:102(1) PETL states that '[t]he required standard of conduct is that of the reasonable person in the circumstances', independently of the tortfeasor's capacities.[2] The PETL thus use, in principle, an objective standard of fault. The figure of the 'reasonable person' may vary and can be adapted not to the individual personality of the person liable, but to the category he represents. **2**

A reasonable first mate of a large passenger ship would have kept the ship under control and prevented it from sailing into a rocky formation and going aground. **3**

However, as set out above, 'the Principles reserve the possibility, in para 2 of Art 4:102, though only for a particular type of wrongdoers and for "extraordinary circumstances", that the objective notion of fault – based on the objective standard of conduct – may be tempered in order to avoid an excessive "hardship" in the evaluation of a person's effective possibilities to behave as the standard would have required. … Art 4:102(2) PETL thus provides that the required standard may be adjusted when … due to extraordinary circumstances the person cannot be expected to conform to it'.[3] **4**

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1 Scenario of the Danish case: Hr (Supreme Court) 21 August 1972, U 1972.866 H, above 12/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig* (held to have been at fault); see also the Belgian case: Criminal Court of First Instance Veurne, 23 May 2007, Circulation, CRA/VAV 2007, 356, above 12/7 nos 1–5 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*: A person who is sleep-deprived drives a vehicle, loses consciousness at the wheel and causes damage (held: at fault); the Polish case: SN (Supreme Court) 30 April 1962, II CR 391/61, OSNC 1964/3/46, above 12/23 nos 1–5 with comments by *E Bagińska*/*I Adrych-Brzezińska*: Collision between tractor with trailer and horse-drawn vehicle causing serious personal injury. Accident caused by farmer's extreme physical exhaustion, which led him to fall asleep (held: at fault); Cass civ 2 (Supreme Court, Civil Division) 26 October 1961, 60-10.017, Bull civ II, no 706, above 12/6 nos 1–3 with comments by *J-S Borghetti*/*M Séjean*: While riding his bicycle a person falls asleep as a result of having worked very late over the previous three days. A friend carried on the same bike is hurt (held: at fault); the Austrian case: OGH (Supreme Court) 30 January 1861, No 13365, GlU 1269, above 12/3 nos 7–12 with comments by *E Karner*: A person who was supposed to tend to the claimant's animals in a field at night falls asleep due to fatigue after a day's work for the claimant. Two foals are killed by wolves (held: no fault).

2 PETL – Text and Commentary (2005) Chapter 4, Introduction 65, and art 4:101, no 4 (*P Widmer*); see also above 1/30 nos 4–8.

3 Emphasis added.

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5 The official commentary to the PETL gives the example of 'a young assistant doctor who, after having been obliged to work for more than 60 hours without any serious interruption, coming across a traffic accident on his way home, provides first aid to the victims, and because of his state of over-fatigue makes a mistake which causes additional harm to the persons assisted'.[4]

6 In this scenario, there is an urgency to assist. What is more, there was no other assistance available and, for this reason, the further harm caused by an overworked doctor (as opposed to one conducting himself as required) was 'due to a kind of fate which belongs to the own sphere of risk of the injured person and should not be attributed and imputed to the doctor'.[5] This is thus an example where the required standard 'may be adjusted ... due to extraordinary circumstances' that prevented the young overworked doctor to conform to the usually required standards.

7 This was however not the case in the scenario of the ship sailing aground. The first mate worked excessively and did not have enough sleep; indeed he had not slept at all before going on duty that day. As the person responsible for the safety of passengers, a reasonable first mate would not have taken over the responsibility for the ship despite being physically exhausted and despite lacking the capacity to guarantee the safety of ship and passengers. Responsibility for the ship could instead have been passed on to another officer until the first mate had taken a rest. He thus violated the standard of conduct required under the PETL.

b) Solution According to the DCFR

8 Pursuant to art VI–3:102 DCFR, negligence is a 'conduct which ... (b) does not ... amount to such care as could be expected from a reasonably careful person in the circumstances of the case'. Like the PETL, the DCFR thus uses an objective standard of care.[6]

9 Transient factors such as extreme fatigue do not fall under art VI–5:301 (Mental incompetence) nor under art VI–5:302 (Event beyond control). The case would instead be analysed under the general provision of art VI–3:102 (Negligence) and the conduct of the first mate held to not have amounted 'to such care as could be expected from a reasonably careful person in the circumstances of the case'.

4 See the example given by *P Widmer*, PETL – Text and Commentary (2005) art 4:102, no 16.

5 Ibid and no 25.

6 *C v Bar/E Clive*, DCFR, art VI–3:102, Comment C (p 3406).

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31. Comparative Report

Fewer than half of the reports included cases in this category, which could involve incapacity from either external or internal factors. Cases on the former included, as very typical examples, many accidents resulting from impaired control of a motor vehicle because of dangerous behaviour by another road user[1] or a mechanical failure.[2] Paradigmatic cases of impairment resulting from internal causes were falling asleep, fainting or sudden unexplained loss of consciousness at the wheel[3] or while at work,[4] and fatigue while performing a repetitive task.[5] A more esoteric case placed here was of a woman in labour who bit the hand of a nurse.[6] A final case supplied in this category involved a mistake resulting from ignorance – a pipe-smoker threw his match into a bucket of paraffin, thinking it contained water[7] – but this does not seem to be a case of incapacity as such. 1

In general, courts in Europe are prepared to take into account an instinctive response to an external circumstance posing a danger (eg dangerous behaviour by another road user or a burst tyre) in their application of the required standard of conduct. The instinctive response is typically considered not to be negligent or otherwise to involve fault.[8] 2

Even if the actor is considered to have lacked capacity at the time of the accident, it may still be that he was guilty of prior fault, for example and perhaps especially in failing to take note of and respond to feelings of tiredness whilst driving. However, the fatigued employee may be treated more leniently than the fatigued motorist, especially if young and inexperienced, and obliged to work to the point of exhaustion.[9] 3

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1 Belgium 12/7 no 6ff (dog on road); Ireland 12/14 no 1ff (motorcyclist attempting to wrench off driver's wing mirror).

2 Germany 12/2 no 1ff (burst tire); Greece 12/5 no 1ff (burst tire).

3 Falling asleep: France 12/6 no 1ff; Belgium 12/7 no 1ff; Denmark 12/16 no 1ff (large passenger ferry; criminal liability); Poland 12/23 no 1ff. Fainting or sudden unexplained loss of consciousness: Austria 12/3 nos 1ff and 4ff.

4 Austria 12/3 no 7ff (servant tending animals at night). Cf Lithuania 12/22 no 1ff (theft from lorry, whose fatigued driver had stopped to sleep in unwatched parking lot, contrary to instructions).

5 Croatia 12/26 no 1ff.

6 Italy 12/9 no 1ff.

7 Norway 12/17 no 1ff. The pipe-smoker was in fact the victim in this case, in an action against the captain of the boat, who claimed to have been distracted at the relevant time because he had been ordered to carry passengers on board, which was out of the usual. Under the circumstances he could not be blamed for not thinking about the danger of fire or be expected to warn the passengers about the contents of the bucket: ibid, no 2. To that extent, the case may be regarded as having a certain relevance here.

8 Germany 12/2 no 1ff (burst tyre); Greece 12/5 no 1ff. See also Ireland 12/14 no 2.

9 Croatia 12/26 no 2.

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4 Where incapacity can in fact be established, this means that the defendant was unable to engage in voluntary conduct, which precludes even strict liability in some countries.[10]

10 Ireland 12/14 no 3.

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E. Degrees of Misconduct

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13. Degrees of Misconduct

1. Historical Report

Gaius, D 19.2.25.7

Facts

The defendant agreed to transport the claimant's column. During the transport, the column broke. **1**

Decision

Gaius[1] decided that the defendant should be liable under the contract for work (*locatio conductio operis*) if he had not done everything that a very diligent person (*diligentissimus*) would have done. **2**

Comments

In general, the Roman jurists recognised two main categories of misconduct, namely *dolus* (malicious intent) and *culpa* (fault in the narrow sense,[2] such as negligence, reproachful inexperience etc).[3] Within the notion of *culpa*, further distinctions were made between *culpa levis*, *culpa lata* and sometimes the absence of *diligentia quam in suis rebus* (diligence as observed in own matters) as well as what once[4] was referred to as *culpa levissima*. **3**

Dolus meant the intentional infliction of damage. Some delicts required a special form of *dolus*. Thus, the delict *furtum* (theft) implied the 'intention to make a gain from dishonest handling' (*contrectatio fraudulosa lucri faciendi gratia*[5]). Similarly, *iniuria*[6] covered situations in which the tortfeasor acted with the intention to insult the victim and thus damage his reputation.[7] For liability under the *lex Aquilia*, **4**

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1 Only known by his first name, 2nd century AD.

2 *Culpa* in a wider sense also referred to blameworthy behaviour in general, leaving open the nature of that behaviour, cf *G MacCormack*, Aquilian Culpa, in: A Watson (ed), Daube Noster (1974) 201 ff; in the following, *culpa* will be used in the narrow sense.

3 Cf *Gaius*, Inst 3.211: 'is iniuria autem occidere intellegitur, cuius dolo aut culpa is acciderit'.

4 *Ulpian*, D 9.2.44 pr.

5 *Paul*, D 47.2.1.3.

6 The term *iniuria* was also used outside the scope of the *lex Aquilia* and referred to the wrongful attack against the reputation of a person; cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1050 ff; *M Hagemann*, Iniuria (1998).

7 Some scholars think, however, that the texts referring to such an *animus iniuriandi* were interpolated by Justinian's compilers; in this sense eg *R Zimmermann*, The Law of Obligations. The Roman

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however, *dolus* played only a minor role. Although under early Roman law, its delicts were interpreted so narrowly that they covered only acts which would typically be intentional, after an extensive interpretation by the Roman jurists, it became applicable to all kinds of situations that could no longer be said to indicate intentional behaviour on the tortfeasor's part but where he was still to be blamed.[8] In short, all that was required on the tortfeasor's part was *culpa* (fault in the sense of reproachful behaviour). Only in some situations was the tortfeasor liable only for *dolus*, for instance in those of concurring fault.[9]

5 The distinction between *culpa levis* and *culpa lata* was entirely irrelevant within the delictual regime of the *lex Aquilia*.[10] As Ulpian[11] put it: '*In lege Aquilia et levissima culpa venit*'.[12] Even the slightest form of negligence would suffice. However, *culpa lata* was an important concept for contractual liability. For certain contracts, such as the *depositum* or the *mandatum*, liability was originally limited to *dolus* and later extended to *culpa lata*.[13] Thus, the *mandatarius* and the depositary were liable, as a rule, if they acted grossly negligent, but not in case of *culpa levis*. The aforementioned *culpa levissima* was probably not seen as a separate degree of misconduct.[14] In the Roman sources, the term was only used once by Ulpian and its implications were supposedly no more than a clarification that also slight forms of negligence still constituted negligence. However, sometimes the Roman jurists made reference

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Foundations of the Civilian Tradition (1990) 1060. The recent approach to the sources is more conservative and tends to acknowledge the classical origin of the idea that *iniuria* requires an *animus iniuriandi* (cf eg *Ulpian*, D 9.2.5.3 where the lack of an *animus iniuriandi* is given as the reason to deny liability for *iniuria*).

8 Cf 2/1 no 3f.

9 For example *Ulpian*, D 9.2.9.4: A slave crossed a drill ground for javelin-throwers and got killed. Ulpian decided that the javelin-thrower was liable if he killed the slave intentionally (*data opera*); *Paulus*, D 9.2.31 (3d/1 nos 1–7): A pruner cut branches of a tree. There was no path underneath the tree. According to Paulus, the pruner only incurred liability in the event of *dolus*; as an example of a case of excessive self-defence cf *Alfenus*, D 9.2.52.1 (14/1 nos 1–6); cf *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der lex Aquilia, in: Gedächtnisschrift Herbert Hofmeister (1996) 261.

10 On *culpa lata* and *culpa levis* cf *H-J Hoffmann*, Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte (1968) 4ff, 8ff.

11 Domitius Ulpianus, died 223 AD.

12 *Ulpian*, D 9.2.44; cf the example of *culpa levissima* provided by Gundling, a jurist of the *usus modernus* in 13.

13 Cf D 16.3.32 ad *depositum*; D 17.1.29.3 ad *mandatum*; cf *Ulpian*, D 11.6.1.1: 'lata culpa plane dolo comparabitur' and *Paulus*, D 50.16.226: 'magna culpa dolus est'; cf the definition of *Ulpian*, D 50.16.213.2: 'Lata culpa est nimia neglegentia, id est non intellegere quod omnes intellegunt'.

14 *T Mayer-Maly*, Die Wiederkehr der culpa levissima, AcP 163 (1964) 114, 124; *H-J Hoffmann*, Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte (1968) 12; *N Jansen*, Die Struktur des Haftungsrechts (2003) 261; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 94.

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to the *exactissima diligentia*[15] or, as in this case, the *diligentissimus*. Although *culpa levissima* was not used in a technical sense, it still exemplifies a shift from a sanction-oriented to a compensation-oriented perspective based on the idea of a distribution of risks.[16]

As was already indicated, the Roman jurists sometimes referred to the *diligentia* **6** *quam in suis rebus*.[17] This form of *culpa* was evaluated by applying a subjective standard of conduct.[18] For example, the depositary was liable if he did not exercise such care as he was accustomed to exercise in his own affairs.[19] Treating entrusted goods less carefully than one's own seems to come close to *dolus* and can therefore be understood as a specific case of *culpa lata*.[20]

Nicolaus Hieronymus Gundling, Discourse über die sämtlichen Pandekten, Lib IX, Tit II, § 2

Facts

The defendant took the claimant's tea cup. Then somebody shot a pistol. The defen- **7** dant was startled and dropped the cup, which hit the floor and broke.

Decision

Gundling held that the defendant was liable for *culpa levissima*. **8**

Comments

The case at hand is discussed by Nicolaus Hieronymus Gundling, a jurist of the *usus* **9** *modernus pandectarum* (the 'new interpretation' of the Roman sources in the 17th and 18th century).[21]

The jurists of this period adopted the degrees of misconduct recognised under **10** classical Roman law. However, in contrast to the Roman jurists, they treated *culpa levissima* as a separate form and thus assumed a threefold division of *culpa* (in the

15 *Gaius*, D 44.7.1.4.

16 *H Kaufmann*, Rezeption und Usus modernus der action legis Aquiliae (1958) 17; *N Jansen*, Die Struktur des Haftungsrechts (2003) 261.

17 Cf *H-J Hoffmann*, Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte (1968) 8; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 210 ff.

18 Therefore also 'culpa in concreto'.

19 *Celsus*, D 16.3.32.

20 *H-J Hoffmann*, Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte (1968) 8.

21 The period was named after the book 'Usus modernus pandectarum' by *Samuel Stryk* in 1690; cf *H Schlosser*, Neuere Privatrechtsgeschichte (10th edn 2005) 76.

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narrow sense).[22] The problematic distinction between *culpa levissima* and *culpa levis* was widely discussed. The example given by Gundling illustrates how high the expected level of diligence was. It is in line with other cases: if somebody carried a lantern, stepped on a hayloft and subsequently caused it to catch fire, he was liable unless the lantern was optimally secured and there was an exceptional emergency making it inevitable to step on the hayloft.[23] Only the 'overachiever with a thousand eyes' who 'cannot rest before he touched every lock in the house and made sure that everything is barred' could avoid *culpa levissima*.[24]

11 The examples show that the jurists themselves could not have expected this high standard of conduct to be met.[25] Liability for *culpa levissima* was probably based on ideas similar to those underlying strict liability: a person who undertakes a dangerous activity should incur liability for the damage arising.[26]

2. Germany

Bundesgerichtshof (Federal Supreme Court) 2 June 1981, VI ZR 28/80

NJW 1981, 2184

Facts

1 The claimants were the owners of a farm. When they learnt that the public administration planned to construct a motorway as well as a railway line over their farmland, they sold it in the expectation and under the condition that they would buy another farm which was offered by Ms A. They entered into a binding contract with her but, before the execution and transfer of title, Ms A sold her farm to the defendant, the Federal Republic of Germany (Federal Railway Company, *Bundesbahn*). The *Bundesbahn* had been informed by the public administration that Ms A was selling her land, which the *Bundesbahn* was eager to use as a replacement for the expropriated land. The *Bundesbahn* knew that the new farm had already been sold to the claimants when it entered into its contract with Ms A and promised in the contract to recompense Ms A for any damages she would have to pay because of her breach of contract. The claimants sued the *Bundesbahn* for damages and requested

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22 *N Jansen*, Die Struktur des Haftungsrechts (2003) 304 ff; *H-J Hoffmann*, Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte (1968) 118 ff; *H Kaufmann*, Rezeption und Usus modernus der action legis Aquiliae (1958) 76 f; *T Mayer-Maly*, Die Wiederkehr der culpa levissima, AcP 163 (1964) 114, 124.

23 *LJF Höpfner*, Theoretisch-practischer Commentar über die Heineccischen Institutionen (1783) § 757 f.

24 *JG Heineccius*, Recitationes in Elementa juris civilis (1773) §§ 786 f.

25 *N Jansen*, Die Struktur des Haftungsrechts (2003) 306 ff.

26 *N Jansen*, Die Struktur des Haftungsrechts (2003) 309 f.

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that all registrations in favour of the *Bundesbahn* should be deleted in the public register.

Decision

The Federal Supreme Court decided in favour of the claimants but remanded the case. Since the loss of the claimants was of a purely economic nature, they were entitled to the claimed head of damages only if the requirements of § 826 BGB[1] – intent and violation of good morals – were fulfilled. Where a defendant has induced a contract party to breach its contract with the other party, this does not normally give rise to tortious liability. Only where further specific elements are present, which show a reckless neglect of the interests of other persons, can this conduct qualify as a violation of good morals. The court regarded the promise of the *Bundesbahn* to free Ms A from the consequences of her breach as such an element because it was directly directed against the binding effect of the first contract. A further element was the fact that the public administration, including the *Bundesbahn* as part of it, had acted in a manner which led the claimants to give up their former farm in the expectation of another plot of land as a replacement. Since the lower court had denied a violation of good morals but had not examined whether the *Bundesbahn* had acted intentionally, the BGH remanded the case. **2**

Comments

German tort law grants compensation for pure economic loss only within narrow limits. § 826 BGB, as the main basis for such claims, requires intent coupled with the violation of good morals. This is misconduct in a specifically strict form and a case where a specific degree of fault is required.[2] **3**

If an absolutely protected right, such as a property right is infringed (§ 823 (1) BGB), the degree of fault is normally not relevant; the lowest degree, namely simple negligence, suffices to entail liability. And even if the tortfeasor acted with gross negligence or intent, this does not affect the amount of damages for pecuniary loss because the principle aim of damages is to compensate the victim's loss and not to punish the tortfeasor in proportion to the degree of his/her fault since German law does not allow punitive damages. The degree of fault is, however, relevant with respect to the amount of damages for non-pecuniary loss if the tortfeasor acted with **4**

1 § 826 BGB: 'Whosoever intentionally inflicts loss on another person in a manner that is contrary to good morals has an obligation to compensate the loss.'

2 See *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 251; *C Katzenmeier* in: NomosKommentar zum BGB vol 2/2 (2nd edn 2012) § 826 no 2ff; *H Sprau* in: Palandt BGB (73rd edn 2014) § 826 no 1.

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gross negligence or intent.[3] Then, the higher the degree of fault, the higher the amount of damages. Here it is thought that damages shall give some satisfaction to the victim.

5 Where the tortfeasor has violated a protective norm (§ 823 (2) BGB), that norm often requires a higher degree of fault than simple negligence. In particular, the violation of provisions of the Criminal Code regularly requires intent. For civil liability this level of fault must also be met.

3. Austria

Oberster Gerichtshof (Supreme Court) 17 November 1983, 7 Ob 64/93
SZ 56/166

Facts

1 The claimant was the owner of a disco and had fire insurance. One day a fire broke out on his premises because one of the wooden dustbins coated with cardboard caught fire owing to cigarette ember disposed of therein. The claimant sought payment from the defendant insurance company, which argued it was released from its payment obligation according to § 61 Austrian Insurance Contract Act (*Versicherungsvertragsgesetz*, VersVG) as the claimant had allegedly acted with gross negligence.

Decision

2 The Supreme Court dismissed the claim because it considered the claimant's conduct grossly negligent. Acting with gross negligence means that the relevant error substantially exceeds common errors, so that the occurrence of damage is not just possible, but very probable. The negligence must be unusual and conspicuous, indicating particular carelessness. In assessing the conduct at issue, the specific circumstances of the individual case must be taken into account. The claimant had arranged for the usage of wooden dustbins in his disco even for cigarette butts, although it was evident that cigarette ends disposed of in wooden bins coated with cardboard create a significant fire risk due to the live embers that often remain. In discos, the situation is especially perilous as, apart from material assets, human life in particular may be endangered. The claimant's instruction to the staff to put the bins containing cigarette ash in the open was not sufficient to refute the accusation of grossly negligent conduct, because the ashes inside the bins could easily be over-

3 See eg LG Bielefeld NJW-RR 2006, 746.

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looked, as was the case. Moreover, no legitimate interest in using wooden bins instead of metal ones could be recognised. Hence, the insurance company was released from its payment obligation according to § 61 Austrian Insurance Contract Act as the claimant caused the insured event in a grossly negligent manner.

Comments

See below 13/3 nos 9–15. 3

Oberster Gerichtshof (Supreme Court) 22 February 1977, 4 Ob 120, 121/76

SZ 50/29 = DRdA 1977, 236 *P Apathy* = ZAS 1978/17 *H Schumacher*

Facts

The claimant worked for the defendant as a storeman; the defendant did not immediately register him with the competent social security fund but only did so after some time. When the claimant retired, his application for a pension was rejected because of the missing insurance periods. The claimant then sought compensation for the loss of old age pension from the defendant. 4

Decision

While the court of first instance allowed the claim, the appeal court rejected it. It held that the loss of old age pension corresponded to loss of profit, which, according to §§ 1323 and 1324 ABGB, is only compensable in cases of gross negligence. However, it found such gross negligence had not been established in relation to the defendant. The Supreme Court reinstated the ruling by the court of first instance: the loss of certain chances of profit must be classified as positive damage if the existence of a chance to earn money is considered to be a present, independent asset on the market at the time the damage was sustained. As the old age pension that the claimant had applied for was by no means an uncertain, future chance of profit but an entitlement that was guaranteed by law, to which the claimant had a legal right insofar as all criteria were satisfied, this undoubtedly constituted positive damage, which is compensable even in the case of slight negligence. 5

Comments

See below 13/3 nos 9–15. 6

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Oberster Gerichtshof (Supreme Court) 18 February 2010, 6 Ob 4/10x
NZ 2012/12

Facts

7 The claimant – an estate agent – was mandated by the owner of an apartment to seek a purchaser for it. The claimant found a prospective buyer and the latter and the owner of the apartment signed an offer. The commission stipulated in the offer amounted to € 18,000. The defendant – a lawyer – was mandated to draft the purchase contract. He asked the caretaker of the property about the condition of the building and any possibly necessary investments. He then untruthfully informed the prospective buyer that the property was in need of renovation and urgent, major investments had to be expected. Consequently, the prospective buyer withdrew the bid. The defendant was aware that his allegations were untrue and the caretaker had not suggested urgent need of renovation. Ultimately, the claimant found another bidder to whom the apartment was sold but only received a much lower commission. Thus, he demanded compensation in respect of the difference from the defendant.

Decision

8 The Supreme Court awarded damages according to § 1295 subsec 2 ABGB, which provides for tortious liability even regarding pure economic loss if the tortfeasor intentionally inflicts damage in a manner contrary to public morals. The defendant had deliberately spread untrue information about the condition of the object of purchase in order to thwart the contract formation because he had been annoyed about not being encharged with the implementation of an eviction settlement. By frustrating the conclusion of the contract, he had intended to harm his client and had at least accepted this would cause damage to the claimant as well. According to prevailing academic opinion and case law, such conditional intent, however, suffices to establish liability under § 1295 subsec 2 ABGB.

Comments

9 As far as the subject of fault is concerned, importance is attached not only to the prerequisites under which it is established but also to the various gradations of fault. Under Austrian law, the following degrees of fault are accepted: intent, *dolus eventualis*, gross negligence, slight negligence and *culpa levissima* (*entschuldbare Fehlleistung*).[1] Intent means that the tortfeasor causes the damage knowingly and wilfully: he knows that the damage will occur and approves of this result or even

1 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 18 f.

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wants the damage to occur. *Dolus eventualis* differs from intent in the sense that it only requires the tortfeasor to foresee that the damage may occur and approve of this possibility. As regards intent and *dolus eventualis*, prevailing opinion assumes that the tortfeasor must be aware of the illegality of his behaviour.[2] If he is not, his conduct can only be classified as negligent.

In contrast to intent and *dolus eventualis*, there is negligence if the tortfeasor **10** does not approve of the damage but merely neglects to exercise the proper diligence and care. Even if the perpetrator knows that his conduct is apt to cause damage, he acts only with (wilful) negligence if he is nevertheless confident that the damage will not occur.[3]

The distinction between slight and gross negligence is not easily drawn. Accord- **11** ing to the Supreme Court, gross negligence – as in the case concerning the fire – is given if the conduct engaged in is unusually and conspicuously careless and the occurrence of damage is not only possible but rather probable. Slight negligence is an ordinary mistake, which is also made by careful people from time to time. However, the differentiation in the individual case can only be ascertained by weighing up the interests, taking into account the dangerousness of the relevant situation, the value of the endangered interests, the tortfeasor's interest in his action and his personal abilities.[4]

Finally, *culpa levissima* (*entschuldbare Fehlleistung*) within the meaning of the **12** Employees' Liability Act (*Dienstnehmerhaftpflichtgesetz*, DHG) means the slightest degree of negligence which, as a rule, is sufficient to establish liability and leads to the employee's exemption from such liability in relation to the employer (cf § 2 subsec 3 DHG).[5]

Under Austrian law, the distinction between gross and slight negligence is of **13** particular importance as the extent of compensation depends – according to §§ 1323, 1324 ABGB – on the degree of fault: In the case of slight negligence, only the actual loss (*positiver Schaden*) is compensable, whereas lost profit (*entgangener Gewinn*) only falls due in the case of gross fault (gross negligence or intent).[6] By means of

2 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 18 f; *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2007) § 1294 no 22.

3 *H Koziol*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 18 f; *idem*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/27.

4 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 5/46 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 11.

5 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 12; *F Kerschner*, Dienstnehmerhaftpflichtgesetz (2nd edn 2004) § 2 no 40.

6 § 1323 ABGB: 'In order to compensate for damage caused, everything must be returned to its previous state, or, if this is inappropriate, the estimated value must be reimbursed. If compensation relates only to the damage suffered, it is termed actual indemnification; insofar as it also includes lost profit and reparation of the offence suffered, it is termed full satisfaction.' § 1324 ABGB: 'If dam-

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this differentiated notion of damage (*gegliederter Schadensbegriff*), the law takes into account the seriousness of the grounds for imputation when determining the extent of the compensation.[7] This has nothing to do with sanctioning fault, as the requisite compensation never exceeds the damage which was sustained; accordingly, Austrian law does not provide for punitive damages.[8] The loss of a possibility to earn is at any rate to be qualified as positive damage if the victim was already in a legally secured position in this context (contract, binding offer).[9] Consequently, the loss of an old age pension[10] in the above mentioned case was deemed to be positive damage since the chance of profit was based on a right.[11]

14 § 1295 subsec 2 ABGB – the application of which is under consideration in the above referred case concerning the real estate sale – provides for liability when someone intentionally inflicts damage in a manner contrary to public morals. According to prevailing case law and doctrine, this purposeful damnification justifies an extensive imputation of damage to the tortfeasor; pure economic loss as well as non-pecuniary damage is recoverable.[12] Thus, the estate agent was entitled to compensation from the lawyer who acted with intent, although in principle pure economic loss is not recoverable under tort law.

15 Even apart from the provisions just discussed, gradation of fault generally plays a role regarding the imputation of damage. It appears appropriate to attribute even less probable consequences to a tortfeasor who has acted grossly negligently or even with intent, hence the limit of adequate causation and the borderline of the scope of a rule are extended.[13]

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age was caused through malicious intent or conspicuous negligence, the person harmed is entitled to claim full satisfaction; otherwise, he can only claim actual indemnification. Pursuant to this, when the law uses the general expression compensation, it falls to be assessed which type of compensation is to be provided.' Translation by *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law Basic Texts (2011) 7; *E Karner*, Austria, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, Vol 2: Essential Cases on Damage (2011) 1/3 no 3.

7 *W Wilburg*, Die Elemente des Schadensrechts (1941) 249 f; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 1/16.

8 *H Koziol*, Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? in: H Koziol/V Wilcox (eds), Punitive Damages: Common Law and Civil Law Perspectives (2009) 283 no 28.

9 See in more detail *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 2/37 ff.

10 OGH 4 Ob 120, 121/76 = SZ 50/29 = DRdA 1977, 236 *P Apathy* = ZAS 1978/17 *H Schumacher*.

11 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 2/38; see also OGH 1 Ob 201/29 = ZBl 1929/267: Frustration of a lottery win; further on positive damage and loss of profit *E Karner*, Austria, in: B Winiger/H Koziol/BA Koch/R Zimmermann (eds), Digest of European Tort Law, Vol 2: Essential Cases on Damage (2011) 6/3 no 5 ff.

12 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1295 no 21; *G Kodek* in: A Kletečka/M Schauer (eds), ABGB-ON (edn 1.01 2013) § 1295 no 79.

13 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 8/15 f; *idem*, Fault under Austrian Law, in: P Widmer (ed), Unification of Tort Law: Fault (2005) 20.

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4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 11 October 2005
ATF 132 III 249

Facts

On a December evening V was walking along a gravel path along the right side of a road. When A drove past, he did not see V and hurt him gravely. V filed a claim for damages. **1**

The cantonal court ordered A to pay damages to V, but reduced them by 10%, because instead of walking on the left hand side of the road, V had walked on the right. **2**

Decision

The Supreme Court admitted V's appeal and ordered A to repair fully the damage without a reduction of 10%. **3**

The Supreme Court stated that the keeper of a car is liable for damage (art 58 al 1 of the Federal Road Traffic Act [LCR]) if a person is killed, or if a person suffers personal injury or material damage. If the keeper proves the victim's contributory negligence, a judge may reduce the damages according to the circumstances. According to art 49 al 1 LCR, pedestrians have to use footpaths.[1] If footpaths are not present, they generally have to walk on the left side of the road and if necessary one behind the other. **4**

In casu, as V did not walk on the road, but beside it, he did not violate art 49 LCR, nor did he infringe fundamental rules of prudence. One could at the most reproach him for failing to keep a sufficient distance away from the road in case a car driver drove too close to the roadside. Had V been further away from the road, the accident would not have happened. However, V's behaviour has to be weighted in comparison to A's, who violated several rules: he did not keep a sufficient distance to the roadside, was not sufficiently attentive, had a blood/alcohol level of 0.73 0/00 and he knew that the lighting system of his car was defective. **5**

Under these circumstances, the fact that V found himself too close to the roadside contributed to less than 10% of the damage and is consequently negligible. **6**

1 On the fault of the pedestrian, see *R Brehm*, La responsabilité civile automobile (2nd edn 2010) 170 f, no 445 ff.

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Comments

7 The Swiss Code of Obligations (SCO) distinguishes between different degrees of fault. Article 41 SCO enumerates *dolus* and negligence. Article 43 SCO states that the amount of damages has to be fixed 'according to the circumstances and the gravity of the fault'. As these provisions are rather general, it is for the jurisprudence and the academic literature to fix the different degrees of fault. It is probably commonly admitted to distinguish between *dolus*, gross, medium and light fault.[2] It would be considered as a light fault if the behaviour of the injuring party could have been performed by any other normally diligent person, whereas gross negligence is defined as a violation of elementary rules, which a person in an identical situation would have respected. On the basis of the present case, we should add very light fault (clearly less than 10%), which has to be neglected by the judge when he assesses the amount of damages.

5. Greece

Areios Pagos (Greek Court of Cassation) 1013/2005

NoV 54 (2006) 64

Facts

1 On 5 November 1994, while hunting, A was shot by a fellow-hunter. His relatives filed an action on tort based on deliberate homicide, which was rejected. The case was brought before the Court of Appeal which, after acknowledging that the death was owed to negligence and not intention, rejected the appeal on the basis that the relatives had based their action only on intention. The relatives lodged an appeal on points of law with the Court of Cassation.

Decision

2 The Court of Cassation accepted the appeal holding that, in order to establish tortious liability, the plaintiff must invoke and prove that an unlawful and culpable act has taken place, regardless of the characterisation of fault as 'dolus' or 'negligence'. It lies with the court to specifically define the degree of fault, after evaluating the evidence brought before it.[1]

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2 See also *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 41 no 191 ff.

1 See also AP 1452/2007 NoV 56 (2008) 398 = EEmpD 2008, 353.

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Comments

All degrees of misconduct are recognised in tort law in the Greek system but the degree of misconduct does not play a specific role in establishing liability, as, according to art 914 GCC, any kind of misconduct (intention, gross or slight negligence) leads to an obligation to pay compensation if damage was caused.[2] Consequently, the damage is always fully repaired, irrespective of the degree of fault. The degree of fault can play a role – only in the case of compensation of non-pecuniary damage – as the court, when determining the amount of money to be awarded to compensate moral harm, takes into consideration the degree of fault of the tortfeasor,[3] among other factors such as the type of the offence, the importance of the harm sustained, and the conditions under which the accident took place. **3**

6. France

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 1 June 1961

59-11.978, Bull civ II, no 410

Facts

While driving at high speed, at night, on a straight road, a car changed course and hit a tree. The passenger was injured and brought a suit against the driver. The appellate court rejected the claim, although it had acknowledged that the accident had been caused by the abnormal behaviour of the driver. The case was brought before the *Cour de cassation*. **1**

Decision

The *Cour de cassation* quashed the appellate court's decision on the ground that, by refusing to find a cause of liability in the case, it had failed to apply art 1382 (now art 1240) *Code civil* and the principle according to which any fault can be a source of liability (*toute faute engage la responsabilité de son auteur*).[1] **2**

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2 See indicatively, from the abundant relevant jurisprudence AP 1452/2007 above; 299/2007 NoV 56 (2008) 869. See also, from the recent bibliography, *G Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) art 914 no 35 f; *I Karakostas*, Greek Civil Code, Vol 6 (2009) art 914 no 38.

3 See, indicatively, AP (full bench) 13/2002 EllDni 43 (2002) 694 = NoV 51 (2003) 660; AP 242/2008 NoV 57 (2009) 595; 1289/2006, published at NOMOS.

1 At the time of this decision, art 1382 Code civil still applied to traffic accidents. Nowadays, the special provisions of the 1985 statute would apply.

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Comments

3 The decision is interesting as it clearly states a rule which is not clearly expressed by the *Code civil* but which has always been held to apply in the context of tort law, ie that any fault, regardless of its intensity, is a source of liability for its author. The rule is regarded as coming from the *jus commune* (*in lege aquilia et culpa levissima venit*) and as having been implicitly upheld by the *Code civil*. This does not mean that, on a case-by-case basis, judges may not be tempted to deny the existence of a fault when the defendant's misconduct appears to be rather insubstantial and consequent damage is of little importance. They cannot do so overtly, however, as it is clear from case law that judges are not allowed to take into account the degree of misconduct when assessing liability.

4 Yet, there are exceptions to this rule. In at least two fields, the legislator has adopted specific provisions whereby only faults with a certain degree of gravity may lead to the defendant being held liable. Firstly, in matters of medical malpractice, art L 114-5 *Code de l'action sociale et des familles* provides that liability for wrongful birth can only be found where the child's handicap was not diagnosed before his birth due to a health care professional's 'blatant fault' (*faute caractérisée*). Secondly, as regards road traffic accidents, the Act of 5 July 1985[2] contains two provisions whereby the degree of misconduct has a direct influence on liability. According to art 3 paras 1 and 3 of this Act, '(1) Victims other than drivers of motor vehicles are indemnified for the harm resulting from personal injury regardless of their own fault, *unless it was inexcusable and constituted the sole cause of the damage*'; '(3) However, no damages are due in such cases *if the victim deliberately incurred the harm suffered*'.[3]

5 Aside from these examples taken from legislation, case law also provides that where several persons are liable for the same damage, the degree of misconduct may have quite serious consequences on their liability. If the co-debtor who paid the whole debt was subject to strict liability (no fault was needed to hold him liable) and the other co-debtor, who has not paid the debt yet, was liable owing to his fault, the courts enable the payer (*solvens*) to act against his co-debtor to recover the entire amount of what he has paid to the victim.[4] Conversely, if the payer was liable owing

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2 Act no 85-677 of 5 July 1985 aiming at the improvement of the conditions of road traffic accident victims and the acceleration of the compensation process, also called *Loi Badinter*, as it was drafted after an initiative from Senator Robert Badinter.

3 Translation by Tony Weir, in the website of The University of Texas School of Law, <http://www.utexas.edu/law/academics/centers/transnational/work_new/>, [copyright holder]. The emphases are ours.

4 See, for a presentation of this case law rule, *L Sichel*, La gravité de la faute en droit de la responsabilité civile, Doctoral Thesis, University Paris I – Panthéon Sorbonne (2011) no 468; *adde* the following cases referenced by Ms Sichel: Cass civ 1, 16 May 1960, D 1960, jur 737, note *A Tunc*; Cass civ 2, 2 July 1969, Gaz Pal 1969, part 2, 220 and 312; Cass mixte, 26 March 1971, JCP, 1971, part II, 16762,

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to his fault, he will have no claim against the co-debtor who was liable under strict liability.[5]

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 21 February 2008

06-21.182, D 2008, 2125 note *J-B Laydu*, JCP G 2008, I, 186, obs *P Stoffel-Munck*

Facts

A woman was the owner of a cellar in a building and her husband had mail sent to him at that address. The building's caretaker, however, refused to receive the mail. The man sued her, arguing that her refusal was a fault that had caused damage to him. The lower court found that the caretaker had committed no fault, but the man brought the case to the *Cour de cassation*. **6**

Decision

The *Cour de cassation* applied a rule developed by case law in 2000,[6] whereby an employee is not liable for damage caused by his/her fault to third parties, as long as he/she did not act outside the scope of his/her tasks and his/her fault was neither intentional, ie committed with an intention to cause harm, nor a criminal offence.[7] Accordingly, it quashed the lower court's decision on the ground that, to justify the absence of liability on the caretaker's part, it should have looked whether the latter, **7**

note *R Lindon*; Cass civ 3, 22 June 1977, D 1977, section 'informations rapides', 472; Cass civ 2, 11 July 1977, Bull civ, II, no 185; D 1978, jur 581, note *E Agostini*; Cass civ 3, 8 May 1979, Gaz Pal 1980, part 2, 684, note *A Planqueel*; Cass civ 2, 2 December 1982, Bull civ, II, no 160; Cass civ 3, 5 December 1984, Bull civ, III, no 206; JCP 1986, II, 20543, note *N Dejean de la Batie*; Cass civ 2, 25 November 1987, Bull civ, II, no 242; Cass civ 2, 20 June 2002, Bull civ, II, no 136.

5 See, among other examples, Cass civ 2, 9 October 1963, Bull civ, II, no 597; Cass civ 2, 19 November 1970, JCP, 1971, II, 16748; Cass civ 2, 31 January 1973, Bull civ, II, no 38; Cass civ 2, 12 June 1975, Bull civ, II, no 175; Cass civ 2, 24 April 1981, Bull civ, II, no 105; Gaz Pal 1981, part 2, section 'panorama', 353, obs *F Chabas*; Cass civ 2, 23 February 1983, Bull civ, II, no 54; JCP, 1984, II, 20124, note *N Dejean de la Batie*; Cass civ 2, 23 May 1984, Gaz Pal 1984, part 2, section 'panorama', 299 f, obs *F Chabas*; Cass civ 2, 20 May 1985, Gaz Pal 1985, part 2, section 'panorama', 234, obs *F Chabas*; Cass civ 2, 10 February 1990, Bull civ, II, no 114; Cass civ 2, 5 June 1991, Bull civ, no 175; Cass civ 2, 13 November 1991, Bull civ, II, no 299; Cass civ 2, 17 March 1993, Bull civ, II, no 106; Cass civ 2, 14 January 1998, Bull civ, II, nos 6 and 8, D, 1998, section 'jurisprudence', 174, note *H Groutel*; JCP, 1998, part II, 10045, note *P Jourdain*; RTD civ 1998, 393, obs *P Jourdain*.

6 Cass ass plén, 25 February 2000, 97-17378 & 97-20152, JCP G, 2000, II, 10295, concl *Kessous*, note *JM Billiau*, ibid I, 241, no 16, obs *G Viney*, RTD civ 2000, 582, obs *P Jourdain*, D 2000, jur 673, note *P Brun*.

7 On which see *P Brun*, Responsabilité civile extracontractuelle (4th edn 2016) no 469 ff.

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who was an employee, had acted outside the scope of her tasks or if she had been guilty of an intentional fault or a criminal offence.

Comments

8 A rule set in 2000 creates a limited immunity for employees in cases when they are at fault. The precise limits of this immunity are not known, as the *Cour de cassation* never defined what acting outside the scope of one's tasks exactly means.[8] What is certain, however, is that an employee, even though he/she acted within the scope of his/her tasks, will not enjoy immunity against the consequences of his/her fault to third parties, if his/her behaviour demonstrates a high degree of misconduct, ie if he/she willingly caused damage or committed a criminal offence. The rule established in 2000 thus creates a double exception to the general rule whereby any fault may be a source of liability: (a) an employee is not liable if he/she caused damage through his/her fault while acting within the scope of his/her tasks; but (b) he/she may nevertheless be liable if his/her misconduct was especially serious.

9 In this case, by quashing the lower court's decision, the *Cour de cassation* implicitly considered that the caretaker's behaviour amounted to fault; this is the reason why she could only escape liability through her benefiting from the immunity resulting from the 2000 rule. Even though the misconduct of the caretaker appeared to be of limited importance, she was nevertheless at fault and only her immunity as an employee could protect her against the obligation to pay damages. The present decision, while restating the 2000 rule, thus also confirms the traditional solution whereby any departure from the behaviour of a reasonable person (here: even a zealous professional!) amounts to fault.

7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 15 May 1941
Pas 1941 I, 192

Facts

1 A, a company which patented a process for manufacturing yellow bricks and brown bricks created using a mixture of ordinary clay and finely ground chalk, filed a claim against V, another company, for patent infringement. The trial judge considered that the procedure could not constitute a patentable invention because it was, even before the date of its discovery by the company who owns the patent, already known in practice, studied and referred to in the relevant scientific literature. V

8 *P Brun*, Responsabilité civile extracontractuelle (4th edn 2016) no 472.

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claimed compensation for the damage (incurred expenses, waste of time) it suffered as a result of the claim brought against it.

The trial judge considered the manufacturing process in question to have been used for a long time and to still be based upon the same principles; the products used in the manufacturing of bricks were natural, known elements; that the process was easy, a considerable amount of documentation existed on the subject and that, given the large size of A, it had all the structural and technical means to put in place all the assurances necessary before applying for the patent and asserting its rights. He therefore considered that A was at fault, the fault consisting in not ensuring the validity of the patent which formed the basis of its claim and initiating a claim with flippancy, which would not have been done by a careful and reasonable person. 2

In the appeal proceedings, the appellant (A) particularly blamed the trial judge for not having amended the amount of compensation on the basis of the level of seriousness of the fault committed. 3

Decision

The Supreme Court stated that art 1382 of the Civil Code is general and makes no distinction as regards the level of seriousness of the fault. It notes that 'redressing' damage means restoring the party who suffered it to the situation it would have remained in if the illegal act complained of had not been committed, and then specified that such a result could only be attained by compensation which completely covers the harm caused by that fact and so a determination of the significance of the fault committed appears, as a result, to have no link to the question being resolved. The court dismissed A's appeal. 4

Comments

In ordinary law (art 1382 of the Civil Code), neither the intentional nor the unintentional nature of the fault, nor its seriousness, are taken into consideration in establishing civil liability. The judgment referred to specifically sanctions this solution, which has long been accepted. We can therefore show that the slightest fault is sufficient to engage the liability of the person committing it. 5

The assessment of the intentional nature of the fault, or its level of seriousness, is not, however, of no interest. The Supreme Court traditionally considered that in cases of concurrent faults, which caused the same damage, their severity constituted a criterion for sharing the tortfeasors' liability as regards contribution to the compensation owed.[1] However, following the development of its case law, it now 6

1 See for instance Cass, 11 June 1981, Pas 1981 I, 1159.

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appears that the causal impact of concurrent faults has replaced this severity criterion in the sharing of liability between co-defendants. The court stated this explicitly in 2008, on deciding that the trial judge, 'by sharing liabilities ... on the basis of the seriousness ... [of the] respective faults ... breaches articles 1382 and 1383 of the Civil Code'.[2] This means that causation may vary in intensity according to the Supreme Court and may be the criterion to determine the part of the damage that each tortfeasor will have to compensate. It is therefore to be understood that compensation is *a priori* not shared equally between the tortfeasors.

