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Role of Foreseeability in Imposition of Civil Liability

L.L.M. Edijs Brants
University of Latvia, Faculty of Law
brants.edijs@gmail.com

Abstract

The purpose of this article is to offer an insight into the role of foreseeability in imposition of civil liability. The article contains analysis of the principle of foreseeability from various points of view, for example, by analysing it from the perspective of the general (fault-based) model of liability as well of the strict liability. Likewise, the article analysis the role of foreseeability during determination of preconditions to civil liability, for example, by introducing it into the concepts of “fault” and “causation”. The aspects referred to in this article are predominantly analysed from the theoretical perspective. The article references various legal sources from different countries, which allows other legal scholars to use the conclusions offered herein.

Keywords: causation, civil liability, fault, fault-based liability, foreseeability, strict liability.

Introduction

According to the general principle, liability is incurred for faulty behaviour (fault). Fault is when a person’s performed activity does not conform with the required level of care either in form of negligence or intent. Herein negligence is one of the main concepts which must be analysed before concluding whether liability should be incurred for the caused damage. The main component of negligence is the test of reasonable careful person. This open-ended concept (general clause) helps to determine a standard of required care, which then is compared to the tortfeasor’s conduct. If this conduct is not in line with the standard of the required care for even a little, fault will be established, which is one of the mandatory preconditions for imposition of civil liability within the framework of the general (fault-based) liability.

Important role for determination of the level of required care is reserved for foreseeability of damage, which forms an essential part of the test of reasonable careful person. Even as early as the Roman Law the *bonus pater familias* has always been as follows: whether 1) an average Roman man, if he had been in the position of the wrongdoer, would have reasonably foreseen a possibility that his activity would cause damage to another person; 2) an average Roman man, if he had been in the position of the wrongdoer, would have performed reasonable and adequate activities to avoid such consequences; 3) the potential wrongdoer performed any such activities (Grueber, 1886). This test has withstood the test of time and can nowadays be found in many legal systems across Europe, whereby the analysis of negligence has been reduced to balancing exercise between possibility of risk, on the one hand, and required level of care (necessary preventive measures) on the other. Herein foreseeability is evaluated by identifying possibility of risk.

The general (fault-based) liability model is typically juxtaposed against the strict liability. In the framework of strict liability, liability is imposed for risk if the damage to the other person was caused while the strict liability subject was performing certain activities within the sphere of strict liability. It is generally recognised that the elements of fault (negligence; test of a reasonable careful person; required care; foreseeability etc.) herein do not play any legal role, because liability in strict liability model is imposed on the subject even if it has acted as a reasonable careful person under the given circumstances. However, the foreseeability is the key concept which demands a second look at the above statement, because it is also reasonable to claim that the general (fault-based) liability framework cannot be distinguished from the framework of strict liability. Namely, the borderline between these two frameworks is so blurry that the anomaly status of the strict liability in private law should be questioned. By analogy, the foreseeability also makes it difficult to distinguish preconditions of civil liability with scientific precision, especially regarding fault and causation. Therefore, these aspects will be analysed further in the article.

Foreseeability as Precondition of Fault

Foreseeability from Historic Perspective. In Roman law there were two criteria of negligence, which formed the test of reasonable careful person: foreseeability of damage and prevention of damage. These criteria can be clearly seen in practice in the classic example of pruning, which is provided in digest D. 9, 2, 31: if a pruner drops branches and they hit a passer-by, the pruner will be held liable if these branches were dropped in a public place without shouting a warning to the passer-by. However, this digest also references opinion of Mucius, according to which the pruner will be found liable for fault (negligence) also if the branches were dropped in a private place. Fault (negligence) is determined when what could have been foreseen by a diligent man was not foreseen, or if the warning about the impending danger was voiced at the time it was already too late

to escape the danger. Under this reasoning distinction between public and private place is irrelevant since people often make their way across private places.

Since the pruner could reasonably foresee that dropping branches in a public place could potentially harm a passer-by (foreseeability), even more so if the passer-by was not warned upon dropping the branches (prevention criterion), the pruner is to be held liable. Moreover, Mucius argued that the foreseeability criterion would be fulfilled even if the pruning was done next to a private road, considering that in majority of cases people often make their way across private places. However, if there is no such road then the liability for fault (negligence) will not be incurred, because the pruner could not expect that somebody would pass by such place (foreseeability criterion is not fulfilled).

