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Programme

Thursday, April 24, 2014

Austrian Ministry of Justice (Palais Trautson),
Museumstrasse 7
1070 Vienna

Chair: **Ken OLIPHANT**

18:00 Welcome Address

18:10 **Helmut Koziol:** Law of Torts and 'Schadenersatzrecht'. Different terms and different ways of thinking

Due to unforeseen circumstances Simon Whittaker is not able to attend the conference. The opening lecture is held by Helmut Koziol instead.

19:15 Opening Reception

Friday, April 25, 2014

Austrian Supreme Court/Palace of Justice,
Schmerlingplatz 11
1010 Vienna

Chairs: **Irmgard GRISS/ Monika HINTEREGGER**

Developments in Tort Law in Europe 2013

09:00 Brief reports on the following jurisdictions:

Barbara C STEININGER: Austria · **Isabelle C DURANT:** Belgium · **Christian TAKOFF:** Bulgaria · **Marko BARETIĆ:** Croatia · **Jiří HRÁDEK:** The Czech Republic · **Søren BERGENSER:** Denmark · **Annette MORRIS:** England & Wales **Irene KULL:** Estonia

10:40 Coffee break

11:00 Brief reports on the following jurisdictions:

Päivi TIILIKKA: Finland · **Michel SÉJEAN:** France · **Florian WAGNER-VON PAPP:** Germany · **Eugenia DACORONIA:** Greece · **Attila MENYHÁRD:** Hungary · **Eoin QUILL:** Ireland · **Elena BARGELLI:** Italy · **Agris BITĀNS:** Latvia

12:30 Lunch Break (light buffet provided)

13:30 Brief reports on the following jurisdictions:

Loreta ŠALTINYTĖ: Lithuania · **Giannino CARUANA-DEMAJO:** Malta **Jessy M EMAUS:** The Netherlands · **Magne STRANDBERG:** Norway **Ewa BAGIŃSKA:** Poland · **André DIAS PEREIRA:** Portugal · **Christian ALUNARU:** Romania · **Martin A HOGG:** Scotland

15:10 Coffee Break

15:30 Brief reports on the following jurisdictions:

Anton DULAK: Slovakia · **Barbara NOVAK:** Slovenia · **Albert RUDA:** Spain
Håkan ANDERSSON: Sweden · **Peter LOSER:** Switzerland · **Thomas THIEDE:** European Union

16:45 **Ernst KARNER:** Concluding Summary

(Discussion at the end of each presentation)

19:30 Heurigen Evening *(separate booking required)*

Saturday, April 26, 2014

Austrian Supreme Court/Palace of Justice,
Schmerlingplatz 11
1010 Vienna

Chair: **Jaap SPIER**

Special Session: Cyber Torts

09:00 **Bernhard A KOCH:** Cyber Torts – Something Virtually New?
Ronen PERRY: Liability for Online Anonymous Speech – Comparative and Economic Analysis

10:30 Coffee Break

11:00 **Steve HEDLEY:** Cybertrespass – A Solution in Search of a Problem?
Mårten SCHULTZ: Tort Law, Guerilla Warfare and the Promotion of Cyber Privacy

(Discussion at the end of each lecture)

13:00 Close

We kindly ask you to take the time to fill in the feedback forms provided at the end of the conference.

The **14th Annual Conference on European Tort Law**, again organized by the Institute for European Tort Law and the European Centre of Tort and Insurance Law, will be held **Thursday, April 9, to Saturday, April 11, 2015.**

Developments in Tort Law in Europe, Friday, April 25, 2014

Barbara C STEININGER: Austria

OGH 18 July 2013, 1 Ob 124/13m

- The claimant had been sexually abused as a pupil of seminary boarding school by head of boarders in 1982
- The defendant abbey operating the school had appointed the offender as head of boarders although they knew him to have abused children
- This fact became known to the claimant in 2012
- He then claimed compensation for the harm suffered due to the abuse
- The defendant argued that the claim was time-barred

Decision – Prescription

- The non-expiry of the absolute 30-year prescription period is undisputed
- The 3-year period starts when the person harmed becomes aware of the damage and the identity of the injurer
- This means the person harmed needs to know all circumstances justifying the allegation of culpable conduct of a defined liable person
- Therefore the prescription period has not elapsed

Decision – Liability

- The offender's position in the boarding school enabled him to select his victims and gave him the opportunity for the abuse
- The defendant abbey was under a duty to avoid anything that could lead to a serious endangerment of the pupils
- By appointing the offender the abbey culpably violated its duty
- The abbey will be liable

Comments

- The decision merits approval
- Idea behind the short prescription period:
  Who does not avail himself, within a reasonable period of time, of a right he can exercise, neglects his own interests and is no longer entitled to full protection
- Therefore prescription presupposes a possibility for the claimant to exercise the right in question, ie awareness of the defendant's culpable conduct

Isabelle C DURANT: Belgium

B E L G I U M

Cour de cassation, 21 March 2013

C.11.0476.F

Principals' liability

Art 1384 (3) of the Civil Code

- Principals are responsible for the **damage caused by their agents** in the functions for which they have been employed by them.
- Non rebuttable **presumption of liability**.

Principals' liability – 3 Conditions

First condition

A relation of subordination

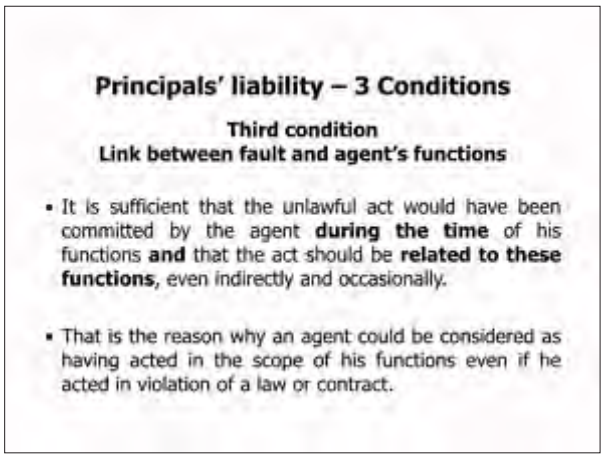
between principal and agent

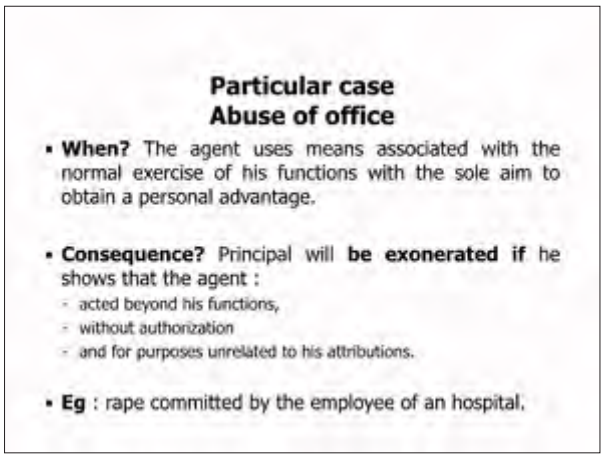
- The principal is the one who may exercise his authority or supervision, **in fact**, on his own behalf, on the acts of another person.

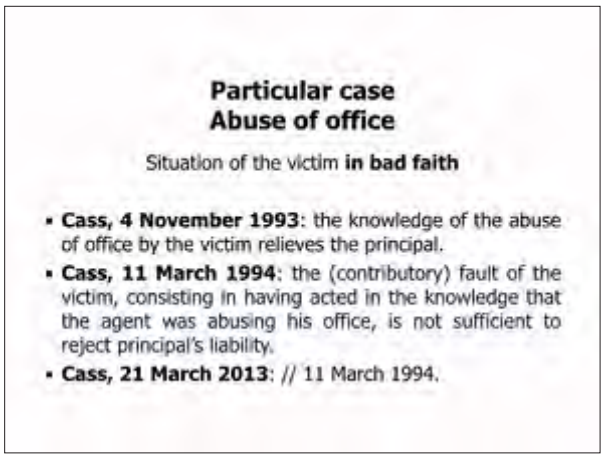
Second condition

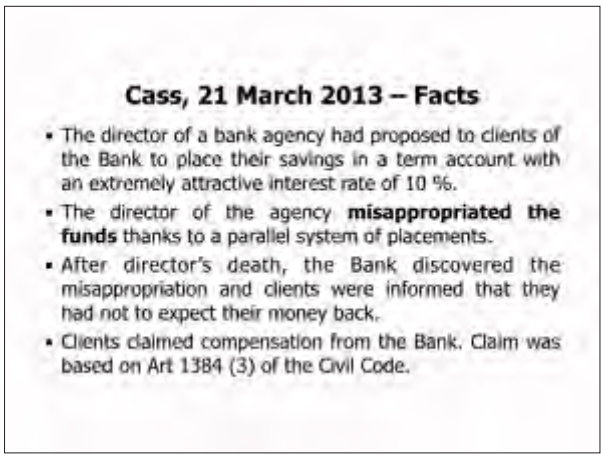
Fault of the agent and causation with damage

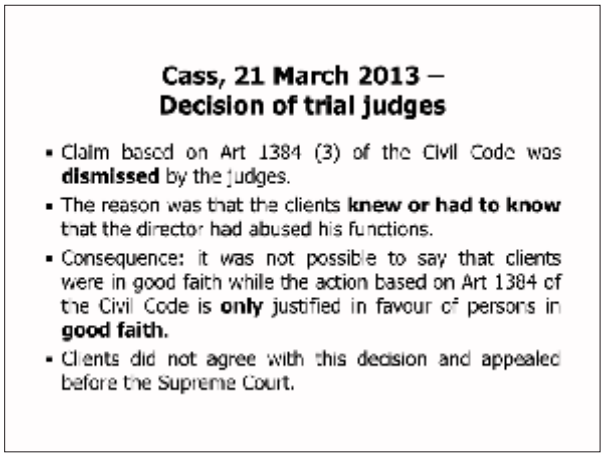
- The agent must have committed a **fault** and this fault must be in **causal relationship** with the damage.

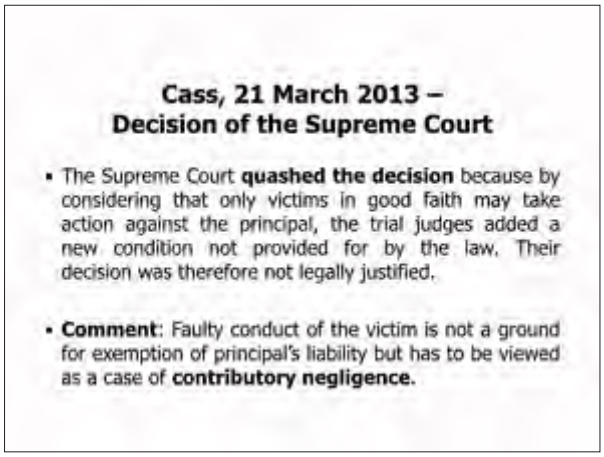












Christian TAKOFF: Bulgaria

Pros & Cons

Pro Tortfeasor	Pro insurer
Abuse with the limitation clause	
No malice aforethought / the tortfeasor acts in good faith.	The tortfeasor didn't act in good faith/ acted intentionally and he signed the clause in order to exclude his liability.
The clause was concluded before the insurance contract.	