7 Furthermore, certain authors highlight a trend in case law to increase the amounts of compensation for victims of moral damage where there is an intentional fault.[3] Additionally, a person who commits a harmful act can be deprived of the option to invoke the faulty negligence of the victim in order to share the liability when he/she commits an intentional fault. This is by virtue of the Belgian legal principle *fraus omnia corrumpit* (literally: 'fraud corrupts everything').[4]

8 Finally there are, on the fringes of ordinary law, various systems of exemption in which the nature of the fault assumes particular importance.

9 Without giving an exhaustive list, we can mention art 18 of the Field of Employment Act dated 3 July 1978 relating to employment contracts and of art 2 of the Act dated 10 February 2003 relating to the responsibility of and for members of staff working for public entities, which grant immunity from employees' liability, which only arises in the event of fraud, gross negligence and minor faults which are more habitual than accidental.

10 Likewise in the automatic compensation scheme for vulnerable users who are victims of a traffic accident implemented in 1994 by art 29*bis* of the Act dated 21 November 1989 relating to mandatory insurance for liability in automotive vehicle matters, the legislator provides that a victim, a vulnerable user, can only lose the benefit of automatic compensation if he/she has committed an intentional fault, that is that he/she wished for the accident and all its consequences to happen.

11 We also note that the rule contained in art 530 of the Company Code (*Code des sociétés/Wetboek van vennootschappen*), which provides for the option to engage the liability of the administrators or former administrators of a company (or any other person who has effectively held the power to manage it) when the company becomes insolvent, applies provided that the company can demonstrate that they committed a serious and clear fault.

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2 Free translation of Cass, 4 February 2008, Pas 2008 I, 329.

3 See *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 263 f, no 378 f.

4 See Cass, 6 November 2002, RW 2002-2003, 1629, cmt *B Weyts*; RCJB 2004, 267, cmt *F Glansdorff*; JT 2003, 579, cmt *J Kirkpatrick*; Bull Ass/T Verz 2003, 815, cmt *P Graulus*.

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8. The Netherlands

Hoge Raad (Dutch Supreme Court) 26 October 2001, ECLI:NL:HR:2001:AB2775
NJ 2002/216 (oogmerk)

Facts

Shortly before their marriage ended, a man killed their son in order to torment his wife. His wife claimed damages for non-pecuniary loss. The question in this case was whether the limited legal position of third parties in the case of death (art 6:108 CC), in which compensation for non-pecuniary loss is denied to next-of-kin, stood in the way of this claim. **1**

Decision

Article 6:108 CC does not preclude compensation for losses other than pecuniary loss if the offender killed someone with the intention of inflicting harm on another. The man was held liable to pay Dfl 100,000 (approx € 45,000) in damages for non-pecuniary loss. **2**

Comments

As mentioned earlier (1/8 no 9), as far as attribution of an unlawful act is concerned, no distinction is made between degrees of blameworthiness.[1] The degree of blameworthiness is, however, relevant for the extent of liability. The gravity of the fault is an aspect of the nature of liability (art 6:98 CC[2]), relevant for the determination of the chain of legal causation. Furthermore, it is relevant for the amount of damages for non-pecuniary loss (art 6:106 CC). This specific case shows that a very specific form of blameworthiness (the aim to injure and to cause non-material harm to a third party) may also be relevant in another respect. Although Dutch law does not (yet[3]) recognise a right to compensation for non-pecuniary loss in the case of death, this limited model does not apply when the tortfeasor intended to hurt a next-of-kin.[4] **3**

1 A rather specific exception is the personal liability of board directors. In these cases gross negligence ('ernstig verwijt') is required. See for example HR 8 December 2006, ECLI:NL:HR:2006:AZ0758, NJ 2006/659.

2 Article 6:98 CC: Only damage that is related in such a way to the event giving rise to the liability of the debtor that it, as regards the nature of the liability and the damage, can be attributed to him as a consequence of the event is eligible for compensation.

3 In May 2014, the legislator proposed to alter this.

4 According to Dutch law, under certain circumstances, a right to compensation is accepted in the case of nervous shock (HR 22 March 2002, NJ 2002/240 with comment *JBM Vranken* [Taxibus]). The

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9. Italy

1 For facts and decisions see cases under 6/9 nos 1–2 and 7/9 nos 1–2.

Comments

2 In Italian law, the subjective element that is required to establish liability is sometimes classified according to intensity of misconduct. There is no such classification in the Italian Civil Code, which has done away with the distinction between *culpa* and *culpa levissima*, but it has some historical pedigree, as it goes back to Roman law. Legal authors usually refer to this tripartite classification when they discuss *graduazione della colpa* or *gradi della colpa*.[1] Accordingly, a distinction is made between *colpa lievissima*, which is currently not sufficient to justify a finding of liability, *colpa lieve*, namely the lack of ordinary care and *colpa grave*, or gross negligence, which is particularly important in the case of professional liability, because professionals who undertake tasks that involve solving complex technical problems are liable only where gross negligence is shown according to art 2236 Civil Code (see 7/9 nos 3–5 above).[2] Intention to do damage is also categorised according to a sliding scale: *dolo eventuale*, is the state of mind consisting in the ex ante acceptance that a certain conduct may result in wrongful damage, and *dolo* is the plain intention to cause such damage.

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 20 March 1995
RJ 1995\1965

Facts

1 The singer A1 entered into a contract with record company A2 while a previous contract that he had signed with V for exclusive provision of his services for three years was still in force. V sued A1 and the record company A2 arguing that the production and launch of three records made by A1 constituted an act of unfair competition,

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Hoge Raad, however, explicitly decided that the scope of protection of 'third' persons is not in general widened by the blameworthiness of the act (HR 9 October 2009, NJ 2010/387 with comment *JBM Vranken* (Vilt)).

1 *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 98; *P Cendon* (ed), Commentario al Codice Civile, artt. 2043–2053 (2008) 146.

2 *M Franzoni*, Dalla colpa grave alla responsabilità professionale (2011).

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and claimed from both of them compensation for breach of the exclusivity agreement. The Court of First Instance and the Court of Appeal decided in favour of the claimant, but A2 filed an appeal in cassation, which the Supreme Court upheld.

Decision

While it can be held that there was unfair competition and an unlawful activity of phonographic production with regard to the singer A1, this consideration cannot be applied to record company A2. A1 signed a subsequent contract with record company C while a contract with record company V was still in force, on the grounds of the identity of the subject matter, it was clearly incompatible with the previous one and caused harm to record company V, which had hired him first. A2, by contrast, had no involvement in the first contract, especially since in the proceedings there is no evidence that A2 would have known of this previous contract at the time of signing its own contract with A1, since such knowledge cannot be established by presumptions when there are no elements that can furnish the grounds for any presumption in this sense. To hold otherwise, taking into account the importance of the financial consequences that this might entail, would contradict the legal rules on obligations and contracts and would disregard the principle of legal certainty that governs contracting. **2**

Comments

The legal notion of fault laid down in art 1902 CC includes intent (*dolo*), in spite of the fact that this provision does not make any express reference to it. Intent does not necessarily require a conscious will to cause harm, but also includes those harmful results, which, although not intentionally pursued, are considered as a possible necessary consequence of an action, which one knows is unlawful.[1] Although in principle the degree of misconduct is not decisive for liability, the example illustrates one case where intent of the person causing harm, in the broad sense just mentioned, is required to establish liability. Interference with a contractual relation gives rise to tort liability only when the defendant in the claim in tort intentionally performed actions addressed to harm the contractual party who is the claimant or, at least, knowing that he was infringing the rights of a contractual party.[2] **3**

1 *M Martín-Casals/J Solé*, Comentario al art 1902, in: A Domínguez Luelmo, Comentario al Código Civil (2010) 2051 and more references therein.

2 Knowledge was considered a condition in SSTS 23.3.1921 (Colección legislativa 1921, no 90) and 4.5.1973 (RJ 1973\2291) to decide against the defendants who had induced the debtor not to perform. See *M Martín-Casals/J Ribot*, Compensation for Pure Economic Loss under Spanish Law, in:

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4 Further, according to art 19 Insurance Contract Act 1980, the insurer is not obliged to pay damages when the damaging event 'has been caused by the bad faith of the insured'.[3] However, the exclusion of intent does not mean that the insurance company is not liable vis-à-vis the victim. According to the construction made by courts of the general direct action laid down by art 76 Insurance Contract Act 1980, the insurer must pay the damage covered and can then recover the amount paid from the insured if he/she acted with intent.[4]

5 The distinction between intent and gross negligence, on the one hand, and fault and slight negligence, on the other, is relevant in tort in some family relations. Parents are jointly and severally liable for 'the loss or damage they have caused to property of their underage children *with intent or gross negligence*' (art 168.2 CC). The community of assets of spouses will also have to pay damages for torts committed by either of the spouses when acting on behalf of the community, 'unless they have been caused *with intent or gross negligence* of either of the spouses' (art 1366 CC).

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 28 May 2007

RJ 2007\3131

Facts

6 V was a passenger in a helicopter dedicated to the extinction of forest fires. On a return flight, the unit encountered a storm located on some hills and flew into the storm as it was flying close to the ground. When trying to surmount the top of one hill, the helicopter was affected by turbulence and crashed. The accident caused serious injuries to V, who sued both the company that owned the helicopter and A, the helicopter pilot, and brought two different claims: a claim for damages following an air accident, according to Act 48/1960 of 21 July, on Air Navigation (LNA) and a tort liability claim pursuant to the general provision on fault liability (art 1902 CC). The judgment in the first instance granted the claim due to the fact that the pilot had been found to have been reckless. On appeal, however, it was considered that the behaviour of the pilot could not be considered negligent or reckless, and that the sole cause of the accident was the sudden and unexpected turbulence that caused the loss of control of the helicopter. Therefore, it merely imposed the payment of the maximum amounts set out in art 120 LNA. V appealed to the Supreme Court, claim-

W van Boom/H Koziol/CA Witting (eds), Pure Economic Loss (2003) 66f and more references therein.

3 Intentional conduct is not an insurable risk (among many others, STS 9.7.1994 [RJ 1994\6383] and 10.5.1995 [RJ 1995\5438]).

4 Among many others, see STS 24.5.2013 (RJ 2013\3616).

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ing a higher amount of damages, based on the argument that the pilot acted intentionally or with gross negligence, but the Supreme Court rejected his appeal.

Decision

Liability for accidents that occur during air navigation is governed by the LNA. This Act provides for two types of grounds for compensation when an air crash causes injury: the first, imposes purely strict liability in arts 116 and 120 LNA. This liability combines with a liability for intent or gross negligence where the limits laid down in arts 117 and 120 LNA do not operate, and which is contained in art 121 LNA. The appellant forgets that art 121 LNA, which has preferential application for being a special Act, requires, in order to give rise to liability, proof of intent or gross negligence of the carrier or of its employees. Failure to comply with regulations cannot simply be inferred from the result that occurred – the accident – since in order to establish liability, the Act requires that gross negligence or intent of the carrier or of its employees has been proven, and there was no such proof on the facts. 7

Comments

As a rule, the existence of strict liability rules as laid down by special legislation does not exclude liability for fault. Therefore, the victim can base his/her claim, either simultaneously or subsequently, upon both grounds.[5] In fact, it must be emphasised that, even in the cases governed by strict liability regimes, Spanish courts tend to apply the general fault liability rules. This happens in such important areas as product liability[6], hunting liability, road traffic liability and pollution caused by fumes or leakage.[7] 8

However, in cases of air accidents, art 121 LNA provides that: 'the carrier or operator will be liable for his own acts and for those of his employees and he will not have recourse to the limits of liability established in this Chapter if it is proven that the damage is the result of an act or omission of his own or of his employees in 9

5 *F Peña López*, Comentario al 1902, in: R Bercovitz (ed), Comentarios al Código Civil (2001) 2121. For instance, concerning strict liability for damage caused by animals, see STS 30.4.1984 (RJ 1984\1974). This is recognised expressly, for instance, by art 15 Products Liability Act, which provides for the compatibility of the actions grounded on the Act with other actions that can be grounded in contract or on other tort liability rules.

6 As regards liability of suppliers, on the grounds of art 1902 CC, see STS 27.2.2012 (RJ 2012\4989) and 25.11.2013 (RJ 2013\7827).

7 See *M Martín-Casals/J Ribot/J Solé*, Spain, in: BA Koch/H Koziol (eds), Unification of Tort Law: Strict Liability (2002) 313 f.

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which *intent or gross negligence* is present [emphasis added]'. The Supreme Court courts once declared that this provision did not mean that the limits established for strict liability can also be extended to fault liability, when negligence was proven but did not meet the conditions to be considered gross negligence.[8] The judgment under comment, by contrast, strictly interprets the terms of this provision and, in order to overcome the compensation limits of the special Act, requires proof of intent or gross negligence.[9] It is possible, however, that the reason for deciding this was to be found in the official report on the accident, which described the gusts of wind that brought down the helicopter as unpredictable, thus being unforeseeable and unavoidable for the pilot.[10]

11. Portugal

Supremo Tribunal Administrativo (Supreme Administrative Court) 16 February 2006 (Freitas Carvalho)

Facts

1 V, recovering after a surgical intervention, fell down an open hole in a ditch on a public pathway, intended for the collection of rainwater. There were no warning signs. V suffered permanent damage to her leg, resulting in permanent incapacity (of 20%), and sought compensation from the City Hall, A, and insurance company, B.

8 STS 6.10.1988 (RJ 1988\4868): 'the opinion holding that lacking proof of gross negligence or intent, compensation amounts must be reduced to those established for strict liability... must be rejected.' Following this ruling, and stating that liability based on the LNA is compatible with the application of the general rules of arts 902 and 1903 CC, SAP Castellón 1.7.1999 (AC 1999\1552) and Málaga 30.6.2006 (JUR 2007\40939), although the latter considered it proven that the accident was due to a 'serious negligence of the crew piloting the plane.'

9 See also STS 23.10.2012 (RJ 2012\9725), confirming that the mere harmful outcome does not establish lack of due care allowing liability to be attributed to the aircraft operator above the limits set by the Act. See, however, a less demanding approach in terms of proof of fault in the STS 22.7.2008 (RJ 2008\4611).

10 Conversely, STS 2.1.2006 (RJ 2006\129) confirmed the opinion of the lower courts considering, also following the findings of an official report, that the wind gusts that caused a helicopter to crash when flying at low altitude near a steep mountain were predictable. SAP Barcelona 23.4.2013 (JUR 2013\220076), however, actually upheld the appeal of a helicopter company that had been sued for property damage on the grounds of ordinary negligence of the pilot.

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Decision

The City Hall, A, was ordered to pay to V the sum of € 20,000 as damages for the personal injuries suffered, based on arts 483, 496(4)[1] and 494[2] of the Civil Code. This sum was lower than that sought by V (€ 30,000) due to a reduction based on equity reasons that can be applied in cases of negligence. According to the court, the City Hall's workers simply forgot to put up signs warning of the hole in the ditch, which they should have, but nevertheless the offence was minor in nature, thus justifying the equity-based reduction of the damages. **2**

Comments

In the Portuguese legal system, consideration is taken of two types of fault: one involving wilful misconduct (the tortfeasor predicts the damage, as granted, necessary or probable, and accepts it or intentionally does nothing to prevent it); and one involving negligence (there is a failure of due diligence, the tortfeasor does not believe that the harmful event will take place – if the tortfeasor does not think that the event will happen but predicts it as possible, this is a case of conscious negligence; if the tortfeasor does not believe that it will happen and does not predict it as possible, the case is one of unconscious negligence).[3] **3**

This distinction may not seem very relevant in a civil liability system with the single purpose of compensating damage. The author of the harmful behaviour has to compensate the injured party for the damage suffered, regardless of whether or not he was at fault.[4] Article 483(1)[5] of the Civil Code seems to lean towards this idea, as it establishes the liability of the author of the harmful behaviour regardless of the classification of his behaviour as wilful misconduct or negligence.[6] **4**

1 'The amount of compensation shall be fixed equitably by the court, having regard in any event to the circumstances mentioned in art 494; in the event of death, regard may be taken not only of non-pecuniary damage suffered by the victim but also to such damage suffered by the persons entitled to compensation by virtue of the previous paragraphs.'

2 'Where liability is based on mere fault, compensation may be fixed equitably to an amount lower than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party as well as the other circumstances of the case so justify.'

3 See *A Sá e Mello*, Critérios de apreciação da culpa na responsabilidade civil, Revista da Ordem dos Advogados 49 (1989) vol II, 537; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 569 ff; *A Vaz Serra*, Culpa do devedor ou do agente [1957] BMJ no 68, 36.

4 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 567.

5 'Any person who, with wilful misconduct or negligence, wrongfully breaches the rights of another or any legal provision intended to protect the interests of others shall be obliged to compensate the injured party for the damage resulting from the breach.'

6 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 475.

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5 Nevertheless, the legislator did not overlook the importance of the distinction between those concepts. In fact, the distinction between wilful misconduct and negligence is extremely important for the determination of the quantity of damages in non-contractual civil liability, pursuant to art 494 of the Civil Code.[7] In these terms, if the author of the unlawful and harmful act behaved with simple negligence, it is possible to reduce the compensation, having equity in mind. But this only applies to situations that justify the equity-based decision because of the reduced fault of the person liable, the economic situation of both the tortfeasor and the injured party, and other relevant circumstances.[8]

6 Another example of the relevance of the distinction between the different degrees of fault is related to the right of redress of those jointly liable. For these parties, art 497(2) of the Civil Code establishes that this right is distributed, taking into consideration the different measurements of fault. Also in terms of contractual liability, there are cases in which only wilful misconduct is the basis for liability.[9]

7 In the case at hand, the plaintiff sought compensation for personal injuries suffered in an accident, and, therefore art 496(4) of the Civil Code by reference to art 494 of the Civil Code was applicable. It is worth noting, however, that the calculation of the compensation is not based on the same rules as those in the case of arts 494 and 496(4). While in art 496(4) compensation will be completely calculated on the basis of an equity judgment of the court, which will be influenced by the classification of the tortfeasor's behaviour as wilful misconduct or as negligence, in art 494 the equity-based reduction of the compensation can only be applied in cases of negligence and is based on the calculated property damage (only the reduction is based on equity and the reduction is only applicable in cases of negligence).[10]

8 This legal regime makes it clear that the different degrees of fault are important to the calculation of the amount of the damages, also making clear that the legislator, considers that, besides the more important purpose of reparation of the actual damage suffered by the victim, tort law should also take into consideration the idea of condemning and punishing the tortfeasor.[11]

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7 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 568; *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 475 and 729.

8 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 568; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 583.

9 See namely arts 814, 815, 957 CC.

10 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 604; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 607.

11 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 608.

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12. England and Wales

Lumley v Gye, High Court (Queen's Bench Division) 1 January 1853
[1853] EWHC QB J73

Facts

Johanna Wagner was hired by the claimant and proprietor of Her Majesty's Theatre, Benjamin Lumley, to sing exclusively at the theatre for three months. The defendant, Frederick Gye, knowing the terms of that contract and maliciously intending to injure the claimant, induced Wagner to breach her contract with Lumley and offered her a position with him at the Covent Garden Theatre, which she accepted. Lumley sued Gye for causing the singer to break the terms of her engagement. 1

Decision

The court unanimously gave judgment for the claimant. Crompton J held that the unlawful and malicious enticing away of any person employed to give his personal labour or service under a contract interrupts the relation subsisting between the contracting parties. Since the servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant, the court turns to the latter who has committed a wrongful act for which he is responsible at law. 2

Comments

Given the lack of privity between Lumley and Gye, no action lay against the former in contract. The court was, however, prepared to fashion a new tort against the procurer. The characteristics of the tort were helpfully summarised by Lord Hoffmann in the case below, *OBG v Allan*.[1] First, he explained that the tort is dependent upon the primary wrongful act of the contracting party (here, Johanna Wagner) and creates accessory liability. Gye was thus an accessory to Wagner's liability. Second, since the action is dependent on a wrongful act of the contracting party, the claimant need not establish that the accessory acted independently unlawfully. All that needs to be established is that he participated in the breach of contract. Third, breach of contract is the gist of the action – there must be primary liability in order for accessory liability to arise. As such, there can be no liability for persuading someone not to enter into contractual relations.[2] Finally, although the action in *Lumley* is described as a tort of intention (see the use of the word 'malicious' above), 3

1 [2008] 1 AC 1, 20.
2 *Allen v Flood* [1898] AC 1, 121 per Lord Herschell.

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the court construed this as meaning only that the defendant intended to procure a breach of contract. The fact that the defendant did not intend to cause damage or even thought that the breach would make the claimant better off is irrelevant. Nevertheless, the intention to procure the breach of contract is sufficient to justify a liability for pure economic loss where no liability would arise for causing such loss through the negligent interference with another person's contractual performance.[3]

OBG v Allan, House of Lords, 2 May 2007

[2008] 1 AC 1

Facts

4 The claimant companies, OBG and an associated company, were in financial difficulties. The defendant receivers, acting in good faith, seized the claimants' assets and business, which were subject to a floating charge (a form of security interest over a pool of changing assets). In addition, the defendants claimed that contracts between the claimants and most of their subcontractors were terminated. This led to the companies' liquidation. It later transpired that the security was invalid. The claimants brought an action for loss suffered as a result of the unlawful interference with their contractual relations and conversion.

Decision

5 The House of Lords distinguished the tort of inducing a breach of contract from causing loss by unlawful means and ruled that they should be treated as two separate torts. It concluded that the claim against the receiver failed as the defendants neither used unlawful means nor procured any breach of contract. As to the latter tort, it ruled that *knowledge* that one is inducing a *breach of contract* and an *intention* to procure a breach despite knowing the consequences of such action is a necessary and sufficient requirement for liability. A conscious decision not to inquire into the existence of a fact may constitute knowledge. The prerequisite of intent is satisfied where a person knowingly induces a breach of contract as a means to an end. For example, one who induces a breach to achieve the further end of securing an economic advantage but was not motivated by malice has the necessary intent. Mere foreseeability of economic harm does not meet the requirement of the tort, however. Again, since there can be no secondary liability without primary liability, a breach by the contracting party of their obligations cannot be dispensed with.

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3 As to the tort of procuring a breach of contract, see further *K Oliphant*, The Economic Torts, in: K Oliphant (ed), The Law of Tort (3rd edn 2015) § 29.11 ff.

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On the facts, it ruled that there was no breach or non-performance of any contract and therefore no wrong to which accessory liability could attach. The House of Lords found (unanimously) that the receivers conducted the negotiations in the *bona fide* belief that they were entitled to act on behalf of OBG. Moreover, from a causative perspective, it was not proved that OBG suffered any loss which it would not otherwise have suffered as a result of the above action. Although the tort of unlawful means protects from interference with legal interests beyond the merely contractual, the court (by a 4:1 majority) ruled that the receivers neither employed unlawful means – referring to acts that would be actionable if they caused loss – nor intended to cause OBG any loss, both essential requirements for that tort. Finally, their Lordships concluded (by a 3:2 majority) that the claimants' submissions in conversion failed too since the tort is historically one that seeks to protect 'chattels' (moveable property) and not 'choses in action' (an intangible property right) such as the pure economic losses the claimants were seeking to recover. **6**

Comments

The tort of causing loss by unlawful means is one of several economic torts,[4] so named because their focus is the protection of purely economic interests. As the House of Lords recognised in *OBG v Allan*, economic torts fall into two broad categories, the first consisting of the tort of procuring a breach of contract (see *Lumley v Gye*, nos 1–3 above), the second involving the intentional causing of loss by unlawful means. The latter category embraces the more specific torts of unlawful means conspiracy and intimidation. The requirement of unlawful means entails acts that would be actionable in damages if they caused harm: for that reason, acts committed without lawful authority by the receivers following their unlawful appointment did not constitute 'unlawful means' for the purposes of the tort. A classic illustration of the liability is provided by *Tarleton v M'Gawley*,[5] the seminal case on the tort of intimidation, where the defendant, the master of a vessel anchored off the West coast of Africa, fired cannon to drive away local merchants who were approaching the claimant's rival trading vessel by canoe, thereby depriving the claimant of commercial gain. Firing the cannon was a tort (assault) against the local merchants and thus constituted unlawful means. **7**

There is one well-established though somewhat anomalous economic tort in which unlawful means need not be proven: the tort of conspiracy to injure.[6] This requires the agreement between two or more persons to commit an act with the *predominant purpose* of causing loss to the claimant, which in fact causes such loss. **8**

4 See generally *K Oliphant*, The Economic Torts, in: id (ed), The Law of Tort (3rd edn 2015).

5 (1794) Peake 270.

6 See *K Oliphant* (ed), The Law of Tort (3rd edn 2015) § 29.78 ff.

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The heightened fault requirement provides a measure of justification for allowing liability to arise in such a case even though no independently unlawful means were employed. Where the conspirators act primarily to further their own interests, there is no liability since causing loss is not their predominant purpose.[7]

9 The economic torts demonstrate how intentional fault may justify a more extensive liability than negligence, particularly when purely economic interests are concerned. Intention is also a requirement of liability in the torts of interference with the person, comprising trespass to the person (assault, battery and false imprisonment) and the tort of intentionally inflicting physical or mental harm under the rule in *Wilkinson v Downton*.[8] And in the tort of misfeasance in public office, it must be shown that a public official acted with the object of injuring the claimant ('targeted malice') or knowingly acted without the power to do so.[9] Intentional fault in the form of 'malice' may also be decisive in establishing liability in the tort of defamation insofar as the defence of qualified privilege (attaching to situations where the defendant has a duty or interest to speak) is defeated by proof that the defendant was actuated by malice, that is, that he spoke with the intention of harming the claimant, or otherwise used the privileged occasion for an improper purpose, or lacked an honest belief in the truth of what he said.[10]

10 Additionally, the defendant's intentional misconduct may affect the scope of his liability because, for at least some intentional torts, the courts apply a more relaxed rule of remoteness of damage (all direct consequences) rather than limiting liability to losses of a reasonably foreseeable type.[11] As has been judicially observed, 'it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer.'[12]

13. Scotland

Donoghue v Stevenson, House of Lords, 26 May 1932

1932 SC (HL) 31, 1932 SLT 317, [1932] AC 562

Facts

1 The pursuer, Mrs Donoghue, visited a café, owned by a Mr Minchella in Paisley, with a friend. Her friend ordered for the pursuer some ice cream, and a bottle of ginger

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7 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435.

8 [1897] 2 QB 57. See further *Wainwright v Home Office* [2004] 2 AC 406 and *Rhodes v OPO* [2015] UKSC 32.

9 *Three Rivers District Council v Governor and Company of the Bank of England* [2003] 2 AC 1.

10 *Horrocks v Lowe* [1975] AC 135.

11 See *K Oliphant*, The Nature of Tortious Liability, in: id (ed), The Law of Tort (3rd edn 2015) § 1.19.

12 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 279 per Lord Stein.

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beer, which was intended to be poured over the ice cream to create an iced drink. The ginger beer was manufactured by the defender. The bottle of ginger beer was made of dark opaque glass, making it impossible to see the contents of the bottle. Mr Minchella opened the bottle and poured some of the ginger beer into a tumbler containing the ice cream. The pursuer drank some of the contents of the tumbler. As the pursuer's friend poured out the remainder of the contents of the bottle into the tumbler, the remains of a decomposing snail floated out of the bottle. The pursuer was put into a state of shock on seeing the snail, and she subsequently developed severe gastro-enteritis as a result of consuming the contaminated ginger beer. She sued the manufacturer in delict, claiming damages from him. Her claim was rejected in the Inner House of the Court of Session. She appealed to the House of Lords.

Decision

The House of Lords allowed her appeal, and found the defender (the respondent) liable in damages to the pursuer. Their Lordships held the defender to have owed to the public a duty of care to ensure that his product was safe for consumption by members of the public, and to have failed in the exercise of this duty of care. 2

Comments

This case is the most famous of all reported delict cases. Although sometimes mistakenly thought to be a common law case, it is of course a Scottish case, albeit one which became as much the foundation of the modern law of negligence in England and other common law systems as in Scotland. Its significance lies in describing wrongfulness in cases of careless (ie non-intentional) conduct in terms of the idea of a breach of a duty of care owed by the defender to the injured party. The formulation of this concept of a duty of care was famously expressed by Lord Atkin in his speech in the case as follows: 3

> 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

In this formulation, Lord Atkin expressed the concept of a pre-existing duty ('You must take ... care'), the standard of the duty ('reasonable care'), and the class of persons to whom the duty is owed ('persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation ...'), hence its scope. 4

The decision marks the beginning of the rise of the concept of duty of care as a major tool in limiting liability for harm in delict in Scots law (and, of course, in the common law). Previously, the idea of remoteness of damage was often called into 5

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play by courts in denying liability for loss; that idea was expounded in the 'grand rule on damages' set out in the seminal Scottish case of *Allan v Barclay*.[1] After *Donoghue*, the concept of duty came more often to be used as the principal means to delineate recoverable losses in delictual claims.[2]

6 The decision in *Donoghue* has been analysed (and developed) in countless subsequent cases and academic commentaries. Whilst it forms the basis of the modern law of negligence in both common law and mixed legal systems, it should not be forgotten that, while in common law systems, it gave birth to a new tort – the tort of negligence – in the system from which the decision itself comes it merely provided a new way of analysing the general action for the reparation of wrongfully caused harm. There is no nominate delict of negligence in Scots law: negligence is a standard used to assess wrongful conduct, and not a separate class of delict.

Hunter v Hanley, Court of Session (Inner House)

1955 SC 200, 1955 SLT 213

7 For facts and decisions see 6/13 nos 1–3.

Comments

8 This case, discussed earlier in relation to the test for professional negligence, is relevant at this point in what it says about different degrees of negligence. Earlier discussion indicated that the Inner House thought that the requirement in a professional negligence claim stipulated by the trial judge, that of 'gross negligence', was incorrect: once the threshold of negligence has been breached, it is irrelevant to the question of wrongfulness what degree of negligence is present.

9 In his judgment, Lord President Clyde, having looked at a number of authorities, said this of the question of degrees of negligence:

> 'The use of ["gross negligence"] ... as the test of liability has been more than once criticised ... But the compendious description "gross negligence", "culpa lata", "crassa negligentia" has frequently been adopted, in deciding Scottish appeals in the House of Lords, as the test of liability of trustees claiming protection under an immunity clause in the trust deed ... I am not therefore prepared to say that the concept of gross negligence forms no part of the law of Scotland to-day.
> In relation, however, to professional negligence, I regard the phrase "gross negligence" only as indicating so marked a departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display. So inter-

1 (1864) 2 M 873.

2 On this developmental shift, see para 257 in 'Obligations', vol 15 of the Stair Memorial Encyclopaedia of the Laws of Scotland.

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preted, the words aptly describe what I consider the sound criterion in the matter, although, strictly viewed, they might give the impression that there are degrees of negligence.'

From these observations, it is clear that, whatever the role that 'gross negligence' or Latin terms indicating degrees of fault may have in specialised areas of liability (such as that relating to the liability of trustees[3]), in the field of professional negligence (and indeed of negligence in general) only negligence *simpliciter* is required to demonstrate the fault that is a requirement of a claim. 10

McKie v Orr, Court of Session (Inner House), 28 February 2003

2003 SC 317

Facts

A police officer was arrested and charged with perjury. She subsequently brought an action of damages against the Chief Constable in respect of what she alleged constituted wrongful arrest. At first instance, the judge dismissed the action on the basis that there were no relevant allegations of malice on the part of the arresting officers. The police officer appealed this decision, arguing that malice could be inferred from three alleged wrongs committed against her, namely (1) the actings of a detective sergeant in watching her urinate, undress, shower and dress at her home after her arrest; (2) the actings of a superintendent in ordering her to be physically held when being charged, and (3) the actings of two female police officers in conducting an intimate body search. The defender argued that the actings of the police officers fell within their normal duties, and that they were not so violent or extreme so as to allow malice to be inferred. 11

Decision

The Inner House of the Court of Session refused the appeal, holding that, in relation to each of the alleged three wrongs, the allegations fell short of what was necessary to be capable of justifying an inference of malice. 12

3 See, for instance, comments of Lord Watson in *Knox v Mackinnon (1888) 15 R (HL) 83*, Lord Herschell, Lord Watson and Lord Fitzgerald in *Raes v Meek (1889) 16 R (HL) 31*, Lord Herschell and Lord Watson in *Carruthers v Carruthers (1896) 23 R (HL) 55*, Lord Halsbury, Lord Morris, Lord Shand, Lord Davey and Lord Macnaghten in *Wyman v Paterson (1900) 2 F (HL) 37*.

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Comments

13 Malice, in the sense of malevolence or ill-will, is not usually a requirement for a delictual claim in Scots law. However, it is a requirement in some forms of delictual conduct, wrongful arrest being one of them. Malice is required in the context of wrongful arrest because, as the appeal court stated in its opinion in this case, 'the law gives a police officer a high degree of protection in the discharge of his or her duties, and that there is a presumption that a police officer in the discharge of those duties is acting in good faith'.[4] In order to overcome this presumption, and thus to raise an action based on police misconduct, malice requires to be shown. Specifically, as was stated in the prior case of *Beaty v Ivory*, 'the pursuer in a case of this kind is to aver facts and circumstances, from which the court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive'.[5] On the facts of this case, the court did not believe that it could be inferred from what the various police officers had done that there had been any such malice motivating their conduct.

14 Malice is required for the commission of a number of other delicts in Scots law: wrongful civil process; wrongful diligence; wrongful imprisonment; wrongful information of crime; wrongful search; and verbal injury (a distinct form of verbal delict, separate from defamation, in which truth is not a defence). Furthermore, in an action of defamation, the defence of qualified privilege will not succeed if the pursuer can demonstrate that the relevant defamatory statement was made with malice.[6]

14. Ireland

Carroll v Clare County Council, Supreme Court, 18 December 1975

[1975] IR 221

Facts

1 The plaintiff was driving at night and he collided with an unlit traffic island constructed by the defendant at the junction of a minor and a major road, suffering extensive personal injuries. The plaintiff had failed to heed a prior warning sign and other road markings and was travelling at excessive speed. There was also evidence that the plaintiff could have been misled by some old traffic markings on the road.

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4 Para 7.

5 *Beaty v Ivory (1887) 14 R 1057, at 1061, per Lord President Inglis.*

6 See *J Thomson*, Delictual Liability (4th edn 2009) para 15.20.

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In the IEHC the jury apportioned 30% of the fault to the plaintiff and the remaining 70% to the defendant. The defendant appealed.

Decision

The IESC allowed the appeal and reversed the proportions of fault. Section 34(1) of the Civil Liability Act 1961 provides that apportionment is to be determined 'as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant'. 'Fault' was interpreted as blameworthiness, based on an objective evaluation of the parties' conduct. **2**

Comments

This is one of the leading decisions on relative blameworthiness on apportionment in cases of contributory negligence; it had earlier been established that causal force is not relevant to the apportionment issue and blameworthiness was the central criterion;[1] this case clarified that the measure of blame was objective rather than subjective. Wilful failure to take precautions is treated as more blameworthy than inadvertent failure.[2] If one of the parties is in breach of a strict duty, the court may take this into account and it is possible that no responsibility would be imposed on such a person in some circumstances.[3] The relative objective blameworthiness approach is also used in apportionment decisions in respect of concurrent wrongdoers.[4] **3**

1 *O'Sullivan v O'Dwyer* [1971] IR 275. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 20.47 ff & § 20.51 ff; *E Quill*, Torts in Ireland (4th edn 2014) 444 ff.

2 *Ward v Walsh* unreported IESC 31 July 1991, noted by *R Byrne/W Binchy*, Annual Review of Irish Law 1991 (1993) 441 ff.

3 Section 43 of the 1961 Act; liability under the Liability for Defective Products Act 1991 is to be treated as fault for the purposes of apportionment – sec 9(2) of the 1991 Act.

4 Section 14(3) and sec 21(2); *Iarnród Éireann v Ireland* [1996] 3 IR 321; *Connolly v Dundalk Urban District Council and Mahon & McPhillips* unreported IESC, 18 November 1992; *Keane v HSE* [2011] IEHC 213; *Brownrigg v Leacy t/a Phoenix Estates* [2013] IEHC 434. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 4.27 ff; *E Quill*, Torts in Ireland (4th edn 2014) 493 ff; *JPM White*, Irish Law of Damages (1989) § 1.7.02 f.

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Conway v Irish National Teachers Organisation, Supreme Court, 14 February 1991
[1991] 2 IR 305

Facts

4 During an industrial dispute at the school where the plaintiff was a pupil, the defendant union issued a directive to teachers in neighbouring schools not to accept pupils from the plaintiff's school. This led to a disruption of approximately six months in the plaintiff's primary education, adversely affecting her future educational prospects and hence her potential income. The plaintiff was one of a number of children that instituted proceedings for conspiracy to deprive them of their constitutional rights. Liability was established at an earlier hearing;[5] the present case was concerned with the assessment of damages. The IEHC awarded the plaintiff £11,500, including £1,500 as exemplary damages. The defendants appealed.

Decision

5 The IESC upheld the award. Exemplary damages are available in limited cases to mark the court's disapproval of the defendant's behaviour where it is particularly egregious. The wilful deprivation of the constitutional rights of the children to further the defendant's industrial relations' goals was sufficiently worthy of censure. The amount awarded as exemplary damages was not excessive in the circumstances. The award of general damages was not excessive either.[6]

Comments

6 Exemplary damages can be awarded in respect of the defendant's behaviour in the commission of a wrong or in respect of subsequent behaviour.[7] Thus, the degree of

5 *Crowley v Ireland* [1980] IR 102. At the time of the IESC hearing in *Conway*, there were 77 claims pending and 53 had been settled. Two of the other claims were heard by the IESC at the same time as *Conway*.

6 £7,500 was awarded for the disruption to schooling relating to matters such as boredom in the period of deprivation and extra work catching up on return. £2,500 was awarded for disruption to career prospects.

7 On subsequent behaviour, see *Crawford v Keane* [2000] IEHC 42. See generally *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 44.13 ff; *E Quill*, Torts in Ireland (4th edn 2014) 532 ff; *J Tully*, Tort Law in Ireland (2014) 365 f; *JPM White*, Irish Law of Damages (1989) § 1.2.07 ff. Section 32(2) of the Defamation Act 2009 provides that exemplary damages in defamation cases are available for misbehaviour in the commission of the tort; it is unclear if such damages can be awarded in respect of the conduct of the defence in a defamation action.

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misconduct can affect the level of damages awarded independently of the effects of the tort on the plaintiff, but only in limited cases. Serious misbehaviour by a plaintiff can adversely affect a claim also. A plaintiff's misbehaviour in presenting false or misleading evidence can lead to dismissal of the claim in its entirety, unless injustice would result.[8] A plaintiff engaged in criminal activity at the time of being injured may have their case excluded on public policy grounds under the illegality defence.[9]

Looking at other aspects of the litigation arising out of this industrial dispute, additional issues in respect of types of misconduct arise. The fact that there was a wilful violation of a constitutional right was significant in establishing liability in the first place; a trade union and its officials and members have statutory protection against liability in tort and cannot normally be sued for conspiracy or other economic torts arising out of the conduct of an industrial dispute;[10] however, the constitution is superior to statute, so constitutional violations cannot be excused by statute and the targeted violation of a constitutional right by a union is not protected.[11] Negligent violation of the constitutional education rights is not necessarily actionable,[12] so the intent was particularly important here. The intentional and constitutional aspects were also relevant in respect of the actionable harm; personal inconvenience and pure economic loss are more likely to be actionable if wilfully inflicted and a constitutional dimension will further enhance the prospects of success. **7**

Apart from intentional torts being broader than negligence in the range of rights and interests protected, the question of degrees of misconduct is manifest in other areas also. In respect of static hazards on premises, an occupier's duty will vary depending on whether the injured entrant is a visitor, a recreational user or a tres- **8**

8 Section 26 of the Civil Liability and Courts Act 2004; see *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 44.289 f; *E Quill*, Torts in Ireland (4th edn 2014) 538 f; *J Tully*, Tort Law in Ireland (2014) 367.

9 *O'Connor v McDonnell* unreported IEHC, 30 June 1970; *Anderson v Cooke* [2005] IEHC 221, [2005] 2 IR 607 (in this case it was considered as part of the standard of care enquiry). Section 4(3) of the Occupiers' Liability Act 1995 gives judges a discretionary power to exclude claims by criminal trespassers in respect of claims under the Act. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 20.108 ff; *E Quill*, Torts in Ireland (4th edn 2014) 439 f; *J Tully*, Tort Law in Ireland (2014) 345 f.

10 The Trade Disputes Act 1906 applied at the time; it has been replaced by Part II of the Industrial Relations Act 1990. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 32.113 ff; *E Quill*, Torts in Ireland (4th edn 2014) 481 ff.

11 *Educational Co of Ireland v Fitzpatrick (No 2)* [1961] IR 345. Another of the cases in the present dispute held that a breach of constitutional rights claim was not a 'tort' and so was not covered by the 1906 Act, *Hayes v Ireland* [1987] ILRM 651.

12 *PH v John Murphy & Sons Ltd* [1987] IR 621.

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passer.[13] Likewise, variable behavioural standards can apply within other torts, such as defamation, nuisance and breach of statutory duty.

15. Malta

Charles Galea and Another v Oscar Caruana Montalto and Another (Court of Appeal – Qorti tal-Appell) 11 October 1963

Collected Judgments, Vol XLVII, part I, 371

Facts

1 The first plaintiff owned a plot of land, which was contiguous with another plot owned by the second plaintiff. The first plaintiff engaged the defendants to build a house on his land. In carrying out this commission, the defendants inadvertently overstepped the boundary between the two plots and built also on the second plaintiff's plot. Both the plaintiffs jointly sued the defendants asking that they rebuild the boundary wall in its proper place.

2 The defendants pleaded in defence that the action was wrongly filed since they had no contractual relationship with the second defendant. They claimed that the correct course of action would have been for the second plaintiff, as owner of the 'invaded' property, to sue the first plaintiff, the owner of the 'invading' property.

Decision

3 The first instance court accepted the defendants' plea and dismissed the action; the plaintiffs appealed. The Court of Appeal overturned the judgment and allowed the action to proceed. It observed that the plaintiffs' action was a unitary action *ex delicto*, and not *ex contractu* for the first plaintiff and *ex delicto* for the second plaintiff. The fact that an action may also be available against the person who commissioned the wrongful act does not exclude the action against the material agent because 'a person who suffers damage as a result of a wrongful act has a direct action against the wrongdoer'.

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13 See *Weir-Rogers v The SF Trust Ltd* (3a/14 nos 17–21 above) on recreational users; there is an additional duty of reasonable maintenance where structures are provided primarily for recreational users – Occupiers' Liability Act 1995, sec 4(4); visitors are owed a standard of reasonable care (the same as common law negligence) – sec 3 of the Act, see *Newman v Cogan* (7/14 nos 1–3 above); trespassers are owed the same duty as that outlined in *Weir-Rogers*. The categories of entrant are defined in sec 1(1) of the Act.

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Comments

The reasoning in this judgment (and in similar judgments in the context, usually, of an *actio spolii*) is close to basing liability on objective wrongdoing irrespective of fault, particularly when it says that an action lies not only against the person who commissioned the act, and who therefore may be subjectively at 'fault', but also against the person who only follows orders in materially carrying out the 'wrongful' act. Although this judgment reached no conclusion on whether the defendants were personally at fault or not, because it dealt only with the preliminary issue of the defendants' plea in defence, it does allow one to draw a clear distinction between harmful result and conduct constituting fault, thereby implying that a harmful result is sufficient basis for an action in tort, at least when the remedy sought is the removal of a wrongful state of affairs (in this case, the boundary wall) rather than payment of damages. 4

Although expressly defined by the court as an action in delict, this particular case deals with matters which have a greater affinity with property law than with tort, as evidenced also by the nature of the remedy sought. In fact, in support of its conclusion, the court expressly cited judgments delivered in possessory actions (*actio spolii*). However, this may strengthen the conclusion that in cases like the present one, the harmful result itself (obviously, when attributable to the defendant) is the basis for liability because in an *actio spolii* the subjective condition of the defendant (negligence or intent) is not relevant. 5

Godfrey Schembri v Victor Portelli (Court of Appeal – Qorti tal-Appell) 31 May 2013, Writ no 803/2004

<http://www.justiceservices.gov.mt>

Facts

The defendant deliberately attempted to run over another person with his car. He missed and hit the plaintiff instead, grievously injuring him. The plaintiff sued for damages. 6

Decision

The first instance court found for the plaintiff and ordered the defendant to pay damages of € 4,201.71. The defendant appealed, claiming inter alia that whereas the basis of the plaintiff's claim was *dolus*, he was at most only guilty of *culpa* because he had not intended to hurt the plaintiff. The Court of Appeal dismissed the appeal on the ground that the evidence amply showed that the defendant had acted with intent. The court also observed, *obiter*, that damages are to be assessed in the same manner irrespective of whether the defendant is guilty of *dolus* or only of *culpa*. 7

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Comments

8 In addition to dismissing the defendant's plea that, since he had intended to harm a third party not the plaintiff, his misconduct was not voluntary, the Court of Appeal went further and stated that damages for *culpa* and for *dolus* are to be assessed in the same manner. This is perhaps too wide and general a statement. Article 1047(2) of the Civil Code expressly provides that where the damage consists in depriving a person of the use of his own money, additional damages may be awarded where the party causing the damage 'has acted maliciously'. Although this is a special rule applying only in specific circumstances, there is no reason to exclude the possibility that it may in appropriate circumstances be extended by analogy. The general comment made by the Court of Appeal was entirely unnecessary in the present case, considering the ludicrous nature of the defendant's plea, and is too restrictive. It could possibly have been avoided.

