B Winiger, B Askeland, E Bargelli, M Hogg, E Karner (eds)

Digest of European Tort Law

Volume 4

Digest of European Tort Law Vol 4: Essential Cases on the Limits of Liability

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

DE GRUYTER

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Volume 4:
Essential Cases on the Limits of Liability

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causal link has not been proved and rejected the claim under an 'either-or' approach. Also, the interpretation of unlawfulness as a prerequisite for liability used to be stricter, preferring a clear breach of statutory requirements applicable to the potentially liable party in order for the claim to be satisfied. However, in cases where no particular requirements of law (obligation to act in a certain way or to refrain from certain action) were applicable to a party (such as owners' liability and other forms of liabilities for failure to ensure a certain result), where the standard of conduct is less concrete, victims have had difficulties in proving misconduct as a precondition of liability. Those few indications, among others in light of a more victim-friendly approach becoming more notable in the last decade, indicate that there has been a shift in the general attitude by the courts, extending the protection of victims in a fair and reasonable manner. Also, the amounts of compensations for non-pecuniary harm have become much more predictable in similar cases, often allowing the parties to assess the potential outcome. In addition to a few legislative amendments and adjustments increasing the protection of victims, the limits of liability could potentially be more predictable and could be explicitly examined and developed by the case law in a uniform manner if statutory prerequisites and liability limits were more clearly addressed by the legislator.

21. Lithuania

1 The Lithuanian Civil Code (CC) does not provide for specific tools aimed to limit tortious liability. It is recognised that a duty to compensate all damage for which a tortfeasor's unlawful and faulty behaviour was a *conditio sine qua non* would lead to unreasonably boundless liability. Therefore, the second stage of the causal link is used as a tool to limit liability. The Lithuanian Supreme Court (LSC), without explicit reference but closely following the wording of art 3:201 (Scope of Liability) of the Principles of European Tort Law (PETL), has consistently held that, in the second stage of the establishment of the causal link, it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right, and the protective purpose of the rule that has been violated.[1] Tools of adequacy, the protective purpose of the rule and lawful alternative conduct are not discussed and *expressis verbis* recognised in Lithuanian legal literature and case law.

2 The theory of the purpose of the rule or any similar theory has never been discussed in Lithuanian tort law. Limitations of liability based on the concept of pure economic loss have once been accepted in the case law of the LSC (see below at 3/21 nos 1–8). However, this was a one-off occasion. Later, the LSC returned to its traditional approach of limiting liability via the causal link.

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1 *L B and others v Daugiabučio namo savininkų bendrija 'Medvėgalis' and UAB 'Telšių šilumos tinklai'*, LSC 26 November 2007, case No 3K-7-345/2007.

3 Though not expressly mentioned, the defence of possible lawful alternative conduct has been found in case law. If the damage caused by a wrongful act would also have been caused otherwise by lawful conduct, it leads to a full exemption from liability. However, the issue of alternative lawful behaviour was also seen as a question of causation. The case illustrating this approach[2] (see below at 5/21 nos 1–6) dealt with a claim whereby the plaintiff sought compensation from the State of Lithuania for the pecuniary and non-pecuniary damage suffered as a result of a failure to adopt the relevant gender reassignment legislation. According to the plaintiff, due to the lack of regulation, she (previously he) was forced to carry out gender reassignment surgery abroad and thus not only suffered emotionally, but also incurred surgery and travel expenses. The Lithuanian Supreme Administrative Court found the State in breach of its obligation to comply with its obligation to adopt a law establishing the conditions and procedure for gender reassignment and awarded non-pecuniary damages to the plaintiff. However, according to the court, the inaction of the State shall not in itself lead to compensation for personal expenses related to gender reassignment and treatment because there is insufficient ground for claiming that, if the procedure and conditions for gender reassignment were established in Lithuania, the costs of this treatment would be fully compensated by the State.

