

Unravelling Causation in European Tort Laws

Three Commonplaces through the Lens of Comparative Law

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I. Three assumptions about causation

A general principle of tort liability throughout all European legal systems is that there cannot be liability for torts without causation, that is, unless the harm allegedly suffered by the plaintiff can somehow be connected to the

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defendant's behaviour.¹ While jurisdictions are not uniform in how they understand and establish causation,² the latter is everywhere an essential ingredient in the liability equation.

Relying on research recently carried out within the "Common Core of European Private Law" project,³ we would like to explore in this paper three assumptions about causation that, in spite of European tort laws' variety, are widely shared in European domestic and comparative legal thinking. The first two are common in domestic manuals, textbooks and decisions, whereas the third one is a topos of European comparative legal studies. The three assumptions run as follows.

First, rules about causation are usually taught and viewed as dealing with a well-defined set of issues of liability in tort. Under what conditions can one say that the defendant's behaviour factually caused the injury? What to do in cases in which the plaintiff's injury would have occurred anyway, but later in time? And what about cases in which the injury would have occurred even if the defendant had behaved properly? Is chance enough for establishing causation? What should be done when no definite proof as to the facts leading to the injury is available? When the plaintiff's susceptibility to injury has contributed to the final result, should it be taken into consideration? How far can liability for consequences be extended? The list might go on, with varying contents from one jurisdiction to another.⁴ Yet the

¹ What triggers the defendant's liability might not only be a behaviour, in the form of either an act or an omission, but also a status, condition or activity, such as being the owner of a thing, the guardian of a person or the manager of a business. Given that the assessment of causation is largely indifferent to the form that the factor triggering liability takes (*Bernhard A. Koch / Helmut Koziol, Comparative Conclusions*, in: *Unification of Tort Law: Strict Liability*, ed. by idem (2002) 395, 425 f.), in this paper we will always make reference to causation as the link between the victim's damage and the defendant's act or behaviour, including also cases in which the factor triggering liability is an omission, a status, a condition or an activity.

² There is substantial literature exploring commonalities and differences between European tort laws as far as causation is concerned. Apart from the study on which the present article relies (*Causation in European Tort Law*, ed. by Marta Infantino / Eleni Zervogianni (2017)), see *Cees van Dam, European Tort Law*² (2013) 308–345; *Jens Kleinschmidt, Causation*, in: *The Max Planck Encyclopedia of European Private Law* (2012) 159 f.; *Perspectives on Causation*, ed. by Richard Goldberg (2011); *Principles of European Law – Non-Contractual Liability Arising out of Damage Caused to Another*, ed. by Christian von Bar (2009) 747–788; *idem, The Common European Law of Torts*, vol. II (2000) 435–498; *Causation in Law*, ed. by Luboš Tichý (2007); *Digest of European Tort Law*, vol. I: *Essential Cases on Natural Causation*, ed. by Bénédicte Winiger / Helmut Koziol / Bernhard A. Koch / Reinhard Zimmermann (2007); *Basil S. Markesinis / Hannes Unberath, The German Law of Torts*⁴ (2002) 103–113, 687–691; *Unification of Tort Law: Causation*, ed. by Jaap Spier (2000); *Walter van Gerven / Pierre Larouche / Jeremy Lever, Tort Law* (2000) 395–466; *Herbert L. A. Hart / Anthony M. Honoré, Causation in the Law*² (1985); *Anthony M. Honoré, Causation and Remoteness*, in: *International Encyclopedia of Comparative Law*, vol. XI, ch. 7 (1971).

³ See: *Causation in European Tort Law* (n. 2); see also below, section II.

⁴ European tort law systems actually do not understand causal problems in the same way. For instance, in Austria, Germany and Portugal, cases in which the same result would have

point remains that, especially in some continental European experiences, the above questions are often framed as if there were an objective, measurable and generalizable answer to them, which would work almost independently from the circumstances of concrete cases.⁵

Second, all European jurisdictions acknowledge a fundamental divide running through the causal inquiry, which can be broken down into different sub-species of investigation: one eminently factual, and the other quint-essentially legal or policy-based.⁶ In many legal systems, the divide overlaps with that between issues of facts and issues of law, thus determining the reviewability of judgments.⁷ But the significance of the distinction lies especially in the different sets of theories applying to each stage. While the es-

occurred even if the defendant's conduct had been lawful trigger the application of the specifically tailored doctrine of "lawful alternative conduct", a doctrine that is virtually unknown in many other places, where the same scenario escapes any unitary categorization (see *Marta Infantino / Eleni Zervogianni*, Summary and Survey of the Results, in: Causation (n.2) 587, 600). "Loss of a chance" is a well-known notion (and a possible form of recoverable damage) in many European jurisdictions, but others – such as Austria, Germany, and the Czech Republic – reject it (*ibid.* 644–646). Further, while virtually all European legal systems have special rules applying to cases in which the victim's susceptibility contributes to the injury, some, such as Lithuania and Portugal, have none (*ibid.* 657–660).

⁵ See, for all, especially *Markesinis / Unberath*, German Law of Torts (n.2) 103, 112.

⁶ Among the many, see: *Principles of European Law – Non-Contractual Liability* (n.2) 763–765; *Jaap Spier / Olav A. Haazen*, Comparative Conclusion on Causation, in: *Unification of Tort Law: Causation* (n.2) 127–134; *Kleinschmidt*, Causation (n.2) 159–60. See also *Martin Weitenberg*, Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte – Zugleich ein Beitrag zur Kohärenz der EU-Haftungssysteme (2014) 315ff. (who points out that this divide also runs through the European Union's main liability schemes). It should however be noted that, in many legal systems – such as Austria, Denmark, England, Ireland, the Netherlands and Sweden – the second stage of the inquiry does not properly fall under the "causation" realm, it being deemed as an autonomous evaluation of a different nature; see *Infantino / Zervogianni*, Summary (n.4) 597.

⁷ This is for instance the case in France and Italy: cf., respectively, *Christophe Quézel-Ambunaz*, France, in: *Causation in European Tort Law* (n.2) 242, 243, and *Marta Infantino*, La causalità nella responsabilità extracontrattuale (2012) 45–48. The divide is now relevant for the division of labour between the judge and the jury in the U.S., the U.S. being the only common law system where juries have historically survived in tort law litigation; *David Ibbetson*, The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries, in: *Negligence: The Comparative Legal History of the Law of Torts*, ed. by Eltjo J. H. Schrage (2001) 229, 245–247. A further divide that coexists, but only partly overlaps, with that between factual and legal causation is the German distinction between "haftungsbegründende Kausalität" and "haftungsausfüllende Kausalität". The first segment of causation is thought to tie the tortfeasor's act to the victim's injury, while the second one brings together the injury and damages that stemmed from it. This division has a practical significance insofar as, once "haftungsbegründende Kausalität" is established (with near certainty), a relaxed standard of proof applies with regard to the "haftungsausfüllende Kausalität". A certain degree of probability (50% + x) may thus suffice for the recovery of the plaintiff's losses; *Nils Jansen / David Kästle-Lamparter / Lukas Rademacher*, Germany, in: *Causation in European Tort Law* (n.2) 281f. This distinction is nevertheless unknown to most other European jurisdictions. See *Kleinschmidt*, Causation (n.2) 159.

establishment of factual causation is everywhere covered by the theory of but-for/*condicio sine qua non* (with its occasional temperaments), the second stage of the inquiry is generally governed by a wide array of tests rooted in different key notions, from adequacy to proximity, from risk to the breach of the causal link.⁸ Although many have issued caveats about the neatness of the divide,⁹ the division of labour is deeply rooted in both academic writing and judicial reasoning.

Third, it is often emphasized – especially in comparative tort law literature – that the space and the role reserved for causation analysis are not uniform across legal systems. On the basis of studies whose focus was largely on the triad of the “major”¹⁰ European jurisdictions (that is, England, France and Germany), it is often observed that jurisdictions whose main liability equation includes extensive analysis on whether the defendant breached a duty of care owed to the victim (England), or on whether the latter’s injury is worthy of tort law protection (Germany), leave in principle less room for causation reasoning than jurisdictions based on a broad formula for negligence liability (France).

“What is regarded as a causation question in France might be a duty question in England and a scope question in Germany. Consider the so-called cable cases concerning loss caused to people and businesses depending on the delivery of gas or electricity: in England, the issue will be dealt with depending on whether the person who damaged the cable owed the victim a duty of care; in Germany, the issues will be whether the author of the damage has infringed one of the rights protected by § 823 I; and in France, the filters of duty of care and protected interests do not exist and thus the limits of liability have to be found in the requirement of causation”.¹¹

⁸ For an overview of these tests, see *Infantino / Zervogianni*, Summary (n. 4) 603–609.

⁹ Non-Contractual Liability (n. 2) 751; *Helmut Koziol*, Natural and Legal Causation, in: *Causation in Law* (n. 2) 53, 66 f.; *Markesinis / Unberath*, German Law of Torts (n. 2) 103; outside Europe, see *Jane Stapleton*, Factual Causation, *FL Rev* 38 (2010) 467. See also *David Hamer*, “Factual Causation” and “Scope of Liability”: What’s the Difference?, *MLR* 77 (2014) 155–188; *Richard W. Wright*, Acts and Omissions as Positive and Negative Causes, in: *Emerging Issues in Tort Law*, ed. by Jason W. Neyers/Erika Chamberlain/Stephen G. A. Pitel (2007) 287, 293; *David A. Fischer*, Insufficient Causes, *Ky.L.J.* 94 (2005/06) 276, 290.

