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The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

A list of books in the series can be found at the end of this volume.

Causation in European Tort Law

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To Cloe and Ioli

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have to bear the risk that the situation cannot be clarified. Consequently, he will have to prove that his negligent increase of the risk did not lead to the harm.¹⁰⁵ The same result was reached by the Austrian Supreme Court, the Oberster Gerichtshof (OGH),¹⁰⁶ which placed the burden of proof – for the question whether the claimant would indeed have opted for an abortion – on the defendant physician.¹⁰⁷

The Netherlands

Ivo Giesen and Rianka Rijnhout

1. Under Dutch law, Dr X's omission could be considered to be the cause of Bettina's loss (see case 1.II. (3), below). Therefore he will most probably be held liable under Art. 6:74 BW (Dutch Civil Code) (contractual liability) in conjunction with Art. 7:453 BW (duty of care of a physician). Bettina will probably be successful in claiming compensation for both pecuniary and non-pecuniary damage.

II. Liability depends on the plaintiff being able to prove the following:

- (1) The physician owes a (contractual) duty of care towards the plaintiff, and
- (2) additionally, the plaintiff, i.e., the mother, should have suffered legally relevant damage.

Under Art. 6:95 BW both pecuniary and non-pecuniary damage are considered to be legally relevant damage. As far as pecuniary damages are concerned, the Dutch Supreme Court decided in the case of *Baby Kelly*

that the cost of bringing up a child should be compensated.¹⁰⁸ Furthermore, the loss of income due to having and raising a child, in principle, should be compensated.¹⁰⁹ It must, however, be mentioned that the decision as regards the latest compensation was given in a case that dealt with the birth of a *healthy child* (a case dealing with contraception). Nevertheless, we cannot think of a reason why this decision should be different in the case of the birth of a *handicapped child* due to the omission of prenatal testing.

Art. 6:106 BW is concerned with compensation for non-pecuniary damage. The Supreme Court held in the case of *Baby Kelly* that the birth of a handicapped child due to a medical mistake (neglecting antenatal screening) should be considered an infringement of the fundamental right to choose a particular form of family life (the right of self-determination). Therefore, whether or not the parent has a physical or mental disability, compensation for non-pecuniary damage should be granted. As far as this case is concerned, it is important to mention that the mother, the father and the handicapped child should receive compensation.¹¹⁰

(3) Furthermore, the plaintiff should – in principle – prove a *conditio sine qua non* (hereafter: CSQN) between the breach of the duty of care and the damage (factual causation, the 'but for' test). The defence raised by Dr X that the plaintiff would have had the child anyway because of her religious beliefs can be qualified as a CSQN defence. In the Dutch case of *Baby Kelly*, the question of liability for the omission of prenatal testing and, as a consequence, the birth of a *handicapped child*, was placed before

¹⁰⁸ HR 18 March 2005, *Nederlandse Jurisprudentie* 2006, 606, comm. J.B.M. Vranken (*Baby Kelly*), 4.5–4.6. The compensation is not limited to the extra costs of bringing up a handicapped child instead of a 'healthy' child.

¹⁰⁹ HR 21 February 1997, *Nederlandse Jurisprudentie* 1999, 145, comm. C.J.H. Brunner (*Wrongful birth I*).

¹¹⁰ It is unclear whether the parents of a *healthy child* should be granted compensation for non-pecuniary damage. The Dutch Supreme Court ruled in 2002 that compensation for non-pecuniary damage, due to the birth of a healthy child, should not be granted, because of the fact that under the regime of the former Civil Code the parent should have suffered a mental illness, and the mother in that case did not. HR 9 August 2002, *Nederlandse Jurisprudentie* 2010, 61, comm. M.H. Wissink, no. 4.3. The Supreme Court has not yet decided, when applying the new Civil Code, upon a case in which the question of the birth of a *healthy child* in connection with non-pecuniary damage is at stake. The Court of Appeal 's-Gravenhage held, however, that the breach of the right of self-determination of both a woman and a man, due to a sterilization of his wife without her consent, could be considered a breach of a fundamental right, for which a compensation for non-pecuniary damage could be granted; it was apparently not necessary that the mother or the father were (mentally) injured. Court of Appeal 's-Gravenhage 29 September 2009, *RAV* 2010, 7.

¹⁰⁵ M. Karollus, *Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung* (Vienna: Springer, 1992), p. 399 ff.; Koziol, *Haftpflichtrecht I*, no. 8167, 16/12, 16/37; id., *Basic Questions*, no. 7128; Kärner, in KBB, § 1295 no. 14.

¹⁰⁶ OGH 1 Ob 91/199k; for an English summary of this decision see B.C. Steininger, 'Austria', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2006* (Vienna-New York: Springer, 2008) no. 13 f.; 6 Ob 303/02 f.; see on this decision B.C. Steininger, 'Austria', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2003* (Vienna-New York: Springer, 2004) no. 63 ff.

¹⁰⁷ The reasoning employed by the OGH is, however, less convincing, as it only refers to its general practice according to which the burden for proving the violation of information duties about treatment risks is reversed. Yet without proper disclosure, the patient's consent to the treatment is invalid, which means that the treatment is unlawful and constitutes bodily injury. In fact we are therefore confronted with harm caused by active conduct. That the doctor has to prove that the patient would also have opted for the treatment in case of proper disclosure is therefore not a reversal of the burden of proof but a consequence of the general rules according to which lawful alternative conduct will have to be proven by the defendant.

the Supreme Court. However, the outcome of this case cannot answer the question which is posed here because the Court of Appeal (the last instance to decide on facts) decided that the mother would have had an abortion if she had known of the handicap. Therefore, the question that is presented in the case of Dr X cannot be answered solely by the outcome in the *Baby Kelly* case. It is nevertheless important to mention that the Supreme Court decided that the medical error in the case was in fact the cause of the damage, notwithstanding the fact that the handicap as such was not caused by the medical mistake.¹¹¹

To come closer to an answer to the question which has been placed before us in the case of Dr X, another Supreme Court case should be mentioned, namely the case of *Stichting Bovenij Ziekthuis/X*.¹¹² In this case a woman had chosen to have an abortion after six weeks of pregnancy. The termination was not successful; during the second check-up the woman was still (at that moment 16–17 weeks) pregnant. She then decided not to have a second abortion, and eventually she gave birth to a healthy child. When the hospital was sued for damages, it argued that there was a lack of factual causation. The Court of Appeal decided that a woman's decision to terminate a pregnancy is very personal, more specifically the freedom of making this choice is based on her fundamental right of self-determination. Therefore, this woman had the opportunity to choose, of her own free will, for or against a second abortion. The personal nature of this decision, i.e., the decision not to have a second abortion, cannot raise any objection against her claim as such. This would however be different if the woman had indeed changed her mind as regards her desire to have a child in general, irrespective of the fact that she was (still) pregnant. Such a change of mind would amount to a liberating defence, and therefore the burden of proof would fall on the hospital. The Dutch Supreme Court upheld this decision by the Court of Appeal.¹¹³

In sum, the Dutch Supreme Court has not decided specifically upon the question posed by the case of Dr X. Nevertheless, the overall conclusion that could be drawn, taking into consideration both cases, is that the choice to carry out an abortion is a personal decision which, as such, cannot diminish the possibility of someone being awarded

¹¹¹ HR 18 March 2005, *Nederlandse Jurisprudentie* 2006, 606, comm. J. B. M. Vranken (*Baby Kelly*), no. 4.4.

¹¹² HR 16 April 2010, *Nederlandse Jurisprudentie* 2010, 229 (*Stichting Bovenij Ziekthuis/X*).

¹¹³ HR 16 April 2010, *Nederlandse Jurisprudentie* 2010, 229 (*Stichting Bovenij Ziekthuis/X*), no. 3.6.4.

compensation. However, considering the reasoning of the Supreme Court in *Stichting Bovenij Ziekthuis/X*, it is possible that compensation will be denied if the woman would never have had an abortion because of her religious beliefs. It is likely that this defence will qualify as a liberating defence, and therefore the burden of proof will fall on the defendant.

(4) When these criteria are met, the defendant could state that the breach of the duty of care cannot be imputed to him (or her),¹¹⁴ because (a) there is no *culpa (schuld)*, (b) the act cannot be attributed to him according to the law or a legally relevant act (e.g., the conclusion of a contract) and (c) the act cannot be attributed to him according to the general prevailing opinion.¹¹⁵ It is however unlikely that this defence will be successful.

Next, if the criteria for breach of contract are met, damages should be estimated in accordance with the law on damages (Arts. 6:95 *BW ff.*), which applies to both contract and tort law claims. One article is especially important concerning the topic of causation, Art. 6:98 *BW*. This article concerns the question of legal or normative causation: *should* the damage be attributed to the defendant? Several factors are used to answer this question.¹¹⁶ It is of importance (but not decisive) whether the person owing a degree of care could have foreseen or should have foreseen that his or her actions would necessarily lead to a certain degree of damage. Additional relevant factors include: the degree to which the damaging results of the wrongful act are either remote or come close to the unlawful act; the degree to which the person owing a duty of care is to be blamed for contributing to the damaging event; and whether the harm was inflicted in the course of a business undertaking or by a private party. Furthermore, attribution is established sooner when a

¹¹⁴ A.S. Hartkamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 6. Verbintenissenrecht. I. De verbintenis in het algemeen* (Deventer: Kluwer, 2012), no. 370.

¹¹⁵ 'General prevailing opinion' is a wide category through which attribution can be justified whilst the defendant acted without *culpa* and the act cannot be attributed to him on the basis of either law or a legally relevant act.

¹¹⁶ This paragraph is based on I. Giesen and A.L.M. Keirse, 'The Netherlands', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2010* (Berlin-Boston: de Gruyter, 2011), pp. 445–6. See also the so-called 'Brunner rules', C.J.H. Brunner 'Causaliteit en toerekening van schade', *Verkeersrecht* 1981, 210, 213; A.S. Hartkamp and C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 6. Verbintenissenrecht, II, De verbintenis in het algemeen* (Deventer: Kluwer, 2013), no. 50–55.

road traffic norm or a safety norm has been violated. Lastly, the attribution of damage is recognized sooner if the damage has been incurred as a consequence of personal injury (injury or death), rather than as a consequence of purely financial loss.¹¹⁷

In the *Baby Kelly* case the Supreme Court decided that full compensation should be granted for the cost of bringing up a child. The compensation was not altered because of the extra cost of bringing up a handicapped child instead of a healthy child.¹¹⁸ As far as the compensation for the loss of income due to the decision to (partially) stop working is concerned, the Supreme Court decided in the case of *wrongful birth I* (compensation for pecuniary damages due to the birth of a healthy child) that the following circumstances should be taken into account when estimating the compensation for loss of income caused by the birth of a healthy child. First, the choice – in that case – of the mother not to start working again (after the birth of the child) should be reasonable. When deciding this, it is on the one hand of importance that a parent has the freedom of choice with regard to the way in which she wants to organize the life of both herself and that of her child. On the other hand, it should be kept in mind that a parent should limit his or her damage, as far as such a limitation could reasonably be demanded. Furthermore, in considering the reasonableness of the given choice not to start working again, the specific family situation should be taken into account, i.e., the number and age of the other children, whether the other partner is employed and the financial means of the family concerned.¹¹⁹ However, as stated, the decision as regards the latest compensation was given in a case that dealt with the birth of a *healthy child* (a case dealing with contraception).

III. Claims by parents have been accepted since the late 1990s, at least in cases of the birth of a *healthy child*. In 2005 the Supreme Court decided similarly in a case concerning the birth of a (by nature) *handicapped child*. In the Netherlands the question is no longer whether these types of claims should be accepted, but the question is how different cases on this subject matter relate to each other.

¹¹⁷ See Giesen and Keirse, 'The Netherlands', pp. 445–6.

¹¹⁸ HR 18 March 2005, *Nederlandse Jurisprudentie* 2006, 606, comm. J.-B.M. Vranken (Baby Kelly), no. 4.5–4.6.

¹¹⁹ HR 21 February 1997, *Nederlandse Jurisprudentie* 1999, 145, comm. C.J.H. Brunner (*Wrongful birth I*), no. 3.13.2.

Lithuania

Loreta Šaltinytė

I. The outcome of this hypothetical under the law in Lithuania is uncertain and problematic as there is not one single wrongful birth case which has been adjudicated by Lithuanian courts, and the topic is not generally discussed. In the less controversial medical negligence case law, arguments against causation on the ground that the damage would have occurred anyway have been rejected. However, the key issue in the given situation is whether the courts would accept that Bettina suffered damage and how they would define it.

II. Lithuanian rules on tort liability are based on a general tort law clause (Art. 6.263(1) CC), which provides that everyone is under a duty to behave so as not to cause damage to another by his or her actions or omissions. The liable person is under a duty to provide full compensation for personal damage, pecuniary damage and non-pecuniary damage when the law provides for the latter (Art. 6.263(2) CC).¹²⁰ Medical liability may also entail contractual liability. At least theoretically Bettina's claim would be qualified as either contractual or delictual depending on whether Dr X works for a public health service provider or in private sector, and this might have an effect on the final outcome of the case. If Dr X is a private practitioner, a contract on provision of healthcare services would be concluded (Art. 6.725 CC) and liability would be contractual.¹²¹ In case Dr X works for a public medical services provider, the claim would be considered delictual.¹²² On the other hand, the LSC usually specifies medical liability as delictual liability. So far, this difference has not been of much practical significance as, in either type of liability: a) courts apply the same period of limitation (three years); b) fault is presumed (however, liability could also be strict if it is established

¹²⁰ LR pacientų teisių ir žalos sveikatai atlyginimo įstatymas (The Law on the Rights of Patients and Compensation of Damage to their Health) 3 October 1993, Art. 25.

¹²¹ *Saulienė v. Kaunas Red Cross hospital*, LSC 14 November 2001, no. 3K-3-11402001.

¹²² *Ibid.*, also Art. 6.725(3) CC, which specifies that the rules of Arts. 6.725–6.746 CC do not apply *inter alia* when the services are paid for from public funds. This distinction has been criticized by a reputable commentator, who considers that the law does not actually treat the two criteria applied in practice by courts as relevant to determine the nature of liability, and that delictual liability for medical malpractice should be applied whenever damage to a patient is caused by a faulty wrongful conduct of any medical service provider. See V. Mizuras, 'Lietuvos deliktų teisės aktualijos ir tendencijos', in *Id.* (ed.), *Šiuolaikinės civilinės teisės raidos tendencijos ir perspektyvos (Trends and Perspectives in the Development of Contemporary Civil Law)* (Vilnius: Justitia, 2007), p. 59.

If both events were events triggering liability, both tortfeasors will be held jointly and severally liable – provided that also the second tortfeasor still acted wrongfully and culpably.²¹⁴ This applies to both actual loss and lost profits. However, the condition of the second tortfeasor also having acted wrongfully and culpably will often not be fulfilled in cases of supervening causation, in particular if the protected interest in question was already destroyed.²¹⁵

If, as in the case at hand, the second event was an event of chance, damage will, according to this view, lead to an apportionment of damage between the tortfeasor and the victim.²¹⁶ However, just as in the case of two events triggering liability, where taking into account the second event presupposes that the second tortfeasor acted wrongfully and culpably, the second event consisting of chance will only be taken into account if it posed a high degree of specific risk in relation to the harm suffered.²¹⁷ Consequently, only such chance events are to be taken into account as ensue during the existence of the good damaged by the first event.²¹⁸

If this second doctrinal position is applied to the case at hand, we reach the following conclusion. In the case of an objective-abstract calculation of damage, Luke can be held liable for the damage consisting of the destruction of the workshop and the fur, not however for any lost profits. In the case of a subjective-concrete calculation of damage, the question arises whether the second potentially causal event should be taken into account. In my view, this is not the case, as the workshop and fur had already been destroyed, which means that the second fire could no longer pose a high degree of specific risk in relation to the destruction of the workshop and the fur.²¹⁹ Even on the basis of this second doctrinal position, Luke would therefore be liable for the entire damage, including lost profits.

²¹⁴ See F. Bydliński, 'Causation as a Legal Phenomenon', in L. Tichý (ed.), *Causation in Law* (Prague: Universita Karlova, 2007), p. 22 f.; Koziol, *Basic Questions*, no 5/116; Id., *Hilffpflichtrecht I*, no 3/74 ff.

²¹⁵ Bydliński, 'Causation', p. 23. Bydliński uses the example of someone shooting at another who is, however, already dead.

²¹⁶ Koziol, *Basic Questions*, no 5/118. ²¹⁷ *Ibid.* ²¹⁸ *Ibid.*

²¹⁹ See Apathy, 'Haftung bei überholender Kausalität', p. 522; Koziol, *Basic Questions*, no 5/118; f. Bydliński, 'Die Verursachung im Entwurf eines neuen Schadensersatzrechts', in I. Griss, G. Kathrein and H. Koziol (eds.), *Entwurf eines neuen österreichischen Schadensersatzrechts* (Vienna: Springer, 2006), no 12.

III. In recent years there have been three drafts to reform Austrian tort law. The first, the Austrian tort law draft,²²⁰ was prepared by a working group constituted by the Austrian Ministry of Justice. A revised version of this draft was published in 2008.²²¹ An alternative draft²²² was prepared by another working group and published in 2008.²²³ In 2011 an unofficial draft of the Austrian Ministry of Justice (the so-called fusion draft) was published, which aims to combine the two earlier drafts.²²⁴

The three drafts take different positions in relation to the question of supervening causation. The Austrian tort law draft²²⁵ follows the second doctrinal view described above. The alternative draft in its § 1302, para. 2, sent. 2, ABGB rejects the liability of the second tortfeasor thereby following prevailing opinion; the fusion draft aiming to combine the two earlier drafts leaves the question open.

The Netherlands

Ivo Giesen and Kianka Rijnhout

I. The foreseeable damage suffered by Mike will reasonably be attributed to Luke's intentionally wrongful behaviour (Art. 6:98 BW). Despite the fact that after the second fire the CSQN between Mike's damage and Luke's behaviour could be discussed, Luke will be held liable for the damage, because of the rule of 'hypothetische causaliteit' (hypothetical causation).

II. The first question, before answering the question of 'hypothetische causaliteit', is whether Mike's damage could reasonably be attributed to Luke's wrongful behaviour (legal or normative causation, Art. 6:98 BW, see case 1.II). It could be argued that because of the fact that Mike suffered damage to property and a loss of profits –

²²⁰ Griss, Kathrein, Koziol (eds.), *Entwurf eines neuen österreichischen Schadensersatzrechts*.

²²¹ *JbI* 2008, 370 and *ZVR* 2008, 172.

²²² R. Reischauer, K. Spielbüchler and R. Welser (eds.), *Reform des Schadensersatzrechts III: Vorschläge eines Arbeitskreises* (Vienna: Manz, 2008).

²²³ English translations of these drafts and the revised version of the first of the two can be found as annexes to the Austrian reports in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2005* (Vienna-New York: Springer, 2006), p. 142 ff.; Id., *European Tort Law 2007* (Vienna-New York: Springer, 2008), p. 158 ff.; Id., *European Tort Law 2008* (Vienna-New York: Springer, 2009), p. 138 ff.

²²⁴ A brief overview of the fusion draft can be found in K. Oliphant and B.C. Steininger (eds.), *European Tort Law 2011* (Berlin-Boston: de Gruyter, 2012), p. 37 ff.

²²⁵ § 1294 para. 2, sent. 2; § 1315 para. 4.

damage that would have fallen within his sphere of risk had the accident not occurred.²²⁹

An example of a situation which falls within the plaintiff's sphere of risk is when he commits a criminal offence.²³⁰ In principle, a fire of unknown origin that bursts out in the streets of the town will not be considered a situation which falls within the sphere of risk of the plaintiff (Mike).

