

European Centre of Tort and Insurance Law

UNIFICATION OF TORT LAW: CAUSATION

J. Spier (Ed.)

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Preface

This book is the fourth volume of the European Group on Tort Law (the Tilburg Group). After a series of meetings, which resulted in 'The Limits of Liability, Keeping the Flood-gates Shut' and 'The Limits of Expanding Liability, Eight Fundamental Cases in a Comparative Perspective', it was decided to embark on drafting European Principles of Tort Law. The first book in this 'new series' was 'Unification of Tort Law: Wrongfulness', edited by Helmut Koziol.

We realise that the drafting of a body of European principles of tort law is quite an exercise. It takes some time to achieve that goal. Consequently, we had to face the question whether we should publish the final principles together with a comment thereto at a much later stage or rather keep those interested informed on a regular basis, as the work progresses. The latter approach has been chosen.

Publishing the various topics after their respective completion undoubtedly has advantages. First, we think that the national reports, based on a mix of theoretical topics and often leading cases, are already in themselves sufficiently important for the outside world and may serve as an up-to-date overview of the law of torts in a large number of countries.

Secondly, by publishing the national report prior to the principles we hope to stimulate a discussion on the conclusions that we have reached mid-way, and so to improve the quality of the final principles. For that purpose, we do not merely publish the reports, but we add a comparative analysis which sheds light on the solutions we think best at the present stage. On the basis of suggestions by others and after reconsideration by the time the entire field has been covered, the final principles will be drafted and published.

Our group aims at drafting European principles. Yet, we are most grateful that eminent tort law experts from the USA and South Africa are members of our group, notably Gary Schwartz (UCLA), Dan Dobbs (Tucson) and Johann Neethling (Pretoria).

The other members of the group are Francesco Busnelli and Giovanni Comandé (Pisa), Herman Cousy (Leuven), Bill Dufwa (Stockholm), Michael Faure (Maastricht), Olav Haazen (Tilburg), Viggo Hagstrøm (Oslo), Helmut Koziol (Vienna), Konstantinos Kerameus (Athens), Ulrich Magnus (Hamburg), Miquel Martin Casals (Girona), Horton Rogers (Nottingham), Jorge Sinde Monteiro (Coimbra), Jaap Spier (The Hague), Geneviève Viney and Suzanne Carval (Paris I), Pierre Widmer (Lausanne) and Michael Will (Geneva).

The next volume in this series will be about damages, and will be edited by Ulrich Magnus.

In our 'Preliminary Observations' of 'The Limits of Expanding Liability', we wrote that our group aimed at establishing an international research centre in the area of Tort and Insurance Law. We are proud to say that at the beginning of this year, the European Centre of Tort and Insurance Law was founded in Vienna; Helmut Koziol – who greatly contributed to its realisation – leads the Centre as its Director.

We are very grateful for the financial support received from the network 'Common Principles of European Private Law', which is sponsored by the European Commission. The network in which participate as partners Barcelona, Berlin, Oxford, Lyon, Münster, Nijmegen and Turin is part of the program 'Training and Mobility of Researchers' (TMR). We are also most grateful both to the Austrian Ministry of Science and to the Austrian Min-

istry of Justice as well as to the Swiss Ministry of Justice for the generous financial and moral support of this project.

Finally, we express our gratitude for the most valuable help of Dr Klaus Vogel and Mag. Martin Kauz to make the manuscript ready for the publisher and to Mag. Barbara Steininger for her help to correct the proofs.

Jaap Spier, Olav Haazen

The Hague, April 1999

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Causation: Questionnaire and Cases

Causation: Questionnaire and Cases

Part I

1. Causation as a requirement

- (a) Is there a requirement of 'causation' in your law?
- (b) If so, is it a one or a two step approach?

E.g. 'a cause in fact', a 'preliminary filter', a difference between causation as a requirement for establishing liability and determining the amount to be paid or between factual and legal causation?

2. Relevant factors/reasons/criteria

Assuming that the first step (if any) has been taken, what reasons/factors are to be taken into account in establishing the scope of causation?

- *conditio/causa sine qua non*;
- (reasonable) foreseeability;
- remoteness;
- probability;
- adequacy;
- common sense and/or policy arguments;
- reasonableness;
- proximity;
- *proximité temporelle*;
- *causa proxima*;
- *disproportion de gravité entre deux fautes concurrentes*;
- protective purpose of the violated rule.

Are you of the opinion that the relevant factors in your legal system are sufficiently clear/well-defined to solve individual cases? If not, do you consider this a disadvantage? If so, could you please provide additional criteria/factors which would increase predictability?