16. Denmark

Østre Landsret (Eastern Court of Appeal) 11 November 1977

U 1978.399 Ø

Facts

1 A sculptor, V, was exhibiting his works at an art exhibition. One sculpture was made of plaster, weighed between 5–10 kg and was exhibited on an approximately 90 cm tall tripod. There were no railings or other barriers placed around the sculpture. One of the visitors, A, to the exhibition had been admiring certain paintings on the wall with his back turned to the sculpture. When stepping backwards to better appreciate the paintings, he knocked the sculpture's tripod, causing the sculpture to break upon impact with the floor.

Decision

2 Under such circumstances the City Court of Lyngby found it to be problematic to hold that the visitor had acted negligently and thus there was no basis for a claim against the visitor. The case was appealed to the Eastern Court of Appeal. The court placed emphasis on the fact that the fragile sculpture was placed in an unprotected position in the exhibition room in a way that made it easy for visitors to accidentally bump into it, causing it to break. Considering that the damage was caused by a moment's inattentiveness of a visitor, the court concluded that the visitor had not exhibited such a level of negligence as required for liability to be incurred under tort law rules.

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Comments

In principle, as already mentioned under the general description of Danish law on misconduct, any level of negligence (including *culpa levissima*) may suffice as a basis for liability under Danish tort law rules. Being inattentive for a moment and knocking an item over will therefore as a starting point provide the required negligence and serve as a basis for liability. However, in a case where the party who has suffered the loss has orchestrated the circumstances so as to provide an increased likelihood that accidents might occur, the courts will be lenient towards the tortfeasor.[1] **3**

Højesteret (Supreme Court) 22 June 1995

U 1995.737 H

Facts

A was an engineer with company B. After hours he decided to use the company's workshop and welding equipment to weld a crack in the silencer on his privately owned car. His car had been coated underneath with an anti-rust agent, which caught fire during the welding procedure. The fire spread to the workshop itself. The fire insurer sued in recourse claiming that A had been grossly negligent (gross negligence being a requirement under Danish law for insurers of chattels or real estate to obtain a claim in recourse against the tortfeasor according to the Damages Act sec 19, subsec 2, 1st sentence). **4**

Decision

The Western Court of Appeal acquitted A of the claim, stating that even if A had displayed a significant degree of negligence, A's actions did not amount to 'gross' negligence. On appeal the Supreme Court held firstly that it had not been proven that employees were prohibited from using the company's workshop after hours and secondly, that even if the flammability of the anti-rust agent was well known amongst car mechanics, it was not a generally known fact. The court further agreed with the Western Court of Appeal that although A had displayed a significant degree of negligence, his actions did not entail such an obvious risk of the damage that had occurred that one should describe the negligence as 'gross' in the sense of the Damages Act. **5**

1 See *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 99. The approach of the Eastern Court of Appeal in this case has been followed in similar later cases, see eg Eastern Court of Appeal Ruling of 14 January 1998 (U 1998.665 Ø/2).

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6 As a starting point, it follows from the Damages Act 19, subsec 2, 1st sentence, that a tortfeasor who damages chattels or real estate which is covered by insurance is exempt from personal liability to the extent that the insurance covers the owner's loss. This applies not only to the owner's claim against the tortfeasor but also to any claim in recourse from the insurers. An exception to this is made if the tortfeasor acted with intent or with gross negligence (*culpa lata*). Accordingly, Danish case law contains many rulings on the distinction between simple and gross negligence (*culpa levis* and *culpa lata*). The above case describes the accepted test for gross negligence – or *culpa lata* – under Danish law. As per the Supreme Court's ruling, the test applied by the court is whether or not the acts or omissions of the tortfeasor entailed an obvious risk of the damage that actually occurred. The test has been used as the decisive factor also in later cases[2] and must now be seen as a firmly established test within the general rules of tort law.[3] The test is applied, taking into account an overall appreciation of the facts of the case as well as an evaluation of the knowledge the tortfeasor *ought* to have had and thus is primarily objective.[4] Thus, it was necessary for the Supreme Court to evaluate how well known the problem of the flammable nature of anti-rust agents was. The problem was only well known amongst car mechanics. The tortfeasor, A, was an engineer – not a car mechanic. Accordingly, although he had shown considerable lack of judgement and had been *negligent*, the negligence had not been *gross*.

Højesteret (Supreme Court) 26 August 1998

U 1998.1558 H

Facts

7 A, who was a plumber, had been allowed to use the workshop of a nearby school to carry out extensive welding work on his privately owned car. Sitting inside the car welding a sheet of metal to the floor under the driving seat, the car caught fire and the car as well as a substantial part of the building burnt down. It was held as proven that the fire started because the fuel pipe had overheated due to the heat from the welding equipment. According to his own witness statement, A had not

2 See eg U 2002.2706 V, U 2004.177 V, FED 2008.13 Ø, and U 2010.833 H.

3 Please note that the test for 'gross negligence' cannot claim total universality as it may be argued that case law, within certain special laws, has developed tests which may differ slightly from the above one; however within the area of general tort law rules, the test is valid. See further on this issue *J Nørgaard* in U 1996.B.191, 'Grov uagtsomhed' i relation til bestemmelsen i erstatningsansvarslovens § 19, stk 2, nr 1, p 195.

4 See *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 451 f.

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checked the location of the fuel pipe before he began the welding. Indeed, he had not thought about the fuel pipe at all. The fire insurer sued A in recourse claiming that A had acted grossly negligently under the Damages Act sec 19, subsec 2, 1st sentence (and thus was not protected by the prohibition of recourse claims otherwise applicable under the Damages Act sec 19, subsec 1).

Decision

The Western Court of Appeal held that even laymen ought to realise that in a car with the petrol tank in the back and the motor in the front, a fuel pipe would have to connect the one with the other and that it would most likely be placed under the car. Consequently, even the most basic of safety precautions would include a determination of the location of the fuel pipe. It followed that A's actions had given rise to an obvious danger for the damage that occurred; being the fire. Consequently, A's actions amounted to gross negligence under the Damages Act sec 19, subsec 2, 1st sentence, and thus the insurer's recourse claim was allowed. On appeal, the majority of the Supreme Court upheld the Court of Appeal's decision. **8**

Comments

The case must be seen in the light of U 1995.737 H, as discussed in 13/16 nos 4–6 above, but is also distinguishable from it. In the latter case, the particular dangers connected with the use of the anti-rust agent were not commonly known. In U 1998.1558 H, the current case, on the other hand, anyone ought to have realised that there would be a fuel pipe in the car somewhere and that when welding metal sheets to the bottom of a car, one ought to consider its whereabouts. Refraining from taking any precautions in that regard amounted to gross negligence. However, the case is particularly interesting because of the discussion between the majority and the minority of the Supreme Court. The court found it to be proven that A simply had not thought about the location of the fuel pipe. Thus, his actions were a result of (severe) carelessness but not conscious, calculated risk taking. In other words: his actions were not reckless. The minority found that in order to qualify as grossly negligent under the Damages Act, the tortfeasor had to display a blatant disregard of other people's interests or conscious risk taking. In this way the minority found that the term 'gross negligence' contained a subjective element: that the actual tortfeasor had to understand the actual danger he was causing. As the minority's reasoning was rejected, it is now safe to say that the approach to the evaluation of the degrees of misconduct under Danish law is objective.[5] **9**

5 See *B von Eyben/H Isager* Lærebog i Erstatningsret (7th edn 2011) 447 ff for further case law and references.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 8 December 1989
Rt 1989, 1318

Facts

1 Pursuant to the Norwegian Act on Inheritance (*Arveloven*, 3 March 1972 No 5) § 7, a spouse is to be notified if the other spouse writes a will. A lawyer advised a spouse when he drew up a will, which favoured the spouse's family. The lawyer was not aware of § 7 of the Act and the requirement to notify the other spouse. The spouse was therefore not informed of the will. The spouse's heirs, who lost their inheritance, claimed compensation from the lawyer's liability insurer. The insurance did not cover gross negligence, and the insurer therefore claimed recourse from the lawyer.

Decision

2 The Supreme Court's majority pointed out that, in general, a person's behaviour must represent a clear deviation from normal prudent behaviour if it is to be characterised as grossly negligent. In some cases, lack of professional expertise could represent gross negligence. Any lack of knowledge concerning legal rules, however, could not be adjudged to constitute gross negligence. Lack of knowledge of central areas of the law, such as general rules of family law and inheritance law, can generally be adjudged more strictly than more peripheral parts of the law. More specifically, the court found that, in this central field of Norwegian law, the rule on notification is a fundamental formal rule that is a prerequisite for a valid will. The lawyer's position as a professional adviser is especially important when it comes to this aspect of the law. Knowledge of such rules is one the main reasons why people in general seek a lawyer's advice. It is a reasonable expectation that a lawyer knows the most fundamental rules in a legal area when he commits to a specific task of this kind. The insurer won the case by three votes to two.

3 The minority took a totally different legal approach. Their main focus was on arriving at a reasonable solution in the concrete case. The point of departure was the contract for liability insurance. The minority pointed out that, pursuant to a new law on liability insurance contracts that had been announced, insurance companies will not be permitted to include clauses that exclude insurance coverage in cases of grossly negligent behaviour. Without any clear legal basis, they thereafter assessed the concrete behaviour of the lawyer in question over a prolonged period of time, and concluded that he normally behaved prudently in his professional duties. On this basis, they concluded that the specific failure in this case appeared to be an isolated error or a lapse of memory.

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Comments

For practical purposes, the gradations of misconduct between ordinary and grave *culpa* are drawn very rarely, the latter category covering gross negligence and intent.[1] The mentioned case regarding professional misconduct and insurance coverage is one area where the distinction may be relevant, because of the generally high standard expected of professionals. Even though the expectations of the ability of professionals to meet certain professional standards are high, there will often be a margin for criticism and error that are accepted without liability being imposed. This margin is often the same as common practice in the profession to which the alleged tortfeasor belongs. The kind of errors that can be accepted without liability being imposed depends on the task the professional was carrying out when the risk materialised, and the standard – from a general point of view – one can usually expect from professionals in the same concrete situation and with the same knowledge and competence. An attorney cannot be excused for mistakes simply because he is young and inexperienced.[2] **4**

One of the most important and fundamental tasks for a legal adviser must be to give his/her clients information about the most central legal rules. The rule in this case was easily accessible. As the minority also stated, the purpose of the will was to favour his client's family over the spouse's heirs in a biased way. A lawyer with reasonable general insight into the law would easily have envisaged that the legislator might have regulated such a situation. It was not a decisive issue in this judgment whether or not the failure was blameworthy to a high degree, but whether it was a clear deviation from reasonable expectations of a lawyer. The judgment delivered by the majority appears to indicate that the standard makes more stringent demands as regards knowledge of the existence of central rules and formalities than as regards assessments based on a juridical analysis of the rules. **5**

The minority's argument is not very convincing. If the law on compensation in cases of professional liability is to have any meaning, it must be based on objective standards of prudent professional conduct. **6**

1 There is an important example where the distinction between ordinary and slight *culpa* is drawn, however, in the Act on Motor Vehicle Liability (*Bilansvarsloven*, 3 February 1961) § 7: 'If the victim has shown only slight culpability, his claim cannot be reduced because of his contribution.'

2 See in the corresponding order cases Rt 1997, 1081 (3d/17 nos 3–4) and Rt 1994, 1465.

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18. Sweden

Högsta domstolen (Supreme Court) 3 January 2011

NJA 2011, 3

Facts

1 A burglar broke into a residence during the day when the owners were not at home. He got in by smashing a window with a big stone, whereby the interior walls and furniture were damaged. The man was convicted of 'grand theft' in a criminal trial. The homeowners sued him for non-pecuniary damage. According to the Swedish Tort Liability Act ch 2, sec 3,[1] non-pecuniary damage can give rise to tort claims if there has been a 'serious offence constituting a crime against someone's person, freedom, peace or honour'.[2]

Decision

2 The court found that the qualification 'serious' can be employed in burglary cases when the owner is at home or otherwise if 'the dwellings have been destroyed, or if the offence has involved other particularly ruthless elements'. The court stated that such a case must be assumed if 'the perpetrator's behaviour, the damage and traces he left behind, the degree of intrusion into the home and other circumstances indicate a particularly far-reaching infringement of the victim's peace and privacy'. Positive indications of such a conclusion in this case were that the burglar had hurled a rock through the dining room window, that the house had been ransacked, that a large number of items, including many with great sentimental value, had been stolen and lastly that the burglar had left traces of blood at several places in the house, including in a drawer where underwear was kept. Taken together, the court concluded that the situation could be regarded as such a serious offence constituting a crime against someone's person, freedom, peace or honour that it could lead to an award of compensation for non-pecuniary aggravated damage.

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1 Tort Liability Act ch 2, sec 3 reads: 'Anyone who seriously violates someone through a crime involving an assault on his person, freedom, peace or honour shall be liable to pay compensation for the violation involved.'

2 Concerning the regulation and the seriousness test, see *S Friberg*, Kränkningsersättning (2010) 527 ff, 653 ff.

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Comments

Normally the degrees of misconduct have no relevance in Swedish tort law. As an exception, the above-mentioned case regarding a claim for non-pecuniary damages involved an evaluation of the particular serious offences which can give rise to claims. As regards the general criterion of seriousness, the Supreme Court concentrated on the perpetrator's 'behaviour', the 'damage and traces' he left behind, the 'degree of intrusion' into the home and other circumstances indicating a particularly 'far-reaching infringement' of the victim's peace and privacy. As a further specific concretisation, the Supreme Court indicated circumstances that can be seen as signs of the general seriousness of the crime, for example, the ransacking of the house and the amount of stolen objects, many with great sentimental value. This pattern of general criterion and specific concretisation can reveal arguments concerning both the tortfeasor's and the victim's perspective. So instead of just repeating – in different words – how 'serious' (or revolting, repellent, disgusting, etc) the offence ought to be considered as the combination of general and specific arguments and the two perspectives can give more detailed content to the legal argument concerning the qualification of degree of misconduct. **3**

19. Finland

Korkein oikeus (Supreme Court) 2004:48, R2002/958, 26.5.2004/1168
<http://www.finlex.fi>

Facts

A car driver drove at 103.5 km/h in a residential area where the speed limit was 40 km/h. It was evening and it was dark. However, it was not so late that the driver could have expected the area to have been free of pedestrians. Moreover, the vehicle's rear tyres were in poor condition. After driving 300 m through the area, the car collided with a pedestrian, fatally injuring him. The pedestrian had been running after his dog a few metres from the pedestrian crossing. **1**

Decision

The Supreme Court (split decision 3-1-1) connected the fault (gross negligence) to the driver's illegal and excessive risk-taking, as the driver had quickly accelerated to a high speed and had also disregarded the somewhat poor condition of his vehicle's rear tyres, the time of the day, and the residential area where he was driving. As the accident occurred a few metres from the pedestrian crossing, the driver should have been able to stop for pedestrians crossing the street.[1] **2**

1 See also *V Hahto*, Tuottamus vahingonkorvausoikeudessa (2008) 106.

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Comments

3 According to ch 5, sec 4 of the TLA, the mental distress caused by the death of a person to his/her parents, children or spouse, as well as to other persons comparably close to the deceased, shall be compensated if the death was caused deliberately or by a grossly negligent act and if awarding damages is deemed reasonable in view of the close relationship between the deceased and the person seeking the damages, the nature of the act, and other circumstances.[2] Consequently, the Supreme Court had to decide whether the 12-year-old son of the deceased was entitled to compensation arising from his father's death.

4 The evaluation of gross negligence in tort is made separately from, for example, the evaluation of whether a defendant is guilty of involuntary manslaughter or aggravated involuntary manslaughter. In this case, the court found that even though the defendant's conduct did not amount to aggravated manslaughter in the criminal sense, the negligence in tort was gross, and for this reason the court ordered the driver to pay compensation to the son of the deceased. The driver did not contest the level of damages, which had been estimated to be ca FIM 30,000 (€ 5,046) by the district court.[3]

5 In the Finnish TLA, there are four degrees of misconduct: intention, gross negligence, negligence and slight negligence. Normally, even slight negligence leads to the establishment of full liability to compensate for the damage caused.

6 According to TLA ch 2, sec 1(1), a person who deliberately or negligently causes injury or damage to another shall be liable for damages, unless otherwise follows from the provisions of the Act.

7 The degree of misconduct is relevant when considering if there are grounds for adjusted liability. According to TLA ch 2, sec 1(2), damages may be adjusted if the liability is deemed unreasonably onerous in view of the financial status of the person causing the injury or damage and the person suffering the damage and other circumstances. However, if the injury or damage was caused deliberately, full damages shall be awarded unless it is deemed that there are special reasons to reduce the damages.

8 The differences between different degrees of misconduct are significant when the question is whether the damage was caused at work by an employee or in other comparable circumstances.

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2 More on that see Government Bill 116/1998.

3 Key issues: excessive speed, presumed very low traffic on the road, presumed danger, and their connection to fault. See also KKO 1993:26. See also Supreme Court case KKO 2002:83, where the defendant, a driver, had taken extreme risks in traffic due to his vehicle's excessive speed and the fact that he was driving under the influence of alcohol (11/19 nos 5–7). Another case that concerns excessive speed and fault, but no liability for damages, is, eg, KKO 2003:134 (a criminal case).

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According to the TLA ch 4, sec 1(1), an employee shall be liable for damages for the injury or damage caused by him/her through an error or omission at work to an amount deemed reasonable in view of the extent of the injury or damage, the nature of the act, the status of the person causing the injury or damage, the needs of the person suffering the damage, and other circumstances. If the negligence of the employee has been merely slight, he/she shall not be rendered liable for damages. In cases like the aforementioned, the employer has to compensate for the total damage. The same applies if the injury or damage is caused by an independent entrepreneur, as referred to in ch 3, sec 1(1).[4] If a student in an educational establishment causes injury or damage while participating in activities pertaining to his/her education, he/she shall be liable for damages in accordance with the provisions in this section. The same applies to liability for damages for injury or damage caused by a patient in an institution while undergoing occupational therapy or by a prisoner while undertaking prison work (1423/1991). **9**

According to subsec 2, if the injury or damage was caused intentionally, full damages shall be awarded unless it is deemed that there are special reasons for reducing them. **10**

There are separate provisions that apply to the liability for damages of an employee towards the employer for injury or damage caused at work. **11**

According to TLA ch 5, secs 4a and 6, special conditions have to be fulfilled before compensation for mental suffering can be awarded. Among these other conditions, the damage has to be caused intentionally or by gross negligence. **12**

According to TLA ch 5, sec 4b, the parents, children and spouse of a deceased person as well as other comparable persons especially close to the deceased, shall be entitled to damages for the suffering arising from the death if the death was caused deliberately or by a grossly negligent act and if the awarding of the damages is deemed reasonable in view of the close relationship between the deceased and the person seeking the damages, the nature of the act, and other circumstances. **13**

4 This refers to an independent entrepreneur who, in view of the permanent nature of the assignment, the nature of the work and other circumstances is to be considered as equal to an employee.

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20. Estonia

Tallinna Ringkonnakohus (Tallinn Circuit Court) 22 June 2007
Civil Matter No 2-05-1648

Facts

1 An accident took place at a harbour belonging to the defendant, damaging a trailer belonging to the victim. The damage occurred when the employees of the defendant unloaded the plaintiff's trailer from a ship belonging to a third party. In the course of unloading, the trailer bumped against the ship of the third party with its rear left-hand corner and side. The accident caused damage to the trailer. The defendant contested the action by claiming that he was not liable for the accident because it took place due to faulty and unstable packing and also due to the manner in which the goods were placed in the plaintiff's trailer. The defendant, whose task it is to load and store cargo, was not liable for the unsuitably packed goods in the trailer. The recipient of the goods is responsible for the packing. The defendant was unaware of the fact that the goods had not been packed as required in the trailer, he had not been warned of this fact and, because the trailer was sealed, it was not possible for him to look inside.

2 The county court did not satisfy the claim.

Decision

3 The circuit court annulled the decision of the county court and satisfied the claim. The court found that the county court had divided the burden of proof between the parties unjustly because, according to § 1050 (1) of LOA, the plaintiff did not have to prove the defendant's fault but the defendant had to prove that he was not at fault for causing the damage in order to be freed from liability for the damage. § 104 (2) of LOA defines the forms of fault ie negligence, gross negligence and intent. Since the form of fault that forms the basis of liability has not been established in § 1043 of LOA, negligence as the lightest form of fault is sufficient. The defendant did not specify the circumstances that could indicate the necessary care used in unloading works, nor the circumstances that could enable the court to conclude that the defendant had taken the necessary care in this case.

Comments

4 § 1050 (1) of LOA, on which the circuit court based its decision in dividing the burden of proof of the defendant's fault or the absence of it, does not establish a presumption of intent, but it does state a presumption of negligence. As a general rule, the particular form of fault is not important as regards the preconditions of liability or the scope of the claim. Therefore, the circuit court was correct to emphasise that,

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for general delictual liability to emerge, negligence as the lightest form of fault is sufficient. The circuit court did not explain whose negligence it presumed under § 1050 (1) of LOA – that of the defendant or its employees.

As stated in the circuit court decision, the forms of fault according to § 104 (2) of LOA are negligence, gross negligence, and intent. The concept of negligence has been established in § 104 (3) of LOA, the concept of gross negligence in § 104 (4) of LOA, and that of intent in § 104 (5) of LOA. § 104 (3) of LOA establishes that 'negligence is the failure to exercise the necessary care.' Based on § 104 (4) of LOA, 'gross negligence is the failure to exercise the necessary care to a material extent.' According to § 104 (5) of LOA, 'intent is the will to bring about an unlawful consequence upon the creation, performance or termination of an obligation'. **5**

It should also be noted that § 104 (5) refers to the concept of direct intent (*dolus*). Indirect intent (*dolus eventualis*) is not listed as a form of fault under LOA, but this does not mean that it does not exist.[1] **6**

However, there are still cases in which the form of fault has relevance in tort law. In questions relating to liability, the form of fault is significant when a victim bases a claim on the intentional causing of damage by the defendant against good morals as a delict (LOA § 1045 (1) 8)). The form of fault may also have relevance when the victim claims that the defendant violated a statutory provision (LOA § 1045 (1) 7)) and this violation of a provision with a protective purpose presumes a fault in this specific form. Concerning the scope of the claim, the form of fault may be relevant in the case of non-pecuniary damage when determining the amount of compensation (LOA § 134) and a reduction of compensation in accordance with the principle of fairness (equity, LOA § 140 (1)). In addition, the form of fault is relevant when dividing liability between tortfeasors who are solidarily liable (LOA § 137 (2)). The form of the fault of the victim may have relevance in a reduction of compensation due to the victim's contribution to the occurrence of the damage (LOA § 139). **7**

1 The LOA does not establish indirect intent as a form of fault and does not define it separately. Nevertheless, the above-mentioned does not mean that indirect intent is not acknowledged in Estonian private law and it is not considered relevant in certain cases. For example, in a comment to the LOA it has been stated that, in the case of indirect intent, the materialisation of an unlawful consequence is not wished for, but the risk that it may occur is accepted *P Varul et al*, Võlaõigusseadus III. Kommenteeritud väljaanne [Law of Obligations Act III. Commented edition] (2009) 676.

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Tallinna Ringkonnakohus (Tallinn Circuit Court) 9 April 2007
Civil Matter No 2-05-15618

Facts

8 According to the statement of claim, a bailiff evicted the plaintiff upon request by the defendant from the residence the plaintiff had occupied. The eviction was based on a court decision that had not entered into force. The plaintiff filed an action against the defendant for compensation of pecuniary and non-pecuniary damage caused as a result of the unlawful eviction. The defendant contested the action by saying that, since the eviction was carried out by a bailiff, it was the latter's obligation to verify whether the court decision on eviction had entered into force. The Tartu County Court satisfied the claim. The county court established that the defendant, when he applied for the execution of the court judgment, knew that the judgment had not entered into force.

Decision

9 The circuit court did not amend the decision, finding that the law does not provide a direct obligation of an obligee to inform a bailiff that the legal grounds for an execution proceeding are lacking. However, the omission of the obligee in failing to notify the bailiff of the fact that the court decision as an execution document was invalid and there was, therefore no ground to carry out an execution procedure based on that document, should be deemed as a violation of the general duty to maintain safety stemming from the principle of good faith. The defendant knew this circumstance and could and should have informed the bailiff of the changed situation. If this had been done, the plaintiff would not have suffered damage. The act of the defendant can be deemed unlawful pursuant to § 1045 (1) 8) of LOA, according to which causing damage is first and foremost unlawful when it was caused by intentional behaviour that contradicts good morals.

Comments

10 In general, the fault of a tortfeasor in the form of negligence is sufficient for general delictual liability pursuant to LOA § 1043ff to arise. However there is one exception in § 1045 (1) 8) of LOA, which states that the tortfeasor's intent is important in deciding on questions of liability and the circuit court applied this exception in this case. Based on the evidence, the circuit court deemed it established that the acts of the defendant were intentional although it did not specify whether the intent was direct or indirect.

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21. Latvia

Augstākās tiesas Senāts (Senate of the Supreme Court) C02026109 No SKC-175/2013, 12 March 2013

Published[1]

Facts

On 11 August 2003 the defendant intentionally splashed acid in the claimant's eyes, causing severe chemical burns, secondary glaucoma, cataract, perforated corneal ulcers of the right eye and a reduction of vision in both eyes. The claimant suffered permanent loss of one third of his working capacity and his impairment was assessed as belonging to the most serious category of disability. In addition to the criminal charges brought against the defendant for inflicting grievous bodily harm, the claimant brought a claim for compensation for non-pecuniary harm and for the medical expenses incurred, lost earnings and the costs of hiring a carer. The defendant, amongst others, argued that the enforcement of such a decision would harm the interests of her four minor children, one of whom was disabled and the claimant was the father of three of them. The fact that the defendant's family was poor and that her monthly income was well below average had to be taken into account. 1

Decision

The court indicated rather a wide range of loss that ought to be compensated as the loss was caused by wilful misconduct – an intentional infringement on the rights of the claimant's physical integrity. As regards the compensation for non-pecuniary harm, the court provided that the amount awarded in criminal proceedings is not final as it does not limit the right to bring a civil action. Since the wilful misconduct was already established in the criminal proceedings, the court did not address the misconduct in further detail. Taking into account the gravity of the injury, the negative effect on the claimant's life, loss of life quality and other factors as well as the form of misconduct, ie, intentional conduct by the defendant, the court determined compensation of € 44,109. The court added that the financial state of the defendant has little impact on the seriousness and the magnitude of the claimant's injury and the compensation claimed. The decision became effective on 12 March 2013 as the Senate of the Supreme Court refused to initiate the cassation proceedings. 2

1 Published partially in Case law review on compensation of non-pecuniary damage in civil cases 70 f. Available at: <http://at.gov.lv/files/uploads/files/6_Judikatura/Tiesu_prakses_apkopojumi/Morala%20kaitejuma%20atlidzinasana_2014_galigais.doc>.

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Comments

3 In this case the misconduct of the defendant was quite obviously a wilful infringement of the rights of another which is also subject to criminal liability. The fact that the act was wilful was not a decisive aspect as the outcome of the case probably would have been the same in the case of a negligent act, because generally a victim has a right to receive full compensation irrespective of the tortfeasor's degree of fault (negligence). Also, in cases where the defendant acted wilfully misconduct, as a precondition for the establishment of liability, does not require extensive reasoning. The case not only presents a clear example of *dolus malus* and the subsequent damage to the claimant's health, but also highlights that sometimes the form of misconduct, namely wilful misconduct, is taken into account as a factor when the amount of compensation for non-pecuniary harm is determined by the court. The rationale behind this consideration is that, in exceptional cases where the harm has been inflicted intentionally, the defendant could be deterred from such conduct in the future by imposing more severe financial constraints than in the case of negligence. Although this would not usually be a decisive factor in determining the amount of compensation, it would in some cases be connected with the manner in which the injury is caused and thus cause psychical harm to a larger extent or even lead to a post-traumatic stress disorder (PTSD) or other conditions.

4 The task of establishing misconduct is much simpler if the person is found guilty in criminal proceedings as the court in a subsequent civil case must take into account the findings of such criminal proceedings in deciding whether or not the person in question committed the particular offence, according to art 96(3) of the Civil Procedure Law. The court is bound by the findings in the criminal case only regarding a person's misconduct as the person may be found guilty of committing a criminal offence that does not involve any damage to another person. Although the victim of a criminal offence may claim and receive compensation also within the criminal proceedings, his/her right to bring a civil action in a separate case against the wrongdoer is not affected due to the fact that compensation awarded according to art 350(3) of Criminal Procedure Law in criminal proceedings tends to be relatively low.[2]

2 Case law review on compensation of non-pecuniary damage in criminal cases 71–81. Available at: <http://www.at.gov.lv/files/uploads/files/docs/petijumi/tiesu%20prakse%20moralais%20kaitejums_an.doc>.

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22. Lithuania

LZ, MZ and others v Marijampolės Hospital, 18 April 2005

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-7-255/2005; <http://www.lat.lt>[1]

Facts

Newborn twins were severely injured just after their birth in a provincial state-owned hospital. The newborns had been negligently swaddled with a warmer that was filled with hot water. As a result, 14% of the skin of one child, and 20% of the skin of his brother was burnt. Both newborns had to undergo numerous operations to graft skin donated by their father. All the family has suffered enormous physical pain and mental suffering. Several employees of the hospital were found guilty of the crime of medical negligence. The plaintiffs – the two newborns and their parents – initiated a civil case against the hospital claiming non-pecuniary damages. **1**

The court of first instance approved the claim in full and awarded non-pecuniary damages amounting to LTL 1,000,000 (€ 289,620) in favour of the plaintiffs, ie LTL 400,000 (€ 115,848) to each of the twins and LTL 100,000 (€ 28,962) to each parent. The treatment of the newborns was considered to be inhumane and unjustifiable. The Court of Appeal disagreed with the decision of the first instance court in terms of the gravity of the fault. According to the Court of Appeal, the damage was caused negligently, therefore, also taking into consideration the general subsistence level of society and the financial situation of the hospital, reduced the compensation by half, awarding LTL 200,000 (€ 57,924) to each of the twins and LTL 50,000 (€ 14,481) to each parent. **2**

Decision

The Lithuanian Supreme Court upheld the decision of the Court of Appeal in terms of the amounts awarded. However, the Lithuanian Supreme Court stressed that the fault of the tortfeasor is one of the criteria to assess the amount of non-pecuniary damages according to art 6.250(2) CC. The Lithuanian Supreme Court decided that damage occurred due to the gross negligence of the hospital's employees. **3**

Comments

LTL 200,000 (€ 57,924) for a person and LTL 500,000 (€ 144,810) for a family was the maximum amount of non-pecuniary damages which could be awarded at that **4**

1 Reported by *H Gabartas/M Laučienė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2005 (2006) 399, nos 13–21.

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time. To date the amount of LTL 200,000 (€ 57,924) serves as the usual upper limit for the calculation of non-pecuniary damages for personal injury and has been exceeded only occasionally.

5 As stated above,[2] although the degree of fault is irrelevant in the establishment of liability, it plays an important role in some situations. For example, the amount of compensation for non-pecuniary damage shall be assessed, among other criteria, taking the degree of the tortfeasor's fault into account (art 6.250(2) CC). The express reasoning of the Lithuanian Supreme Court in the annotated case shows that gross negligence was considered in this case as one of the most important factors (together with the grave consequences of the damage) for setting such a high level of compensation. This case had a great influence on Lithuanian case law. The amounts of non-pecuniary damages have become more dependent on the particular circumstances of the case including the degree of fault of the defendant.

Criminal case against SP, 8 May 2009

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Criminal Case No 2K-237/2009; <http://www.lat.lt>

Facts

6 The parents of three children brought an action for compensation of non-pecuniary damage against the defendant who, intoxicated and grossly over-speeding, fatally injured the minors when his car crashed into a group of children walking along the road on their way home from school. The defendant, who was a police officer at the time of traffic accident, drove away after the accident, abandoning the injured children.

7 The court of first instance awarded non-pecuniary damages in the amount of LTL 500,000 (€ 145,000) to each of the six parents. The appeal instance court reduced the amount of damages to LTL 150,000 (€ 43,443) to each of the parents.

Decision

8 The Lithuanian Supreme Court upheld the decision of the appeal instance court. The Lithuanian Supreme Court mostly focused on the form of the fault of the defendant and concluded that gross negligence is one of the most important factors in assessing the amount of non-pecuniary damages. However, the Lithuanian Supreme Court took into consideration the amounts awarded for non-pecuniary damages in the

2 1/22 no 6.

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previous case law and decided to reduce the compensation awarded by the lower instance courts.

Comments

LTL 150,000 (€ 43,443) for a relative of the deceased is still one of the highest amounts of compensations ever awarded in a fatal accident claim in Lithuanian case law. Together with the previously commented case[3] this case shows that the amount of compensation for non-pecuniary damage is adapted to the gross negligence of the tortfeasor. On the other hand, simple negligence justifies a lower amount of non-pecuniary damages. 9

UAB 'Stagena' v AB SEB bankas and GS, 26 July 2013

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-420/2013; <http://www.lat.lt>

For facts and decision see 3b/22 nos 5–7. 10

Comments

The case apparently demonstrates that the degree of misconduct is relevant in the establishment of liability in cases of pure economic loss, which has a lower ranking in the hierarchy of protected interests. In these cases gross negligence or even deliberate conduct may be required as a standard for liability to be applied. 11

23. Poland

Court of Appeal in Cracow, 9 March 2001, I ACa 124/01

Przeglad Sadowy 2002/10, 130

Facts

During a procedure to remove a tonsil, the laryngologist – the deputy head of the Laryngology Department in a hospital – did not secure the cut off tissue mass in the child's throat. The six-year-old V choked on the tonsil and stopped breathing. When he lost consciousness, the laryngologist called the resuscitation team but he did not inform them about the lost tonsil for five minutes. He said that the reason for the 1

3 13/22 nos 1–5.

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severe state of the patient was losing consciousness. Several anaesthesiologists tried to unsuccessfully intubate the patient twice. Only when the fourth and chief anaesthesiologist was called to the dying patient, did the laryngologist admit that the tonsil might be in the patient's throat. The doctors managed to remove it after around ten minutes. The child was intubated but did not regain consciousness due to the extensive and severe brain damage.

2 As a consequence V has become quadriplegic and was declared 100% disabled. The physician's fault was determined by a criminal court. V sued the state for pecuniary and non-pecuniary damage.

Decision

3 The state was held vicariously liable for the doctor who was an employee in the public hospital. A functionary's negligence was the basis of state liability under the former art 417 KC. The court stated that the operating laryngologist breached the prescribed standards of medical procedure. Doctors are required to conform to a higher standard of care as compared to other professionals and diligence because the objects of their activities are human beings and the results of their work are often irreversible.

4 The criminal nature of the doctor's conduct and the high degree of his negligence played a significant role in increasing the compensation for non-pecuniary loss. Moreover, the hospital did not undertake any steps to alleviate the results of the damage, which also influenced the amount of compensation for non-pecuniary damage (art 445 KC).

Comments

5 The conduct of the doctor in this case was particularly reprehensible;, in fact, by failing to inform the other medical personnel of his error, he delayed effective resuscitation and did not prevent further brain damage. A's conduct could be classified as a mixture of *culpa lata* and intent. Failure to secure the patient's throat was grossly negligent, while lying to the team of anaesthesiologists was intentional because the doctor was fully aware of his mistake and the irreversible consequences of the state of unconsciousness.

6 Some Polish authors question the need for establishing degrees of fault (negligence), as any kind of fault is sufficient to establish tort liability, albeit a distinction is usually made between an intentional and a negligent act. Also, traditionally, recklessness is equated with wrongful intention. In most cases it will not be material for the establishment of tortious liability whether the tortfeasor's fault was intentional or not. Polish legal scholarship does not seem to recognise a 'flexible' system in this respect. However, in some provisions the distinction is relevant. This is, for instance the case in art 422, where the Code regulates liability of those who enticed or aided

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the direct tortfeasor or who consciously took advantage of the damage. Here in most cases only intentional fault is relevant. Secondly, art 441 KC, which regulates joint and several liability of a number of people for the same damage, provides that the person who compensated the victim should be reimbursed by the others. The amount of reimbursement depends on the circumstances, but in particular on the level of fault of a particular person and their contribution to the damage.

Thirdly, the degree of fault may influence the calculation of damages for non- 7
pecuniary loss, which is the case here. A's situation was affected by a judgment of a criminal conviction. Especially in the case of criminal convictions and the possibility to assign intentional fault to A, the court should increase the quantum of compensation in order to reflect the deterrence function of compensation for non-pecuniary loss.[1]

Finally, intentional fault has an impact on an employer's right of recourse 8
against its employees, who having caused damage intentionally, have to indemnify full damages, unlike in a situation of a negligent conduct where they pay an amount which cannot exceed three months' salary.

The legislator has decided that, when a tort is criminal in nature, that is the 9
misconduct has been penalised by the law (whether committed through intentional or unintentional fault), then a longer prescription period applies.[2] The standard limitation period for torts is three or ten years (art 442^1 KC).

The problem of different periods of limitation of actions may also arise with re- 10
gard to the liability of multiple tortfeasors, when only one or some of them committed a criminal act, and others a 'civil' fault. See also SN 26 June 2013, II CSK 582/12 (intent leading to a tort – contractual parties) in 3b/23 nos 1–8 and SN 22 May 2002, I CKN 127/00 (recklessness of a car driver) in 11/23 nos 1–9.

Sąd Najwyższy (Supreme Court) 22 June 2007, III CNP 37/07 (degree of wrongfulness)

OSNC 7-8/2008, item 94

Facts

V – a public medical service provider – lost a suit against the National Health Fund 11
for the reimbursement of expenses linked to the mandatory increase in medical per-

1 Similar reasoning in the case SN 24 March 2011, I CSK 389/10, OSNC-ZD 1/2012, item 22, see *E Bagińska/K Krupa-Lipińska*, Poland, in: K Oliphant/BC Steininger (eds), European Tort Law 2012 (2013) 519, nos 51–58.

2 According to art 442^1 § 2 KC, if damage resulted from a crime or misdemeanour, compensation claims are barred after a period of 20 years from the date when the crime or misdemeanour was committed, regardless of when the person who suffered the damage learned about it and about the person obliged to redress it.

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sonnel salaries, imposed on public medical care establishments by the Act of 1994. V then filed an action for rendering the appellate judgment unlawful on the basis of art 424[1] § 2 KPC. V claimed that the substantial change in the interpretation of the law by the Supreme Court, which took place in a resolution of seven judges of 30 March 2006,[3] rendered the appellate judgment unlawful. It should be mentioned here that the legal grounds for the action were highly disputed and there are several theories applied by the courts to these peculiar claims of public medical establishments.

Decision

12 The Supreme Court followed its case law, according to which, the notion of unlawfulness in judgments should be given a specific interpretation. Thus, a judgment that is unlawful is a judgment which unquestionably violates the principal legal provisions which are 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.

13 The Court of Appeals relied on one of the many substantiated approaches to the compensatory claims brought by V. Although the resolution of 2006 followed a different path, the appellate verdict was well-reasoned and within the margin of judicial discretion. The party 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.

Comments

14 In the light of the constitutional principle (art 77 of the Constitution of Poland of 1997), the obligation to repair damage arises only when the conduct of a public authority which caused the damage was unlawful (literally 'contrary to law' – *niezgodne z prawem*). The words 'contrary to law' caused some doubts as to their relation to the private law notion of unlawfulness, as the letter of art 417 ff KC speaks about conduct 'contrary to law' (the same language as in the Constitution). Obviously, unlawfulness is 'reduced' to pure (public) illegality in cases of unlawful legal acts (ie decisions, judgments, statutes, regulatory acts). According to the Supreme Court case law, 'unlawfulness' of a valid judgment is interpreted even more nar-

3 OSNC 11/2006, item 177.

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rowly.[4] Thus, a judgment that is unlawful is a judgment that is unquestionably contrary to principal legal provisions which are 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. That interpretation is compatible with the ECJ's requirements of Member States' liability set out in the *Köbler* and *Traghetti* cases, but which render the protection of individuals illusory.

The degree of unlawfulness is not linked to the degree of fault in either case law or doctrine. 15

26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 387/1998-2 of 19 March 1998

<www.vsrh.hr>

Facts

V was injured when she slipped on a wet floor in a hospital where she was employed. V sued the insurer of her employer. Since the insurer could release itself from liability if it was proven that V's behaviour was faulty, the insurer insisted that the damage occurred due to V's fault. 1

Decision

The SCRC stated that Croatian tort law recognises two types of fault: intention and negligence. This Court further asserted: 'An individual who does not want damage to occur nor does he accept the possibility of damage occurrence but still does not act as the legal order requires, is negligent. He is careless and presumes that damage will not occur or that he will be able to prevent it (conscious negligence) or he is not even aware that his actions can cause damage, although he should be (unconscious negligence). There are two levels of negligence: gross negligence (*culpa lata*) when somebody fails to act with the care which would be used by an average person and simple negligence (*culpa levis*), when somebody fails to act as a particularly prudent person would.' On the basis of the facts established in the proceedings before the lower courts, the SCRC concluded that there were not enough elements to arrive at the conclusion that V's behaviour was faulty and, therefore, the SCRC remanded the case to the first instance court for re-examination. 2

4 SN 22 June 2007, III CNP 37/07, OSP 7-8/2008, item 94, TK 1 April 2008, SK 77/06, OTK 39/3/A/2008.

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Judgment of the Supreme Court of the Republic of Croatia No Rev-1916/1999-2 of 27 May 2003

3 For facts and decision see 11/26 nos 1–2.

Decision of the Supreme Court of the Republic of Croatia No Rev 258/02-2 of 7 July 2004

4 For facts and decision see 7/26 nos 1–3.

Judgment of the Supreme Court of the Republic of Croatia No 1424/1994-2 of 19 July 1995

<www.vsrh.hr>

Facts

5 V was picking wild asparagus in a field when A's unleashed shepherd dog attacked her. In the course of the proceedings, A invoked a provision of the COA enabling a court to reduce compensation if a tortfeasor is poor.

Decision

6 The SCRC held that art 191 of the COA 1978,[1] invoked by the tortfeasor, cannot be applied to this case since this provision can be applied only to cases where a tortfeasor acted with simple negligence whereas in the case at hand the tortfeasor, who unleashed his dog without paying attention to the safety of others, acted with gross negligence.

---

1 Article 191 of the COA 1978 reads:
(1) The court may decide, taking into account the financial position of the victim, to impose on a responsible person compensation lower than the amount of damage, if the damage was not caused intentionally or with gross negligence, and if the responsible person is poor and a full payment of the compensation would greatly impoverish that person.
(2) If the defendant has caused damage performing something of interest to the injured party, the court may reduce the compensation, taking into account the due care demonstrated by the defendant in his own business.
An identical provision is today provided in art 1091 of the COA.

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Comments

As accurately displayed by the SCRC in the judgment No Rev 387/1998-2, Croatian tort law recognises two types of faulty behaviour; intentional and negligent. Negligence is further divided into simple negligence and gross negligence. A person acts with simple negligence if in his/her actions he/she does not employ the standard of care which would be employed by a good master of the house, a good merchant or a good expert, ie a particularly prudent person. A person acts with gross negligence if in his/her actions he/she does not employ even the standard of care which would be employed by any average person. However, Croatian courts rarely elaborate on a tortfeasor's fault and even more rarely engage in a determination of the degree of a tortfeasor's fault. This is the result of some particularities of the Croatian tort law system. First, Croatian tort law recognises a concept of presumed fault. As already explained,[2] in cases of fault-based liability, simple negligence is presumed. Hence, in legal proceedings, fault becomes of interest only if a defendant disputes it. Furthermore, unlike some other national legal systems, Croatian tort law does not adhere to the 'graded concept of liability', which means that in Croatian tort law the scope of compensation in principle does not depend on the level of a tortfeasor's fault. Hence, even if damage is caused by simple negligence, a tortfeasor will have to compensate for the damage in full. For this reason, in Croatian jurisprudence, a determination of the degree of fault in a particular case is of no importance or at best, it is of secondary importance. **7**

One of the exceptional cases where the courts will engage in an assessment of the degree of a tortfeasor's fault is where a defendant asks a court to reduce the compensation amount due to his/her poverty. As already explained, the COA permits the possibility of compensation being reduced if a tortfeasor is poor, but only provided that the damage was not caused intentionally or with gross negligence. For this reason, as is evident from the judgment of the SCRC No 1424/1994-2, the issue of the degree of the tortfeasor's fault will often arise in cases where a tortfeasor seeks a reduction of the compensation amount because of his/her poor financial situation. **8**

The second exception where the courts do engage in an assessment of the degree of a tortfeasor's fault concerns claims of workers for damage sustained in the course of work. Pursuant to special regulations on the protection of workers, an employer must compensate damage which workers suffered in the course of their work save in cases where damage can be imputed to a worker's intentional or grossly negligent actions in which case the employer's liability may be reduced or even excluded.[3] For this reason, as clearly demonstrated in the judgment of the SCRC No Rev 387/1998-2, should a worker claim compensation for damage sustained at **9**

2 See 1/26 no 10.

3 Article 25 of the Protection at Work Act (NG 71/14).

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work or in the course of their work, either from an employer or an insurer, the issue of the degree of worker's fault will commonly arise.