¹⁰ *Van Gerven / Larouche / Lever*, *Tort Law* (n. 2) 2; see also, among the many other studies that focus on the English–French–German law triad, *van Dam*, *European Tort Law* (n. 2), and *Wolfgang Wurmnest*, *Grundzüge eines europäischen Haftungsrechts* (2003) 8, 159 ff.

¹¹ *Van Dam*, *European Tort Law* (n. 2) 309; on the same lines, see *von Bar*, *Common European Law of Torts* (n. 2) 436 f. (“The more specifically analytical the tort system is (i.e. the more liability criteria it provides), the less decisive causation becomes, and vice versa. Where pure economic loss and damage consequent upon infringement of a right are distinguished, it can easily be found that someone who negligently causes a road accident also causes the loss of a businessman who misses an important meeting because he is caught in the resulting traffic jam; the finding of causation does not necessarily imply liability. Where there is a general tort liability clause, liability can be avoided only where causation is denied by the court, because fault and damage (according to the then current position) are clearly both present. Similar

A further corollary of this thesis is the idea that French judges often end up being more open to tort law claims than their English and German colleagues.¹²

Based on the comparative legal research we recently completed, all the above commonplaces are in need of some refinement. In the following pages, we will first explain the framework of our work (section II.) and then present an excerpt of our findings in order to show both the methodology of our study and the results we achieved (section III.). We will then see what these results can tell us about the three commonplaces just surveyed (section IV.) and in particular about the linkages between causation and legal cultures (section V.). Conclusions will ensue (section VI.).

II. Our study in context

The research on which this paper is based was carried out under the umbrella of the “Common Core of European Private Law” project. As is well-known, the “Common Core” initiative was launched in 1993 by Mauro Bussani and Ugo Mattei in Trento (and then moved to Turin and occasionally to other cities). Drawing from Rodolfo Sacco’s and Rudolf Schlesinger’s scholarship,¹³ Bussani and Mattei developed a research methodology focussed on factual questionnaires and on three-level responses (“operative rule”; “legal formants”; “meta-legal formants”) and fostered thematic collaborative research with the aim of unearthing what is common and what is different between European private laws.¹⁴

The theme of the research project we directed was causation in European tort law. By “causation” we meant to cover both factual issues (“to what extent can the plaintiff’s harm be traced back to the defendant?”) and issues

problems arise in cases of damaged gas and electricity mains supplies. A finding of liability can usually be avoided only if either the damage is only economic loss or if there is no causation”).

¹² See again *van Dam*, *European Tort Law* (n. 2) 309; *von Bar*, *Common European Law of Torts* (n. 2) 437.

¹³ *Formation of Contracts: A Study of the Common Core of Legal Systems*, ed. by Rudolf B. Schlesinger, 2 vols. (1968); *idem*, *The Past and Future of Comparative Law*, *Am.J.Comp.L.* 43 (1995) 477–481; *Rodolfo Sacco*, *Legal Formants: A Dynamic Approach to Comparative Law* (instalments I and II), *Am.J.Comp.L.* 39 (1991) 1–34 (I), 344–401 (II).

¹⁴ For a more extensive presentation of the project, see: *Opening Up European Law*, ed. by Mauro Bussani/Ugo Mattei (2007); *idem*, *Le fonds commun du droit privé européen*, *RIDC* 52 (2000) 29–48; *idem*, *The Common Core Approach to European Private Law*, *Colum.J.Eur.L.* 3 (1997/98) 339–356. With specific regard to tort law, see *Mauro Bussani / Marta Infantino / Franz Werro*, *The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law*, *KLJ* 20 (2009) 239–255. For a comparison of the Common Core project vis-à-vis other projects on tort law that were and are being carried out in Europe, see *Mauro Bussani / Marta Infantino*, *Harmonization of Tort Law in Europe*, in: *Encyclopedia of Law and Economics*, ed. by Alain Marciano / Giovanni B. Ramello (2014) 1–17.

of “legal” causation and remoteness (“how far can the defendant’s liability go?”). Our team consisted of twenty-two national rapporteurs from sixteen European legal systems: Austria, Bulgaria, the Czech Republic, Denmark, England (and Wales¹⁵), France, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain and Sweden. With our rapporteurs’ invaluable collaboration, we drafted a factually tailored questionnaire of seventeen real-world hypotheticals that the rapporteurs answered from their national points of view. All the materials, enriched by two stand-alone contributions from distinguished causation experts, were subsequently collected in the volume mentioned above.¹⁶

As any scholarly enterprise, the breadth of our research had many constraints. The study did not cover all European Union jurisdictions and relied on the answers given by a limited number of people (from one to three) from each of these jurisdictions, therefore inevitably reflecting these individuals’ subjective views on how their legal systems would have handled the claims envisaged by the questionnaire. In many jurisdictions, some of the problems posed by our questionnaire had not yet been adjudicated by courts, regulated by statute or discussed by scholars, thereby forcing our rapporteurs to guess how their legal systems might deal with the issues at stake. Further, in the absence of a European common vocabulary of tort law, the majority of rapporteurs were obliged to translate national concepts, notions and rules from their own languages into English. Translation often resulted in disagreements on the very meaning of words, starting from that of “causation”, which for some covered both factual and legal causation and for others meant factual causation only.¹⁷ On top of the above, we as editors might have misunderstood our rapporteurs’ answers.

Yet, as any comparative lawyer knows, the above risks are almost inevitable in any comparative enterprise.¹⁸ If one takes these risks too seriously, no comparative law exercise would be ever done. We therefore tried, with the cooperation of the very knowledgeable and supportive people working with us, to minimize errors as much as we could. The jurisdictions included in the study, though limited in number, were picked for being sufficiently representative of European legal diversity, covering Balkan, Baltic, Central-European, Scandinavian and Western European civil law and common law

¹⁵ Since England and Wales follow a single legal system, “England” is the term we will use throughout the text.

¹⁶ Causation in European Tort Law (n. 2). There were two stand-alone contributions; see *Ingeborg Puppe / Richard W. Wright*, *Causation in the Law: Philosophy, Doctrine and Practice*, and *Anthony J. Sebok*, *Actual Causation in the Second and Third Restatements: Or, the Expulsion of the Substantial Factor Test*, respectively, in: *Causation in European Tort Law* (n. 2) 17–59, and 60–84.

¹⁷ See above, n. 6.

¹⁸ For all, see *Pierre Legrand*, *The Impossibility of Legal Transplants*, *Maastricht J.Eur. & Comp.L.* 4 (1997) 111–124.

countries. While a certain degree of subjectivity and discretion is inescapable in law, we worked to reduce problems of interpretation (and translation) through constant confrontation and open discussion with all the members of the group.

III. Selected cases and results

This is not the place to report the results of our study. What we will do here is to present a summary of the comparative picture stemming from the national answers to three cases in our questionnaire. These three cases deal, respectively, with injuries arising from an exposure to a cancerous drug (section III.1.), the outbreak of an epidemic in a town (section III.2.), and the intervention of a good Samaritan (section III.3.). Each case focuses on a specific core issue of causation – namely, causal uncertainty, the extent of the circle of legal consequences and the scope of protection for indirect victims. Given the centrality of these issues in tort law adjudication, we believe that the comparative overview of European jurisdictions' approaches and answers will provide some representative illustrations for the refinements promised above.

1. Case A: A cancerous drug

Case A goes as follows. While pregnant, Ruth is prescribed a drug in order to prevent miscarriage. Ruth carries the pregnancy safely and gives birth to Elaine. When Elaine is nine years old, she is diagnosed with cancer. It turns out that Elaine's cancer has been caused by the drug which Ruth took during pregnancy. For Ruth, it is impossible to determine the manufacturer of the drug that she had consumed. Therefore, she, on behalf of Elaine, sues Pharmaceutical Inc., which at the time Ruth took the drug accounted for 70% of the national market for the drug. Assuming that conditions for product liability were met, will Pharmaceutical Inc. be held liable and, if yes, what extent of Elaine's recoverable damages should it be held liable for?

As the facts make clear, this hypothetical is largely based on the U.S. DES saga.¹⁹ Claims such as the one in question were actually brought before

¹⁹ The most well-known case arising out of the diethylstilbestrol (DES) litigation is probably the Californian Supreme Court's decision in *Sindell v. Abbott Labs.*, 607 P.2d 924 (1980), where the court affirmed liability on the basis of the market share liability theory, drawing inspiration from the proposal contained in a student note published some years before (*Naomi Shemer*, DES and a Proposed Theory of Enterprise Liability, *Fordham L.Rev.* 46 (1978) 963–1007). In spite of the large amount of scholarly literature that the theory has stimulated, especially in the United States (see, among the many: *Restatement of Torts*, 3d, §28, cmt. (t);

courts in France and in the Netherlands;²⁰ in all other European legal systems, no such actual cases have been tried, but the issue has been discussed in literature.²¹ One should further note that the problems posed by the case would be of practically no relevance in Denmark and in Sweden, where injuries caused by pharmaceuticals are always (or almost always, in the case of Sweden) covered by insurance schemes.²²

That being said, in terms of actual solutions – either actual or predictive, either through tort or through insurance schemes – our study concluded that Elaine would probably recover her loss in more than half the countries examined (Austria, Denmark, France, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal and Sweden, and possibly also England),²³ though not always in full and not along the same line of reasoning.