The opinion of Mucius is considered as the most prominent attempt to provide a definition of fault in the Roman sources, which provides good insight into an objective approach, seeing that the tortfeasor's conduct required a comparison with an abstract measurement. This seemingly general nature of Mucius' formulation has led some scholars to believe that the Roman lawyers equated fault with negligence, the failure to exercise the care of reasonable careful person, with foreseeability as its main criterion (Winiger, Karner & Oliphant, 2018).

Likewise, foreseeability was the focal point also in Paul's digest D. 9, 2, 28, in which the defendant was digging holes to catch bears and deer. In one of these holes a slave fell in and got injured. Paul claimed that the defendant is liable only if the holes were dug alongside a pedestrian road – the defendant should not be liable if holes were dug in a hunting zone, or if the slave was warned or if it could foresee the danger in any other way. Similarly, in Ulpian's digest D. 9, 2, 9, 4 liability of a javelin thrower was dependent on whether the javelin throw was performed in a training field or in a public place. Whereas, digest D. 9, 2, 11 addressed a situation where a hairdresser had set up his workplace close to an area where balls were usually thrown. While the hairdresser was shaving a slave's beard, a ball hit his hand and as a result the hairdresser cut the slave's throat. In Proculus' view the hairdresser was at fault, whereas Ulpian maintained that liability should be incurred only if the balls were thrown regularly near the area of the accident; it could also be argued that it was fault of the injured party itself if it chose to shave its beard at a hairdresser who provides its services at a dangerous place. Thus, there exists close relationship between the degree of danger and foreseeability of damage.

Foreseeability in modern private law. The Roman law criteria of foreseeability and prevention can nowadays be applied to two aspects – risk (that must be foreseen) and care (that must be exercised to prevent or mitigate the risk). Therefore, when the test of a reasonable careful person is applied, a balance between risk and care is in fact sought. Namely, the higher the risk of damage, the higher the level of foreseeability will be and consequently the higher level of care (more serious preventive measures) the person has to exercise.

Today both the common law system and Romano-Germanic legal system have recognised this method of balancing between risk and care when assessing negligence. The level of risk can be determined by a) the seriousness of the expected damage and b) the probability that an accident will happen. And the level of care can be broken down into c) the character and the benefit of the conduct and d) the burden of precautionary measures (van Dam, 2013). These levels are evaluated in a complex balancing (adjusting) exercise (Winiger, Karner & Oliphant, 2018), by keeping in mind that rights and freedoms cannot be fully warranted at the same time – full freedom to act would make society extremely dangerous, whereas full protection of rights and interests would paralyse society. It therefore follows that the criteria of foreseeability (risk) and prevention (care) that were recognised in the Roman law are presently divided into sub-criteria, though keeping the same underlying idea.

This approach can be illustrated by the *Bolton vs Stone* (1951) case, where during the game of cricket the ball was hit outside of the playing field and it hit a woman passing by. Prior to this accident, in the last 30 years the ball had been hit on the street only six times. The woman's claim was dismissed by the fact that the risk of damage was foreseeable *per se*, but this risk was so small that it did not amount to negligence. As was stated by Lord Reid: "The test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of views of safety, would have thought it right to refrain from taking steps to prevent the danger" (van Dam, 2013). When considering this example from the "four factor" standpoint, on the risk side a) the seriousness of the expected damage concerned personal injury, but b) the probability that an accident would occur was very low. Whereas, on the conduct side, c) the risk (probability and seriousness) did not outweigh the costs of precautionary measures such as erecting a high fence. Moreover, d) cricket is a useful activity, even though the character and benefit of the conduct can be a ground of justification in exceptional circumstances only (van Dam, 2013). It must be noted that the outcome was different in *Miller vs Jackson* (1977) case, which was reviewed 26 years later, where the likelihood of cricket balls being hit out of the ground was significantly higher (regardless of the 4.57 m high fence) – the plaintiffs successfully gave evidence that over the last three years in total thirteen incidents had occurred, when balls had been hit into their property, some of which chipped their brickwork, damaged their roof tiles etc. (Winiger, Karner & Oliphant, 2018).