At the time the tortfeasor signed the clause, he could not have known that the damage will occur

If there hadn't been a clause, the price of the contract between the tortfeasor and the damaged party would have been higher.

Does the insurer have a "sacred right" of recourse claims against the tortfeasor?

The clause is not a lack of liability but a means to lower the price of the contract between the tortfeasor and the damaged party.

This statement rests unproved and unprovable .

There are many cases when the recourse claims do not exist at all:

- The tortfeasor and the damaged party are in a close relation and the tortfeasor didn't act intentionally
- The tortfeasor is insolvent
- There are preferred creditors and the insurer would not receive anything
- The tortfeasor cannot be found
- Cases of force majeure/ cas fourtuit/ fait du prince
- The damage is caused by the victim's own property or by the property of an unknown owner

The insurer must then evaluate the risk of the limitation or exclusion clause in the insurance premiums.

Yes, he does, as otherwise we tolerate the lack of liability.

Yes, he does, as otherwise the price of the insurance would be much higher

Yes, he does, as the recourse claims are legally defined.

Due diligence in negotiations

The insurer could have asked is there a limitation or exclusion clause.

The insurer could have excluded payment of damages in case of such a clause.

The insurer could have reinsured him against that clause with another insurer.

Cujus commoda ejus incommoda

The insurer deals with risk by profession so he must be ready to take it and not to escape from it.

The tortfeasor doesn't act in good faith because he can easily foresee that his active behavior increases the risk for the insurer.

This argument is good for nothing. / This argument is absolutely irrelevant.

It will definitely increase the price of insurance.

It will result in useless complication of the general terms and conditions.

Freedom of contract

This is an attempt to limit the freedom of contract that aims to protect some private interests.

This is abuse of freedom of contract and it means that Res iner alios acta tertiis nocere potest.

Marko BARETIĆ: Croatia

The Protection of Environment Act (Zakon o zaštiti okoliša)

- Environmental damage extensively regulated (Arts. 173-208)
- Two-tier liability system
  - Liability of an operator of a dangerous activity
    - Strict
  - Liability of an operator of a non-dangerous activity
    - Fault-based liability with presumption of fault
    - *Presumption of unlawfulness*
- Joint and several liability of multiple operators who acted jointly
- The claim against the tortfeasor shall be brought by the Republic of Croatia within five years as of the day when necessary measures were taken or the day when liability of an operator was determined

Exoneration from Strict Liability

- if damage is a consequence of a natural phenomenon of unpredictable and unavoidable nature, which can neither be escaped nor eliminated,
- if damage is a consequence of the state of war or other armed hostilities,
- if damage is caused by an act of a third person, albeit all necessary precautionary measures were taken,
- if damage resulted from actions of an operator taken in accordance with an order or instruction issued by public authority, save for orders or instructions issued after the occurrence of emission or other incident caused by actions of the operator.

Exculpation from Fault-based Liability

- If the operator proves that it did not act with intent or negligence, and
- if it proves that the damage to environment was caused by an emission or activity which is explicitly allowed by an act of the competent authority or that the damage to the environment was caused by an emission or activity for which, on the basis of the level of scientific and technical knowledge at the moment of damage occurrence, it was not likely to expect to cause the damage

Reparation of Damage

- Measures for recovery of environment, if possible
- Pecuniary compensation if damage cannot be eliminated by measures for recovery of environment
  - Quantum to be determined on the basis of both, economic and environmental considerations

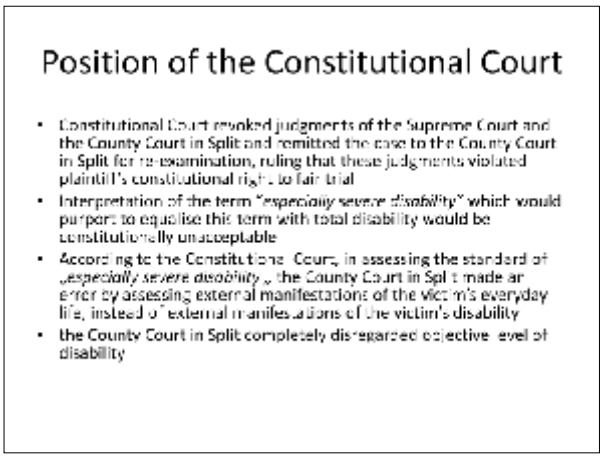
Decision of the Constitutional Court of the Republic of Croatia No U-III-5092/2012 of 30 November 2013

- In 1991 minor plaintiff's son was injured when police patrol opened fire at the car in which he was driven as passenger. On that occasion plaintiff's son was shot eleven times, sustaining severe bodily injuries, but fortunately survived.
- In 1995 competent public body assessed plaintiff's son to be 100% permanently incapacitated which entitled him to personal pension.
- In 2007 the responsibility of the Republic of Croatia for damage sustained by the plaintiff's son was established by final judgment of the court of first instance in Zagreb, confirmed by the County Court in Zagreb. These judgments found that plaintiff's son sustained injuries which impaired his life activity in 90% which prevented him from carrying out any everyday activity which would involve heavier physical engagement.
- Subsequently plaintiff brought an action against the Republic of Croatia for the award of just pecuniary compensation for non-material damage sustained due to her son's disability.
- The court of first instance awarded plaintiff just pecuniary compensation for sustained non-material damage in the amount of 220.000,00 Croatian kuna.
- Subsequently, the County Court in Split quashed the decision of the court of first instance.
- The Supreme Court of Croatia upheld the decision of the County Court in Split.

LEGAL BASIS

- Article 201, paragraph 3 of the COA of 1978

In the event of death or ***especially severe disability of a person****, the immediate family members of the direct victim (spouse, children and parents) are entitled to just pecuniary compensation for non-material damage*



Jiří HRÁDEK: The Czech Republic

Decision of the Supreme Court on Liability of Spouses for Damage Caused by Deceased Spouse; Case no 23 Cdo 2743/2011

Facts of the Case
The claimant, a guarantee fund of Czech Bureau of Insurers (the "Bureau"), claimed from the defendant a payment of approx EUR 30,000 as recourse based on compensation provided to the aggrieved party in a traffic accident caused by the defendant's husband as the vehicle's driver. The driver, who had not taken out a compulsory insurance on liability for damage caused by the operation of the vehicle, died in the accident.
Nevertheless, the courts of both instances concluded that since the car was acquired solely by the husband of the defendant from money donated to him by his parents, this fact excludes any liability of the defendant for damage caused by the car.

Conclusion of the Supreme Court
Czech law acknowledges specific joint property of spouses (společné jmění manželů), as a specific type of co-ownership where no shares are determined and the spouses are entitled and liable not only for the whole property but also for any liabilities resulting herefrom.
Joint property of spouses consists of a) property acquired by either of the spouses or by both of them during the marriage [...] and b) obligations incurred by one spouse or jointly by them both during the marriage except for obligations concerning a property belonging exclusively to one of them. Based on this, the Supreme Court ruled: 'Debts of the deceased person that transfer to his/her heirs, are not only obligations (liabilities) that are based on a reason, which occurred during the lifetime of the deceased, but also obligations (liabilities) which have their origin in the legal act, an unlawful act or other legal facts based on which the deceased should perform, if not prevented by his/her death.'

Comments
It was concluded by the courts in previous instances that the car which the deceased husband of the defendant drove was in his own ownership and was not subject to the joint property of spouses. Thus, any obligation arising from such property could meet the conditions under which the joint property of spouses consists of inter alia obligations incurred by one spouse except for obligations concerning a property belonging exclusively to one of them.

However...
The court came to the conclusion that delictual obligations arise independently from the property of the spouses as they depend on the will of the spouse and do not present the automatic excluded obligations resulting from property.
Consequently, as the obligation (liability) relationship was established by the damaging event and thus occurred during the lifetime of the defendant's husband, it automatically became part of the joint ownership of spouses.

Søren BERGENSER: Denmark
Materials will be posted on the conference website (www.acet.ectil.org) when available.

Annette MORRIS: England & Wales

ENGLAND AND WALES

Negligence and Non-Delegable Duties of Care

Woodland v Essex County Council [2013] UKSC 66

Annette Morris, Cardiff Law School

FACTS

- Woodland (aged 10) attended school in the control of Essex County Council
- As part of the National Curriculum, school provided swimming lessons
- Swimming lessons (provided off site but during school hours) outsourced to independent contractor
- During swimming lesson, Woodland experienced difficulties and suffered severe brain damage
- Woodland pursued claims against several parties including Essex County Council

LEGAL ISSUE

- Essex County Council
  - Not vicariously liable as swimming lessons provided by independent contractor (which was uninsured)
  - Accepted that it owed Woodland a duty to take reasonable care in respect of its own acts (e.g. in selecting the independent contractor)
  - BUT disputed that it owed Woodland a ('non-delegable') duty to ensure the careful performance of the swimming lessons outsourced to the independent contractor
- Non-delegable duty pursued as a preliminary issue

OUTCOME

- High Court/Court of Appeal: preliminary issue struck out as 'bound to fail'
- Supreme Court unanimously allowed the appeal
  - Essex County Council had assumed a 'non-delegable' duty to ensure that the swimming lessons were carefully conducted and supervised
  - This was consistent with the long-standing policy of the law to protect vulnerable and dependent people under the control of others
- Case remitted to the High Court to be decided on the facts

REASONING

- Non-delegable duties are inconsistent with fault-based negligence but are fair, just and reasonable in cases with the following characteristics:
  - The claimant is a patient or child or is otherwise especially vulnerable or dependent on the protection of the defendant
  - There is an antecedent relationship between the claimant and defendant (independent of the negligent act/omission itself) which places the claimant in the care of the defendant AND through which the defendant assumes a positive duty to protect the claimant from harm

REASONING

- The claimant has no control over how the defendant performs that duty
- The defendant has delegated a function which is part of its positive duty towards the claimant to a third party
- The third party has been negligent, not in a collateral respect, but in the exercise of that delegated function

- Essential element: control over the claimant (not control over the environment in which the claimant is injured)

COMMENT

- Court of Appeal: extension of non-delegable duty likely to have 'chilling effect'
- Supreme Court : not creating open-ended liability
  - Non-delegable duty only imposed if and so far as independent contractors are performing functions which schools/education authorities have assumed a duty to perform
  - Non-delegable duty will not apply within school hours where no control over the child has been delegated (e.g. bus drivers, museum staff involved in school trip) or outside school hours in respect of extra curricular activities (e.g. trips in the school holidays)

COMMENT

- Given the increasing trend for schools to outsource functions historically performed by teaching staff, the non-delegable duty imposed in Woodland largely replaces vicarious liability
- Also, Lady Hale stressed that the law should make sense to ordinary people
  - Would be difficult to defend legal distinctions between independent schools providing swimming lessons via contract; large state schools providing their own swimming lessons and small state schools outsourcing swimming lessons to independent contractors

Irene KULL: Estonia

Legislation

On 26 March the Parliament of Estonia adopted a **new car insurance law**, which will enter into force on 1 October 2014.

As one of the **conceptual changes** the new Law allows the victim, in specific cases, to submit a claim for damages against one's own insurer. After compensating the damage to the victim, the respective insurer can claim compensation against the insurer of the person who caused the damage.