III. The rule of *hypothetische causaliteit* is generally accepted in the Netherlands. The rule that the (first) tortfeasor should not be held liable for the damage (that occurred after the second event), that is of a continuous nature and that falls within the sphere of risk of the plaintiff, has been criticized in the literature regarding property damage and economic loss as well.²³¹

Lithuania

Loreta Šaitinytė

I. Luke would be found liable to the full extent of the damage, including the loss of income.

II. The civil liability of Luke would be decided under general tort law rules. A subsequent event, which would have likely caused the same damage, would not excuse Luke from liability and would be disregarded, except to the extent that it caused additional damage or aggravated the damage already caused by Luke. Courts would take into consideration that, when the second event occurred, damage to Mike's fur workshop was already done, and its cause was Luke's tortious conduct. Therefore, they would disregard the subsequent activity, apart from the circumstance that it caused additional damage to that caused by Luke. In this way they would accept the solution of Art. 3.104 PETA. However, such a case has not yet been discussed in Lithuanian courts.

²²⁹ HR 2 February 1990, *Nederlandse Jurisprudentie* 1991, 292, comm. C.J.H. Brunner (*VermaatsStaat*), no. 3.3.

²³⁰ HR 23 December 2011, *Nederlandse Jurisprudentie* 2012, 377, comm. P. van Schilgaarde (*V. & P./De Nederlandse Bank N.V. & Stichting AFM*).

²³¹ See, for example, comm. J.B.M. Vranken under HR 7 December 2001, *Nederlandse Jurisprudentie* 2002, 576 (*Gemeente Leeuwarden/Loss*), no. 9.

instead of personal injury – the damage should only be partly compensated. However, considering the intentional behaviour of Luke and the fact that the damage is a foreseeable consequence, it is most likely that the total damage suffered by Mike will be attributed to the wrongful act of Luke.²²⁶

The second question is whether the fire, which broke out three days later, would lead to the conclusion that Mike's damage should not or should merely be partly compensated, because, strictly speaking, the CSQN between the damage and the wrongful act by Luke is absent after the second fire; this damage would have occurred anyway. Under Dutch law this situation is considered to be an instance of '*hypothetische causaliteit*'. As a rule the first tortfeasor (chronologically the person who first caused the damage) is liable for all the damage that occurred. The rationale of this rule is that the plaintiff should not bear the risk of the non-liability of the second tortfeasor, or of the fact that no one is liable for the second event that (again) caused the damage.²²⁷ Luke will therefore be held liable.

A distinction should however be made between damage that occurs instantly (e.g., damage as a consequence of damage to property) and damage which is continuous in nature (e.g., damage as a consequence of full or partial disability or pure economic loss caused by a wrongful decision of a (governmental) inspector). An exception to the rule of *hypothetische causaliteit* is made when the plaintiff's damage is of a continuous nature and the second event falls within the plaintiff's sphere of risk.²²⁸ The rationale of this rule is, according to the Supreme Court in the case of *Staat/Vermaas*, that:

the obligation to compensate damage as a consequence of an accident does not go as far as the situation in which the tortfeasor should preserve the plaintiff from

²²⁶ See, for example, HR 25 March 2011, *Nederlandse Jurisprudentie* 2011, 139 (*Bremer/Hoogheemraadschap Rijnland*), in English: Giesen and Keirse, 'The Netherlands', pp. 444–6.

²²⁷ HR 7 December 2001, *Nederlandse Jurisprudentie* 2002, 576, comm. J.B.M. Vranken (*Gemeente Leeuwarden/Loss*), no. 3.4.

²²⁸ HR 2 February 1990, *Nederlandse Jurisprudentie* 1991, 292, comm. C.J.H. Brunner (*Staat/Vermaas*); HR 7 December 2001, *Nederlandse Jurisprudentie* 2002, 576, comm. J.B.M. Vranken (*Gemeente Leeuwarden/Loss*), no. 3.4. Recently repeated by the Supreme Court: HR 23 December 2011, *Nederlandse Jurisprudentie* 2012, 377, comm. P. van Schilgaarde (*V. & P./De Nederlandse Bank N.V. & Stichting AFM*). See also A.J. Akkermans, 'Oorzakelijk verband', in *Onrechtmatige daad BW-Krant Jaarboek 1996* (Deventer: Gouda Quint, 1996), p. 49; Hartkamp and Sieburgh, *Verbindingsrecht*, no. 90; C.J.M. Klaassen, *Schadevergoeding: algemeen*, II (Mon. RW B35) (Deventer: Kluwer, 2007), pp. 36–9.

(b) With respect to the *electricity company's liability*, similar questions need to be raised. Clearly the company's negligence was not a *conditio sine qua non* for the fall as such but only for the increase in severity of the fall's consequences. Again imputation of the harm presupposes adequacy and the harm being covered by the protective purpose of the norm. Here it would be decisive whether contact with the wire was something that could be expected at all. Clearly the question whether it was foreseeable that someone would grab the wire when falling, thus increasing the severity of the resulting injuries may be disputed. If, however, the wire was within the reach of bridge users or people walking under the bridge, adequacy will be given. On condition of the wire being within reach, the harm would, moreover, be covered by the protective purpose of the norms violated by the electricity company. On the basis of these assumptions the electricity company will be held liable, though only to the extent of the additional damage.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Both the owner of the bridge and the electricity company will be held jointly and severally liable. The tortfeasor who actually pays compensation to the victim has, in principle, a right of recourse against the other tortfeasor.

II. The following factors contributed to the accident: without the poor maintenance Gregg would not have fallen off the bridge and he would not have had to grab the defective wire that eventually led to him being permanently disabled. Both factors were essential for the damage to occur. However, the occurrence of one factor is, in itself, not sufficient for a CSQN to exist between the damage and the other factor. In Dutch law it is generally accepted that both the owner of the bridge and the electricity company will be jointly and severally liable (*samenlopende oorzaken*).²⁹⁷ An exception will be made when the fault of the second tortfeasor is so much worse when compared to the fault of the first tortfeasor that this second fault cannot reasonably be attributed to the first tortfeasor. This is due to the fact that the second fault was an unforeseen consequence of the behaviour that led to the

²⁹⁷ HR 24 December 1999, *Nederlandse Jurisprudentie* 2000, 351, comm. C.J.H. Brunner (Van Nigteerdt/Meskes). See also Akkermans, 'Oorzakelijk verband', 47; Hartkamp and Sieburgh, *Verhittensrecht*, II, no. 86; Klaassen, *Schadevergoeding*, p. 35.

first fault and the second fault does not fall within the sphere of risk of the first tortfeasor.²⁹⁸ Yet, it does not seem that the exception would apply in this case.

The tortfeasor who actually pays compensation to the victim has a right of recourse against the other tortfeasor. This question of allocation of damage is dealt with in Art. 6:102 in conjunction with Art. 6:10 *BW*. The question whether a party has a right of recourse is twofold (see Art. 6:102 section 1 in conjunction with Art. 6:101 *BW*). First, it should be questioned how far both parties (the creditor and the debtor) contributed to the damage arising from the wrongful act. Second, the question of reasonableness arises: should the damage be distributed in another way?²⁹⁹

III. The rule of *samenlopende oorzaken* is generally accepted in the Netherlands.

Lithuania

Loreta Šaltinytė

I. Under Lithuanian law both the electricity company and the owner of the bridge would be held solidarily liable as both of them omitted to act so as to prevent the damage.

II. The owner of the bridge will be held liable under Art. 6.266 CC, which provides for liability of owners and keepers of immovable property and engineering constructions, including roads if damage is caused by their collapse or other deficiencies, unless the owner (keeper) proves that the damage was caused by *force majeure* or occurred due to the intentional conduct or gross negligence of the victim. Liability of the owner (keeper) of the electricity company would be governed by Art. 6.270 CC, which provides that the owner (keeper) must compensate for the damage caused by an 'object of higher danger' (including electricity) unless he proves that the damage was caused by *force majeure* or occurred due to the intentional conduct or gross negligence of the victim. Causation is governed by Art. 6.247 CC. Art. 6.6(3) CC provides that solidary liability is presumed if the obligation concerns compensation of damage caused by multiple tortfeasors. Art. 6.279(1) CC provides that where several persons are liable

²⁹⁸ HR 25 September 1992, *Nederlandse Jurisprudentie* 1992, 751 (*Alpiro/Dijkhuizen*), no. 3.3.

See Hartkamp and Sieburgh, *Verhittensrecht*, II, no. 86; Klaassen, *Schadevergoeding*, p. 35.
²⁹⁹ The main rule regarding distribution of damage could however be set aside when the law or a legally relevant act dictates another rule for allocation.

Austria

Barbara C. Steininger

I. On the basis of Austrian national civil liability rules Penny's claim will probably fail – though not for reasons of causation. There may, however, be liability on the basis of Art. 35a of Reg. 1060/2009/EC.

II. Under Austrian law, the liability of rating agencies towards third parties,³⁷³ like Penny, for pure economic loss, may be based on objective legal duties of care towards such third parties. If an expert provides information which is clearly directed towards third parties, if the information serves as a basis for a third party's decision and if the expert issuing the information draws on the third party's trust by declaring him or herself to be an expert providing neutral expert information, such an expert will owe a duty of care towards third parties and may, consequently, be held liable for their loss.³⁷⁴ However, such liability presupposes that the circle of potential claimants can be delimited and the risk of liability thereby controlled. This is problematic in the case at hand as we are faced with a rating directed towards the public at large. However, rating agencies issue public ratings in their own financial interest and should therefore also bear the liability risk involved provided that the liability risk can all in all be measured and delimited.³⁷⁵ It has been held in doctrine³⁷⁶ that it is possible to delimit the liability risk for issue ratings, though this is not the case for issuer's ratings. Although the facts of the case do not expressly mention the kind of rating we are confronted with, the more likely option is an issuer's rating. Penny's claim would therefore probably fail.³⁷⁷ However, Art. 35a of Reg. 1060/2009/EC (as amended by Reg. 462/2013/EU) provides for liability of rating agencies towards investors as well. Such liability presupposes gross negligence or intent on the part of the rating agency when infringing the regulation. As the facts state that Roor, Roody and Ritch acted recklessly this condition is probably fulfilled. The burden of proof will, however, lie

³⁷³ On the liability of rating agencies see OGH 4 Ob 249/14t, ecolex 2015/221 with commentary by G. Willhelm; *Österreichisches Bank-Archiv (ÖBA)* 2015, 665 with commentary by P. Apathy; E. Karner, 'Zur Haftung von Rating-Agenturen', *ÖBA* 2010, 587 ff.; G. Graf, 'Unautorisierte Eigenwerbung mit fehlerhaften Ratings - Haftet die Ratingagentur?', *JBl* 2012, 210. See also M. Gass, *Haftung für Rating-Agenturen* (Vienna: Verlag Österreich, 2014); A. Baumgartner, *Die (Dritt-)Haftung von Rating-Agenturen und anderen Informationsexperten* (Vienna: Verlag Österreich, 2016).

³⁷⁴ See on this E. Karner, 'Haftung für Rat und Auskunft zwischen Vertrag und Delikt', in *Festschrift Kozioł*, p. 713 ff.

³⁷⁵ Karner, 'Haftung von Rating-Agenturen', 594 f.

³⁷⁷ A more severe liability for pure economic loss will, however, apply according to § 1300, sent. 2, *ABGB* in the case of willful infliction of damage. Karner, in *KBB*, § 1300 no 4.

with Penny. If Penny succeeds in providing such proof, Roor, Roody and Ritch may be held liable provided that the financial instrument in question was covered by the rating and that Penny was reasonably relying on the rating.

The second aspect of the case – the question of multiple, independently sufficient causes taking effect at the same time – is discussed under the notion of cumulative causation in Austrian law. Although all the events in question were highly suited to cause the harm,³⁷⁸ none of them brought about a *conditio sine qua non* as the damage would have occurred even if one of the events in question had not taken place. After all, one of the other events would then have brought about the damage. In Austrian law it is generally accepted that in such situations all wrongdoers are solidarily liable.³⁷⁹ Thereby it is made sure that the existence of multiple, independently sufficient causes does not exonerate the authors of the damage to the detriment of the victim.³⁸⁰

III. Both the Austrian tort law draft (§ 1294) and the alternative draft (§ 1302) provide for solidary liability in cumulative causation scenarios. The question is not addressed in the fusion draft but it can be assumed that no change is intended in this respect.

The Netherlands

Ivo Giesen and Rianka Rijthout

I. Ritch could either be held liable in tort under Art. 6:193c (incorporation of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market), or under Art. 35 *bis* para. 1 of regulation (EU) no. 462/2013, (or both) as far as a duty of care is breached. The CSQN argument raised by Ritch will most probably not be successful in light of the outcome in the *World online* case³⁸¹ and Art. 6:99 *BW*.

II. The aim of this hypothetical situation is twofold. First is the question of the duty of care; second is the question of causation, both as regards the CSQN and legal causation (see Case 1, II). At the outset, it is important to note that an analogous case has not yet been brought before the Dutch courts.³⁸²

³⁷⁸ Kozioł, *Basic Questions*, no 51111.

³⁸⁰ *Bydlinski, Schadensverursachung*, p. 15 ff.; Karner, in *KBB*, § 1302 no 8.

³⁸¹ HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403.

³⁸² See however 'Beleggers vechten kredietbeoordelaars en RBS aan wegens hoge beoordeeling', *Het financieel dagblad*, 6 december 2013, 15. The *Stichting Ratings Redress* (a corporation in which 16 corporate investors are represented) started a case against S&P and the Royal Bank of Scotland to claim damages. See I.C. laakke, 'Strengeer regels voor

(a) To start with the question of duty of care, Penny could claim on the basis of either misleading business information (Art. 6:193c BW) or the liability of credit rating agencies (35 bis para. 1 of regulation (EU) no. 462/2013).

To analyse whether Art. 6:193c BW could be applied successfully a comparison should be made with the outcome in a comparable case – the case of *World Online*: the liability of an internet service provider that floated its stock in 2000. The shares of World Online decreased in value from €50 on the first day (initial offering price was €43) to €31 almost a month later. The fall in the price of shares as such will not lead to liability. However, there is an additional storyline. The fall in the share price after it was floated happened simultaneously with the news that the chairwoman of World Online – Brink – had sold her shares (6.35 per cent) in the company before the stock was floated for €6.04 per share to an equity house. The claim against World Online and ABN Amro Bank was based on the former Art. 6:194 BW on the basis of misleading information in the prospectus. In the prospectus it was stated that Brink had transferred her shares. The shareholders argued that they had been misled because the word *sold* was not used. The case went all the way to the Supreme Court which determined that World Online was liable in tort for misleading information. The following duty of care was formulated:

To answer the question whether a prospectus is misleading in the sense of Article 6:194 BW, one has to consider the presumptive expectation of an average informed, cautious and careful investor to whom the communication is directed or through whom the communication is reached.³⁶³

The Supreme Court stated that the definition of an 'average person' ('*matman*') is equivalent to the definition given by the European Court of Justice.³⁶⁴ The Court continued by stating that one can expect from this average investor that he is prepared to gain more in-depth knowledge, but not that he has substantial sources of knowledge or experience. An exception is made when the information only addresses persons with that kind of specific knowledge or experience.³⁶⁵ Furthermore, it was stated that information could be misleading when it is incorrect or

ratingbureaus. Een vereenvoudiging van de aansprakelijkheidstelling onder Nederlands recht?'. *Arx Acqui* 2014, 190–3.

³⁶³ HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403, no. 4.10.3.

³⁶⁴ ECJ 19 September 2006, C-356–04.

³⁶⁵ HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403, no. 4.10.3.

incomplete. However, the fact that information is incorrect or incomplete does not in itself justify the conclusion that the information is misleading. According to the Supreme Court, it is necessary that the information given to investors has misled or could mislead investors, and because of this misleading nature their economic behaviour could be influenced. Again the average investor is the starting point to be taken into consideration in this matter.³⁶⁶ It is important to note that the Supreme Court reached its decision under the former Art. 6:194 BW, but it also stated that the outcome would not have been fundamentally different under the new Art. 6:193c BW (for a claim made by consumers) or Art. 6:194 BW (new) (for a claim made by professionals).

Going back to the facts of the current case, Tenron's financial statements – that were confirmed by Ritch – misrepresented the health of its finances. Considering the outcome in the case of *World Online* (if we consider this to be an analogous case), it needs to be taken into account whether the misrepresentation could be qualified as misleading and, additionally, whether the misleading character of the information would influence an average investor in his or her decision making. The fact that Penny states that she was influenced by the information does not mean that the average investor would change his or her behaviour in the light of the information given by Ritch. However, if we assume that this would be the case, then the question of causation arises.

However, before the question concerning CSQN is raised, the second possible duty of care, Art. 35 bis of regulation (EU) no. 462/2013, will be analysed briefly. In June 2013 the EU introduced a new regulation concerning rating agencies. In Art. 35 bis a duty of care of a credit rating agency has been formulated. Three criteria are mentioned in this article. First, a credit rating agency must have committed an infringement as listed in Annex III. In our particular case this infringement could probably be found under number 42. Second, the infringement should have had an impact on the credit rating. We presume that in Case 4 Ritch's infringement has had an impact on the rating. Third, and finally, the credit rating agency should have committed the infringement intentionally or with gross negligence. It is unclear whether Ritch has committed an infringement of this nature, since its recklessness might not amount to intention or gross negligence as required by Art. 35 bis. If we assume that these criteria are met, the question of CSQN has to be raised.

³⁶⁶ HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403, no. 4.10.4.

(b) As regards the question of factual causation (CSQN) (see Art. 6:162 BW and Art. 35 *bis* regulation EU no. 462/2012), the outcome of the *World Online* case could be decisive. The Supreme Court decided that in principle the burden of proof falls on the investor (Penny). However, providing such evidence will be problematic, as the Supreme Court stated, and this would lead to a situation where the protection that the prospectus guidelines aim at become illusory.³⁸⁷ In light of the starting point of effective protection that should be provided by these guidelines by means of national law, the Supreme Court decided to introduce a presumption of a CSQN between the misrepresentation and the damage. In other words, as Pijls and Van Boom argued (and in our opinion correctly), the Supreme Court did not decide to shift the burden of proof (*het bewijsrisico*), but simply presumed that a CSQN is present and placed the onus of having to adduce counter-evidence on the shoulders of the defendant.³⁸⁸ However, when the defendant succeeds in raising doubts regarding the presence of a CSQN between the breach of duty and the damage (i.e., the judge starts to doubt this presumption, *prima facie*), then the plaintiff should prove that a CSQN is present. This line of reasoning could be applied when the investor claims damages under Art. 6:193c (in conjunction with Art. 6:162 BW), but probably also when the claim is made under Regulation EU No. 462/2013, because the EU introduced this regulation to protect parties against unfair ratings and also that this protection would be illusory when the CSQN is not presumed.

As far as this reasoning could be reproduced in the current case of Penny against Ritch, the conclusion could be that, although the burden of proof falls on Penny, the judge could presume that there is a CSQN.

(c) Next, the damage should be attributed to Ritch's behaviour (Art. 6:98 BW legal causation). Again, the different circumstances (foreseeability, intent, type of damage, etc.) should be weighed (see Case 1, II). It is worth mentioning that the fact that Penny suffered pure economic loss is not an obstacle as regards attribution. Nevertheless, it could be a factor which mitigates damages under Art. 6:98 BW. However, that depends on the weight of other factors that are of importance under this article.

³⁸⁷ HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403, no. 4.11.1.

³⁸⁸ A.C.W. Pijls and W.H. van Boom, 'Handhaving van prospectusaansprakelijkheid niet illusoir: vermoeden van causaal verband bij prospectusaansprakelijkheid' (2010) 6834 *Weekblad voor Privaatrecht, Notariaat en Registratie* 195–6.

(d) Finally, Ritch's argument as regards the fact that along with him both Rudy and Rick also misrepresented Tenron's financial situation and therefore there is no CSQN should be considered. Art. 6:99 BW states that if the damage is a consequence of two or more events, and the liability of different persons is established for those events, and it is a matter of fact that the damage is a consequence of one of these events, then all persons are individually obliged to compensate all the damage, unless (a shift in the burden of proof) such a person proves that the damage is not a consequence of the event for which he or she is liable. In other words, all persons who are liable are jointly and severely liable for all the damage, unless the liable person who is addressed proves that the damage is not a CSQN of his wrongful act. In practice this shift in the burden of proof will lead to the conclusion that one of the liable persons should pay damages to the plaintiff. Therefore, Ritch's argument will not be successful under Dutch law.