Therefore, the risk of damage or foreseeability of damage is characterised by two criteria: a) seriousness of the expected damage; b) probability of the damage occurring. Foreseeability of damage as one of the components of negligence is envisaged also in paragraph 1 of Article 4:102 of the Principles of European Tort Law (PETL):

"The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the *foreseeability of the damage*, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods."

Majority of these components of negligence had already been recognised in Roman Digest, and in fact most of them are generally still recognised in majority of legal systems across Europe (Winiger, Karner & Oliphant, 2018).

The author agrees with the suggestion that the criteria laid down in this legal norm should be followed, while simultaneously supplementing the clause of reasonable careful owner with relevant content in Latvian law (Kubilis, 2016). In Latvian civil law it is the role of foreseeability that is especially highlighted in determination of the fault of the tortfeasor (Kārklīņš, 2015). This follows from the Article 1646 of the Civil law of Latvia (CL): “Ordinary negligence shall be considered to be that lack of care and due diligence as must be observed by any reasonable careful person.” Similarly, the foreseeability is also the central issue in concept of negligence in tort liability in Italian private law, since negligence in Italy is defined, amongst other things, as failure to foresee that which should have been foreseen, as well as failure to act accordingly. Likewise, foreseeability is an essential precondition that gives rise to liability in tort law of Spain (Winiger, Karner & Oliphant, 2018) and Norway, because the very first question that must be answered is how likely it is that this act leads to damage. The PETL commentary also notes that foreseeability, perhaps, is the most important and practically most appropriate factor, and this claim is also confirmed in other legal sources (Koziol, 2012).

When talking about the principle of foreseeability, its basic idea must always be stressed: the more serious the expected damage and the more likely it is that it will occur, the bigger the risk, and the higher is the ability to foresee such risk. I.e., the faster someone drives through a residential area, the more likely it is that an accident will occur, and the more serious the consequences will be (van Dam, 2013). As it relates to the above-mentioned pruning example – therein the possibility of risk is determined by the fact that the branches pruned next to a road frequently used by others, whereas the seriousness of the expected damage is determined by the potential damage to health of the passerby, when the branches were dropped. It follows, therefore, that the pruner could have reasonably foreseen the risk of damage, which in turn necessitated implementation of relevant prevention measures (i.e., to exercise adequate care). Similar arguments regarding the risk of damage were used by the Supreme Court of the Czech Republic in a case where the plaintiff had brought a claim against the forest owner because a tree fatally fell on the plaintiff’s daughter as she was riding her bicycle through the owner’s forest. The owner argued that it had a limited possibility to impact the forest resources, even more so considering that the forest was partly located in a nature protection zone. The Supreme Court rejected these arguments, except for the defendants claim that it is unreasonable to hold the defendant liable for inability to be in full control of the entire forest area (i.e., to inspect each tree separately). However, under the circumstances the fatal accident happened not to a person freely moving in the woods but rather to a person riding bicycle on a forest path, where the movement of persons is usual. Moreover, the path was marked as a cycle path. In the end, the defendant was held liable for failure to inspect condition of the trees close to this path (Winiger, Karner & Oliphant, 2018).

It is essential that the degree of probability of damage is established from the perspective of the moment right before the harmful event. Namely, this level of possibility, same as the other components of negligence, must be evaluated from an *ex ante* perspective (Winiger, Karner & Oliphant, 2018). However, once a case is brought before the court and the judge has heard the facts, it may be tempting for him to look at a case with hindsight. For example, in *Haley vs London Electricity Board* (1965) a blind man had fallen into a hole on the pavement and as a result of this fall, he lost his hearing. The construction worker had marked the hole only with his hammer. The court decided that an accident to a blind person could have been expected with a reasonable degree of probability, referring to statistics showing that large numbers of unaccompanied blind people use pavements. As Lord Dunedin said: “People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities” (van Dam, 2013).