3. Specific legislation

Please mention legislation establishing specific rules concerning causation, e.g. about joint and several liability of joint tortfeasors. Please stick to your national legislation and disregard treaties and conventions.

4. The borderline between causation and causation or other factors

It will not always be easy to argue whether, let alone why, specific cases are to be addressed from the angle of causation or from the related perspective of damage.

Would you approach the following cases as a matter of causation and/or damage and/or the scope of the protective rule:

- (a) x poisons a horse in a stable with a slowly working poison. Before the poor animal dies,

Y sets the stable afire. The horse perishes in the flames.¹ Who could be sued: X and/or Y and why?

(b) X has been exposed to asbestos dust during his work for three subsequent employers (A, B and C). Ten years after retirement he falls seriously ill. Inhaling asbestos dust does not affect a person's health unless the total amount of dust exceeds a certain level. It has to be assumed that the fatal threshold was crossed when X was employed by C. X sues A, as B and C went bankrupt. A argues that he is not liable because the damage was caused by crossing the threshold (in other words: when X was employed by C). Please disregard prescription and assume that A's liability as such is not disputed.

(c) an attorney (A) makes a mistake by not lodging an appeal in time. His client (C) sues him for damages. A argues that the appeal would have been rejected.

(d) A statute requires a carrier by sea to keep animals in pens. The purpose of this requirement is to prevent the spread of a disease. While P's animals are being carried on deck without pens they are swept overboard in a storm. If they had been penned they would not have been lost. Alternatively, the unpenned animals are lost because the ship sinks in the storm.

Part II Cases

Single event occurrences

1. D collides with a coach with US attorneys (P 1/10) who earn quite a lot of money, as we know. They are all seriously injured. The loss of income of all the attorneys amounts to at least \$ 250.000.000. P 1/10 sue D.

2. P is struck in an accident for which D is liable. P has a predisposition. As a consequence of this predisposition P remains unable to work, while he otherwise would have recovered in several weeks. P sues D for the loss of income.

3. T has stolen a car and causes an accident to P. O, the owner of the car, negligently did not remove the key from the lock, despite the fact that many cars are stolen in the area. P sues O, because T is not worth suing.

4. The power supply of an entire neighbourhood has been cut off by the negligent act of D, a building company. The cables belong to the supplier of energy. A factory plant (P1), its customers (P2) and their customers (P3) suffer damage – P1, P2 and P3 sue D. It has to be assumed that P1's engines were damaged.

5. The defendant negligently places unlabelled rat poison on a shelf full of food. The shelf happens to be near a stove that gives off heat, and the heat quickly causes the poison to explode, injuring the plaintiff.

6. A bus is damaged in a car accident caused by D. While the bus is under repair, P, the owner of the bus, uses a reserve bus and sues D for part of the costs of buying and maintaining the reserve bus.

¹ The example is borrowed from Iulianus, D. 9.2.51.2.

7. In a railroad accident caused by the negligence of A, B is injured and, moreover, is left in a position of peril. C, coming onto the scene, attempts to rescue A. In the course of this rescue effort, C is himself injured. C brings suit against A.

8. Because of the negligence of D, A's only kidney is badly damaged. A will not survive without a kidney transplant. P is an appropriate match. P permits the surgical removal of his own kidney, so that it can be transplanted into A. P sues D for all the pain and discomfort associated with the surgery.

Intervening events

(a) Natural event occurs independently of the act of any human being

9. D, a plumber, negligently causes fire in P's house. Before repair, the house is completely destroyed by an earthquake. P sues D, who argues that P did not suffer damage, as his house would have been destroyed anyway.

10. A ship was damaged in a collision for which the defendant's ship was wholly responsible. After temporary repairs which restored the ship to a seaworthy condition, she set out on a voyage to the USA, a voyage which she would not have made had the collision not occurred. During the crossing of the Atlantic she suffered extensive damage due to heavy weather, and on her arrival in the USA the collision damage was permanently repaired at the same time as the heavy weather damage was dealt with. The owner sues D for the entire damage.

(b) The event consists of the act or omission of a third party

11. P is seriously injured by a car accident caused by D. It would take him about a year to recover. An ambulance brings P to the hospital. On the way to the hospital, the ambulance is hit by:

- (a) a car, driven by a drunk driver X;
- (b) an avalanche.

P's injury further increases; he will now need three years to recover. Is D also liable for the loss of income over the last two years?

12. D1's vehicle broke down and he negligently failed to take steps to remove it from the highway. His car was struck by D2's truck. The latter came to rest at the opposite carriage-way, where it was struck by P2 and P3. D2 had been driving recklessly. P2 and P3 sue D1.