III. It is very surprising that the European Union has failed to introduce a rule with respect to the shifting of the burden of proof as regards the CSQN.³⁸⁹

Lithuania

Loreta Šaltinytė

I. The result is difficult to predict in view of the specificity of the situation and the complete absence of either case law or legal literature on the topic of liability for negligent statements in Lithuanian law. The LSC has only recently explicitly accepted pure economic loss as *sui generis*, defining that liability for the loss would be possible only if the tortfeasor intentionally breached his or her duties and had an economic interest in mind.³⁹⁰ Whether Ritch would be held liable also depends on the legal regulations on solidary liability.

II. Penny's claim would be considered admissible and would be decided on the basis of the general CC rules on tortious liability. Lithuania has not yet taken steps to define the notions that Art. 35(a) of Regulation No. 462/2013, amending Regulation No. 1060/2009 on Credit Rating Agencies, leaves to national law.³⁹¹ In a recent decision the LSC

³⁸⁹ See also J.-C. Jaakke, 'De regulering van en toezicht op ratingbureaus in de Europese Unie' (2012) 20 *Onderneming en Financiering* 43, at 52–3.

³⁹⁰ *UAB Lik2 v. Vilnius City municipality*, LSC 27 January 2015, no 3K-3-8/2015.

³⁹¹ These notions include 'damage', 'intention', 'gross negligence', 'reasonably relied', 'due care', 'impact', 'reasonable' and 'proportionate'.

II. Currently, approximately 99 per cent of the total sales value of pharmaceuticals in Sweden is covered by a compensation scheme for pharmaceutical injuries: *Läkemedelsförsäkringen*.⁴⁵⁶ The insurance company designs the conditions under which compensation may be paid. The insurance is technically a liability insurance in favour of pharmaceutical companies – not an insurance designed for the benefit of the person who suffers a drug related injury. According to this compensation scheme, plaintiffs can however claim compensation directly from the insurance company. The responsibility is strict and requires a weaker causal link than the Product Liability Act and the Tort Liability Act. The causal link between damage and the drug does not have to relate to a certain drug if more than one can be the cause of the damage (the causation requirement is one of a balance of probabilities), as long as the drugs are covered by the compensation scheme.

If the drug related damage were not covered by the compensation scheme as described above, the outcome would be more difficult to predict. It has been discussed in the Swedish literature that if a method where each company is held responsible in relation to its share in the collective effect, then some sort of 'market share liability' could be used instead of traditional principles of causality.⁴⁵⁷ However, according to such a method the claimant would then probably have to sue all the companies on the market to get full compensation. Typically, this has only been discussed concerning serious personal injuries or environmental damage.

Austria

Barbara C. Steininger

I. Pharmaceutical Inc. will probably be held liable for 70 per cent of Elaine's damage.

II. There is no court practice available on cases of market share liability. However, in doctrine it has been argued that, according to Austrian law, proportionate liability of the producer towards an individual victim, i.e., market share liability, is possible.⁴⁵⁸ The main argument

⁴⁵⁶ Swedish Government Official Reports 2013:23, pp. 27–8.

⁴⁵⁷ Hellner and Radetzki, *Skadeståndsrätt*, pp. 208–9.

⁴⁵⁸ Koziol, *Basic Questions*, no 5/109; *Id.*, *Hafpflichtrecht I*, no 31/46; *Id.*, 'Causation under Austrian Law', p. 20 (case 21); E. Karner and O. Riss, 'Aggregation and Divisibility of Damage in Austria: Tort Law', in K. Olyphant (ed.), *Aggregation and Divisibility of Damage* (Vienna-New York: Springer, 2009), no. 68.

for accepting market share liability, notwithstanding the fact that it will regularly not be possible to link an individual producer to a specific victim, is that in such scenarios it is clear that each of the manufacturers certainly caused part of the damage, namely in proportion to his or her market share.⁴⁵⁹ At the same time, accepting the liability of each manufacturer towards each victim only to the extent of the manufacturer's market share ensures that none of the manufacturers will have to pay more than the damage it actually caused.⁴⁶⁰

III. This solution, which is also adopted in the Austrian tort law draft (§ 1294), leads to considerable practical problems.⁴⁶¹ On the one hand, in order to be fully compensated, victims will, for instance, have to sue all the manufacturers involved. On the other hand, establishing the share of each manufacturer will entail considerable difficulties. For lack of special procedural rules for solving these problems it is, as is rightly stressed by Koziol,⁴⁶² preferable to offer a solution flawed with such practical difficulties than to deprive victims of any means of claiming compensation.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. The manufacturer will be held liable in full for the damage caused to the plaintiff.

II. The facts of this case are very similar to the facts in the case of *DES daughters*,⁴⁶³ under Dutch law. Several manufacturers brought a similar pharmaceutical product onto the market and it had similar side effects as stated in this case. The plaintiffs in the *DES* case were also daughters of persons who had taken the pharmaceutical product. However, they could not prove which manufacturer supplied their mother with the products, and therefore they could not prove a CSQN between the damage and the wrongful act of the – or rather one of the – manufacturer(s). The Supreme Court decided that the *DES* daughters could claim damages in full from one manufacturer that could have caused all the damage to the plaintiffs.⁴⁶⁴

⁴⁵⁹ Koziol, *Basic Questions*, no 5/109.

⁴⁶⁰ Koziol, *Basic Questions*, no 5/108, 5/110.

⁴⁶¹ Koziol, *Basic Questions*, no 5/108 ff.

⁴⁶² HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner (*DES*).

⁴⁶⁴ The Supreme Court denied the theory of market share liability, HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner (*DES*), no. 3.8.

The decision of the Supreme Court was rendered under the former Civil Code, and no rule to solve this CSQN problem was laid down in that code. The Supreme Court however decided that the current Art. 6:99 BW was already substantive law.⁴⁶⁵ According to this standard if two or more wrongful acts may have caused the damage, but it is unclear which of the alternative causes did, in fact, cause the damage, then each responsible actor is liable in full unless he can prove that his act certainly did not cause the damage.⁴⁶⁶ The rationale of this rule is the idea that it is unfair that the plaintiff should bear the risk of the impossibility of proving whose wrongful behaviour caused the damage.⁴⁶⁷ The Supreme Court even decided that the defendant (who had acted wrongfully) was liable in full when the possibility existed that the plaintiff suffered damage because of taking DES which had been produced by another manufacturer who had not acted wrongfully.⁴⁶⁸ See Case 3, II on the rule concerning the right of recourse.

Lithuania

Loreta Šalinytė

I. So far a similar problem has not been addressed by Lithuanian courts. However, it is likely that courts would choose the solution suggested by Art. 3:103(1) PETL, i.e., each drug manufacturer would be regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage.

II. The case would be decided under product liability rules under Arts. 6:292–6:300 CC, which implement the EU directive concerning

⁴⁶⁵ HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner, (DfS), no. 3.4.
⁴⁶⁶ The Dutch Supreme Court did also apply the DES rule in an environmental tort case (HR 17 January 1997, *Nederlandse Jurisprudentie* 1997, 230) and in a tort case concerning property damage (HR 31 January 2003, *Nederlandse Jurisprudentie* 2003, 346). See also W.H. van Boom and I. Giesen, 'The Netherlands', in B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds.), *Digest of European Tort Law*, I, *Essential Cases on Natural Causation* (Vienna-New York: Springer, 2007), p. 370. An English version of this case has been published in W. van Gerven, P. Larouche and J. Lever, *Tort Law* (Oxford: Portland: Hart, 2000), p. 477 ff.

⁴⁶⁷ C.J. van Zeben, J.W. Du Pon and M.M. Olthof, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 6. Algemeen gedeelte van het verhietsenrecht* (Deventer: Kluwer, 1981), p. 346. The Supreme Court also decided that this applies when the plaintiff is unable to give a description of all possible tortfeasors: HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner (DfS), no. 3.7.4.

⁴⁶⁸ HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner (DfS), no. 3.7.6. An exception should be made when there is a good chance that the damage of the plaintiff is caused by taking Des of another manufacturer who did not act wrongfully. The burden of prove is however on the defendant.

liability for defective products. Art. 6:295 CC provides for strict liability in this category of cases, i.e., the claimant would need to establish that he or she suffered damage, that the product was defective and that there is a causal link between the defects and the damage. The burden of proof would be on the injured party with respect to the damage and the defect. Under Art. 6:279(4) CC where damage may have been caused by occurrences for which different persons were accountable and it is established that the damage was caused by one of these occurrences but not which one, each person accountable for any of the occurrences is arguably presumed to have caused that damage. This regulation is sufficiently wide to allow for application of market-share liability. However, it is difficult to predict whether courts would apply it in practice in view of the scarcity of judicial precedence on product liability.⁴⁶⁹ Recent implicit references to PETL in the LSC's case law on causation suggest that if faced with a similar situation the LSC might accept the solution of market-share liability under Art. 3:103(1) which provides that where each of the multiple activities would have been sufficient to cause the damage, but it remains uncertain which one in fact caused it, each activity will be regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage. This conclusion follows because in developing the notion of causation, the LSC has drawn a lot of inspiration from the PETL. It did so in 2005 when it introduced the two-step reasoning on establishing causation, with the *conditio sine qua non* test at the first step and the remoteness of damage at the second. Prior to this development causation was understood as a matter of fact, not law.⁴⁷⁰ The understanding of causation introduced in 2007⁴⁷¹ is so close to the wording of Arts. 3:101 and 3:201 PETL that it is most probable that it was a direct source of the LSC's inspiration.⁴⁷² Finally, the LSC's list of instances on the application of

⁴⁶⁹ The only article on product liability in Lithuanian law is written by a current LSC justice A. Norikūnas. It does not even touch on the issue of causation. A. Norikūnas, 'Vartotojų (tarsi) dėl žalos, padarytos nekokybiškais produktais, gynimo pokyčiai Lietuvos įstojus į Europos Sąjungą' ['Changes in the Protection of the Consumer Right to Compensation of Damage Caused by Defective Products Introduced by Lithuanian Membership in the European Union'], (2006) 2(80) *Jurisprudencija* 73–9.

⁴⁷⁰ *Raudoniė and Raudonitis v. Vilnius University Santariskės clinics*, LSC 30 March 2005, no. 3K-3-206/2005.

⁴⁷¹ *LB et al. v. Medvegalis et al.*, LSC 26 November 2007, no. 3K-7-345/2007; also *SR v. Klaipeida bus park*, LSC 1 March 2010, no. 3K-3-53/2010.

⁴⁷² V. Jurkevičius, T. Kadner Graziano and S. Seleionytė-Drukteinienė, 'The Impact of the Comparative Method on Lithuanian Private Law', (2013) 21(4) *European Review of Private Law* 959–90.

solution for this complex group of cases. On the basis of his generally accepted theory of solidary liability of all potential wrongdoers in cases of alternative causation between different events triggering liability,⁵²⁶ Bydłinski argued that damage should be divided if one of the potential causes falls within the victim's own sphere.⁵²⁷ He does so with reference to § 1304 ABGB on contributory negligence, which provides for the damage to be borne proportionately by the victim and the injurer. In the case of alternative causation of an event triggering liability and chance, the injurer is burdened with his or her wrongful and faulty conduct while chance falls in the victim's own sphere.⁵²⁸ Proportionate liability will, however, presuppose that the injurer's act was concretely dangerous, that is, highly adequate for the occurrence of the damage.⁵²⁹ Bydłinski's theory has the great advantage of avoiding all-or-nothing approaches, where minor differences in probability may lead to opposite results.⁵³⁰

The theory has been repeatedly accepted in court practice⁵³¹ and doctrine but has also led to criticism.⁵³² In particular it has been held

⁵²⁶ Applying § 1302 ABGB in analogy. F. Bydłinski, 'Haftung bei alternativer Kausalität', *JBl* 1959, 8 ff.; see also Koziol, *Hafpflichtrecht I*, no 3129 ff.; *Id.*, *Basic Questions*, no 5175 ff.
⁵²⁷ Bydłinski, *Schadensverursachung*, p. 86 ff.; *Id.*, 'Aktuelle Streitfragen um die alternative Kausalität', in *Festschrift Betzke* (Berlin: de Gruyter, 1979), pp. 3, 30 ff.; *Id.*, 'Haftungsgrund und Zufall als alternativ mögliche Schadensursachen', in *Festschrift Frenz* (Vienna: Manz, 1993), p. 3. See also Koziol, *Hafpflichtrecht I*, no 3136 f.; *Id.*, *Basic Questions*, no 5186 f. For a recent discussion of the problem see E. Heinrich, 'Teilhaftung bei alternativer Kausalität mit Zufall', *JBl* 2011, 277. For an overview in English see H. Koziol, 'Problems of Alternative Causation in Tort Law', in H. Hausmaninger, H. Koziol, A. M. Rabello and I. Giljead (eds.), *Developments in Austrian and Israeli Private Law* (Vienna: Springer, 1999), pp. 177, 180 ff.; B. A. Koch, 'Austria', in B. Winiger, H. Koziol, B. A. Koch and R. Zimmermann (eds.), *Digest of European Tort Law, I. Essential Cases on Natural Causation* (Vienna-New York: Springer, 2007), 663, nos 6–9.

⁵²⁸ See Karner, in *KBB*, § 1302 no 5.

⁵²⁹ Koziol, *Hafpflichtrecht I*, no 3137 f.; *Id.*, *Basic Questions*, no 5190.

⁵³⁰ See Koziol, *Basic Questions*, no 5188 f.

⁵³¹ OGH 7 Ob 648/89 = *JBl* 1990, 524 with commentary by W. Holzner; 8 Ob 608/92 = *Evidenzblatt der Rechtsmittelscheidungen (EvBl)* in Österreichische Juristen-Zeitung (OJZ) 1994/13; 4 Ob 554/95 = *SZ* 68/207; 3 Ob 106/06v; 1 Ob 631/11p = *EvBl* 2012/45 with commentary by E. Karner; the theory was, however, rejected in 6 Ob 604/91 = *JBl* 1992, 522; 2 Ob 590/92 = *JBl* 1994, 540 with commentary by R. Bollenberger.

⁵³² In particular R. Weiser, 'Zur solidarischen Schadenshaftung bei ungeklärter Verursachung im deutschen Recht' (1968) *Zeitschrift für Rechtsvergleichung (ZfRV)* 38, 40 ff.; and, following the former, A. Kletečka, 'Alternative Verursachungskonkurrenz mit dem Zufall', *JBl* 2009, 137. OGH 2 Ob 590/92, *JBl* 1994, 540 with commentary by R. Bollenberger; F. Harrer, 'Zufall und Wahrscheinlichkeit im Haftungsrecht', *ZVR* 2012, 440; M.-S. Häusler, *Haftung ohne Kausalitätsnachweis* (Vienna: Facultas, 2013).

by critics of the theory that the latter would lead to anyone who acted wrongfully and culpably, and who might thereby potentially have caused the harm suffered, being held liable, as any doubt concerning causation would, according to the critics, constitute alternative causation of an event triggering liability and chance. The critics argue that, as soon as causation by the wrongful and culpable conduct cannot be established with a 100 per cent certainty, the damage was caused by something else with a likelihood amounting to the remainder up to 100 per cent certainty, so that Bydłinski's theory would lead to a liability according to probabilities. This is, however, not the case, as proportionate liability will, according to Bydłinski's theory, not apply to all cases of difficulties of proof but only if two particular events were, to an extremely high degree, concretely dangerous for the harm.⁵³³ Moreover, it has been argued that accepting proportionate liability would lead to an unjustified advantage to the victim⁵³⁴ (namely partial liability of the injurer which may be unjustified from the perspective of causation). As is stressed by Bydłinski, it is, however, not convincing why a potential advantage for the injurer acting wrongfully and culpably (namely the fact of the injurer being free from liability even though this may not be justified from the perspective of causation) should be accepted merely in order to avoid a potential advantage to the victim.⁵³⁵ The criticism put forward against Bydłinski's theory is therefore not convincing and it can be welcomed that the OGH has repeatedly followed this theory.

III. The Austrian tort law draft also provides for proportionate liability in such scenarios (§ 1294) and therefore follows Bydłinski's theory; the same is true for the fusion draft.⁵³⁶ The alternative draft took the opposite view and rejects liability in such scenarios (§ 1302).

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. If the possibility that the wrongful behaviour of Hanna caused the damage suffered by Harold is not very small, Hanna could be held

⁵³³ Bydłinski, 'Haftungsgrund und Zufall', p. 6; Koziol, *Hafpflichtrecht I*, no 3137 f.; *Id.*, *Basic Questions*, no 5190.

⁵³⁴ Weiser, 'Zur solidarischen Schadenshaftung', 40 f.

⁵³⁵ Bydłinski, 'Haftungsgrund und Zufall', p. 4.

⁵³⁶ The question is not addressed explicitly but covered by the wording of § 1294 fusion draft. In this sense also H. Koziol, 'Gedanken zur österreichischen Schadenersatzreform', in Bundesministerium für Justiz (ed.), *200 Jahre ABGB* (Vienna: Manz, 2011), p. 316.

'proportionally liable', i.e., liable in proportion to the probability that she caused damage to Harold.

II. If Hanna has breached a duty of care towards Harold, the question of CSQN arises. The key question is whether Hanna could be held liable considering the fact that it cannot be ascertained whether her behaviour or the storm caused the stone to roll down. As stated under Case 5, II, the Supreme Court decided in *D&S* that a defendant could be held liable in full, even when the possibility exists that another manufacturer, who did not act wrongfully, caused the damage of the plaintiff.⁵³⁷ In this case there is the particular circumstance that two possible causes exist: Hanna's behaviour and the storm. However, only Hanna's behaviour is wrongful. The theory of proportional liability could be helpful in this case. Namely, if the theory of proportional liability could be applied, then liability could be accepted for the possibility (in proportion to the likelihood) that the damage was caused by the behaviour of the defendant.

The theory of proportional liability was accepted by the Supreme Court in the case of *Nefaiti/Karamus*.⁵³⁸ A former employee who had worked with asbestos claimed damages because of the fact that he suffered from lung cancer. One difficulty existed: the CSQN between the damage as a result of cancer and the wrongful act of the employer (Art. 7:658 *BW*) could not be established. The cause of the lung cancer could have been the inhaling of asbestos dust, but also the fact that the plaintiff was a heavy smoker, or simply because of genetic factors. The Supreme Court decided in general that if there is a very small possibility that the damage to the plaintiff's health has been caused by the wrongful act of the defendant, his claim should be denied. However, when that possibility is very high, the claim should be allowed. As regards the 'grey area' – neither a very small nor a very high possibility – the Supreme Court decided that, considering the rationale of the norm which was breached (to prevent damage to the health of employees and the nature of the wrongful act), it would be contrary to reasonableness and fairness to leave the risk either on the side of the employee or on the side of the employer. The Supreme Court decided:

Also in view of the starting points that underlie Articles 6:99 and 6:101 *BW*, it has to be accepted that, when an employee suffers damage that, considering the possibilities in percentage terms, could have been suffered both because of the wrongful act of his employer and his duty to protect the health of his employees, and because of circumstances that could be attributed to the employee himself, without the possibility of ascertaining how far the damage is a consequence of one of these circumstances, the judge could allow the claim by the employee; however, damages should then be decreased in proportion to (and with a reasoned estimation) the extent to which the circumstances that increased the damage should be attributed to the plaintiff.⁵³⁹

In other words, under certain circumstances a judge can decide to hold the defendant partly responsible, i.e., for the part for which he is indeed responsible, but not with regard to the circumstances that fall within the plaintiff's sphere of risk. Thus, the defendant could be held proportionally liable for the damage to the plaintiff in the course of the *establishment of liability*, not of assessment of damages.