10 The degree of a tortfeasor's fault generally becomes an issue in recourse claims. Pursuant to art 1061, para 3 of the COA, an employer who redressed the damage caused by its employee is entitled to file a recourse claim against the employee, provided that the damage was caused intentionally or with gross negligence. For this reason, as is evident from the judgment of the SCRC No Rev-1916/1999-2 and the decision of the same court No Rev 258/02-2,[4] in recourse claims plaintiffs often invoke defendants' gross negligence or wilful misconduct. And whereas in judgment No Rev-1916/1999-2 the SCRC dismissed a request for revision opining that the tortfeasor acted only with simple negligence, in No Rev-258/02-2 this court upheld the lower court's judgments in which the claimant's request was accepted, holding that in the given case the tortfeasor acted with gross negligence.

27. Slovenia

Decision of the Supreme Court RS (Sodba in sklep Vrhovnega sodišča RS) II Ips 387/2006, 24 January 2008

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/13210/> (7 March 2015)

Facts

1 A motorcyclist was driving at 76.9 km/h in a residential area in which the speed limit was 50 km/h, without headlights on and highly intoxicated. A car driver was driving in the opposite direction, partially on the left side of the road because he was avoiding a parked car. The car driver only noticed the unlit motorcycle when the motorcyclist was close enough to be in range of the beam of the dipped headlights of the car. The courts of first and second instance judged the motorcyclist's contribution to the occurrence of damage at 80% and that of the car driver 20%.

Decision

2 The Supreme Court confirmed the judgment of the courts of first and second instance. The Supreme Court judged the contribution of the motorcyclist and car driver in relation to their fault for the occurrence of the traffic accident. The motorcyclist, who was driving while intoxicated because of which he was unable to respond suitably to traffic events, and without headlights on, decisively contributed to the occurrence of the traffic accident. The level of fault of the motorcyclist (grave

4 See 11/26 nos 1–6, 13/26 no 10 and 7/26 nos 1–4.

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negligence) was therefore essentially greater than that for which the car driver could be reproached, so in the opinion of the courts, the motorcyclist contributed to the occurrence of the damage at a level of 80% and the car driver 20%.

Comments

The Code of Obligations recognises two levels of fault: intentional and negligent (art 135 of the Code of Obligations). In the case of the former, theory distinguishes between direct and contingent intent, and in the latter, between grave and ordinary negligence.[1] **3**

Although the level of fault (intention or negligence) is not important for the existence of tortious liability,[2] the level of fault in specific cases is important for the use of legal provisions. If both vehicles are to blame for an accident, the level of fault is important for the division of damages between them (para 2 of art 154 of the Code of Obligations). If a worker intentionally or through grave negligence causes damage to a third person, the employer may reclaim the compensation paid from the worker (para 3 of art 147 of the Code of Obligations). An injured party may also claim compensation of damage directly from the worker if the latter caused the damage intentionally (para 2 of art 147 of the Code of Obligations). The level of fault is also important for determining the contribution of an individual person in a case in which several people are liable jointly and severally (para 2 of art 188 of the Code of Obligations). **4**

The form of fault does not in principle affect the level of damages, except in two cases. First, in taking into account the state of assets of an injured party, a court may order the responsible person to pay a lower amount of compensation provided the damage was not caused intentionally and also not as a result of grave negligence, and the responsible person is in a weak financial position and payment of full compensation would place him/her in (financial) difficulties (para 1 of art 170 of the Code of Obligations). Secondly, if an object was destroyed or damaged intentionally, a court may award compensation in relation to the value that the object had for the injured party (*pretium affectionis*, para 4 of art 168 of the Code of Obligations). **5**

1 On this also see 1/27 no 5. See also *D Jadek Pensa*, 135. člen Obligacijskega zakonika (OZ) [Article 135 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 797 ff.

2 *D Jadek Pensa*, 135. člen OZ [Article 135 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 796, 797.

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28. Romania

Înalta Curte de Casație și Justiție (High Court of Cassation and Justice)
Civil Section II, Decision No 1067 of 28 March 2014
<http://www.scj.ro>

Facts

1 A publishing house published a work which had been plagiarised. The owner of the copyright sued the publishing house in tort.

Decision

2 The highest court established that the publication of a completely *or* partially plagiarised work is illegal since this infringes the rules of mandatory law (Law no 5/1996 on copyright) and thus implies tort liability under arts 998 and 999 of the old Civil Code (in force at the time of publication). The court ruled that infringement of a copyright implies tort liability even in the case of the slightest fault (*culpa levissima*) of the publishing house, ie regardless of the degree of its fault. Thus in this case the provisions on tort liability for one's own acts apply including the conditions on exoneration from liability. The fact that a company which regularly concludes publishing contracts should act with the diligence expected of a professional and should check copyright issues before the publication of an intellectual product should not be ignored. Since the publishing company had previously published the original work, it should have compared the content of the two works. The inscription on the back cover of the book that 'the author is exclusively liable for the content and originality of the text' does not exclude the liability of the publishing company.

Comments

3 According to art 1357(2) of the new Civil Code, the tortfeasor is liable even for the slightest misconduct (*culpa levissima*). The standard of *culpa levissima* is commonly referred to as the standard of a *bonus pater familias*, so this form of *culpa* is that which could only be *avoided* by a *bonus pater familias*. In such a case the plaintiff will be entitled *to* full compensation.

4 Article 16(1) of the new Civil Code on fault states that, if not provided otherwise by law, a person is *liable* only for the acts he committed intentionally or negligently; whereas art 16(3) defines what is gross negligence (*culpa grava*).[1] Doctrine and case

1 New Civil Code, Chapter III (Interpretation and Effects of Civil Law), art 16 on fault:
(3) An act is committed by fault (*culpa*) when the author foresees the results of this act, but does not accept it, hoping without justification that it will not happen, or he does not foresee the result, al-

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law use the traditional classification from Roman law: *culpa lata, culpa levis* and *culpa levissima*.

There are some particular criteria for the assessment of fault mentioned in art 1358 of the new Civil Code, Chapter IV (Civil Liability), Section 3 (Liability for Own Acts). According to this provision, when establishing the fault of the tortfeasor, account should be taken of the circumstances outside the control of the tortfeasor *and* whether the damage was caused by a professional in the course of a business operation. According to the new Civil Code, Chapter I (General Provisions), art 3 on the general application of the Civil Code, a professional is a person who exploits an undertaking and the exploitation of an undertaking consists in the systematic undertaking by one or more persons of activities of production, administration or trade in goods, or provision of services, regardless of whether or not this is income generating. **5**

29. European Union

European Court of Justice, 10 July 2003

C-472/00 P, Commission v Fresh Marine Co A/S [2003] ECR I-7541

Facts

This case deals with an appeal to a decision by the CFI presented above at 7/29 nos 1–7, where both the facts of the matter as well as the contested decision are presented. The CFI had granted Fresh Marine partial compensation for its foregone sales in the Community in the interim, against which the Commission appealed. Fresh Marine in turn cross-appealed against the reduction of the award based upon the court's finding of contributory negligence with respect to a certain part of its loss. **1**

Decision

The ECJ inter alia confirmed the requirements for liability under Community law in the tradition of *Brasserie du Pêcheur*[1] and subsequent case law and stated with regard to the requirement of a 'sufficiently serious breach' as follows: **2**

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though he should have. Fault (*culpa*) is severe when the person acts with such negligence or imprudence that a less circumspect person would never have done.

1 Above 2/29 nos 1–12.

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> '[T]he decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned *manifestly and gravely disregarded the limits on its discretion*. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ... Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned ...'.[2]

3 The court was unimpressed by the Commission's efforts to challenge the evaluation of its actions by the Court of First Instance as cited above. According to the Commission, the lower court should instead have focused on who had the burden of proving that Fresh Marine had complied with its agreed minimum sales prices. The ECJ rejected the whole argument of the Commission's appeal by declaring it irrelevant: since the court had already found that the Commission had indeed committed a sufficiently serious breach of Community law, 'it is irrelevant whether or not the Court of First Instance's assessment of the Commission's action when analysing [Fresh Marine's] report is vitiated by an error' (para 40).

4 However, the ECJ upheld the lower court's reasoning regarding Fresh Marine's own conduct by dismissing its cross-appeal on that point: 'Having found that the Commission's reaction in unilaterally amending [Fresh Marine's] report was unlawful and that Fresh Marine's submission to the Commission of a report which did not contain the explanations necessary to understand it correctly was negligent, the Court of First Instance rightly held that, when determining the Commission's obligation to make reparation, account should be taken of the fact that each party bears half of the responsibility for the events' (para 66).

Comments

5 This is one of the few cases where traditional fault language is used extensively with respect to both parties, at least by the CFI. It is in line with preceding case law that the latter's subjective evaluation of the Commission's conduct in the instant case is frowned upon by the ECJ. Even more so, it is rather surprising that on appeal the court confirmed the lower court's finding that the claimant had been contributorily negligent, at least with respect to a certain part of its loss, which impacted upon the ultimate award of damages. While the CFI had held both parties *negligent* in equal parts with respect to that part of the overall loss, the ECJ denied that negligence was of the essence with respect to the Commission's liability. If that is so, it would at least have deserved an explanation as to why the impact of the claimant's own conduct was still considered to reduce the Community's liability by half and not by any

2 Para 26 f (emphasis added).

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other percentage. At least on its face, the ruling seems to suggest that the liability of the EU, which is *irrespective of fault* as confirmed, can be reduced by contributory *negligence* within the victim's own sphere. Since it is evaluated as equal to the 'sufficiently serious breach' of EU law by the defendant, it cuts the latter's liability in half to the extent both sides' contributions concern the same (portion of the) loss.[3]

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Sculptor V is exhibiting his works (sculptures and paintings) at an art exhibition. One fragile sculpture made of plaster and weighing between 5 and 10 kg is exhibited on a plinth approximately 90 cm tall in the middle of a room open to visitors. There are no railings or other barriers placed around the sculpture. A, one of the guests at the exhibition, is admiring paintings on the wall with his back turned to the sculpture. When stepping backwards to better appreciate the paintings, he knocks the plinth, causing the sculpture to fall and break upon impact with the floor. V claims compensation for his material and immaterial harm suffered due to the loss of the sculpture.[1] **1**

What if A caused the damage on purpose? **2**

Solutions

a) Solution According to PETL

Article 4:101 defines fault as an 'intentional or negligent violation of the required standard of conduct'. For the tortfeasor to be liable, he must thus have acted *at least with negligence*. **3**

Different degrees of misconduct may come into play when the scope of protection under the PETL is defined. According to art 2:102(5), '[t]he scope of protection **4**

3 See also ECJ 27.3.1990, C-308/87, *Grifoni v European Atomic Energy Community* [1990] ECR I-1203, where the court also held the claimant contributorily liable in equal parts with the defendant. The latter had ignored Italian safety regulations and was held liable for acting 'unlawfully', whereas the claimant had 'failed to exhibit the necessary care for his own safety' and therefore acted negligently. As in the case above, the court completely abstained from even considering the question of why responsibility should be borne by the two parties in equal parts rather than in any alternative ratio. It did not even address the causation aspect of the claimant's harm, but merely stated that the claimant had 'partly contributed to bringing it about', without specifying how 'partly'.

1 Compare the Danish case: Ø (Eastern Court of Appeal) 11 November 1977, U 1978.399 Ø, above 13/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*.

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may also be affected by the nature of liability, so that an interest may receive more extensive protection against *intentional* harm than in other cases'.[2] Pursuant to art 2:102(4), protection against pure economic loss[3] may be more extensive in cases in which 'the actor *is aware* of the fact that he will cause damage', that is, if he acts at least with *dolus eventualis*.[4] Otherwise, the PETL do not use degrees of fault, such as gross or ordinary negligence or *culpa levissima*, when it comes to attributing liability.

5 The degree of fault may further play a certain role in *reducing* damages. Article 10:401 PETL provides: 'In an exceptional case, if in light of the financial situation of the parties full compensation would be an oppressive burden to the defendant, damages may be reduced. In deciding whether to do so, the basis of liability (Art. 1:101), the scope of protection of the interest (Art. 2:102) and the magnitude of the damage have to be taken into account in particular'. According to the commentary to the PETL, '[a] reduction will probably not be conceded to a person who has acted with intent or gross negligence'.[5]

6 In the above scenario, A suffered injury to his property, which is a right that enjoys 'extensive protection' under the PETL. The solution under the PETL depends on whether the visitor to the exhibition acted negligently when knocking down the sculpture. Should negligence be admitted at all in the above scenario,[6] it was arguably (very) slight (*culpa levissima*) given that the sculpture was exhibited in the middle of a room which was open to visitors, that it was not protected by railings or barriers, and that the visitors were also invited to admire the paintings exhibited on the wall (an act which ultimately led to the damage in question).

7 Since the PETL do not use degrees of fault, such as gross or ordinary negligence or *culpa levissima*, when it comes to attributing liability, under the PETL the solution will in principle be either full compensation (if negligence is admitted, even if negligence was only very slight) or no compensation at all (should A be found not to have been negligent). The fact that the negligence, if admitted, was only slight would not lead to a reduction of A's liability under the PETL. Thus, when it comes to

2 Emphasis added.

3 'Pure economic loss is a financial loss which does not result from physical injury to the plaintiff's own person or property', PETL – Text and Commentary (2005) art 2:102, no 9 (*H Koziol*).

4 Emphasis added. For more information, see PETL–Text and Commentary (2005) art 4:101, nos 7 and 10 (*P Widmer*).

5 PETL – Text and Commentary (2005) art 4:101, no 16 (*P Widmer*).

6 In the Danish case that served as the source of inspiration for this scenario, the court emphasised the fact that the fragile sculpture was placed in an unprotected position in the exhibition room in a way that made it easy for guests to accidentally bump into it, causing it to break. Considering that the damage was caused by a moment's inattentiveness from a guest, the court concluded that the guest had not displayed a level of negligence sufficient to incur liability under tort law, see above 13/16 nos 1–3 with comments by *V Ulfbeck*/*A Ehlers*/*K Siig*.

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the protection of life, bodily integrity, or property rights, there is no fundamental difference, under the PETL, between situations in which the damage was caused intentionally on the one hand, or with only slight negligence (*culpa levissima*) on the other.

However, V may be held to have contributed to the damage, and liability may be reduced pursuant to art 8:101(1) PETL, in the light of the fact that he may not have properly protected the sculpture against damage.[7] 8

b) Solution According to the DCFR

Under the DCFR, the fact that damage was caused by an intentional act may be taken into consideration for both the attribution of liability and in defining the amount of damages, and therefore damage arising from intentional acts and negligent acts may, in some cases, follow somewhat different rules.[8] 9

Article VI–2:101(3) DCFR, for example, states that '[i]n considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability', thus liability may be established under the DCFR for damage done intentionally where there would not otherwise have been had the damage been caused by negligence alone. The official commentary gives the example of someone who intentionally induces someone else to not perform his contractual obligations vis-à-vis a third party.[9] According to art 5:401, '(1) Liability for causing legally relevant damage intentionally cannot be excluded or restricted' and '(2) Liability for causing legally relevant damage as a result of a profound failure to take such care as is manifestly required in the circumstances cannot be excluded or restricted: (a) in respect of personal injury (including fatal injury); or (b) if the exclusion or restriction is otherwise illegal or contrary to good faith and fair dealing'. 10

Last but not least, and possibly much more important in practice, pursuant to art VI–5:102 (Contributory fault and accountability), '(1) [w]here the fault of the person suffering the damage contributes to the occurrence or extent of legally relevant damage, reparation is to be reduced according to the degree of such fault'. 11

For cases that do not fall under any of these specific rules, the DCFR does not use degrees of fault, such as gross or ordinary negligence or *culpa levissima*. Similar 12

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7 Article 8:101 (Contributory conduct or activity of the victim) provides: '(1) Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor.'

8 Compare *C v Bar/E Clive*, DCFR, art VI–3:101, Comment A (p 3389 f).

9 *C v Bar/E Clive*, DCFR, art VI–2:101, Comment E (p 3146) with reference to art VI–2:211 DCFR and providing further examples.

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to the solution under the PETL, the DCFR would arrive at the outcome that, in the scenario above, either full compensation (if negligence was admitted, even if very slight) or no compensation at all (should A be found not to have been negligent) would be awarded. The fact that the negligence of the person alleged to be liable, if admitted, was only slight would not lead to a reduction of A's liability under the DCFR.

13 However, according to art VI–5:102(1) DCFR (Contributory fault and accountability), '[w]here the fault of the person suffering the damage contributes to the occurrence or extent of legally relevant damage, reparation is to be reduced according to the degree of such fault'. In the above scenario, it may be found that V did not properly protect the sculpture against damage and, for this reason, A's liability may be reduced in relation to the contribution of each party to the damage occurring.

31. Comparative Report

1 All the reporters submitted cases, except for the ones reporting for the Czech Republic and Slovakia.

2 *General remarks*: in this category the main question is, whether the legal orders distinguish between degrees of fault, or whether fault is conceived as a monolith. As a general rule, one could say that the distinction between degrees of misconduct is firmly established in Europe, to begin with the *summa divisio* between intended (*dolus*) and unintended (fault, negligence etc) harming. Furthermore, unintended harming is generally subdivided into two, three or four categories (from gross to very slight negligence). An important difference appears concerning the consequences of these degrees on the amount of damages awarded. One half of the countries involved apply the principle according to which, the higher the degree of fault, the higher the award of damages. In the other half of the countries involved, the degree is irrelevant for the *quantum* of damages and the victims get full reparation. A second but minor difference concerns the influence of the degrees of fault and the scope of liability: several reports mention that the higher the degree of fault, the more extensive the causal link (legal causation) or the limits of imputation can be; sometimes certain damage is redressed only if the act was intentional. Surprisingly only a few reports mention whether fault is evaluated subjectively or objectively (*in concreto* or *in abstracto*).[1] This is unexpected, because the debate on this point seems to be dominant in several European countries, even if there seems to be a preference for an evaluation *in abstracto*. Finally we have to add that the Polish report mentions degrees of unlawfulness;[2] the expression 'serious breach of law' used

1 See overview 1/30 no 1ff.

2 Poland (13/23 no 15).

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in the European Union report points in the same direction.[3] Though the distinction between degrees of unlawfulness is rarely mentioned, it is certainly sensible. Indeed everybody experiences more or less severe violations of the legal order: for example to kill someone is of course a more serious violation of law than to jump the traffic lights. Therefore the question is not whether the distinction makes sense, but only whether the degree of unlawfulness has consequences in tort law. It seems that in a large majority of countries it is not the case.

Typology: already in Roman times, misconduct was divided into several rather finely nuanced categories. The dividing line was then drawn between *dolus* and *culpa*: *dolus* supposed intention, while *culpa* only a form of lack of prevision (*cum a diligente provideri poterit*).[4] *Culpa* was divided into four different degrees: *culpa lata*, *levis* and *levissima* and sometimes the absence of *diligentia quam in suis rebus* (diligence as observed in one's own affairs).[5] **3**

The Roman typology has to a large extent shaped the contours of modern law. As mentioned, the distinction between intended and unintended harming is well established.[6] Intent means primarily that the tortfeasor wants to cause damage and approves of it as a result.[7] Between intended and unintended harm some reports mention the – certainly almost everywhere well established – *dolus eventualis*, where the tortfeasor could foresee the damage and accepted it as a possible result of his act.[8] Also well established are several degrees of fault such as gross negligence, (simple) negligence and slight negligence.[9] Gross negligence can be defined as a **4**

3 European Union (13/30 nos 2, 5).

4 Paulus, Digest 9.2.31.

5 Historical Report (13/1 nos 3–6).

6 Germany (13/2 no 3f); Austria (13/3 no 8); Switzerland (13/4 no 7); Greece (13/5 no 1); France (13/6 no 7); Belgium (13/7 no 5f); Netherlands (13/8 no 2); Italy (13/9 no 2); in Spain the distinction is only implicit, Spain (13/10 no 3); Portugal (13/11 no 3); England and Wales (13/12 nos 3, 5, 8) intention or malice; Scotland (13/13 no 13f); Ireland (13/14 no 3); Malta (13/15 no 7); Norway (13/17 no 4); with a different vocabulary Sweden (13/18 no 1f); Finland (13/19 no 4f); Estonia (13/20 nos 4f, 9); Latvia (13/21 nos 2, 3); Poland (13/23 no 5f); Croatia (13/26 nos 2, 7); Romania (13/28 no 4); DCFR/PETL (30/13 nos 4, 10).

7 In particular Austria (13/3 no 9); Slovenia (13/27 no 3).

8 Austria (13/3 no 9f); Italy (13/9 no 2); Spain (13/10 nos 3, 7); Estonia (13/20 no 6).

9 Germany (13/2 no 3f); Austria (13/3 nos 2, 5, 9); Switzerland (13/4 no 7); Greece (13/5 no 3); see Italy (13/9 no 2) with a split between courts' and scholarly opinions; Spain (13/10 no 5) in particular in family law; Spain (13/10 no 8f) strict liability does not necessarily exclude fault; Portugal (13/11 no 2f); Ireland (13/14 no 8); Denmark (13/16 nos 3, 5f, 8f); to some extent Norway (13/17 no 4); Finland (13/19 nos 2–6); Estonia (13/20 nos 3, 5, 10); Lithuania (13/22 nos 2, 8); Poland (13/23 no 4); Slovenia (13/27 no 2) has two levels of fault; Romania (13/28 no 4); EU liability is 'irrespective of fault'; nevertheless liability can be reduced by contributory negligence, European Union (13/29 no 5).

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mistake exceeding substantially common errors,[10] while (simple) negligence is neglect of proper diligence and care;[11] slight negligence means an ordinary mistake which even a careful person can make from time to time;[12] slight negligence defines an extremely high standard of conduct nearly impossible to be met in everyday life.[13] Beyond slight negligence in Switzerland a degree of negligence can be found which is so minor that the judge can disregard it.[14]

5 *Degrees of misconduct and damages*: in certain countries the reparation can depend on the degree of fault or negligence according to the principle, the higher the degree of fault, the higher the amount of damages.[15] In Austria slight negligence only leads to the reparation of actual loss (*positiver Schaden*), while gross negligence leads additionally to compensation for lost profit (*entgangener Gewinn*).[16] In other countries the degree of fault does not influence the amount of damages and the victim is in principle entitled to full reparation.[17]

6 *Scope of liability*: several reports establish a connection between the degree of fault and (legal) causation.[18] In Austria 'it appears appropriate to attribute even less probable consequences to a tortfeasor who has acted grossly negligently or with intent'.[19]

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10 See in particular Austria (13/3 no 2); Switzerland (13/4 no 7); Norway (13/17 no 2f); Estonia (13/20 no 5); see also Croatia (13/26 nos 2, 7) with a particular definition.

11 Austria (13/3 no 10); Estonia (13/20 no 5); see also Croatia (13/26 nos 2, 7).

12 Austria (13/3 no 11); Switzerland (13/4 no 7).

13 Historical Report (13/1 no 10f); see also Austria (13/3 no 12); see also Romania (13/28 no 2f) where the *culpa levissima* refers to the *bonus pater familias*.

14 Austria (13/3 no 12); Switzerland (13/4 no 6f).

15 Germany (13/2 no 4); Austria (13/3 nos 5, 13); Switzerland (13/4 no 7); Netherlands (13/8 no 3); Portugal (13/11 nos 5–7) with the possibility to take into account the equity criterion; England and Wales (13/12 nos 3, 9) where damages are sometimes possible in the case of intent, while the author would not be liable for negligence; Scotland (13/13 nos 1–6, 9); Ireland (13/14 no 2f), on exemplary damages (nos 4–6); Denmark (13/16 no 3); Finland (13/19 nos 7–13) about adjusted liability taking into account various criteria; Estonia (13/20 no 7) with an equity criterion; Lithuania (13/22 nos 5, 8f); Poland (13/23 no 4); DCFR/PETL (30/13 nos 5, 9, 11, 13).

16 Austria (13/3 no 13).

17 Greece (13/5 no 3) except for non-pecuniary damage; France (13/6 nos 3–5, 8f) except for medical malpractice, road traffic accidents, multiple tortfeasors and third parties' liability (employees); Belgium (13/7 nos 4f, 7, 8–11) except for concurrent faults, intention and specific laws; Spain (13/10 no 3); Malta (13/15 no 7f) but criticised by the reporter; Sweden (13/18 no 3) but with exceptions; Estonia (13/20 no 4); Latvia (13/21 no 3) but exceptions are possible; Poland (13/23 no 6) except for the apportionment of damages between multiple tortfeasors; Croatia (13/26 no 7) with exceptions (nos 8–10); Slovenia (13/27 no 4f) with exceptions; Romania (13/28 no 3); DCFR/PETL (30/13 no 7).

18 Austria (13/3 no 15); Belgium (13/7 no 6); differently Netherlands (13/8 no 3); England and Wales (13/12 no 10) where wider liability can be imposed upon intentional wrongdoers.

19 Austria (13/3 no 15).

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Subjective/objective standard: some reports mention that the measure of fault (or blame) is objective, rather than subjective.[20] *Diligentia quam in suis rebus* refers to a subjective standard of behaviour, as it refers to the diligence a person practises in his own affairs.[21] As such it can be considered as an individual degree of fault. 7

20 Ireland (13/14 no 3); Malta (13/15 no 4); Denmark (13/16 no 9); Norway (13/17 no 6).
21 Historical Report (13/1 no 6).

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F. Grounds of Justification

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14. Self-Defence and Other Grounds of Justification

1. Historical Report

Alfenus, D 9.2.52.1

Facts[1]

Hypothesis 1: An innkeeper (*tabernarius*) placed a lantern at night above his display counter, which adjoined a footpath. A passerby took the lantern and carried it off. The innkeeper pursued him, calling for his lantern, and caught hold of him. The passerby tried to escape and hit the innkeeper with a whip that was equipped with a spike. In the subsequent brawl, the innkeeper poked out the eye of the passerby. **1**
Hypothesis 2: The innkeeper poked out the eye of the passerby intentionally.
Hypothesis 3: The innkeeper started the brawl when trying to snatch back his lantern.

Decision

For hypothesis 1, the jurist Alfenus[2] affirms that the innkeeper did not incur liability since the damage was the passerby's own fault. In hypotheses 2 and 3, he held that the incident was the innkeeper's fault and should therefore entail his liability. **2**

Comments

The present opinion[3] demonstrates that liability under the *lex Aquilia* did not only require *occidere* or *corrumpere* of a *res*.[4] By poking out the eye of the passerby, the innkeeper doubtlessly committed *rumpere*. And yet, Alfenus did not hold him ac- **3**

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1 Based on the translation in *A Watson*, The Digest of Justinian I (revised edn 1998) 292.

2 Publius Alfenus Varus, 1st century BC.

3 On this text cf *B Winiger*, La responsabilité aquilienne romaine (1997) 27 f; *JE Spruit*, Nocturne – Eine Auslegung von Alfenus D 9.2.52.1 aus soziologischer Sicht, TR 63 (1995) 247 ff; *A Wacke*, Notwehr und Notstand bei der aquilischen Haftung, ZSS 106 (1989) 469 ff; *H Hausmaninger/R Gamauf*, Casebook zum römischen Vertragsrecht (7th edn 2012) 459 f; *P Paschalidis*, What did iniuria in the *lex Aquilia* actually mean? RIDA 55 (2008) 321, 350 f; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 107 f; *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der *lex Aquilia*, in: Gedächtnisschrift Herbert Hofmeister (1996) 247 ff; *G MacCormack*, Aquilian Studies, Studia et documenta historiae et iuris 41 (1975) 1, 46 f.

4 Although the text does not explicitly tell us that the passerby was a slave, the integration in D 9.2 can only mean as much; cf *JE Spruit*, Nocturne – Eine Auslegung von Alfenus D 9.2.52.1 aus soziologischer Sicht, TR 63 (1995) 247, 254; *H Hausmaninger*, Das Mitverschulden des Verletzten und die Haftung aus der *lex Aquilia*, in: Gedächtnisschrift Herbert Hofmeister (1996) 235, 247 and fn 65.

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countable as the damage also needed to be *iniuria datum*, ie wrongfully inflicted. Although committing *occidere* or *corrumpere* normally implied wrongful behaviour, the jurists recognised certain situations in which the injury, even if it had been inflicted directly and intentionally, was justified.[5]

4 One of these situations was self-defence. For the Roman jurists *vim vi repellere licet* (to defend yourself with violence against violence is legitimate) was a rule of the *ius naturale*, deduced from the *naturalis ratio*.[6] However, self-defence was based on certain preconditions that had to be met:[7] There had to be an unlawful and imminent attack.[8] These first two elements were satisfied in all three hypotheses. But moreover, the means applied in the act of self-defence must not have been unreasonable or excessive. Thus, in the first hypothesis, Alfenus did not consider the tortfeasor's act *iniuria datum*. The serious attack on the innkeeper justified severe countermeasures, even if they resulted in the unintentional poking out of an eye or some similar injury. Doing so intentionally, on the other hand, seemed excessive to Alfenus, just as fending off an attack not on the innkeeper himself but merely on his property (the lantern[9]). In Alfenus' words, in hypothesis 2 and 3 the injury was the innkeeper's fault. Hypothesis 2 shows that, in evaluating the question whether somebody acted with *iniuria*, the jurists also took into account subjective features of the injurer's behaviour such as his intention.[10]

5 At first sight, it seems odd that Alfenus did not discuss this case in the light of *furtum* (theft), considering that, under the XII Tables, a thief apprehended at night (*fur nocturnus*) could lawfully be killed.[11] From this angle, the considerations about fault seem redundant. The seizing of the almost valueless lantern was probably merely seen as a 'drunken prank' and therefore not as theft.[12]

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5 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 999.

6 Cf *Gaius*, D 9.2.4 pr: 'adversus periculum naturalis ratio permittit se defendere'; *Paulus*, D 9.2.45.4: 'vim enim vi defendere omnes leges omniaque iura permittunt'; *A Wacke*, ZSS 106 (1989) 469, 474; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 999.

7 Cf *H Hausmaninger*, Das Schadenersatzrecht der lex Aquilia (5th edn 1996) 21 ff; *A Wacke*, ZSS 106 (1989) 469, 481 ff; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 999 f.

8 Cf *Paulus*, D 9.2.45.4: If somebody throws a stone in self-defence but hits an innocent passerby, he is not justified; acts of revenge cannot constitute self-defence.

9 According to *JE Spruit*, Nocturne – Eine Auslegung von Alfenus D 9.2.52.1 aus soziologischer Sicht, TR 63 (1995) 247, 253 most of the Roman lanterns represented a value comparable to a modern-day light bulb.

10 Cf *B Winiger*, La responsabilité aquilienne romaine (1997) 103 ff.

11 *Gaius*, D 9.2.4.1: 'Lex duodecim tabularum furem noctu deprehensum occidere permittit'.

12 *A Watson*, The Law of Obligations in the Later Roman Republic (1965) 239 fn 5; *G MacCormack*, Aquilian Studies, Studia et documenta historiae et iuris, 41 (1975) 1, 46; *H Hausmaninger*, Das Mit-

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Other justification grounds, accepted by Roman jurists, included necessity,[13] self-help,[14] the actions of a magistrate acting with public authority and consent.[15] 6

Ulpian (Celsus) D 9.2.49.1

Facts

The defendant pulled down his neighbour's house in order to keep a raging fire from his own. 7
Hypothesis 1: The fire would have actually reached the neighbour's house.
Hypothesis 2: The fire would not have reached the neighbour's house because it had been put out first.

Decision

The jurist Celsus,[16] whose opinion was reported by Ulpian,[17] held that neither in hypothesis 1 nor in hypothesis 2 was the defendant liable for the neighbour's house. 8

Comments

The opinion[18] at hand illustrates another justification ground recognised by the Roman jurists, namely necessity. Although the defendant's act constituted *rumpere* (in the wide sense of *corrumpere*) and would thus normally entail liability, Celsus did not consider the damage wrongfully inflicted (*iniuria datum*). 9

The preconditions of justification due to necessity were disputed among the Roman jurists. In any event, there had to be an imminent danger, in this case the 10

verschulden des Verletzten und die Haftung aus der *lex Aquilia*, in: Gedächtnisschrift Herbert Hofmeister (1996) 235, 248 fn 71; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1000 fn 18.

13 See 14/1 nos 7–11.

14 See 14/1 nos 12–16.

15 On legitimate acts of magistrates and consent of the injured parties as justifications grounds, cf *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1003 f.

16 Publius Iuventius Celsus Titus Aufidius Hoenius Severianus, early 2nd century AD.

17 Domitius Ulpianus, died 223 AD.

18 On this text, cf *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 310 ff; *B Winiger*, La responsabilité aquilienne romaine (1997) 93; *G MacCormack*, Aquilian Studies, Studia et documenta historiae et iuris 41 (1975) 1, 55 ff; *A Wacke*, Notwehr und Notstand bei der aquilischen Haftung, ZSS 106 (1989) 469, 498 f; *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1001 f; *G Longo*, Sulla legittima difesa e sullo stato di necessità in diritto romano, in: Festgabe für Ulrich von Lübtow (1970) 321, 333 f.

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fire that threatened to burn down the defendant's house. Furthermore, the act in question must have been necessary to avert the danger. The jurists differed on whether to assess this second criterion from an ex post[19] or an ex ante perspective. This controversy is not relevant for hypothesis 1, as the fire would have reached the neighbour's house anyway and thus, pulling it down was certainly necessary. However, the same cannot be said for hypothesis 2 where the fire would never have reached his house and the defendant's act was not necessary judging from an ex post evaluation. Nonetheless, Celsus pleaded for an ex ante perspective and denied liability of the defendant as long as he had acted under the impulse of reasonable fear (*iusto enim metu ductus*).

11 For a modern lawyer, it is striking that Celsus did not resort to balancing the interests involved. After all, the neighbour's property seems just as worthy of protection as the tortfeasor's. One interest cannot be said to have 'outweighed' the other. A possible explanation is that the neighbour's house will expectably burn down anyway and the defendant merely anticipates what is about to happen.[20] Another factor could be that the defendant did not only want to save his own house but also others and considering the constant dangers of fires in ancient Rome any contributions to preventing fires should be encouraged.[21] In other cases the saved interest obviously outweighed the one sacrificed, although this issue was never explicity addressed by the Roman jurists.[22]

Pomponius (Quintus Mucius) D 9.2.39 pr

Facts

12 The defendant found someone else's pregnant mare grazing in his meadow and drove her off. As a result, the mare miscarried.

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19 In this sense Servius (D 43.24.7.4) who made an exception only for magistrates acting within their authority; cf *S Schipani*, Responsabilità 'ex lege Aquilia' – criteri di imputazione e problema della 'culpa' (1969) 153 ff.

20 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1002; *R Willvonseder*, Die Verwendung der Denkfigur der 'condicio sine qua non' bei den römischen Juristen (1984) 157 ff; *FH Lawson/BS Markesinis*, Tortious Liability for Unintentional Harm in the Common Law and the Civil Law (1982) 21.

21 *R Zimmermann*, The Law of Obligations. The Roman Foundations of the Civilian Tradition (1990) 1002.

22 *Ulpian*, D 9.2.29.3: Sailors merely cutting fishing nets or anchor ropes of another vessel in which their boat was blown.

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Decision

Pomponius[23] cited the opinion of Quintus Mucius[24] that the tortfeasor should only be liable if he struck the mare or intentionally drove her off too violently. **13**

Comments

By causing the miscarriage of the mare, the defendant committed *rumpere*.[25] Nevertheless, Quintus Mucius decided that the defendant should only be liable if he either struck the mare intentionally or drove her off too violently. *E contrario*, in principle, the jurist regarded chasing off someone else's cattle as lawful.[26] In other words, the defendant was justified if he resorted to appropriate means. The use of intentional violence or, in Pomponius' view,[27] also caging the mare was considered disproportionate. Rather, Pomponius added, the person chasing off someone else's cattle must show the same care as if the mare was his own. **14**

The case provides an example of self-help under Roman law. Self-help was lawful in a variety of situations.[28] Thus, one could lawfully use force to regain possession of a *res* that was taken *vi*, *clam* or *precario* (by force, clandestinely or as a mere *precarium*). The lessor could retain the tenant's property in case of a delay in payment. If somebody laid a water conduit through someone else's house without an easement, it could be removed. However, pulling down a projecting roof, which had been built unlawfully above one's house, gave rise to a claim for compensation.[29] **15**

Over the course of time, the right of self-help became increasingly restricted. The late classical jurist Paul[30] stated as a rule that 'individuals must not be allowed to do what a magistrate can do publicly in order that no occasion may arise for substantial tumult'.[31] **16**

23 Sextus Pomponius, 2nd century AD.

24 Quintus Mucius Scaevola, 2nd century BC.

25 Cf *Ulpian*, D 9.2.27.22: 'Si mulier pugno vel equa ictu a te percussa eiecerit, Brutus ait Aquilia teneri quasi rupto'.

26 *A Pernice*, Labeo II/1 (2nd edn 1895) 59 f; *U v Lübtow*, Untersuchungen zur lex Aquilia de damno iniuria dato (1971) 168.

27 *Pomponius*, D 9.2.39.1.

28 For details on the following cf *G Wesener*, Offensive Selbsthilfe im klassischen römischen Recht, in: Festschrift Artur Steinwenter (1958) 100 ff.

29 *Ulpian*, D 9.2.29.1.

30 Iulius Paulus, 1st half of the 3rd century AD.

31 *Paulus*, D 50.17.176.

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2. Germany

Bundesgerichtshof (Federal Supreme Court) 23 September 1975, VI ZR 232/73

NJW 1976, 42

Facts

1 The claimants were a wife and her two children. The husband and father was shot and killed by the defendant. This happened after the deceased and the defendant had visited a spring festival. There, a Moroccan friend of the deceased had been insulted, allegedly by the defendant. When the latter left the festival with two other men, the deceased followed with two friends, stopped them and wanted to have an explanation and/or apology for the offending behavior. The claimants alleged that the defendant fired a shot almost immediately after the first words were exchanged whereas the defendant asserted that he was attacked by the deceased and his friends, was hit on the head and that he fired the shot only while already lying on the ground and fearing for his life. The claimants claimed compensation of their lost maintenance, which the deceased would have paid.

Decision

2 The lower courts had granted the claimed maintenance because it had not been not proved that the defendant acted in 'rightful self-defence'. The BGH remanded the case because the lower court had not fully examined the evidence. The Federal Court held that, in principle, the defendant was allowed to use a deadly weapon only in a situation of serious danger. However, in such a situation, the attacked person is allowed to use even a dangerous weapon as a defence against the attack if no other means is available and likely to end the attack. If the attacked person did not provoke the attack, he/she is then not obliged to use less dangerous means or to flee.

Comments

3 German law knows of a number of defences which may either exclude wrongfulness or fault concerning a damaging act.[1] Self-defence is the most prominent and prob-

1 Other defences are, for example, self-help (§ 229 BGB), state of necessity (§§ 228 and 904 BGB) or the exercise of legitimate interests (§ 193 Criminal Code, StGB). The most common defence is contributory negligence, which, however, neither excludes the wrongfulness of the damaging act nor the fault of the tortfeasor but may nonetheless lead to a partial or even full reduction of the amount of damages.

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ably the most relevant of them. Rightful self-defence[2] excludes the wrongfulness of any damage that is caused by the defence.[3] In order to be relieved from liability, the tortfeasor must prove that he faced an unlawful attack, which he had not provoked and against which his defence was proportional.[4] Where a person has erroneously – though without fault – assumed that he/she was entitled to use self-defence, this person's act remains a wrong but is excused if the error was excusable.[5] Another defence that justifies damage is the victim's valid consent. It is particularly relevant in medical law: if the fully informed patient consents, any invasive treatment is no longer wrongful.

3. Austria

Oberster Gerichtshof (Supreme Court) 19 January 1972, 1 Ob 3/72

EvBl 1972/219

Facts

The defendant and his wife were returning home in the dark. In the vicinity of their house they noticed a person going away as they approached and – as they perceived it – hiding among the trees on the opposite side of the street. As there had been thieves in their house before, the defendant took a torch and decided to look for the stranger. He came close to the tree behind which the claimant, a worker in a nearby factory, was standing after having relieved himself. The defendant, blind in one eye, aimed the beam of light at the face of the claimant, who was visually handicapped as well. After having asked the defendant twice to turn away the light beam because it was dazzling him, the claimant knocked the torch out of the defendant's hand. The latter felt he was under attack and struck the former in the face, causing injuries. **1**

Decision

The Supreme Court stated that the defendant was in principle liable under §§ 1295 ff ABGB, unless he acted in self-defence, as this is one of the grounds of justification. However, self-defence is only assumed if the offender makes use exclusively of the **2**

2 Self-defence is regulated by § 227 BGB. Its para (2) provides: 'Self-defence is the defence required to ward off a present unlawful assault on oneself or another.'

3 *H Grothe* in: Münchener Kommentar (7th edn 2015) § 227 no 1.

4 The defendant must not transgress the limits of the defence that is necessary to avert the attack; see BGH NJW 1976, 42.

5 See thereto also BGH NJW 1987, 2509 (15/2 nos 1–3).

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necessary defence to see off a present and unlawful attack on life, freedom or assets. Consequently, the defendant could not have acted in self-defence, because the claimant had not attacked him. The Supreme Court also denied exculpation on the basis of putative self-defence, as this requires that the offender incorrectly assumed a situation of self-defence due to an inculpable error as to the facts. However, this was not the case here, because the claimant's behaviour could not even have been understood as a present and unlawful attack against the defendant. Thus, the latter had been under a negligently caused misapprehension regarding the situation and therefore was liable. The Supreme Court nonetheless also affirmed contributory negligence of the claimant.

Comments

3 See below 14/3 nos 6–9.

Oberster Gerichtshof (Supreme Court) 13 December 1988, 5 Ob 573/88
EvBl 1989/72

Facts

4 The defendant – a detective in a department store – watched someone trying to steal a handbag (which retailed at about € 50). After the thief had passed the cashiers without paying, the defendant started chasing him. At the exit of the department store the defendant nearly caught up but had to slow down in order not to knock into the thief. When he finally got hold of him on the footpath, he accidentally pushed him and they both fell on the claimant's car which was parked near the exit. The claimant sought compensation for material damage to the car.

Decision

5 The Supreme Court found the defendant liable for the damage to the claimant's car. It stated that although the mere infringement of the claimant's absolute property right cannot by itself establish the unlawfulness of the harmful conduct, it may at least indicate it. The question of whether the conduct was indeed wrongful must be assessed based on a comprehensive balance of interests. On the other hand, the law provides for grounds of justification in the case of characteristic constellations of interests such as self-defence and state of necessity. In the case at hand, however, the defendant's harmful conduct was not justified as the prerequisites for an act of necessity were not given: in terms of the balance of interests, the defendant should only have considered measures to retrieve the handbag that did not endanger or violate superior rights or articles of higher value than said handbag. As the material damage to the car exceeded the value of the handbag by far and the defendant

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ought to have considered the possibility of causing such damage, his conduct was not justified. Neither was the defendant exculpated on grounds of irresistible compulsion.

Comments

Regarding the violation of an absolute right such as life or property, the unlawfulness of conduct must be assessed by a comprehensive weighing up of interests, taking into account the value of the protected interest, the dangerousness of the activity, the reasonableness of an alternative course of behaviour and the general interest in freedom of action.[1] For some characteristic situations, however, the interests have already been weighed up by the legislature: therein lies the significance of the grounds of justification.[2] If there is such a justifying situation, the harmful conduct is not unlawful. Grounds of justification are self-defence, act of necessity, right to self-redress, the injured person's consent and legal authorisation, with only the first two being relevant here. **6**

Self-defence is the necessary defence to see off a present or imminent and unlawful attack on life, health, physical integrity, freedom or assets (cf § 19 ABGB and § 3 Criminal Code [*Strafgesetzbuch*, StGB]). The same applies if the tortfeasor fights off an attack on another person (*Nothilfe*). The assault does not have to be culpable but only unlawful, which includes any abstractly forbidden endangerment of a protected sphere. Wrongfulness of conduct is not necessary (cf 1/3 no 3).[3] The defence is only justified if the defender uses reasonably proportionate force. Although strict proportionality between the attacked interests of the defender and those of the aggressor is not required, the defence must not be completely disproportionate and excessive as compared to the imminent danger. In the case of excessive self-defence (*Notwehrexzess*), the defender's conduct is wrongful and renders him liable if he was also culpable with regard to having exceeded the necessary degree.[4] **7**

The case concerning the couple and the worker illustrates so-called putative self-defence: although the worker knocked the torch out of the husband's hand, this could not be considered an attack as it was only a reaction to his being dazzled with the torch. Apart from this, he made no further move to assault the other man. Thus, **8**

1 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/28 ff; *idem*, Wrongfulness under Austrian Law, in: H Koziol (ed), Unification of Tort Law: Wrongfulness (1998) 15 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1294 no 4.