In the majority of the jurisdictions just mentioned, courts would adopt an all-or-nothing approach, under which there would be either full compensation or full dismissal of the claim. Facing this alternative, courts in both France and the Netherlands have applied doctrines of joint and several liability of multiple potential wrongdoers and have ruled that each producer may be held liable for the whole damage unless he is able to prove that he did not, in fact, cause the plaintiff's harm.²⁴ Speculatively, courts in Denmark, Ireland, Italy, Poland, Portugal and Sweden would follow the same path, going for joint and several liability of all producers.²⁵ This might be the case

Richard W. Wright, Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof, *Loy.L.A.L.Rev.* 41 (2008) 1295, 1324 f.; see also, in Europe: *Richard Goldberg*, Causation and Risk in the Law of Torts – Scientific Evidence and Medicinal Product Liability (1999) 55–75; *Sandy Steel*, Proof of Causation in Tort Law (2015) 174–197, the theory has been rarely followed by U.S. courts (see also *Steel*, *ibid.* 167) and has never been applied as such in Europe.

²⁰ Cass.Civ. 1^o, 24 September 2009, n^o 08-16305, *Bull.civ.* 2009, I, n^o 187, and HR 9 October 1992, *Nederlandse Jurisprudentie* 1994, 535, *comm. C.J.H. Brunner* (DES). Cases pertaining to DES may be also found in Spanish case law, but they do not address the issue in question since in Spanish DES litigation the producer that manufactured the drug that was consumed was identified: *Audencia Nacional*, 6 March 2002, *JUR* 2003, 58544.

²¹ With the possible exception of Bulgaria and the Czech Republic: *Silvia Tsoneva*, Bulgaria, in: *Causation in European Tort Law* (n. 2) 279 f.; *David Elischer*, Czech Republic, *ibid.* 282 f.

²² *Lone Hansen / Kristina Siig*, Denmark, in: *Causation in European Tort Law* (n. 2) 286 f.; *Sandra Friberg*, Sweden, *ibid.* 287 f.

²³ *Barbara C. Steininger*, Austria, in: *Causation in European Tort Law* (n. 2) 288 f.; *Hansen / Siig*, Denmark (n. 22) 286 f.; *Quézel-Ambrunaz*, France (n. 7) 272–274; *Eleonora Rajneri*, Italy, in: *Causation in European Tort Law* (n. 2) 274–276; *Ursula Connolly*, Ireland, *ibid.* 293 f.; *Loreta Šaltinytė*, Lithuania, *ibid.* 290–292; *Ivo Giesen / Rianka Rijnhout*, The Netherlands, *ibid.* 289 f.; *Ewa Bagińska / Katarzyna Krupa-Lipińska*, Poland, *ibid.* 278 f.; *Nuno Manuel Pinto Oliveira*, Portugal, *ibid.* 284–286; *Friberg*, Sweden (n. 22) 287 f.; see also *Ken Oliphant*, England, in: *Causation in European Tort Law* (n. 2) 292 f.

²⁴ See the two cases mentioned above, n. 20. A different issue is the internal right of recourse between the defendants; see *Marta Infantino / Eleni Zervogianni*, *Comparative Remarks*, in: *Causation in European Tort Law* (n. 2) 295 f.

²⁵ See the authors quoted above, n. 23.

in England as well, although English courts have shown reluctance towards accepting naked statistics as evidence.²⁶

A different conclusion might be reached in Austria. In Austria, market share liability is accepted by prevailing scholarly opinion,²⁷ while proportional liability has been applied by case law in a limited number of alternative liability settings.²⁸ Proportional liability might be favourably considered by courts in Lithuania as well, given the strong reliance of Lithuanian case law on the Principles of European Tort Law (PETL).²⁹

By contrast, defendant's liability would be rejected under the prevailing opinion in Bulgaria, the Czech Republic, Germany, Greece and Spain.³⁰ In these countries, the high standard of proof – close to certainty – applicable to tort law proceedings, coupled with the plaintiff's burden of proving that his or her harm was caused by the behaviour of the specific defendant, would in all likelihood lead to the rejection of the claim.

The following table shows the overall picture of the liability outcomes in this hypothetical.³¹ The value of 1 stands for a certain conclusion of (full or partial) liability, 0.5 for a likely conclusion of (full or partial) liability, and 0 for a likely conclusion of no liability.

Table 1

	AT	BG	CZ	DE	DK	EN	ES	FR	GR	IE	IT	LT	NL	PL	PT	SE	Sum
Case A	1	0	0	0	1	0.5	0	1	0	1	1	0.5	1	1	1	1	10

2. Case B: An epidemic in town

These are the facts underlying Case B: Alex is driving in a busy town centre. He negligently fails to see Bert crossing the road in the pedestrian crossing and runs him over. Bert is brought to the local hospital for treatment. The emergency room where he waits for three hours is full of people infected with an outbreak of endemic pneumonia in town. Four days after

²⁶ See *Oliphant*, England (n. 23) 292f.

²⁷ *Steininger*, Austria (n. 23) 288f.

²⁸ *Steininger*, Austria (n. 23) 311–313, 344, 507.

²⁹ *Šaltinytė*, Lithuania (n. 23) 290–292. The idea of proportional liability is embraced by Art. 3:103(1) PETL.

³⁰ *Tsoneva*, Bulgaria (n. 21) 279f.; *Elischer*, Czech Republic (n. 21) 282f.; *Jansen / Käßle-Lamparter / Rademacher*, Germany (n. 7) 281; *Eugenia Dacoronia*, Greece, in: *Causation in European Tort Law* (n. 2) 284; *Elena Vicente Domingo*, Spain, *ibid.* 276–278.

³¹ The abbreviations used are those adopted by the International Organization for Standardization (ISO 3166-1). Accordingly, AT: Austria; BG: Bulgaria; CZ: the Czech Republic; DE: Germany; DK: Denmark; EN: England; ES: Spain; FR: France; GR: Greece; IE: Ireland; IT: Italy; LT: Lithuania; NL: the Netherlands; PL: Poland; PT: Portugal; SE: Sweden.

Bert is released from the hospital, he is diagnosed with pneumonia. Bert sues Alex, claiming compensation for all the damages sustained by him, including those stemming from pneumonia. Should Alex be held liable?

The case clearly aimed to test the boundaries between the two stages of causation, the theories invoked to distinguish between recoverable and non-recoverable consequences of accidents and the results actually achieved on the basis of these theories.

Almost all rapporteurs agreed that, under the above circumstances, the but-for/*condicio sine qua non* test is satisfied, because Bert would not have gone to the hospital but for Alex's negligence.³² The only exception is Denmark, in which the case would fail on the but-for ground because Bert cannot prove that but for the hospitalization he would not have contracted pneumonia.³³

Despite the quasi-general agreement on the fulfilment of the but-for test, legal systems appear to take different stances as to how far Alex's liability can go, and whether it should include damages arising from Bert's pneumonia infection. Differences range from the very qualification of the issue at stake, to the tests (other than the but-for/*condicio sine qua non*) that would be deemed applicable to the case, to the outcomes of the application of these tests.

As to the question of qualification, the majority of European legal systems would label the problem raised by the hypothetical as one of "legal causation";³⁴ yet in Austria and in the Netherlands it would be framed as a question of "attribution of damage",³⁵ while in Germany the case would fall under the issue of "haftungsausfüllende Kausalität".³⁶

In terms of tests invoked, courts in many jurisdictions would resort to the so-called "adequate" causation test, asking themselves whether the car accident was an adequate cause of the victim's hospital-acquired infection.³⁷ Yet many legal systems would substitute or accompany the adequate cause formula with other tests and doctrines, such as those addressing the scope of the

³² *Infantino / Zervogianni*, Comparative Remarks (n. 24) 403.

³³ *Hansen / Siig*, Denmark (n. 22) 395 f.

³⁴ *Dacornia*, Greece (n. 30) 392–294; *Connolly*, Ireland (n. 23) 402 f.; *Rajneri*, Italy (n. 23) 381–384; *Šaltinytė*, Lithuania (n. 23) 400 f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 386 f.; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Vicente Domingo*, Spain (n. 30) 384–386.

³⁵ *Steininger*, Austria (n. 23) 397 f.; *Giesen / Rijnhout*, The Netherlands (n. 23) 398–400.

³⁶ *Jansen / Kästle-Lamparter / Rademacher*, Germany (n. 7) 389–391. For the practical relevance of this distinction see above, n. 7.