The second decision of the Supreme Court as regards the theory of proportional liability was the case of *Fortis/Bourgonje*. In essence, the scope of the theory of proportional liability was questioned. The Supreme Court decided that this theory could not be generally accepted throughout liability law in its entirety. The theory of proportional liability is an exception to the rule that there must be a CSQN between someone's wrongful act and the damage suffered by the plaintiff. The judge should exercise restraint as regards applying the rule of proportional liability, and if he does apply this rule he should justify his decision according to the rationale of the norm which is breached, the nature of the wrongful act, as well as the nature of the damage suffered. However, the theory of proportional liability should not be limited, according to the Supreme Court, to cases similar to *Nefaiti/Karamus* (the liability of an employer and damage to the health of the employee). In general the Supreme Court decided that:

[A judge can choose to hold the defendant partly liable] especially when the liability [the wrong] of the tortfeasor is definite, the possibility of a CSQN between the wrong and the damage is not very small, and the rationale of the norm breached, and the nature of the wrongful act, justifies the application of proportional liability.⁵⁴⁰

⁵³⁷ HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, comm. C.J.H. Brunner (*D&S*), no. 3.7.6. See also fn. 539 below in this Chapter.

⁵³⁸ HR 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai, no. 3.13.

⁵³⁹ HR 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai (*Nefaiti/Karamus*), no. 3.13.

⁵⁴⁰ HR 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251, note T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*), no. 3.8.

In the case of *Fortis/Bourgonje* the Supreme Court declined to apply proportional liability, because it concerned the duty of an asset manager to warn his client, and the rationale of this duty – this norm – is to prevent financial loss. Furthermore, the Supreme Court ruled that the possibility that the client would have listened to this warning and thereby would have sold his shares – after a lock-in period – would not have been very great.⁵⁴¹

Coming back to the case; as stated, 'it cannot be ascertained whether it has been Hanna's negligent behaviour or the storm that caused the stone which hit Harold to roll down'. If the theory of proportional liability can be applied, the problems with regard to the CSQN can be solved. A wrongful act by Hanna seems to be present. Next, the rationale of the norm breached is to protect the safety – and health – of fellow mountaineers. Furthermore, the nature of the wrongful act is carelessness in a dangerous situation in which two mountaineers rely on each other to be careful. What we do not know in the case of *Hanna v. Harold* is the possibility that a CSQN exists between the wrongful behaviour of Hanna and the damage suffered by Harold. If that possibility is not very small – whatever that may be – Hanna could be held proportionally liable.

III. The reasoning in *Fortis/Bourgonje* has been criticized in Dutch literature, because, considering the importance of the question whether an exemption to the rule of CSQN can be made, it is not very clear under which circumstances the theory of proportional liability could be applied and on what justification it could be based.⁵⁴² In the case of *Nationale-Nederlanden/SL* the Dutch Supreme Court cleared to some extent the question regarding the interpretation of the factor of the nature of the norm that has been breached. In that particular case a traffic norm, to prevent people from getting injured, was breached. The Supreme Court decided in this case that the theory of proportional liability could be applied (for more detailed information on this case see Case 7, III).⁵⁴³

⁵⁴¹ HR 24 December 2010, *Nederlandse Jurisprudentie* 2011, 251, note T.F.E. Tjong Tjin Tai (*Fortis/Bourgonje*), no. 3.10.

⁵⁴² See I. Giesen, '(Dis)Proportionele duidelijkheid', *Nederlands Tijdschrift voor Burgerlijk Recht* 2011, no. 19, 149–50; S.D. Lindenberg and S.B. Pape, 'Proportionele aansprakelijkheid bij onzeker causaal verband: deel 2', *Ars Aequi* 2011, 720–5.

⁵⁴³ HR 14 December 2012, *Nederlandse Jurisprudentie* 2013, 236, comm. S.D. Lindenberg (*Nationale Nederlanden/SL*).

Lithuania

Loreta Šaltinytė

I. The result in this hypothetical would be problematic, although a positive result is likely if courts exercise their discretion and interpret Art. 6.279(4) CC widely, as encompassing natural causes.

II. The claim would need to be made under the general tort clause (Art. 6.263 CC). Harold would need to prove wrongful conduct, damage and the causal link between the two, as well as fault. For the claim to succeed the claimant needs to establish that it was more likely than not that Hanna caused the damage. The CC includes a separate rule on alternative causation in its Art. 6.279(4), though it is not certain whether courts would apply it to a situation involving natural causes, because the provision specifically refers to the conduct of 'persons'. It would be within the power of the courts to apply this rule by analogy with respect to a natural cause or to expand the meaning of the provision, and a positive result would be likely since this solution is also found in PETL.⁵⁴⁴ If the court decides to invoke Art. 6.279(4) CC, Hanna would be presumed to have caused damage, unless she rebuts this presumption. So far the LSC has discussed natural causes as a possible cause of harm only in one case, which concerned damage done to an orchard by spraying a neighbouring field with herbicides.⁵⁴⁵ Another cause of the damage (reduced fruit yield) was unfavourable weather conditions. However, in this case it was beyond doubt that the major cause of the damage was the conduct of the tortfeasor, and not natural causes; therefore it was not an alternative causation case and does not help in deciding this hypothetical.

England

Ken Oliphant

I. As it cannot be ascertained whether it was Hanna's negligent behaviour or the storm that caused the stone to be dislodged and to hit Harold, the claim fails for lack of causation. Harold cannot prove that, on the balance of probabilities, it was more likely Hanna than the storm that was to blame.

II. If it cannot be proven that the defendant's tortious act or omission was more likely than not a cause of the claimant's injury, causation is

⁵⁴⁴ On the LSC's practice of referring to the PETL, see discussion under Case 5.

⁵⁴⁵ *AG v. A.S.*, LSC 27 November 2006, no 3K3-625/2006.

except in cases of intent.⁶¹⁹ Nate will therefore not be liable for Kevin's damage.⁶²⁰

However, if one disregards the employers' privilege and only looks at the causation problem involved, it becomes clear that the present case is similar to the previous one. A likelihood of 55 per cent does not suffice to prove causation as the standard of proof is that of high probability.⁶²¹ Consequently, we are again faced with a situation of alternative causation of more than one harmful event, one of which falls in the victim's own risk sphere. *In casu* this event is the victim's own behaviour, namely his heavy smoking. Therefore, the tortfeasor and the victim would have to bear the loss proportionately.

If the alternative cause in the victim's risk sphere is not a chance event but has to be considered as contributory negligence, which is probably the case for smoking (after all everyone knows that smoking is harmful), the latter will weigh more strongly against the victim than a chance event in his sphere would. This means that the victim would then have to bear a larger part of the damage (on the basis of the figures provided in *casu* that would mean that more than 45 per cent of the damage would have to be borne by the victim).⁶²² In this sense the OGH⁶²³ decided on the injury suffered by the claimant in a fight he had sought, and which was caused either by the first punch of the defendant, which was justified as an act of self-defence and knocked the claimant unconscious, or by the following punches of the defendant delivered when the claimant was already helpless. Probability of causation could not be ascertained and the court therefore assumed that both would in principle have to bear half of the damage. However, as the claimant

⁶¹⁹ § 334, subsection 1, ASVG grants the social insurance carrier an own right of recourse against the employer if the latter caused the work accident deliberately or with gross negligence. See on this H. Krejci and E. Böhler, 'Schadenersatzrecht', in Tomandl (ed.), *System des österreichischen Sozialversicherungsrechts*, 3.3.4.; E. Karner and F. Kernbichler, 'Austria', in K. Olliphant and G. Wagner (eds.), *Employers' Liability and Workers' Compensation* (Berlin: de Gruyter, 2012), no 94.

⁶²⁰ According to court practice, the employers' privilege even applies to claims for compensation of non-pecuniary loss although there are no equivalent social insurance benefits. See on this Krejci and Böhler, 'Schadenersatzrecht', 3.3.3 with further references. See also Karner and Kernbichler, 'Austria', no. 108.

⁶²¹ W. Rechberger, 'Maß für Maß im Zivilprozess? Ein Beitrag zur Beweismaßdiskussion', in *Festschrift Baumgärtel* (Köln: Mohr Siebeck, 1990) pp. 471, 484 f.; T. Klicka, *Beweislastverteilung im Zivilverfahrensrecht* (Vienna: Manz, 1995), p. 30 ff.

⁶²² Bydlinski, *Schadensverursachung*, p. 87.

⁶²³ See B Ob 608192= EvBl 1994/13; for an English summary of the decision see Koch, 'Austria', 6B3, nos 1–9.

had started the fight he was only compensated for a quarter of the harm suffered.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. See Case 6.

II. The employer will be held proportionally liable on the basis of *Nefait/Karamus*.⁶²⁴ A Dutch compensation scheme that applies in these types of cases does not exist.

III. Proportional liability is a solution to a CSQN problem in the phase of establishing liability, not of assessment of damages. Therefore it could be asked whether damages can be decreased when applying the law of damages. In 2012 the Supreme Court delivered a judgment on the question whether it is within the bounds of possibility that, whilst the tortfeasor is proportionally liable, damages are adjusted in conformity with the plaintiff's contributory negligence (Art. 6:101 *BW*). Under Art. 6:101 *BW* two questions arise.⁶²⁵ The first question is that of causation: to what extent did the wrongful behaviour of the plaintiff and the tortfeasor, respectively, add to the damage which occurred? The second question is one of fairness. The Supreme Court has ruled that the rule(s) of contributory negligence cannot influence proportional liability as such (the establishment of liability). However, when proportional liability is established, contributory negligence could lead to a moderation of damages. A necessary condition is, however, that there is a 'causal circumstance' on the side of the plaintiff which was not, or could not have been, taken into account when establishing proportional liability. When this 'causal circumstance' exists, damages could be decreased. However, then the question of fairness could (again) lead to another amount of damages, provided that these damages do not exceed damages for which proportional liability was established.⁶²⁶

⁶²⁴ HR 31 March 2006, *Nederlandse Jurisprudentie* 2011, 250, comm. T.F.E. Tjong Tjin Tai (*Nefait/Karamus*). See also HR 7 July 2013, *Jurisprudentie Aansprakelijkheidsrecht* 2013/108 (*Lansink/Ritsma*), no. 4.3.1–4.3.2; HR 7 July 2013, *Jurisprudentie Aansprakelijkheidsrecht* 2013/128 (*Sociale Verzekeringsbank/Van de Wege*), no. 4.5.2.

⁶²⁵ See however Keirse who argues that Art. 6:101 *BW* contains a four-stage test: A.L.M. Keirse, *Schadebeperkingsplicht: over eigen schuld aan omvang van de schade* (diss. Groningen) (Deventer: Kluwer, 2003), p. 83 ff.

⁶²⁶ HR 14 December 2012, *Nederlandse Jurisprudentie* 2013, 236, comm. S.D. Lindenberg (*Nationale Nederlanden/S.G.L.*), nos 4.3–4.4.

argued that all victims should be compensated according to the probability of causation.⁶⁹⁵ However, there seems to be no court practice on this question.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Considering the fact that it is impossible that one manufacturer created all the damage, all factories are liable for the proportion of damage they have done. If one factory is held partially liable, another question of causation arises. Since it is uncertain whether Petra's injury is caused by the high concentration of Cr(VI) or other circumstances, for which no liability exists, the theory of proportional liability could perhaps be applied to assess liability.

II. This case raises two questions with regard to the *conditio sine qua non*. First is the question regarding the responsibility for damage caused by an accumulation of wrongful behaviour. Second is the question of uncertain causality due to the existence of two (or more) possible causes for which only one (partial) liability exists.

Let us start with the accumulation of wrongful behaviour. Art. 6:99 BW, as described under Case 5, is not applicable in this case since the defendant could not have caused all the damage on his or her own.⁶⁹⁶ That is precisely the central difficulty in this case: all factories together created the health risks. The prevailing view is that the defendant should be liable for the part of the damage for which he or she is responsible.⁶⁹⁷

This conclusion would be in line with the outcome in the Dutch Supreme Court case of *Kalimijnen*. MDPA, a French company, wrongfully drained off salt into the Rhine. The plaintiff, a Dutch farmer, who used underground water to irrigate his crops, suffered damage because of the high quantity of salt in the river, which was however caused by both the behaviour of MDPA and by the large quantity of salt-water fish in local waters. The plaintiff claimed compensation for the cost of limiting and preventing his damage. The Supreme Court ruled that, considering the fact that the plaintiff had to incur expenses for limiting or preventing his

slightly negligent polluters will only be liable for the part of the contamination caused by them.⁶⁸⁹ If, however, such part cannot be determined, slightly negligent polluters will be liable in equal shares.⁶⁹⁰ *In casu* the factories dumped their waste against all regulations. It remains open whether the regulations were broken intentionally or with gross negligence. However, even if this was the case, one cannot automatically assume that damage was inflicted with gross negligence or intent.⁶⁹¹ As *in casu* the individual quantities were so small that they alone would not have led to any damage, harm was probably not inflicted with gross negligence or intent. Consequently, the factories will only be liable for their contribution to the damage. If such contribution cannot be determined, everyone will be liable in equal shares.

If one disregards the specific situation of water contamination, the general rules apply (§ 1302 ABGB). The outcome of the case will then depend on whether only the accumulation of contamination by all 40 factories led to the damage or whether the harm caused by only 39 would have resulted in the same effect. In the former scenario, contamination by each of the 40 factories was a *conditio sine qua non* for the entire damage. Therefore, everyone would be held solidarily liable for the entire harm.⁶⁹² In the latter scenario, we would, on the other hand, be faced with the problem of minimal causation, where it remains unclear whether an individual event would have caused a certain harm while it is clear that a multitude of such events together brought about the harm. Court practice would in such cases apply solidary liability.⁶⁹³ However, it has been argued convincingly in doctrine for such scenarios of minimal causation that, except in cases of joint and intentional conduct, tortfeasors should only be liable for equal shares as otherwise they would be held liable for harm which they have certainly not caused.⁶⁹⁴

The second question addressed by the case is that of alternative victims. While it is clear that some cancer cases were caused by the contamination it is also clear that some have other causes. As part of the damage was therefore certainly caused by the contamination while it only remains unclear how this is split among the potential victims, it is

⁶⁸⁹ See on this rule also II. Koziol, *Österreichisches Haftpflichtrecht II*, 3rd ed. (Vienna: Manz, 2014), no 3/4/11 f.

⁶⁹⁰ M. Gimpel-Hinteregger, *Theoretische Grundfragen der Umwelthaftung* (Vienna: Manz, 1994), p. 185.

⁶⁹¹ See Koziol, *Haftpflichtrecht I*, no 5/32.

⁶⁹² See Koziol, *Haftpflichtrecht I*, no 3/84 f. 14/11.

⁶⁹³ OGH GUINF 3873; JBl 1931, 81; Karner, in KRR, § 1302 no 11.

⁶⁹⁴ Koziol, *Haftpflichtrecht I*, no 3/83.

⁶⁹⁵ Koziol, *Haftpflichtrecht I*, no 3/39.

⁶⁹⁶ See A. J. Akkermans, *Proportionale aansprakelijkheid bij onzeker causaal verband* (diss. Tilburg) (Deventer: W. E. J. Tjeenk Willink, 1997), pp. 74-6.

⁶⁹⁷ Akkermans, *Proportionale aansprakelijkheid*, pp. 76-7; J. Spier, *Schadevergoeding algemeen*, III (Mon. BW B36) (Deventer: Kluwer, 1992), no. 15; Hartkamp and Sieburg, *Verbitenisrecht*, II, no. 95-6.

damage because of both the behaviour of MDPA and the large quantity of salt-water fish in local waters, and the linear connection between the amount of salt and the quality of the crops respectively, MDPA should partially compensate the damage to the plaintiff. According to the Supreme Court, damages should be a reflection of the extent to which MDPA contributed to the total quantity of salt by wrongfully draining off ('its') salt.⁶⁹⁸

The second question of causation concerns the existence of two or more possible causes of Petra's injury, i.e., Petra's injury is either caused by the pollution or by another cause or causes for which no liability exists. The theory of proportional liability (see Cases 6 and 7) could perhaps be applied in these types of cases, considering the nature of the norm breached (most presumably to prevent damage to health) and the gravity of the damage. However, the Dutch Supreme Court has not decided yet on the accumulation of the theory of partial liability and proportional liability respectively.

III. The Dutch Supreme Court has not ruled on the subject matter stated in Case 8. However, the outcome in the *Kalimijnen* case could support the conclusion drawn above. But the basis for this partial liability is still unclear as one could also use the theory of proportional liability. The difference is however that in cases of proportional liability (as in Case 7) there is a certain probability that the tortfeasor caused the whole damage, whereas in cases of partial liability, it is certain that the tortfeasor caused part of the damage only.

Lithuania

Loreta Šaltinytė

I. The outcome would be problematic since there are no legal rules which would alleviate the problem of establishing individual causation in tort litigation related to toxic waste. Case law is absent, and there is no doctrine on this issue.

II. The claim would be adjudicated under general tort liability rules. For the claim to succeed the claimant will need to establish that it is more likely than not⁶⁹⁹ that her cancer was caused by industrial waste

⁶⁹⁸ HR 23 September 1988, *Nederlandse Jurisprudentie* 1989, 743, comm. J.C. Schultsz and J.H. Nieuwenhuis (*Kalimijnen*), no. 3.5.1.

⁶⁹⁹ Recent LSC case law suggests it is sufficient that the likelihood that damage was caused by the defendants is circa 50 per cent. See *MV 5 AV*, under Case 1.

containing Cr(VI). Thus, the incidence of harm among the people living near the river needs to be at least twice as high as in the group which was not so exposed. Courts would not consider it material that the amount of Cr(VI) released by factories is not sufficient to raise its concentration above permissible levels—they would apply CC rules on solidary liability (Arts. 6:279 and 6:6 CC).⁷⁰⁰ However, the claim would most likely fail because of the difficulty in establishing that the claimant's illness was caused by the toxic emissions, and not by other, non-tortious reasons. Although at present there is no rule alleviating the difficulty in establishing causation in similar claims, given the willingness of the LSC to seek inspiration from PETL in order to decide on situations which have not been addressed previously,⁷⁰¹ it is possible that when faced with this issue the LSC would introduce the rule found in Art. 3:103(2) PETL. The article provides that if it remains uncertain whether a particular victim's damage was caused by an activity, while it is likely that it did not cause damage to all the victims, the activity would be regarded as a cause of the damage suffered by all the victims in proportion to the likelihood that it may have caused the damage to a particular victim.

England

Ken Oliphant

I. Petra's claim has no prospect of success. There is insufficient evidence of specific causation – and perhaps not even enough evidence of general causation.

II. The hypothetical facts are similar to those of the English case of *Reay v. British Nuclear Fuels Plc.*, relating to a cluster of leukaemia cases in the vicinity of a newly constructed nuclear power plant.⁷⁰² The claim in *Reay* failed because, despite epidemiological evidence that there was a six to eight-fold excess of leukaemia cases in the area, this was just as likely the product of chance and socio-demographic factors as it was of the construction of the nuclear power plant. The present case is even weaker because 40 different factories were responsible for the pollution.

The issue relating to the multiple contributions to the pollution can be addressed separately. As a matter of causation, the test to be applied is whether each defendant made a 'material contribution' to the damage (not, as under the 'Fairchild exception', the risk of damage: see under

⁷⁰⁰ See discussion under Case 3.

⁷⁰¹ See discussion under Case 5.

⁷⁰² [1994] Env LR 320.

well have weakened the victim's immune defences.⁷⁶¹ For these reasons, Bert's pneumonia infection is an adequate consequence of the accident. For the same reasons, I would consider the harm suffered to be covered by the protective purpose of the norm. Consequently, Alex will also be held liable for the damage suffered due to the pneumonia infection.⁷⁶²

III. It is interesting to note that § 1340 of the fusion draft provides for strict liability of hospitals for infections.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Alex can be held liable for all damages, including those stemming from pneumonia.

II. Art. 185 *Wegenverkeerswet* (WVW) (The Road Traffic Act) should be applied when assessing Alex's liability. Art. 185 WVW concerns the responsibility of a motorized traffic participant towards a non-motorized traffic participant, and contains a rule of strict liability.

(1). A motorized traffic participant is liable when he or she inflicts personal injury on or damage to the goods of a non-motorized participant, in the course of a traffic accident on a public road, with his or her motor vehicle. An exception is made in cases of *force majeure*. The Supreme Court has limited the definition of *force majeure*. When the plaintiff is a child younger than 14 years the *force majeure* defence states that the defendant is liable except for the situation in which the plaintiff had the intent or acted with gross negligence that verges on intent.⁷⁶³ However, when the plaintiff is 14 years or older, the defence is that the defendant is liable except when that defendant can in no way be blamed.⁷⁶⁴ The burden of proof as regards motorized/non-motorized, traffic accident, public road, cause (CSQN) and damage (injury or damage to goods) falls on the plaintiff. In contrast, the burden of proof with regard to *force majeure* falls on the defendant.