2 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/62.

3 *BA Koch* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 19 no 3; *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/67.

4 *R Reischauer* in: P Rummel (ed), ABGB (3rd edn 2000) § 19 nos 9, 13.

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the latter was incorrect in assuming a situation of self-defence. In such a case of putative self-defence, the conduct is not justified and the tortfeasor is liable if he was at fault in assuming such a situation.[5]

9 An act of necessity is at issue if somebody saves himself from danger by injuring the protected interests of another person who did not evoke the danger by means of an unlawful attack.[6] In contrast to self-defence, all interests protected by law may be defended through an act of necessity. However, the latter is only lawful if the interests of the person in a state of necessity considerably outweigh those of the person being harmed, and the infringement is the least possible injury to this end as well as the last resort (*rechtfertigender Notstand*). If this is not the case, the offender acts unlawfully but may be exculpated if the harm he causes is not disproportionately graver than the damage he would have suffered and different behaviour could not have been expected even from an average person acting correctly (*entschuldigender Notstand*).[7] However, in both cases of necessity, the perpetrator may nevertheless be subject to liability in equity under § 1306a ABGB.[8] As the store detective inflicted much greater damage than was the value of the stolen good he tried to recover, his conduct was not justified. Nor was it exculpated because different behaviour could reasonably have been expected from him. Moreover, it should be noted that a person who culpably places themselves in a situation of necessity is responsible for the damage under § 1307 ABGB.[9]

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5 Cf OGH 1 Ob 169/66 = JBl 1967, 320; *BA Koch* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 19 no 7.

6 *H Koziol*, Österreichisches Haftpflichtrecht I (3rd edn 1997) no 4/79 ff; *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1306a no 1.

7 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1306a no 3.

8 § 1306a ABGB: 'If a person, in a situation of necessity, causes damage to avert imminent danger to himself or another, the judge has to decide whether and to what extent the damage has to be compensated, thereby taking into account whether the person harmed refrained from a defence out of consideration for the imminent danger to the other, the relation between the extent of the damage and the danger and lastly, the financial means of the injurer and of the person harmed.' Translation by *BC Steininger* in: K Oliphant/BC Steininger (eds), European Tort Law, Basic Texts (2011) § 1306a Austrian Civil Code; *H Koziol*, Österreichisches Haftpflichtrecht II (2nd edn 1984) 313 ff.

9 *E Karner* in: H Koziol/P Bydlinski/R Bollenberger (eds), Kurzkommentar zum ABGB (4th edn 2014) § 1307 no 2.

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4. Switzerland

Tribunal Fédéral Suisse (Federal Supreme Court of Switzerland) 3 July 1975
ATF 101 II 177

Facts

X was seriously injured in a car accident. During a hospital visit, doctors informed X's parents, V1 and V2, and their family that there was no hope of saving X. When X's brain death occurred, the doctors A1 and A2 of the Zurich Cantonal Hospital transplanted his heart to R. A3, the director in charge of the Zurich Department of Health, who was himself a doctor, was present during the intervention. 1

The hospital informed the press about the successful transplantation, but did not publish the name of the organ donor. X's family had not been informed about the fact that it was X's heart which had been transplanted. X's wife lived for years separated from her husband and had earlier filed an action for divorce. 2

The foreign press reported on the transplantation and published the name of the donor, which had been discovered in the course of an investigation and, possibly, due to the indiscretion of the hospital. On the demand of X's wife, A2 confirmed that her husband's heart had been transplanted, while the parents probably learned this from the media. Journalists contacted the parents V1 and V2, who indicated that they would have agreed to the transplantation, had they been asked by the hospital. 3

V1 and V2 filed an action against A1, A2, A3 and A4 (Canton of Zurich). They asked the judge to state that the intervention was unlawful and against morality (*gute Sitten*). On this basis, they sought CHF 10,000 (€ 8,300) as compensation for the damage and the moral harm they suffered, arguing that they had been deeply offended in their personal rights, because the intervention had taken place without their agreement, that the operation had received widespread publicity, that the medical confidentiality had been breached, that they had been the victims of the press's sensationalism and that, as a consequence, they had to undergo medical care. 4

The cantonal court rejected the claim. 5

Decision

The Supreme Court rejected V1's and V2's appeal. 6

The Supreme Court analysed the case in depth but only that part concerning the damages will be examined here. 7

The Supreme Court admitted that the parents V1 and V2 were closer to X than his wife and that they would have had the right to decide whether the transplantation should take place. The fact that their consent had not been asked for and that they were not aware of what happened to their son's body is a violation of their per- 8

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sonal rights, even if they would have permitted the intervention had they been contacted.

9 However, this does not mean that the transplantation was unlawful in respect of art 28 of the Swiss Civil Code (SCC).[1] This provision is only violated if there is no justification excluding the unlawfulness which is presumed according to art 28 al 2 SCC. Grounds of justification could be the consent of the plaintiff or the victim, the lawful exercise of a (public) function, self-defence (*Notwehr*) and state of emergency (*Notstand*). Further violation of a personal right is also lawful if it is justified by a higher interest (*höheres Interesse*). Therefore a decision on unlawfulness depends to a large extent on the fair balancing (*Abwägung*) of opposite goods or interests.[2]

10 *In casu*, the judge had to proceed to a fair balancing of the opposing goods and interests.[3] On one hand, there were the victims' interests: the right to decide on the fate of a corpse does not belong to the core area of the personality. Consequently, and in contrast to the solutions in neighbouring countries, the justification of the behaviour of A1, A2 and A3 does even not suppose a state of emergency. V1 and V2 had an interest in their personal rights not being violated. In fact, these rights were violated. But in this context it is important to remember that the plaintiffs would have agreed to the intervention had they been asked.

11 On the other hand, there was R's interest in receiving a new heart, linked to the doctors' interest in exploring a (then) new healing method.

12 According to art 49 al 2 (revised in the meantime [1983]) of the Swiss Code of Obligations (SCO), damages for moral harm could only be awarded if the fault were particularly gross. The fair balancing of the interests shows that this was not the case. Neither the violation of V1's and V2's personal rights nor the fault of A1, A2 and A3 was particularly gross. Consequently, the appeal had to be rejected.

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1 Article 28 of the Swiss Civil Code (SCC):
Protection of legal personality against infringements
1. Principle
[1]Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.
[2]An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law.

2 On these grounds of justification, see *A Bucher*, Personnes physiques et protection de la personnalité (5th edn 2009) 108 ff, no 495 ff; *P Tercier*, Le nouveau droit de la personnalité (1984) 84 ff, no 583 ff.

3 On this concept, see *P Tercier*, Le nouveau droit de la personnalité (1984) 87 f, no 609 ff.

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Comments

Concerning art 49 SCO, it has been revised in the meantime (1983).[4] It is no longer required for compensation for moral harm that the author committed a particularly gross fault. In any case, even under the new art 49 SCO, where the requirement of gravity of the impairment has been lowered, the result of the present case would have been the same, because it is still required that damages can only be adjudged if the gravity of the victim's moral harm justifies it. In its decision the Supreme Court denied this gravity. **13**

In the present case, the Supreme Court applied the fair balance of interests (*Interessenabwägung*) as a defence. It also mentioned other defences: in the first place, the consent of the victim. An act, which would normally be considered as unlawful, such as physical harm, can become lawful through the victim's consent. The typical case is the patient's consent to medical treatment.[5] The exercise of a (public) function can have the same effect; for example, if a policeman causes damage during a correctly executed task, the damage can be considered as lawfully inflicted.[6] **14**

As to self-defence, state of emergency (*Notstand*) and self-help (*Selbsthilfe*), according to art 52 SCO[7] the injuring party does not have any obligation to repair the damage he caused. **15**

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4 Old version of art 49 SCO:

[1]One who suffers an infringement to his personal interests and if a fault has been committed, may claim damages and satisfaction, without prejudice to an allowance for moral compensation if it is justified by the gravity of the illicit act.

[2]The judge may substitute or add to the allocation of the allowance another mode of repair. [our translation]

New version of art 49 SCO:

[1]Any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction provided this is justified by the seriousness of the infringement and no other amends have been made.

[2]The court may order that satisfaction be provided in another manner instead of or in addition to monetary compensation.

5 See *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 OR (4th edn 2013) art 41 no 63 ff; see also ATF 108 II 59 at 5/4 nos 10–12.

6 See *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 (4th edn 2013) art 41 no 61.

7 Article 52 SCO:

Self-defence, necessity, legitimate use of force

[1]Where a person has acted in self-defence, he is not liable to pay compensation for loss or damage caused to the person or property of the aggressor.

[2]A person who damages the property of another in order to protect himself or another person against imminent damage or danger must pay damages at the court's discretion.

[3]A person who uses force to protect his rights is not liable in damages if in the circumstances the assistance of the authorities could not have been obtained in good time and such use of force was the only means of preventing the loss of his rights or a significant impairment of his ability to exercise them.

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16 The academic literature also mentions that the exercise of certain subjective private rights may lead to damage, which the author does not have to repair, such as the renter's right of retention of the hirer's furniture, as long as the rent is not entirely paid.[8]

5. Greece

Areios Pagos (Greek Court of Cassation) 1534/2010

Published at ISOKRATIS = NoV 59 (2011) 775 (summary)

Facts

1 The plaintiff-company, in order to provide access to the parking and service station it had constructed, unlawfully (without obtaining the relevant permission) occupied and coated with concrete the pavement and part of a road (65 m^2), which belonged to municipality X and were subject to public use. The defendants (the mayor and the vice-mayor of the municipality, a member of the municipal council and employees of the municipality) acting in common with the purpose of preventing the operation of the plaintiff's service station, destroyed the construction of the access to the service station and car park with an excavating machine. The plaintiff filed an action seeking damages from the defendants for the damage sustained.

2 The defendants claimed that the destruction of the access and the prevention of its reconstruction by the plaintiff was not unlawful and no obligation for damages according to art 914 GCC was generated, as, according to art 282 GCC on 'self-help', art 284 GCC on self-defence and art 985 § 1 GCC providing that a possessor is entitled to avert by reasonable force every disturbance of or threatened eviction from possession, they had the right, as organs and employees of the municipality, to 'self-help'. In particular the defendants claimed that they had the right to regain control of space belonging to the municipality and give its use back to citizens, given that the need for the use of municipal spaces was urgent and that public use could not have been timely restored if the legal procedures had to be followed and if they had to wait for the contribution of the competent authorities; thus, their act was not unlawful and there was no obligation to pay damages to the plaintiff.

See *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41–61 OR (4th edn 2013) art 52 no 4 ff.

8 See *R Brehm*, Berner Kommentar, Obligationenrecht, die Entstehung durch unerlaubte Handlungen, Art 41-61 (4th edn 2013) art 41 no 62.

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Decision

The Court of Cassation held that since no restriction is provided by another provision, every person, natural or legal, of private or public law, such as the state and municipalities as well as communities, has a right to protect their possessions according to art 985 § 1 GCC. However, according to the court, 'self-help', based on art 282ff GCC, is not allowed for the protection of a right of public law. The Court of Cassation confirmed the decision of the Court of Appeal, according to which there had been no unlawful act on the part of the defendants who exercised their right deriving from art 985 § 1 GCC. Thus, it was held that the plaintiff had no right to damages according to art 914 GCC. 3

Comments

Permissible 'self-help', self-defence and state of emergency, as described in arts 282–286 GCC,[1] the exercise of a right or the execution of a duty imposed by law, the execution of a proper order (art 21 GPC), the conflict of duties, where a duty is not fulfilled in order to fulfill another of the same or greater value are among the grounds that exclude wrongfulness.[2] All tortious liability is negated in such cases. If, however, the conditions prescribed in such articles are not met, then the act is unlawful and an obligation to pay damages is born, provided that the other conditions of art 914b f GCC also exist. According to the Court of Cassation, however, arts 282–286 GCC only apply for the protection of a right of private law and not for the protection of a public law right. 4

1 Article 282 GCC: 'Self-help. The satisfaction of the claim with self-help and without the help of public assistance, is allowed only when the delay in obtaining public assistance would render significantly more difficult or impossible the realisation of the claim.'
Article 283 GCC: 'If the conditions of the law for self-help are not met, or if the person used excessive force, he is liable to pay damages. He has the same obligation if he erroneously thought that the conditions of the law existed.'
Article 284 GCC: 'Self-defence. Self-defence which is permitted for protecting oneself or another from a present actual attack on the actor or another is not an unlawful act.'
Article 285 GCC: 'State of emergency. The destruction of things belonging to another, if it became necessary in order to ward off a present danger threatening a disproportionate damage to the actor or another, is not an unlawful act.'
Article 286 GCC: 'The actor if he had himself caused the danger in accordance with the previous article, is liable for compensation if he had himself caused the danger by his own fault; in all other cases he may still be required to provide reasonable compensation. After the performance he has an indemnity action against the person who benefited from it, according to the provisions for administration of another's affair.'

2 *P Kornilakis*, Law of Obligations, Special Part I (2002) § 86 5 IV 507.

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6. France

Cour de cassation, Chambre criminelle (Supreme Court, Criminal Division) 31 May 1972

71-92.899, Bull crim no 184

Facts

1 A man, without authorisation, entered a naturist camp at night and assaulted the watchman, who was patrolling with a loaded gun, with a hammer. The watchman shot at the trespasser and killed him. He was later prosecuted for homicide but was found not guilty, having acted in self-defence. The criminal court nevertheless found that he had been imprudent in patrolling with a loaded gun and that this fault had been a cause of the trespasser's death. The watchman was thus ordered to pay damages to the dead man's family, but brought the case before the *Cour de cassation*.

Decision

2 The *Cour de cassation* quashed the criminal court's decision, stating that 'self-defence in itself bars any fault and cannot give rise to a claim for damages in favour of the person who made it necessary through his aggression.' The lower court had therefore been wrong in finding that the watchman had been at fault, even though he had acted in self-defence.

Comments

3 In this decision, the *Cour de cassation* stated very clearly that self-defence excludes the finding of fault. He who acts in self-defence cannot be at fault, even though he might have caused damage by so doing. The rule is actually very ancient,[1] but is not always formulated as explicitly.

4 In the present case, the watchman's disputed action, ie to have loaded his gun before he patrolled the camp, was actually distinct from the action whereby he defended himself against the trespasser, and this fact could have been regarded as allowing a finding of fault, despite the existence of self-defence. The *Cour de cassation* did not see things that way, however. This illustrates the fact that self-defence tends to be regarded in French law not only as barring the finding of fault, but more generally as excluding any civil liability of the person who rightfully defended himself. This is actually not a written rule, and has not even been explicitly stated by the courts. There

1 See Cass crim, 19 December 1817, Jurisprudence de la Cour de cassation, 1817, at 393; Cass chambre des requêtes, 25 March 1902, S 1902.1.5, note *Lyon-Caen*.

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seems to be no example, however, of a case where the *Cour de cassation* accepted that someone who had acted in self-defence could be held liable towards the person who had assaulted him, on whatever ground. And it is an uncontroversial solution, for example, that someone acting in self-defence cannot be held strictly liable towards the person he defended himself against.[2]

One could probably say that, even though self-defence is usually presented as a ground of justification (*fait justificatif*), it functions rather like a cause of forfeiture, whereby the person who provoked someone else into acting in self-defence can never claim damages for injuries he suffered on that occasion. 5

Cour de cassation, Chambre civile 2 (Supreme Court, Civil Division) 25 February 2010

08-21.309

Facts

A man tried to enter his brother's home using violence. A fight between the two brothers ensued, in which the trespasser was injured. The social security system later sued the other brother before a civil court, seeking reimbursement of the costs of the injured man's hospitalisation. A lower court awarded damages, on the ground that, given the circumstances, liability for the injury had to be shared between the two brothers. The case was brought before the *Cour de cassation*. 6

Decision

The decision was quashed by the *Cour de cassation*. It was held to violate art 1382 (now art 1240) of the *Code civil* and art L 122-5 of the Penal Code, which provides: 'A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.' According to the *Cour de cassation*, the lower court could not apportion liability between the plaintiff and the defendant without having first responded to the defendant's argument that he had acted in self-defence. 7

2 See Cass civ 2, 22 April 1992, 90-14.586, Bull civ II, no 127; D 1992, 353, note *Burgelin*. In that case, a woman had wounded with a gun the man who was assaulting her. The latter claimed damages against her on the ground that she was strictly liable for any damage caused by the gun she had in her keeping (see no 1/6 no 2). The appellate court had granted the claim, but the *Cour de cassation* quashed its decision, on the ground that, because self-defence had been recognised, no civil liability could attach to the defendant's action, even if that liability was not based on fault.

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Comments

8 This decision illustrates an unwritten but undisputed rule, whereby the grounds of justification which apply in criminal law also suppress liability in tort – even when civil proceedings are totally independent from criminal proceedings.[3] Damage caused in self-defence, therefore, cannot give rise to liability if the conditions set by the Penal Code are met. In the present case, the lower court's error was that it had established the defendant's liability without answering his argument that he had acted in self-defence.

Cour de cassation, Chamber criminelle (Supreme Court, Criminal Division) 1 June 2010

09-87.159, Bull crim, no 96

9 For facts and decision see 3d/6 nos 1–2.

Comments

10 From the standpoint of 'unavoidable necessity' (*état de nécessité*), some commentators[4] have showed dissatisfaction with the *Cannelle* solution, whereby an additional condition, not mentioned in the legislation, is set by judges to recognise unavoidable necessity as a ground of justification: the lack of awareness, by the actor, that he was placing himself in a situation of danger. In other words, where a fault was committed prior to the act of unavoidable necessity, no ground of justification may be claimed. However, art 122-7 of the French Penal Code does not require the absence of fault to recognise necessity ('A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act necessary to ensure the safety of the person or property, except where the means used are disproportionate to the seriousness of the threat'). It could be argued that, according to the principle of strict interpretation of criminal law, the

3 The only exception is the so-called 'statutory authorisation' (*autorisation de la loi*; art L 122-4, al 1 of the Penal Code), whereby no criminal liability can arise out of an act authorised by statute. Statutory authorisation does not necessarily suppress tortious liability (see 4/6 nos 4–6).

4 See among others *J Lasserre-Capdeville*, Etat de nécessité et faute de l'intéressé, Actualité juridique Pénal 2010, 393 ff; other authors have expressed their satisfaction with this ruling: see especially *L Neyret*, Mort de l'ourse Cannelle, une responsabilité sans culpabilité, in: Environnement et Développement durable, January 2011, issue no 1, commentary no 2; others have showed no dissatisfaction: see among others *M Véron*, La mort de l'ourse 'Cannelle': y avait-il état de nécessité? Droit pénal, September 2010, issue no 9, commentary no 89; *J de Malafosse*, La mort de l'ourse Cannelle et l'état de nécessité, in: Environnement et Développement durable, October 2010, issue no 10, 'repère' no 9.

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occurrence of a fault prior to the act of unavoidable necessity should be irrelevant. Some scholars argue that ruling otherwise could jeopardise this principle, and thus weaken the principle of legality of criminal offences and penalties.[5] Yet it is hard to accept that the state of unavoidable necessity can be successfully claimed even when the perpetrator put himself negligently in a state of necessity.

7. Belgium

Cour de cassation/Hof van Cassatie (Supreme Court) 18 April 2007
Pas 2007, 710

Facts

Two police officers were ordered to neutralise individuals believed to be carrying heavy weaponry. While they were carrying out their mission, an individual suddenly came towards them, with his hand on an object which, to the police officers, appeared to be a weapon. The police officers reacted by shooting in the individual's direction, injuring him in the leg. 1

Decision

The criminal judge held that there was no offence on the basis of self-defence. The Supreme Court confirmed this, specifying that an act of self-defence is one which, not having the possibility to distance themselves from a serious assault against their person or that of a third party, other than the person committing the offence, the defendant defends himself in a manner which is proportionate to the attack. The court also stated that the judge must verify whether the shots and injuries were proportionate, basing this decision on the factual circumstances and taking into account the reactions which the threatened person could and should reasonably have had. 2

Comments

The identification of grounds for justification (or 'justifications'), which are allowed by Belgian law, are not straightforward. There are numerous language misunderstandings (in particular surrounding the notion of *force majeure*), the concepts clash with one another and the assessment of the legal system relating to each of them is 3

5 See among others *J Lasserre-Capdeville*, Etat de nécessité et faute de l'intéressé, Actualité juridique Pénal 2010, 393.

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often the subject of controversy.[1] In order to ease comprehension, it is therefore preferable to stay with some general considerations taken from traditional teachings.

4 We therefore traditionally compare the grounds for justification with what we call in French 'causes d'exonération'.[2] According to traditional opinion, the first exerts an impact upon accountability for the harmful behaviour, by depriving its perpetrator of his/her free will, and by *de facto* removing the tortious nature of this behaviour, while the second allows it to be shown that the damage was caused, not by the fact alleged, but by an event which is independent of the alleged tortfeasor, (namely *force majeure*, a third party act or the conduct of the victim).

5 Grounds for justification can be identified as self-defence, necessity, order or permission of the law or an authority, coercion and unavoidable error.[3] However there is no document in civil law which establishes an exhaustive list of the grounds for justification. In reality, the law of tortious liability borrows these elements from criminal law. In principle, 'any event, third party act or act of the victim can, in civil matters, constitute a justification ..., provided that it is unforeseeable and irresistible as well as not being the will of the defendant'.[4] The unforeseeable and unavoidable nature of the event must be objectively assessed in the light of the standard of behaviour expected of an ordinarily prudent and diligent person.[5]

6 In order to be accepted as a ground for justification and exclude any liability on the part of the perpetrator of the harmful act, the act of self-defence must fulfill various conditions, which are also set out in the judgment used as an example (the commented case concerns a case of putative self-defence; therefore, it was necessary to firstly examine whether the police officers could have legitimately thought that they were threatened by a firearm). It is necessary for there to be an attack, upon a person or assets[6] (this differs from criminal law), which is illegal and renders necessary an immediate defence on the part of the victim, provided that this defen-

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1 See in this respect, for a summary *J Van Zuylen*, Du fait justificatif à la force majeure: les visages contrastés de l'exonération de la responsabilité, in: Evaluation du dommage, Responsabilité civile et Assurances. Liber amicorum Noël Simar (2013) 263 ff.

2 *L Cornelis*/*P Van Ommeslaghe*, Les 'faits justificatifs' dans le droit belge de la responsabilité aquilienne, in: In Memoriam Jean Limpens (1987) 265.

3 *T Vansweevelt*/*B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 306 ff.

4 Free translation of *L Cornelis*/*P Van Ommeslaghe*, Les 'faits justificatifs' dans le droit belge de la responsabilité aquilienne, in: In Memoriam Jean Limpens (1987) 277.

5 *J Van Zuylen*, Du fait justificatif à la force majeure: les visages contrastés de l'exonération de la responsabilité, in: Evaluation du dommage, Responsabilité civile et Assurances. Liber amicorum Noël Simar (2013) 276 ff.

6 *L Cornelis*/*P Van Ommeslaghe*, Les 'faits justificatifs' dans le droit belge de la responsabilité aquilienne, in: In Memoriam Jean Limpens (1987) 278.

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sive reaction is proportionate to the attack.[7] In this regard, an assessment of the proportionate nature of the defence is carried out objectively, in the light of the behaviour which an ordinarily prudent and diligent person would have adopted in the same circumstances.[8]

Necessity and insurmountable error are dealt with succinctly in the context of the two decisions which follow. 7

Juge de police/Politierechter (Police Judge, Pol) Liège, 14 February 2005

JJ Pol/T Pol 2006, 37

Facts

A doctor was urgently called to attend to a patient. Arriving by car, the doctor exceeded the speed limit on a straight road bordered by fields, and residential properties were nearby. 8

Decision

After having stated that doctors do not benefit from any immunity that could exempt them from respecting road safety regulations, the judge decided that in this case there was a necessity present which justified the excessive speed. This necessity existed from the moment the interest, the patient's health, was in serious and imminent peril, and on the basis that the interest to be protected was more valuable than the interest sacrificed, that is the strict respecting of a speed limit in the open countryside on a straight road in an unpopulated area. 9

Comments

This decision, which was made in a criminal matter, allows us to illustrate the extent to which the violation of a standard of behaviour can be justified by the need to protect a superior interest, or at the least one of equal value to that which is sacrificed by the violation. 10

The Supreme Court has expressly allowed necessity as a ground for justification in civil matters.[9] In that case, the captain of a ship had taken the difficult decision to run it aground against a quay in order to avoid a collision with another ship, which was carrying numerous passengers. Even if significant material harm was caused, 11

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7 *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 306 ff.

8 *L Cornelis/P Van Ommeslaghe*, Les 'faits justificatifs' dans le droit belge de la responsabilité aquilienne, in: In Memoriam Jean Limpens (1987) 278.

9 Cass, 15 May 1930, Pas 1930 I, 223.

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the grounding had avoided a more serious accident in which there would have been a risk of one or more people drowning.

12 Clearly, the injuring party must find himself/herself in a situation in which there is a serious and present threat of danger to him/her, a third party or even an asset, which necessitates a reaction to remove it. The fault, for that matter, is only negated provided that the interest protected by the harmful act is at least equal in value to the interest sacrificed.[10]

Cour d'appel (Court of Appeal) Brussels, 26 November 1992

RGAR 1995, 12488

Facts

13 When motorist V was driving on a road where he had the right of way, motorist A approached him from the right at a crossroads, and the two vehicles collided. V claimed compensation for his damage from A, while the latter argued in his defence that the give-way road sign was not in the right place and was hidden from view behind an obstacle, meaning that he was not aware of the sign and had applied the general principle of giving way to the right when entering the road.

Decision

14 After stating that V had not committed any violation of the traffic regulations, while A should have given way but did not do so, the Court of Appeal, however, decided that the latter was induced into making an unavoidable error due to the fact that the sign was inadequate, with the result that no fault with a causal connection to the disputed accident could be attributed to him.

Comments

15 The unavoidable error ground for justification can be defined as 'a false representation of reality which leads the perpetrator to commit a violation of a particular standard of behaviour. It is a mistake of fact if it relates to a fact and a mistake of law if it relates to the legal impact of the standard in question'.[11] The Supreme Court had the opportunity to specify that an error is only unavoidable if it is of the type which could be committed by any reasonable and prudent person in the same circum-

10 *T Vansweevelt/B Weyts*, Handboek Buitencontractueel Aansprakelijkheid (2009) 308 ff.

11 Free translation of *T Léonard*, Faute extracontractuelle et juridictions commerciales: principes et plaidoyer pour un retour à une vision unitaire de la faute, RDC/TBH 2013, 966.

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stances.[12] This principle takes us back to the principle of objective assessment, which has already been extensively discussed.

8. The Netherlands

Hoge Raad (Dutch Supreme Court) 10 October 1993, ECLI:NL:HR:1993:ZC1179
NJ 1994/242

Facts

During a riot of squatters, who were masked and armed with sticks, a policeman, threatened by the squatters, shot a squatter in the arm. 1

Decision

The police officer was held to have been in such a threatening situation that he could not be blamed for the shooting. 2

Comments

A *prima facie* unlawful act is, according to art 6:162(2) CC, considered not to be unlawful whenever *force majeure*, self-defence or a statutory provision justify it.[1] The question of when an act, performed in self-defence is unlawful or not, is considered to be largely a matter of fact. Relevant factors are deducted from art 41(1) of the Dutch Criminal Code: 'He who commits an act, compelled by the necessary defence of one's own or another's body, dignity or goods against immediate unlawful assault is not punishable.' Hence, relevant factors are (threat of) an *immediate assault*, (threat of) injury to *body*, *dignity* or *goods*,[2] *unlawful* defence, the *aim* (of the defence) must be necessary (principle of subsidiarity) and the *means* must be proportional. 3

Another example is a case in which visitors to a club were removed, because they had been fighting inside. While they were being removed, the doorman heard that one of them was carrying a gun. When the group subsequently attacked a person, the doorman went outside and used an iron bar in an attempt to help that person by dispersing the group. One of the members of the group was hit on the 4

12 Cass, 25 November 1999, Pas 1999 I, 1384.

1 See *AS Hartkamp/CH Sieburgh*, Verbintenissenrecht, Asser Serie 6-IV* (2015) no 88 ff.
2 Threats to 'mental integrity' are considered to be covered by *force majeure*. See Onrechtmatige Daad, art 6:162, sec 2 BW (*Jansen*), cmt 167.1.

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head with the iron bar and suffered severe injury. The conduct of the doorman was not considered to be tortious.[3]

9. Italy

Corte di Cassazione (Court of Cassation) 25 May 2000, no 6875

Leggi d'Italia

Facts

1 A, a young boy, trying to defend a friend from the aggression of V, another minor, reacted to V's kick with a punch, causing him damage. The parents of V sued A's parents in tort for the compensation of damage.

Decision

2 The *Corte di Cassazione* held that no compensation should be awarded for the damage suffered by V. In the opinion of the court, pursuant to art 2044 Civil Code, A's action was justified because he had acted in self-defence to protect a third party's rights, and his action was not illicit, as there was a proportionality between the action in defence of the friend and the single punch given to V.

Comments

3 As mentioned in the General Overview, according to the provision of art 2043 Civil Code, only that damage which is not justified is to be compensated. On the contrary, this same damage is not to be compensated where a ground of justification exists, because the action that caused the harm is no longer considered illicit and therefore its consequent damage is not compensable unjust damage.

4 The ground of justification provided for in art 2044 of the Civil Code, concerning self-defence,[1] is also contained in art 52 of the Italian Criminal Code, to which it is generally reputed to refer,[2] although more recently some scholars consider the link to the provision in the Criminal Code should be understood more as an integration

3 HR 10 December 1999, ECLI:NL:HR:1999:AA3841, NJ 2000/9.

1 Article 2044 (Self-defence): 'A person who causes injury in the exercise of self-defence or the legitimate defence of another is not liable for the injury.'

2 Cass 16 February 1978, no 753, Arch Civ 1978, 762; Cass 24 February 2000, no 2091, Mass Giur It 2000.

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than as a referral.[3] The self-defence ground of justification exists where the agent committed the harmful action to protect his/her own or somebody else's rights from the actual danger of an unjust harm, not caused by the agent, when that harmful action was necessary and the injury caused by it was unavoidable and proportionate to the threatened damage. This means that the act of self-defence is a licit act and that the consequent damage is not unjust.[4]

This ground of justification applies where a protected interest exists and, therefore, art 2044 Civil Code protects not only personal integrity or other personal interests, but also economic interests.[5] The rule was thus applied in cases of damage caused by the reaction of a businessman against the attempt of a competitor to steal his clientele,[6] or in cases of comparative advertising, discrediting the product of the competitor in reaction to his attack.[7] **5**

The aggression can originate from both persons or animals, because self-defence justifies (proportionate) reactions against all sources of unjust harm. For the same reason it also applies to reactions to aggression by an incompetent person.[8] The defence does not apply if the harm is a consequence of the performance of one's duties (for example, a policeman arresting a supposed criminal). **6**

The danger must be real, although it is not required that an offence has already been committed. Moreover, the agent should not have had any alternative but to react with the harmful action, and the injuries caused by his action should not have been otherwise avoidable.[9] If the damage caused by the agent is greater than that he/she aimed to avoid, the agent should only be held liable for the damage that exceeds the amount of damage he/she wanted to avoid.[10] **7**

3 *M Comporti*, Fatti illeciti: le responsabilità presunte: Artt. 2044–2048, in: FD Busnelli (ed), Codice civile commentato (2002) 6.

4 *G Giacobbe*, Illecito e responsabilità civile, in: M Bessone, Trattato di diritto privato, vol X (2000) 53; *G Alpa*, La responsabilità civile, in: Trattato di diritto civile, vol IV (1999) 339.

5 Cass 6 March 1984, Riv Pen 1984, 792.

6 Pret Taranto, 2 July 1982, Arch Civ 1982, 1145.

7 Trib Torino, 21 March 1983, Giur dir ind 1983, 527.

8 *P Cendon* (ed), Commentario al Codice Civile, artt. 2043–2053 (2008) 470; *A Venchiarutti*, La legittima difesa, in: P Cendon (ed) La responsabilità civile (1988) 485.

9 *F Mantovani*, Diritto Penale, parte generale (2007) 253 f.

10 Cass 5 August 1964, no 2227, Arch resp civ 1965, 464; *G Giacobbe*, Illecito e responsabilità civile, in: M Bessone, Trattato di diritto privato, vol X (2000) 63; *G Cattaneo*, Concorso di colpa del danneggiato, in: G Visintini (ed), Risarcimento del danno contrattuale ed extracontrattuale (1984) 273; *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 609.

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10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 28 June 1996

RJ 1996\4905

Facts

1 A, a night watchman, was prosecuted and acquitted for the crime of murder. The trial court found that the homicide was justified by self-defence. According to the proven facts, a stranger assaulted A in a quarry while in his lookout post. After a melee, the attacker managed to snatch one of the two weapons that A was carrying. When he threatened to shoot, A shot and wounded the attacker fatally. The attacker's widow and children sued A in the civil courts, holding that A had caused the death of their husband and father by fault. The Court of First Instance dismissed the claim, but the Court of Appeal decided in favour of the claimants, although it reduced the compensation amount they had claimed on the grounds of contributory negligence of the victim. The Supreme Court reversed and rejected the claim in full.

Decision

2 The judgment of appeal, neglecting the fact that the question focuses on the absence or not of unlawfulness in A's conduct, concludes that he acted with 'some negligence'. Conversely, the unlawful nature of the action, underlying the responsibility rule laid down in art 1902 CC, must be rejected when there is self-defence. Consequently, the matter over which the court had to decide was the existence of self-defence. In the facts proven in the file before the courts of the criminal case, it was shown that the defendant's conduct was not excessive when compared to the attacker's conduct. A's conduct was thus lawful and justified by his right to defend himself reasonably from the aggression that he was facing.

Comments

3 Although there is 'wrongfulness established by the result' in this case, the admission of the existence of self-defence, which is treated as a case of lack of wrongfulness or unlawfulness, makes it clear that Spanish law places the emphasis on the 'wrongfulness of conduct' although, in order to succeed in a tort claim, recoverable damage is always required.[1] STS 5 May 2008[2] has also confirmed that the exemption from criminal liability on the grounds of self-defence (art 20.4 CP) is not binding on

1 Instead of many see, recently, *M García-Ripoll*, La antijuridicidad como requisito de la responsabilidad civil, ADC 2013, 1539 and more references therein.

2 RJ 2008\2947.

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the civil courts when they deal with the same cases and that it is for the civil courts 'to establish the existence or not of wrongfulness in the defendant's conduct as an underlying element of tortious liability for fault pursuant to art 1902 CC.' In this latter judgment it was also considered that 'the act of the defendant was justified', since the claimant first assaulted the defendant and the defendant's reaction, a punch, 'did not overstep his defence', in spite of the fact that the claimant knocked his head on the floor and suffered serious injuries.

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 11 December 2009

RJ 2010\1

Facts

V, a 17-year-old boy, participated in a bike race organised by A, a Cultural and Sports Association, which took place on a public road on a mountain pass, closed to traffic and guarded both by staff of the organisation and the *guardia civil*. At the beginning of the descent of a mountain pass indicated in the road book as having a 'dangerous descent', V, who at that time was riding alone, ran off the road and fell into a ravine, falling into an irreversible vegetative coma. V's father, in his own name and in the name of his son who had been legally incapacitated, sued the association that organised the event. The judgment of the first and second instance held the defendant liable. However, the Supreme Court upheld A's appeal and dismissed the claim. **4**

Decision

Admittedly, the regulatory standard requires an organiser to take all safety measures that prudence imposes to safeguard the integrity of the participants in the race, avoiding places or situations that pose a particular risk to the safety of people all along the course of the competition. However, when these requirements have been met, the competing riders analyse the route and the situations of risk that the race may involve in advance, from the data provided, and in this particular case they referred to the spot where the accident took place, inter alia, as a 'dangerous descent'. The fact that there was loose gravel on the spot is a noticeable fact for those who are qualified to undertake such a race and it enables them to foresee a potential risk and a possible fall from the road when cycling down the mountain pass, as is, to a greater extent, the existence of the ravine through which he fell. These are risks that cyclists know and voluntarily undertake as part of their activity, and this prevents participants from transferring the consequences resulting from a fall suffered in the course of the race to the organisers. The reason is that damage occurred as a result of a danger inherent to an activity under the control of the victim to which he **5**

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exposed himself by riding down the mountain pass and is not a result of the conduct of those who organised it, since they did not create any further risks than those involved in preparing a race on a road that was suitable for it.

Comments

6 This judgment illustrates a case of assumption of risk as grounds for justification for the harm suffered, and the fact that this defence prevents attributing it to the defendant. It is frequently applied in cases involving the practice of sports in risky settings such as rafting,[3] skiing[4] or cycling, as in the case under comment. Nonetheless, the assumption of risk does not purport the irrelevance of the misconduct attributable to the organisers of sporting events when, for instance, these run through areas with a specific hazard which should have been known and avoided.[5]

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 12 January 2010

RJ 2011\305

Facts

7 An association of homeowners with industries handling, cutting and preparing marble operating close to their homes brought a claim against the owners of the marble industries for compensation for the damage resulting from the nuisance suffered over more than 20 years and for the depreciation of their houses. The defendant industries had been located in that place since 1964, 1984 and 1985. The homes of members of the association had been built on undeveloped land and common rural land, and one of them even on land classified as an urban-industrial zone, ie, a non-residential zone. The plots were rural land ('land for garden'), some with single-family rural housing and others – the majority – without any buildings at the time of purchase. However, in 1992, 1995 or 1998, respectively, the houses that had been built had been registered as such; in other cases, finally, there was no evidence that any building had been built on them. The Court of First Instance dismissed the claim, but on appeal the claim was partially upheld, and the defendants were ordered to compensate the claimants with € 70,000 for the nuisances – mainly noise – plus the amount established by expert opinion on the execution of the

3 STS 17.10.2001 (RJ 2001\8639).

4 STS 20.3.1996 (RJ 1996\2244) and 15.2.2007 (RJ 2007\1452).

5 In this sense, see *J Solé Feliu*, Comentario de la Sentencia de 31 de mayo de 2006, CCJC 74 (2007) 869, 888 (concerning the organisation of the Tour of Spain). As regards ski accidents, see also STS 22.12.2006 (RJ 2007\302) and 9.2.2011 (RJ 2011\1822) (both concerning inadequate safety measures taken by the operator of the ski station).

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judgment for the loss of value of their homes. The Supreme Court upheld the appeal of the defendants and dismissed the claim in full.

Decision

According to the case law of this court, pre-occupation, ie the fact that the defendants carried out an industrial activity causing nuisance before the claimants built their homes in the vicinity, does not in itself exclude the obligation to compensate. It is also established in case law that the administrative authorisation for an industrial activity does not preclude the obligation to repair the damage it causes. However, it is one thing that pre-occupation or pre-existence of an industrial activity and its administrative authorisation does not exclude the obligation to prevent or to repair the damage that such an activity causes and quite a different one that both circumstances are irrelevant when deciding whether appropriate avoidance or reparation must take place, since the decision made can never dispense with general principles such as good faith in neighbourhood relations, recognised by case law, as already indicated, or the necessary causal link between the activity of the defendant and the damage suffered by the claimant. **8**

If all homes had been built years after the defendants exercised and expanded their activity in the area, it is clear that the homes could suffer no depreciation for the activity of such business. As regards the other head of loss, also contested here, referring to € 70,000 for non-pecuniary loss, the industrial activity of the defendants generates noise which is transmitted to the said housing, and, from this point of view, they cause damage to their inhabitants. However, this damage is not compensable because it is not unlawful, since the free decision to live in a non-residential area adjacent to an industrial zone of the municipality requires those who take it to endure the inconvenience of a lawful and authorised activity of industries previously established in this industrial area. Otherwise, a contradiction would arise which would allow turning urban illegality itself into a source of compensation to the person who built a home in an industrial area; and also that the mere municipal licence to build a house in rural area is automatically translated into a cost, without any legal support, for holders of legitimately installed industries in the adjoining industrial area. **9**

Comments

This case illustrates a situation which *a priori* could be unlawful, but where the defendant company argued that it was using the right to develop industrial activities in the area where the factory was located for many years. The court solves the issue relying upon the general principle of good faith in the use of subjective rights, which subjects nuisances to limits of tolerability. It also puts emphasis upon the connection of the conflict between private parties with the land zoning as approved **10**

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by the competent public bodies. The result of this approach is that the claimants must bear the noises and other emissions as long as they decided to build illegally in the area near the factory of the defendant, knowing about the inconveniences flowing from its industrial activities.[6]

11. Portugal

Tribunal da Relação de Porto (Porto Court of Appeal) 22 January 1986 (Teixeira do Carmo)

Colectânea de Jurisprudência, year XI, 1986, T I, 197–200

Facts

1 A was the owner of a vineyard surrounded by walls whose grapes were partially destroyed by dogs belonging to his neighbours. He asked his neighbours to lock up the dogs and when this did not have any effect, A placed six poisoned sardines in his vineyards (inside his property and in area protected by walls).

2 A informed his son to warn his neighbours of the presence of the poisoned sardines and advised them to keep their dogs locked up, or face the danger of death. The neighbour, V, did not oblige and, as a consequence, his dogs ate the sardines, eventually dying days afterwards.

3 V sought compensation from A for the damage suffered as a result of the death of his dogs. A contested, defending that he acted in self-defence, to protect his property, pursuant to the terms of art 336 of the Civil Code.

Decision

4 The court decided that A had acted in the legitimate use of defence (a cause for exclusion of unlawfulness), self-help (art 336[1]), to protect his right of property. The

6 This element is especially remarked on by *A Ruda*, CCJC 2012, 213, 231 ff. This author comments on the judgment with approval and remarks that it does not depart from prior case law, which has rejected allegations of legitimate 'pre-use' of the land when the nuisance affects claimants who use the land according to the applicable zoning regulations. See also *T Hualde Manso*, La pre-utilización de los inmuebles y las inmisiones, Aranzadi Civil-Mercantil 1 (2011) 6–9.

1 '(1) The use of force is lawful to obtain or secure a rightful interest if self-help is essential, because of the impossibility of using regular coercive means, to avoid the destruction or disablement of the right, provided that the agent does not exceed the necessary measures to avoid the damage.
(2) Self-help can substantiate the appropriation, destruction or deterioration of a thing, the elimination of resistance irregularly arising against the exercise of a right or similar act.
(3) Self-help is unlawful if it sacrifices interests greater than those that it aims to attain or secure.'

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resort to the regular coercive means would be ineffective because the police could not effectively stop the numerous dogs (from different owners) from entering A's vineyard.

On the other hand, the court did not find that the measure was inadequate because the lives of people were not at stake (because it is unlikely that someone trespassing would eat uncooked sardines that were on the ground), as it was suggested in the proceedings. Neither could be it be said that the interest sacrificed by A was superior to the one protected. As V was warned that there was poison on A's property and that he should lock his dogs up to prevent them from being poisoned, it was his responsibility to ensure, as owner of the dogs, that they did not invade A's property. 5

Comments

The causes of justification, or defences, of harmful acts are those that exclude liability by excluding the unlawfulness of the action.[2] There are two general forms of exclusion of unlawfulness: the regular exercise of the right and compliance with a legal duty;[3] besides some special situations expressly established by law as a form of defence of rights. These defences can justify the violation of rights and consequent damage to others, having, for this reason, to be established by law.[4] Our Civil Code establishes: self-help (which is used to guarantee or to protect a right), self-defence (which is used to protect a person or thing from any danger or aggression), necessity (where the need for protection from damage to a thing or person makes the agent destroy or damage a thing of clearly smaller importance) and consent (where the holder of the infringed right gives consent for its destruction or damage). 6

In the case at hand, it was decided to apply the self-help provision, pursuant to art 336 of the Civil Code, and, therefore the placing of poison made by A was considered lawful. Self-help is the possibility that someone has to guarantee his own right by force,[5] and, as such is in clear contradiction with the rule of prohibition of self-defence of rights contained in art 1 of the Civil Procedure Code.[6] For this reason, although regulated by law, this defence can only be used in the strict way predicated by law.[7] 7

2 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 567.

3 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 567; also *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 552.

4 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 484.

5 See *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 569; *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 553.

6 'For no one is it lawful to secure or attain a right by force, with the exceptions and between the limits set by law.'

7 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 553.