Personal Injury

- Compensation for non-pecuniary damage is still rather modest (around € 2,000 - € 4,000)
- New Motor Insurance Law (in force from 2014) provides maximum compensation sum for severe injury of € 3,200 instead of the € 640 in previous Act.

(Higher compensation for non-pecuniary damage could be awarded if the claim for damages is submitted directly against the person who caused the damage)

Court practice

From the **Tort Law Developments Report 2009**

- Judgment of the Estonian Supreme Court from **10 June 2009, No 3-2-1-43-09 Leedo v Delfi**: defamatory comments, omission of the Internet portal Delfi to remove the comments from the portal was found unlawful
- European Court of Human Rights decided on 10.10.2013 in the case **Delfi v Estonia (64569/09)** that Delfi is not exempted from liability for insulting remarks in its readers' online comments even after immediate removal.
- Application for referral to the Grand Chamber of the ECHR was accepted on **17.02.2014**.

I Case: defamation

No 3-2-1-18-13, 26 June 2013

a) Facts
- Claimant I is an artist working in Estonia, claimant II is that person's underage son. Claimant I had expressly prohibited the publication of the articles and pictures about their private life.
- Claimants sought fair compensation at the court's discretion for the non-pecuniary damage they suffered as a result of the intrusion into their private and family life.

b) Judgment
- Lower courts satisfied the claims and ordered the payment of damages in the amount of € 2,500 for each claimant as compensation.
- Supreme Court: when a person is engaged in creative work or in its presentation, the heightened interest in his or her creative activities might generally be justified, but this is not the case with his or her private life.
- The private life of a minor is under stricter protection.

c) Comments
- First decision based on § 134 sec 6 LOA providing higher compensation according to the financial situation of the person who caused the damage.
- In this case damages were awarded in the amount of 5% of the income of the magazine.

II Case: General duty to maintain safety

No 3-2-1-73-13, 20 June 2013

1) Facts
- older woman with children entered the corridor at 11.15 pm, lights were working with time switch (1 min 42 seconds)
- the lights went off → woman tried to find support on wall → opening → fell onto the first floor
- building in question was built in 1938
- physical injuries and emotional pain and distress
- 80% permanent partial incapacity for work

2) Judgment
- County Court: satisfied the claim to the full extent
- District Court: overruled the country court's decision and dismissed the case
- Supreme Court: dismissed the decision of District Court, partially satisfied the claim (€ 4,112 for non-pecuniary damage)
- breach of the duty of care: the opening in the wall and the lighting

3) Comments
- second case where the Supreme Court has applied responsibility based on breaching the general duty to maintain safety
- high standard of care of the owners of real estate who are engaged in renting apartments

III Case: Traffic accident

No 3-2-1-7-13, 19 March 2013

1) Facts
- automobile and motorcycle were involved in a traffic accident
- automobile was standing on the road (for left turn), oncoming motorcyclist collided with the car
- the automobile driver should have given way to the motorcyclist
- the driver of the automobile filed a claim for damages.

2) Judgment
- Court of First Instance and the Court of Appeal: dismissed the claim
- Supreme Court: upheld the judgments but revised the reasons
- lower courts: no grounds for reducing damages as the accident was caused partly because of the driver of the automobile
- Supreme Court: revised the reasons by explaining that the respective part played by the drivers in causing accident was unclear and there are no substantial differences in the risks arising from the vehicles, each vehicle possessor must **fully compensate the damage caused to the other.**

III Case: Traffic accident

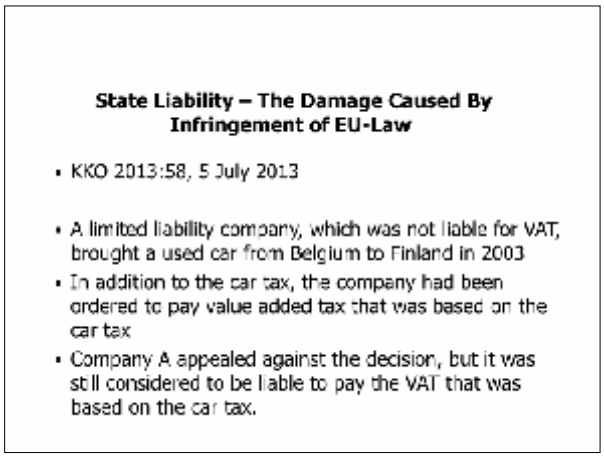
c) Commentary
- The most important in 2013 as regards the development of Estonian tort law
- First time: in some cases, a stationary car on the road may fulfil the conditions under operating a vehicle.
- First time: circumstances justifying reduction of compensation (in Estonia there is no regulation to determine the share of responsibility).
- Questionable:

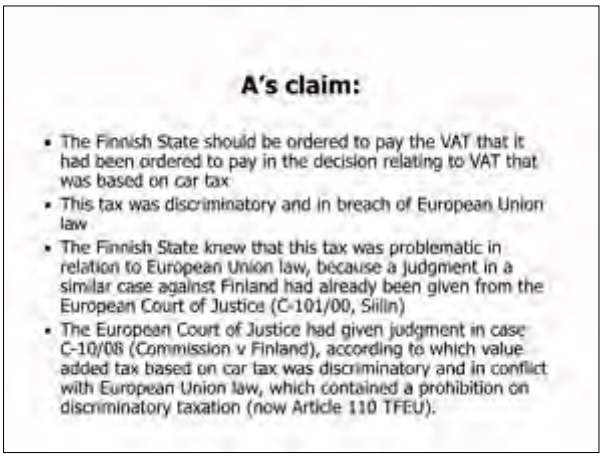
If the driver's involvement in causing the accident is unknown and there are no significant differences in respect of the risks attributable to the vehicles, both of the vehicle operators should compensate the caused damage to the full extent

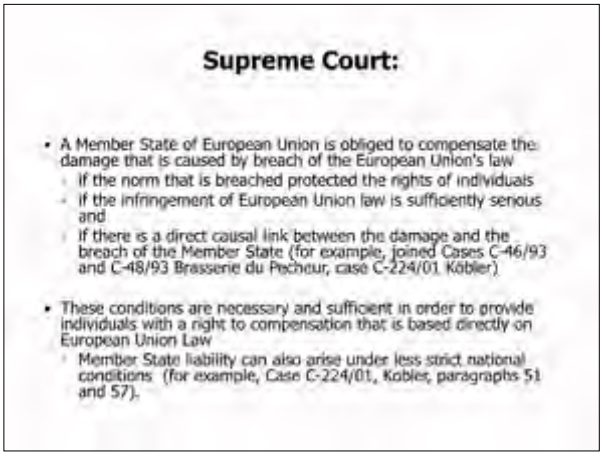
- Result: may invite parties not to disclose the circumstances of an accident to the insurer.

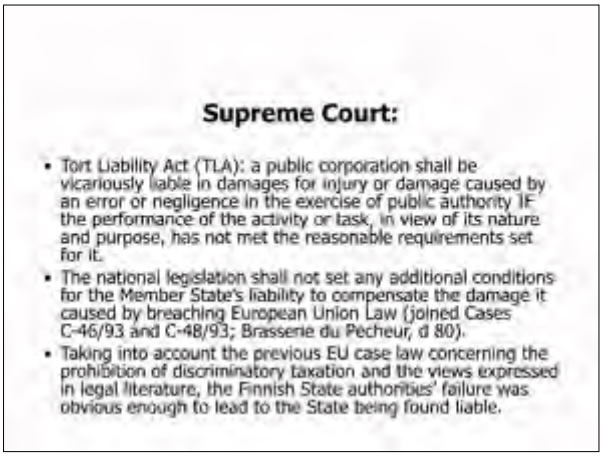
Even though at first glance this solution may seem beneficial for the policyholders, it should be taken into account that the policyholders will ultimately pay higher insurance premiums if compensation amounts are higher.

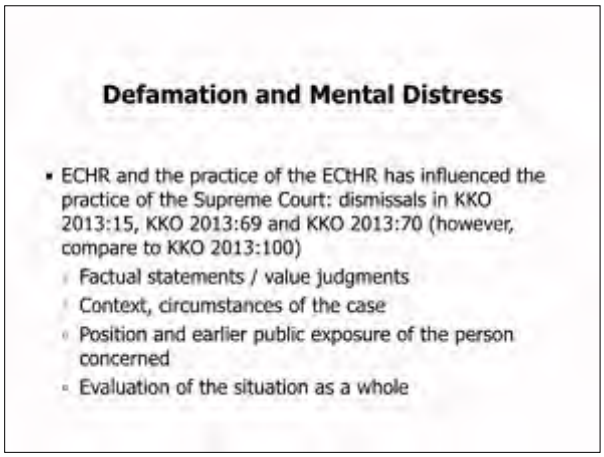
Päivi TIILIKKA: Finland











Michel SÉJEAN: France
Prevention and Compensation

Prevention: Law of 16 April 2013 on Independent Expert Reporting in matters of Health and Environment, and on the Protection of Whistle-Blowers

Compensation: Definition of the Damage of Anxiety Suffered by Victims of Exposure to Asbestos (Court of Cassation, 25 September 2013, Five Rulings the same day)

Florian WAGNER-VON PAPP: Germany

Germany (Florian Wagner-von Papp, UCL):

Defamatory results in the 'auto-complete' function of Google searches

- In April 2009, Google introduced the 'auto-complete function' into its search engine, which makes suggestions based on past user searches
- This has led to litigation where the auto-complete suggestions following the entry of a name falsely indicate an association with illegal, immoral or otherwise socially disfavoured behaviour

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- Plaintiff 1 is a corporation that distributes nutrition supplements and cosmetics in the form of a "network-marketing system" (multi-level marketing)
- Plaintiff 2 is its founder and CEO whose initials are "RS"
- Defendant is Google
- When the full name of RS is entered into Google, the auto-complete suggestions are "[RS] Betrug [= Fraud]" and "[RS] Scientology".
- Plaintiffs successfully applied for a preliminary injunction. Google refused to accept the preliminary ruling as final.

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- First, the Court reiterates that German courts have **international jurisdiction** because the infringing content has a clear nexus to Germany in that the conflicting interests involved actually clash in Germany (see the New York Times decision and the Seven days in Moscow decision discussed in YB 2011, 252 paras 26-32; see also Host Provider Liability, ibid., paras 33-40)
- Secondly, the Court reiterates that **German law is applicable**, see the eDate Advertising decision discussed in YB 2012, 279 paras 45-52

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- The court below considered the content of the auto-complete suggestions only to be that "this is what other users searched for when they where searching for [RS]" or that "pages found when looking for [RS] also contained the terms..."
- In contrast, the Federal Court of Justice considered the content of the auto-complete suggestion to be more substantial: **users expect, or at least consider possible, an inherent connection between the search term (RS) and the suggestions.**

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- The allegation that there is a connection between RS and "Scientology" and/or "Fraud" (both of which have a "negative connotation") implicates RS's personality rights.
- Google cannot rely on the privilege in § 10 TMG because the **auto-complete content is created by Google itself** (rather than merely being the presentation of others' content)

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- Google may therefore be liable as an interferer (Störer)
- However, the Court refrains from assigning liability per se. It considers the key point to be the **omission of removing (or preventing) defamatory suggestions** rather than the commission of suggesting connected search terms.
- By this dodge, the Court gets to the **"notice-and-take down"** principles established for host providers (see YB 2011, Germany paras 33-40): Google does not have to prevent the occurrence of defamatory auto-complete suggestions ex ante, but has to investigate possible infringements once notified and "take down" infringing suggestions.