In Latvian case law the risk of damage is often established in instances where “the defendant, whose commercial activity is related to provision of hotel services and housing of guests, could not be unaware of the consequences that can result from insufficient removal of ice from the territory.” Similarly, the following argumentation was used in another case: “Considering that the retail shop is a public place that is being used for commercial activity and is visited by a large number of people, the defendant as the owner has to ensure that the building conforms with the requirements of construction and safety standards, and that its use does not endanger visitors.” The risk of damage was also described as such: “It is a well-known fact that emergencies related to broken water pipes happen quite often, and therefore the cause of such emergency does not occur due to an exceptional extra-contractual natural event, which the defendant, who was responsible for the water pipes, could not have reasonably foreseen.”

It follows from this case law that when the risk of damage is determined, the nature of the defendant’s performed activity and its potential harmfulness (for example, if services are regularly provided in a dangerous way to a large number or people), as well as potential risk of damage under normal everyday circumstances (for example flooding of apartment, which is rather often occurrence), may be of importance.

When analysing the risk of damage, the harmfulness of the activity, which was indicated as a criterion in first paragraph of Article 4:102 of the ELTP, must also be taken into account. In this regard the Supreme Court of Justice in Austria reviewed a case where a soccer goal fell on a child and caused injuries. The soccer goal had initially been adequately reinforced, but over time the reinforcements were removed as the goal was often relocated. The Supreme Court decided that any person who produces or keeps a source of danger in its sphere of risk is obligated to protect other persons, as far as it is reasonable in relation to the risk. Thus, the defendant had to implement adequate security measures regarding the freely standing goal, because this source of danger was in its sphere of risk. Existing risk of damage call for an obligation to implement security measures, as long as they are reasonable. Moreover, the duty to maintain safety also applies to dangers created unlawfully and wilfully by third parties (Winiger, Karner &

Oliphant, 2018). Elaborating on this example, it is important to highlight the criterion of sphere of risk, which is one of the main components of negligence, considering that lack of adequate security measures (lack of care) can be imputed only on a person in whose sphere of risk performance of such activities or relevant risk of damage exists in the first place. This aspect is especially important in the context of omission when, contrary to active conduct, it is more difficult to identify a person to impute negligence on.

Regarding degree of danger of an activity the legal literature often quotes a phrase from *Becket vs Newalls Insultation Co Ltd* (1953): “The law expects a man a great deal more care in carrying a pound of dynamite than a pound of butter” (Winiger, Karner & Oliphant, 2018). Additionally, the degree of danger posed by an activity or thing also depends on where it is, when it is there and how long it is there for. Sometimes a situation that poses only a small element of risk at any given moment may yet be regarded as dangerous because of its long duration. As pointed out in several reports, danger is also the source of strict liability in many legal systems across Europe, or at least a source for stricter liability based on the reversal of the normal burden of proof (Winiger, Karner & Oliphant, 2018).

The CL applies strict liability to sources of increased danger (second paragraph of Article 2347). It thus follows that if an activity reaches certain degree of danger, the level of exercised care or implemented security measures by the possessor of such source will have no relevance whatsoever. Therefore, ability to distinguish a source of increased danger within meaning of Article 2347 of CL from any other source of danger is crucial, because not only relevance of evidence regarding implementation of security measures (level of care exercised) by the possessor of such source depends on this, but also what justifying circumstances will the possessor of such source be able to indicate (in this regard second paragraph of Article 2347 of CL provides an exhaustive list of circumstances that exclude liability).

Foreseeability as Precondition of Causation

Latvian legal sources note that the remoteness of damage

“[...] describes situations where causation raises no objections in a philosophical sense, but it does cast doubt whether or not it is right to impose liability for damages, which the relevant activity had caused, but which are atypical under normal course of business or if it turns out that it was merely an initial impulse which sparked a long chain of events which led to the incurred damages” (Torgāns, 2013).

As regards foreseeability, the author will henceforth analyse origins of the concept of remoteness of damage in common law, as well as origins of the doctrine of adequate causation in Romano-Germanic legal system.