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8 There are requirements of self-help: ownership of the right that needs protection; necessity (the impossibility of, timely, resorting to typical coercive means, facing the possibility of seeing the right rendered useless); adequacy (no more shall be done than that necessary to stop the threat to the right); and proportionality (the interest being sacrificed cannot be more valuable than that being protected).[8]

9 A distinction between self-help and self-defence should be made. The former allows the owner of the right the use of force to avoid that right being rendered useless in practice. The second authorises the agent (owner of the right or third person protecting the harmed person) to use force to protect his own or another person's right from immediate offence contrary to law (in both cases it has to be impossible to resort to typical coercive means).[9]

10 In any of these cases, if the agent acts in the wrongly assumed conviction that all the requirements to use these defences are justified, he will be liable under general provisions, with an exception being made if the mistake was excusable (art 338 of the Civil Code).[10] The judgment of excusability is made using the criteria of the averagely diligent and careful man pursuant to the terms of art 487(2).[11]

11 In the case at hand, it was clear that the requirements for self-help were verified and, therefore, A's conduct was considered as lawful.

12. England and Wales

Marshall v Osmond, Court of Appeal (Civil Division) 16 March 1983

[1983] QB 1034

Facts

1 The claimant was a passenger in a vehicle he knew to be stolen. The first defendant was the Chief Constable of Hampshire who bore vicarious liability for the second defendant, a police officer. The claimant was struck and injured either by the unmarked vehicle driven by the second defendant or by some part of the stolen vehicle after it had been hit by the police vehicle in the course of the second defendant's attempt to effect an arrest. The claimant argued he sustained injuries arising out of the negligent driving of the officer in respect of which he claimed damages.

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8 See *J Antunes Varela*, Das obrigações em geral, vol I (10th edn 2000) 553; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 570.

9 See *G Marques da Silva*, Da tutela dos direitos na acção directa, Revista da Ordem dos Advogados no 33, vol I (January/June 1973) 43 f.

10 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 501; *MJ de Almeida Costa*, Direito das Obrigações (12th edn 2009) 570.

11 See *A Menezes Cordeiro*, Tratado de Direito Civil Português, vol II, tomo III (2010) 502.

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Decision

The court unanimously dismissed the claimant's action. Sir John Donaldson MR observed that the duty owed by a police officer to a suspect is the same duty as that owed to anyone else, namely to exercise such care and skill as is reasonable in all the circumstances. The vital words in the proposition of law, he said, are 'in all the circumstances'. One of the circumstances presented in this case was that the claimant bore all the appearance of having been somebody engaged in a criminal activity for which there was a power of arrest. The officer thus used force that was reasonable in the circumstances. Emphasis was also placed on the fact that the incident took place at night and no doubt in a stressful setting. While the second defendant clearly made an error of judgment, the court was far from satisfied on the evidence that he was negligent. The second defendant had also invoked the defence of *volenti non fit injuria*. Since no liability was found, there was no need to hide behind the shield of *volenti*. However, the court ruled *per curiam* that the defence was not really applicable in the case of the police pursuing a suspected criminal. **2**

Comments

In the case of emergency services the interplay of factors in assessing the standard of conduct required is very often weighted *against* the finding of a breach of duty in the first place. Thus, a similar outcome to that in *Marshall* was reached in the case of *Watt* (see 3f/12 nos 4–7 above), for example. That is not to say, however, that those providing emergency services will always escape liability. That notwithstanding, the abovementioned tendency prompted one judge to ask: 'why should those men of courage, who are the persons who run the risk on behalf of the public? If ... the public interest obliges the service to respond to public need, why should it not be equally in the public interest to compensate those who are foreseeably injured in the course of meeting that public need?'[1] As Denning LJ observed in *Watt*, it is always a question of balancing the risk against the end: 'I quite agree that fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger.'[2] On the facts, however, the ruling seems appropriate in light of 'the circumstances': a lower standard of proof towards a claimant voluntarily ferried in a vehicle he knew to be stolen appears justifiable. **3**

As regards self-defence, see *Ashley v Chief Constable of Sussex* in 15/12 nos 1–3 below. **4**

1 *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413, at [47] per Buxton LJ.

2 *Watt v Hertfordshire County Council* [1954] 1 WLR 835, 838.

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13. Scotland

Reekie v Norrie, Court of Session (Inner House), 21 December 1842
(1842) 5 D 368

Facts

1 The pursuer, George Reekie, a sailor, had been the first mate of a ship called the Isla, of which the defender, James Norrie, had been the master. Reekie claimed that during a voyage on the Isla he had been violently assaulted by Norrie. He sued Norrie in damages, claiming £100. The defender admitted that he had struck the pursuer with his fist, but he alleged that the pursuer had, at the time, been instigating a mutiny on board the ship, disobeying the defender's orders, and had changed the ship's course from that which had been ordered, thereby placing the ship into imminent peril.

Decision

2 The Inner House of the Court of Session held that the assault was fully established, and that no defence was supported by the evidence. They therefore found the defender liable in damages, assessed at the sum of £10. The court took the view that, after the assault was proved against the defender, the *onus* of proving a justification for committing it lay on him, but that he had failed to make out any justification for it. The court held that it would have been a complete defence to the assault if the defender had been able to prove that resort to 'personal correction' of the pursuer had been necessary for the 'maintenance of discipline and subordination', albeit that in administering such 'correction' the defender would have been bound to 'observe due moderation, and abstain from mere passionate violence'.

Comments

3 The report of the decision is a very short one (as is not untypical in a report from the period), but it makes it reasonably clear that the court thought that the captain of a ship would be justified in using physical force such as would ordinarily constitute an actionable assault if it was necessary to maintain discipline and good order on a ship, but that such necessity was not proved on the facts. This was not quite a case of reasonable 'self-defence' (also a valid defence to a delictual claim),[1] as there is no evidence that the captain himself was physically threatened or assaulted, but it does represent acknowledgement of special circumstances justifying the use of physical

1 See *Hallowell v Niven* (1843) 5 D 759, and *Ashmore v Rock Steady Security Ltd* 2006 SLT 207 (where the defence was unsuccessful).

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force. A justification in these circumstances is comparable to the justification recognised as pleadable by parents and (formerly) teachers in the use of reasonable physical chastisement of children.[2]

Though the specific judgment has not been relied upon in recent years, it was cited in the leading twentieth century work on delict as still good law.[3] 4

Titchener v British Railways Board, House of Lords, 24 November 1983

1984 SC (HL) 34, 1984 SLT 192, [1983] 1 WLR 1427

Facts

A 15-year-old girl was struck by a train while crossing a railway line. She raised an action of damages against the British Railways Board arguing that they had failed, in breach of their duty under sec 2(1) of the Occupiers' Liability (Scotland) Act 1960 ('the Act'), as occupier of the land, to take reasonable care to maintain a fence which separated the street from the embankment on which the line was situated. It was established after a trial of the facts that there had been gaps in the fence through which pedestrians could easily reach the line, and that the defenders had known that pedestrians were using this gap as a route to walk across the line. The pursuer admitted in evidence that she had crossed the line that way on several previous occasions, that she had known that it was dangerous to do so, and that she should have looked out for trains on the occasion of the accident, as she had done on prior occasions. At first instance, the judge found in favour of the defenders. The pursuer appealed, the Inner House of the Court of Session upholding the decision at first instance. The girl appealed again to the House of Lords. 5

Decision

The House of Lords upheld the decision of the lower courts, holding that (1) the judge at first instance had been entitled to hold that the respondents owed no duty to the appellant to maintain the fence in a better condition than it was on the grounds that she was aware of the danger, that oncoming trains could be seen from a quarter of a mile away, and that she had not alleged any complaint as to the way in which the train had been operated; (2) even if the respondents had failed in their duty to maintain the fence, the appellant had failed to prove as a matter of probability that the accident would have been prevented had the fence been maintained; and (3) in any event, the respondents had established a defence of *volenti non fit* 6

2 As recognised in English authorities such as *R v Hopley* (1860) 2 F & F 202 (a case of appalling brutality, in which a schoolmaster beat a pupil to death), and *R v Newport Justices* [1929] 2 KB 416.

3 See *DM Walker*, The Law of Delict in Scotland, vol 1 (1966) 333, 339.

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injuria, as the appellant was well aware of and accepted the risk of crossing the line while trains were running along it. This defence was given statutory form in sec 2(3) of the Act.

Comments

7 This decision is the principal Scots authority setting out the defence to an action in delict that the injured party suffered injury in circumstances indicating that he/she knew of and accepted the risk of injury. Both knowledge of the risk involved, and an indication that, in acting as he/she did, a defender was accepting that risk, is required for the defence to operate. Such a voluntary assumption of the risk of injury by a party is referred to by reference to the maxim *volenti non fit injuria* (often translated as 'to a willing party, no injury is done').

8 In the specific instance of the Act, the defence is given statutory form, sec 2(3) stating that:

> 'Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.'

9 One argument of the appellant was that she was too young to appreciate the risk of what she was doing. Consistent with other judicial pronouncements discussed earlier, the view was again taken at all levels in this case that, in Scots law, there is no hard and fast rule as to a minimum age at which a person is deemed to appreciate the need for the exercise of care in their actions: it is always a question of fact, to be determined in relation to the specific party in question,[4] as the comments of Lord Fraser in the House of Lords regarding the attitude of the injured girl, and her awareness of the risks, indicates.[5]

14. Ireland

Ross v Curtis, High Court, 3 February 1989

Unreported

Facts

1 The plaintiff was one of three intruders who broke into the defendant's shop at 4am to rob from it. The defendant lived in an adjacent house, with an interconnecting

4 See comments of Lord Avonside in the Inner House, 1984 SC (HL) at 47.

5 See comments of Lord Fraser, 1984 SC (HL) at 56 f.

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door. He was in possession of a large sum of money – proceeds from the shop and another business. The defendant fired a warning shot at the intruders with a legally held .22 rifle. The bullet hit the plaintiff in the skull; the plaintiff survived and sued the defendant for battery. The plaintiff pleaded self-defence and defence of property.

Decision

Barr J held that the defendant did not act in 'reckless disregard for the safety of the Plaintiff'; the firing of a warning shot was reasonable in the circumstances and the inaccuracy of the aim was inadvertent and understandable. The claim was dismissed. **2**

Comments

Reasonable force may be used to defend persons or property (it is not confined to self-defence; one can protect third parties);[1] force is reasonable if it is proportionate to the risk and greater latitude is allowed with respect to criminal trespassers posing a potentially serious risk to life (hence the reference to recklessness).[2] **3**

Other defences, which may possibly be regarded as justifications, include, waiver,[3] necessity,[4] statutory authority[5] and discipline of children.[6] **4**

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1 *Dullaghan v Hillen & King* [1957] Ir Jur Rep 10; *Gregan v Sullivan* [1937] Ir Jur Rep 64; *People (AG) v Keatley* [1954] IR 12; *Lynch v Fitzgerald* [1938] IR 382. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) §§ 22.105 ff & 23.57 ff; *E Quill*, Torts in Ireland (4th edn 2014) 194 ff; *J Tully*, Tort Law in Ireland (2014) 195 f, 215 f.

2 Proportionate force is a question of fact, dependent on all the circumstances of the case. The reference to recklessness in Barr J's judgment is criticised in *R Byrne/W Binchy*, Annual Review of Irish Law 1989 (1990) 440, suggesting that reasonableness is the proper standard for both self-defence and defence of property.

3 *O'Hanlon v ESB* [1969] IR 75; also considered in *McComiskey v McDermott* (3g/14 nos 1–4). See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 20.68 ff; *E Quill*, Torts in Ireland (4th edn 2014) 446 ff; *J Tully*, Tort Law in Ireland (2014) 341 ff.

4 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 22.68 112, § 23.52 ff; *E Quill*, Torts in Ireland (4th edn 2014) 202; *J Tully*, Tort Law in Ireland (2014) 216.

5 *Woodhouse v Newry Navigation Co* [1898] 1 IR 161; *Burke v South Dublin County Council* [2013] IEHC 185; *Dempsey v Waterford Corporation* [2008] IEHC 55. See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 22.133 ff, § 23.06 ff, § 24.102 ff & § 25.46 f; *E Quill*, Torts in Ireland (4th edn 2014) 197 ff, 232 f & 255; *J Tully*, Tort Law in Ireland (2014) 195 f, 216, 218, 225, 250 f & 268.

6 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 22.113 ff; *E Quill*, Torts in Ireland (4th edn 2014) 203; *J Tully*, Tort Law in Ireland (2014) 216 ff.

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16. Denmark

Østre Landsret (Eastern Court of Appeal) 12 May 2004

FED 2004.1325

Facts

1 In order to resist a wrongful assault from a person, V, the defendant, A, wilfully strangulated V to death. A explained that the incident occurred on a boat and that he had been afraid of losing his life as a result of the assault. In the criminal proceedings, the spouse and son of the late V put forward a claim for loss of dependency against A. A pleaded not guilty with reference to sec 13 of the Criminal Code[1] on self-defence and with respect to the claim in tort he refused to be considered liable for the said loss.

Decision

2 The court held that A ought to have known that V could die from the said strangulation and thus he was guilty of violating sec 246 of the Criminal Code. The exact nature of V's assault on A was not established by the court, but it found sufficient evidence to conclude that V had provoked A to feel panic-stricken and agitated. In assessing whether A had acted in lawful self-defence under sec 13(1) of the Criminal Code, the court held that A had manifestly exceeded the limits of what was reasonable. Nevertheless, A was right to feel that his life was threatened by V's assault and therefore he was acquitted according to sec 13(2) of the Criminal Code. With respect to the claim for loss of dependency, the court held that A should have known that the strangling would cause V's death and therefore A was liable. However, the court reduced the amount to be compensated by A on the grounds that A was defending himself.

Comments

3 The case deals with the question of when a given act can be considered an act of lawful self-defence under criminal law and tort law. Under sec 13(1) of the Criminal Code, a defendant can avoid punishment provided: (a) that his/her acts were necessary to resist or ward off a present or imminent wrongful assault; and (b) that they do not manifestly exceed the limits of what is reasonable in view of the danger of the assault. In the present case, A's self-defence was not justified under sec 13(1) but under sec 13(2) which sets out that a person may be exempt from punishment if

1 Consolidated Act No 871 of 4 July 2014.

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his/her actions can be attributed to the fear or excitement produced by the assault he was trying to ward off. It is generally accepted that the fundamental principles of sec 13(1) of the Criminal Code apply to tort law to the effect that a tortfeasor may avoid liability if he/she acts in self-defence. However, if the conduct of the tortfeasor is exempt from punishment according to sec 13(2), it is less clear if he/she will avoid liability in tort also. The present case shows that the courts may be reluctant to exempt the tortfeasor from liability in such situations but instead they may choose to reduce the compensation payable to the claimant. The most important other grounds of justification recognised by Danish tort law are *negotiorum gestio*[2] and consent.[3]

18. Sweden

Högsta domstolen (Supreme Court) 8 November 1974

NJA 1974, 585

Facts

An improvised ball game without any specific rules was played between two groups of boys aged 7 to 13 years. When one of the players hit the ball, his club smashed into another player's face, injuring his eye. **1**

Decision

The court found that a ball game – even if improvised – can be considered as a normal and acceptable leisure activity, even if it involves some risks of injury. Therefore a blow from a club cannot automatically give rise to a tort claim. In a joint game, a milder application of the *culpa* rule has to be applied, and a player should not be liable in tort to another player if no specific conditions demand this, such as ruthlessness or an action that clearly falls outside the normal game. Although the boy was aware that another player was near, it was not clear that he knew that the other was so close that he could be touched by the club. Due to these circumstances, the player was not liable for the eye injury. **2**

Comments

The case shows that the grounds for justification may be present to a greater or lesser degree and, therefore, they are suitable for inclusion in a balanced evaluation **3**

2 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 76 f.

3 *B von Eyben/H Isager*, Lærebog i Erstatningsret (7th edn 2011) 77–82.

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of the total picture of liability for an action. To put it another way, the justification – and this is correct even for self-defence – is not an issue of an independent factor that 'takes away' liability which otherwise would be established for a specific action; instead factors both 'for' and 'against' liability will have to be considered and balanced. Thus, one can pragmatically consider it as a matter of choice of words as to whether the existence of more or less exonerating grounds of justification leads to the exclusion of liability on the basis of lowered standards of action (within the application of the *culpa* rule) or by direct application of a justification.

19. Finland

Korkein oikeus (Supreme Court) KKO 2013:60, R2011/580, 5.8.2013/1588
<http://www.finlex.fi>

Facts

1 One afternoon, V had threatened A and X after which A had contacted the police. In the evening, V forcibly entered the apartment of A and X, pushed X to the floor and began strangling him with a rubber truncheon. While X was being strangled, A struck V 22 times in the face, chest and limbs with a knife with a blade of 7 cm. She continued stabbing V, even after V had ceased his attempts to strangle X. However, after releasing X, V had tried to open the door and let his friend in.

2 The court of appeal convicted A of aggravated assault, on the grounds of excessive use of force. A appealed to the Supreme Court, demanding that the charges and compensation claims be dismissed.

Decision

3 According to the Supreme Court, A and X, who were smaller in stature than V, had reason to fear for their lives and health, especially as V had already threatened them that afternoon and had intruded into their home with a rubber truncheon. The court found A guilty of aggravated assault, on the basis of excessive use of force. However, because A's behaviour was forgivable under the circumstances, the court did not impose any penalty. Nevertheless, even if A was (found guilty but) released from criminal liability, on the basis of her negligence as defined in TLA ch 2, sec 1(1), she was liable to compensate V for the damage she had caused. Because she did not challenge the amount of compensation or call for its adjustment, the Supreme Court did not change the court of appeal's decision in this respect.

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Comments

Chapter 4 (515/2003) of the Finnish Criminal Code (39/1889) includes grounds for exemption from liability. According to sec 4, an act that is necessary to defend against an ongoing or imminent unlawful attack is lawful as self-defence, unless the act manifestly exceeds what in an overall assessment is to be deemed justifiable, taking into account the nature and strength of the attack, the identity of the defender and the attacker and other circumstances. As can be seen from the wording of this section, oral provocation does not give an individual the right to engage in physical violence. **4**

According to subsec 2, if the defence exceeds the limits of self-defence (excessive self-defence), the perpetrator is exempt from criminal liability if the circumstances were such that the perpetrator could not reasonably have been expected to have acted otherwise, taking into account the dangerousness and sudden nature of the attack and other elements of the situation. **5**

Section 5 of the same chapter states that an act other than that referred to above in sec 4, necessary to ward off an immediate and compelling threat to a legally protected interest, is permissible as an act of necessity if the act when assessed as a whole is justifiable, taking into account the nature and extent of the interest at risk and the damage and detriment caused by the act, the origin of the danger and other circumstances. **6**

If the act committed in order to protect a legally protected interest is not to be deemed permissible pursuant to subsec 1, the perpetrator is nonetheless free from criminal liability if the perpetrator could not reasonably have been expected to have acted otherwise, taking into account the importance of the interest to be rescued, the unexpected and compelling nature of the situation and other circumstances. **7**

In this case the Supreme Court paid very little attention to the question of compensation, not even mentioning what kind of compensation the defendant had been ordered to pay at the court of appeal. In Finnish court practice it is very typical that when the question of compensation is decided in a criminal case, the main focus is on the evaluation of the crime and the judgment on damages is subsidiary. **8**

See also KKO 2003:67, where A caused severe brain damage to V who, immediately prior to the assault, had verbally irritated A. V's behaviour was deemed insufficiently serious enough to provide grounds for adjusting the compensation sum. However, it was considered difficult for A to have foreseen that his actions would lead to V's particular injuries. Moreover, A's financial position was weak due to his state of health and large family. Taking into account these factors, as well as V's own behaviour just before the assault, there were specific reasons mentioned in TLA ch 2, sec 2(2) for adjusting liability to 75% of the damages. This led to compensation of FIM 60,000 (approx € 10,091) for pain and suffering, FIM 7,560 (approx € 1,272) for loss of earnings, FIM 690 (approx € 116) for medical expenses as well as FIM 413 (approx € 69) for other costs. **9**

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20. Estonia

Tartu Ringkonnakohus (Tartu Circuit Court) 13 May 2012
Civil Matter No 2-09-55061

Facts

1 A fight broke out between two youth gangs, the defendant belonging to one of them and the victim to the other. During the fight, the victim pushed the 16-year-old defendant, after which the defendant threw his mobile phone in the direction of the victim. At this time, the victim was about 5 metres away from the defendant. The mobile phone hit the victim in the face and broke his glasses. One of the glass shards penetrated the victim's eye, resulting in loss of sight in this eye. The defendant was found guilty in a criminal case for causing bodily injury to the victim. The Republic of Estonia (plaintiff) compensated the damage to the victim under the Victim Support Act via the National Social Insurance Board. The victim's claim for compensation of damage was transferred to the plaintiff according to the law and the plaintiff requested from the defendant compensation in the amount of compensation paid to the victim.

2 The county court dismissed the claim, finding that it was proven that the defendant caused the bodily injury to the victim in self-defence. The circuit court annulled the decision of the county court and sent the case back for review to the county court. The Supreme Court annulled the decision of the circuit court and sent the case back for review to the same circuit court.

Decision

3 The circuit court dismissed the claim with its new decision, but amended the reasoning of the county court's decision. The circuit court did not agree with the county court that the defendant had been acting in self-defence while performing the act he was accused of. The defendant's claim that the victim had pushed him was not disputed but the statements of both the victim and a witness indicated that, when the mobile phone was thrown, the victim was five metres away from the defendant and thus the victim's attack had ended by that time. The circuit court also referred to the criminal case law of the Supreme Court in which it has been found that a fight is a person's voluntary self-endangerment in which all the participants take into consideration the constant shifting of the role of the attacker and the defender and the possibility of harming one's health, which is why their behaviour cannot be regarded as averting an assault. Therefore, according to the Supreme Court, a fight that has taken place upon agreement of the parties rules out the right to claim that one acted in self-defence since the participants have agreed to damaging their own health. The circuit court observed the interpretation of the Supreme Court in the same case by referring to the fact that a tortfeasor can excuse his/her act under

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§ 1045 (2) 3) only when he/she caused the damage intentionally (with the only aim of defending himself/herself).

Because the defendant's conduct, ie throwing her mobile phone, caused the stated bodily injury to the victim, the defendant should be deemed objectively negligent as regards the possible consequences and she may be exempted from liability to compensate for the damage according to § 1050 (2) of LOA if she can prove that she was not internally negligent, taking into consideration the circumstances of the case and her character. 4

Comments

According to § 1045 (2) 3) of LOA, causing damage is not unlawful if the tortfeasor acted in self-defence or out of necessity. Therefore, causing injury as a result of self-defence rules out the delictual liability of the tortfeasor if the limits of self-defence are not exceeded when fending off an attacker. Estonian civil law has not defined the concept of self-defence or exceeding the limits of self-defence. However, § 28 (1) of the Penal Code (PC) does establish that an act is not unlawful if the person combats a direct or immediate unlawful attack against the legal rights of the person or of another person by violating the legal rights of the attacker and without exceeding the limits of self-defence. The concept of exceeding the limits of self-defence is provided by § 28 (2) of PC, according to which a person is deemed to have exceeded the limits of self-defence if the person, with deliberate or direct intent, defends himself/herself by means which are evidently incongruous with the danger arising from the attack or if the person, with deliberate of direct intent, causes evidently excessive damage to the attacker. 5

In this case, the circuit court found that the defendant had not acted in self-defence since the attack against the defender's health had already ended by the time the defendant threw his phone toward the victim. The circuit court also found that the claim that it was not self-defence is also supported by the fact that the defendant did not injure the plaintiff intentionally. The circuit court relied on the opinion of the Supreme Court in the same case (12 June 2012 Judgment No 3-2-1-72-12), according to which, in case of self-defence, the person who caused injury to the attacker must have acted with the intention of defending himself/herself or another person. Therefore, the injury to the attacker must have been caused with direct or indirect intent. This means that, in the case of the unintentional injuring of the attacker, the person who caused damage to the attacker cannot excuse himself for causing injury in the state of self-defence as a circumstance stated in § 1045 (2) 3) of LOA. The Supreme Court brought an example to illustrate its position: if a person is attacked, he/she takes out a firearm in self-defence (only to 'encourage' the attacker to stop) and it fires accidentally and injures the attacker, the person who took out the firearm cannot prove that he/she caused the injury in self-defence under § 1045 (1) 3) of LOA. However, this does not rule out the possibility 6

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that he/she may be freed from liability under civil law if he/she can prove that he/she was not negligent.

7 It should also be mentioned that the circuit court applied § 1050 (2) of LOA in this case, finding that the defendant was not liable for causing the damage.[1] It is debatable whether the young age of the defendant (he was 16 years old at the time of injuring the victim) and the circumstances of the case should influence the assessment of the defendant's fault in this case. Throwing a mobile phone at another person does not comply with the standard of required care (LOA § 104 (3)). The defendant should have proven that, due to his subjective characteristics, observance of this required care could not have been required of him.

8 This case could also qualify under 3a/20, 3d/20, 3g/20, and 8/20.

Harju Maakohus (Harju County Court) 17 June 2009

Civil Matter No 2-08-34756

Facts

9 The plaintiff visited the defendant and they began to argue, ending with a physical conflict. The statements of the plaintiff and the defendant on the circumstances of the conflict differed significantly. The statements of witnesses revealed that they woke up at night due to hearing noises from the street. After going outside, they saw the defendant holding a stone and running towards the plaintiff. One of the witnesses saw the defendant lying on the ground while the plaintiff was holding the defendant by the throat. The defendant tried to struggle free and another witness managed to separate the women.

10 The defendant admitted the fact that she bit the plaintiff on the arm to defend herself. The photos of the plaintiff submitted to the court show that she had haemorrhages below her eyes, a split lip, and a bite mark on her arm. The plaintiff sought compensation of pecuniary and non-pecuniary damage from the defendant in the amount of € 3,195.

Decision

11 The court deemed proven that the defendant had bitten the plaintiff and ordered the defendant to pay the plaintiff compensation for pecuniary damage in the amount of € 306 and for non-pecuniary damage, € 140.

1 LOA § 1050 (2): 'The situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration upon assessment of the culpability of the person for the purposes of this Chapter.'

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When assessing the unlawfulness of the defendant's act, the court stated that causing injury is not unlawful under § 1045 (2) 3) if the tortfeasor acted in self-defence or in an emergency situation. An act of self-defence is not unlawful according to § 140 of the General Part of the Civil Code Act if the limits of self-defence are not exceeded and, pursuant to § 141 (1), a person who causes damage in order to prevent danger to oneself or another person or to property does not act unlawfully if the damage is necessary to prevent the danger and the damage is not unreasonably excessive compared to the danger. 12

The court found that the defendant did not prove that she was defending herself against the attack by the plaintiff by biting, in accordance with § 140 of the General Part of the Civil Code Act, that is, acted in self-defence. In itself, biting would be an appropriate defence in response to being dragged by the hair by another person and would comply with the preconditions of self-defence to force the other person to release the hand that was being bitten and thus end the attack. However, it was not proven that the defendant acted in self-defence. 13

Comments

Although there were several problems as regards proof in this case, it was nevertheless clear that the defendant had bitten the plaintiff's hand. Unlawfulness of causing such damage may be ruled out due to a state of self-defence (LOA § 1045 (2) 3)). In this case, the defendant was unable to prove that she bit the plaintiff to avert her attack. The court nevertheless stated hypothetically that biting is a suitable measure against being dragged by the hair. 14

22. Lithuania

JR and ZR v Vilnius University Hospital Santariskiu Clinics, 30 March 2005

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-206/2005; <http://www.lat.lt>

For facts and decision see 3a/22 nos 1–2. 1

Comments

Article 6.253 CC ('Non-application of civil liability or exemption from it') lists the following grounds of exoneration or reduction of liability: *force majeure*, acts of the state, conduct of a third party, conduct of the victim, state of necessity, self-defence and self-help (actions of a person by which he lawfully enforces his right in instances where competent authorities fail to provide timely assistance and where, without such actions, the implementation of that right would be rendered impossi- 2

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ble or essentially obstructed). The list is not exhaustive, since other grounds of exoneration or reduction of liability are also permitted if established by laws or the agreement of the parties. Despite the long list, the grounds of exoneration or reduction of liability are not often employed in Lithuanian case law, perhaps mostly because of the wide application of strict liability[1] according to which most of the exoneration grounds cannot be relied on (with the exception of *force majeure*, intent and gross negligence of the victim).

3 The commented case is one of the examples where one of the grounds of exoneration, ie the consent of a victim, is discussed. Article 6.253(5) CC defines conduct of the victim as the acts committed through the fault of the victim himself/herself. The same norm provides that such acts may include the consent of the victim or assumption of risk. The consent of the victim shall not be given in breach of imperative legal norms, public order, good morals, and principles of fairness, reasonableness and justice. Although the definition of conduct of the victim and assumption of risk through fault is not precise, hopefully the shortcomings of the CC rule will be remedied in case law.

4 The main argument for the doctor's lack of care in this case was the failure of the doctor to act within the limits of the extent of the consent given by the minor patient's parents, even though the doctor was convinced that he was acting in the best interests of the patient. In this aspect the commented case is one of the rare cases which demonstrate that a duly informed patient's consent to a risky operation excludes both the doctors' unlawfulness and fault with respect to the materialisation of the risk. However, the consent does not exclude liability for medical malpractice.

23. Poland

Sąd Najwyższy (Supreme Court) 31 October 1950, C 281/50 (necessity)
OSNC 2/1951, item 44

Facts

1 V sued its employee, a bus driver, who damaged the bus when trying to save the lives of two pedestrians. On the evidence, A drove the bus with due diligence. When approaching a bus stop 'on demand', he spotted two persons, running across the road in order to catch another bus which was going in the opposite direction. In order to avoid running into the two passengers, the driver turned abruptly and caused damage to the bus.

1 See 1/22 no 7 and 3f/22 nos 5–8.

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Decision

The trial court held that a bus driven by an employee of a transport company is an 2
'alien thing' in relation to this employee. The thing (a piece of property) can lawfully be damaged in order to avert direct higher danger to human life or health posed by that thing. Hence, A acted in a state of necessity and cannot be ascribed any fault. The collision was in fact caused by the reckless behaviour of other persons. The Supreme Court affirmed the judgment.

Comments

If damage is caused in a state of necessity or as a consequence of self-defence, the 3
element of wrongfulness of conduct is lacking, which excuses the actor from tortious liability.

The Polish legislator has solved the question of necessity and self-defence in the 4
Civil Code. The reported case was decided under art 140 of the Code of Obligations (1933), which did not lay down the qualifications set out in the last words of the present art 424 KC. The wording of the latter article was drafted carefully. A person who destroys or damages another person's thing or kills or injures another person's animal in order to avert danger directly threatened by the thing or animal to himself/herself or others is not liable for the resulting damage. Liability can be avoided if the person in question did not cause the danger himself, if the danger could not otherwise have been averted, and if the interest preserved was clearly more important than the interest infringed (art 424 KC). This rule also covers sources of danger other than human behaviour (ie a threat must come from a thing or an animal). The legislative change in 1965 followed the pre-existing case law, of which the reported case is an example. The courts had recognised that the existence of the state of necessity was possible where the damage caused was proportionate to the interests which were being protected.

Sąd Najwyższy (Supreme Court) 16 April 2002, V CKN 1010/00 (legitimate public interest)

OSNC 4/2003, at 56

Facts

The plaintiffs (Vs) were 17 newly elected members of a city council, whose photo- 5
graphs appeared in the local newspaper under the title 'Mob in the Council. Are any of the SLD (social democratic party) councillors a Mafioso?'. Vs claimed that their personal interests, such as dignity, reputation and public trust necessary to fulfil the mandate of a councillor, were violated and therefore they sued the journalist (A) and his publisher (B) for damages and also demanded the publication of an apologetic statement in the newspaper.

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6 A and B argued in defence that they had received the information from an article in a German newspaper, which had previously published the accusations. The court of first instance held them liable for the negligent violation of the Vs' personal rights on the basis of arts 24 and 448 KC.[1] In the appellate court, the award was reduced by one third due to the local character of the newspaper and its poor financial position. The defendants filed a cassation with the Supreme Court.

Decision

7 The Supreme Court approved of the findings of the lower courts as to the conditions of A's and B's liability. The presumption of unlawfulness in art 24 KC[2] was not rebutted by the defendants by pointing to a legitimate social interest and imputed links with the mob of one of the councillors. The boundaries of the journalists' freedom of speech and right to information have been shaped by numerous cases, which impose certain requirements of a proper form, as well as of diligence, fairness and professional standards. The technique employed by the author of the publication was a blatant violation of the professional diligence. According to art 12 sec 1 of the Press Law,[3] a journalist has a duty to act diligently and honestly in collecting and using press materials, in particular he has a duty to check on the authenticity of the received information or to refer to its source. A sole reference to a source is not sufficient to fulfil this obligation. Thus, Vs have remedies on the basis of art 24 KC (compulsory apology, publication of the judgment in the newspaper) and art 448 KC (claim for non-pecuniary damages).

8 The degree of A's fault influences the assessment of damages and hence must be taken into consideration, along with other circumstances, in particular the type of the violated interest and the extent of the harm suffered, the intensity of the infringement, and the economic situation of the defendant.

Comments

9 A legitimate public interest is a defence against wrongfulness. Even if a journalist published untrue material, a legitimate public interest absolves him from liability if he acted diligently, including the manner of dissemination of information. The only

1 According to art 448 KC, in the event of infringement of personal interests, the court may award an injured person an adequate sum as compensation for non-pecuniary loss or, on his demand, award an appropriate sum for a designated social purpose, irrespective of other means necessary to eliminate the effects of the damage caused.

2 Pursuant to art 24 § 1 KC, 'anyone whose personal interest is threatened by another person's activities may demand that the activity cease, unless the activity is not illegal.'

3 Act of 26 January1984, DzU no 5, at 24 with later amendments.

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remedy left for the injured is a right to demand a correction of untrue information. The case shows a blurred distinction between fault (professional negligence) and wrongfulness in the field of liability of the mass media.

Sąd Najwyższy (Supreme Court) 29 October 2003, III CK 34/02

OSP 4/2005, item 54, with comments by *E Bagińska*

Facts

V underwent a neurological operation on her wrist. During the local anaesthesia her lungs were perforated and serious complications followed. The patient's hospitalisation was prolonged for a few weeks, during which time she suffered severe pain and was subject to further medical procedures. V now suffers from certain ailments. She claims damages for personal injury from the public hospital (the State Treasury). **10**

The regional and appellate courts dismissed the claim on the ground that the conduct of the anaesthesiologist was neither wrongful nor negligent. The court admitted the defence of the patient's consent, which was 'informed' and correctly given. The risk of complications was linked with the procedure, but in the absence of fault, the doctor/hospital does not answer for the effects of the realisation of this risk. The risk burdens the patient. In consequence, V did not prove negligence of a state functionary (the doctor), thus the cause of action based on art 417 KC[4] could not stand. **11**

Decision

As to the scope and effects of a patient's consent, the court emphasised that each medical intervention is linked with the risk of complications. A patient's consent does not embrace consenting to any complications or negative results of the intervention, especially when the patient is not aware of the possibility of such complications, but to typical post-operational complications. However, it does not include complications and injuries caused as a result of a physician's error or lack of skill. In particular, a patient does not bear the risk of a doctor erroneously damaging another organ during an operation. **12**

4 Pursuant to former art 417 § 1 KC, the State Treasury was liable for damage caused by a servant of the state in carrying out a delegated function. This provision was interpreted to require the fault of the servant in order to hold the State Treasury liable. Presently, public authority liability is based on unlawfulness.

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Comments

13 With regard to informed consent, the judgment rightly confirms the established jurisprudence.[5] A patient who expresses his/her consent to an operation, accepts the risk related to this operation ie to its direct, typical and ordinary effects of which he/she should have been instructed corresponding to the situation. There is a doctrinal dispute as to the legal nature of a patient's consent. The court adopts the approach that it is a declaration of will, the effect of which is the elimination of unlawfulness of a physician's medical intervention.

14 In other cases had a person consented to the infliction of personal injury by wrongful conduct (eg in certain sports) such an act would have been invalid as contrary to public policy – art 58 § 2 KC.

24. Czech Republic

Nejvyšší soud České republiky (Supreme Court of the Czech Republic)
30 September 2009
25 Cdo 4228/2007

1 For facts and decision see 3b/24 nos 1–7.

Comments

2 This case shows the consideration of the court as to which proportion of damage shall be borne by the primary wrongdoer, who intentionally acted with the aim of stealing a handbag (case of robbery), and the secondary wrongdoer, who protected his property by using a legally held firearm of necessity.

3 In general, the following cases of defence based on justification are acknowledged both by legal theory and case law:

- fulfilment of legal obligations;
- exercising a subjective right (*neminem laedit qui iure suo utitur*); however, the exercise must not intentionally interfere with rights of a third party without a legal reason and must not contradict 'proper morals';
- self-help;
- self-defence;
- necessity; and
- approval of the injured party.

5 The Law on the Professions of Physicians and Dentists deals with the obligation of informed consent in art 31–34 (Act of 5 December 1996).

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As regards the basic conditions for self-defence and necessity, both are defined in sec 2905ff NCC. Pursuant to sec 2905, a person who, by averting an imminent or unlawful attack on himself/herself or another, causes damage to the attacker is not obliged to compensate the damage caused. This does not apply if it is apparent that the attacked person may only have suffered minor harm or self-defence is obviously unreasonable, particularly because of the seriousness of the injury caused to the attacker when averting the attack. 4

As for necessity, pursuant to sec 2906 NCC, a person who averts imminent danger of harm to himself or another is not obliged to compensate damage caused as a result if it was not possible under the circumstances to avert the danger otherwise or if he/she does not cause such a result that is apparently as serious or more serious than the injury which he was threatened with. This does not apply if the risk arose as the result of the fault of the party actually averting damage. Finally, under sec 2907 NCC, in assessing whether someone acted in self-defence or of necessity, it shall be taken into account if he/she acted in excusable excitement of mind. 5

The other above-mentioned cases are not regulated by the generally binding laws; nevertheless, their application is undisputed. 6

As the respondent acted as a reaction to the conduct of the injured party and believed that a huge amount of money was being stolen, these facts directly influence any conclusion on the value of the protected interest, although the injured party was not aware of the amount of money in the handbag. But with his act, coordinated with other robbers, he obviously accepted the scope of risk. 7

25. Slovakia

Nejvyšší soud České republiky (Supreme Court of the Czech Republic) 17 May 2006, Case No 8 Tdo 572/2006

<http://kraken.slv.cz/8Tdo572/2006>

Facts

Security guards caught the claimant shoplifting in a department store. The claimant was asked to follow the security guards to a room for identification and personal checking. Suddenly he drew out a gun and pointed it at a guard, who was able to disarm the accused. The evidence showed that the security guards treated him properly and tactfully, which, according to the court, corresponded with the requirements of self-help envisaged by § 6 of the Civil Code.[1] 1

1 § 6: 'If a person is imminently threatened with an unjustifiable violation of a right, the person so threatened may himself avert such violation in an appropriate manner.'

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Decision

2 In the given case, the conduct of the security company employees, not a governmental authority, should be considered from the point of view of self-help under § 6 of the Civil Code, according to which, in a situation where a person is imminently threatened with an unjustifiable infringement of a right, the person so threatened may himself avert such infringement. This provision has an impact on exceptional cases of imminent threat when legal protection provided by governmental authorities authorised to do so could be given too late. Therefore, the Civil Code grants a threatened person the right to avert, in an adequate manner, by his own and unilateral activity, ie in fact by coercion, by his strength and power, an unjustified infringement imminently threatening his right. Legal circumstances allowed in self-help include: unjustified intervention/infringement, the right must be under imminent threat, self-help must be performed in an adequate manner, which is also related to the provisions of § 417 of the Civil Code, according to which any person who is threatened with damage must take measures to avert its occurrence in a manner appropriate to the circumstance of the threat.

Comments

3 As mentioned in civil law literature, self-help is not often applied in judicial practice.[2] From a long-term perspective, there has been no decision of the Supreme Court considering any case concerning the conduct causing damage in the case of necessity or self-defence. The decision of the Supreme Court of the Czech Republic quoted above is from criminal practice. In this case, the court showed unambiguously that the conduct of the security guards satisfied the elements of self-help in protecting private rights.[3] The judicial decision also defined the elements of the conduct in the circumstances of self-help in which unlawfulness of such conduct is excluded. In the practice of the Czech courts, a similar decision is quoted in the case of the conduct of a ticket inspector who detained a passenger who could not show him a valid ticket.[4]

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2 See *K Eliáš et al*, Občanský Zákoník – Velký Akademický Komentář, vol 1 (2008) 784 ff.

3 See also *F Púry*, K nepřípustnosti nutné obrany proti útokům zaměstnanců soukromé bezpečnostní služby učiněným za podmínek svépomoci při ochraně zboží v obchodním domě, Trestněprávní revue 1/2007 (6) 18.

4 Decision of the Supreme Admnistrative Court of the Czech Republic, 9.10.2010, No 1 As 34/2010.

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26. Croatia

Judgment of the Supreme Court of the Republic of Croatia No Rev 178/06-2 of 17 January 2007

<www.vsrh.hr>

Facts

A went out to the city with B, her boyfriend, who parked their car in front of a pub. As they were leaving the pub, the owner also left and started an argument with B. Soon after two more men, including V, came out of the pub and started a fight with B. V and another person started banging on the car and tried to pull out a door handle. A became frightened and attempted to escape. She started the engine and began to reverse. V held on to the car and placed his feet under a tyre when he was knocked down and the car ran over him. 1

V claimed damages from both A and B, especially pointing to the fact that A had been driving the car without a driving licence. The lower courts dismissed V's claim due to the fact that A acted in justified self-defence. V filed a request for revision of the lower courts' decisions before the SCRC. 2

Decision

The SCRC upheld the lower courts' decisions. According to the SCRC, A acted in a state of imminent danger and made use of justified self-defence, which she was entitled to, pursuant to the relevant regulation. The fact that A drove a car without a driving licence bore no relevance to the case at hand since A used a car exclusively for the purposes of escaping an imminent danger she was exposed to. Since A committed a tort in justified self-defence, she could not be held liable for the damage thereby sustained, held the SCRC. 3

Comments

Pursuant to art 1052 of the COA, a person who causes damage to someone attacking them will not be held liable for damage, unless self-defence is excessive. Self-defence is perceived in legal writings as one of the instances where unlawfulness is excluded.[1] Hence, an action which would otherwise be characterised as unlawful will nevertheless be allowed or at least tolerated if a person undertakes that action in order to avoid or deflect an actual attack by another person. And this is exactly what happened in the case at hand. The defendant drove a car without a driving 4

1 See *P Klarić/M Vedriš*, Građansko pravo [Civil Law] (11th edn 2014) 603.

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licence thereby inflicting injuries to the victim. However, since the defendant undertook that action in order to avoid being attacked by the victim, she was freed from liability.

Judgment of the Supreme Court of the Republic of Croatia No Rev 779/00-2 of 28 January 2004

<www.vsrh.hr>

Facts

5 V lent a car to A, who used the car to smuggle weapons from Austria to Croatia. V knew that A wanted to borrow the car for this purpose. In fact, V gave money to A to buy him a gun. Slovenian customs officers discovered weapons and seized the car in customs proceedings. V sued A for damage inflicted due to the failure to return his car. The court of first instance accepted V's claim and awarded him damages. The court of second instance affirmed the first instance decision.

Decision

6 The SCRC reversed the lower courts' decisions and dismissed V's claim. The SCRC established that V knew for what purposes A needed the car and held that by lending the car to A, V approved of A's actions. Accordingly, the SCRC held that A cannot claim damages caused by an action of which he approved.

Comments

7 Apart from justified self-defence,[2] and legitimate self-help, the concept of 'consent of a victim' is yet another instance where unlawfulness is excluded. Pursuant to art 1054, para 1 of the COA, a person who has allowed, to his own detriment, another person to undertake certain actions will not have a right to request from the latter compensation for damage caused by these actions. Hence, if a tortfeasor inflicts damage with the consent of a victim, he/she will not be held liable for that damage. The SCRC obviously decided to apply the 'consent of a victim' concept to the case at hand. However, it is rather doubtful if this concept should have been applied to this case at all. Pursuant to art 1054, para 2 of the COA, a victim's statement of consent to an action which is prohibited by law shall be nullified. Since smuggling weapons undoubtedly is an action prohibited by law, it seems that the victim's consent to his

2 See judgment of the SCRC No Rev 178/06-2, 14/26 nos 1–4.

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car being used to smuggle weapons should not have been taken into account in deciding this case, as it was ineffective as a result of its nullity.

27. Slovenia

Judgment of the Supreme Court RS (Sodba Vrhovnega sodišča RS) II Ips 205/2000, 26 October 2000

<http://www.sodisce.si/vsrs/odlocitve/6811/> (7 March 2015)

Facts

After a quarrel, the plaintiff threw the defendant to the ground, held him by the throat, throttling him. The defendant then took out a knife and cut the plaintiff's hands. The plaintiff was 33 years old and in much better physical condition than the 65-year-old defendant. The first instance court rejected the plaintiff's claim for damages, which the second instance court confirmed. 1

Decision

The Supreme Court rejected revision as unfounded. In the opinion of the Supreme Court, the defendant could only defend himself against the attack of the younger and stronger attacker, who had increased the level of his attack, with a knife. The defendant acted in self-defence and, therefore, his behaviour was not unlawful. 2

Comments

The Code of Obligations does not define self-defence but only determines that anyone who in self-defence causes damage to an attacker is not liable to pay compensation unless the self-defence was excessive (para 1 of art 138 of the Code of Obligations). The criteria for defining self-defence have thus been formed by theory and court practice, which are modelled on the arrangement of self-defence in criminal law. Self-defence is a defence that is urgently necessary for someone to prevent a simultaneous unlawful attack on themselves or someone else.[1] If all the conditions 3

1 See *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 239; *D Jadek Pensa*, 138. člen 135. člen Obligacijskega zakonika (OZ) [Article 135 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 808; judgment of the Supreme Court II Ips 316/1997, 21 October 1998 – computer database Ius-Info, (28 February 2015).