(2). Because the CSQN is not difficult to establish here, liability will be established.

(3). Additionally, the second test of causation should be applied, i.e., the test of reasonable attribution (Art. 6:98 BW). This concerns the question of assessing damages. The key question is whether there is sufficient causal connection between the damage and the circumstance (s) that caused the damage, and that as a consequence the damage could reasonably be attributed to the tortfeasor.⁷⁶⁵ Several factors are of importance (see Case 1, II).

Alex breached a traffic norm, therefore circumstances that could not immediately be expected can be attributed to the tortfeasor. Two examples arise from the decisions of the Supreme Court. The first is the case of an unexpectedly long period of recovery, for example due to depression.⁷⁶⁶ The second is that of the attribution of a medical error by a doctor treating the plaintiff after the wrongful behaviour of the tortfeasor that led to the plaintiff's injury. The plaintiff was injured whilst performing his job, and as a consequence he received medical treatment, but his doctors failed to observe certain symptoms – which occurred later on – and therefore the status of the plaintiff worsened (mainly mentally).⁷⁶⁷ In both examples the Supreme Court decided that, considering the norm which had been breached (a safety or a traffic norm), damage that does not fall within the scope of reasonably expected consequences could also be attributed to the defendant.

The conclusion that Alex should bear the risk of recovery because he infringed a traffic norm – including if the damage worsened after the infection – is in line with this reasoning by the Supreme Court.⁷⁶⁸

III. There has not been any discussion on this specific issue, only on the factors to be used (and how they are to be used) under Art. 6:98 BW (legal causation) in general.⁷⁶⁹ The large number of harmful consequences which can be attributed to the tortfeasor who breached a traffic norm is probably due to the presence of compulsory insurance for traffic accidents.

⁷⁶³ Klaassen, *Schuldvergoeding*, no. 32.

⁷⁶⁶ HR 9 June 1972, *Nederlandse Jurisprudentie* 1972, 360, m.nt. G.J.S..

⁷⁶⁷ HR 8 February 1985, *Nederlandse Jurisprudentie* 1986, 136, m.nt. C.J.H. Brunner.

⁷⁶⁸ A.L.M. Keirse, 'The Tortfeasor Takes His Victim as He Finds Him', in: T. Hartlief and S. D. Lindenberg (eds.), *Tien penningstreken over personschade* (The Hague: Sdu Uitgevers, 2009), pp. 107, 114–16.

⁷⁶⁹ See however recently W. Dijkshoorn, 'De leer van de redelijke toerekening: back to the eighties', *Aansprakelijkheid, Verzekerings & Schade* 2011, 257–68.

⁷⁶¹ Koziol, *Hofpflichtrecht I*, no.8146. ⁷⁶² This is different to the case of influenza; *ibid.*

⁷⁶³ HR 31 May 1991, *Nederlandse Jurisprudentie* 1991, 721, comm. C.J.H. Brunner (Marbeth van Ultegi).

⁷⁶⁴ HR 22 May 1992, *Nederlandse Jurisprudentie* 1993, 137.

It should be emphasized that under Dutch law special rules concerning traffic accidents apply when considering the question of contributory negligence. When a motorized traffic participant causes damage to a non-motorized traffic participant and the plaintiff is 14 years or older, the tortfeasor should in principle compensate 50 per cent of the plaintiff's damage (as a minimum).⁷⁷⁰ When the plaintiff is younger than 14 years, the tortfeasor should in principle offer full compensation.⁷⁷¹

Lithuania

Loreta Šalkinytė

I. Under Lithuanian law Alex is not likely to be found liable for Bert's damages stemming from pneumonia as this consequence would most probably be considered too remote from Alex's negligent conduct.

II. Liability for car accidents is governed by Art. 6.270 CC, which provides that persons, whose activities pose 'higher danger' (vehicles, electricity and nuclear power, explosives and poisonous materials, constructions, etc.), are liable for any damage caused by the 'object of a higher danger', unless they establish that damage occurred due to *force majeure* or the victim's fault or gross negligence. The Lithuanian CC includes a flexible notion of causation which allows taking into consideration various relevant factors.⁷⁷² Therefore, the conduct of a tortfeasor need not necessarily be the sole cause of damage: it is sufficient that his conduct is an adequate cause of damage.⁷⁷³ In this situation courts would arguably find that the damage due to the victim's pneumonia was too remote from the wrongful conduct of the tortfeasor. In other words that there was no legal causation.⁷⁷⁴ For the purposes of assessing remoteness, the LSC has instructed courts to consider whether the damage was foreseeable to a reasonable person. Courts also need to take into consideration the nature and value of the legal interest/right which was breached, as well as the scope of the relevant legal regulation. The other important aspects identified by the LSC are the nature of liability

and the general risk to life.⁷⁷⁵ However, so far the LSC has not had a chance to express itself on the issue of remoteness in situations similar to this hypothetical. It is likely that there are no similar cases in view of the prevailing understanding that the causal link is interrupted – that it was both unforeseeable to the tortfeasor that the traffic accident would lead to the victim's pneumonia, or that the causal chain was interrupted by an event which was a part of the normal risk to life.

England

Ken Oliphant

I. Alex is liable for the immediate consequences of the accident, but it is arguable that Bert's intervening exposure to the risk of infection with pneumonia 'breaks the chain of causation' precluding Alex's liability for harm attributable to the pneumonia with which Bert is diagnosed.

II. It could not be disputed that Alex is liable for the immediate consequences of the accident, but it is less certain he could be found liable for harm attributable to Bert's hospital-acquired infection. Whether an intervening occurrence 'breaks the chain of causation' is addressed through the rather imprecise concept of reasonable foreseeability and, on the present facts, plausible arguments could perhaps be made each way. On the one hand, the risk of hospital-acquired infection is widely known and cannot be eliminated entirely by mechanisms the hospital could reasonably be expected to introduce. On the other hand, the outbreak of the pneumonia epidemic is clearly a very rare occurrence. I would incline to the view that the (rare) risk of infection in an epidemic is simply a particular instantiation of a reasonably foreseeable risk of some hospital acquired infection, and that Alex would therefore in principle be liable for it.

If it could be shown that the hospital had been negligent in allowing the infection, that could be sufficient to tip the scales the other way – on the (perhaps counterfactual) basis that it was not reasonably foreseeable that Bert would get an infection through the hospital's negligence. According to a recent case, the test to be applied was whether there was 'an egregious event, in terms of the degree or unusualness of the negligence, or the period of time for which it lasted, to defeat or destroy the causative link between the defendant's negligence and the claimant's injury.'⁷⁷⁶

⁷⁷⁰ HR 28 February 1992, *Nederlandse Jurisprudentie* 1993, 566, comm. C.J.H. Brunner (*Iza Verint*); HR 24 December 1993, *Nederlandse Jurisprudentie* 1995, 236, comm. C.J.H. Brunner (*Avija Kellners*).

⁷⁷¹ HR 1 June 1990, *Nederlandse Jurisprudentie* 1991, 720, comm. C.J.H. Brunner (*Ingrid Kolkman*).

⁷⁷² Mikelenas (ed.), *LR civilinio kodekso komentaras*, p. 338. ⁷⁷³ *Ibid.*

⁷⁷⁴ *Raudonienė and Raudonius v. Vilnius university Santariškių klinika*, LSC 30 March 2005, no. 3K-3-206/2005; *LB et al. v. Medvegalis et al.*, under Case 5.

⁷⁷⁵ *LB et al. v. Medvegalis et al.*, under Case 5.

security flaw, the claimant would have to found their claim on the Tort Liability Act and plead negligence or intent by the manufacturer, the K-Motor Company. Either way, Victor's claim would probably be rejected for reasons other than causation.

II. To answer whether or not the defective trunk lid constitutes a security flaw according to the Product Liability Act, the claimant has to prove that it is the defective trunk lid that has caused the damage. Even if one said that the accident would not have happened had it not been for the defective trunk lid (the *conditio sine qua non* test is satisfied), there are other reasons as to why Victor's claim would likely be rejected. The court could, for instance, probably argue that the risk which materialized in the case in question – that the driver might be involved in a car accident while trying to close the defective trunk lid – is different from the risk which might have been contemplated by the defendant. Likewise, the scope of the strict liability in the Product Liability Act would be limited to typical sources of risks that a defective trunk lid would constitute, e.g., obstruction of the driver's view.⁸¹⁰ The claim would therefore, likely, be rejected but for reasons other than causation.

III. In this context, it is to be noted that if the case in question were to be a matter of the scope of the car insurance, i.e., whether or not the claimant could get compensation from his own car insurance company, the Supreme Court would argue as follows.⁸¹¹ A man had to scrape ice from the windscreen of his car before driving. While scraping the windscreen, he slipped on a patch of ice on the ground. He fell on the ground, hit his neck and contracted a head and a neck injury. The question was whether he was entitled to compensation from the car's insurance company. The Supreme Court stated that he was. Since the man was injured while performing a preparatory act so as to be able to drive his car in a roadworthy condition, the damage was deemed to have such a connection with the normal use of a car that it was to be considered as being caused in traffic. When referring to this case, one has to bear in mind that it was a matter of compensation through car insurance. The function of insurances spreading costs on a large group and providing a social security system for traffic accidents⁸¹² could very well have importance in the judgment. When the question of

⁸¹⁰ Bengtsson and Ullman, *Produktansvaret*, p. 33.

⁸¹¹ NJA 2007 p. 997.

⁸¹² See for a discussion on pulverizing and the influence of insurance systems on tort law, Hellner and Radetzki, *Skadeståndsrätt*, pp. 37–42; Andersson, *Skadeståndsmål och adekvans*, pp. 317–19, with references.

liability concerns a weighing of risk between the defendant and the claimant, it is harder to point out who should bear the cost of the risk. The fact that Victor would have some chance of claiming compensation from his own insurance company would however not affect the assessment of causation/the notion of risk in his claim against the manufacturer.

Austria

Barbara C. Steininger

I. Victor's claim against the K-Motor Company will fail. This result is undisputed.

II. As in the previous case, we are faced with a problem which is, under Austrian law, solved on the basis of adequacy and the doctrine of the protective purpose of the norm. A defective trunk lid may be problematic in relation to the driver being distracted, his or her visibility being obstructed, or the like. The damage suffered in *casu*, namely that of being injured due to the negligence of another driver, is a normal risk of life. Anyone parking in that position would have suffered the harm irrespective of whether the trunk lid was defective or not. While the defective trunk lid was therefore clearly a *conditio sine qua non* and therefore causal for the damage suffered, there will be no liability of the K-Motor Company as the harm is neither an adequate consequence of the defect nor covered by the protective purpose of the norm.⁸¹³

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Although a CSQN between the accident and the damage exists, damages will most probably be denied because the damage is too remote.

II. As described under Case 1, II, in Dutch law there are two causation tests. The first is the test of CSQN, which is a criterion for accepting liability. The second test is the test of reasonable attribution (Art. 6:98 BW) and concerns the question of assessing damages. A CSQN between the accident and the damage exists; however, it is unlikely that the damage would be compensated considering the factors of Art. 6:98 BW. Notwithstanding the fact that Victor has been injured, which is an

⁸¹³ Under Austrian law there would be no need to sue the K-Motor Company as the Insurance Association would have to cover the harm caused by the driver who fled according to § 4(1) 2 *Verkehrsvpfer-Haftungsgesetz* (Act on compensation for traffic victims).

another vehicle while trying to open the trunk is amongst the risks legally attributable to the defect; arguably, then, Victor's injury is too remote from the K-Motor Company's supply of a defective vehicle, and the (untraced) van driver would be exclusively liable for it.

II. Formally, the same legal principles would apply in such a case as where the intervening occurrence is medical negligence (see under Case 9). But the courts seem more prepared to trace causation through intervening negligence in road accident cases⁸¹⁵ – perhaps on the basis (again, open to dispute in terms of factual accuracy) that negligence on the roads is more foreseeable than negligence in the provision of health care. In such a case, liability for the ensuing harm is joint and several.

On these facts, the added complication is that it is not clear that the accident that occurred was within the scope of the risk created by the product defect; arguably, it was too 'remote'. The test of remoteness applied in English law is whether the harm that occurred falls within the type of harm whose occurrence was a reasonable foreseeable consequence of the negligence.⁸¹⁶ On the facts, the outcome would turn on the evidence Victor was able to present about the risks of accidents of this sort (as opposed to, for example, accidental injury from the trunk shutting on someone's hand).

III. (a) Though often treated as questions of 'legal' causation, issues of intervening occurrences and remoteness are regarded by some scholars⁸¹⁷ as providing for the non-causal limitation of liability in the interests of justice.

(b) On the hypothetical facts, even if formal legal liability were to rest exclusively with the untraced van driver, Victor would be able to claim full compensation for his injury from the Motor Insurers' Bureau, under the applicable Untraced Drivers' Agreement made with the Secretary of State for Transport.⁸¹⁸

⁸¹⁵ See e.g. *Rouse v. Squires* [1973] QB 889.

⁸¹⁶ *Overseas Tankship (UK) Ltd v. Mitsui Bussan Kaisha Ltd*, *The Wagon Mound* [1961] AC 388.

⁸¹⁷ E.g., Jane Stapleton: see especially J. Stapleton, 'Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences' (2001) 54 *Vanderbilt Law Review* 941; J. Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388.

⁸¹⁸ Available online at www.mib.org.uk/making-a-claim/claiming-against-an-untraced-driver/untraced-drivers-agreements/. Compensation for property damage is subject to a cap.

argument for the attribution of damage, it could be argued that the damage is too remote, because of the distance in time and space between the K-Motor Company's negligence and the accident, and because of the third party's intervention in the causal chain leading to the accident. Furthermore, it is highly unlikely that the K-Motor Company could or should have foreseen the situation in which Victor, whilst discovering the defect in his trunk lid and, as a reaction, stopping at the side of the road, would have been hit by another car. In other words, the company could not and should not have foreseen that its actions would lead to the damage suffered by Victor. It is therefore highly unlikely that the K-Motor Company will pay damages.

Victor could, however, claim damages under the *Waarborgfonds Motorverkeer* (compensation scheme for uninsured and unknown drivers, see Art. 270 *Wet aansprakelijkheidsverzekering motorrijtuigen*).

Lithuania

Loreta Šaliminytė

I. The claim would be governed by rules of product liability and general rules of tort liability under the CC. Similar to the previous hypothetical, a finding establishing liability of the K-motor company is unlikely as the consequences would be considered unforeseeable.

II. As discussed under Case 9, the key issue under this hypothetical is whether there is an adequate link (legal causation) between the damage and the wrongful conduct. One of the criteria for assessing legal causation is whether the damage was foreseeable to a reasonable person.⁸¹⁴ However, so far there is no LSC case law illustrating how courts would understand the notion of foreseeability for the purposes of causation. It is likely that courts would dismiss the claim on this particular ground, as there is no reason for the defendant to foresee that the driver might be involved in a car accident while trying to close the defective trunk lid.

England

Ken Olliphant

I. The defective trunk lid would probably be treated as the cause of Victor's injury – the other driver's negligence is unlikely to break the chain of causation – but it is open to doubt whether getting injured by

⁸¹⁴ *LB et al. v. Medvėgalis et al.*, under Case 5.

situation of issuing new shares,⁸⁶² and ending a sizeable credit, and again granting credit, but subject to the condition that security is provided by means of a transfer of property (as a security right, *fiducia*), including future goods (a claim made by a creditor who – before granting the second credit – already had a claim against the client of the bank).⁸⁶³

Therefore we have to consider whether Bank Ltd owes a special duty of care towards Fresh Fruits, a creditor of Groceries Store, a client of the bank. As stated, the societal function of banks and the circumstances of the case should be taken as a starting point. It could be argued that it is a standard activity of a bank to grant credit to clients, and in the course of doing so, to check the financial situation of a client. Additionally, it could be argued that the purpose of this check is not only to ensure that the bank can recoup its money, but also to protect society from actors with non-liquidity still operating in the market, and thereby not only damaging new creditors, but also former ones.

If this duty of care is found, the question of damage and CSQN arises. Pure economic loss is damage which is as such protected under Dutch law. It could be questioned, however, whether there is indeed a CSQN: would Fresh Fruits not have suffered a loss if the Bank had not acted negligently?

Let us assume that Fresh Fruits have suffered damage, then the question arises whether the damage could reasonably be attributed to the Bank (legal causation, Art. 6:98 *BW*). As stated in Case 1, II, several factors are of importance here. In this case it could be argued, on the one hand, that the damage to already existing creditors is foreseeable and that the actions of the Bank are very careless. On the other hand, however, a creditor is a 'third party' and he or she does not 'directly' suffer a loss. Additionally, the creditor suffered a purely economic loss (instead of personal injury or damage to property). Considering these different factors, it could be argued that the damage suffered by the creditor could only be partly or not at all attributed to the bank.

III. A special duty of care is something of a trending topic in the Netherlands. As stated, a bank might have a special duty of care, but so do notaries, schools, employers, insurance companies and accountants. It is unclear as to what extent these special duties of care exist, to

loan is beneficial for other creditors of the debtor.⁸⁵⁷ Consequently, granting a loan to someone in a bad financial situation is not, as such, wrongful.⁸⁵⁸

The situation may be different if additional factors weigh against the creditor, e.g., if the latter exerted influence on the management of the debtor or if a loan was given out in order to recapitalize a debtor in trouble and the creditor acted with gross negligence and it was clear to the creditor that rights of other creditors are thereby encroached upon.⁸⁵⁹

There are no indications of such further factors weighing against Bank Ltd in the case at hand. Bank Ltd therefore did not owe a duty of care towards Fresh Fruits and granting Groceries Store a loan was therefore not wrongful. Consequently Bank Ltd will not be liable towards Fresh Fruits.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. If Bank Ltd owes a special duty of care towards creditor Fresh Fruits, which is a third party with respect to the contract between the bank and Groceries Store, and liability could be established, it would be unlikely that the damage of Fresh Fruits could be attributed to Bank Ltd (Art. 6:98 *BW*, legal causation).

II. It is possible that a bank owes a duty of care towards third parties, e.g., creditors of a client of that bank. The Supreme Court has (repeatedly) decided that:

The societal function of a bank could bring about a special duty of care towards third parties, whose interests should be taken into account because of the requirement of social decency. The scope of that duty of care depends on the circumstances of the case.⁸⁶⁰

Examples of a breach of a special duty of care towards third parties are: ineffective action against the unlawful behaviour of a client (claims made by investors who paid money into the account of that client),⁸⁶¹ a breach of the duty to inform third parties – investors – sufficiently and correctly in a

⁸⁵⁷ Bollenberger, 'Das Kreditgeschäft', no 14/23. ⁸⁵⁸ *Ibid*.

⁸⁵⁹ Bollenberger, 'Das Kreditgeschäft', no 14/24 ff.

⁸⁶⁰ HR 23 December 2005, *Nederlandse Jurisprudentie* 2006, 289, with a note by M.R. Mok (Fortis/Stichting Volendami); HR 27 November 2009, *RvdW* 2009, 1403 (*World online*). See also HR 28 June 1957, *Nederlandse Jurisprudentie* 1957, 514 (*Eriba/Amsterdamsche Bank*).

⁸⁶¹ HR 23 December 2005, *Nederlandse Jurisprudentie* 2006, 289, with a note by M.R. Mok (Fortis/Stichting Volendami).

⁸⁶² HR 27 November 2009, *Rechtspraak van de Week* 2009, 1403 (*World online*).