Foreseeability and Remoteness of Damage in Contract Law. One cannot but only agree that *Hadley vs Baxendale* (1854) is a paradigmatic common law case law example within the context of remoteness of damage (Torgāns, 2013). Firstly, it is

considered as the very first case in common law where the principle of foreseeability was analysed, and, secondly, it may be the most quoted case law example when restrictions to compensation of damage are determined (McKendrick, 2010). In *Hadley vs Baxendale* the wing of the plaintiff's windmill was broken and as a result the windmill could not operate. The defendant had undertaken to take the broken wing to the manufacturer as a model; however, due to the fault of the defendant, the delivery of the wing was late and the windmill could begin to operate again much later than initially expected, thus incurring damages to the plaintiff in form of loss of profit. The court rejected the plaintiff's loss of profit claim by arguing that the defendant was not aware that failure to deliver the wing will delay operation of the windmill. According to legal doctrine, the plaintiff's claim was also rejected since the damages were not suffered as natural consequences of breach of contract, because the plaintiff could have had a replacement wing (McKendrick, 2010). From *Hadley vs Baxendale* two following components of damage remoteness test were distinguished: 1) only a naturally occurring damage is to be compensated, i.e., damage occurring under normal course of business due to contractual breach, and 2) only such damages are to be compensated which the parties had contemplated upon conclusion of the contract as possible negative consequences due to breach of contract (Stone, 1997). Some legal sources argue that these two components form a unified test of remoteness of damage, since the borderline between them is rather "smoky" (Peel, 2011).

Victoria Laundry (Windstor) Ltd vs Newman Industries Ltd (1949) is considered just as classical case law example as *Hadley vs Baxendale* (Major & Taylor, 1996; McKendrick, 2010). Here the defendant's obligation to sell and deliver a water boiler to the plaintiff was analysed. The defendant was aware that the plaintiff intended to install the boiler in its laundry as soon as possible. However, the defendant delivered the boiler five months late. The plaintiff claimed the loss of profit which resulted from the late delivery. The court satisfied the claim insofar as it was related to the loss of profit which flowed naturally from the breach of contract, because the defendant was informed only of the fact that the plaintiff needed to have the boiler on the agreed date. Whereas, the rest of the claim was rejected, because the defendant is not responsible for any loss of profit potentially resulting from exceptionally lucrative contracts, which the plaintiff had concluded with the government. The defendant was not aware of any such agreements and therefore the lucrative loss of profit was out of defendant's reasonable contemplation, i.e., these damages were not foreseeable (Voganauer & Kleinheisterkamp, 2009).

Nevertheless, broad discussions amongst legal scholars still exist regarding both mentioned case law examples regarding legal mechanisms in the context of remoteness of damage (Giliker & Beckwith, 2011), including those regarding the issue of whether the test of foreseeability is distinguishable from the test of remoteness. In any case, from the mentioned case law examples a principle can be extrapolated, according to which any damage not occurring as a consequence of natural circumstances and therefore is

unforeseeable, shall not be compensated. This is the very essence of the test of remoteness of damage in contractual law. The foundation for the test of foreseeability comes from a rationale that at the time of conclusion of the contract, the debtor cannot be considered as having subjected himself to any risks that lie beyond the limits of foreseeability (Zimmermann, 1992). Under this test, a person cannot be held liable for damages which do not emerge from the sphere of the contract, i.e., compensated are only such damages which the other party suffers under normal course of business (Peel, 2011; McKendrick, 2010). The debtor at the time of incurring an obligation has an opportunity to restrict its liability in relation to foreseeable damages, but not in relation to unforeseeable damages (von Bar & Clive, 2010). Therefore, the injured party cannot refer to some exceptionally lucrative transaction when claiming that the other party's failure to perform the contract had prevented the injured party from receiving the expected profit (Lando & Beale, 2000). It is said that the question of foreseeability usually arises only when the performance of a contract was a precondition to conclusion or performance of a subsequent contract (Torgāns, 2014).

Though partly, the principle of foreseeability can also be found in Article 1779.¹ of the CL, which prescribes that:

“A person who causes the damages shall compensate the damages in such amount which could have been reasonably foreseen upon entering into a transaction as expected consequences of non-performance, unless such non-performance has occurred through malicious intent or gross negligence.”

This provision was introduced in the CL by the 4 June 2009 amendments (in force as from 1 July 2009). The annotation of these amendments reveals that the article in question was introduced as part of measures to harmonise the CL with other European legal systems and draft unification documents.