4 The foreseeability criterion is also one of the few tools available to limit liability. The case illustrating this approach[3] (see below at 2/21 nos 1–15) dealt with the potential liability of the State for its inability to provide proper health care services to a mentally ill person whose health allegedly deteriorated after being informed that he had cancer and who shot dead the plaintiff's teenager daughter in a state of incapacity. The Lithuanian Court of Appeal (CoA) found the State and the municipality not guilty due to a lack of unlawfulness and fault. Though it was not expressly mentioned in the decision of the CoA, it may be understood from the reasoning that, according to the CoA, the worsening of the person's condition and the intent to commit a crime could not have been foreseen by the mental health institution even if its psychiatrist had consulted with him after the cancer diagnosis. Thus, the argumentation of the CoA demonstrates that the liability of the State and the municipality was not established because of a lack of foreseeability.

5 Many of the interesting categories of this research lack cases. According to the authors, this may be explained only by the size and short span of Lithuanian jurisdiction. Modern tort law rules started to develop only after restoration of Lithuania's independence on 11 March 1990. Lithuania, with a population of approximately 2.7 million inhabitants, appears too small to develop case law in all categories that are the focus of this research.

2 Lithuanian Supreme Administrative Court, 29 November 2010, Administrative Case No A-858-1452-10.

3 Lithuanian Court of Appeal, 13 February 2013, Civil Case No 2A-18/2013.

The fact that employees and other officers act imprudently and negligently does not generally serve as an exemption from liability in board member liability cases under Latvian law.

21. Lithuania

Lietuvos apeliacinis teismas (Lithuanian Court of Appeal) 13 February 2013, Civil Case No 2A-18/2013

<http://liteko.teismai.lt/>

Facts

The twelve-year-old daughter of the plaintiff was shot dead by the defendant, a paranoid schizophrenic (A1), in 2004. The girl was mortally wounded when she entered the apartment of her stepfather, who was about to sell a gun to A1. A criminal investigation established that A1 was mentally incompetent at the time of his action. **1**

The girl's mother filed a claim for compensation of pecuniary and non-pecuniary damage from the Republic of Lithuania, represented by the Ministry of Health (A2) who is responsible for the State health care system, and the Vilnius City Municipality (A3), which is the organiser of mental public care services within its territory and was the owner of the public clinic which provided health care services to A1. **2**

The plaintiff pleaded that improper health care services were rendered to A1 and the mental care institutions failed to control the treatment of A1. The last record at the public clinic of A1's mental health treatment was three years before the murder. A1 had expressed his intention to the public clinic to switch to another institution but never showed up anywhere. The plaintiff pleaded that the worsening of A1's mental condition was caused by A1 being diagnosed with cancer approximately one month prior to the tragic event. The plaintiff argued that A1 should have been treated by a psychiatrist after he was given this diagnosis. **3**

The clinic which treated A1 three years before the tragic event argued that, under the Law on Mental Health Care, a mentally ill patient has the right to choose his or her doctor, health care institution, and scope of medical services and at any time may terminate treatment, except in the case of involuntary hospitalisation. However, a person may be involuntary hospitalised only under certain preconditions, which were absent in this case. Since 1997, the patient had been treated conservatively in the clinic where he had been prescribed medical treatment. As his mental health improved, the diagnosis was changed to a milder form of mental disorder in 2000. A1 lived on his own, was unemployed, and had no close relations. Therefore, no one informed the health care provider or public institutions about the alleged worsening of A1's condition. Moreover, it was established that, before the murder, not one of the few persons who had contact with the mentally ill A1, including the doctors who were treating his cancer, noticed a worsening of his mental condition. **4**

5 The court of first instance awarded LTL 4,000 (€ 1,158) in pecuniary and LTL 150,000 (€ 43,443) in non-pecuniary damages from A1 and dismissed the claims against the State and the municipality. In 2009, the CoA essentially agreed with the reasoning of the district court; however, it reduced the amount of non-pecuniary damages to LTL 10,000 (€ 2,896).