³⁷ *Steininger*, Austria (n. 23) 397 f.; *Tsoneva*, Bulgaria (n. 21) 387–389; *Elischer*, Czech Republic (n. 21) 391 f.; *Jansen / Kästle-Lamparter / Rademacher*, Germany (n. 7) 389–391; *Dacornia*, Greece (n. 30) 392–394; *Rajneri*, Italy (n. 23) 381–384; *Šaltinytė*, Lithuania (n. 23) 400 f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 386 f.; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Vicente Domingo*, Spain (n. 30) 384–386. Adequacy is not assessed on the basis of the same criteria in all jurisdictions. Cf., e.g., *Steininger*, Austria (n. 23) 233 (referring to an "objective observer"), *Elischer*, Czech Republic (n. 21) 475 (referring to an "optimal observer"), and *Pinto Oliveira*, Portugal (n. 23) 395 (referring to an "experienced observer").

rule/scope of the risk,³⁸ the foreseeability of damage,³⁹ and the “direct and immediate” consequences of the wrongful act.⁴⁰

Divergence does not stop here. Jurisdictions seem actually to be divided as to the very outcome of the case, even when apparently applying the same test. While in Austria, England, France, Germany, Ireland, Italy and the Netherlands Alex would most likely be held liable for Bert’s infection,⁴¹ he would not be responsible for the pneumonia infection in Bulgaria, the Czech Republic, Greece, Lithuania, Poland, Portugal, Spain or Sweden (nor, of course, in Denmark).⁴²

A final note. According to many rapporteurs – both from countries in which Alex would be held liable for Bert’s pneumonia infection as well as from countries in which he would not⁴³ –, the manner in which courts would assess causation in cases such as the present one could be linked to the strict liability regime and the mandatory liability insurance that applies to traffic accidents. Other rapporteurs noted that the possible liability of the hospital may be a factor inducing courts not to establish causation against the defendant or mitigating the extent of the defendant’s liability.⁴⁴

The outcome of the case in the jurisdictions reviewed is shown in the table below, where the value of 1 stands for a certain conclusion of liability for pneumonia (liability for the accident being unquestioned), 0.5 for a likely conclusion of liability, and 0 for a likely conclusion of no liability. The substantial degree of uncertainty characterizing the outcomes of the case can be attributed to the wide discretionary power of courts in the assessment of the issue in question.⁴⁵

³⁸ *Steininger*, Austria (n. 23) 397 f.; *Jansen / Kästle-Lamarter / Rademacher*, Germany (n. 7) 389–391; *Giesen / Rijnhout*, The Netherlands (n. 23) 398–400; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Friberg*, Sweden (n. 22) 396 f.

³⁹ *Elischer*, Czech Republic (n. 21) 391 f.; *Oliphant*, England (n. 23) 401; *Jansen / Kästle-Lamarter / Rademacher*, Germany (n. 7) 389–391; *Connolly*, Ireland (n. 23) 402 f.; *Rajneri*, Italy (n. 23) 381–384; *Šaltinytė*, Lithuania (n. 23) 400 f.; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Friberg*, Sweden (n. 22) 396 f.

⁴⁰ *Rajneri*, Italy (n. 23) 381–384.

⁴¹ *Steininger*, Austria (n. 23) 397 f.; *Oliphant*, England (n. 23) 401; *Quézel-Ambrunaz*, France (n. 7) 380 f.; *Jansen / Kästle-Lamarter / Rademacher*, Germany (n. 7) 389–391; *Connolly*, Ireland (n. 23) 402 f.; *Rajneri*, Italy (n. 23) 381–384; *Giesen / Rijnhout*, The Netherlands (n. 23) 398–400.

⁴² *Tsoneva*, Bulgaria (n. 21) 387–389; *Elischer*, Czech Republic (n. 21) 391 f.; *Dacoronia*, Greece (n. 30) 392–394; *Šaltinytė*, Lithuania (n. 23) 400 f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 386 f.; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Vicente Domingo*, Spain (n. 30) 384–386; *Friberg*, Sweden (n. 22) 396 f.; as for Denmark, see *Hansen / Siig*, Denmark (n. 22) 395 f.

⁴³ Respectively, France, Ireland and Italy for liability, and Poland and Sweden for no liability: *Infantino / Zervogianni*, Comparative Remarks (n. 24) 404.

⁴⁴ Cf. *Elischer*, Czech Republic (n. 21) 392; *Oliphant*, England (n. 23) 401; *Rajneri*, Italy (n. 23) 384; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 387.

⁴⁵ In Germany, the judicial discretion regards a relaxation of the standard of proof of factual causation at the stage of “haftungsausfüllende Kausalität” (*Jansen / Kästle-Lamarter /*

Table 2

	AT	BG	CZ	DE	DK	EN	ES	FR	GR	IE	IT	LT	NL	PL	PT	SE	Sum
Case B	0.5	0	0	0.5	0	0.5	0	1	0	0.5	0.5	0	1	0	0	0	4.5

3. Case C: The good Samaritan

The facts of Case C are the following: Vanessa, a motorbiker, is riding her bike at night on a country road. At some point, she notices an oncoming car, driven by Raymond, zigzagging across the road. In order to avoid the crash, Vanessa makes an abrupt move towards the edge of the street, and her motorbike runs off the bank. Sarah, a driver passing by, sees Vanessa lying unconscious near the fallen motorbike, stops her car and runs to Vanessa to assist her. On her way down, the motorbike's engine explodes, engulfing Vanessa's body in flames. Seeing Vanessa helplessly burning alive results in Sarah suffering a nervous breakdown. Would Sarah be able to recover damages from Raymond?

European legal systems differ both in the ways in which they would frame the case and the ways in which they would solve it.

As to the framing, it is only in a minority of countries – namely, the Czech Republic, France, Italy, Lithuania, Poland and Portugal⁴⁶ – that the questions raised by the above hypothetical would be understood as causation-related. In all these jurisdictions, but for the Czech Republic, the answer to the liability question would be affirmative, insofar as Sarah's behaviour would be held as an adequate consequence of the accident⁴⁷ and foreseeable by the driver.⁴⁸ Rapporteurs stressed that the positive outcome of the case would probably be due to the judicial favouring of rescuers.⁴⁹

In the majority of jurisdictions included in our study, however, the case would not pose a causation problem. For instance, in England there is little doubt that a driver can foresee that the danger created by his act will invite

Rademacher, Germany (n. 7) 391). In Italy and in Austria there is uncertainty over the assessment of adequacy (*Rajneri*, Italy (n. 23) 384; *Steininger*, Austria (n. 23) 398). In England the problem centres on the “imprecise concept of foreseeability” (*Oliphant*, England (n. 23) 401). Similarly, *Connolly*, Ireland (n. 23) 402, referring to Irish law.

⁴⁶ *Elischer*, Czech Republic (n. 21) 474f.; *Quézel-Ambrunaz*, France (n. 7) 467f.; *Rajneri*, Italy (n. 23) 468; *Šaltinytė*, Lithuania (n. 23) 485; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 470–472; *Pinto Oliveira*, Portugal (n. 23) 477 f.

⁴⁷ *Quézel-Ambrunaz*, France (n. 7) 467f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 470–472.

⁴⁸ *Rajneri*, Italy (n. 23) 468f.; *Šaltinytė*, Lithuania (n. 23) 485; *Pinto Oliveira*, Portugal (n. 23) 477 f. An exception is the Czech Republic, where Sarah's claim will in all likelihood be rejected because it will be difficult for her to prove that her injury was foreseeable by Raymond; *Elischer*, Czech Republic (n. 21) 475.

⁴⁹ *Infantino / Zervogianni*, Comparative Remarks (n. 24) 491.

rescue,⁵⁰ and under Austrian law rescue is generally deemed as an adequate consequence of the tortfeasor's conduct and included within the protective purpose of the rule that the latter breached.⁵¹ Rather, the main issue at stake in these legal systems would be the relationship between the defendant, the primary victim and the plaintiff, as well as the nature of the loss (nervous shock) suffered by the latter.

National rapporteurs from these jurisdictions were in disagreement both as to whether the plaintiff should be considered as a primary or a secondary victim, and whether the defendant should be liable for the plaintiff's nervous shock. These issues are in fact interrelated. In Austria, and probably also in England, Sarah would be considered as the primary victim, and it is for this reason that her claim would have chances of success.⁵² Conversely, in most countries (namely in Bulgaria, Denmark, Germany, Greece, Ireland, Spain and Sweden), Sarah would be deemed to be a secondary victim of Raymond's negligence and would thus not be allowed to recover damages in tort for her nervous shock.⁵³ In the Netherlands, where the recovery of psychiatric shock of secondary victims is possible in principle, the outcome of the case in question is uncertain because there is no case law as to the application of the rule to claimants who are not closely related to the primary victim.⁵⁴

With regard to Case C, it should be noted that national divergences run deeper than legal rules and lie in the highly variable interpretation given to the same facts. With regard to the foreseeability of the harm, the Czech rapporteur notes that "it is very problematic to say that an optimal observer would imagine Vanessa's burning injuries and subsequently Sarah's nervous breakdown as a consequence of Raymond's zigzagging".⁵⁵ Such a statement is totally overturned by the rapporteurs from England,⁵⁶ Italy⁵⁷ and Lithuania,⁵⁸ all of whom stressed that it is perfectly foreseeable for drivers to have accidents that might cause damages to road users, bystanders and rescuers.

⁵⁰ *Oliphant*, England (n. 23) 485 f.

⁵¹ *Steininger*, Austria (n. 23) 481 f.

⁵² *Steininger*, Austria (n. 23) 481 f.; *Oliphant*, England (n. 23) 485 f.