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

- The question then is the extent of Google's duty to investigate an infringement of personality rights once it is given notice.
- The Court remands the case to the Higher Regional Court for an assessment of whether Google complied with its duty to investigate an infringement of RS's personality rights.

Google auto-complete function: "[RS] Fraud" "[RS] Scientology" - Federal Court of Justice, 14 May 2013, VI ZR 269/12, NJW 2013, 2348

Criticism

- At least one commentator has taken issue with the uncritical acceptance of Google's auto-complete suggestions as "permissible conduct" which shifted the analysis to the "omission" (Gerald Mäsch, JuS 2013, 841).
- Conversely, we noted in the context of host providers that the balancing of personality rights vs freedom of speech is an intricate one. Once notice is given, chances are that the blog post is taken down without a balancing process – personality rights trump free speech regardless of circumstances. It is likely that the same will be true for Google's auto-complete suggestions (although the loss of them is arguably less problematic from a free speech perspective).

Eugenia DACORONIA: Greece

Greek Supreme Court 10/7.01.2013
Wrongful Birth, Compensation of the 'Moral Harm' of the Father of a Handicapped Child

Brief Summary of the Facts
The plaintiffs were married and were already expecting their first child, so the wife, being in the 21st week of her pregnancy, underwent an ultra-sound, from which it was detected that the foetus' bowel was in distension (echogenic bowel), which is an indication that the foetus may suffer from Down's Syndrome or cystic fibrosis, a hereditary disease also known as mucoviscidosis, which is a very severe incurable disease which leads to the child's death sooner or later.
The obstetrician as well as the doctor who performed the ultrasound, after telling the plaintiffs that foetuses suffering from cystic fibrosis "are not left to be born", recommended that the plaintiffs themselves and the foetus should undergo a molecular test for the said disease. The plaintiffs decided to do so and, in case the results were positive, to artificially interrupt the pregnancy for eugenic reasons, given that the foetus had an echogenic bowel and there was still time for the interruption of the pregnancy, as the 24th week had not been completed yet. The plaintiffs and the foetus underwent a special molecular test performed by the defendants, doctors and genetics laboratory, specialised in prenatal control.
The said defendants, due to their negligence, did not discover that the parents were carriers of cystic fibrosis and the foetus was suffering from it; as a result they did not inform the parents accordingly. The latter decided not to interrupt the pregnancy. Unfortunately, the child was born with the said disease, had problems in taking food and had to be operated on three days after birth to avoid perforation of the bowel.
The parents filed an action claiming for pecuniary satisfaction of their moral harm due to the violation of their personality right, alleging that they would have terminated the pregnancy if the doctors had not been negligent and had informed them about the disease of their child.

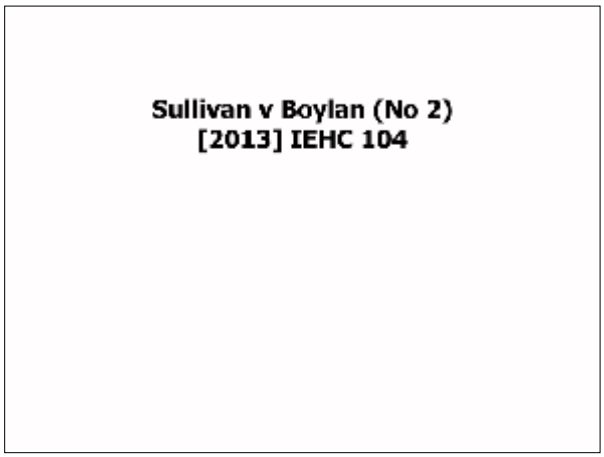
Judgment of the Court
The Supreme Court confirmed the decision of the Piraeus Court of Appeal 22/2011 which, taking into consideration the conditions under which the offence to the personality of the parents took place, the kind and the extent of the offence and its consequences to their mental health and social and business life, the culpability of the defendants, the social and financial status of the litigants (the plaintiff-father of the child is a farmer and the plaintiff-mother does not work because of the need to continuously take care of their ill child, whilst the defendants-doctors are shareholders of the genetics laboratory, which is estimated to be in a good, financial position, awarded the amount of 250,000 Euros to each spouse as moral harm because of the offence to their personality.
The Supreme Court held that the protection of the personality according to art 57 of the Greek Civil Code (GCC) encompasses all goods that are related to the human being such as health (public and personal), honour, private life and the sphere of secrecy, all elements by which a person is distinguished in the outside world (name, image), the physical and emotional integrity. One of the elements that constitute the personality of the individual is mental health and the emotional world which belong to the category of mental goods. The emotional world is also offended by an unlawful act which is directed against another person, to whom the person who felt the grief or the pain is closely related. In accordance, an action for the protection of the personality can also be filed by a third person, a relative, closely connected to the one directly offended.
Furthermore, as is deduced from art 304§§ 1-3 GPC, the rule is that the artificial termination of pregnancy is prohibited and that is why it is punished with the sentences the said article provides. As an exception, the artificial termination of the pregnancy (always with the consent of the pregnant woman) is legally justified in the cases provided in art 304 §4 GPC. One of the cases that justifies the artificial termination of a pregnancy according to the said paragraph is a eugenic indication, i.e. the existence of indications of a severe foetal abnormality, discovered by modern means of prenatal diagnosis, which entail the birth of a pathological child (art 304 §4b GPC).
Obstructing a pregnant woman (either by an act or by an omission) in the enjoyment of her legal choice to terminate the pregnancy when this is permitted by law constitutes a violation of her personality right in the meaning of art 57 GCC; if this offence is culpable, she is enti-

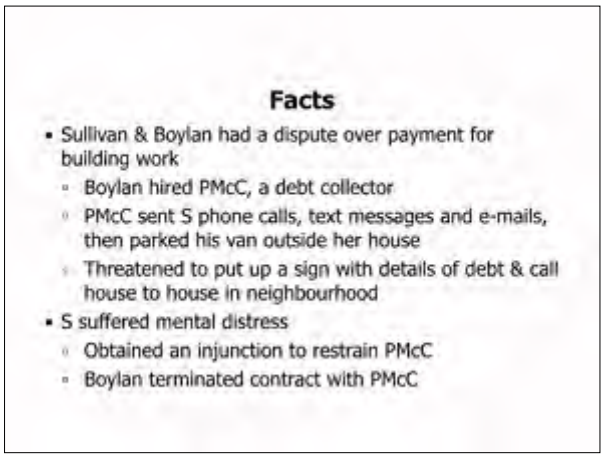
tled to seek compensation for her moral harm (art 59 GCC).
Such a claim also belongs to her husband, even if he is not the one who has been directly offended, because, on the one hand, the decision of termination of the pregnancy is not a personal decision of the pregnant woman but a joint issue of their common marital life and on the other hand, because of the close (marital) relation with the pregnant woman, the adverse consequences on her personality are also felt by her husband.

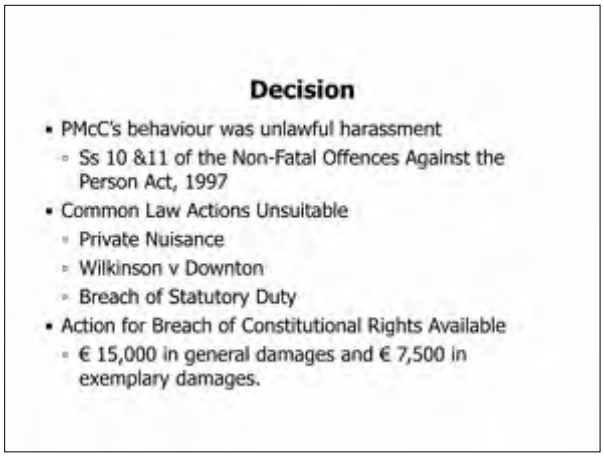
Commentary
The Supreme Court adopts the view according to which, in cases of ill-advice regarding prenatal exams, which in case correctly given would have led to the termination of the pregnancy instead of the birth of a severely handicapped child, the father who felt grief or pain can ask for compensation of his 'moral harm' on the ground that his emotional world has been offended; and this irrespective of the fact that the unlawful act was not directed against him but against another person, his wife.
Greek theory is divided on the subject matter:
According to one view, the possibility recognised to the father to be awarded compensation for moral harm not because of a direct offence to his personality but due to an offence to the personality of another person with whom said person has a close relationship (eg wife), is completely foreign to Greek law; thus, the husband/father should not be entitled to compensation for moral harm.
According to another view, the husband/father is entitled to such compensation, but not on the ground given by the courts, but because he has suffered, like the mother, a direct damage. According to this view, it derives from the community of life of the spouses during marriage, the equality of spouses, the non-establishment by marriage of a parental relation between the spouses and from the interpretation of the rule according to which spouses have to make all decisions jointly, that the relation of the child cannot be considered direct towards the mother and indirect towards the father.
According to a third view, the absolute right of both parents to family planning and in particular their right to have a healthy child should be considered as the basis for the right of each of them to damages and to compensation of their moral harm in case said right is infringed.

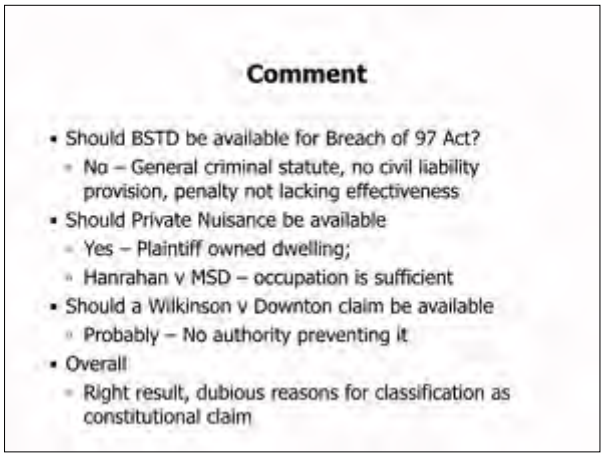
Attila MENYHÁRD: Hungary
Materials will be posted on the conference website (www.acet.ectil.org) when available.

Eoin QUILL: Ireland









Elena BARGELLI: Italy

Cassazione 17 September 2013 ('Lodo Mondadori' – non-contractual liability and restoration in kind; causation, more probable than not)

The plaintiff (Cir Company) and the defendant (Fininvest company) contended for the control of a third company (Mondadori) in the 1980s. The corruption of a judge of the Court of Appeal of Rome, which had been declared by a criminal judgment, lay at the core of the plaintiff's claim. In particular, the plaintiff argued that, had the judge not been corrupted, the decision of the Tribunal of Rome regarding the validity of an arbitration agreement would have been in its favour, and, therefore, it would not have agreed a subsequent bad compromise with the defendant regarding the control of the Mondadori company. The plaintiff claimed for damages for loss of the chance to take over the Mondadori company. The damage would consist in the difference between the actual compromise agreement and the content it could have had if the court had come to a fair judgment. Both the Tribunal and the Court of Appeal of Milan courts upheld the claim for economic damages filed by the plaintiff. The Cassazione confirmed these judgments.