6 In 2010, the LSC returned the case for retrial in the appellate instance, ordering the court to assess whether the legal regulation on treatment and observation of a psychiatric patient's condition was sufficient to notice in time the possible worsening of mental health which could pose a danger to the public.[1]

Decision

7 The CoA in essence agreed with the decision of the district court.

8 The CoA noted that the legislative framework regulating procedures and control of mental health care is clear and harmonised with legislation of the European Union; neither medical and legal doctrine nor the public opinion expressed reasonable proposals to change the regulation. Under the Law on Mental Health Care, a mentally disordered person may be detained in hospital against his wishes, if: 1) his/her illness is severe, and he/she refuses hospitalisation and 2) there is real danger that, by his/her actions, he/she is likely to commit serious harm to his/her health and life or to the health and life of others. According to the CoA, the regulation in force is sufficient and ensures not only public safety, but also rights to those with mental illnesses. The CoA also analysed the legislation, which regulates in which situations and under which procedure the person's legal capacity is limited and a guardian is appointed and concluded that the regulation in force is appropriate. Therefore, the CoA did not establish unlawfulness in the acts (omission) of the Ministry of Health.

9 The CoA agreed that, under the applicable legislation, it is the function of a municipality to organise individual and public health care. However, the municipality is not the public health care service provider and is not under a duty to control the process of treatment of individual patients. In view of this, the CoA dismissed the claim against the Vilnius City Municipality.

10 Although the claimant did not sue the health care institutions which treated A1, as instructed by the LSC, the CoA analysed *ex officio* whether the medical treatment institutions had met their duty of due care, observing that A1's mental condition did not deteriorate to the point of posing a danger to the public. The CoA observed that there were no recorded suspicions regarding a worsening of A1's mental illness. The CoA also took note of the fact that several months before the crime, A1 was treated in two hospitals, where his status was observed by various medical specialists. The doctors had no suspicions of his capacity, which means that A1 was legally capable several months before the

1 The commented decision is a continuation of a case which was decided in 2010 by the LSC. In 2010, the LSC returned the case for retrial in the appellate instance ordering the court to assess whether the legal regulation on treatment and observation of a psychiatric patient's condition was sufficient in order to notice in time the possible worsening of mental health, which could pose a danger to the public.

crime. Consequently, the CoA held that there were no violations committed in the treatment of A1's mental illness.

11 The CoA held that the failure to involuntary hospitalise A1 was also not proven, because involuntary hospitalisation should be justified by a real danger that, by his/her actions, the mentally ill person is likely to commit serious harm to his/her health and life or to the health and life of others, which had not been established prior to the occurrence of the wrongdoing in this case.

Comments

12 The CoA stated that it is common knowledge that murders, or injuries committed by persons suffering from mental illnesses, occur only rarely. It may only be regretted that this statement lacks any reference.[2]

13 Although it was not expressly mentioned in the decision of the CoA, it may be understood from the reasoning that, according to the CoA, the worsening of A1's condition and the intent to commit a crime could not have been foreseen by the mental health institution even if its psychiatrist had consulted A1 after the cancer diagnosis. Thus, the argumentation of the CoA demonstrates that the liability of the State and the municipality was not established because of a lack of foreseeability.

14 Under Lithuanian tort law, foreseeability is one of the criteria that is considered in the second stage of assessing the causal link, which is understood as an instrument for limiting the scope of liability. Since 2007, the LSC has accepted the criteria-based approach to legal causation suggested by art 3:201 PETL. Without explicit reference to PETL, the LSC stated that, when establishing a causal link, it is necessary to consider the foreseeability of the damage to a prudent and reasonable person at the time of the activity, the nature and the value of the protected interest or right and the protective purpose of the rule that has been violated, the basis of liability and the ordinary risks of life.[3] Such understanding allows for a flexible limitation of liability. For example, if the tortfeasor acted intentionally, foreseeability must be extended further than in the case of negligence.

15 Considering the above, it may be stated that Lithuanian tort law applies lack of foreseeability as a limit to liability within the notion of causation.

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2 On criticism that the CoA did not do what it had been instructed to do by the LSC, see *Selelionytė-Drukteinienė/Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law 2013 (2014) 387, no 86.

3 *L B and others v Daugiabučio namo savininkų bendrija 'Medvėgalis' and UAB 'Telšių šilumos tinklai'*, LSC 26 November 2007, case No 3K-7-345/2007.