⁵³ *Tstoneva*, Bulgaria (n. 21) 472 f.; *Hansen / Siig*, Denmark (n. 22) 478 f.; *Jansen / Kästle-Lamarter / Rademacher*, Germany (n. 7) 473 f.; *Dacoronia*, Greece (n. 30) 475–477; *Connolly*, Ireland (n. 23) 487 f.; *Vicente Domingo*, Spain (n. 30) 468–470; *Friberg*, Sweden (n. 22) 479–481. Sarah would be considered a secondary victim also in Poland and in Portugal, but in these countries courts would follow a different line of argumentation in deciding Sarah's claim (*Bagińska / Krupa-Lipińska*, Poland (n. 23) 470–472; *Pinto Oliveira*, Portugal (n. 23) 477 f.).

⁵⁴ *Giesen / Rijnhout*, The Netherlands (n. 23) 483.

⁵⁵ *Elscher*, Czech Republic (n. 21) 475.

⁵⁶ *Oliphant*, England (n. 23) 486 ("one might well anticipate that a[n English] court would find both that it was reasonable to foresee that the engine might explode after a crash and that a rescuer might thereby suffer injury").

⁵⁷ *Rajneri*, Italy (n. 23) 468 ("Sarah's injury cannot be seen as an exceptional and unforeseeable event").

⁵⁸ *Šaltinytė*, Lithuania (n. 23) 485 ("it would be clearly foreseeable to a reasonable person

A similar disagreement concerns the policy considerations underlying the case. While some rapporteurs noted that the victim's good intentions will probably have no weight on the appreciation of the causal link,⁵⁹ others stressed that providing potential Samaritans with an incentive to intervene could be a factor that might be taken into account in establishing causation in rescue cases.⁶⁰

The following graphs depict the outcome as to liability. As usual, in the table the value of 1 means a certain conclusion of liability, 0.5 stands for a likely conclusion of liability, and 0 represents a likely conclusion of no liability.

Table 3

	AT	BG	CZ	DE	DK	EN	ES	FR	GR	IE	IT	LT	NL	PL	PT	SE	Sum
Case C	1	0	0	0	0	0.5	0	0.5	0	0	1	0.5	0.5	0.5	1	0	5.5

IV. Revisiting commonplaces

Of the many interesting issues that these results open up, we would like to focus on those which more clearly shed light on the need for refining the assumptions mentioned above in section I. In the following paragraphs we will therefore explore the lessons that these three case-studies might teach us about the alleged objectivity and invariability of causation-based reasoning (IV.1.), the apparent neatness of the divide between factual causation and legal/policy considerations (IV.2.) and the asserted correlation between the number of elements required by a legal system's liability rule and the stance taken by that same legal system as far as causation is concerned (IV.3.). Let us look at these assumptions more closely.

1. The embeddedness of causation

Especially in continental jurisdictions, causation is often presented in domestic textbooks and manuals as an issue to be tackled through quasi-scientific rules and tests – from but-for/*condicio sine qua non* to foreseeability, from

that dangerous driving may cause another driver to take steps to avoid an imminent accident, and it was foreseeable that damage could not necessarily be avoided”).

⁵⁹ *Bażyńska / Krupa-Lipińska*, Poland (n. 23) 472.

⁶⁰ *Tsoneva*, Bulgaria (n. 21) 472f.; *Oliphant*, England (n. 23) 486; *Quézel-Ambrunaz*, France (n. 7) 467f.; *Connolly*, Ireland (n. 23) 487; *Rajneri*, Italy (n. 23) 468; *Šaltinytė*, Lithuania (n. 23) 485; *Giesen / Rijnhout*, The Netherlands (n. 23) 483f.; *Pinto Oliveira*, Portugal (n. 23) 477f.

adequacy to scope of norm, and so on – whose size and shape is deemed to be largely indifferent to the concrete circumstances of the cases at stake.

Yet, the above results confirm what many have already noted from the comparative perspective,⁶¹ that is, the alleged objectivity of causation judgments can be understood only against the background of the issues that, under the circumstances of each case, end up being the most relevant to the liability claim. Factors that might affect the assessment of causation are many, ranging from the nature and the extent of the losses claimed by the plaintiff, the magnitude of the risk posed by the defendant's activity, the number of potential victims and tortfeasors, the availability of alternative remedies and/or of insurance coverage, the functions that judges assign to tort law and to themselves, and also policy reasons of various kind. What seems to vary the most across legal systems is not the significance of these and other possible factors in the evaluation of causation, but rather the openness with which legal actors deal with these interrelations.

The comparison between answers to Case A (on DES-induced cancer) and Case C (on the nervous shock suffered by a bystander of a car accident) makes it clear that – in all jurisdictions – the more serious and widespread the harm and the more “dangerous” the defendant's activity, the easier it is to establish causation and the greater the consequences that might be attributed to the defendant.⁶² In Case A, in which mass personal injury is involved, courts in many legal systems would probably affirm causation despite the total uncertainty about the connection, if any at all, between the defendant's behaviour and the plaintiff's harm.⁶³ By contrast, in Case C, where the claim is based on an individual, intangible injury, not even the certainty

⁶¹ Among many others, cf. *van Dam*, European Tort Law (n.2) 307–309; *Markesinis / Unberath*, German Law of Torts (n.2) 686–691; *Spier / Haazen*, Comparative Conclusion (n.6) 134–136; *Honoré*, Causation and Remoteness (n.2) 32f.; outside Europe, see, among the many, *Leon Green*, Rationale for Proximate Cause (1927) 135–141, 171–176, 190–194; *Guido Calabresi*, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, U.Chi.L.Rev. 43 (1975) 69, 103–106; *Jane Stapleton*, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, Vand.L.Rev. 54 (2001) 941, 1008f.; *Douglas Hodgson*, The Law of Intervening Causation (2008) especially 6.

⁶² Similarly, the more blameworthy the defendant's behaviour is, the greater the scope of causation (and liability); see *Mauro Bussani / Vernon V. Palmer*, The Liability Regimes of Europe – Their Façades and Interiors, in: Pure Economic Loss, ed. by idem (2003) 120, 127–131; *Walter Wilburg*, The Development of a Flexible System in the Area of Private Law (2000); *idem*, Die Elemente des Schadensrechts (1941) 26ff.; *Markesinis / Unberath*, German Law of Torts (n.2) 686–691, 885f.; *Paolo Cendon*, Il dolo nella responsabilità extracontrattuale (1976) 44f., 398; *Paul Esmein*, Le nez de Cléopâtre ou les affres de la causalité, Dalloz chr. 1964, 210; outside Europe, *Calabresi*, U.Chi.L.Rev. 43 (1975) 69, 103–106; *Green*, Rationale (n.61) 135–141, 171–176, 190–194.

⁶³ See above, under section III.1.

about the factual sequence of the events leading from defendant's act to the plaintiff's harm might be enough to establish causation and liability.⁶⁴

Further, the hypotheticals analysed here show that the number of defendants as well might be significant, although in varying directions. On the one hand, the relatively high rate of success of the plaintiff in a "hard" scenario, such as our DES Case A, is probably also linked to the high number of potential defendants, a number that makes it easier for each of them to share or transfer to one another the burden of liability.⁶⁵ On the other hand, many rapporteurs in Case B (about a driver's liability for an infection contracted by the victim at the hospital where he was treated) noted that the presence of a possible defendant (the hospital) other than the driver might induce courts not to establish causation against the latter or at least to mitigate the extent of his liability.⁶⁶

The Scandinavian answer to Case A makes evident that the availability of a collateral remedy, such as a compensation scheme, renders the problem of proving causation almost irrelevant.⁶⁷ Many rapporteurs in Cases B and C stressed that the finding of causation and the affirmation of liability might be equally facilitated, in tort law cases, by the presence, alongside the defendant driver, of the latter's mandatory insurer.⁶⁸

Judges' views about the function of tort law (as focused on compensation only, or as embodying a deterrence/punitive nuance) as well as courts' self-narratives about their own role (as being more or less creative, or more or less rule-making) seem to play a role in a jurisdiction's option for or against liability in Case A.⁶⁹ As many rapporteurs stressed in answering Case C, public policy considerations in creating incentives for good Samaritans might be taken into account in establishing causation between the defendant's reckless behaviour and the plaintiff's harm in rescue cases.⁷⁰

⁶⁴ Above, under section III.3.

⁶⁵ See *Infantino / Zervogianni*, Comparative Remarks (n. 24) 297.

⁶⁶ Cf. *Oliphant*, England (n. 23) 401; *Rajneri*, Italy (n. 23) 384; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 387.

⁶⁷ See authors quoted above, n. 22.

⁶⁸ *Quézel-Ambrumaz*, France (n. 7) 468; *Connolly*, Ireland (n. 23) 402f.; *Šaltinytė*, Lithuania (n. 23) 485; *Giesen / Rijnhout*, The Netherlands (n. 23) 399; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 472; *Friberg*, Sweden (n. 22) 397. Cf., however *Dacoronia*, Greece (n. 30) 393 ("[t]he presence of an insurance contract will not be taken into account"); *Bagińska / Krupa-Lipińska*, Poland (n. 23) 387 ("neither the blameworthiness of the defendant's activity nor the presence of an insurance contract are taken into account"); *Vicente Domingo*, Spain (n. 30) 470 (noting that insurance law might indeed limit liability, thanks to the special rules applicable in that sector). See also above, under section III.2.