Foreseeability and Remoteness of Damage in Tort Law. When joining contractual relationship, the parties are free to limit any unforeseeable risks. Whereas, in tort law there is no such possibility (Major & Taylor, 1996) – here the damage is caused suddenly and without prior agreement of the parties, and the injured party usually has not had the opportunity to take preventive steps that would protect its interests from this damage (Peel, 2011). On the one hand, the approach where “all damage must be compensated” is in line with the principle of effectiveness of civil liability, because otherwise the significance of compensatory and preventive nature of civil liability would be lost (Palmer & Bussani, 2009). On the other hand, it would not be fair if a person was held liable for negligence with regard to such damage which does not usually occur in relevant circumstances and therefore is not foreseeable (Torgāns, 2009). Consequently, in tort law the concept of remoteness of damage also inevitably developed. In tort law, with the help of this test of remoteness of damage, determination is made whether the relevant negative consequences are direct and immediate result of the tortfeasor's activity, whether they are accidental, and whether they are too remote (Abott & Pendlebury, 1993). The basic

idea of the test of remoteness of damage is rooted in the question of whether the sense of fairness should reject claim for compensation of damage, if such damage is a consequence of a tortfeasor's activity (Giliker & Beckwith, 2011). Considering that the courts are not always willing to put too heavy burden of liability on the tortfeasor and its insurers, it is only logical that the test of remoteness of damage is pervaded by legal policy concerns (Cooke, 1995).

Similarly to contract law, notable common law tort cases exist as well. In the context of foreseeability, the most notable are *Re Polemis* and *The Wagon Mound* cases. In *Re Polemis and Furness, Withy & Co* (1921) an employee of the defendant had been loading oil container cargo into the underhold of a ship when it negligently dropped a large plank of wood. As it fell, the wood knocked against the oil cargo, which created a spark which in turn ignited the surrounding petrol fumes, ultimately resulting in the substantial destruction of the ship as well as damage to the surrounding ships. The court decided that the defendant is liable for the damages. Although the employee could not reasonably foresee that the falling plank would cause fire, the court argued that it should have foreseen that a falling wooden plank could cause "certain damage" to the ship (for example, a dent or scratch). Therefore, the defendant was held liable for all damages that were directly caused by the negligence of the employee (Giliker & Beckwith, 2011).

The court's reasoning in *Re Polemis* has been criticised as rather confusing, because it opened the door to two possible interpretations in tort law: 1) narrower interpretation – the tortfeasor is liable for all direct damage if it could have foreseen "certain type of damage" (in the above example, it would be damage to property which resulted in scratches to ship, and such type of damage must be separated from pure economic loss and personal injury); 2) wider interpretation – the tortfeasor is liable for all direct damage if it could have foreseen "any type of damage" at all. In the context of the wider interpretation, the tortfeasor would potentially be held liable also for "other type of damage", namely, for personal injury and pure economic loss, which the tortfeasor could not have foreseen as consequences of its activity. In this regard, it is only fair that *Re Polemis* is often quoted as cornerstone to the notion that "liability shall be incurred for all direct consequences" (Shapo, 2000).

The direction taken by *Re Polemis* was preserved in tort cases up until 1961 when in *The Wagon Mound No.1 (Overseas Tankship (UK) Ltd vs Morts Dock & Engineering Co Ltd)* the court marked a turning point in the notion of "liability for all direct consequences". In this case *Wagon Mound's* crew negligently spilled oil into the sea. The oil drifted around for certain period about 200 meters from the *Wagon Mound* ship. The oil then mixed with the cotton waste that was drifting near in the sea. In the sea melted metal was also spilled, because welding works were performed in the seaside as per usual. When the melted metal mixed with the oil and cotton waste, a sudden fire broke out and damaged the nearby ships. The court decided that only the damage caused to the seaside was foreseeable (von Bar, 2000).

As per the Judge Viscount Simonds:

“It does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or gross, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be ‘direct’. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable [not unusual – author’s note] consequences of his act. To demand more of him is too harsh a rule [..]” (Giliker & Beckwith, 2011)

This example perfectly illustrates that it is not always fair to impose civil liability for “all direct consequences”. Had the court held on to the reasoning of *Re Polemis*, a conclusion would follow that the defendant could have reasonably foresee “any type of damage” to the plaintiff, and liability would be imposed for “all direct consequences”. It is no wonder that *The Wagon Mound No.1* case is often cited as the “new rule in tort law” as opposed to the “old rule”, which was established in *Re Polemis* (Heuston & Buckley, 1996).