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are met for self-defence, then behaviour and damage are not unlawful, and the attacker will not be held liable in tort.[2]

4 We talk about excessive self-defence when the defence has all the characteristics of self-defence but the proportionality between the attack and defence is exceeded. When the boundaries of self-defence have been overstepped, the causer of damage behaves unlawfully so his tortious liability is not precluded.[3] In calculating damages, the court also takes into account the attacker's contribution to the occurrence of damage and, in relation to his fault, proportionally reduces the compensation.[4]

5 Self-help also precludes unlawful behaviour and damage. Self-help is only allowed if someone prevents a violation of rights when direct danger threatens and if such protection is necessary and if the method of preventing the violation corresponds to the circumstances in which the danger occurs. Anyone who in self-help has caused damage to the person who caused the need for it is not liable to compensate the damage that occurred (art 139 of the Code of Obligations).

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 951/1994, 6 June 1996

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/3864/> (7 March 2015)

Facts

6 An unknown vehicle incorrectly overtook a column (of vehicles) because of which the defendant, driving in the opposite direction, had to swerve onto the hard shoulder in order to prevent a head-on collision. When driving on the hard shoulder, the defendant began to swerve and collided with the plaintiff. The court of first instance rejected the plaintiff's claim for compensation. The second instance court in an interim judgment partially granted the plaintiff's claim and decided that the defendant was basically responsible for the damage caused to 70% and, in relation to the level of damages, returned the case for retrial at first instance.

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2 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 239.

3 *D Jadek Pensa*, 138. člen OZ [Article 136 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 809.

4 Para 1 art 171 of the Code of Obligations: An injured party who also himself/herself contributed to the occurrence of damage or caused the damage to be greater only has the right to a proportionately smaller amount of compensation.

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Decision

The Supreme Court rejected revision as unfounded and confirmed the interim judg- 7
ment of the court of second instance. The Supreme Court stressed that the traffic accident was caused by an unknown driver, who improperly overtook. The defendant justifiably withdrew to the hard shoulder to prevent a head-on collision with the unknown vehicle driving in the opposite direction. The defendant thus behaved under pressure (in extremity). The injured party can claim compensation from the defendant, but may not request compensation greater than the benefit the defendant had therefrom.

Comments

It is permissible to cause damage under pressure, ie, when someone prevents a si- 8
multaneous danger to themselves or someone else, which is not possible to prevent otherwise and thus the damage caused is not greater than the damage that threatened. An action performed under pressure is not unlawful.[5]

With the occurrence of damage caused under pressure, an injured party can 9
claim compensation from the person who is responsible for the risk of damage or from those who would have incurred damage. However, only in the amount of the benefit which they had from it. If the person who prevented the risk of damage from another suffered any damage as a result of his/her actions, he/she can claim compensation of the damage to which he was thereby exposed from the person from whom the damage was diverted (paras 2 and 3 of art 138 of the Code of Obligations).

Judgment of the Supreme Court (Sodba Vrhovnega sodišča RS) II Ips 43/2013, 16 January 2014

<http://sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/2012032113063753/#>
(7 March 2015)

Facts

A physician performed a diagnostic examination of the plaintiff, a colonoscopy, to 10
which the plaintiff agreed. During the investigation, the physician noticed two polyps on the mucous membrane of the intestine. She removed the larger polyp and biopsied the smaller one. The physician had not informed the plaintiff in ad-

5 *B Novak*, Pravni subjekti, Fizična oseba in njene sposobnosti [Legal subjects, natural persons and their capacities], in: M Juhart/D Možina/B Novak/A Polajnar-Pavčnik/V Žnidaršič Skubic, Uvod v civilno pravo [Introduction to civil law] (2011) 239; *D Jadek Pensa*, 138. člen OZ [Art 138 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 809.

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vance that she would remove the polyp. She did not explain to the plaintiff that she had found a polyp, why removal of the polyp was necessary, in what way she would remove it or whether other means of removing the polyp were available and what the possible complications during and after the operation could be. The physician only informed the plaintiff about the removal of the polyp when the plaintiff suffered pain because of removal of the polyp. The plaintiff claimed compensation for non-pecuniary loss (pain and suffering) from the physician and the healthcare institution where the physician was employed. The courts of first and second instance judged that the physician and the healthcare institution at which the physician was employed were solidarily obliged to pay the plaintiff € 15,720 (16.2 average net monthly salaries) compensation for pecuniary and non-pecuniary loss.

Decision

11 The Supreme Court rejected revision and confirmed the judgments of the first and second instance. In view of the fact that the physician did not communicate with the plaintiff and did not provide any explanations in connection with the endoscopic operation to remove the polyp, the Supreme Court concluded that, in the case in question, she did not fulfil the obligation to explain and that the plaintiff did not agree to the operation. The physician only informed the plaintiff of the removal of the polyp when the plaintiff began to suffer pain. In the opinion of the Supreme Court, informing a patient about an operation after the event is not enough to fulfil the duty to explain. The plaintiff did not agree to the operation because she did not know that it would be performed. Because the plaintiff did not consent to the operation, which was otherwise performed professionally and without any medical error, it was impermissible and was thus an encroachment on the plaintiff's physical integrity.

Comments

12 Unlawfulness can also be excluded by consent of the injured party. If an injured party consented to the act which led to damage, he/she cannot claim compensation for damage that occurred because of it (para 1 of art 140 of the Code of Obligations). The consent of an injured party is not valid and does not exclude unlawfulness if it conflicts with morals, compulsory regulations or basic constitutional principles (para 2 art 140 of the Code of Obligations).

13 In the case in question, the physician did not explain to the plaintiff before the diagnostic investigation of the possibility of her polyps being removed and did not obtain her consent and similarly did not inform her and gain her consent during the diagnostic investigation immediately prior to the removal of the polyps. Because the plaintiff did not consent to the operation, which was otherwise performed profes-

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sionally and without medical error, the operation was impermissible and thus an encroachment on the plaintiff's physical integrity.

29. European Union

European Court of Justice, 8 October 1996

Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, Dillenkofer and Others v Germany [1996] ECR I-4867

Facts

The claimants sued Germany for failing to transpose the Package Travel Directive[1] in due time. While it should have been implemented by 31 December 1992, the corresponding German provisions did not enter into force before 1 July 1994. The claimants had in the meantime booked travel packages from organisers who had gone bankrupt without providing for the security as required by the Directive. The referring German court asked the ECJ for a preliminary ruling on a multitude of questions relating to the potential liability of Germany. Inter alia, it specifically asked whether 'the right to compensation on grounds of breach of Community law is not dependent on a finding of fault in general, or at any rate of wrongful non-adoption of legislative measures, on the part of the Member State'. **1**

Decision

The court first repeated the three conditions of state liability under the *Francovich* doctrine (sufficiently serious breach of a rule of law that was intended to confer rights on individuals, direct causal link between the breach and the damage sustained). A breach of Community law is sufficiently serious if a Community institution or a Member State 'manifestly and gravely' disregarded the limits on their law-making powers. If there was hardly any or even no discretion left to the Member State, however, 'the mere infringement of Community law may be sufficient' (para 25). If a Member State fails to take any of the measures required by a directive within the time limit it sets, this constitutes a breach serious enough to trigger liability. **2**

The court went on, however, to expressly state that such liability 'cannot depend ... on the existence of intentional fault or negligence on the part of the organ of the State to which the infringement is attributable' (para 28). Failing to transpose **3**

1 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158 , 23.6.1990, 59–64.

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a directive in due time therefore 'constitutes *per se* a serious breach of Community law' (para 29).

4 The court was not impressed by Germany's argument that the period foreseen by the Directive for implementation was too short since in addition to introducing new legislation adjustments in the economic sector and cooperation with stakeholders were also necessary. 'That kind of circumstance cannot justify a failure to transpose a directive within the prescribed period' (para 53). If the period really had been too short, Germany should have taken appropriate initiatives on Community level to be granted an extension of the period (para 54).

Comments

5 As cited from the ruling above, the ECJ expressly confirmed that state liability under the *Francovich* doctrine does not require fault. However, this has to be seen in light of the context that the time period for transposing a directive into national law is defined by a fixed (end) date, leaving no leeway to the Member States to decide when the appropriate time would be. Therefore, the infringement of Community law at stake here (missing the deadline) has to be distinguished from substantive failures to implement a directive, eg by taking inadequate measures beyond the range of discretion granted by that legislation.

6 The ruling is further interesting in light of its clarification that Member States cannot excuse themselves ex post by claiming that the period foreseen for implementation had been too short. Instead, they have to be pro-active and seek an extension at (now) Union level with the appropriate institutions while the period is still running rather than waiting for it to expire.

30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

Various scenarios

1 1. Three intruders break into a shop at 4 am in the course of a burglary. The shop owner lives in an adjacent house with an interconnecting door. He is in possession of a large sum of money – proceeds from the shop and other businesses. He fires a warning shot at the intruders with a legally held .22 rifle. The bullet hits one of the intruders in the skull. He survives and sues the shop owner for damages. The shop owner pleads self-defence and defence of property.[1]

1 See the Irish case: *Ross v Curtis*, Unreported IEHC, 3 February 1989, above 14/14 nos 1–4 with comments by *E Quill*.

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2. In another case, a night watchman is assaulted by a stranger in a quarry while at his lookout post. After a brawl, the attacker manages to snatch one of the two weapons that A is carrying. When he threatens to shoot the night watchman, the latter shoots and wounds the attacker fatally. The attacker's widow and children claim damages from the night watchman, holding that he has negligently caused the death of their husband and father.[2] 2

3. A minor boy, protecting his friend from physical bullying, punches the bully and injures him. The parents of the bully claim compensation from the boy in tort for the damages suffered.[3] 3

4. A detective in a department store watches someone trying to steal a handbag (valued at € 50). After the thief has passed the cashiers without paying, the detective starts chasing him. When he finally gets hold of him on a footpath outside the store, he accidentally pushes him and they both fall on a third party's car which is parked near the exit. The owner of the car seeks compensation for material damage to the car.[4] 4

Solutions

a) Solution According to PETL

The PETL address grounds of justification in art 7:101. The provision reads: 5

> '(1) Liability can be excluded if and to the extent that the actor acted legitimately
> (a) in defence of his own protected interest against an unlawful attack (self-defence),
> (b) under necessity,
> (c) because the help of the authorities could not be obtained in time (self-help) ....
> (2) Whether liability is excluded depends upon the weight of these justifications on the one hand and the conditions of liability on the other.
> (3) In extraordinary cases, liability may instead be reduced'.

'*Self-defence*', according to art 7:101(1)(a) PETL, is the immediate[5] defence of one's own protected interests against an 'unlawful attack', that is, against an attack by which the attacker violates the standard of conduct required from him and consequently injures or endangers the protected interests of the attacked. In jurisdictions belonging to the Germanic legal family, the issue would be discussed under the 6

2 See the Spanish case: Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 28 June 1996, RJ 1996\4905, above 14/10 nos 1–3 with comments by *M Martín-Casals*/*J Ribot*.

3 See the Italian case: Cass (Italian Court of Cassation) 25 May 2000, no 6875, above 14/9 nos 1–7 with comments by *N Coggiola*/*B Gardella Tedeschi*/*M Graziadei*.

4 See the Austrian case: OGH (Austrian Supreme Court) 13 December 1988, 5 Ob 573/88, EvBl 1989/72, above 14/3 nos 4–9 with comments by *E Karner*.

5 Compare PETL – Text and Commentary (2005) art 7:101, no 8 (*B Koch*).

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heading *Rechtfertigungsgründe* (grounds for justification).[6] The PETL merge wrongfulness and fault, laying the focus on a breach of the objectively required standard of conduct (under the PETL called 'fault', as defined in art 4:101ff).[7] They therefore do not state that a defence under art 7:101 excludes 'wrongfulness', but rather provide that self-defence may exclude (or reduce)[8] 'liability' for damage occasioned through the act in self-defence.

7 The defence of '*necessity*', under art 7:101(1)(b) PETL, requires an actual threat to the defendant's (or someone else's) interests which leaves the defendant with no choice but to infringe the interests of a *third party* (as opposed to those of the attacker) to ward off the danger.[9]

8 Last but not least, '*self-help*' under art 7:101(1)(c) PETL 'involves behaviour to restore the defendant's legitimate interests when interference therewith is no longer pending, but has already happened in the past, so that the defendant's action can no longer be seen as an immediate response thereto'.[10] The official commentary gives the example of an owner of stolen goods who accidentally discovers them in the hands of another person on the move. If the 'help of the authorities' cannot 'be obtained in time' the victim may help him- or herself.[11]

9 Whether liability is actually excluded 'depends upon the weight of these justifications on the one hand and the conditions of liability on the other', art 7:101(2). The outcome of this test depends on a weighing of the interests of the parties that are involved. For example, 'in defending property of an inferior value, one is not allowed to kill or even wound the attacker seriously'.[12]

10 In the first of the above scenarios, the intruders threatened to steal a large sum of money and injure the shop keeper's property rights. Property enjoys extensive protection under the PETL, cf art 2:102(1) and (3). The shopkeeper threatened by these unlawful attacks was authorised, pursuant to art 7:101(1)(a) PETL, to act in self-defence. He intended to fire a warning shot but hit one of the intruders in the skull, injuring him severely. Under the circumstances of the case, the firing of a warning shot was arguably reasonable and the inaccuracy of the aim may have been inadvertent and understandable. The shopkeeper's liability may thus be excluded in this case, the actual outcome however depending on the precise circumstances of the case (for instance, whether the intruders were armed, the visibility at the mo-

6 PETL – Text and Commentary (2005) art 7:101, no 1 with references (*B Koch*).
7 Compare above 1/30 nos 4–8.
8 See art 7:101(3) PETL.
9 PETL – Text and Commentary (2005) art 7:101, no 11 (*B Koch*).
10 PETL – Text and Commentary (2005) art 7:101, no 14 (*B Koch*).
11 PETL –Text and Commentary (2005) art 7:101, no 15 (*B Koch*).
12 PETL –Text and Commentary (2005) art 7:101, no 2 (*B Koch*).

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ment of confrontation, the distance between the attackers and the shopkeeper, the fact that they were three against one, etc).

11 In the second case, the stranger threatened to shoot the night watchman, injuring him in his health or even life. Health and life enjoy most extensive protection under art 2:102(1) and (2) PETL. In order to protect himself from being shot, the night watchman was authorised to choose a safe way for himself against the imminent threat to his life, including arguably shooting the attacker to death, if there was no other safe way available to protect himself.

12 In the third scenario, the minor boy defended a friend against physical bullying by another child. He punched the bully once and injured him. In this scenario, the minor did not injure the bully's bodily integrity for the purpose of protecting himself, but in order to defend his friend's safety. Although the text of art 7:101(1)(a) PETL mentions only the case of self-defence (that is, the defence of one's own protected interest against an unlawful attack), such text will arguably also cover defence of someone else's protected interests against an imminent attack (*Nothilfe*, as opposed to *Notwehr*).

13 In the fourth of the above scenarios, when pursuing a thief and in order to protect the department store's property, the detective damaged a car belonging to a third party. This case raises the question of whether liability for damage to the car owner's property is excluded under the PETL by virtue of 'necessity', pursuant to art 7:101 (1)(b). Just as in the case of self-defence, this depends on a weighing of the interests involved, and will eventually be very doubtful in the present case, given that the damage to the car might be considerably more than the threatened damage to the apartment store's property (which amounted to just €50).

b) Solution According to the DCFR

14 The DCFR addresses grounds of justification in Chapter 5.[13] Article VI–5:202 (Self-defence, benevolent intervention and necessity) DCFR reads:

> (1) A person has a defence if that person causes legally relevant damage in reasonable protection of a right or of an interest worthy of legal protection of that person or a third person if the person suffering the legally relevant damage is accountable for endangering the right or interest protected. ...
> (3) Where a person causes legally relevant damage to the patrimony of another in a situation of imminent danger to life, body, health or liberty in order to save the person causing the damage or a third person from that danger and the danger could not be eliminated without causing the damage, the person causing the damage is not liable to make reparation beyond providing reasonable recompense.

13 For art VI–5:301 and the defence of 'mental incompetence' see above 10/30 nos 1–17.

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15 Article VI–5:202 DCFR establishes the defences of '*self-defence*' in para (1), both in cases of imminent danger to one's own legally protected interest (*Notwehr*) and that of a third party (*Nothilfe*), and in cases of 'necessity' in para (3). Para (1) leads to complete exoneration resulting in no liability at all, whereas under para (3), liability is limited to a reasonable recompense.

16 The person acting in self-defence 'must have opted for a means of defence that was reasonable under the circumstances. That will be so only where the means chosen were apt and necessary to fulfil the intended aim. Furthermore the act of self-defence must not have been out of all proportions to the interest under threat – even if there were no other possibilities of defence'.[14]

17 In the first of the above scenarios, the intruders threatened to steal a large sum of money and to injure the shop keeper's property rights. These rights enjoy protection under art VI–2:206 DCFR. The shopkeeper intended to fire a warning shot but hit one of the intruders in the skull, injuring him severely. The shooting was appropriate as a means of stopping the intruders. Whether severely injuring the intruder was necessary and – as a means to defend one's property – not out of proportion, depends on the circumstances of the particular case, just as under the PETL (for instance, whether the intruders were armed and threatened the body or life of the shopkeeper; even if unarmed, that they were three against one; the visibility at the moment of confrontation; the distance between the attackers and the shopkeeper; whether a non-fatal shot to the leg would have been sufficient to defend himself; etc).[15]

18 In the second scenario, the stranger threatened to shoot the night watchman. Body, health and life enjoy protection under art VI–2:201 DCFR. If one's life is in imminent peril, shooting the attacker is appropriate as a means to counter such threat and the protected interest was in proportion with the injured right of the attacker. It is again submitted that in order to protect himself from being shot, the night watchman was authorised to secure himself from the imminent threat to his life, which would arguably include shooting the attacker to death if he had no other secure means of protection available to him.[16]

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14 *C v Bar/E Clive*, DCFR, art VI–5:202, Comment B (p 3666).

15 If the shopkeeper resorted to an unreasonable method of defence (so-called excessive self-defence), his liability is to be analysed according to the general rule in art VI–3:102 (Negligence) DCFR. See below 15/30 nos 1–14. If the shopkeeper cannot be blamed for over-reacting because he was exposed to a life-threatening situation, he will not be liable for negligence. Cf *C v Bar/E Clive*, DCFR, art VI–5:202, Comment B (p 3667 and Illustration 5).

16 Should a non-fatal shot in the leg have been sufficient to safely defend himself, the defence in art VI–5:202(1) DCFR would not be available and the general rule in art VI–3:102 (Negligence) DCFR would apply instead. See below 15/30 nos 1–14. If the night-watchman cannot be blamed for over-reacting because he was exposed to a life threatening situation, he will not be liable for negligence. Cf *C v Bar/E Clive*, DCFR, art VI–5:202, Comment B (p 3667 and Illustration 5).

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In the third scenario, the minor boy did not injure the bully's bodily integrity for the purpose of protecting himself, but in order to defend his friend's safety. This situation is explicitly covered by art VI–5:202(1) DCFR (acting in defence 'of an interest worthy of legal protection of that person *or a third person*', a case of *Nothilfe*, as opposed to *Notwehr*). 19

In the fourth scenario, the detective damaged a car belonging to a third party in order to protect the department store's property. The question is whether liability for damage to the car owner's property is excluded by virtue of 'necessity'. 20

According to art VI–5:202(3) DCFR, '[w]here a person [the detective] causes legally relevant damage to the patrimony of another [the car belonging to a third party]' he may only invoke the defence of necessity if he acted 'in a situation of imminent danger to life, body, health or liberty' to another. Para (3) thus 'deals with situations in which a defence against a direct threat to life, body or freedom is possible only by making use of another one's property'.[17] The person acting does not commit a legal wrong and the owner has to endure the interference with his rights but then has a right to 'reasonable recompense' (as opposed to full compensation), following the maxim 'endure, then claim'.[18] Para (3) therefore only covers 'situations where there is a clear legal discrepancy between the values of the conflicting interests. … The rule assumes that in those situations property rights, possessions and money cede to life, body and freedom. For conflicts *within* both groups, a general defence cannot be formulated. Such situations have to be solved by reference to the general rules on liability for intention or negligence'.[19] 21

In the fourth scenario, the detective damaged the property of a third party, the car owner, in order to protect the property of his employer. Since the protected interest was not superior to the injured, he cannot invoke the benefit of art VI–5:202(3) DCFR and is consequently liable according to the general provision in art VI–3:102 (Negligence). 22

31. Comparative Report

All the reporters submitted cases, except for the ones reporting for Malta, Norway, Latvia and Romania. There is a certain overlap with the chapter 'Self-defence against non-misconduct' (ch 15). 1

General remarks: the central question in this category is whether and to what extent a tortfeasor can avoid redressing the damage he/she caused by bringing for- 2

17 *C v Bar/E Clive*, DCFR, art VI–5:202, Comment D (p 3667 f).
18 *C v Bar/E Clive*, DCFR, art VI–5:202, Comment D (p 3668).
19 Ibid.

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ward grounds of justification such as self-defence, state of necessity, consent of the victim or the like.

3 The main grounds of justification are self-defence, state of necessity, defence of others, self-help, and the conduct of the victim or of a third party.[1] Though the rules applying to these grounds may vary, they are similar to a large extent.

4 Dogmatically there exist different possibilities to treat the different grounds of justification. One could consider that damage inflicted by self-defence is not unlawful or that there is no fault, or that neither unlawfulness nor fault exist. Finally one can also simply declare that there is no obligation to redress the damage, without deciding on unlawfulness or fault. If certain authors do not mention the argument used – lack of unlawfulness or fault – it seems to suggest that the question is not considered as relevant.

5 Already in Roman law self-defence was admitted under the legal adage *vim vi repellere licet*.[2] However it was submitted to a number of preconditions: the attack had to be unlawful and imminent and the defence could not be unreasonable or excessive; further subjective elements such as the defender's intention to inflict harm could be taken into account.[3] Other grounds allowing the infliction of harm were necessity, self-help, (lawful) actions of magistrates and consent by the victim.[4] These juridical concepts have survived to a very large extent in modern law.

6 *Unlawfulness and fault*: in a significant number of countries a rightful ground of justification excludes the unlawfulness of the damaging act.[5] In others, rather in the French tradition, where unlawfulness is not mentioned in the Code, it is the lack of fault of the author that excludes the obligation to redress the damage.[6]

7 *Imminent and serious danger*: imminent danger is often a precondition,[7] as well as its seriousness.[8] The Italian report mentions as a condition the absence of alterna-

1 For an extensive enumeration, see Lithuania (14/22 no 2f); Czech Republic (14/24 no 3); see also DCFR/PETL (30/14 nos 6–8, 14–16).

2 Historical Report (14/1 no 4).

3 Historical Report (14/1 no 4).

4 Historical Report (14/1 no 6); for necessity (nos 7–11); for self-help (nos 12–16).

5 Germany (14/2 no 3); Greece (14/5 no 3f); Netherlands (14/8 no 3); Italy (14/9 no 2f); Spain (14/10 no 2f); Portugal (14/11 nos 4, 6); England and Wales (14/12 no 2); possibly Denmark (14/16 no 3); Finland (14/19 no 4); Estonia (14/20 nos 5, 12); Lithuania (14/22 no 4); Poland (14/23 no 3); Slovakia (14/25 no 3); Croatia (14/26 no 4); Slovenia (14/27 nos 2f, 5, 8).

6 France (14/6 no 3); Belgium (14/7 no 14); Spain (14/10 no 2f); Lithuania (14/22 no 4); Poland (14/23 no 9).

7 Germany (14/2 no 2); Austria (14/3 nos 4–7); Switzerland (14/4 nos 13–15); Belgium (14/7 no 12); Netherlands (14/8 no 3); Italy (14/9 no 6); Poland (14/23 no 3f); Slovakia (14/25 no 2); Croatia (14/26 no 3); Slovenia (14/27 no 3); DCFR/PETL (30/14 no 21).

8 France (14/6 no 7); Belgium (14/7 no 2).

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tives to avert the damage;[9] however and even if the reports do not explicitly mention it, it is not unlikely that in other countries the same condition is also in force.

Proportionality: as to the means used, they have to be limited to what is necessary to avert the treat[10] and proportional to the threat.[11] The excitement of the overreacting person under attack, caused by the threat and the dangerousness of the attack can, in certain cases, be a ground of justification resulting in a reduced award of damages or in none at all.[12] **8**

Another precondition is that the defendant has not provoked the situation of self-defence;[13] this is probably also a very largely applied condition, despite the fact that only a few reporters mention it. **9**

Consent of the victim: consent of the victim generally has the effect that the damaging act is not considered as unlawful.[14] Likely, the tortfeasor has as a defence that the victim consciously accepted a risk, which ultimately materialised resulting in damage.[15] **10**

Error: in certain cases the defendant acted erroneously believing that he/she was entitled to do so.[16] Under German law, such an act is considered unlawful, even if the author's error was excusable.[17] But one would have to consider that he/she was not at fault and is thus not held liable. **11**

Balance of interests: in certain countries the author of the damage has to balance the interest, on the one hand, in saving the protected good and, on the other hand, in not endangering other goods by his/her protective behaviour;[18] this balance has to be comprehensive, taking into account the value of the protected inter- **12**

9 Italy (14/9 no 7).

10 Austria (14/3 no 2); Denmark (14/16 no 3).

11 Germany (14/2 no 2f); Austria (14/3 no 7); France (14/6 no 7); Belgium (14/7 nos 2, 6); Netherlands (14/8 no 3); Italy (14/9 no 4); Portugal (14/11 no 8); Ireland (14/14 nos 1–3); Finland (14/19 no 4); Estonia (14/20 no 5); Slovakia (14/25 no 2); Croatia (14/26 no 3); Slovenia (14/27 no 4); Slovenia (14/27 no 8).

12 Denmark (14/16 no 3); Finland (14/19 no 5).

13 Germany (14/2 no 3); Poland (14/23 no 4); Czech Republic (14/24 nos 5, 7).

14 Germany (14/2 no 3); Denmark (14/16 no 3); Poland (14/23 nos 11, 12); Croatia (14/26 no 7); Slovenia (14/27 no 12).

15 Scotland (14/13 nos 5–7).

16 Germany (14/2 no 3); Austria (14/3 no 2); Belgium (14/7 nos 13–15) about an error resulting in a road traffic accident; Portugal (14/11 no 10).

17 Germany (14/2 no 3); differently Austria (14/3 no 6).

18 Austria (14/3 no 5f); Switzerland (14/4 nos 10–12, 14); Greece (14/5 no 3f); on the balance of interests between the need for a doctor rushing to the aid of a patient to respect speed limits and the imminent peril of his patient, Belgium (14/7 no 9); on the balance of interests in general Portugal (14/11 no 5); England and Wales (14/12 no 3); Finland (14/19 no 6f); Poland (14/23 nos 2, 4, 9).

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ests, the dangerousness of the protective act, alternative courses of behaviour and the 'general interest in freedom of action'.[19]

13 *Execution of a duty*: several reports mention as a ground of justification the execution of a (legal) duty,[20] such as damage inflicted by a policeman in the performance of his duty, but also physical violence from the master in order 'to maintain discipline and good order on a ship'.[21] Again execution of a duty might well be a generally accepted rule in Europe, even if only a few reports mention it.

14 *Assumption of a risk*: if the victim has assumed a risk resulting in damage, in Spain he/she cannot sue a third person in charge of monitoring the security of a place or installation (such as a road, river, ski piste, etc) for damages.[22] Also a person who illegally builds a house in an industrial zone cannot claim damages from the pre-existing industry for nuisances such as noise, etc.[23] Again these rules could also apply in other countries.

19 Austria (14/3 no 5 f).

20 Netherlands (14/8 nos 1–4); Italy (14/9 no 6); Portugal (14/11 no 6); England and Wales (14/12 no 2); Czech Republic (14/24 no 3).

21 Scotland (14/13 no 2 f).

22 Spain (14/10 nos 4–6).

23 Spain (14/10 nos 7–10).

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15. Self-Defence against Non-Misconduct

2. Germany

Bundesgerichtshof (Federal Supreme Court) 26 May 1987, VI ZR 157/86

NJW 1987, 2509

Facts

The claimant was a policeman who was injured by the defendant when on duty. The claimant and a colleague were called to a property where the alarm had sounded for unknown reasons in the middle of the night. Since the door to the half-dark property was closed, the two policemen climbed over the fence and searched for criminals with their torches on and pistols in their hand. The defendant, who lived in the only flat on the site, had also heard the alarm sound. Since he knew that there had recently been a series of burglaries, he took his pistol and, wearing only his trousers, he also began to search for criminals on the site. When he saw the two policemen, he assumed they were burglars since they were not wearing police uniforms. There was some shouting between them and the claimant fired a warning shot. The defendant reacted by shooting at the claimant, injuring him very severely. The claimant claimed compensation for his damage, in particular for pain and suffering. **1**

Decision

The lower court had granted the claimed compensation. The defendant was not excused because of faultless putative self-defence. He should have assumed that policemen would come to the site due to the alarm and that burglars would already have left because of the alarm, which had continued to sound for a while. The BGH reversed this decision and remanded the case. It held that it was highly likely that the defendant acted without fault although there was no real situation of self-defence but only one which he – erroneously, though faultless – had assumed and was allowed to assume because the two policemen were not identifiable as such. **2**

Comments

If a person erroneously believes that he/she is entitled to exercise self-defence although there is no unlawful attack, the defence and any ensuing damage is wrongful.[1] However, the defender may be excused if he/she erred without fault (so-called putative self-defence).[2] Thus, the defender made a mistake but an excusable one. **3**

1 *H Grothe* in: Münchener Kommentar (7th edn 2015) § 227 no 26.

2 *H Grothe* in: Münchener Kommentar (7th edn 2015) § 227 no 26.

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Such excuse will be accepted where a reasonable person in the circumstances would have suspected an attack.

5. Greece

Areios Pagos (Greek Court of Cassation) 402/1989

EEN 57 (1990) 97

Facts

1 For many years A had been cultivating a field of 14 acres in a location which belonged to the state and had been paying an amount of money as compensation for its use, although he was making use of the field without holding a relevant right. In 1982, he planted clover in the field. The next year, it became known to the associations of landless people of the region in a document signed by the prefect that public land, which included the aforementioned field, would be allotted to landless cultivators for collective cultivation. Thus, the defendants, who belonged to the said associations, acting together, occupied the aforementioned field, which had been planted with clover, ploughed it and planted barley. They acted in this way, however, despite doubts as to whether or not the concession was valid for fields already planted with clover and without waiting for clarification from the responsible authority. The day after the fields were taken over, the Direction of Agriculture asked the regional police station to prevent the destruction of the sowed clover fields although they had been unlawfully planted. The result of these actions was to deprive A of the harvest and consequently from the income he could have received. It should be noted that, without the said behaviour on the part of the defendants, A would have continued to work the field and to pay compensation for its use.

Decision

2 According to the Court of Cassation, 'self-help', when performed without the conditions of art 282 GCC being fulfilled, constitutes an unlawful act and a person who takes matters into his own hands, without holding a relevant right, is obliged to pay damages, even if he erroneously assumed that the conditions of lawful 'self-help' existed in the particular case. In this case, the court held that the defendants, by taking over the field and destroying the clover which had been planted, committed a tort in the form of unlawful 'self-help' against A, whose behaviour (planting the field with clover) did not constitute misconduct, as not only had he been cultivating the field for many years and had been paying an amount of money as compensation for its use but also the instructions given by the Direction of Agriculture to the regional police station were not to destroy fields which had already been planted with

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clover. Thus, as there was no right to 'self-help', the court held that the defendants should pay damages.

Comments

According to art 283 GCC, if the conditions of the law for 'self-help' are not met, or if the person used excessive force, he is liable for damages. He has the same obligation if he erroneously thought that the conditions of the law existed. In these cases the behaviour continues to be unlawful, which is why an obligation for damages exists.[1] The legislator, considering 'self-help' an extremely harsh and dangerous means, considered it necessary to provide that a person who acts, whilst erroneously thinking that he acts in 'self-help', acts at his own responsibility and bears the risk of his error, irrespective of whether his mistake was excusable or not.[2] **3**

9. Italy

Corte di Cassazione (Court of Cassation) 21 December 2004, no 23696
Leggi d'Italia

Facts

The driver of a bus belonging to Atac, the transport company of Rome, had to suddenly brake to avoid a collision with the car driven by A, which had entered the traffic lane from his parking space without any warning. As a consequence of the sudden braking, Mrs V, a passenger on the bus, fell and injured herself. Mrs V sought compensation from Atac and its insurer, Ascoroma, as well as from, Mr A3, the car driver, and his insurance company, *La Nationale* for the damage suffered. **1**

Decision

The *Corte di Cassazione* refused to order A1, the bus company, and A2, its insurer, to pay compensation, holding that the bus driver's action was the necessary consequence of the irregular driving of the car driver, and that her right to compensation for the damages was, therefore, excluded by art 2045 Civil Code. Moreover, her right to an indemnity for her damage, as provided for by the same article, was also excluded, because the court affirmed that the same damage would have occurred even if the bus driver had not braked, as the consequence of seeking to prevent a collision with the car. **2**

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1 See, among others, *I Karakostas*, Law of Torts (2014) 113.

2 For one of the most recent analyses see *N Georgiades* in: A Georgiades, Syntomi Ermineia tou Astikou Kodika [Short Interpretation of the Civil Code, SEAK] I (2010) 283 no 7.

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Comments

3 Article 2045 Civil Code[1] provides the ground of justification in cases involving a 'state of necessity', where the injury was caused by an action of the agent compelled by the necessity of saving himself/herself or others from a present danger of serious personal injury, if the danger was neither voluntarily caused by the agent nor otherwise avoidable. This civil provision is identical to the criminal provision contained in art 54(1) of the Criminal Code.

4 This ground of justification only applies to cases of damage caused to avoid an actual risk of serious personal injury, when the damage is unavoidable and the peril was not caused by the same agent. The defence action must be the direct consequence of the present danger, to avoid, according to the latest doctrine, not a danger which could not be prevented, but rather damage that could not otherwise be avoided.

5 The cause of the danger must be unintentional. The meaning of the prerequisite of an unintentional cause of the danger was largely disputed, although the prevailing opinion is that the state of necessity is excluded in all cases where the agent acted voluntarily, even if his actions were neither negligent nor malicious. The danger can also be caused by a negligent third party. In the opinion of most scholars, on the basis of the provision of art 54(2) of the Italian Criminal Code, this ground of justification cannot be applied where the person has a duty to expose himself to a peril.[2]

6 The harm to the person that the injurious action aimed to avoid must be serious in nature. The rule does not apply to economic losses, although it covers personality rights, the authorship of an invention, personal moral rights[3] and, possibly, diffused or collective interests.[4]

7 While self-defence completely excludes the right of the injured party to compensation, because he was the cause of the injuring reaction, the person injured by an act committed under necessity can recover compensation, precisely because he did not trigger the danger which caused the reaction. Nonetheless, the claimant will

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1 Article 2045 (State of necessity): 'If a person who commits an act which causes injury was compelled by the necessity of saving himself or others from a present danger of serious personal injury, and the danger was neither voluntary caused by him nor otherwise avoidable, the person injured is entitled to compensation in an amount equitably established by the court.'

2 Cass 27 April 1960, no 935, Mass Giur Civ 1960, 356; Cass 8 May 1971, no 1316, Mass Foro It 1971, 399; *B Troisi*, Lo stato di necessità nel diritto civile (1988) 25; *A Venchiarutti*, La legittima difesa, in: P Cendon (ed) La responsabilità civile (1988) 483; *R Scognamiglio*, Responsabilità civile, in: Nov dig it, vol XV (1968) 665.

3 *F Mantovani*, Diritto Penale, Parte generale (2007) 260; *G Visintini*, Trattato breve della responsabilità civile (3rd edn 2013) 611.

4 *B Troisi*, Lo stato di necessità nel diritto civile (1988) 19; *M Franzoni*, L'illecito (2nd edn 2010) 296.

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only be awarded an indemnity, of an amount calculated on the basis of an equitable evaluation of the interests at stake, rather than full compensation.[5]

10. Spain

Sentencia del Tribunal Supremo (Judgment of the Supreme Court) 24 January 1995

RJ 1995\141

Facts

A was positioned on a rock during a hunting party when all of a sudden a 200 kg male grizzly bear came out of the trees. The animal saw him and quickly went straight up as if it were going to attack him. A, fearing for his life, struck down the animal with five consecutive shots. A was prosecuted for the offence of breaching the Hunting Act, but was acquitted and no compensation for damage was ordered. The private organisation, the Fund for the Protection of Wild Animals, appealed, claiming, inter alia, that, even if the defendant was not guilty of the crime because he acted under necessity, he had to compensate for the damage caused consisting of shooting down a protected species whose value was estimated at PTA 1,500,000 (€ 9,000). 1

Decision

Undeniably, there is a parallel – from the standpoint of this case – between the legitimate defence against the unjust aggression of a person and the defence against an unprovoked attack from an animal. It is against all logic and legal sense that when a person legitimately defends himself from the unlawful aggression of another, he is not required to compensate for the damage he may have caused to the aggressor or to his family, and, that if he defends himself from an unprovoked attack from an animal, he must compensate for the damage caused by its loss. 2

Comments

This judgment applied the previous Penal Code which, regarding the exemption of criminal responsibility for having committed a crime in a state of necessity, established that the persons 'in whose favour damage has been prevented, in proportion to the profit obtained' were civilly liable. Currently art 20 I 5 CP also exempts parties from criminal liability in these cases, but art 118.1 3rd CP now provides that 'those 3

5 Cass 19 July 2002, no 10571, Danno resp 2003, 1, 103; Cass 19 August 2003, no 12100, Mass Giur It 2003.

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persons in whose favour damage has been prevented, in proportion to the damage they have avoided, if it can be assessed, or, if this is not the case, in the proportion that the judge or the court establish according to their prudent judgment' will be held civilly and directly liable. Accordingly, saving interests which are not valuable in terms of money, such as life or physical integrity, may entail the duty to compensate even though the amount will be determined at the discretion of the court.

4 The case under comment brought about the paradox that the good sacrificed to save one's own life and physical integrity was also the origin of the risk created to those interests. Because no unlawful act could be attributed to a person in a legal sense, it makes no sense to justify the death of the bear on the basis of legitimate self-defence. Accordingly, the only way to circumvent the criminal responsibility was to adduce necessity. Unlike the situation in which someone destroys the property of another to save his own property from a threat coming from a natural event or from conduct of a third party, in this case the issue at stake was that a person connected with the element which caused the situation of necessity claimed to be entitled to a certain amount as compensation for the damage to a protected wild animal. This is why the Supreme Court rejected the claim by also making reference to the fact that the possessor of animals is strictly liable under art 1905 CC. It implied thereby that, as a matter of fact, if the hunter had not killed the bear but had suffered injuries, the public body responsible for the protection of wild animals in this area would have been liable to him. Although the claimant was a private ecologist association, this fact should not make any difference as to the final outcome of the case, since the public interest at stake (ie protection of wild animals) is the same as when it is defended by the competent public bodies.

12. England and Wales

Ashley v Chief Constable of Sussex, House of Lords, 23 April 2008

[2008] 1 AC 962

Facts

1 The deceased was the subject of a police raid on his flat (as part of an investigation into drug trafficking and a stabbing). Although unarmed, he was shot dead by an officer within seconds of entering his bedroom which was dark. The officer alleged he acted in self-defence and was acquitted of murder on that basis. The deceased's family brought a number of tortious actions against the chief constable, who was vicariously liable for his officer's conduct, some of which were admitted. One issue before the House of Lords was whether the test for self-defence in cases of assault and battery is the same in civil law as in criminal law.

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Decision

Their Lordships observed that, in criminal law, the ingredients for self-defence include a subjective (honest) belief by the assailant that he was about to be subjected to an attack. Such a defence is open to him even if the belief can be regarded as unreasonable. In civil actions, however, the defence is only afforded to the inflictor where that belief is based upon reasonable grounds. The underlying justification for this distinction is that the two branches of law are significantly different: one aiming at the imposition of punitive sanctions for the purpose of maintaining social order and the other at balancing fairly between two conflicting rights and interests. In addition, Lord Neuberger pointed to the fact that, historically, criminal law also required the threat of the attack to be reasonable. However, following a recommendation in a report by the Criminal Law Revision Committee, judges adapted the law to its current position. 'While such recommendations and cases may have some persuasive force outside the criminal law, they do not have to be followed in a field where they were not intended to apply and where they do not have to be applied as a matter of logic.'[1] **2**

Comments

Lord Scott put it cogently in stating that every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also under both civil and criminal law to defend themselves against an imminent risk of attack and, if need be, to kill another whether or not they were mistaken.[2] In a civil action, however, it would be unfair, as Lord Neuberger observed, to rob the perceived aggressor of his civil rights irrespective of the *reasonableness* of the defender's belief.[3] This is because the ends which the two fields of law aim to achieve are different. If the belief is unreasonable (eg because the threat in fact fell a long way from constituting misconduct), there is no right to defend oneself against it. **3**

1 [2008] 1 AC 962, at [88] per Lord Neuberger.

2 [2008] 1 AC 962, at [18].

3 [2008] 1 AC 962, at [86].

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14. Ireland

Osbourne v Minister for Justice, High Court, 13 April 2006

[2006] IEHC 117, [2009] 3 IR 89[1]

Facts

1 The plaintiff claimed to have been injured by the police when they attempted to arrest a neighbour of the plaintiff. The police had a search warrant for the suspect's apartment and the plaintiff's adjacent one.

Decision

2 The IEHC found that the search warrant for the plaintiff's apartment suffered from a technical invalidity, but no liability could attach to the police in the absence of knowing and deliberate violation of statute or constitutional rights on their part. The police officers involved were found to have been acting in good faith when obtaining and executing the warrant in respect of the plaintiff's premises; no liability was imposed in respect of either the entry into the plaintiff's property or the alleged personal injury.

Comments

3 This suggests that inadvertent error in respect of lawful authority may provide a defence in some circumstances, even though the injured plaintiff has not misbehaved.[2] It is accepted in texts that reasonable mistake as to the existence of circumstances justifying self-defence or defence of third parties will not render a defendant liable, provided the force used is proportionate to the perceived risk;[3] there is a statutory provision, sec 5 of the Criminal Law (Defence and the Dwelling) Act 2011, which allows a defence based on the defendant's subjective perception of risk.[4]

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1 Noted by *R Byrne/W Binchy*, Annual Review of Irish Law 2006 (2007) 590 ff.

2 Contrast *Kessopersadh v Keating* [2013] IEHC 317, noted by *E Quill*, Ireland, in: E Karner/BC Steininger (eds), ETL 2013 (2014) 319, nos 26–29, where the police were held liable for trespass to property for entering in excess of lawful powers even though the officers acted in good faith in the belief that a lawful power was being exercised.

3 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 22.111; *E Quill*, Torts in Ireland (4th edn 2014) 195; *J Tully*, Tort Law in Ireland (2014) 216. There is one criminal law decision supporting this approach, *The People (AG) v Keatley* [1954] IR 12.

4 See *BME McMahon/W Binchy*, The Law of Torts (4th edn 2013) § 23.57 ff; *E Quill*, Torts in Ireland (4th edn 2014) 196; *J Tully*, Tort Law in Ireland (2014) 216.