The case involves three main questions. Firstly, whether a claim for damages may be upheld in the event that, as an alternative remedy, the plaintiff would be allowed to claim restoration in kind. In particular, as the 'corrupted' decision of the Tribunal of Rome became final, it could be overturned by an extraordinary means of appeal, which is to say, revocation due to the judge's corruption. Secondly, whether a compromise reached by the parties prevents any other judicial claim (res litigiosa transacta). Thirdly, whether a proper causal link between the unfair decision of the Court of Appeal and the Cir's economic damage exists.

As regards the first question, the Cassazione pointed out that, since the revocation is aimed at the restoration of the status quo ante and the restitution, it could not play any role in the present case, as the restitution in integrum became fairly impossible. As further argument,

the Cassazione invoked the right to the effective remedy, which should lead to the compensation of damage whenever the restoration in kind has become impossible. As regards the second question, the court advocated that the compromise could not prevent the plaintiff from filing an extra-contractual claim for damages. Finally, the Court confirmed the 'more probable than not' doctrine, and, therefore, concluded that the causality requirement was fulfilled in this case.

Agris BITĀNS: Latvia

Judgment of the Senate of the Supreme Court, Department of Civil Cases, 21 February 2013, No SKC-36/2013: Legal ground for compensation of non-pecuniary loss caused by environmental pollution as result of road traffic accident

Facts

On 10 June 2008, near the plaintiffs' home a road traffic accident happened with the defendant's tractor.

As a result, the trailer, which contained 9 tons of ammonium nitrate, a liquid fertiliser - tumbled down a slope and overturned, spilling the contents onto the plaintiffs' plot of land. In addition diesel from the tractor's tanks spilled out as well and part of the residential house had been hit.

Environmental expert found pollution of the local soil, underground water and air, as well as landscape degradation as a result of accident and pollution.

Facts

The pollution level of underground water in the local well's drinking water was 3 to 100 times higher than the limits prescribed by regulatory norms and, therefore, it was impossible to use this water as drinking water.

Thus, the living conditions for the plaintiffs in their property no longer met sanitary and hygienic standards. The plaintiffs (family with several minors and one disabled child) were forced to live in a tent for a few months because it was impossible to stay in the house due to ammonia fumes.

The rehabilitation work carried out had been unsuccessful.

Facts

- Insurance company 'B' paid as insurance indemnity for losses caused as a result of road traffic accident under vehicle owner's mandatory civil liability insurance (€ 1,500).
- The defendant paid € 1,400 for new well.
- However these compensation amounts only covered part of the losses incurred. Difference was € 15,300.
- The plaintiffs requested as compensation for pain and suffering approx € 42,700 for one plaintiff and approx € 113,830 for another plaintiff, which also represented the interests of the children.

Main questions

1. Is compensation for non-pecuniary loss suffered by the plaintiff as result of mental and physical suffering due to environmental pollution caused by road traffic accident legally permissible?
2. What is interaction between the Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners as lex specialis and Civil Law as lex generalis in this regard?
3. Is contributory negligence of victim an independent basis for rejecting the claim ?

Judgment of the Court

Under art 1635 of the Civil Law, the defendant, whose vehicle caused road traffic accident, could be liable for non-pecuniary loss suffered by the plaintiffs due to environmental pollution.

The Law on Compulsory Third Party Liability Insurance for Motor Vehicle Owners states the insurer's liability limit, but it cannot restricts the rights of the victim to receive fair compensation for non-pecuniary loss suffered under art 1635 of the Civil Law.

The claim was not brought against the insurer for insurance indemnification, but for compensation for non-pecuniary loss under art 1635 of the Civil Law which directly provides compensation for non-pecuniary loss.

Judgment of the Court

The consequences of this accident was infringement of the right to inviolability of the home. The right to the integrity of person should also apply to the protection against pollution, noise, etc.

There is no ground to reject the claim due to fact that the plaintiff immediately after the accident prohibited starting emergency rehabilitation work which aggravated the conditions of polluted environment and minimised possibility to reduce pollution and duly eliminate the consequences. These actions of the plaintiff could be taken into account when determining the amount of compensation for non-pecuniary loss.

Loreta ŠALTINYTĖ: Lithuania

I A and J A v the Republic of Lithuania and S N, LSC 18 June 2013, No 3K-3-320/2013: State Liability for Omission: whether a State should be solidarily liable with its prisoners

A State prison inmate called JA from an illegally held mobile, introduced himself as a police officer

claimed that the JA's mother was being held by the police, and that if she wanted her mother to be released, she needed to pay

The conversation lasted for over 2 hours

Persuaded, JA gave an unidentified person LTL 12,725 (€ 3,685)

Is the State liable?

Decisions of courts

- CFI & District Ct: no wrongfulness of the State
- LSC: possible State liability for omission, but too little evidence – case returned to the District Ct for reconsideration
  - Prison inmates' access to mobile phones and that they use them to commit similar crimes - public knowledge
  - The State is under a duty to organise the prison work so that inmates do not have a possibility to use mobile phones

State liable with its prisoner in solidum? LSC: NO

Arts. 6.279(1) and 6.6(3) CC provide for a possibility to establish **solidary liability** in cases where the whole or a distinct part of the damage is attributable to more than one person, **and if the nature of causation between the conduct of the parties and the damage is identical**.

When the **direct cause of damage is the conduct of one tortfeasor, whereas the second tortfeasor contributes to damage only indirectly,** the liability of the tortfeasors is several, not solidary.

- **Art. 6.279 (1) CC:**

Where several persons are liable for the same legally relevant damage, they are liable solidarily. (Rule of inspiration: VI 4.101 PEL Liab.

- **Art. 6.6(3) CC:**

Solidary liability is presumed if the obligation concerns provision of services, joint venture or compensation of damage caused by multiple tortfeasors.

comment

- The CC is new (2000), entered into force in 2001; its sources of inspiration - DCFR and PETL
- The current doctrine of causation - 'flexible'
- First time the LSC reiterated the rule that the nature of causation between the conduct of the parties and the damage needs to be the same in order for solidary liability to apply was in *L B et al v* DNSB 'Medvėgalis', LSC 26 November 2007, No 3K-7-345/2007.
- Same rule cited along with Art. 9.101 PETL (Solidary and several liability: relation between victim and multiple tortfeasors) in *J M Š v State Enterprise 'Registers Center', bailiff L U D*, LSC 26 March 2008, No 3K-7-59/2008.
- The source of this rule unknown; not explained anywhere. Historical and subconscious? An original attempt to restrict the scope of liability in causation protecting the interests of the State?

Giannino CARUANA-DEMAJO: Malta

Foreseeability and Fault

Court of Appeal, Malta
Judgment of 25 October 2013

Writ nº 329/2000

Sexual abuse of a minor

Timeline (1)

- Plaintiff (P), a nine year old girl, goes on weekly visits to her grandfather.
- There she meets the First Defendant (FD).
- Grandfather goes out on an errand leaving P alone with FD.
- FD has sexual contact with P.
- He threatens her and tells her not to reveal what happened.

Timeline (2)

- On subsequent occasions FD takes P to his flat, occasionally also making her miss school to spend the day with him.
- P starts going to secondary school.
- School authorities require medical certificate to explain P's absence from school.
- FD asks the Second Defendant (Dr SD), a physician, to issue a medical certificate.

Timeline (3)

- Dr SD knows that FD is not the parent or legal guardian.
- He does not ask to see the child.
- He still issues the certificate.
- This is done on more than one occasion.
- FD uses the certificates to make P miss school and spend the day with him at his flat.

Timeline (4)

- On the last occasion FD keeps P in his flat under lock and key for four days – he kidnaps her.
- Police find P in FD's flat after four days.
- P suffers psychological trauma.
- P's parents file action for damages on her behalf against FD and Dr SD.
- Only Dr SD contested the action.

First Court Judgment (1)

- Dr SD was negligent in issuing the certificate:
  - without seeing the child;
  - without ascertaining whether FD was authorised to ask for the certificate;
  - in breach of the standards of his profession;
  - especially since he knew that FD was not the child's father or legal guardian.

First Court Judgment (2)

- Damages assessed at €114,780 considering also the 'particular gravity' of the case.
- Both parties are equally at fault and jointly liable to pay the full damages.
- Dr SD appealed.

Appeal Court Judgment

- The cause of the harm was FD's abuse and not Dr SD's certificate.
- Dr SD was in breach of the standards of his profession, but this is not sufficient for liability.
- He could not have foreseen the use which FD would make of the certificate.
- Foreseeability is an element of liability in tort.
- Therefore Dr SD is not liable.

Comment

- Dr SD may not have acted maliciously but he acted knowingly: he knew that he ought not to have done what he did.
- He did not foresee the actual outcome but he knew that rules are there for a purpose.
- He was more than negligent; he was at least reckless.
- Should degree of foreseeability not depend on whether behaviour was reckless/malicious or merely negligent?

Jessy M EMAUS: The Netherlands

Hoge Raad 11 January 2013, RvdW 2013, 255

What happened?

An Egyptian citizen…
- … first applied for a residence permit in 2001
- … applied for a residence permit again in 2006

Both applications were rejected

The claimant lodged objections against both rejections
Both objections were dismissed

The Law

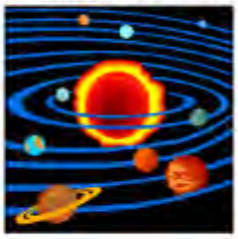
- ECtHR: **Article 6 ECHR not applicable** (ECtHR 5 October 2000, Maaouia v France)
- ABRvS: **Principle of legal certainty** obliges these cases to be conducted within a reasonable time
- ABRvS: **Presumption of non-pecuniary damage**, following case law of ECtHR on article 6

Hoge Raad 11 January 2013, RvdW 2013, 255

- Article 6 ECHR guarantees the right to a 'fair and public hearing **within a reasonable time** by an independent and impartial **judge** (emphasis added)'.
- The application mutatis mutandis of art 6 ECHR does not mean that it also includes a reasonable time complaint that only relates to the objection stage, without the objection stage having been followed by a court hearing.