13. D, a driver, knocks down P, a pedestrian, whose wallet is stolen while he is lying injured. P sues D.

(c) The event consists of the act or omission of the plaintiff himself or is attributable to a cause which can be imputed to him

14. P is seriously injured by a car accident, caused by D. He would never sufficiently recover to take up his work again. In the hospital he has a heart attack. Had it not been for the accident, he would have become unable to work for the rest of his life. P sues D for the loss of income.

15. P loses one leg as a consequence of a traffic accident. D is liable for this accident. He dies eleven years later in a fire in his house, because he was not able to leave the house fast enough. P's widow sues D.

Loss of a chance

16. Doctor A negligently fails to diagnose the cancer in his patient B. At the time of the negligent failure, B's chances of survival (had proper treatment been given) were 40 percent. By the time the proper diagnosis is provided, B has no chance of surviving. After B's death, B's heirs sue Doctor A.

17a. 1 per cent of the residents of a small town with 10.000 inhabitants (notably: 100 persons, $100/10000$) fall ill due to a very dangerous illness. The percentage is extremely high, as 0.05 per cent would be 'normal' (i.e. 5 persons). This may be caused by negligent emissions from D, a neighbouring factory, it may also be mere coincidence. $100/10000$ sue D for the entire amount of their alleged damage.

17b. The normal rate for a particular form of cancer is one person per one thousand residents. Because of D's negligent emissions, the cancer rate goes up to three persons per thousand. All three victims sue D. (This hypothetical raises the issue of proving causation by statistics. It also raises the question whether all three plaintiffs can sue, even though only two are apparent victims of the defendant's negligence.)

17c. The normal cancer rate is two persons per one thousand. Because of D's negligent emissions, the rate goes up to three. All three sue D. This raises the issue whether the defendant escapes liability despite the evident causation of harm – because no one victim can make a 'more-likely-than-not' causal showing.

Concurring causes

18. D1 and D2 each pile a ton of rubbish against P's wall which, in consequence of the total pressure, collapses. P sues D1 for the entire damage, D2 not being worth suing.

19. D1, D2 and D3 are hunters. In a wood, frequently visited by walkers, they negligently try to bring down a bird. Instead, one shot hurts P. It is unknown whether the fatal shot was fired by D1, D2 or D3. P sues D1, D2 and D3 not being worth suing. Does it make any difference whether or not they act in concert?

Please assume that the case is about tort law and (consequently) disregard funds dealing with hunting accidents.

20. At the same time A and B discharge poisonous waste into a river. All of the fish die. The waste water of A as well as that of B was sufficient to kill the fish. P, the owner of the fishing rights, sues A.

21. Several manufacturers (D1/D20) negligently² manufacture a drug. D1 has a marketshare of 50.01 per cent; D2 a marketshare of 15 per cent; the remaining companies have

2 Negligence possibly is not a requirement for liability (yet in view of prescription, it may be). To avoid discussion about liability, it has been added.

marketshares ranging between 0.5 and 3 per cent. D20 probably has a marketshare of approximately 0.5 per cent. The drug causes serious injury, which has a long incubation period. It occurs after 10 years. P1/25000 are seriously affected by the drug. However, after such a long period, they are no longer able to identify the manufacturer of the drugs bought by them. It has to be assumed that the total harm can be attributed to D1/D20, while each of them cannot have caused the same.

- (a) P1/25000 sue D20, the other manufacturers not being worth suing;³
- (b) P1/25000 sue D2, the other manufacturers not being worth suing;
- (c) P1/25000 sue D1, assuming that their chances are most favourable in doing so.

Please disregard prescription.

22. Mountain climber P is hurt by a falling rock. At the same time a second rock nearly hits him. The falling of the rocks is caused, on one hand, by negligence of D, and on the other hand, by a chamois. It is unknown which rock hit P. P sues D.

23. Ship A (SA) crashes into ship B (SB). It is demonstrated that the accident causing extensive damages to both vessels can be attributed to the captain of SA only for 20 per cent, the remaining 80 per cent must be attributed to exceptional unpredictable weather conditions, fog, heavy sea.

Can SB sue the captain and/or the owner of SA for damages? In case of an affirmative answer, does SA have to pay the entire damage?

Miscellaneum

24. D1, driving too fast in the fog on the motorway runs into the back of the vehicle in front, bringing both vehicles to a halt. In the ensuing seconds another ten vehicles, driven by D2–D11 are involved in further collisions attributable to the initial obstruction, causing death, injury and property damage to the participants. Some of these vehicles are being driven at a proper speed but are nevertheless hit by vehicles coming from behind. After the first collision, it is not possible to allocate blame to individual drivers.

3 This is not likely, of course. Yet, the example aims to show the most farreaching consequences.

Country Reports