⁶⁹ *Infantino / Zervogianni*, Comparative Remarks (n. 24) 297; *idem*, Summary (n. 4) 665.

⁷⁰ See the authors quoted above, at n. 60.

2. Discovering relativity

As said above,⁷¹ and as the summaries of national answers in sections III.1.–III.3. show, bifurcation of causation is a widespread, trans-systemic feature of tort actions: one aspect is factual causation, to be evaluated through the but-for/*condicio sine qua non* test; another one is “legal” causation and remoteness, to be appreciated through an array of formulas that vary across jurisdictions.⁷² However, what becomes apparent from the comparative standpoint⁷³ is that, despite the theoretical brightness of the factual/legal divide, European legal systems are often in disagreement not only about the tests that should be applied at the second stage, but also as to the inferences to be drawn from similar tests and as to the very distinction between what is factual and what is legal.

Let us start from the last point. What emerges from the comparative survey sketched above, in sections III.1.–III.3., is that the very understanding of the boundary between the two causation stages is not consistent across jurisdictions. While in many cases there is a substantial uniformity as to the qualification of the issues involved, in other instances rapporteurs from different legal backgrounds diverge as to whether the hypothetical raises a factual or a normative problem. A good illustration of these divergent qualifications is offered by Case B, concerning the victim of a car accident who becomes infected with pneumonia while his injuries are treated in hospital. For the majority of the rapporteurs, Case B posed a problem of “legal” causation, whereas the Danish one dealt with the hypothetical through the lens of factual causation.⁷⁴

This counters the widespread assumption that the boundary between the last event attributable to the defendant and the first of the harmful consequences which that event has generated, as well as the divide between factual appreciations and policy considerations, is a bright line observable in each and every tort case. Our results also push back against the idea that causation tests are as reliable and quasi-scientific as mainstream discourses would often depict them. For instance, when confronted with the facts of Case C (a bystander suffers a nervous shock while trying to rescue a person involved in a car accident caused by the defendant), many rapporteurs concluded that the

⁷¹ At section I.

⁷² Needless to say, the usual dual understanding of causation does not mean that this duality comes up in every tort law case. As stressed by many rapporteurs, it is not rare that courts merge the two inquiries into a single investigation of whether the defendant’s activity was a but-for and adequate/foreseeable/proximate cause of the plaintiff’s harm; see *Infantino / Zervogianni*, Summary (n. 4) 598 f.

⁷³ See the authors quoted above, at n. 9.

⁷⁴ See above, at section III.3.

bystander's nervous shock is a foreseeable⁷⁵ and adequate⁷⁶ consequence of the accident. However, others emphasized that courts would consider the victim's shock unforeseeable⁷⁷ and "too remote, collateral and indirect" in relation to the defendant's negligence.⁷⁸

Still, in Case B, for half of the rapporteurs,⁷⁹ the victim of a car accident becoming infected while waiting in a hospital emergency room during a pneumonia outbreak in town is not a typical and foreseeable consequence of the car accident itself, considering also that the chances of contracting pneumonia were equally high outside the hospital. For this very reason, but on the ground of factual causation, the Danish rapporteurs concluded that the car accident is not a but-for condition of the victim's infection, for the latter might have happened anyway.⁸⁰ By contrast, for all other rapporteurs, the pneumonia infection was a consequence of the car accident that was adequate,⁸¹ direct,⁸² foreseeable⁸³ and included in the scope of the breached norm.⁸⁴ As noted by the Austrian rapporteur, "after all, there is a higher likelihood of an individual contracting a disease after having spent a considerable amount of time in a hospital's (most probably air-conditioned) waiting area together with many infected people".⁸⁵

Of course, the above disagreement might well be associated with differences in the personal views of the rapporteurs, rather than with a divergence of the legal systems they represented. Yet, the variety witnessed is in line with the observation that causation tests and formulas acquire meaning only in context, insofar as causal investigations are guided by the appreciation of both the facts under examination and the policy-based perspectives raised in the circumstances.⁸⁶

⁷⁵ *Rajneri*, Italy (n. 23) 468 f.; *Šaltinytė*, Lithuania (n. 23) 485; *Pinto Oliveira*, Portugal (n. 23) 477 f.

⁷⁶ *Quézel-Ambrunaz*, France (n. 7) 467 f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 470–472.

⁷⁷ *Elischer*, Czech Republic (n. 21) 475.

⁷⁸ *Tsoneva*, Bulgaria (n. 21) 472.

⁷⁹ *Tsoneva*, Bulgaria (n. 21) 388 f.; *Elischer*, Czech Republic (n. 21) 391 f.; *Dacornia*, Greece (n. 30) 392–394; *Šaltinytė*, Lithuania (n. 23) 400 f.; *Bagińska / Krupa-Lipińska*, Poland (n. 23) 386 f.; *Pinto Oliveira*, Portugal (n. 23) 394 f.; *Friberg*, Sweden (n. 22) 396 f.

⁸⁰ *Hansen / Siig*, Denmark (n. 22) 395 f.

⁸¹ *Steininger*, Austria (n. 23) 397 f.; *Jansen / Kästle-Lamparter / Rademacher*, Germany (n. 7) 390.

⁸² *Vicente Domingo*, Spain (n. 30) 385.

⁸³ *Oliphant*, England (n. 23) 401; *Quézel-Ambrunaz*, France (n. 7) 381; *Connolly*, Ireland (n. 23) 402 f.; *Rajneri*, Italy (n. 23) 382–384.

⁸⁴ *Giesen / Rijnhout*, The Netherlands (n. 23) 399 f.

⁸⁵ *Steininger*, Austria (n. 23) 397.

⁸⁶ See, apart from the authors quoted above, at n. 9, *Hart / Honoré*, Causation (n. 2) 80, 262 f., and *Jane Stapleton*, Choosing What We Mean by "Causation" in the Law, *Mo.L.Rev.* 73 (2008) 433, 438–440; as well as, from the law and economics perspective, *Mark F. Grady*, Causation and Foreseeability, in: *Research Handbook on the Economic Analysis of Torts*, ed. by Jennifer H. Arlen (2013) 114 ff.; *Steven Shavell*, *Economic Analysis of Accident Law* (1987) 129.

3. The imprint of culture

Although often disregarded at the national level, the two aspects just highlighted – the context-dependency of causation arguments and the malleability of the two-stage division – have long been emphasised by European scholarship on comparative tort law.⁸⁷ Another recurrent observation in comparative studies about European tort law concerns the role and space reserved in a legal system to causation as being dependent upon the number of liability requirements.⁸⁸

Prompted by observations focussed on the Anglo-French-German triad, the thesis holds that in countries – such as France – where the general provision for negligence liability relies (for the time being)⁸⁹ solely on the elements of fault, damage and causation, the latter element ends up working as a filter for claims that elsewhere would be evaluated through the lens of other requirements of liability for negligence, such as duty of care in England and wrongfulness in Germany. Underlying this scenario there also seems to be the assumption that, the greater the number of elements in the main liability equation, the harder it would be for plaintiffs to obtain recovery, and vice-versa.

There is little doubt that the above account powerfully captures the different role played by causation in France vis-à-vis England and Germany. The point, however, is that when one opens up the horizons of research, that explanation becomes less satisfactory for a number of reasons.

First of all, the elements of the negligence cause of action are not fixed. They change with time and through the interpretive practices of the legal actors in the system. What starts as a “limited” clause might be opened up by interpretation, and vice-versa. Among the many illustrations, one may think of the diverging path of development followed by the broad general clauses enshrined in Art. 1240 (former Art. 1382) of the French Code civil and Art. 1295 of the Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) of 1811. Especially during the 19th century, the former was interpreted as if it allowed the only reparation for an injury to a legitimate interest,⁹⁰ while the latter has from the second half of the 19th century been understood by Austrian scholars and judges through the lens of the German absolute rights doctrine.⁹¹

⁸⁷ See authors quoted above, n. 9.

⁸⁸ See above, nn. 11 and 12.

⁸⁹ Pursuant to the proposal for a reform of French tort law, the future version of Art. 1240 (former Art. 1382) might read as follows: “Est réparable tout préjudice certain résultant d’un dommage et consistant en la lésion d’un *intérêt licite*, patrimonial ou extrapatrimonial” [italics by authors]; Art. 1235 of the *Projet de réforme de la responsabilité civile*, of March 2017, <www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>.

⁹⁰ *Olivier Moréteau*, France, in: *Digest of European Tort Law*, vol. I (n. 2) 24 f.