A Wider Perspective: Two Topics in Dutch Tort Law

I. The Role of Tort Law in Redressing Fundamental Rights Infringements



II. Compensation for Non-Pecuniary Loss

Magne STRANDBERG: Norway

The Down's Syndrome Case

The Facts

- A woman (A) gave birth to a child with Down's syndrome
- During the pregnancy, A should have been offered an amniotic fluid test from Haukeland University Hospital
- Such a test would have revealed that the child had Down's syndrome
- A alleged that she would have had an abortion if she had known that the child had Down's syndrome

The Claim

- A claimed compensation for psychological problems that she had after the baby was born
- A did not claim compensation for the burdens of raising the child
- The claim was based on the Patient Injury Compensation Act (2001/53)

The Parties

- A against the Norwegian System of Patient Injury Compensation
- The Norwegian System of Patient Injury Compensation is liable for claims based on the Patient Injury Compensation Act

The Supreme Court's Reasoning – The Majority

- The preparatory works
- The Sterilisation case from 1999
- The interest in the case "should not be subject to economic measurements"
- Problems of evidence and causation in future cases
- The principle that all humans carry the same human dignity

The Supreme Court's Reasoning – The Minority

- A claimed compensation for her psychological problems
- Such problems are regarded as damage in Norwegian tort law
- The psychological problems were caused by a mistake made by the hospital

The Missing Arguments

- The ethical controversies
- The law of abortion
- Lack of economic loss
- Arguments on consequences

Ewa BAGIŃSKA: Poland

Compensation for Non-Pecuniary Loss in Personal Injury Cases and Compensation for the Violation of Patient Rights

Impact of Victim's Disease on Liability

Polish Supreme Court judgment of 27 April 2012
(V CSK 142/11, OSP 6/2013, item 61)

Summary of facts

- The plaintiff suffered a stroke. The hospital doctor initially diagnosed it as a 'common' stroke, but in a few days it developed into a serious brain failure.
- Despite several prompt requests from the family members, the doctor refused to refer the patient to a CT scan at another hospital (lacking proper equipment on site). He planned to run the test a few days later.
- Soon, the state of the patient deteriorated dramatically. She was still treated with aspirin and the CT scan was performed 2 days later, after she had lost consciousness. A brain surgery at another hospital saved her life.

Summary of facts

- Patient survived, but became an invalid, unable to live by herself, move, communicate, etc.
- Two expert opinions concluded that her brain would have been damaged in the same way had the initial diagnosis been followed by the CT scan. However, failure to run such a test was still a violation of a proper medical procedure.
- Two claims: (1) **a claim for personal injury** & (2) a claim for **compensation of the violation of the patient's right** to health care services that meet the requirements of medical science

Court of 1st Instance – Court of Appeal

- the doctor was negligent
- a case of uncertain causation: both the victim's disease and the doctor's fault had an impact on the development of the disease and the final result
- relied on indirect evidence as to causation, on the probabilities of causal contribution to the deterioration of the patient's state
- held: that the cause in the victim's sphere had preponderant significance and the doctor's fault was attributable to 1/3 of the loss.
- expert opinions were sufficiently clear as to the lack of factual causation between the delay of further diagnostic tests and the final damage. No indirect evidence regarding this issue was permissible.
- The delay of the test as such was wrongful, but the initial diagnosis was still considered as legitimate under the circumstances, albeit the development of the disease counter-indicated the administration of aspirin.
- lack of causation between the final loss and the denial of the medical service.
- !! Decision: **both claims dismissed**

The Supreme Court – on claim no 1

- This is not a case of concurrent causes, the probabilities of each had to be individually assessed
- The principle: fault of a doctor needs to be proven by the plaintiff.
- Exceptions: the standard of proof of causation is relaxed by procedural rules, such as prima facie evidence.
- Exceptions not allowed here: a trial court may not undermine a clear expert conclusion by indirect evidence indicating a lower probability of facts.
- The **dismissal** of claim no 1 is **affirmed.**

The Supreme Court – on claim no 2

- Cassation allowed as to damages for the infringement of the right to proper health care services.
- There are two distinct bases for the award of non-pecuniary damages: medical malpractice resulting in personal injury that resulted in pain and suffering (art 445 KC) and the infringement of a patient's rights (art 4 of Patient Rights Act, ex 19a Medical Establishments Act).
- Although the doctor committed no diagnostic error (because the diagnosis was proper in the circumstances), any unjustified & negligent delay of diagnostic tests constitutes a negligent violation of the patient's right to proper medical services. The patient need not prove a causal link between the infringement of his rights and moral harm suffered.
- Patient Rights Act protects patient rights regardless of the diligence and effectiveness of a medical intervention.

Comment

- As to **claim no 1**: Traditional case-law in cases like this appears to attach greater importance to proof of a physician's negligence than to the failure to meet the required standard of proof of causation. Once the plaintiff proves that he suffered damage in connection with a medical service and the court establishes the respondent's negligence, the general preference is that the latter should not escape liability by providing evidence that some other reasons might have caused, or contributed to, the patient's injury.
- Hence, it is necessary to determine to which degree the fault of a physician is a probable cause of the harm when compared to other factors (eg the development of the victim's disease). If there is a high degree of probability that the action/omission of a hospital or physician was the source of the injury, causation is established.

Comment

- The result in the reported case seems to have turned on the lack of proven negligence in diagnosis. Unless we consider that the test in question was a part of the diagnostic process, since it was said to be included in proper standard procedure, we should accept the decision of the Supreme Court.
- As to **claim no 2**: the two provisions provide for liability for two different wrongful acts and play different functions (compensatory and preventive-compensatory, respectively).
- The Court affirmed its case-law that the breach of right to a proper standard of medical care entitles an individual to compensation even if no personal injury resulted.
- The Supreme Court has rightly confirmed that the two causes of actions are separate and independent avenues for seeking compensation.

André DIAS PEREIRA: Portugal

Portugal – Wrongful birth and wrongful life

Supremo Tribunal de Justiça, 17 January 2013

'Wrongful birth'

'wrongful life'

Baby - severe malformations

- The baby was born with severe malformations: polimalformativ syndrome, agenesis of both forearms and arms, hypoplasia of the mandible and hipoglossia, high palate, broad nose, ears low-set, micropenis, hypospadias, etc.

- **Plaintiffs**
- The mother
- The (severely handicapped) son

- **Defendants**
- The physician
- The radiology clinic

The Court of Appeal

- Accepted the claim of the mother
- The defendants were ordered to pay the plaintiff (mother), jointly and severally, the sum of **€ 200,000.**
- Did not accept the claim of the child, considering the actions of 'wrongful life' contrary to Portuguese law, in that it is not constitutionally granted a right to be born healthy, nor did the Court accept that life with deficiency and malformation is less life worth living....

Supreme Court

- Criminal Code allows termination of pregnancy
- Causal link:
- If properly informed with the rigor needed in this type of events, would lie on the defendants most elementary duty of care with regard to making the diagnosis, which was negligently omitted...

Non-Admissibility of the Action of 'Wrongful Life'

- impossibility of someone taking advantage of their poor condition;
- the malformations were not caused by the defendants; therefore, it is impossible to establish causation;
- absence of a right to life without malformations;
- absurdity that would be open and would lead to new claims: a disabled person could blame their parents for not having aborted.
- the foetus cannot be seen as a **third party** in the contract between the plaintiff (mother) and the defendants (doctors and clinic), by not having, at the date of the facts, legal personality.

My Opinion: Wrongful life cases should be accepted !

- Prenatal medicine... why do we invest so much?
- Private eugenics...
- Doctors of high expertise negligently violate leges artis... do not fulfil their duty to provide information and advice...
- Shall remain irresponsible?

- Wilburg's theory of "moveable" system
- cases of gross negligence and the harm caused – by omission – to the child is enormous

- Right to unfair damage – Art. 24 Oviedo Convention

Modern Opinion in the Literature

- Doctors should be liable in tort or in contract
- this liability includes wrongful birth
- and **wrongful life**,
  - rectius, **diminished life**

Christian ALUNARU: Romania

High Court of Cassation and Justice – 1st Civil Section; Decision no 3127 of 5 June 2013.

Action for damages against Ministry of National Defence and Ministry of Internal Affairs for the damage caused by the shootings of December 1989. Conditions for principal's liability for its agent

Brief Summary of the Facts

The plaintiff sued the Ministry of National Defence and Ministry of Internal Affairs, claiming liability as principals for their agents' acts, whose negligence resulted in the fatal shooting of plaintiff's son, on 23 December 1989.
The plaintiff's son was shot to death that day during the shootings at the television building area.

In the area surrounding the television building mixed forces of the Ministry of National Defence, the Ministry of Internal Affairs (Militia), patriotic guards of various State companies and armed civilians were present, having as their objective the defence of the television area. As they permitted the entrance of the group of demonstrators to the courtyard of the building, the plaintiff concluded that the protective obligation that these military units had extended to the group of civilian demonstrators.

Conditions of principal's liability for its agents' act:

Condition 1: The so-called 'principal-agent relationship' = a subordinating relationship based on the parties' agreement, through which the agent recognises the principal's authority to supervise, to direct and to control his activity.

Conscripted soldiers are not agents of the Ministry of National Defence, lacking agreement between parties. According to Art 52 para 2 of the Romanian Constitution in force on December 1989, military service was compulsory for men (Romanian citizens) of 20 years of age. Therefore, these youths did not exercise functions, but fulfilled a constitutional duty of honour. Their subordination is imposed by the law with this purpose.

Condition 2: 'the damaging act must have been committed by the agent in the fulfilment of the function assigned by the principal'

High Court: 'a direct causal relationship or such connection that the function assigned to the agent would have decisively determined the commitment of the act'.

Implicit condition: a principal can be held liable only if the agent is identified. In the area where the plaintiff's son was killed, military personnel (hired on the basis of an employment contract) as well as conscripted soldiers were present. The liability entailed is different for the two categories of soldiers. For the military personnel, hired on the basis of an employment contract, the Ministry is held liable, while it is not for the conscripted soldiers.

The substantive law principle of in dubio pro reo cannot be transposed on a procedural field, considering that the inability to identify the perpetrators is not imputable to the Ministry of Defence.

Conclusion:

Apparently, the High Court's motivation is grounded on legal provisions, legal literature opinions and related case-law.

However, the solution is profoundly unjust, as, in essence, the reason for which the mother of a victim of the Revolution cannot obtain moral damages is the impossibility of identifying the person who shot her son during the fighting in the area surrounding the television building. In absence of an identified agent, there is no principal liability.

The conclusion of the Bucharest Court of Appeal is preferable: 'The plaintiff's obligation to prove the identity of the persons from the Ministry of Internal Affairs who were agents is excessive and what is relevant in the case is the identification of the natural or legal person in whose interest the activity took place'.

The principle of moral damages invoked by the High Court

The moral damage consists in the plaintiff's emotional suffering for her son's death and not the death itself. Furthermore, compensation for moral damage was awarded by the Tribunal in order to cover the emotional pain and suffering, and was not aimed at allowing the plaintiff to 'buy' material satisfaction. The compensation awarded by the Tribunal was a price for pain, not a price for pleasures desired and not obtained by the plaintiff.

Conclusion: from the types of moral damage (analysed already in a previous report, in 2010), in the case at hand, 'pain and suffering' (pretium doloris) and not 'loss of amenity' (known in the Romanian and French doctrine as 'prejudice d'agrement') is applicable.

Martin A HOGG: Scotland

Shields v Crossroads (Orkney)

- **Facts**: The pursuer had a brief romantic, sexual affair with one of the defenders' employees, who was, at the time, a social worker assigned by his employer (a charity) to assist her with various problems in her life. He eventually ended the affair.
- **Alleged injury**: The pursuer claimed that the affair had caused her to suffer serious injury to her mental health and certain financial losses. She claimed £100,000 in damages, arguing that the defenders (i) were vicariously liable for his wrongful conduct, and (ii) were under a direct duty to protect her from their employee's conduct.
- **Case based on vicarious liability**: She argued that her former lover owed her a **duty of care** not to have an affair with her because of the position he was in as her social worker; that he had **deliberately intended** to cause her distress and psychological harm by deciding to have an affair with her; and that the defenders were **vicariously liable** for this wrongdoing.