21. Lithuania

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) 27 January 2015, Civil Case No 3K-3-8-916/2015

<http://liteko.teismai.lt/>

Facts

1 The case was initiated by the plaintiff, the previous owner of a plot of land and administrative building in the centre of the city of Vilnius, against the Vilnius city municipality. The plaintiff argued that, due to the alleged illegal construction of an overhead road, linking two roads, the value of the property decreased, and he had managed to sell it at a lower price than established by the property assessor. The difference between the price established by the property assessor and the price at which the plaintiff sold the plot of land and administrative building was approximately 3 % and amounted to € 157,699. In the plaintiff's view, this amount must be regarded as a loss suffered by him and the result of an unlawful construction permit, since the distance of the overhead road from the administrative premises is less than in the urban plan.

2 The courts of lower instance dismissed the claim. They decided that the plaintiff failed to prove illegal actions and damage. According to the courts, there was no evidence that the Vilnius city municipality issued the permit illegally. Moreover, the value established by a property assessor does not necessarily coincide with the sales price.

Decision

3 The LSC upheld the decisions of the lower instance courts; however, it supplemented their motives. For the first time in Lithuanian case law, the LSC relied on the concept of pure economic loss established by art 2:102 of the Principles of European Tort Law, which has been analysed once in Lithuanian legal literature.[1]

4 Having referred to art 2:102 PETL, the LSC stated that interests of a purely economic nature lie at the bottom of the scale of protected interests. Thus, their defence may be more limited in scope. In the Court's view, life, health, and liberty enjoy the most extensive protection. Property rights are of lesser importance compared to the above mentioned, however their defence is still superior to the defence of pure economic interests.

5 On the other hand, the fact that the interest infringed is at the bottom of the scale of the values protected by tort law does not in itself justify the conclusion that this value should not be defended. In deciding whether compensation for pure economic loss is to be awarded, it is necessary to establish a balance between the interests of the victim and

1 *S Selelionytė-Drukteinienė*, Grynai ekonominio pobūdžio žala kaip specifinė žalos kategorija Lietuvos Respublikos deliktų teisėje [Pure economic loss as a special kind of loss in Lithuanian tort law] Jurisprudencija 2009 no 4 (118) 123–146, commented by *H Gabartas*/*L Šaltinytė*, Lithuania, in: H Koziol/BC Steininger (eds), European Tort Law (ETL) 2009 (2010) 374, nos 59–62.

those of the infringer. According to the LSC, liability for pure economic loss could arise only if the intentional form of fault of the infringer, the economic interest of the infringer, and the importance of the financial loss for the victim were established. In this case, these elements were not established. The municipal administration did not pursue and did not have an economic interest in organising the construction of the overhead road. On the contrary, it met the needs of society – improving transport connections. Thus, the fault of the defendant was not established. In addition, the plaintiff, who sold the property at a price only approximately 3 % lower than the market value established by the property assessor, did not prove that there was a sufficient legally significant causal link between the defendant's actions, namely the construction of the overhead road, and the decrease of sales price. The LSC also noted that the property is located in the central part of the city, in an area of heavy traffic, thus, the property owner must be prepared for the restrictions that result from necessities of a modern city.

Comments

6 The LSC based its decision on the purely economic nature of loss even though the CC establishes no such category of loss. Thus, there is no general principle that pure economic loss is not recoverable in tort. In this decision, the LSC has attempted to accept the concept of pure economic loss in tort law and use it as a tool to limit liability.

7 There are no cases of protected purpose of the conduct norm breached, but a similar result was reached in this case on a more general level. Based on the reasoning of the LCS in this case, it was decided to report this case under this category, even though this case does not fully fit it.

8 However, until now, the concept of pure economic loss has not gained significance in case law. Nevertheless, the statutory definition of causal link established in art 6.247 CC sets the nature of damage as one of the factors to be taken into account when establishing a causal link. Article 6.247 CC sets out: only damage that is connected in such a way to the actions (omission) that made the debtor liable, that it, in regard to the nature of his liability and of the damage caused, can be attributed to him as a consequence of these actions (omission), is eligible for compensation.[2] Thus, causation shall serve as a tool to limit tortious liability for pure economic loss.

2 The rule resembles art 6:98 of the Dutch Civil Code, although it actually uses the term 'damages' (nuostoliai), not 'damage' (žala): 'Only damage that is connected in such a way to the event that made the debtor liable, that is, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation', see <http://www.dutchcivillaw.com/civilcodebook066.htm>.