⁹¹ For a short and useful historical survey of the cultural factors which led Austrian jurists

Second, not all legal systems fit easily into the grid of English–French–German tort law models. There are many regional peculiarities, more or less deeply rooted in the legal culture – think of the Scandinavian family or of the post-socialist experiences – whose specificities do not totally overlap with those of the “major” jurisdictions of Western Europe. Even in the Western part of Europe, there are many legal systems with hybrid characteristics which can hardly be qualified as belonging to the English, French or German group alone. Think for instance of the developments undergone by the German-inspired requirement of “unlawfulness” mentioned in Art. 914 of the Greek Civil Code of 1940 and Art. 2043 of the Italian Civil Code of 1942, which already from the 1960s has been interpreted by Greek and Italian literature and case law, respectively, as allowing the protection of a variety of interests not amounting to an absolute right.⁹² Or think of Dutch tort law, whose basic rule, Art. 6:162 BW, has a first paragraph enshrining a general clause of liability along the pattern of Art. 1240 (former Art. 1382) of the French Code civil, but which specifies in the second paragraph that liability is conditioned upon the infringement of a right and the breach of statutory duty as distinct causes of action, like § 823 BGB does. Yet Art. 6:162(2) BW purposely fails to enumerate the protected rights and further contains an additional cause of action (according to which the unlawfulness might stem from the breach of proper social conduct), which instils a French-like flexibility in the system.⁹³ On the top of that, the pragmatic, open and case-sensitive Dutch style of reasoning far more closely resembles the English mentality than it does the French and German one.⁹⁴

Third, when one considers legal systems other than the English–French–German triad, the inverse connection between the number of elements in the liability equation, on the one hand, and the space devoted to causation and the overall generosity of a legal system, on the other hand, does not seem to always hold true. Let us take again the case of Austria. Despite being heavily influenced by German law,⁹⁵ the creativity of Austrian scholarship and case law has made the Austrian approach to causation distinctively more

to fall back on German legal thought, see *Konrad Zweigert / Hein Kötz*, Introduction to Comparative Law³ (transl. Tony Weir) (1998) 160 ff.

⁹² See *Rodolfo Sacco*, L'ingiustizia del danno di cui all'art. 2043, *Foro Pad.* 1960, I, 1420 ff.; *Jean Deliyannis*, La notion d'acte illicite: considéré en sa qualité d'élément de la faute délictuelle (1952), whose work has been very influential for the developments in Greece.

⁹³ *Jan M. Smits*, The Netherlands, in: *Elgar Encyclopedia of Comparative Law*² (2012) 620; *Christian von Bar*, Non-Contractual Liability and Contract law, in: *The Interaction of Contract Law and Tort and Property Law in Europe – A Comparative Study*, ed. by idem / Ulrich Drobnig (2004) 25, 28.

⁹⁴ *Bussani / Palmer*, Liability Regimes (n. 62) 146–148.

⁹⁵ For all, see *Ernst A. Kramer*, Der Einfluß des BGB auf das schweizerische und österreichische Privatrecht, *AcP* 200 (2000) 365, 397 f.

pragmatic and policy-oriented than the German one.⁹⁶ It would certainly be hard to trace this creativity back to the French-like façade of the more-than-200-years-old Austrian Civil Code. Yet, the result, viewed solely in terms of (full or partial) liability outcomes, seems to bring Austria close to France. See the table of overall liability outcomes below (whereby the value of 1 denotes liability, 0.5 possible liability and 0 no liability):

Table 4

	AT	BG	CZ	DE	DK	EN	ES	FR	GR	IE	IT	LT	NL	PL	PT	SE	Sum
A	1	0	0	0	1	0.5	0	1	0	1	1	0.5	1	1	1	1	10
B	0.5	0	0	0.5	0	0.5	0	1	0	0.5	0.5	0	1	0	0	0	4.5
C	1	0	0	0	0	0.5	0	0.5	0	0	1	0.5	0.5	0.5	1	0	5.5
Sum	2.5	0	0	0.5	1	1.5	0	2.5	0	1.5	2.5	1	2.5	1.5	2	1	

The table offers many other examples of the lack of a connection between the number of requirements in the general liability equation and the final “generosity” of the legal system concerned. For instance, among the countries with the lowest rate of success for plaintiff’s claims, one can find Bulgaria and Spain, that is, two legal systems endowed with an open-ended general clause and deeply indebted to French legal culture.⁹⁷ Portugal – whose general clause, Art. 483 of the Portuguese Civil Code, is modelled after § 823 BGB and whose legal culture is impregnated with German influences⁹⁸ – displays a distinctively high rate of “generosity”, much closer to that of France than to that of Germany. Furthermore, Greece’s and Italy’s rates for successful claims are far apart despite their general provisions on torts (Art. 914 of the Greek Civil Code and Art. 2043 of the Italian Civil Code) being almost identical.

What does all the above tell us about the traditional thesis that there is a correlation between the structure of the liability equation, the space reserved for causation and the “generosity” of a legal system? We think that our results demonstrate that the elements of negligence as a cause of action are decisive neither in shaping legal actors’ approaches to causal problems nor in determining the higher or lower rates of “generosity” of a given jurisdiction.

⁹⁶ For some illustrations of this creativity, see, for instance, *Bernhard A. Koch*, Proportional Liability for Causal Uncertainty: How It Works on the Basis of a 200-Year-Old Code, in: *Uncertain Causation in Tort Law*, ed. by Miquel Martín-Casals / Diego M. Papayannis (2015) especially 73, 75, 78f., 83.

⁹⁷ See respectively Art. 45 of the Bulgarian Obligations and Contracts Act and Art. 1902 of the Spanish Civil Code. On the French influence in both countries, see *Marta Infantino / Eleni Zervogianni*, The European Ways to Causation, in: *Causation in European Tort Law* (n. 2) 85, 100f. (Bulgaria) and 96f. (Spain).

⁹⁸ On these features of the Portuguese tort law system, see *Infantino / Zervogianni*, *European Ways* (n. 97) 110–112; *Bussani / Palmer*, *Liability Regimes* (n. 62) 154f.

Needless to say, the quantitative method we used to illustrate this point has its own limits, which actually affect any empirical study of legal phenomena.⁹⁹ There is indeed little doubt that legal quantitative analysis has to be complemented by descriptive, qualitative research highlighting traits and patterns that are worthy of attention and that often are not captured by numbers alone. Nevertheless, we believe that the data offered above are helpful, not because they *per se* tell us something but insofar as they constitute an indicator of the underlying qualitative parameters that should be taken into account when trying to taxonomise legal systems. Relying on the evidence provided by such an indicator and by its associated qualitative research, we suggest that mainstream comparative law arguments should be refined by considering the general character of each jurisdiction's tort law culture. By "tort law culture" we refer not only to the exterior appearance of tort law systems' fundamental rules of liability as understood by legal actors, but also to the many other features that might influence the way in which causation is employed, that is, the breadth given to non-tort law remedies (such as contract law and compensation schemes), the degree of creativity and policy-making that judges are entrusted with, the comparative models a given system is influenced by, the deeply-rooted assumptions about what one should blame others for and what one should accept as part of every day's life risks, and so on. To put it differently, we argue that the role and style reserved for causation in the systems surveyed can be best understood as a variable of these systems' overall tort law culture.

It is on the basis of such a relationship that we propose to enrich the traditional observation about causation in England, France and Germany with a more complex distinction between systems with (what we will call) overarching, bounded and pragmatic causation. In the next section, we will illustrate this tripartition relying upon the comparative outcomes associated with the hypotheticals presented above.¹⁰⁰ The cases surveyed are indeed characteristic of the way in which the legal systems under examination deal with causation and will thus allow us to draw some general conclusions. A more thorough justification of the classification of each jurisdiction within a specific group, however, is possible only with recourse to the entire study and thus exceeds the scope of this paper.¹⁰¹

⁹⁹ See, among the many, *Holger Spamann*, *Empirical Comparative Law*, *Ann.Rev.L. & Soc.Sci.* 11 (2015) 131, 138–140; *Ran Hirschl*, *Comparative Matters – The Renaissance of Comparative Constitutional Law* (2014) 268–281.

¹⁰⁰ See above, section III.

¹⁰¹ See, in this regard, *Infantino / Zervogianni*, *European Ways* (n. 97) 89–128.

V. A new taxonomy

Underlying the tripartite distinction between legal systems with overarching, bounded and pragmatic causation, there is a similar starting point to the mainstream comparative observation about the inverse link between the elements of the liability equation and the space devoted to causation. It may thus seem at first glance that our tripartition is a confirmation rather than a refinement of the traditional taxonomy. Nevertheless, our tripartition takes into account factors other than the basic tort law requirements in order to capture additional features that might be relevant and to offer a broader explanatory grid of legal systems' attitudes towards causation and liability. France, Germany and England are still grouped separately. Yet, a second look into the rest of the countries that fall within each group reveals our departure from the typical classification of jurisdictions.¹⁰²

According to our grid, countries with “overarching” causation are those showing a long-lasting indebtedness to the French open-ended approach to liability: besides France, this is the case for Italy, Spain, Poland and Bulgaria. In these countries' tort law, causation has a large role to play because, in the absence of preliminary filters other than fault and damage, it is used as a privileged instrument to weigh parties' interests.¹⁰³ Yet, this weighing of interests, rather than being openly carried out by judges, is generally unexpressed and concealed under the manipulation of the ordinary principles of causation. As to liability outcomes, the numbers aggregated in Table 4 allow us to draw some inferences about the success rate of tort law claims in these countries. The open-endedness of tort law structure in the jurisdictions falling within this group relates to a generally high rate of success, although significant differences between countries might be detected.¹⁰⁴ As compared to “bounded” regimes, which scored an aggregate total of 3.5, systems with “overarching” causation appear to yield a greater number of successful actions in our hypotheticals, their aggregate score being 6.5. Yet these systems' limited openness to overt policy-reasoning make them less creative than jurisdictions with “pragmatic” causation, especially in difficult and dubious cases – a trait which explains why the overall rate of success of plaintiffs'

¹⁰² As follows from the analysis below, this is particularly evident when it comes to countries with pragmatic causation.