⁸⁶³ HR 28 June 1957, *Nederlandse Jurisprudentie* 1957, 514 (*Eriba/Amsterdamsche Bank*).

acquisition of which the bank was financing, were changed, reducing the value of the assets of the company and worsening the creditors' chances of recovery. However, the bank did not react; instead, even though the company was not operational from the time of the acquisition of the new premises, it issued an additional loan just a few weeks before the company went bankrupt. Even if the bank took into consideration the financial situation of the borrower before issuing the loan, under these circumstances, especially with respect to the second loan, it would be rather difficult to establish that it expected the loan to be paid back. Regrettably these issues were not discussed in the LSC's decision in detail. Arguably, there were sufficient factual circumstances to establish wrongfulness and to dismiss the case on causation by restricting its understanding in bank liability cases.

England

Ken Oliphant

I. It is very unlikely that Fresh Fruits can recover its losses from Bank Ltd as – even though these could well be regarded as caused by the latter's granting of a loan – banks do not owe a duty of care to prevent their clients' customers from suffering pure economic losses.

II. Fresh Fruits' losses could well be regarded as caused by Bank Ltd's granting of a loan (to the extent that Fresh Fruits could have recovered at least some of its debt if Groceries Store had gone bankrupt earlier). But it is very unlikely that Fresh Fruits can successfully claim on these facts as its loss is purely economic and it is hard to see any basis upon which Bank Ltd could owe Fresh Fruits a duty of care to prevent such loss.⁸⁶⁶

Ireland

Ursula Connolly

I. As with Case 4, this raises issues of pure economic loss and the principles discussed in that question apply equally to this one. The plaintiff is unlikely to have an action, as the courts are unlikely to find that sufficient proximity exists for a duty of care to arise. If this were not the case, both factual and legal causation would have to be established. As conceded above, it will be relatively straightforward to establish factual causation; however, the plaintiff's claim against the bank might fail on legal causation.

⁸⁶⁶ Cf. *Barclays Bank plc v. Quinccare Ltd* [1992] 4 All ER 363: the bank owes no duty of care to the guarantor of its client's loan.

whom they are applicable, and even why they should be called a 'special' duty of care.⁸⁶⁴

Lithuania

Lorita Šaltinytė

I. There are no specific restricting conditions with respect to the prerequisite of causation in bank liability cases. A bank is considered to have a duty of care towards any possible person who may be affected by its decision. Therefore, if Fresh Fruits manages to establish that the bank acted wrongfully, i.e., that it clearly deviated from the standard of a responsible banker, the claim is likely to succeed.

II. The claim would be decided under general rules of tort liability. In a situation recently addressed by the LSC,⁸⁶⁵ compensation was claimed from a bank which issued a loan to a financially struggling company twice – first, for acquisition of new company premises, and, second, an additional loan only two weeks before that company was declared insolvent. The claim failed because the LSC did not agree that the bank did not observe the standard of a responsible banker. In this decision the LSC suggested that the bank may incur liability for lending if its decision clearly deviates from the standard of a responsible banker. In the LSC's understanding, the bank's decision to lend would be wrongful if it was made without collecting the necessary information on the financial standing of the borrower, his or her ability to pay, or if the bank decided to lend without expecting to receive the loan back. The bank may also incur liability for damage for clearly arbitrary commercial decisions of a borrower, if it exercised influence on making them. The LSC has emphasized that banks have a certain discretion in their lending decisions, which needs to be exercised in good faith and by observing the standards of a responsible banker. The LSC's decision to reject the claim on the ground of lack of wrongfulness of the bank's conduct is not persuasive. The facts of the case are rather explicit that the bank decided to lend to the company when its financial situation was already complicated. Furthermore, subsequent to the bank's decision to lend money, the terms of the contract, with respect to the premises the

⁸⁶⁴ See T. F. E. Tjong Tjin Tai, *Zorgplichten en zorgethiek* (Deventer: Kluwer, 2007), chapter 6; B. M. Pajmians, 'De bijzondere zorgplicht van scholen. De grondslag en reikwijdte van de civielrechtelijke zorgvuldheidsnorm van scholen jegens leerlingen' (Deventer: Kluwer, 2013), pp. 457–8.

⁸⁶⁵ *Stagena v. SIBB bank and RS*, LSC 26 July 2013, no. 3K-3-420/2013.

suffered a head injury, i.e., exactly the damage the violated norm intended to prevent. The depression he developed which led to his subsequent suicide is a typical consequence of the head injury suffered. The suicide is therefore covered by the protective purpose of the violated norm. Moreover, Austrian courts have in the past considered suicide to be an adequate consequence of a serious injury with lasting consequences.⁹¹¹ Generally imputation of damage may also be denied if the harm was due to an independent decision of a third party or victim which was not provoked by the event bringing about liability.⁹¹² However, in the case at hand the victim's decision to commit suicide cannot be considered as autonomous from the injury. Consequently, Factory B will be held liable for Thomas's death.

The Netherlands

Ivo Giesert and Rianka Rijnhout

I. The employer will be held liable under Art. 7:658 BW in contract.⁹¹³ Within the scope of the assessment of damages the employer has to compensate the damage for Thomas's next of kin, as regards their dependency claim. Damages must be calculated under Art. 6:108 BW.

II. Under Dutch law the employer's duty of care is specified in Art. 7:658 BW.⁹¹⁴ The burden of proof falls on both the employer and the employee.⁹¹⁵

⁹¹¹ OGH 2 Ob 27/91 = JBl 1992, 255. Cf. also Koziol, *Haftpflichtrecht I*, no 8/11; Karner, in KBB, § 1295 no 7; Reischauer, in Rummel, *ABGB*, § 1295 no 12; Kodek, in *ABGB-ON*, § 1295 no 18; Harter/Wagner, in Schwimann/Kodek, *ABGB VI*, § 1295 no 10.

⁹¹² See on this Koziol, *Haftpflichtrecht I*, no 8/77 ff.

⁹¹³ On the English case of *Thomas Carr v. IBC Vehicles Limited* [2008] UKHL 13 and the (predicted) outcome under Dutch law, see M. Hebly, 'Suicide na een arbeidsongeval: een (on)geval apart?', *Nederlands Tijdschrift voor Burgerlijk Recht* 2010, no. 32, 258–63.

⁹¹⁴ Art. 7:658 BW deals with liability for damage as a result of an unsafe working area or the use of (defective) instruments and tools with which the labour should be performed. See S.D. Lindenberg, *Arbeidsongevallen en beroepsziekten* (Mon. Privaatrecht 13) (Deventer: Kluwer, 2009), pp. 42–3. Art. 7:658 BW deals with liability for damage as a result of an unsafe working area or the use of (defective) instruments and tools with which the labour should be performed. See Lindenberg, *Arbeidsongevallen en beroepsziekten*, pp. 44–6; G.J.J. Heerma van Voss, Mr. C. Assers *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten, V. Arbeidsovereenkomst, collectieve arbeidsovereenkomst en ondernemingsovereenkomst* (Deventer: Kluwer, 2008), no. 243.

⁹¹⁵ See e.g. HR 7 July 2013, *Jurispudentie Aansprakelijkheidsrecht 2013/108*, comm. J. den Hoed (Lansink/Ritsma), no. 4.1.2; HR 7 July 2013, *Jurispudentie Aansprakelijkheidsrecht 2013/128*, comm. J.P.M. Simons (Sociale Verzekeringsbank/Van de Wege), no. 4.2.2.

in personality, which in turn led to the suicide five years later. It is likely that Factory B would be held liable for the suicide as well.⁹⁰⁷

The question was tried by the Supreme Court almost 50 years ago.⁹⁰⁷ The circumstances were the following. A man who was riding his bike was hit by a car. The victim suffered severe head injuries and was treated in hospital multiple times. The head injury inflicted in the accident caused post-traumatic dementia, which meant significant changes to the victim's personality. Ten months after the accident, he took his own life. Since there were no other circumstances than the head injury that contributed to why the victim took his own life, the court found that the suicide had such a close connection to the accident that they awarded compensation not only for the accident but also for the suicide.

Although the time frame in the hypothetical case is different from the Supreme Court case, there is nothing given that would suggest a different outcome. As there is such a close connection between the effects of the initial injury (personality changes)⁹⁰⁸ and the suicide, the damage would be attributed to the defendant.⁹⁰⁸

Austria

Barbara C. Steininger

I. Thomas suffered a work accident. He (and his heirs after his death) will therefore be entitled to workers' compensation via the accident insurance system. Consequently, Factory B will not be liable for Thomas's death, as it will benefit from employers' privilege.

II. As indicated above⁹⁰⁹ § 333 ASVG excludes employers' liability for bodily harm due to work accidents except in cases of intentional infliction of harm. The employer's intent will thereby have to cover the harm suffered, which means that an intentional violation of protective norms will not suffice.⁹¹⁰

If we disregard the special rules applicable to employers and look at the underlying causation issue, Factory B would probably be held liable for Thomas's death. The statutory rules in question aim at protecting workers from head injury. Due to the violation of such protective statute, Thomas

⁹⁰⁷ NJA 1966 p. 331.

⁹⁰⁸ Cf. Andersson, *Skyldsamfundet och adekvans*, pp. 507–10; MJA 1955 p. 148.

⁹⁰⁹ Case 7, 910 M. Neumann/C. Huber, in M. Schwimann/C. Kodek (eds.), *ABGB Praxiskommentar VII*, 4th ed. (Vienna: LexisNexis, 2016), § 333 ASVG no 54.

(a) As stated in Art. 7:658 *BW*, the employer is obliged to arrange and maintain the working area, tools and equipment, and give instructions and take measures in such a way as is reasonably necessary to prevent damage to an employee while performing his or her job. As a consequence, the employee needs to prove that he or she suffered the damage as a consequence of their work.⁹¹⁶ Both physical injury and mental injury are covered under Dutch law.⁹¹⁷ As stated in the case, Thomas suffered from a physical injury, and as a normal consequence thereof he suffered from depression, and, eventually, after five years he committed suicide.

(b) The onus of proof lies with the employer as regards the second question: whether the employer acted in conformity with his duty of care. When obligations arising from provisions as regards working conditions are breached, as they were in Thomas's case, the employer will most probably not have acted in conformity with his duty of care, at least as far as the provision has the tenor of protecting the safety of employees.⁹¹⁸

(c) The burden of proof with regard to the facts of the matter ('*toe dracht*') also falls on the employer. In other words, he needs to prove that the damage is not related to the breach of duty of care.⁹¹⁹

(d) When an employer is liable under Art. 7:658 *BW* a special rule of contributory negligence has to be taken into account (Art. 7:658(2) *BW*). The employer is totally excluded from liability when he can prove that the damage that occurred while he was doing his job has been substantially caused by the intentional behaviour or gross negligence of the employee. As to the contention that the damage as a consequence of Thomas's suicide did not occur in the course of his work, it has been argued that the general rule of contributory negligence – under

Art. 6:101 *BW* – is applicable when considering the duty of the plaintiff to take reasonable steps to mitigate damage.⁹²⁰

Focusing on the case of Thomas's damage, it could be argued that part of the damage was caused by his own behaviour, because he committed suicide. The Dutch Supreme Court has decided that, when considering the question of attribution, the (weak) personality of the plaintiff and possible problems in the private sphere have to be taken as a starting point, and taking these circumstances into account the question arises whether the damage could be attributed, as a wrongful act, to this plaintiff.⁹²¹ One could argue that Thomas wrongfully did not mitigate his damage, for example because of the fact that he negligently failed to undergo psychiatric treatment, and eventually, therefore, committed suicide. However, it has been stated in this case that psychiatric injury is a normal consequence of the physical injury suffered by Thomas. Therefore, one could also argue that the mental injury is directly related to the accident, and therefore attributable to the tortfeasor.⁹²² The question could be raised, however, whether the act of committing suicide could be attributed, being contributory negligence, to the plaintiff.⁹²³ Despite the fact that we do not have any empirical evidence, it could be argued that someone with a weak personality and suffering from depression finds himself in a high-risk group as regards suicide. If this holds true, it could be argued that this 'act of committing suicide' has a strong causal link with the personality of the plaintiff, Thomas, and therefore the damage could not be attributed to this plaintiff.⁹²⁴

If this argument does not hold, and damage is partially attributed to the plaintiff, equity (Art. 6:101 *BW*; see Case 6, III) will most probably still give rise to the conclusion that the tortfeasor has to compensate the damage in full. This is because of the nature of the wrong committed by the employer (a breach of a safety norm) and the fact that the employer should most probably have taken out an insurance policy with regard to such industrial accidents.⁹²⁵

⁹²⁰ A.L.M. Keirse and M. Schaub, 'Dutch Case Note: Employer's Liability for an Injured Employee's Suicide in Dutch Law' (2010) *European Review of Private Law* 631, 643. See also Heblly, 'Suicide na een arbeidsongeval'.

⁹²¹ HR 4 November 1988, *Nederlandse Jurisprudentie* 1989, 751 (ABR/Stuyvenberg), no. 3.2. See also Heblly, 'Suicide na een arbeidsongeval'.

⁹²² See Keirse and Schaub, 'Dutch Case Note', 646 where they consider the case heard by the Court of Appeal (*Hof*) 's-Hertogenbosch 18 June 1980, VR1981, 72.

⁹²³ Keirse and Schaub, 'Dutch Case Note', 644–6.

⁹²⁴ See also Heblly, 'Suicide na een arbeidsongeval'.

⁹²⁵ See also Keirse and Schaub, 'Dutch Case Note', 646. These authors make a comparison between the nature of the norm which is breached and the personality of the plaintiff

⁹¹⁶ Heema van Vos, *Bijzondere overkomsten*, no. 252. See also HR 25 June 1993, *Nederlandse Jurisprudentie* 1993, 686, comm. P.A. Stein (*Cijssow I*). When an employee (possibly) suffers damage caused by working with toxic chemicals, a different rule applies. The employee then needs to prove that he could have suffered this damage as a consequence of performing his labour. See e.g. HR 7 July 2013, *Jurisprudentie Aansprakelijkheidsrecht* 2013/108, comm. J. den Hoed (*Lansink/Riksmid*).

⁹¹⁷ See Heema van Vos, *Bijzondere overkomsten*, no. 247; M.S.A. Vegter, *Vergoeding van psychisch letsel door de werkgever* (diss. VU Amsterdam) (The Hague: Sdu, 2005), on liability for psychiatric injury caused by labour. See also HR 11 March 2005, *Nederlandse Jurisprudentie* 2005, 84 of 37 (ABN *Amro/Nieuwenhuys*).

⁹¹⁸ Presumably the instructions with regard to offering a helmet to an employee should be considered as a safety norm that has the tenor of protecting the health of an employee, and thus protecting the safety of Thomas.

⁹¹⁹ HR 10 December 1999, *NJ* 2000, 211, comm. P.A. Stein (*Franssen/Pasteurziekenhuis*). See Lindenberg, *Arbidsongevallen en beroepsziekten*, pp. 33 and 77.

(e) The position of the next of kin in wrongful death cases needs to be considered. This position is restricted under Dutch law, as far as their damage, caused by the death or injury of the direct victim, is concerned. Art. 6:108 BW, which grants the next of kin a derived claim based on the liability towards the deceased, states (exclusively) that (a) the loss of dependency should be compensated for a limited number of relatives, and only as far as these relatives need that compensation to maintain their standard of living before the death of the plaintiff occurred. It further states that (b) funeral expenses have to be compensated. Under Dutch law no compensation is granted for damage caused by bereavement.

III. Art. 6:108 has been criticized for two reasons. First, Rijnhout criticized this article because it exclusively regulates the position of third parties in wrongful death cases. When the damage suffered by the third party is a consequence of the injury or death of the direct victim, Art. 6:108 BW will apply on an exclusive basis. This means that a right to full compensation cannot be allowed on the basis of the general rules of tort law, not even when full compensation should be granted under the rules of general tort law. In Rijnhout's opinion this is a mistaken starting point. The focus should be, to start with, on the question whether a protected interest exists and whether the tortfeasor has infringed that protected interest, and not on whether someone is a third party in fact.⁹²⁶

Second, the rule that a dependency claim only exists as far as the relatives need compensation to maintain their standard of living before the death of the plaintiff, has been criticized. The idea of 'need for compensation' differs from the general idea that in principle full compensation should be granted, and additionally it differs from the general rules regarding deduction (*verrekening*, Art. 6:100 BW).⁹²⁷

(qualified as 'weak'), and conclude that it is possible that the employer should pay full damages.

⁹²⁶ R. Rijnhout, *Schadevergoeding voor dertien in persoonschadezaken* (diss. Utrecht) (The Hague: Bju, 2012), chapters 8 and 9.

⁹²⁷ See e.g. I. van der Zalm, 'Schadevergoeding bij overlijden: een stoel die een soort tafelje is', in W.H. van Boom, J.H. Dam-Lely and S.D. Lindenberg (eds.), *Rake remedies* (The Hague: Bju, 2011), pp. 47-67.

Lithuania

Loreta Šalkinytė

I. It is likely that causation would be established under the circumstances, even though it is not entirely certain how it would be assessed technically in view of the lack of clarity of the LSC's guidelines on assessing causation.

II. An employer's liability for damage to an employee's health is governed by Art. 246 EC, which requires establishing (1) a damage, (2) a wrongful act, (3) a causal link between the two, (4) the employer's fault, (5) the fact that the victim was employed and (6) that damage is related to the employment. This liability is described as 'pecuniary' and is complemented by the general rules on tort liability, but it is not clear whether it is contractual or delictual. The understanding of causation is the same as in other tort cases. It is thus necessary to establish that the wrongful conduct was an adequate cause of the damage, which either contributed to the occurrence of the damage or aggravated it.⁹²⁸ Courts have also emphasized the need to establish that the consequences are an 'immediate' or a 'direct' result of the damage. Therefore, in the given hypothetical courts might agree that the workplace accident was a *conditio sine qua non* of the victim's suicide. However, they are likely to find that it was too remote from the workplace accident. On the other hand, in some decisions the LSC has used language which may raise doubts whether the workplace accident would even be accepted as a *conditio sine qua non* of the suicide, although this would not necessarily preclude liability.⁹²⁹ The LSC has also directed courts to assess the possibility that the defendant, had he acted as a reasonable and careful person, could predict that his conduct could cause harm, to consider the character and value of the infringed right or legal interest, and to take into consideration the protective purpose of the legal regulation that was breached.⁹³⁰ Courts would further take into consideration the nature of liability and the general risk involved in similar activities as equally important factors.⁹³¹ In view of these criteria it is likely that causation would be established, although this is speculative in view of the absence

⁹²⁸ *Bl. et al. v. Vilnius city 5th notary bureau et al.*, LSC 17 April 2002, no. 3K-3-614/2002; *Baldy rojus v. GO*, LSC 8 May 2007, no. 3K-3-197/2007; *RL et al. v. Center of Registers*, LSC 9 March 2005, no. 3K-3-156/2005.

⁹²⁹ *Bl. et al.*, above; *VP v. DD et al.*, under Case 4.

⁹³⁰ *LB et al. v. Medvegalis et al.*, under Case 5. ⁹³¹ *Ibid.*

The second issue raised by the case at hand is that of compensation for secondary victims. The mental shock of the secondary victim is not covered by the protective purpose of the norm endangering the primary victim as a person's bodily integrity will be protected for its own sake.⁹⁸⁵ Liability can, however, be based on a violation of the secondary victim's own right to bodily and mental integrity.⁹⁸⁶ Liability for the secondary victim's mental shock therefore presupposes that the conduct of the wrongdoer was highly dangerous also in relation to the secondary victim, i.e., the conduct has to be highly apt to cause the secondary victim's injury to health.⁹⁸⁷ In the case at hand, Sarah directly witnessed the accident. Moreover, she was not merely a remote bystander but was involved in the course of the accident.⁹⁸⁸ In such cases the conduct of the tortfeasor is considered to be highly dangerous also in respect of the secondary victim's mental shock and the former will therefore be liable for the harm suffered.⁹⁸⁹ Consequently, Sarah's claim will be successful.

The Netherlands

Ivo Giessen and Rianka Rijnhout

I. A nervous shock claim finds its basis in general tort law under Art. 6:162 BW. Whereas the Supreme Court has not yet decided on a claim by a rescuer, it has allowed a nervous shock claim to be made by the next of kin, and in its decision it did not exclude (or include) rescuers from the circle of persons who can claim. It is, however, uncertain whether liability exists in Case 13.