21. Lithuania

Lietuvos vyriausiasis administracinis teismas (Lithuanian Supreme Administrative Court) 29 November 2010, Administrative Case No A-858-1452-10

<http://liteko.teismai.lt/>

Facts

1 The plaintiff sought compensation from the State of Lithuania for the pecuniary and non-pecuniary damage suffered as a result of a failure to adopt the relevant gender reassignment legislation. According to the plaintiff, due to the lack of regulation, she (previously he) was forced to carry out the gender reassignment surgery in Thailand and thus incurred surgery and travel expenses amounting to approximately LTL 31,000 (€ 9,000).

2 The plaintiff also sought LTL 100,000 (€ 28,962) in non-pecuniary damages. According to the plaintiff, she suffered mentally before the surgery and after it due to the lack of medical services to transgender persons resulting from the gap in regulation, as well as to the refusal to issue new personal ID confirming the reassigned gender.

Decision

3 The first instance court dismissed the claim for pecuniary damages and awarded LTL 30,000 (approx € 8,700) in non-pecuniary damages.

4 The Supreme Administrative Court of Lithuania (SACL) upheld the decision. The courts agreed that the unlawful conduct of the State took the form of a legislative omission, as the legislator failed to comply with the obligation laid down in the Civil Code to adopt a law establishing the conditions and procedure for gender reassignment. However, the inaction of the State did not in itself lead to the compensation for personal expenses related to gender reassignment and treatment. There is no sufficient ground for claiming that, if the procedure and conditions for gender reassignment were established in Lithuania, the costs of this treatment would be fully compensated by the State. The SACL based its decision, inter alia, on art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the right to respect for private and family life but does not guarantee the right to free treatment.

5 However, the absence of appropriate legal preconditions for the treatment of the disease and change of personal ID after the surgery caused moral suffering to the plaintiff.

Comments

6 Only one case has been found in this category. The concept of alternative lawful conduct is not *expressis verbis* used in Lithuanian case law. However, the motives of the commented decision show that, if the same damage would have occurred but for the illegal

actions of the perpetrator, no liability would arise. In this case, the core of the question with respect to pecuniary damages was whether, in the absence of unlawful conduct on the part of the State, the plaintiff would still have incurred the costs of the gender reassignment surgery. In other words, even if the Lithuanian legislation had made it possible to carry out this surgery in Lithuania, this does not mean that such medical services would be provided free of charge. The SACL addressed the issue of alternative lawful behaviour on the basis of legal causation and reached the conclusion that there was no causal link between the illegal actions of the State and pecuniary damage.

22. Poland

Sąd Najwyższy (Supreme Court) 14 January 2005, III CK 193/04

OSP 7-8/2006, item 89

Facts

1 V took out three loans (nos 1, 2 and 3) in the defendant's bank A, but he did not pay off any of them. A therefore issued enforcement titles on all three loans, however, only the title to credit no 3 was subject to a court enforcement. After having executed loan no 3 and, upon A's request, the bailiff continued execution on loans no 1 and no 2. The execution did not result in full satisfaction. V sued for damages in tort claiming wrongful and negligent conduct of the bank.

2 Both the first and the second court dismissed the suit, because although the bank initiated the enforcement of the contracts in violation of law, it caused no loss to V, but rather a reduction of his debts. Hence, the courts determined that A may not be held liable for a tort (art 415 KC). At the time of delivery of the appellate judgment, V was still in default. V appealed to the Supreme Court.

Decision

3 The Supreme Court considered whether the bank could argue that, had the bailiff not continued execution on credits no 1 and no 2, the bank could have been able to obtain a court enforcement on the loans and could have performed execution lawfully (lawful alternative conduct). In general, the Court permitted a supervening cause to be taken into account for the purpose of assessing the extent of property losses.

4 The Court established the following conditions that should be met in order to plead a supervening cause:

5 (i) First, the supervening cause has to form a part of a parallel, hypothetically constructed chain of events, independent of the actual sequence of events. A hypothetical cause is an event that has been prevented from happening by the first, independent event.