¹⁰³ For a survey of these systems' approaches as to causation, see *Infantino / Zervogianni*, *European Ways* (n. 97) 89–101; *Principles of European Law – Non-Contractual Liability* (n. 2) 755–758, 763 f.; *Suzanne Galand-Carval*, *Causation under French Law*, in: *Unification of Tort Law: Causation* (n. 2) 53–62; *Francesco D. Busnelli / Giovanni Comandé*, *Causation under Italian Law*, *ibid.* 79–92.

¹⁰⁴ According to the Table 4, above, we have at one extreme France and Italy scoring 2.5 and at the other extreme Bulgaria and Spain scoring 0. In the middle, Poland scored a 1.5.

claims in these countries remains inferior to that of “pragmatic” regimes (whose aggregate score is 9).

Much more limited and rigid is the role played by causation in the countries labelled with “bounded” causation, that is, countries influenced by the German legal culture and those belonging to the Scandinavian legal family: Germany, Greece, Portugal, the Czech Republic, Denmark and Sweden.¹⁰⁵ Here causation is only one of the many means set up by the system to deny or, in any case, to limit tort law liability, whose functions are largely absorbed by other concurrent mechanisms, such as contract law rules in Germany and collective insurance schemes in Denmark and Sweden. As a consequence, causation in these systems plays a somewhat more confined and rigid function than it does in jurisdictions with “overarching” causation. All these features help explain why tort laws in “bounded” regimes are generally (though not universally, Portugal being the main exception) quite restrictive in terms of liability outcomes, with fewer successful actions than other regimes. In our sample, the rate of success of the plaintiff in these legal systems is actually the lowest: with an aggregate of just 3.5.

In the middle between systems having “overarching” and “bounded” causation, there are the jurisdictions we label as “pragmatic” – Austria, the Netherlands, Lithuania, England and Ireland.¹⁰⁶ These jurisdictions have different tort law histories and structures. They are also divergent in terms of concrete outcomes. This is clearly illustrated in Table 4. According to our rapporteurs, plaintiffs in the Austrian and Dutch courts would likely have the same rate of success as plaintiffs in France and Italy (all these countries scoring 2.5), making them the most plaintiff-friendly legal systems in the sample. In both England and Ireland, the plaintiff’s success rate drops to 1.5, and it descends to 1 in Lithuania. Nevertheless, all these jurisdictions have something in common, since they share a similarly pragmatic approach to causation problems.¹⁰⁷ Pragmatism in the causation field means that courts are openly sensitive to the concrete implications of their decisions and tend to propose flexible, case-tailored solutions that are driven neither by the dictates of wide or limited tort law rules nor by dogmatic adherence to

¹⁰⁵ On the general features of these systems, cf. *Infantino / Zervogianni*, *European Ways* (n. 97) 101–116; *Principles of European Law – Non-Contractual Liability* (n. 2) 758–760, 761 f., 764 f.; *Ulrich Magnus*, *Causation under German Tort Law*, in: *Unification of Tort Law: Causation* (n. 2) 63–72; *Konstantinos D. Kerameus*, *Causation under Greek Law*, *ibid.* 75–78.

¹⁰⁶ Cf. *Infantino / Zervogianni*, *European Ways* (n. 97) 117–128. On the main characteristics of these jurisdictions, see also: *Principles of European Law – Non-Contractual Liability* (n. 2) 759, 760 f., 762 f., 764 f.; *Helmut Koziol*, *Causation under Austrian Law*, in: *Unification of Tort Law: Causation* (n. 2) 11–22; *W. V. Horton Rogers*, *Causation under English Law*, *ibid.* 39–52.

¹⁰⁷ Similar remarks, as far as Austria and England are concerned, are made by *Colm P. McGrath / Helmut Koziol*, *Is Style of Reasoning a Fundamental Difference between the Common Law and the Civil Law?*, *RabelsZ* 78 (2014) 709, 741–745.

causation principles,¹⁰⁸ their being influenced instead by a concrete and overt policy-making effort.

Another characteristic of these jurisdictions is their emphasis on the “duty of care” concept. Each situation requires a determination that, given all the circumstances of the case, a “duty” to guard against this harm should be established by the defendant. The “duty” analysis is a flexible one, much as is that of causation. In terms of actual results, “pragmatic” systems are in principle as generous as countries with “overarching” causation, and they are more open to allowing case-by-case deviations to well-established principles when the circumstances so mandate.

Needless to say, the above tripartition should be applied with caution. A number of caveats attach to it.

First of all, the above grouping, like any other taxonomic exercise, emphasizes (what we think are) the main traits of the concerned legal systems, thereby downplaying other aspects of difference and commonality that might be of some relevance. For instance, it is apparent to everyone that Denmark’s and Sweden’s approaches to causation have a rationale which overlaps only in part with Germany’s, the former being firmly rooted in the Scandinavian countries’ pervasive presence of insurance and social solidarity schemes that reduce the space reserved for tort law liability regimes. Equally clear is that England’s and Ireland’s pragmatism is of quite a different nature than that of the Austrian, Lithuanian and Dutch legal systems. While the English and the Irish pragmatism is linked to the open policy-based argumentation which is a fundamental trait of common law jurisdictions, the Austrian, Lithuanian and Dutch approaches seem to be related to the influence of causation scholarship in judicial practice – and also, in the case of Lithuania and the Netherlands, to the contribution of academics in drafting and interpreting the relatively new statutory tort law frameworks.¹⁰⁹

Second, in considering the above tripartition, one should take into account that the grouping is based on our interpretation of the national reports under our project. One clear example comes from the comparison between Italy and Greece. The two countries have Civil Codes that were enacted in the 1940s and which share a lot in terms of historical developments and actual practices. However, in the light of the portraits drawn by our rapporteurs and also our comparative analysis, Italy ended up in the group of countries with “overarching” causation whereas Greece fell in the group of countries having “bounded” causation. In this case, as well as in others, one should be aware of the possibility of alternative classifications. The division should,

¹⁰⁸ A possible exception to this is the Austrian legal system, where the analysis remains quite dogmatic; see the country description of Austria in: *Infantino / Zervogianni*, *European Ways* (n. 97) 117–119.

¹⁰⁹ The Lithuanian Civil Code came into effect in 2000, while the Dutch Burgerlijk Wetboek went into force in 1992.

therefore, be understood flexibly, for many jurisdictions present hybrid features that cannot be adequately captured by any rigid taxonomic effort.

Third, the tripartition proposed herein overlaps only in part with legal systems' outcomes in terms of liability. As Table 4 shows, our grouping of jurisdictions according to the space and flexibility reserved for causation reasoning in tort law frameworks puts together experiences reflecting very different rates of success in terms of litigation. For instance, in Italy a plaintiff's chances of succeeding in the hypotheticals examined is scored at 2.5, while in Bulgaria, another country with "overarching" causation, the success rate value drops to 0. The plaintiff's rate-of-success score in Portugal is 2, whereas in other experiences with "bounded" causation, such as the Czech Republic, the value falls down to zero. Scores in legal systems with "pragmatic" causation range from 2.5 (Austria and the Netherlands) to 1 (Lithuania). It is only when one considers the group as a whole that clearer trends as to the rate of success emerge. This should, however, be taken as a caveat against any easy inference of correlation between systems' legal façades and their actual generosity.

VI. An uncommon core?

When one looks at European tort law systems comparatively and examines how causation works in factual cases, it becomes clear that, apart from some general commonalities (such as the context-dependency of causation arguments and the malleability of the factual/legal divide), the European picture is very fragmented. Sometimes legal systems resort to different devices and reasoning, and yet results might nevertheless coincide.¹¹⁰ Other times the device or rule invoked might be the same, but it might be used with different meanings or might produce different results.¹¹¹ Still, the disagreement as to the outcome does not necessarily imply a different approach to causation as such, the disagreement being attributable to reasons other than causation.¹¹² This confirms Sacco's well-known finding about the possible mismatch between declamatory statements, official rules and operational results,¹¹³ but it also corroborates the idea that it is hard to see clear lines of convergence in European legal systems' approaches to causation.

¹¹⁰ For instance, all our rapporteurs answered Case 10 in our questionnaire by saying that there would not be liability under the circumstances. However, notwithstanding the unanimity of the outcome, the particular reasons leading to the acceptance or to the rejection of the plaintiff's claim differed considerably; see *Infantino / Zervogianni*, Comparative Remarks (n. 24) 421 f.

¹¹¹ See above, at section IV.2., as to the use of the notion of foreseeability.

¹¹² See above, Case C at section III.3.

¹¹³ *Sacco*, Legal Formants (n. 13) 31–34 (I).

Indubitably, this does not prevent one from looking for certain common paths, such as those highlighted above with regard to the interrelationships between the attitude to causation problems and the overall legal culture of the system in which the problem is posed. Our tripartition between jurisdictions with “overarching”, “bounded” and “pragmatic” causation is indeed based on the different forms that such interrelationships might take. We deeply believe that such distinction tells us something about legal systems’ stances towards causation in tort law, and that it is overall more explanatory of European tort law cultures and operative rules than the traditional argument based on the elements of a negligence cause of action.