Case based on directly owed duties: She argued that the defenders owed directly to her:

(i) a duty to see to it that staff did not behave in an inappropriate manner (including a sexual manner) towards service users and that staff did not form inappropriate relationships with such persons;

(ii) a duty to take reasonable care to prevent staff from engaging in conversations or correspondence of a sexual nature with service users;

(iii) a duty to advise staff that all meetings should be conducted in the defenders' premises;

(iv) a duty to prohibit staff from communicating with service users other than by means of their work computers; and

(v) in circumstances where the defenders became aware of an inappropriate relationship having been entered into by one of their employees, a duty to take reasonable care to investigate and to take adequate steps to prevent or stop the relationship from continuing.

Judgment of the court: There was no basis in law for imposing any of the duties of care alleged by the pursuers on the defenders:

(1) the basis of the duties alleged would impose requirements on the defenders in relation to their employees which would be **too burdensome or impracticable** for them to undertake;

(2) moreover, there was nothing in the facts alleged by the pursuer to suggest that the defenders should have appreciated at a managerial or supervisory level that an improper sexual relationship had begun between the pursuer and the social worker or that he was acting in an inappropriate manner (far less a sexually abusive or predatory manner) towards her;

(3) even were the duties alleged to have existed, it **would have made no difference had they been complied with**: none of the duties alleged would have prevented the parties from seeing through the course on which they each freely and willingly agreed to embark;

(4) in all the circumstances, it would **not be fair, just and reasonable** to impose on the employee a duty not to enter into a sexual relationship with her based on the position of trust he occupied and in view of his state of knowledge about the pursuer's psychological vulnerability;

(5) the pursuer's claim that the employee **deliberately intended to inflict harm** on her was also irrelevant: the employee's motivation was to have a sexual relationship with the pursuer and not to inflict harm on her; and

(6) In relation to any claim of **vicarious liability** against the defenders, the employee's conduct in undertaking the relationship fell **outside the 'scope of the employment'**.

Analysis:

- Case is of interest for its discussion of a **novel argument** to be pled before the Scottish courts, namely that the undertaking and subsequent ending of a romantic affair between a person in a position of trust and the party reposing trust in him might amount to breach of a duty of care in delict.
- The result may well be the right one, but the judgment has not aired all of the issues relevant to a claim of this sort.
- **Intentional infliction of mental harm is only briefly discussed, and dismissed**, in the judgment, without proper consideration of the fact that there is some Scottish authority supporting a right of action in relation to "intentional conduct likely to cause, and in fact causing, harm by way of nervous shock".

- Furthermore, in relation to **intentional delicts**, **recklessness is normally sufficient to trigger liability**, subjective intention to inflict the harm not being required.
- The judge's discussion of the vicarious liability aspect of the claim relies heavily on the traditional analysis of whether the acts undertaken were "**in the course of the employment**". However, the newer approach in this field is based on a "**close connection**" test. That test has been held to have been met in relation to the physical and sexual abuse of children by those entrusted with their care; it does not seem far fetched, by analogy, that it might be met in relation to sexual conduct between a social worker entrusted with the care of an adult, though this approach is not explored by the judge.

Conclusion

It might well be desirable for the law of delict to avoid imposing duties of care between consenting adults in relation to the commencement and breaking off of romantic affairs, even if a position of trust is involved. Whether or not that is so, the judgment in this case does not fully discuss all of the pertinent issues, and it is possible that a case of this sort may come before the courts again for fuller analysis of all such issues.

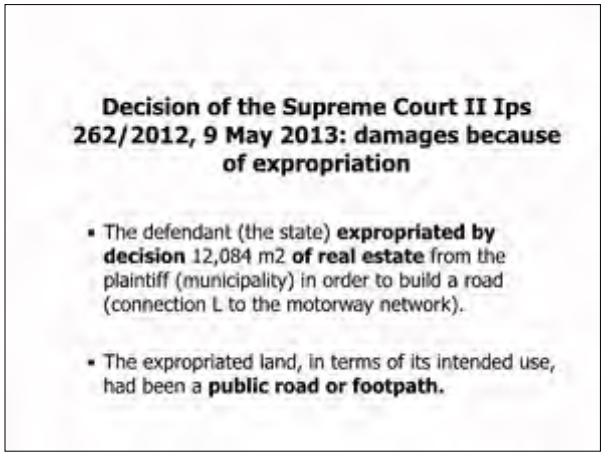
Anton DULAK: Slovakia

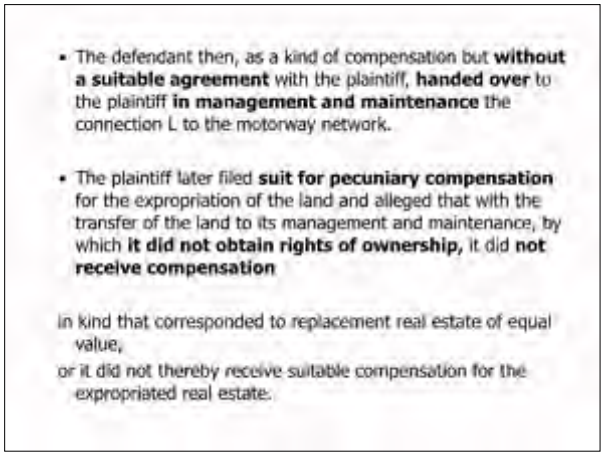
The Judgment of the Regional Court Nitra dated 2 October 2013, File No 9Co/330/2012 on immaterial damages, unpublished: the highest amount of compensation ever awarded for personal injury in Slovakia.

Facts: Claimant one had undergone simple nasal septum surgery. During the operation and in the follow-up post-operative care, it was alleged that the employees of the defendant (hospital) had committed a gross breach of their duties, which resulted in claimant one's irreversible and permanent brain damage, termed as permanent vegetative state (pseudo coma) or 'social death'.
By means of a legal action dated 7 May 2009:
- Claimant one claimed compensation for the pain he suffered in the amount of Eur 90,833. Furthermore, he claimed the payment of an amount of Eur 155,500 to compensate his reduced capacity for social life plus an amount of Eur 330,000 due to the immaterial injury suffered.
- Claimants two to five (parents and siblings) sought compensation for immaterial injury in the amount of Eur 90,000 each
The court of first instance decided in favour of the claimants.
- To claimant one: maximum possible amount of compensation for the pain (Eur 17,942), Eur 181,666 for reduced capacity for social life and Eur 200,000 for immaterial injury,
- To claimants 2 - 3 (parents) Eur 90,000 each,
- To claimants 4 – 5 (siblings) reduced compensation Eur 10,000 each.
The county court (court of appeal) upheld the judgment.

From the court argumentation:
- '...if the claims brought under the provision on damages (sec 444 of the Civil Code) do not constitute sufficient satisfaction for damage to health, for pain and reduced capacity for social life, it is not to be excluded that those affected seek further satisfaction according to the general provisions on personality rights...',
- '...the court must always examine whether the person acted in such a manner as can be expected from any reasonably behaving physician ... when examining the possibility of avoiding damage to another's health, a higher level of accountability must be applied to physicians as an expert as against a layperson – a non-expert,'
- '...the question of degree of culpability of the tortfeasor substantially influences the amount of compensation awarded ...'
- '...the decisive goal of sec 11 CC should not only be satisfaction, but also prevention .... and also a sanction.'

Barbara NOVAK: Slovenia





- **The Supreme Court** stressed that in procedures of expropriation it is also possible to consider **within the concept of compensation:**
- **the transfer of real estate in management and maintenance**
- **if such a transfer represents a benefit** to the person liable to expropriation,
- especially if such benefit can **be evaluated in pecuniary terms.**

- The reasoning of the court **could be dubious, since** the right to management and maintenance of real estate **cannot generally represent the equivalent to the right of ownership.**
- In addition, the court did not consider the key questions of **what kind and how much the benefit** from management and maintenance **must be for it in general to represent the equivalent of the right to ownership.**
- The final decision may therefore be **dubious from a constitutional point of view.**

The question of determining compensation because of expropriation during road building appeared several times in 2013:

- the function of compensation for expropriation is that it enables the affected person to obtain something on the market of the same value as the expropriated object. Because the person liable to expropriation can only obtain real estate on the market, **compensation must be a reflection of relations on the market** at the time of its determination.

- in determining compensation, **the purpose for which the land was used** until the adoption of the planning document by which its status was changed because of the envisaged building of infrastructure **is crucial.** Its level is calculated in relation to the market value that would have been possible to achieve with the sale of the land before expropriation.
- an expropriation claimant is paid compensation with a delay **not longer than the final decision on expropriation.** Persons subject to expropriation are therefore **entitled to default interest** from the day following the final decision on expropriation.

Albert RUDA: Spain

Contergan-Skandal, the Spanish way

Contergan (Thalidomide)

- Produced by Grünenthal Pharma SA
- Sold in 50 countries
- Birth defects
- Withdrawn from the Spanish market in 1963 (!)
- Around 20,000 mutilated people worldwide
- Around 3,000 victims in Spain

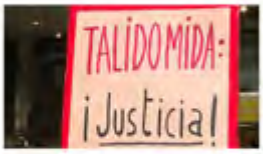
Judge of First Instance No 90 (Madrid)

AVITE

www.avite.org

- Decision 19.11.2013
- 50 years have elapsed
- Claim by AVITE members
- Product commercialized although banned in Germany (1961-1963)
- Negligent behaviour (art 1902 CC)

Prescription?



- 1 year since the victim knew (art 1968 CC)

but:

- General and progressive impairment of the victims
- Continuing damage (daños continuados)

Håkan ANDERSSON: Sweden
Materials will be posted on the conference website (www.acet.ectil.org) when available.

Peter LOSER: Switzerland
Materials will be posted on the conference website (www.acet.ectil.org) when available.

Thomas THIEDE: European Union

CJEU 16 May 2003 – C-228/11, Melzer v MF Global UK Ltd

Art 5(3) Brussels I Regulation must be interpreted as meaning that 'it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised'.

CJEU 24 October 2013 – C-22/12, Katarína Haasová v Rastislav Petrík, Blanka Holingová and CJEU and CJEU 24 October 2013 C-277/12, Vitālijs Drozdovs v AAS 'Baltikums'

Art 3(1) of Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Art 1(1), (2) of Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005, and Art 1(1) Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles must be interpreted as meaning that compulsory insurance against civil liability in respect of the use of motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law applicable in the dispute in the main proceedings.

CJEU 10 October 2013 – C-306/12, Spedition Welter GmbH v Avanssur SA

The claims representative's sufficient powers must include authority validly to accept service of judicial documents necessary for proceedings for settlement of a claim to be brought before the court of the domicile of the victim.

CJEU 3 October 2013 – C-170/12, Peter Pinckney v KDG Mediatech AG

Art 5(3) must be interpreted as meaning that,

in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.