II. The compensation for third-party damage due to a psychiatric illness caused by the wrongful act towards the direct victim is possible according to Dutch law. This action is only possible when strict requirements are fulfilled. However, different from Arts. 6:107 and 6:108 BW (see Case 12, III) this action is not derived from liability towards the direct victim, but instead finds an autonomous basis in general tort law.

A duty towards a third party is breached and this in turn causes damage which should be compensated. But, as stated, that duty only exists subject to express conditions.

The Dutch Supreme Court mentions six conditions. (1) A safety standard should have been infringed by the tortfeasor towards the direct victim. (2) The third party should have been confronted with (3) a severe accident or its direct aftermath. (4) Because of that confrontation the third party should have suffered (5) severe shock, which resulted in (6) a mental injury. Compensation for non-pecuniary injury can only be granted when that mental injury can be qualified as a psychiatric illness.⁹⁹⁰

Although the different criteria and (especially) the causation test (mental injury because of a shock due to the confrontation with a severe accident or its aftermath) have been strongly criticized in the relevant literature, they have been confirmed by the Supreme Court in the *Vit* case.⁹⁹¹ Therefore, it is highly unlikely that the fact that Sarah chose to help Vanessa influences the question of liability. Next, seeing the Supreme Court's decisions on this subject the outcome would not have been different if Sarah was one of many rescuers or even a mere bystander.

As stated, the specific situation of a rescuer claiming damages in a nervous shock case has not yet been decided upon by any court.⁹⁹² However, the Supreme Court has ruled in general that compensation for nervous shock should be granted when these six criteria are met, and therefore one could conclude that a claim might well be successful.

The conditions for Dutch nervous shock claims should be considered against the background of the Dutch legislation regarding the compensation for third-party damage. Due to the exclusivity of Arts. 6:107 and 6:108 BW judges are limited in their judgment as regards direct wrongfulness towards a third party. Next, compensation for bereavement

⁹⁹⁰ HR 22 February 2002, *Nederlandse Jurisprudentie* 2002, 240, m.nt. J.B.M. Vranken (Taxibus); HR 9 October 2009, *Nederlandse Jurisprudentie* 2010, 387, m.nt. J.B.M. Vranken (VIII).

⁹⁹¹ See e.g. E.F.D. Engelhard and I.M. Engelhard, 'Shockschade', in W.H. van Boom, I. Giessen and A.J. Verheij (eds.), *Capita civiologische handboek empirie en privaatrecht* (The Hague: Bju, 2013), pp. 517-39. See also HR 9 October 2009, *Nederlandse Jurisprudentie* 2010, 387, m.nt. J.B.M. Vranken (VIII).

⁹⁹² See however A.J. Verheij, 'Vergoedbaarheid van shockschade van professionele hulpverleners bij rampen', in A.J. Akkermans and E.H.P. Brans (eds.), *Aansprakelijkheid en schadeverhaal bij rampen* (Nijmegen: Ars Aequi Libri, 2002), pp. 281-303; Rijnhout, *Schadevergoeding voor derden in personschadezaken*, pp. 233-5.

⁹⁸⁵ Koziol, *Haftungrecht I*, no 8147; E. Karner and H. Koziol, *Der Ersatz ideellen Schadens im österreichischen Recht und seine Reform*, 15. Österreichischer Juristentag vol. III/1 (Vienna: Manz, 2003), p. 78; Reischauer, in Rummel, *ABGB*, § 1325 no 5; see also OGH 2 Ob 79/00g = ZVR 2001/52 with commentary by E. Karner = JBl 2001, 659.

⁹⁸⁶ Karner and Koziol, *Ersatz ideellen Schadens*, p. 78.

⁹⁸⁷ E. Karner, 'Rechtsprechungswende bei Schock- und Fernwirkungsschäden Dritter?', ZVR 1998, 187 ff.; Karner and Koziol, *Ersatz ideellen Schadens*, p. 78.

⁹⁸⁸ Karner and Koziol, *Ersatz ideellen Schadens*, p. 79.

⁹⁸⁹ *Ibid.*

Lithuania

Loreta Šaltinytė

I. Theoretically causation should be established. Nevertheless, since the limits of liability have not been tested in practice, the result is not entirely certain.

II. Liability for damage caused by vehicles as 'objects of higher danger' would be governed by Art. 6.270 CC. A decision establishing causation would be in line with the doctrine of flexible causation, which is purportedly a part of Lithuanian civil law.⁹⁹⁷ It requires taking into account various circumstances, including the legal interests of the parties, the conduct of the victim, the fault of the tortfeasor, the financial situation of the parties, etc.⁹⁹⁸ The situation which led to the damage suffered by Sarah was created by Raymond's dangerous driving. It would be foreseeable to a reasonable person that dangerous driving may cause another driver to take steps to avoid an imminent accident, and it is foreseeable that the damage would not necessarily be avoided. In view of the circumstances, Raymond would be considered to have breached the general duty of traffic participants not to pose a risk to the safety of other traffic participants as well as other persons and the environment under traffic regulations. Arguably, the scope of the rule encompasses the damage suffered by other traffic participants like Sarah.

III. Policy reasons, in particular the need to protect the public against personal injuries caused by careless driving, weighs in favour of establishing causation.

England

Ken Oliphant

I. Raymond's negligence, if proven, would probably be regarded as a cause of Sarah's nervous breakdown and she would likely be able to recover damages from him if she was a primary victim of the accident (i.e., personally exposed to the risk of foreseeable physical injury) but not otherwise.

⁹⁹⁷ Mikeliūnas (ed.), *LR civilinio kodekso komentaras*, p. 338.

⁹⁹⁸ *Ibid.* The list of criteria for the purposes of assessing legal causation is identified by the LSC in *Matveigalis*, under Cases 5 and 9.

damage is not possible according to Dutch law. When looking at the conditions determined by the Dutch Supreme Court, it should be noted that the court found a way around the exclusive system of Arts. 6:107 and 6:108 BW. Compensation can now be awarded where the third-party damage is caused (not by the injury or death of the direct victim, but) by the direct confrontation with a severe accident or its direct aftermath. The Supreme Court thereby broadened tort law, with a move which was welcomed in the literature, although the conditions chosen by the court were criticized.

The condition of a confrontation has been strongly criticized.⁹⁹³ By demanding a 'confrontation' incongruous boundaries are put in place. One can think of the difference in the outcome between the situation in which a family member becomes mentally ill because of witnessing the accident and because of hearing about the accident from a police officer. In the former situation full compensation could be granted, whilst in the latter it cannot. Next, from the perspective of clinical psychology, the cause of the psychiatric injury cannot be qualified.⁹⁹⁴

III. As stated above, the Supreme Court has not yet decided on the subject of nervous shock suffered by rescuers. However, there are important policy considerations for accepting this type of claim. First, it is a matter of fact that 'danger invites rescue'.⁹⁹⁵ Therefore, if someone creates a situation of risk, he or she should also accept the fact that third parties may be injured (mentally or physically) when trying to end this risk. Next, it is nowadays well known that a dangerous situation may not only lead to physical injury, but also to severe mental injury. Additionally rescuers take on a socially desirable task of limiting the consequences of risks being taken by third parties. The risks of injury and the consequences thereof should perhaps be shifted to the person who creates that risk instead of the person who suffers because of the risk.⁹⁹⁶

⁹⁹³ See Rijnhout, *Schadevergoeding voor derden in persoonschadezaken*, pp. 235–9 (for an overview).

⁹⁹⁴ See, for example, W. van Tilburg, 'Affectieschade, shockschade en compensatie: de visie van een psychiater', *Verkeersrecht* 2004, 7–12; Engelhard and Engelhard, 'Shockschade'.

⁹⁹⁵ See Hickinbottom J. in *Tolley v. Carr* [2010] EWHC 2191 (Q. B.), 80, 84, with reference to *Wagner v. International Railway Co.* (1921) 232 N.Y.Rep., 176, 180, by Cardozo.

⁹⁹⁶ Rijnhout, *Schadevergoeding voor derden in persoonschadezaken*, pp. 386–90.

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Gaetano could most probably be held liable under Art. 185 WVVW in conjunction with Art. 6:108 BW.

II. Esther's relatives claim damages. Their claim would be based on Art. 6:108 BW in conjunction with Art. 185 *Wegenverkeerswet* (WVVW) (Road Traffic Act). As stated under Case 9, II, Art. 185 WVVW concerns the responsibility of a motorized traffic participant towards a non-motorized traffic participant, and contains the rule of strict liability.

The burden of proof as regards the CSQN lies with Esther, and thus with her relatives who have a derived claim under Art. 6:108 BW (see Case 12, III).¹⁰⁵² Therefore, if the relatives cannot prove that the plaintiff died as a consequence of the accident, then Gaetano cannot be held liable. The relatives do not have to make absolutely sure that Esther died because of the accident. It is only required that the relatives prove with a reasonable degree of certainty that Esther's death was caused by the traffic accident. It is also possible that the judge will 'shift' the burden of proof by presuming that a CSQN is present and place the burden of having to adduce the evidence on the shoulders of the defendant, Gaetano. This 'shifting' of the burden of proof has been accepted by the Supreme Court when the defendant caused a traffic accident by speeding or was driving while intoxicated.¹⁰⁵³ However, it must be emphasized that this 'shift' was accepted as regards a claim under Art. 6:162 BW (general tort law).

If Esther's relatives do not succeed in proving that her death was a consequence of the accident, but the possibility exists that it could either be caused by the accident or by another cause, e.g., her genetic background, than Gaetano could be held proportionately liable (see Case 6, II). If Gaetano can be held liable then he has to compensate the loss due to dependency – as far as damages are needed by the plaintiffs – and funeral expenses (Art. 6:108 BW).

¹⁰⁵² See HR 21 March 1975, *Nederlandse Jurisprudentie* 1975, 372, comm. GJS (*Aangereden huurpauzant*), a case which is comparable to Case 14, although there was no discussion on the CSQN. See in this regard A.J. Akkermans, 'Causaliteit bij letsel schade en medische expertise', *Tijdschrift voor Vergoeding Personenschade* 2003, 93, 94.

¹⁰⁵³ See e.g. HR 16 November 1990, *Nederlandse Jurisprudentie* 1991, 55; HR 24 December 1999, *Nederlandse Jurisprudentie* 2000, 428, comm. HJS.

III. The 'shifting' of the burden of proof under Dutch law does not mean shifting of 'legal' burden, but of 'evidential' burden, i.e., the burden of proof does not change, it only denotes that, for the time being, that burden has been discharged. It is then for the opposite side to come forward with evidence to rebut that provisional judgment.¹⁰⁵⁴ Recently the Supreme Court has (again) decided on the range of applicability of this rule, by holding that:

In order to apply this rule it is required that the defendant's behaviour infringed a norm that aims at preventing a specific danger with regard to causing damage, and that the person who refers to this norm, makes it plausible, also in the case of argument, that in his specific case the danger that the norm aims to prevent has nevertheless been realized.¹⁰⁵⁵

The rule as regards 'shifting' of the burden of proof has had a tempestuous past. Giesen speaks of the rise and fall of this rule.¹⁰⁵⁶ It seems as if nowadays the rule is limited to a situation in which a safety or traffic norm has been infringed.¹⁰⁵⁷ This does not mean however that a judge cannot use other procedural devices to lessen the burden of proof that falls on the claimant, e.g., presumption. Additionally, the theory of proportional liability can be used to solve difficulties as regards proving a CSQN.

Lithuania

Lorita Šaitinytė

I. The decision would be problematic as neither current case law nor doctrine suggest guidelines on how to decide the issues raised by this hypothetical. However, courts are likely to find the consequences were too remote.

¹⁰⁵⁴ I. Giesen, 'I. The Burden of Proof and Other Procedural Devices in Tort Law', in H. Kozlowski and B.C. Steininger (eds.), *European Tort Law 2008* (Berlin-Boston: de Gruyter, 2009), p. 56. See recently HR 23 November 2012, *Nederlandse Jurisprudentie* 2012, 669 (*Erven van A/B. & C.*).

¹⁰⁵⁵ HR 23 November 2012, *Nederlandse Jurisprudentie* 2012, 669 (*Erven van A/B. & C.*), no. 3.7.

¹⁰⁵⁶ I. Giesen, 'De aantrekkingskracht van Loreley. Over opkomst en ondergang (?) van de "omkeringsregel"', in T. Hartlief and S.D. Lindenberg, *Tien penmenstreken over personenschade* (The Hague: Sdu, 2009), pp. 69–86. See also A.J.P. Schild, 'Het "conditio sine qua non"-verband bij de schending van een zorgvuldigheidsverplichting: enige wegen naar Rome', *Rechtsgeleerd Magazijn THEMIS* 2009–6, 257.

¹⁰⁵⁷ Giesen, 'De aantrekkingskracht van Loreley', 80; A.J. Akkermans and C.H. van Dijk, 'Proportionele aansprakelijkheid, omkeringsregel, bewijslastverlichting en eigen schuld: een inventarisatie van de stand van zaken', *Aansprakelijkheid, Verzekering en Schade* 2012, 157–77.

non-pecuniary damage. Furthermore, Mary would have to prove that (4) through the wrongful act of Georgia she was persuaded to commit suicide and therefore suffered damage (CSQN). Her predisposition – her physical and mental condition that triggered her to commit suicide – does not break the causal chain between the wrongful act and the damage. Finally Mary would have to prove that (5) the norm breached aimed to protect her interest (Art. 6:163 BW, *Schutzweck*).

The question whether the suicide attempt was too remote to be attributed to Georgia is a question relating to the assessment of damages. This question has to be answered by means of Art. 6:98 BW, legal causation. As mentioned above, several factors can and should be taken into account when considering whether the damage could reasonably be attributed to the tortfeasor. In this case Georgia had acted intentionally. We do not know whether she intended for Mary to commit suicide; however, we do know that she intended to hurt Mary's feelings. On the basis of the Supreme Court's decision in *Bremer/Hoogheemraadschap*,¹⁰⁹⁹ it could be argued that the damage is attributable to Georgia, because she deliberately hurt Mary's feelings.

The importance of the nature of the norm breached is confirmed by the Supreme Court in the aforementioned case of *Bremer/Hoogheemraadschap*.¹¹⁰⁰ Bremer offered to stand as a candidate for the district water board. However, he rigged the election by handing in a list of non-existent signatures; handing in a list of signatures was a necessary condition to stand as a candidate. As a consequence, new elections had to be called and the district water board suffered damage to the extent of €357,616.90. The Supreme Court decided that the damage should be attributed to Bremer considering the foreseeability of the damage and the nature of the norm breached (fraud).¹¹⁰¹

Returning to the case of Georgia, it could also be argued that the damage attributed to her is that Mary suffered severe personal injuries, both physically as well as mentally. The result – suicide – might not be foreseeable, but we could assume that Georgia's behaviour stimulated Mary's 'weak' predisposition, and as a result she tried to commit suicide.

¹⁰⁹⁹ HR 25 March 2011, *Nederlandse Jurisprudentie* 2011, 139.

¹¹⁰⁰ HR 25 March 2011, *Nederlandse Jurisprudentie* 2011, 139.

¹¹⁰¹ HR 25 March 2011, *Nederlandse Jurisprudentie* 2011, 139, r.o. 3.6.4. The fact that the Supreme Court decided that the damage was foreseeable was criticized by Dijkshoorn, 'De leer van de redelijke toerekening', p. 265.

improbable result; imputation would then only be limited by the protective purpose of the norm.¹⁰⁹⁶ Georgia's cyber mobbing was wrongful and the harm suffered is also covered by the protective purpose of the protective statutory provisions violated. She will therefore be held liable for Mary's harm. A reduction of liability due to contributory negligence would presuppose that Mary acted with fault. Taking into account Mary's fragile mental state, it may, however, be doubted that this is the case.¹⁰⁹⁷

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Georgia can be held liable for Mary's damage, if she acted wrongfully. Mary's predisposition does not break the causal connection between her damage and the wrongful act. The difference between Cases 14 and 15, at least in Dutch law, is that the CSQN in Mary's case is present, whilst in Esther's case the causal link between the accident and the damage is inconclusive.

Next, when assessing damages, it is important to note that the tortfeasor has to take the victim as he finds him. Therefore, when considering the question of legal causation (Art. 6:98 BW) the fact that concrete consequences were unforeseeable does not lead to the conclusion that the damage could not be attributed to the tortfeasor.

II. Georgia will be held liable if Mary proves that (1) Georgia behaved in an unacceptable way (as far as the general public is concerned). Several factors influence this decision: the nature of the damage and the wrong respectively, the possibility that certain behaviour would lead to damage, the inconvenience of taking preventive measures, and the extent to which it could be expected of this (possible) plaintiff that she would be influenced by the messages.¹⁰⁹⁸ Considering these factors, and returning to the case of Georgia, perhaps it was not easily foreseeable that Mary would have tried to kill herself; nevertheless it could be argued that she – by pretending to be John – deliberately tried to hurt Mary, and therefore an unwritten law was breached. This conclusion is, however, nothing more than an assumption, because an analogous case has not come before the courts in the Netherlands. Mary would also have to prove that (2) the unlawful act can be attributed to Georgia, because the latter acted with *culpa*; and that (3) she suffered both pecuniary as well as

¹⁰⁹⁶ Koziol, *Basic Questions*, no 713.

¹⁰⁹⁷ See on this Kanner, *Idelle Schüden*, p. 159 f.
¹⁰⁹⁸ HR 5 November 1965, *Nederlandse Jurisprudentie* 1966, 136, comm. G.J.S.

III. For comments on normative causation, see Case 9, III.

Lithuania

Loreta Šalimytė

I. The result is not certain in view of the absence of court practice or doctrine on the issue of the significance of the victim's fragility. However, it is likely that courts would not establish causation between Mary's injury and Georgia's conduct.

II. The claim would be decided under general rules of tort law. The situation involving tortious liability of a tortfeasor when a victim attempts suicide has been addressed by the LSC only on one occasion.¹¹⁰² However, it is of limited use for the purpose of the given hypothetical because under the factual circumstances the abusive conduct of the tortfeasor lasted for over ten years. Consequently, the decision is likely to be interpreted as requiring a consistent abusive conduct of a tortfeasor which contributes to the unstable psychological state of a person. If the person subsequently commits suicide, it aggravates the damage. However, if a person commits suicide without consistent abusive conduct of another, courts would be reluctant to establish causation even though there may have been some abuse. The requirement of consistency is also reiterated in criminal cases. In one of the criminal cases the court notoriously found a person not guilty for leading another to suicide on the ground that there was no causal link between the attempted suicide of the teenage victim and the fact that the victim was continuously terrorized, beaten and forced to steal and finally take part in Russian roulette.¹¹⁰³ The court reasoned that the defendant's conduct was not sufficiently systematic and consistent. Although it could be argued that this decision is applicable only to criminal cases, the link between the understanding of causation under civil law and criminal law remains close, as illustrated by a recent split decision taken by the LSC agreed composition of seven justices of the LSC on tort law in which the LSC agreed that a person 'A' who negligently failed to keep his lawfully possessed weapon locked was liable solidarily with the others, who took possession of the gun and used it to commit a crime. Three justices, usually adjudicating in criminal cases, appended a dissenting opinion arguing that there was no causal link between the failure to ensure that the gun was kept safely and the fact that the gun was used for robbery. In their view, getting

hold of A's gun did not contribute materially to the decision of others to commit robbery, as they had another gun in their possession.¹¹⁰⁴

England

Ken Oliphant

I. It is arguable on these facts that Mary's attempted suicide was not the product of a voluntary, informed decision by a mature person of sound mind, but was caused by the impact of Georgia's taunts on her fragile mental health. If Georgia acted with knowledge of Mary's pre-existing condition and with the intention to harm or to cause severe distress, she would be liable for the injury Mary sustained in her suicide attempt.

II. An initial question to ask would be whether Mary's attempted suicide was the product of a voluntary, informed decision by a mature person of sound mind¹¹⁰⁵ or caused by the impact of Georgia's taunts on her fragile mental health (it being well-known that eating disorders are related to mental as well as physical health). If the latter, then her acts would not break the chain of causation linking her injury with Georgia's taunts,¹¹⁰⁶ and Georgia could be held liable if she can be shown to have been at fault *vis-à-vis* the harm. It would not matter that Mary's pre-existing condition also contributed: a tortfeasor takes the victim as he finds him or (as in this case) her.¹¹⁰⁷

If Mary is found to have been a mature person of sound mind and to have made a voluntary, informed decision to take her own life, Georgia could not be regarded as having caused her suicide attempt and would bear no liability for Mary's injury.