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17. Norway

Høyesterett (Norwegian Supreme Court, Hr) 4 January 2012
Rt 2012, 5

Facts

A was present at a Hallowe'en party in a hall belonging to a sports club. He went with five friends. His group did not get along with another group of guests at the party. The two groups of guests began to argue, and some members of the groups engaged in physical fights with each other with bare hands. A felt that he was threatened and that he had to get out of the building. On his way out, he saw two people from the other group coming towards him. Because of the fact that he felt threatened, A hit one of the mentioned two persons in the face with a plastic sword. The victim did not actually at any point intend to attack A. The victim was injured and claimed compensation for damages, so-called *oppreisningserstatning* (non-pecuniary loss compensating pain and suffering) based on skl § 3-5. 1

Decision

The question for the court was whether A should be acquitted on the basis that he did not act wrongfully as long as he thought that he was going to be attacked. The rule in skl § 1-4 second section prescribes that there is no liability for damage inflicted in order to protect oneself from an attack. The rationale behind the rule is that a person who attacks another must accept that the other person will protect himself without being held liable afterwards. The Supreme Court found that this rule applied only in cases where the victim actually attacks the alleged tortfeasor. This was not the case, and therefore A could be liable in damages on the basis of the general *culpa* rule. Due to the fact that the appeal court had not discussed the rules and the facts mentioned above sufficiently, the Supreme Court chose to declare the decision void. 2

Comments

The case is a seldom example of the so-called 'putative' right to defend oneself. The Supreme Court solved the problem quite elegantly by a narrow interpretation of the rule of the right to defence in skl § 1-4 excluding 'imagined' or 'putative' defence. When the rule in § 1-4 does not apply, the damaging act must be regulated by the general *culpa* rule. Hence A was deemed to be liable. He was perceived to be negligent in his belief that he was going to be attacked. 3

Accordingly, his strike against the victim, using the plastic sword, could not in any way be justified on the facts found proven. The decision of the appeal court was declared void and in such circumstances, the case must be tried once again by the 4

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lower courts, based on the understanding of the law that the Supreme Court expressed.[1]

18. Sweden

Högsta domstolen (Supreme Court) 14 October 1988

NJA 1988, 495

Facts

1 The owner of goats in an enclosure killed a dog, which had attacked some of the goats. In the criminal law proceedings, the goat owner was found guilty; since the value of the dog was many times higher than that of the goats, he could not invoke the ground of justification. The issue in the civil tort proceedings was if he could invoke self-defence as a ground of justification.

Decision

2 The court found no misconduct, etc on the part of the dog owner. Nevertheless, the goat owner had, through no fault of his own, found himself in an emergency situation. And the only reason that his action was not seen as justifiable (in the criminal law part of the judgment) was the great difference between the values of the animals. Therefore, the compensatory sum was adjusted to two thirds of the actual damage.

Comments

3 Although the ground of justification in this case did not lead to relief from liability, the judgment shows an alternative way of dealing with the same issue. The same circumstances that are involved in the argument about justification can also be part of the discussion concerning the adjustment of the amount of damages. In this way, a tortfeasor, in certain cases, can invoke a line of 'almost justification reasoning' – concerning adjustment (even theoretically down to zero) – even in cases of self-defence against an action which does not constitute misconduct.

1 The case is thorougly commented on by Koch, see *S Koch*, Putativt nødverge – Rt 2012 s 5, Tidsskrift for Erstatningsrett, forsikringsrett og velferdsrett 2013, 45 f.

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22. Lithuania

UAB 'Ad Locum' v VA, 28 May 2008

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) Civil Case No 3K-3-257/2008; <http://www.lat.lt>

Facts

The defendant, a former employee of the plaintiff, after he had been fired, failed to return his work car and garage to the employer for more than two years. The defendant returned the property when the plaintiff filed suit for restoration of the property and compensation for the damage caused by the illegal possession of the car and use of the garage. The defendant argued that he had not returned the property before because he had exercised his right of retention as the plaintiff failed to pay him salary that was due. 1

The court of first instance dismissed the claim for compensation of damage arguing that unlawfulness and fault had not been proven by the plaintiff. 2

Decision

The appeal instance court overruled the decision of the court of first instance and the Lithuanian Supreme Court agreed. The Lithuanian Supreme Court held that the right of retention is a right of self-defence and shall not exceed the limits of it. If limits of self-defence are exceeded, the damage caused shall be compensated. As the defendant at the moment of termination of the employment contract was the lawful keeper of the property, he could have exercised the right of retention until he was fully paid by the former employer. Therefore, the Lithuanian Supreme Court recognised that the defendant lawfully exercised his right of retention as self-defence until the plaintiff fully settled all due payments with the defendant. The right of retention was exercised unlawfully after the plaintiff had settled his account with the defendant, therefore the defendant was held liable for the damage inflicted by the unlawful keeping of things after that moment. 3

Comments

This case is one of the rare cases of the Lithuanian Supreme Court where self-defence is applied as a ground for justification. Damage incurred by the plaintiff because of the lost possession of the property was compensated by the Lithuanian Supreme Court only in part because the courts held that the defendant lawfully exercised his right of retention of the property as self-defence until he was fully paid by his former employer. 4

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26. Croatia

Judgment of the County Court in Zagreb No Pp-113/06 Gž-597/08 of 19 February 2008

Unreported

Facts

1 V sued A for trespassing on V's property. A, who lived in the same building as V, carried out the replacement of old power lines. For this purpose, he went to the attic where power lines were situated and replaced them. Due to works on the replacement of power lines, V was deprived of the power supply. Once the replacement was complete, the power supply was re-established. V sued A, claiming that A trespassed on his part of the attic without permission and deprived him of power supply for some time.

2 The court of first instance dismissed V's claim.

Decision

3 The County Court in Zagreb, acting as an appellate court, affirmed the first instance decision. The court established that old power lines had to be replaced in order to eliminate the danger of a fire breaking out. In this respect, the court held that A undertook a legitimate act aimed at preventing the occurrence of damage and for that reason the court opined that A's actions were not unlawful. Since there was no unlawfulness in A's actions, V's claim had to be dismissed.

Comments

4 Although in this case the courts dealt with possessory protection, ie a claim brought under the rules of property law, and not a damages claim, the judgment of the County Court in Zagreb bears particular significance for the issue of misconduct. It is obvious that in this case the courts employed the concept of necessity as a legitimate reason to exclude unlawfulness. Since the defendant acted with the legitimate aim of preventing the likely occurrence of damage, thus protecting not only his but also the claimant's property, the courts decided that his actions were lawful and consequently dismissed the claim.

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27. Slovenia

Decision of the Supreme Court (Sodba in sklep Vrhovnega sodišča RS) II Ips 168/1996, 2 July 1997

<http://www.sodisce.si/znanje/sodna_praksa/vrhovno_sodisce_rs/4314/#> (7 March 2015)

Facts

Hunting dogs owned by the plaintiff escaped from the plaintiff's property and slaughtered poultry on the defendant's property. The defendant shot one of the dogs when it ran towards his extra-marital partner. The plaintiff claimed compensation from the defendant for the injury to the dog. The court of first instance rejected the plaintiff's claim for compensation, which the second instance court affirmed. 1

Decision

The Supreme Court rejected the revision as unfounded. The Supreme Court confirmed the judgment of the lower courts that the defendant had behaved under pressure. The defendant could not predict what the dog that was dashing towards his extra-marital partner would do. The defendant caused the injury under pressure and therefore his behaviour was not unlawful and he was not liable to pay compensation for the injury caused. 2

Comments

The Code of Obligations does not contain provisions on compensation of damage when the causer of the damage is not challenged with unlawful behaviour. Similarly, theory and court practice do not give an explicit answer to this question. The rules on self-defence cannot be applied since the attack was not unlawful.[1] A case of causing damage not caused by unlawful behaviour can thus only be judged under the provisions of the Code of Obligations on pressure.[2] The Supreme Court also indicated such a solution in this case when it stressed that it is not important whether the owner's fault is shown in allowing the dogs to escape from his control. 3

1 *D Jadek Pensa*, 138. člen Obligacijskega zakonika (OZ) [Article 138 of the Code of Obligations], in: M Juhart/N Plavšak (eds), Obligacijski zakonik s komentarjem, Splošni del, 1. knjiga [Code of Obligations with commentary, General part, vol 1] (2003) 807.

2 More on pressure in the commentary on judgment of the Supreme Court II Ips 951/1994 in 14/27.

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30. The Principles of European Tort Law and the Draft Common Frame of Reference

Facts

1 1. Two policemen, V1 and V2, are called to a property where the alarm has sounded in the middle of the night. Since the door to the dimly-lit site is closed, they climb over the fence and search for criminals with their torches on and pistols in their hand. A, who is a resident living in the only flat on the site, has also heard the alarm sound. Since A knows that several burglaries have happened before, he takes a pistol and also begins to search for criminals on the site. When he sees V1 and V2 he assumes that they are burglars since they are not wearing police uniforms. There is some shouting between them and V1 fires a warning shot. In reaction to this shot, A shoots V1 and injures him very severely. V1 claims compensation for his damage.[1]

2 2. A is positioned on a rock during a hunting party when all of a sudden a 200 kg male grizzly bear comes out from the trees. The animal sees him and quickly proceeds straight at him in attack mode. A, fearing for his life, kills the animal with five consecutive gunshots. A is prosecuted for an offence under the Hunting Act, but is acquitted in criminal proceedings. A private association for the protection of wild animals claims that even if the defendant was not guilty of a crime because he acted under necessity, he has to compensate the damage he has caused by shooting down a protected species whose estimated value is € 9,000.[2]

Solutions

a) Solution According to PETL

3 In the scenarios dealt with in Chapter 14, damage was caused in defence against an 'unlawful attack'.[3] In the first of the above scenarios, on the other hand, A erroneously thought that he was being attacked, although in fact he was not. The first scenario thus raises the issue of a so-called 'wrongful self-defence'.[4] In the second case, there is no 'unlawful' attack by a human being, but rather an unprovoked attack from an animal.

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1 See the German case: BGH (German Federal Supreme Court) 26 May 1987, VI ZR 157/86, NJW 1987, 2509, above 15/2 nos 1–3 with comments by *U Magnus*; see also, and contrast with, the Austrian case: OGH (Austrian Supreme Court) 19 January 1972, 1 Ob 3/72, EvBl 1972/219, above 14/3 nos 1–3 with comments by *E Karner*; contrast the Austrian with the Belgian case: Cour de cassation/Hof van Cassatie (Belgian Supreme Court) 18 April 2007, Pas 2007, 710, above 14/7 nos 1–7 with comments by *B Dubuisson*/*I Durant*/*T Malengreau*.

2 See the Spanish case: Tribunal Supremo (Spanish Supreme Court) 24 January 1995, RJ 1995\141, above 15/10 nos 1–4 with comments by *M Martín-Casals*/*J Ribot*.

3 See above 14/30 nos 1–13.

4 PETL – Text and Commentary (2005) art 7:101, no 6 (*B Koch*).

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The commentary mentions this category of cases as examples which do 'not really allow a clear-cut answer in the sense of an all or nothing liability'. The members of the European Group on Tort Law and authors of the PETL 'all agreed, therefore, that there are cases possible where a mere reduction of liability is the better solution as compared to a complete exoneration, and art 7:101(3) is meant to serve that goal'.[5] Article 7:101(3) PETL states that '[i]n extraordinary cases, liability may instead be reduced'. 4

'The critical point in such cases will be whether the ultimate injurer was reasonable in believing that the other was about to attack him, even though this was actually not the case retrospectively'. Also the 'misapprehension of the situation itself may constitute fault under certain circumstances'.[6] Regarding the exemption from, or the proportioning of, liability in such cases, several factors may be taken into consideration, such as the value of the protected interests, whether and to what extent the error of the person was avoidable, to what extent the victim should have realised that his act may be perceived as an unlawful attack, whether the attack seemed imminent or rather the party who erroneously thought that he was being attacked could have resolved the situation in another way, whether the person exposed himself to a dangerous situation, and so on. 5

In the first of the above scenarios, from the position of A, the resident who attacked V1, the policeman, V1 and V2 – who were not wearing uniforms and climbed over the fence carrying torches and pistols – may indeed have looked like dangerous, armed burglars. Given that there had been previous burglaries, the situation appeared even more dangerous to him. Since V1 and V2 carried pistols, the putative burglars seemed to create a threat not only to his property, but also to his health, or even life. Under such conditions, A arguably acted reasonably in believing that V1 was about to attack him, even though this proved not to be the case. Whether liability may be excluded or reduced pursuant to art 7:101(3) PETL may depend on the answer to the question of whether and to what extent the situation could have been resolved safely, from his perspective, and the error avoided under the precise circumstances of the case. 6

For the analysis of the second scenario it shall be assumed that: (a) there is a person, association or institution that has standing to bring a damages claim following impairment of the environment (such as an environmental NGO); and (b) that this claim is governed by private law. 7

Given that, in the second scenario, there was no human attack but a danger resulting from an unprovoked act of an animal, owned by nobody, the case arguably does not fall under the PETL's rule on 'self-defence' against an unlawful (human) 8

5 PETL – Text and Commentary (2005) art 7:101, no 6 (*B Koch*).

6 Cf PETL – Text and Commentary (2005) art 7:101, no 9 (*B Koch*).

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attack in art 7:101(1)(a).[7] The case could be solved by analogous application of the aforementioned provision to an attack carried out by a wild animal. Alternatively, it could be analysed under the provision relating to 'necessity' in art 7:101(1)(b) PETL, applied by way of analogy to infringements of public, environmental interests (whereas the direct application requires a threat to the defendant's interests which leaves the person under attack with no choice but to infringe the interests of a third party, more specifically the state or the public at large, to ward off the danger). It may, however, also be regarded as an 'extraordinary case' pursuant to para (3) of art 7:101 PETL in which 'liability may [or may not[8]] be reduced'.[9] When determining the extent of liability under the latter provision, it could be taken into consideration: firstly, that the bear belonged to a protected species, and secondly, that the hunter exposed himself consciously to a dangerous situation when participating in a hunting party in an area populated with wild grizzly bears.

b) Solution According to DCFR

9 In the first of the above scenarios, A caused the damage since he erroneously thought that he was being attacked. Where a person mistakenly 'misreads the situation and wrongly believes there is an attack (so-called putative self-defence) …', art VI–5:202 (self-defence) does not apply. '[T]he issue is [then] decided solely under VI–3:102 (Negligence). Where the mistake was avoidable, negligence is present; where it was unavoidable, liability is absent'.[10] As set out above, in the first scenario, A may have acted reasonably in believing that the policeman was about to attack him, even though this proved not to be the case. In this case, the mistake would be deemed unavoidable and the resident not liable.

10 In analysing the second scenario, it shall again be assumed that (a) there is a person, association or institution that has standing to bring a damages claim following impairment to the environment; and that (b) this claim is governed by private law.

11 Had A been attacked by an animal kept by B, for example a dangerous dog, and had A used the dog for carrying out the attack, A would have acted in self-defence in relation to B – the keeper of the dog – and would benefit from the defence found in art VI–5:202(1) DCFR.[11]

12 Article VI–5:202(1) DCFR provides: '(1) A person has a defence if that person causes legally relevant damage in reasonable protection of a right or of an interest

7 For the text of this provision, see above 14/30 no 5.

8 Compare the outcome of this case in Spanish law, above 14/10 nos 1–3 with comments by *M Martín-Casals/J Ribot*.

9 Article 7:101(3) PETL: 'In extraordinary cases, liability may instead be reduced'.

10 *C v Bar/E Clive*, DCFR, art VI–5:202, Comment D (p 3667).

11 *C v Bar/E Clive*, DCFR, art VI–5:202, Comment B (p 3666).

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worthy of legal protection of that person or a third person if the person suffering the legally relevant damage is accountable for endangering the right or interest protected. ...'[12] With respect to the attack by the wild bear, the provision does not apply directly since the bear is not owned by anybody and there is therefore no person who is 'accountable' for the attack, as required by art VI–5:202(1) DCFR.

Under the DCFR, as under the PETL, the case of the attack by the bear might be solved by an analogous application of the provision on 'necessity' in art VI–5:202(3) DCFR.[13] (A direct application is excluded since killing the bear does not cause damage 'to the patrimony of another' as required by para (3) of art VI–5:502 DCFR). 13

The analogous application of the provision on 'necessity' would lead to the result that the person who caused the damage would have to pay a 'reasonable recompense'. This is arguably an appropriate and reasonable result taking into consideration that the bear belonged to a protected species and the hunter exposed himself to a dangerous situation when participating in a hunting party in an area populated with wild grizzly bears. 14

31. Comparative Report

Only 11 reports proposed cases for this category. 1

The question is whether a party who has caused damage to a lawfully acting person can bring forward the argument of self-defence. To some extent this category overlaps with category 14 (ch 14: 'Self-defence and other grounds of justification'). 2

Error in self-defence against a lawfully acting authority: if someone who believes that his aggressor is a burglar causes damage to a lawfully acting policeman, his act is unlawful. But if the person acted erroneously, his/her act was not faulty. Consequently he/she does not have to pay damages.[1] Inversely if a policeman, believing that the person he/she has to arrest is armed and dangerous, kills this person (in a dark room), he/she can plead self-defence and does not have to pay damages if his/her belief was reasonable.[2] In Ireland, it seems that inadvertent error by a law- 3

12 Emphasis added.

13 Compare the reasoning regarding the PETL, above 15/30 no 8. Article VI–5:202(3) DCFR provides: '(3) Where a person causes legally relevant damage to the patrimony of another in a situation of imminent danger to life, body, health or liberty in order to save the person causing the damage or a third person from that danger and the danger could not be eliminated without causing the damage, the person causing the damage is not liable to make reparation beyond providing reasonable recompense'.

1 Germany (15/2 nos 1–3); see also DCFR/PETL (30/15 nos 4 f, 9, 12).

2 England and Wales (15/12 no 2 f); for error and putative self-defence of a civil person Norway (15/17 no 3).

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fully acting authority offers a defence to the officer, even if the victim did not misbehave.[3]

4 *Self-help*: self-help is a harsh and dangerous instrument. As such it is submitted to strict conditions. If these conditions are not fulfilled, the act is considered as unlawful and the author has to redress the damage caused.[4]

5 *State of necessity*: if a lawful act committed in a state of necessity caused damage, the victim is not entitled to full damages, but to an indemnification established by an equitable evaluation of the different interests.[5] However damages or an indemnification is excluded if the damage would also have occurred if there had been an alternative course of events, for example if the author of the damage had not acted.[6] In Croatia and Slovenia, a civilian acting in a state of necessity does not act unlawfully.[7]

6 *Right of retention*: a former employee who exercises his right of retention over a movable (car) as long as his former employer has not fully paid his salary acts lawfully in self-defence.[8]

3 Ireland (15/14 no 3).

4 Greece (15/5 nos 1–3).

5 Austria (14/3 no 9). Moreover, it should be noted that a person who culpably places themselves in a situation of necessity is responsible for the damage under § 1307 ABGB. Italy (15/9 no 7); Spain (15/10 no 3); for the calculation of damages in emergency situations see also Sweden (15/18 no 3).

6 Italy (15/9 no 7).

7 Croatia (15/26 no 3 f); Slovenia (15/27 no 2 f).

8 Lithuania (15/22 no 2 f).

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G. Other Issues

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16. Additional Questions

2. Germany

Bundesgerichtshof (Federal Supreme Court) 9 February 1965, VI ZR 253/63

NJW 1965, 1075

Facts

The claimant, when riding his motorbike, was badly injured in a road accident for which the defendant was exclusively responsible. The claimant, who had not been wearing a helmet, suffered a fractured skull and further injuries. It was necessary to transplant a piece of bone from one side of the skull to the injured part. This had the consequence that, at this side, the claimant's brain was merely covered by skin. The claimant sued the defendant for compensation of the entire loss. **1**

Decision

The lower courts held the defendant liable, however only for 80% of the damage because, if the claimant had been wearing a helmet, the damage to his head would have been much less serious. The claimant was therefore guilty of contributory negligence. The Federal Supreme Court upheld the decision. Although at the time of the accident no statutory provision obliged motor-bikers to wear helmets,[1] it was already a widespread custom to wear them. Since an expert had explained that the claimant's injuries would have been less serious had he worn a helmet, the claimant had not taken the reasonable care that was to be expected of him. For this contributory negligence, a 20% reduction of the damages was justified. **2**

Comments

Contributory negligence is the most frequently raised defence. Even if the defendant is actually fully liable, the amount of damages will be reduced if the claimant has neglected the care that a reasonable person would have observed to avoid or minimise any damage.[2] The standard of reasonable care is the same as that applied to persons who are liable for damage to others.[3] Moreover, the standard is not neces- **3**

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1 Today (2014) § 21a Road Traffic Ordinance (StVO) requires drivers of motorbikes and mopeds to wear a helmet. On the contrary, there is no contributory negligence if the driver of a bicycle does not wear a helmet even if the helmet would have reduced the damage; see BGH NJW 2014, 2493 with note *D Kettler*.

2 See § 254 BGB.

3 See for instance *H Kötz/G Wagner*, Deliktsrecht (12th edn 2013) no 744.

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sarily the commonly exercised conduct but the standard that should reasonably be observed.

6. France

Cour de cassation, Chambre civile (Supreme Court, Civil Division) 27 February 1951
35.594, Bull civ no 77, D 1951, jur 329, note *H Desbois*; ibid, chron 119, note *J Carbonnier*

Facts

1 Turpain had published a book on the history of wireless telegraphy without, for political reasons, mentioning Branly's name, although the latter was commonly held to be the inventor of wireless telegraphy. Branly sued Turpain and sought damages. The Poitiers appellate court rejected the claim and the case was brought before the *Cour de cassation*.

Decision

2 The appellate court's decision was quashed by the *Cour de cassation* on the basis of arts 1382 and 1383 (now arts 1240 and 1241) of the *Code Civil*. After having stated that fault, as set down by those two articles, may consist in omissions as well as in positive acts, the court ruled that Turpain had violated the standard of objective information which should be met by a historian and had thus caused moral damage to Branly.

Comments

3 *Branly v Turpin* is a leading case in French tort law, as it clearly stated for the first time that omission, inaction, or nonfeasance – whatever we call it – may amount to fault even where there is no malicious intention behind the wrongful failure to act.[1] Yet, at the same time, this case tried to set a limit to the cases in which failure to act could be regarded as a fault, as it stated that a positive duty to act, the breach of which might constitute a fault, could only arise from a statute, from convention, or, in professional matters, from the 'requirement that information be objective'.

4 Since the days of *Branly v Turpain*, French law has become rather messy, as far as wrongful inaction is concerned. While it is undisputed that an omission may amount to fault, in which precise cases this might be the case is not clear. The re-

1 In that case, even though the failure to mention Branly's name was deliberate, the lower court had ruled that it had not been malicious; and the *Cour de cassation* ruled that its being malicious or not had no impact on the existence of a wrongful inaction.

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striction set in 1951, whereby positive duties to act may only arise out of a statute, a convention or professional standards, no longer seems to be valid. Some decisions do stick by this restrictive approach to wrongful inaction,[2] but there are many more cases in which the *Cour de cassation* found an omission to be wrongful, even though there was no clear source for the defendant's duty to act.

The intention to cause harm is obviously a reason why inaction may be re- 5
garded as fault, even though there was no positive duty to act.[3] Courts are also prompt to recognise a wrongful omission, regardless of any explicit duty to act, in cases where the defendant's action could have prevented physical injuries.[4] Some scholars have interpreted these cases as pointing to a 'total assimilation of omission faults and commission faults',[5] which amounts to saying that judges should have as much leeway in finding a wrongful omission as they have in finding 'ordinary' fault.

15. Malta

Lorenzo Buttigieg v Henry Hirst on behalf of another (Court of Appeal – Qorti tal-Appell) 16 February 1945

Collected Judgments, Vol XXXII, part I, 163

Facts

The plaintiff purchased an object from the defendant subject to the express condi- 1
tion that the object had certain specific qualities. Some time after taking delivery, the plaintiff discovered that the object did not have those qualities. He did not seek to rescind the sale but sued the defendant for the damage suffered in consequence of the latter's failure to abide by the agreement.

Decision

The first instance court dismissed the action. Since this was an action for damages 2
rather than for rescission of the sale, the plaintiff had to prove that the defendant was negligent or in some way at fault. In the present case the defendant had taken all precautions, including commissioning an inspection by experts, in order to ascertain, before delivery, that the object sold had all the qualities agreed upon. If there were fault, it lay with the experts, not with the defendant. Moreover, since the

2 See eg Cass civ 1, 18 April 2000, 98-15770, Bull civ I, no 117.

3 See eg Cass civ 2, 13 December 1972, 71-12043, Bull civ II, no 320, D 1973, 493, note *Larroumet*.

4 See eg Cass civ 2, 5 October 2006, 05-14.825, RCA 2006, comm 364, note *Groutel*, and the many cases cited in *Viney*/*Jourdain*/*Carval*, Les conditions de la responsabilité (4th edn 2013) no 456-1.

5 *G Viney*/*P Jourdain*/*S Carval*, Les conditions de la responsabilité (4th edn 2013) no 456-1.

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defendant, through no fault of his own, was not aware of the missing qualities, he could not be held liable for consequential damage.

3 The plaintiff appealed. In allowing the appeal and overturning the judgment, the Court of Appeal observed that this was not an action in tort, where the defendant would have been liable only if it were shown that he was at fault – *culpa in eligendo* – in choosing the experts who inspected the object prior to delivery, failing which the experts alone would carry liability. Since, however, the action was in contract, the defendant was liable because of his failure to perform his obligation. Although there is no reversal of the burden of evidence – it is still for the plaintiff to prove non-performance – this burden is lighter than that required for proving *culpa* in tort because it may be sufficient to prove the mere fact of non-performance. In the present case it was the experts who had not exercised proper care in examining the object prior to delivery, but this was sufficient to engage the defendant's liability for non-performance.

Comments

4 This judgment is relevant for this study only insofar as it highlights the difference for the purpose of the burden of proof between fault in a contractual context and fault as an element of tort.

5 Although not entirely satisfactory – liability in this case arose not through lack of diligence but through an objective failure to perform a contractual obligation, and would have arisen even if the experts had exercised proper care in inspecting the object – this judgment shows that, when it is open for the plaintiff to choose between basing his action in contract or in tort, it is preferable to choose contract. In practice, this has made it easier for victims of industrial accidents to recover damages from their employer. Plaintiffs in medical malpractice actions, however, have not acquired any significant benefit. Although it is now established that an action for malpractice lies in contract rather than in tort, this has not had any significant effect on the burden of evidence or the degree of proof of fault.[1]

R von Brockdorff Insurance Agency Ltd on behalf of another v Falcotrans Ltd on behalf of another (Court of Appeal) 28 June 2013, Writ no 3214/1996

<http://www.justiceservices.gov.mt>

Facts

6 A trading company insured with the plaintiff imported fresh fruit and vegetables from Holland and Italy in a refrigerated trailer owned and operated by the defen-

1 See *RG v DF* in 3f/15 nos 1–11 above.

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dant company. While unloading the goods in Malta, there was a power failure at the warehouse. The merchandise was therefore reloaded in the trailer and the cooling system was kept running on batteries. Later that evening the trailer caught fire because the terminals of the batteries had not been properly insulated, and all the merchandise was destroyed. The plaintiff as insurer indemnified the importer and was subrogated in the rights of the insured. It then sought to be reimbursed by the defendant. The defendant submitted inter alia that it was not responsible for the fire which had broken out; it also pleaded that its responsibility ceased once the trailer had been unloaded, and was not re-engaged by the reloading because the trailer was intended for the transport of the merchandise and not for its storage. Its local agent had exceeded his authority by authorising the use of the trailer for that purpose.

Decision

The first instance court observed that in terms of the contract between the parties for the carriage of goods, the defendant's responsibility indeed ceased once the merchandise had been unloaded. The action, however, was not in contract but in tort. The evidence showed that the trailer had not been properly maintained and the insulation of the batteries was not kept in a good condition. Since every person is liable for the damage which occurs through his fault, and the plaintiff had shown that the defendant had failed to keep the trailer in a good condition such that it could be used without causing damage, the defendant was liable for the damage. **7**

The defendant appealed. The Court of Appeal disagreed with the first court's categorisation of the action as one in delict. It observed that the defendant, through its agent who had ostensible authority, had agreed to the use of the trailer for temporary storage of the goods. By so doing it assumed a contractual obligation which it failed to fulfil when the trailer was destroyed. It could avoid liability only by showing that the damage was due to *force majeure*, which was not the case. The court therefore dismissed the appeal and confirmed the first judgment, although for different reasons. **8**

Comments

Like *Buttigieg v Hirst*[2] this judgment highlights the different requirements for establishing liability in contract and liability in tort. **9**

The appeal judgment may perhaps be criticised for disregarding the fact that the additional service provided by the defendant – the storage of the goods until power **10**

2 16/15 nos 1–5 above.

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was restored to the warehouse – was in the circumstances provided gratuitously. This does not, however, detract from the principle that the defences available to a defendant in an action for non-performance of a contractual obligation are much more limited than those available in an action in tort and that (with the possible exception of medical malpractice suits) it is advisable for a plaintiff to exercise the action in contract when this is available.

29. European Union

European Court of Justice, 24 March 2009

C-445/06, Danske Slagterier v Bundesrepublik Deutschland [2009] ECR I-2119[1]

Facts

1 The members of the claimant, an industry association of Danish slaughterhouse companies and pig farmers, had started to farm uncastrated male pigs in the course of a campaign based upon research that the typical risk of such meat giving off a pronounced sexual odour when heated can be controlled by way of a test in the course of slaughter. Germany held that test unreliable and therefore imposed a *de facto* import ban on such meat by requiring another test from January 1993 onwards, relying on Directives 64/433/EC[2] and 89/662/EEC.[3] This measure was subsequently rejected as inadmissible by the ECJ in 1998 in a case filed by the Commission in 1996,[4] and the claimants therefore brought an action for damages against Germany in 1999, seeking compensation for the loss they had suffered in the meantime. Apart from other questions relating in particular to prescription,[5] the German Federal Court of Justice (*Bundesgerichtshof*, BGH) inter alia asked the ECJ for a preliminary ruling on the question of whether national rules are permissible which deny state liability 'if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy'.

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1 This case was already presented by *BA Koch* in: H Koziol/BC Steininger (eds), European Tort Law 2009 (2010) 643, nos 16–28.

2 Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat, OJ 121, 29.7.1964, 2012–2032, English Special Edition 1963-64, 185, amended by Council Directive 91/497/EEC of 29 July 1991 amending and consolidating Directive 64/433/EEC on health problems affecting intra-Community trade in fresh meat to extend it to the production and marketing of fresh meat, OJ L 268, 24.9.1991, 69–104.

3 Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market, OJ L 395, 30.12.1989, 13–22.

4 ECJ 12.11.1998, C-102/96, *Commission v Germany* [1998] ECR I-6871.

5 See the presentation of these issues by *BA Koch* in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2009 (2010) 643, nos 16–28.

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Decision

By pointing at the *Brasserie du Pêcheur* case,[6] the court first confirmed that art 28 ECT (now art 34 TFEU) 'has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and that breach of that provision may give rise to reparation'. The Directive at issue here was 'designed to encourage intra-Community trade' by imposing health requirements for fresh meat, thereby defining further the right conferred by art 28 ECT. While the Directive at stake here allows Member States to ban imports of fresh meat if it does not conform to the standards foreseen, at the same time it prevents Member States from imposing further restrictions, thereby giving 'individuals the right to market in another Member State fresh meat that complies with the Community requirements' (para 24). Therefore, unlike the Advocate General,[7] the court was of the opinion that claimants could very well rely upon the incorrect transposition and application of Directives 64/433/EEC and 89/662/EEC as grounds for state liability. **2**

The court then turned to the remaining questions dealing with the limitation of claims and the consequences thereof. Of relevance to this volume is the court's response to the claimants' argument that § 839 para 3 BGB as applied by the German courts was precluded by Community law. The said provision states that an 'obligation to compensate shall not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy'. The court had already held, in *Brasserie du Pêcheur*, that 'the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him'.[8] That did not mean, however, that claimants should have made use of all potential legal remedies available and imaginable. Therefore, a rule such as § 839 para 3 BGB could be applied in the instant case as long as claimants could reasonably exercise the legal remedies they should have utilised under that provision and that it was not excessively difficult for them. The possibility that one of those remedies may give rise to a reference for a preliminary ruling does not render that remedy unreasonable (para 66). Neither does the fact that the Commission has initiated infringement proceedings lead to such a conclusion, as 'the procedure under Article 226 EC is entirely independent of national procedures and does not **3**

6 Above 2/29 nos 1–12.

7 Attorney General Trstenjak had argued 'that the abovementioned provisions of Directive 89/662 are limited essentially to the regulation of procedural aspects of official checks, with producers and distributors of pig meat accorded a passive role inasmuch as they must tolerate the measures adopted by the competent authorities. Therefore, those provisions do not confer any rights with a sufficiently defined content capable of establishing the basis for that group of individuals to bring a state liability claim.' (para 70 of her opinion). She was, however, of the opinion that claimants could rely upon art 28 ECT directly if national courts so decide (para 84 of her opinion).

8 Above 2/29 nos 1–12.

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replace them'. Even though the outcome of such proceedings 'may serve an individual's interest, it none the less remains reasonable for him to avert the loss or damage by applying all the means available to him' (para 67).

Comments

4 In *Danske Slagterier*, the ECJ had the opportunity to clarify several important aspects of state liability for breach of Community law which had so far been disputed in academia, in particular with respect to time limitations.[9]

5 With a particular focus on the assessment of misconduct, one facet under dispute in this case is of particular interest – the claimants' argument that Member States could not restrict access to state liability by requiring that claimants should first try to exhaust all other legal remedies to the extent these are readily available and not excessively burdensome to pursue. In fact, such a requirement is common to many European legal systems, and any ruling by the ECJ to the contrary would have disrupted the balance of state liability in these countries.

6 While this is not a ground of justification, one could possibly argue that, due to the special nature of state liability, it does not attach to misconduct of a state if the latter was not given a chance to make amends in the course of a review procedure it itself foresees internally. If the state repeals, withdraws or avoids a flawed Act (what it turned out to be during the review procedure), one might see this as a belated correction of the original misconduct, thereby ironing out the flaws inherent therein at first.

31. Comparative Report

1 In this category, designed for cases which do not fall under one of the specific categories, only four reporters submitted a total of five cases. This seems to indicate that the questionnaire was considered to have been comprehensive.

2 **A.** *Wrong of abstention*: two cases concern what we could call wrongs of abstention. In the first case a motorbiker did not wear a helmet with the consequence that his injuries in an accident were much more serious than they would have been otherwise.[1] It has to be added: (a) that no statutory provision obliged him to wear a hel-

9 See the presentation of this case by *BA Koch* in: H Koziol/BC Steininger (eds), ETL 2009 (2010) 643, nos 16–28.

1 Germany (16/2 nos 1–3). Austria: Non-use of a bicycle helmet (2 Ob 99/14v ZVR 2014/218 *Karner*). No motorcycle protective clothing when travelling at high speeds (OGH 2 Ob 119/15m ZVR 2016/10 *Ch Huber* = EvBl 2016/10 Obermayr).

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met; and (b) that helmets were at the time already used very widely (1965). The judges considered this abstention as contributory negligence and reduced the award of damages. Technically they circumvented the absence of a specific norm by applying the well-established rule that we have to take certain precautionary measures to protect ourselves if such are dictated by the general experience of life, eg to wear a helmet. To neglect such rules of general knowledge constitutes a fault. By the way in the meantime most European countries are being confronted with this type of case.

The second case is about an author who did not mention in a scientific publication the name of another author, who had made major inventions in his field. The judges admitted that this abstention 'violated the standard of objective information' causing moral damage.[2] Again it is a case of abstention without a clear legal obligation to act. The judge refers to what a *bonus vir* would have done in a given situation and takes this as the criterion upon which to decide on the presence of fault or negligence. **3**

B. *Other cases*: the third[3] and fourth case[4] carve out the difference between contractual and tort liability. As in most common law systems, in Malta contractual liability does not generally suppose lack of diligence, but only an 'objective failure to perform a contractual obligation',[5] while tort liability requires fault, which has to be proven by the victim. This difference could of course be decisive for the victim when it comes to choosing between an action in contract or tort. **4**

The fifth case concerns state liability: it is notably admitted that a state can require a claimant to exhaust all national legal remedies before filing an action to the Court of Justice of the European Union.[6] **5**

2 France (16/6 nos 1–3).
3 Malta (16/15 nos 1–5).
4 Malta (16/15 nos 6–10).
5 Malta (16/15 no 5).
6 European Union (16/30 no 5).

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Contributors

Iza Adrych-Brzezińska
Faculty of Law and Administration
Gdansk University
ul Bażynskiego 6
80–952 Gdansk
Poland
izabela.adrych@gmail.com

Håkan Andersson
Uppsala Universitet
Juridiska institutionen
Box 512
751 20 Uppsala
Sweden
hakan.andersson@jur.uu.se

Bjarte Askeland
University of Bergen
Faculty of Law
Magnus Lagabøtes plass 1
5010 Bergen
Norway
bjarte.askeland@jur.uib.no

Ewa Bagińska
Faculty of Law and Administration
Gdansk University
ul Bażynskiego 6
80–952 Gdansk
Poland
baginska@prawo.ug.edu.pl

Marko Baretić
University of Zagreb
Faculty of Law
TRG Marsala Tita 3
10000 Zagreb
Croatia
marko.baretic@pravo.hr

Andrew Bell
Institute for European Tort Law
Reichsratsstraße 17/2
1010 Vienna
Austria
andrew.bell@oeaw.ac.at

Jean-Sébastien Borghetti
Université Panthéon-Assas (Paris II)
12, place du Panthéon
75005 Paris
France
Jean-Sebastien.Borghetti@u-paris2.fr

Arnaud Campi
Université de Genève
40, boulevard du Pont d'Arve
1211 Geneva 4
Switzerland
Arnaud.Campi@unige.ch

Giannino Caruana-Demajo
Judges' Chambers
Republic Street
Valletta CMR 02
Malta
giannino.caruana-demajo@gov.mt

Nadia Coggiola
Department of Management
Università di Torino
C.so Unione Sovietica 218/bis
10134 Torin
Italy
nadia.coggiola@unito.it

Eugenia Dacoronia
National and Kapodistrian University
of Athens
Law School
18, Valaoritou Str
10671 Athens
Greece
dacoronia@yahoo.com

Simona Drukteinienė
Mykolas Romeris University
Ateities st 20
08303 Vilnius
Lithunia
simona.selelionyte@veto.lt

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Bernard Dubuisson
Université catholique de Louvain
Faculté de droit et de criminologie
Place Montesquieu 2 bte L2.07.01
1348 Louvain-la-Neuve
Belgium
bernard.dubuisson@uclouvain.be

Gregor Dugar
University of Ljubljana
Faculty of Law
Poljanski nasip 2
SI-1000 Ljubljana
Slovenia
gregor.dugar@pf.uni-lj.si

Anton Dulak
Univerzity Komenského
Faculty of Law
Safárikovo nám 6
818 05 Bratislava
Slovakia
dulak@sba.sk

Isabelle Durant
Université catholique de Louvain
Faculté de droit et de criminologie
Place Montesquieu 2 bte L2.07.01
1348 Louvain-la-Neuve
Belgium
Isabelle.Durant@uclouvain.be

Caroline Duret
Université de Genève
40, boulevard du Pont d'Arve
1211 Genève 4
Switzerland
caroline.duret@unige.ch

Andreas Ehlers
Centre for Enterprise Liability
Faculty of Law
Copenhagen University
Karen Blixens Plads 16
2300 København S
Søndre Campus
Building: 6B-3-57
Denmark
aeh@jur.ku.dk

Anne Marie Frøseth
University of Bergen
Faculty of Law
Magnus Lagabøtes plass 1
5010 Bergen
Norway
anne.froseth@jur.uib.no

Bianca Gardella Tedeschi
Università del Piemonte Orientale
Dipartimento per l'Economia e l'Impresa
Via Perrone18
28100 Novara
Italy
bianca.gardella@unipmn.it

Michele Graziadei
Law Department
University of Turin
Lungo Dora Siena 100/A
10153 Turin
Italy
michele.graziadei@unito.it

Martin Hogg
University of Edinburgh
School of Law/Old College
South Bridge
Edinburgh, Scotland
EH8 9YL
United Kingdom
martin.hogg@ed.ac.uk

Jirí Hrádek
Charles University in Prague
Faculty of Law
Nám Curieových 7
110 00 Praha
Czech Republic
hradek@prf.cuni.cz

Mónika Józon
Sapientia- Hungarian University of
Transylvania
Piata Libertății 1
530104 Miercurea Ciuc
Romania
monika.jozon@gmail.com

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Thomas Kadner Graziano
Université de Genève
Faculté de droit (INPRI)
40, boulevard du Pont d'Arve
1211 Geneva 4
Switzerland
thomas.kadner@unige.ch

Ernst Karner
Institute for European Tort Law
Reichsratsstraße 17/2
1010 Vienna
Austria
e.karner@ectil.org

Julija Kiršienė
Vytautas Magnus University
Faculty of Law
Jonavos st 66
44138 Kaunas
Lithuania
julija.kirsiene@vdu.lt

Bernhard A Koch
Universität Innsbruck
Institut für Zivilrecht
Innrain 52
6020 Innsbruck
Austria
bernhard.a.koch@uibk.ac.at

Päivi Korpisaari
University of Helsinki
Institute of Int Economic Law
PL4
00014 Helsinki Yliopisto
Finland
paivi.korpisaari@helsinki.fi

Jānis Kubilis
ZAB VILGERTS
Elizabetes iela 33
LV 1010 Riga
Latvia
janis.kubilis@vilgerts.com

Janno Lahe
University of Tartu
Faculty of Law
Näituse 20
50409 Tartu
Estonia
janno.lahe@ut.ee

Siewert Lindenbergh
Erasmus School of Law
Erasmus University of Rotterdam
PO Box 1738, room L7–109
3000 DR Rotterdam
The Netherlands
lindenbergh@law.eur.nl

Ulrich Magnus
University of Hamburg, Department of Law
Schlüterstraße 28
20148 Hamburg
Germany
ulrich.magnus@jura.uni-hamburg.de

Thomas Malengreau
Université catholique de Louvain
Faculté de droit et de criminologie
Place Montesquieu 2 bte L2.07.01
1348 Louvain-la-Neuve
Belgium
thomas.malengreau@uclouvain.be

Miquel Martín-Casals
Universitat de Girona
Facultat de Dret
Campus de Montilivi
c/de la Universitat de Girona 12
17003 Girona
Spain
miquel.martin@udg.edu

Franz-Stefan Meissel
University of Vienna
Institut für Römisches Recht und
Antike Rechtsgeschichte
Schenkenstrasse 8–10, 1010 Vienna
Austria
franz.stefan.meissel@univie.ac.at

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Pedro Morgado
Rua Nova do Salão, nº41
Mira
3070-329
Portugal
pedrotmorgado@hotmail.com

Barbara Novak
University of Ljubljana
Faculty of Law
Poljanski nasip 2
1000 Ljubljana
Slovenia
barbara.novak@pf.uni-lj.si

Ken Oliphant
University of Bristol Law School
Wills Memorial Building
Queen's Road
Bristol
BS8 1RJ
United Kingdom
ken.oliphant@bristol.ac.uk

Solveiga Palevičienė
Mykolas Romeris University
Ateities 20
Vilnius
Lithuania
solveiga.paleviciene@mids.ch

André Pereira
Universidade de Coimbra
Faculdade de Direito
3004–545 Coimbra
Portugal
andreper@fd.uc.pt

Stefan Potschka
University of Vienna
Institut für Römisches Recht und
Antike Rechtsgeschichte
Schenkenstrasse 8–10, 1010 Vienna
Austria
stefan.potschka@univie.ac.at

Eoin Quill
University of Limerick
School of Law
Limerick
Ireland
eoin.quill@ul.ie

Jaliya Retamozo
University of Lima – Faculty of Law
Av Javier Prado Este, 4600
Urb Fundo Monterrico Chico
Santiago de Surco-Lima 33
Peru
jretamoz@ulima.edu.pe

Jordi Ribot
University of Girona
Institute of European and Comparative Private
Law
17003 Girona
Spain
jordi.ribot@udg.edu

Sara Félix Rodrigues
Urbanização Vilabeira, lote 2, 5º esquerdo
Repeses
3500-733 Viseu
Portugal
sarafelix22@hotmail.com

Alessandro P Scarso
Università L Bocconi
Istituto di Diritto Comparato
Piazza Sraffa 15
20135 Milan
Italy
alessandro.scarso@unibocconi.it

Michel Séjean
Université de Bretagne-Sud
188 bis, rue de Crimée
75019 Paris
France
michel.sejean@univ-ubs.fr

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Kristina Siig
Syddansk University
Campusvej 55
5230 Odense M
Denmark
kms@sam.sdu.dk

Tambet Tampuu
The Supreme Court of Estonia
Lossi 17
50093 Tartu
Estonia
tambet.tampuu@nc.ee

Luboš Tichý
University Karlova v Praze
Právnická fakulta
nám Curieovy ch 7
11640 Prague 1
Czech Republic
ltichy@ssd.com

Kalvis Torgans
University of Latvia
Faculty of Law
Department of Civil Law
19 Raina Blvd
Riga LV 1586
Latvia
kalvis.torgans@lu.lv

Vibe Ulfbeck
Centre for Enterprise Liability
Faculty of Law
Copenhagen University
Karen Blixens Plads 16
2300 København S
Søndre Campus
Building: 6B-3-61
Denmark
vibe.ulfbeck@jur.ku.dk

Vanessa Wilcox
Institute for European Tort Law
Reichsratsstraße 17/2
1010 Vienna
Austria
vanessa.wilcox@oeaw.ac.at

Bénédict Winiger
Université de Genève
40, boulevard du Pont d'Arve
1211 Genève 4
Switzerland
benedict.winiger@unige.ch

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European Group on Tort Law

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A new feature recently added to the ECTIL/ETL homepages is the European tort law blog (<www.europeantortlaw.net>). This highlights important legislative changes and case law developments in the European tort law field, as well as forthcoming events, new publications, useful web links and other items of topical interest. Suggestions of items for posting are always welcome.

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