8 Such reasoning is debatable, as the court probably did not sufficiently assess the causal link in the matter in question. Due to the fact that documents submitted to the chairmen of commissions of the Parliament are usually made available to the members of commissions and also to the participants of their meetings, one could argue that it would be difficult to conclude that A could not foresee that its application might become available to journalists or that A's action was too remote to be taken into account as the cause of dissemination of information in the newspaper. It is also difficult to provide solid grounds for such a broad limitation of liability by referring to the principle of justice.

21. Lithuania

Lietuvos Aukščiausiasis Teismas (Lithuanian Supreme Court) 15 June 2018, Civil Case No 3K-3-235-1075/2018 and 30 October 2018, Civil Case No e3K-7-143-684/2018
<http://liteko.teismai.lt/>

Facts

1 At midnight, a motor vehicle accident occurred. The police arrived, cordoned off the street and started an investigation into the cause of the accident. Because of the street closure, a traffic jam formed behind the accident scene. When a taxi carrying the passenger approached the scene of the first accident, a police officer showed a sign indicating either to reverse or to turn around. The passenger of the taxi stepped out of the cab on to the street in order to help the taxi driver to turn around. Another car driven by a speeding and intoxicated driver (defendant DN) crashed into the man causing him fatal injuries.

2 The plaintiffs, the immediate family members of the passenger, sought compensation from the driver DN and the State of Lithuania, represented by the Police Unit, solidarily, for pecuniary and non-pecuniary damage. The plaintiffs argued that the State should also be held liable, since the police officers contributed to the damage by failing to ensure the safety of the traffic at the scene of the first accident.

3 The court of first instance dismissed the claim against the State, justifying its decision inter alia on the basis of the foreseeability of the damage. The court stated that: 'the failure of the police officers to foresee that a drunk driver would arrive at the accident scene and that he would not react to the flashing warning lights of police cars and that he would cause the second detrimental accident does not amount to a breach of the duties of police officers'.

4 The CoA reversed, finding the State liable on the basis of art 6.271(1) CC, which provides for liability of the State for damage inflicted in the course of the activity of public authorities, irrespective of the fault of any particular officer.

Decision

5 The LSC agreed with the findings of the CoA. Both courts held that the officers failed to take the action necessary to control the behaviour of traffic participants, leaving it to the drivers to decide on how to act. Since the police officers had not detoured traffic after the first accident, they failed to exercise their duties in order to ensure general traffic safety. According to the CoA and the LSC, since a causal link between the omission of the police officers and the damage is only indirect, the State shall be responsible to the plaintiffs for only 5 % of the damage.[1]

Comments

6 In this case, the loss was triggered as a result of 'intervening' misconduct of a third party – the intoxicated driver. However, the LSC considered that the State is also liable because there was a sufficient connection between the omission of police officers to act and the damage. Thus, the consequences of damage in this case were not based on an independent act on the part of a third party. The LSC explicitly indicated that the damage was not too remote a consequence of the omission of the police officers. The decision to declare the State liable only up to 5 % of damage is questionable. In the authors' opinion, the joint and several liability of the State and the intoxicated driver and a recourse action between the two tortfeasors would be the correct solution.

7 No cases were found to illustrate the issue as to when the consequences of damage are the result of an intervening wilful act, even though causality exists in the sense of the *conditio sine qua non* test. Thus, it is difficult to state whether the separate act of the third party shall exempt the first perpetrator from liability. According to the authors, the first tortfeasor should not be held liable for the (part of the) damage that occurred due to an intentional act of a third party. In other cases, issues of liability of the first party depend on a comprehensive evaluation of interests – the nature of the damage caused, the degree of fault, foreseeability, etc.

1 It seems difficult for Lithuanian courts to abandon the rule that if the conduct of one party only indirectly creates the possibility for another to cause damage by his independent conduct, the liability of those parties would be several. This approach precludes an application of solidary liability in any case where there is a person whose conduct is a direct cause of damage, whereas another person fails to prevent infliction of that damage, even if he was under a legal duty to do so. For criticism of the approach, see *S Selelionytė-Drukteinienė/L Šaltinytė*, Lithuania, in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2013 (2014) 387, no 23.

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