Of course, the line between acting voluntarily and acting non-voluntarily is both extremely imprecise and artificial, at least to the extent that it probably does not correspond with any distinction made by medical science.

To this point, the analysis presented here presupposes that Georgia was aware of Mary's condition and that it was thus reasonably foreseeable to her that Mary might engage in (for example) self-harming of some nature if taunted in this way. Had she been unaware of Mary's

¹¹⁰⁴ *VP v. DD et al.*, Dissenting opinion, LSC 3 March 2014, no. 3K-7-345/2014.

¹¹⁰⁵ Applying the test adopted by the House of Lords in *Corr v. IBC Vehicles Ltd* [2008] AC 884.

¹¹⁰⁶ *Corr v. IBC Vehicles Ltd* [2008] AC 884.

¹¹⁰⁷ *Smith v. Leech Brain & Co Ltd* [1962] 2 QB 405.

¹¹⁰² *RP & DP v. AP*, discussed under Case 12.

¹¹⁰³ *Prosecutor v. AS*, Vilnius District Court 13 September 2013, no. 1-234-274/2013.

breach of Art. 2 (the right to life) in a 'similar' situation.¹¹⁵⁸ The European Court of Human Rights considered the following:

The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... This involves the primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends to the appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.¹¹⁵⁹ (Emphasis added.)

The Court also considered that this positive obligation to take preventive measures should not impose an impossible or disproportionate burden on the authorities.¹¹⁶⁰ The European Court of Human Rights decided that Ms Kontrová's right to life had been infringed by the state and therefore compensation for non-pecuniary damage should be granted.

Although the case of Ana cannot be equated with the case of Kontrová (Ana was raped), it could be argued that the Court has generally stated that the state has a positive obligation to prevent criminal offences from occurring under certain conditions. This positive obligation is fulfilled by two criteria: (1) the authorities knew or ought to have known that Ana was under 'a real and immediate risk to life'; and (2) the authorities 'failed to take measures within their powers which, judged reasonably, might have been expected to avoid that risk'.

(b) Since Dutch law also assesses liability when the tortfeasor fails to act (omission), and therefore acts wrongfully, no exceptional question of causality is raised (neither CSQN nor legal causality).

III. In Dutch literature the manner in which decisions of the European Court of Human Rights should be incorporated into Dutch private law, more specifically in civil liability law, has been questioned.¹¹⁶¹ The growing case law of the European Court of Human Rights concerning compensation for non-pecuniary loss because of the idea of effectively remedying

liable provided that both events were concretely dangerous for the harm suffered.¹¹⁵⁵

While intentional infliction of harm by a third party will often lead to a rejection of liability of a further contributor to the damage, such is not true in the context of the present case as the duty violated by the police was exactly aimed at protecting the victim from such harm and therefore lies within the core area of protection of the violated rule.¹¹⁵⁶

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. The police – or their employer, the municipality (Art. 6:170 BW) – will be held liable considering the outcome in the Dutch case of *Oudejaarsrellen Groningen*, and the positive obligation on the state under Art. 2 ECHR to prevent, as far as is reasonable, immediate threats that the police knew of or ought to have known about (*Kontrová v. Slowakia*).

II. (a) The police can be held liable for wrongful omissions in Dutch law. The Supreme Court decided in the case of *Oudejaarsrellen Groningen* that the police – and under certain circumstances their employer, the municipality (Art. 6:170 BW, strict liability), or the state (for instance if the prosecution wrongfully omits to react adequately to a reasonable request for police action) – can be held liable.¹¹⁵⁷ During the night of 30 to 31 December 1997 a group of youngsters disturbed the plaintiffs' home three times. The plaintiffs called the police five times to ask for help and protection. The first call was at 9.50 p.m. The police at first decided not to react, though at around midnight they did. Riot police were alerted at 11.55 p.m., although it was only two-and-a-half hours later that they arrived at the scene (at around 2.30 a.m.). It is possible to grant compensation for both pecuniary and non-pecuniary damage (infringement of a fundamental right).

Although the case is not similar to the case of *Oudejaarsrellen Groningen* it could be argued that the police can be held liable for not adequately investigating a serious threat. Especially considering that in the *Kontrová* case the European Court of Human Rights held the state liable for a

¹¹⁵⁸ See also *Osman v. The United Kingdom* 28 October 1998, 87/1997/187/11083.

¹¹⁵⁹ *Kontrová v. Slowakia* ECHR 31 May 2007, no. 7150/04, no. 49.

¹¹⁶⁰ *Kontrová v. Slowakia* ECHR 31 May 2007, no. 7150/04, no. 50.

¹¹⁶¹ J.M. Emaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* (diss. Utrecht) (The Hague: Bju, 2013).

¹¹⁵⁵ P. Apathy in his commentary on OGH 2 Ob 12/86, JBl 1986, 787; B.C. Steinger, 'Austria', in *Oliphant and Steinger, European Tort Law* 2012, no 59 ff.

¹¹⁵⁶ *Kozioł, Hołpiński* 1, no 8/78.

¹¹⁵⁷ HR 9 July 2004, *Nederlandse Jurisprudentie* 2005, 391.

and held that the omission of the police officers was an adequate cause of the damage.¹¹⁶⁵ The LSC reasoned as follows:

when the conduct at issue is omission, there is no conduct which can be considered as a *conditio sine qua non* with respect to specific negative consequences, therefore no factual causal link may be established. However, in legal terms it is accepted that there is a causal link if the person had a duty to take action, but failed to act, and this inadequate conduct with respect to the factual circumstances contributed to the occurrence of the negative consequences. This may be sufficient to establish civil liability.¹¹⁶⁶

The extent of liability is likely to be a contentious issue as, up until recently, despite explicit legal regulation on solidary liability, courts have been reluctant to apply it fully, arguing that if the damage was caused by a direct conduct of a person whereas another's omission only indirectly contributed to the damage, their liability would be partial.¹¹⁶⁷ To justify this approach the LSC invoked a rule pursuant to which solidary liability would apply only if the nature of causation between the tortfeasors was the same; if the conduct of one tortfeasor was a direct cause of the harm, whereas the conduct of another only indirectly contributed to the damage, their liability would be partial. This approach began to change in 2008, when the LSC, sitting in its extended composition of seven justices, implicitly referred to the PETL while citing instances of application of solidary liability.¹¹⁶⁸ The LSC seemed to have finally abandoned the rule in its decision of 2014,¹¹⁶⁹ but it was again applied by another panel in a subsequent decision.¹¹⁷⁰

III. Studies indicate that physical violence at the hands of their intimate partners has been experienced by 32.7 to 42 per cent of women in Lithuania.¹¹⁷¹ Despite that, so far the LSC has not decided a single tort

¹¹⁶⁵ *Ibid.*, ¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ *RJ et al. v. Center of Registers*, LSC 9 March 2005, no. 3K-3-156/2005.

¹¹⁶⁸ *JMS v. Center of Register and bailiff LUD*, LSC 26 March 2008, no. 3K-7-59/2008, also restated in *SU et al. v. Lithuania*, under Case 4; *JA and JA v. Lithuania*, SN, LSC 18 June 2013, no. 3K-3-320/2013.

¹¹⁶⁹ *VP v. DD et al.*, under Case 12. The factual circumstances of the case are discussed under Case 4. Three justices disagreeing that there was a causal link between the victim's damages and one of the defendant's negligence of keeping his gun which was stolen and used to commit a robbery.

¹¹⁷⁰ *ES v. II*, LSC 30 April 2014, no. 3K-3-241/2014.

¹¹⁷¹ UN General Assembly, *In-depth Study on All Forms of Violence against Women: Report of the Secretary-General*, 6 July 2006; United Nations Entity for Gender Equality and the Empowerment of Women, Survey of 2000.

infringements of human rights has questioned the extent to which the Dutch law of damages should be adapted. This is because generally compensation for non-pecuniary loss is granted only when the plaintiff is injured.

Lithuania

Loreta Šaltinytė

I. In this situation it is more than likely that courts would establish state liability for failure to investigate as omission, even though an actual case on the issue is yet to be decided by the LSC.

II. Liability of judicial authorities, judges, prosecutors and pre-trial investigative institutions (which include the police) is governed by Art. 6.272 CC, which provides for strict liability. For the purposes of Ana's case, it is relevant that Lithuania is also party to the ECHR, which under Art. 1 provides for an obligation of the state to secure to everyone, within its jurisdiction, rights and freedoms defined in the Convention, and taken together with other articles of the Convention, requires the state to take measures designed to ensure that individuals within its jurisdiction are not subjected to a breach of their rights by private individuals.¹¹⁶² Lithuanian courts accept the ECHR as constituting a part of the legal system and apply it directly.¹¹⁶³ It would not be difficult to establish causation in the given situation in view of a recent LSC decision in a case concerning failure of the police to duly regulate traffic after a car accident.¹¹⁶⁴ The LSC declared that the omission of the police officers to organize traffic after one accident was not a *conditio sine qua non* of another accident, caused by a drunk driver who crashed into the car while manoeuvring out of the traffic jam at the scene of the first accident. The LSC nevertheless found the police liable to 5 per cent of the damage caused by the second accident,

¹¹⁶² ECHR, *A. v. the United Kingdom*, judgment 23 September 1998, application No 25599/94, § 22.

¹¹⁶³ Constitutional Court of the Republic of Lithuania, ruling of 24 January 1995 'Regarding compatibility of Articles 4, 5, 9, 14 of the European Convention on human rights and fundamental freedoms and Article 2 of its 4th protocol with the Constitution of the Republic of Lithuania'. The Court stated that the Convention constitutes a part of the Lithuanian legal system and should be applied as its laws. On the approach of the LSC see *JR v. Lithuania*, LSC 12 February 2010, no. 3K-3-75/2010, H. Gabartas and L. Šaltinytė, 'Lithuania', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2010* (Berlin-Boston: de Gruyter, 2011), p. 363, also *SR v. Lithuania*, LSC 2 December 2011, no. 3K-7-375/2011, discussed in Seičionytė-Drukteimienė and Šaltinytė, 'Lithuania' (2012), p. 412.

¹¹⁶⁴ *SU et al. v. Lithuania*, under Case 4.

this line of reasoning would have nothing to do with the question of causality but would be a matter of defining damage.

Austria

Barbara C. Steininger

I. Stephan's claim for loss of the chance to timely treatment will fail.

II. The theory of loss of chance is not accepted in Austrian law. As has been rightly stressed in doctrine, such approach brings about serious problems from a dogmatic point of view. If we look at the example of lost chances of recovery at stake in the case at hand, the loss of chance theory shifts its focus from the damage to a person's bodily integrity (causation of which remains uncertain) to the loss of a chance of recovery (where causation is certain). However, under Austrian law a chance of recovery is as such not a legally protected interest.¹²²⁴ Moreover, the loss of chance theory will not offer a solution if there is no lost chance as it only remains unclear whether a certain injury/disease was caused by the tortfeasor or not.¹²²⁵

That the loss of chance theory is rejected does not, however, mean that there can be no recovery of the harm suffered. Under Austrian law, such cases are solved on the basis of Bydlinski's theory of alternative causation between an event triggering liability and chance.¹²²⁶ If Stephan dies, his death will have been caused either by Dr Y's medical malpractice, an event triggering liability or by his family predisposition, an event of chance in Stephan's own sphere. Provided that both events were concretely dangerous for the harm suffered, Dr Y will be liable for part of the damage. Due to Dr Y's negligence, the likelihood of Stephan's death was 70 per cent (instead of 30 per cent) and 40 per cent out of this 70 per cent was attributable to the defendant.¹²²⁷ Stephan's heirs will therefore be able to claim

¹²²⁴ Cf. Koziol, *Basic Questions*, no 5198 with further references; Id., 'Comparative Report', in Winiwter, Koziol, Koch, Zimmermann (eds.), *Digest*, I, 1029 no 5; Id., 'Schadenersatz für den Verlust einer Chance?', in *Festschrift Stoll* (Tübingen: Mohr Siebeck, 2001), p. 233 ff.

¹²²⁵ Koziol, *Basic Questions*, no 5198. Such a scenario was the basis of the OGH's decision in 4 Ob 554/95 = JBl 1996, 181, where it remained unclear whether the disability of a baby was a consequence of its premature birth or whether it was due to medical malpractice.

¹²²⁶ See Cases 6 and 7, also for the references to court practice.

¹²²⁷ As even in case of timely treatment, the likelihood of Stephan's death would have been 30 per cent.

40 per cent of the harm suffered.¹²²⁸ If however, Stephan recovers, Dr Y will not be liable.¹²²⁹

The Netherlands

Ivo Giesen and Rianka Rijnhout

I. Dr Y will be held liable for Stephan's loss of chance of survival.

II. The delay in treatment increased Stephan's loss of chance of survival. Such a loss of an opportunity can be compensated under Dutch law.¹²³⁰ For lawyers, the *Baijings/H.* case needs to be mentioned.¹²³¹ When a lawyer makes a mistake, for example he fails to appeal within the given terms, the damage can be assessed according to a chance that the outcome in the case would have been successful had the mistake not been made. Ever since this Supreme Court case, more and more lower courts have used the lost chance approach to decide also medical negligence cases.¹²³² The Supreme Court, however, has not yet decided on the applicability of the theory of loss of chance in medical negligence cases. However, the Supreme Court has ruled that the theory of loss of chance is not restricted to mistakes by lawyers, and has applied it, e.g., in a case of liability of an investment consultant and liability of an employer under Art. 7:658 *DW*.¹²³³ In practice, the theory of loss of chance is accepted in medical negligence cases. A case which is regularly mentioned is the case of *Baby Ruth*.¹²³⁴

¹²²⁸ A different calculation method is used by G. Wagner, 'Proportionalhaftung für ärztliche Behandlungsfehler de lege lata', in *Festschrift Hirsch* (Berlin: de Gruyter, 2008), p. 456 ff. On the basis of his calculation method, the heirs can claim 4/7 of the harm suffered, which means approximately 60 per cent of the damage.

¹²²⁹ Here another problem of the loss of chance approach becomes evident: if one really looks at the lost chances, recovery would also be possible in cases in which the claimant did not suffer any harm. See on this Koziol, *Basic Questions*, no 5101.

¹²³⁰ See on that theory in general Akkermans, *Proportionele aansprakelijkheid*, p. 107 ff.

¹²³¹ HR 24 October 1997, *Nederlandse Jurisprudentie* 1998, 257, comm. P.A. Stein. See also HR 19 January 2007, *Nederlandse Jurisprudentie* 2007, 63 (*Krasmidomk Holding/ Millicbescherming De Vries & Van der Wiel holding*); HR 11 December 2009, *Nederlandse Jurisprudentie* 2010, 3 (*Velle/Lemmen*).

¹²³² See e.g. Hof Arnhem 14 December 1999, *Nederlandse Jurisprudentie* 2000, 742; Rechtbank Den Haag 12 July 2000, *Tijdschrift voor Vergoeding Persoonsschade* 2000/4, 94 ff. (comm. Giesen); Hof Den Haag 10 October 2002, *Nederlandse Jurisprudentie* 2003, 99; Rechtbank Amsterdam 28 May 2003, *Nederlandse Jurisprudentie* 2004, 45.

¹²³³ HR 21 December 2012, *Nederlandse Jurisprudentie* 2013, 237 (B. & Deboitteffl. and H.G.H.); HR 7 July 2013, *Jurispudentie Aansprakelijkheidsrecht* 2013, 108 (*Lansink/Riksmia*).

¹²³⁴ Hof Arnhem 4 January 1996, *Nederlandse Jurisprudentie* 1997, 213.

As to Stephan's case the (best) analogous Dutch case is in fact the case of *Baby Ruth*.¹²³⁵ Ruth, the one-month-old daughter of the claimants, was referred to a hospital by the family physician after several small spontaneous bleedings were discovered. The consultant doctor examined her but did not find any conclusive signs of brain haemorrhage, as was feared. He decided that Ruth could go home and should come back the next morning for an extensive examination. That same evening, at around 8.00 p.m., the claimant went back to the hospital once again. The doctor on duty concluded that there was no need for further examination at that point in time. The next morning Ruth was examined again. A large haemorrhage on the left side of her brain was discovered; she was immediately placed in the intensive care ward and underwent brain surgery that same day. Ruth's parents instigated a civil case claiming that medical errors had been made and that these errors caused or at least contributed to the disability from which Ruth suffered. The doctors claimed that Ruth's late admission into the hospital did not cause the damage. Since the bleeding had already been going on for some time, there would have been residual damage in any case, even if there had been an early diagnosis. Experts reached this conclusion as well.

The Court of Appeal had to consider the objection that was raised against the decision of the District Court that the chance of a complete recovery had not been lost. It decided that, although the chance of complete recovery could not be excluded with a 100 per cent certainty, the possibility that even with an early diagnosis there would have been residual damage was extremely high. It also ruled that the District Court was right in holding that the percentage of damage cause due to the late admission into the hospital should be put at 25 per cent.

Considering the outcome of this case, Dr Y will in principle be held liable for the loss of chance of survival, as far as a CSQN exists (and it does) between his medical error and the loss of chance of survival. The damage that Stephan encountered because of the loss of chance of survival will have to be compensated.

Case 17 does not however give any information on Stephan's actual physical state of well-being. If he chooses an operation and he completely recovers, it is likely that he will only receive compensation for a proportion of his actual damage (the cost of the operation and recovery, and

¹²³⁵ Hof Arnhem 4 January 1996, *Nederlandse Jurisprudentie* 1997, 213. This paragraph is strongly based on Van Boom and Giesen, 'The Netherlands', 561-2.

non-pecuniary loss). However, if he dies, perhaps his relatives can claim damages under Art. 6:108 BW. It is, however, uncertain whether the next of kin could profit under the theory of loss of chance. The Dutch Supreme Court has never ruled on this subject matter. We, however, do not see any reason why dependants cannot apply the theory of loss of chance to cope with causal uncertainties.

III. A key question is under which circumstances the theory of loss of chance can be used to solve CSQN problems. The relevance of this question is reflected in the outcome of the case of *Fortis/Bourgonje* (proportional liability; see Case 6, II). In essence, the Supreme Court decided that proportional liability – as a solution to CSQN difficulties – could only be applied in exceptional cases. It gave several – restricting – factors which should be taken into account when considering the application of proportional liability and stated that a court should be reluctant to use this theory. In the case of *B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer* it was however decided that this reluctance is not needed towards the theory of loss of chance.¹²³⁶ The Supreme Court explicitly mentioned that proportional liability and loss of chance are two different theories.¹²³⁷ The distinction made between the theory of proportional liability and loss of chance respectively has been criticized in legal discourse. The main argument being that both theories in essence aim to solve the same problem, namely the impossibility of proving a CSQN.¹²³⁸

Lithuania

Loreta Šaltinytė

1. The claim is likely to be successful. The legal regulation is the same as under Case 1, and the key issue is whether the patient suffered damage. Courts would take into consideration that the suffering of the patient was real and occurred due to a negligent failure to diagnose in a timely fashion the illness which would have ensured a higher likelihood

¹²³⁶ See however comm. S.D. Lindenberg, HR 21 December 2012, *Nederlandse Jurisprudentie* 2013, 237 (B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer), no. 7-10.

¹²³⁷ HR 21 December 2012, *Nederlandse Jurisprudentie* 2013, 237, comm. S.D. Lindenberg (B. and Deloitte Belastingadviseurs/H. and H. & H. Beheer); *Jurisprudentie Aansprakelijkheidsrecht* 2013, 41, comm. C.H. van Dijk and A.J. Akkermans.

¹²³⁸ See e.g. C.H. van Dijk, 'Causale perikelen: het is moeilijk en zal moeilijk blijven', *Tijdschrift voor Vergoeding Personenschade* 2013, 61, 81-2. See also Akkermans, *Proportionele aansprakelijkheid*, pp. 248-50.