ECtHR 10 October 2013 – no 64569/09, Delfi v Estonia

The Estonian authorities' approach that Delfi's news portal is to be considered as a publisher, rather than as an (intermediary) internet service provider is endorsed by the ECtHR. The court found that the news portal should have exercised greater diligence with respect to reader comments: the word-based technical filter that was installed to delete vulgarities, threats or obscene expressions was shown to be insufficient; the notice-and-take-down facility, according to which anyone by simply clicking on a button designed for that purpose could notify inappropriate comments to the administrators of the portal, had not prevented the grossly insulting comments from being published on the platform; it was primarily incumbent upon on Delfi to take preventive measures, rather than relying on victim complaints. The ECtHR opined that Delfi exercised 'a substantial degree of control over the comments published on its portal', although it did not make as much use as it could have done of the full extent of the control at its disposal. As Delfi allowed comments by non-registered users, and as it would appear disproportionate to put the onus of identifying authors of the offensive comments on the injured person, the ECtHR held that Delfi for that reason must have realized that 'there was a higher-than-average risk that the negative comments could go beyond acceptable criticism' and Delfi must have considered 'to have assumed a certain responsibility for these comments'. As the comments themselves were of a particularly 'insulting and threatening nature' the chamber unanimously came to the conclusion that the Estonian courts' finding was a justified and proportionate restriction of Delfi's right to freedom of expression.

Ernst KARNER: Concluding Summary

Materials will be posted on the conference website (www.acet.ectil.org) when available.

Special Session: Cyber Torts, Saturday, April 26, 2014

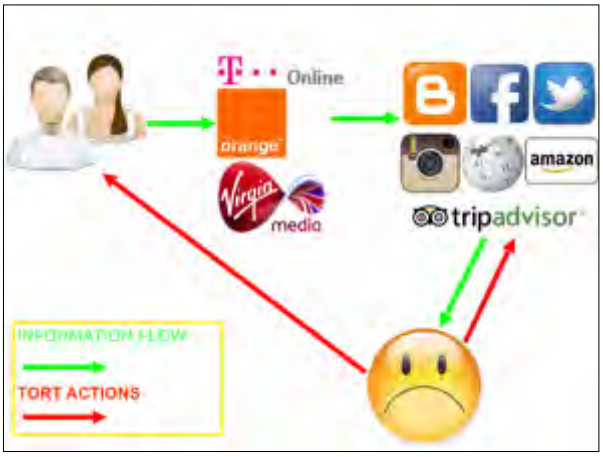
Bernhard A KOCH: Cyber Torts – Something Virtually New?
Steve HEDLEY: Cybertrespass – A Solution in Search of a Problem?
Mårten SCHULTZ: Tort Law, Guerilla Warfare and the Promotion of Cyber Privacy

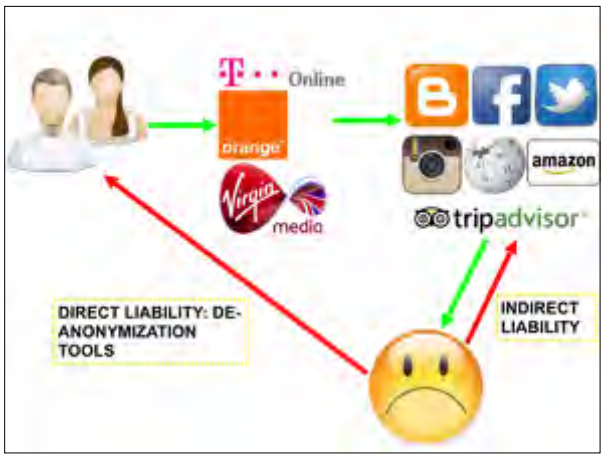
Materials will be posted on the conference website (www.acet.ectil.org) when available.

Ronen PERRY: Liability for Online Anonymous Speech: Comparative and Economic Analysis

Liability for Online Anonymous Speech:
Comparative and Economic Analyses

Ronen Perry & Tal Zarsky
Annual Conference on European Tort Law
Vienna, April 24-26, 2014





Recent Developments

- Indirect liability:
  - *Delfi v Estonia* (ECHR, 10.10.2013)
  - *Tamiz v Google* (Eng Ct App 2013)
  - English Defamation Act (in force: 1.1.2014)
- Direct liability:
  - *Digital Rights Ireland Ltd v Minister for Communications* (ECJ, 8.4.2014)
  - *Ryanair v Eircom* (Ir H Ct 12.2.2013)
  - *AB Ltd v Facebook Ireland Ltd* (N Ir H Ct 6.2.2013)

... ...

Roadmap

- A comparative analysis
- Economic analysis

- Assumptions:
  1. Traditional defamation law is defensible
  2. Online anonymous defamation is a distinct category of online anonymous speech
  3. Anonymous statements may be harmful
  4. Content providers are the only candidates for indirect liability
  5. Parties are subject to the same jurisdiction

Part I: A Comparative Analysis

Four paradigms:

- *United States*: de-anonymization tools available, no indirect liability
- *Israel*: no de-anonymization tools, indirect liability available
- *European Union*: de-anonymization tools available, indirect liability available
- *UK*: de-anonymization tools available, residual indirect liability (only if speaker cannot be reached)

Model 1: United States

- Indirect liability:
  - Background:
    - *Cubby v CompuServe* (1991): no liability without moderation
    - *Stratton Oakmont v Prodigy* (1995): liability follows editorial control
  - Communications Decency Act § 230 (1996):
    - "No provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another"
  - *Zeran v America Online* (1997):
    - "Lawsuits seeking to hold a service liable for its exercise of a publisher's traditional editorial functions... are barred"

Model 1: United States

- Direct liability:
  - "John Doe Subpoena"
    - Uncertainty about evidentiary standards
    - The substantive balance between freedom of speech and reputation enters the process

Model 2: Israel

- Indirect liability:
  - Section 11 of the Defamation Act ("Communication media")
  - *Dubitsky v Shapira*: liability for negligent monitoring
- Direct liability:
  - *Rami More v Barak ITC*: no procedural framework for ordering intermediaries to provide identifying data about anonymous users
  - The decision reflects a substantive preference

Model 3: EU

- Indirect liability:
  - E-Commerce Directive 2000/31/EC
    - Ch. II, Sec. 4 : "Liability of intermediary service providers":
      - Art. 14: hosts liable if they had knowledge or refused to remove illegal statements (notice-and-takedown)
      - Art. 15: Hosts have no general obligation to monitor.
    - Recitals 47-48: "duties of care"
    - Restrictions do not apply to non-hosts
  - *Delfi v Estonia* (ECHR, 10.10.2013):
    - Delfi's actions rendered it a "publisher," rather than a mere "intermediary"

Model 3: EU

- Direct liability:
  - E-Commerce Directive
    - Art. 15(2): Member States can establish rules obliging service providers to transfer user information
    - Rules must comply with Data Protection Directive 94/45/EC, Electronic Privacy Directive 2002/58/EC, and national privacy laws
    - *Ryanair v Eircom* (2013)

Model 4: England

- Indirect Liability:
  - Defamation Act of 2013 (in force: 1.1.2014)
    - Sec. 5: a content provider has a defense unless the speaker cannot be identified, and the content provider did not properly respond to the victim's complaint → residual indirect liability
    - Sec. 10: non-author/editor/publisher can be liable only if suing author/editor/publisher is not reasonably practicable
- Direct Liability:
  - *Norwich Pharmacal* order

Part II: Economic Analysis

Four options:

1. No liability
2. Exclusive direct liability
3. Exclusive indirect liability
4. A combination of direct and indirect liability
   a) Concurrent liability
   b) Residual indirect liability

Model 1: Exclusive direct liability

- Justification: wrongdoers internalize negative externalities and incentivized to take the desirable level of care

Model 1: Exclusive direct liability

- 1st problem: high identification costs:
  1. Legal complexity (free speech and privacy)
  2. Technological obstacles:
     - IP address hidden (proxy servers, Tor)
     - Public hotspots (resolved by registration requirement)
     - No sufficient retention of user data (Data Retention Directive of 2006 found invalid in *Digital Rights Ireland v Minister of Communications*, EC., 8.4.2014)
  3. Reposting by several users
- Effects:
  - No full internalization → Under-deterrence
  - Inefficient lawsuits may be brought
- Standard solution (multiplier) inappropriate

Model 1: Exclusive direct liability

- 2nd problem: judgment-proof defendants:
  - Ease of access and anonymity encourage everyone to participate. The typical user is the average citizen
- Effect: No full internalization → Under-deterrence
- Solutions:
  - Indirect liability of a deep-pocketed party
  - Prohibiting activity without financial capacity
  - Mandatory liability insurance
  - Criminal liability

Model 1: Exclusive direct liability

- 3rd problem: transaction costs
- Effect: no transfer of the burden to content provider when it is the cheapest cost avoider

Model 2: Exclusive Indirect liability

- Justifications:
  - Direct liability leads to under-deterrence. The solution is to impose liability on a third party who is (1) easily identifiable; (2) deep-pocketed; and (3) capable of controlling the primary wrongdoer's conduct
  - The intermediary may be the cheapest cost avoider
  - Loss spreading

Model 2: Exclusive Indirect liability

- 1st problem: relatively high cost of precaution:
  - Monitoring
  - Notice-and-takedown
  - Collecting user data and acting upon it
- Types of monitoring/S&T systems:
  - Human discretion: (1) high cost, (2) multiplied by the number of all statements
  - Automatic screening: low marginal cost, risk of "false positives"
- Data Retention Directive held invalid by ECJ

Model 2: Exclusive Indirect liability

- 2nd problem: unaccounted benefits:
  - Most users create positive externalities (Lichtman & Posner 2006), which offset negative externalities
  - Content providers do not capture the full social benefit
- Effect: over-deterrence
- Solutions:
  - Transactions between public and content providers → unrealistic (Hamdani 2002)
  - Market forces → network effects, vendor lock-in
  - Fault-based liability (Lichtman & Landes 2003) → impractical

Model 2: Exclusive Indirect liability

- 3rd problem: asymmetric response to errors:
  - In cases of uncertainty:
    - False negative: no liability
    - False positive: liability
- Effect: over-deterrence (removing statements, blocking users, disabling user-contribution, reducing demand for technological innovation)
- Solutions:
  - Counter-incentive – enabling speaker to respond → high cost, still chilling effect
  - Market forces

Model 3: Concurrent Liability

- Advantages:
  - Overcoming direct liability problems: identification costs and judgment proof defendants
  - Content providers' incentive to facilitate speaker identification
- Disadvantages:
  - Possible over-deterrence (double censorship) ⇔ possible under-deterrence (diluted sanction)
  - Aggregation of costs (monitoring + identification)
  - Privacy and data protection concerns

Model 4: Residual Indirect Liability

- Structure: generally, the speaker alone will be liable. But if a speaker is unreachable, indirect liability is imposed
- Advantages:
  - Eliminating monitoring costs, preventing over-deterrence
  - Reducing speaker identification costs
  - Preventing multiple-defendants issues

Model 4: Residual Indirect Liability

- Disadvantages:
  - Jeopardizing free speech and privacy
  - Does not overcome judgment-proof issue (may not be a serious problem and can be solved)
  - Applies even when the content provider is the cheapest cost avoider (not likely)

Curricula Vitæ

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liability, consumer protection and comparative law. She worked for the Commission for the Codification of Civil Law (on torts and on consumer contracts). She is a member of the European Group on Tort Law and an elected member of the National Council For Science and Higher Education; editor-in-chief of Studia Iuridica Toruniensia (2008-2012), and a member of the advisory boards of the European Review of Private Law and Wiadomosci Ubezpieczeniowe.

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