A more complicated manifestation of the test of remoteness of damage can be observed in personal injury cases. For example, in *Hughes vs Lord Advocate* (1963) post office workers, while repairing cables, breached their duty of care and left an unattended manhole on the street. The manhole was covered only with a tent. In the evening, the manhole was not guarded and instead it was surrounded only by paraffin warning lamps. The injured was an 8-year-old boy who took one of the paraffin lamps and climbed down the manhole. Due to specific and unusual chemical reaction an explosion occurred in the underground tunnel causing severe burns to the boy. The court decided that the post office was liable, because it could have reasonably foreseen that “somebody could have been burned by the flame produced by the paraffin lamp”. Therefore, the court concluded that it was the “damage from the fire” and not “damage from the explosion” that was the decisive factor in determination of foreseeability or type of damage (Giliker & Beckwith, 2011). Nevertheless, other legal sources explain that the post office was held liable because the fact that “some child would get into the tunnel with the paraffin lamp” was foreseeable, and therefore it could have been reasonably foreseen that the child would suffer certain burns (Cooke, 1995).

It can be concluded that it is sufficient for common law courts in personal injury cases to establish, for example, reasonably foreseeable “personal damage to health in of itself”, whereas in property damage cases the courts require more specific objects of foreseeability, namely, specific types of property damage. The differences in object of foreseeability can be explained by legal policy. Firstly, the law is concerned, first and foremost, with protection of person’s life and health, not property. Secondly, if, in the event of property damage, the object of foreseeability would be distinguished only as property damage as unified tortfeasor’s liability risk, then the tortfeasors could be held liable for very wide variety and scale of damage (Giliker & Beckwith, 2011) resulting in the so-called “crushing liability”. To give an example, a person A, while visiting a person B at his home, inadvertently pushes over a vase which was standing on a regular coffee table, and this

vase breaks into pieces. However, later it turns out that the vase was a very valuable Ming dynasty relic with very high historic value, of which a person A was unaware. In such scenario it would be unfair to impose liability to A for full value of the vase because A could not have reasonably foreseen “damage to a priceless antiquity”, but instead it could merely foresee “damage to a household item”. Such valuable items usually are not placed on coffee tables (Giliker & Beckwith, 2011). Moreover, in cases of property damage the approach of narrower interpretation of foreseeability object is justified by the fact that the injured party has usually insured itself against such damages (Cooke, 1995).

Foreseeability and Doctrine of Adequate Causation. The most notable example of evolution of foreseeability within the doctrine of adequate causation in Romano-Germanic legal system can be found in German contract law. It has to be taken into account that today in Romano-Germanic legal system (especially in Germany) the principle of *conditio sine qua non* serves as the basis for causation. Within this principle of *conditio sine qua non* the stated doctrine of adequate causation evolved, according to which an activity is considered as cause of damage only if it in of itself can objectively cause the resulting damage. Over time, this doctrine covered foreseeability also – in both contract and tort law.

During the early 19th century, Germany had not yet developed a reliable doctrine that would limit civil liability in cases of contractual breach. To this end, the notable German legal scholar, Nobel Prize in literature laureate, Theodor Mommsen, rejected foreseeability as too contradictory to the basic tenets of contractual law (including, to the principle of effectiveness of civil liability), although at the same time there existed contrasting views that criticised Mommsen (Zeller, 2005). In this regard, legal scholar Guenter Treitel noted that it is no surprise – the German Civil Code and its legal commentary originally did not recognise the principle of foreseeability, but instead adopted the doctrine of adequate causation (*die Adäquanztheorie*) that is so prevalent today (Brox & Walker, 2003). Over time, the German example was followed by Austria, Greece, Portugal, Slovakia, and Sweden (von Bar & Clive, 2010).

Consequently, the German legislator chose to reject limitations to compensation of damages, by arguing that in contractual relationship (especially between business entities) the party in contractual breach must compensate the caused damages in full amount (Schlechtriem, 2000), as long as these damages have causal link to breach of the relevant contract (the essence of the doctrine of adequate causation). However, this does not mean that the principle of foreseeability is not recognised in German contract law at all. For example, it must often be determined if the relevant damage was caused by breach of contract, assuming that the party in contractual breach is an experienced party (Lando & Beale, 2000). This approach is allegedly favourable to the creditor because an experienced party can foresee more than an inexperienced person in case of a contractual breach. This approach is based on the principle of fault which is a cornerstone of German contract law (von Bar & Clive, 2010).

In Germany, such model of civil liability, wherein the principle of foreseeability is rejected, has been preserved for approximately eight centuries, and is still considered as the leading doctrine therein. Nevertheless, the German contract law, in terms of the doctrine of adequate causation, draws similarities with the principle of remoteness of damage, which is recognised in common law: “the common experience of mankind”; “ordinary course of business”; application of test of a “reasonable man” – all these concepts are often invoked in characterisation of the test of remoteness of damage in common law. Consequently, German legal scholars began to cautiously relate these concepts to remoteness of damage (*weit entfernt*), which is considered as a secondary element to the doctrine of adequate causation (Schlechtriem, 2000). Legal scholar Jean Corbonnier argued that both the doctrine of adequate causation and the principle of foreseeability within the test of remoteness of damage are mutually indistinguishable concepts (Zeller, 2005). Likewise, legal scholar Bruno Zeller recognised that separation of both of these concepts has become essentially impossible, because boundaries of these doctrines have merged together (Zeller, 2005). G. Treitel has joined this proposition as well (Markesinis, Unberath & Johnston, 2006).

In 1870s, an active discussion amongst German legal scholars broke out regarding whether or not it is necessary to adopt the principle of foreseeability in the context of contractual liability, taking into account that the German courts had already begun to apply the principle of foreseeability to certain types of agreement (Schneider, 1995). The essence of these discussions was whether the outcome of application of the doctrine of adequate causation is the same as when the concept of foreseeability from the test of remoteness of damage is applied. Over time, in the context of the doctrine of adequate causation the test of “objective observer” was introduced where the said observer is placed at the time the damage is incurred (*im Zeitpunkt des Schadensereignisses*) and is informed of all factual circumstances of the case (Schlechtriem, 2000). Additionally, German legal scholar Dieter Medicus has stated that the doctrine of adequate causation is rooted in the belief of “ordinary course of business” (*im regelmäßigen Laufe der Dingen liegen*) – the same core notion that is reflected in the famous *Hadley vs Baxendale* case and many others. Furthermore, D. Medicus notes the necessity to apply the test of the “objective observer” to the tortfeasor at the time the harmful activity was performed, as well as considering the circumstances of which the tortfeasor was informed (Medicus, 1999). It can, therefore, be concluded that the German doctrine of adequate causation in fact applies the same principle of foreseeability which is used in the test of remoteness of damage in common law. The doctrine of adequate causation was adopted in German tort law as well; however, it is criticised as quite unclear (Winiger, Karner & Oliphant, 2018).

The doctrine of adequate causation as derived from the principle of *conditio sine qua non* is the leading doctrine not only in German private law, but in Latvian private law as well – both in contract law and tort law (Torgāns, Kārklīņš & Bitāns, 2017; Strazdiņš, 2017; Mantrovs, 2016).

As was put by the Latvian scholar Konstantīns Čakste:

“Let’s take an example: a random person is shouting on the street whilst a woman with a weak heart is passing by and as a result of hearing these shouts she dies from a heart attack. In this instance it can also be said that the person shouting was responsible for the death of the woman. Logically, if the woman did not have heart problems, the shouting would not have caused her death. Boundaries are needed here. In doctrine many have contemplated these boundaries. Currently the leading concept in doctrine and in practice is the so-called adequate doctrine. It states that activity or inactivity is deemed to be the cause of the damage if such damage usually follows from the said activity under relevant circumstances. For example, since death usually does not follow from shouting or uproar – the person responsible for the uproar cannot be held liable for causing death according to the adequate doctrine, because the adequate doctrine does not recognise this matter as cause of death.” (Čakste, 2011)

In the doctrine of adequate causation an objective link between the activity and the resulting consequences is a crucial factor if the tortfeasor knew or at least should have known the significance of such link between the activity and its consequences (von Bar & Clive, 2010). Furthermore, as stated by the famous legal scholar Helmut Koziol, adequate or “normal” consequences are such consequences that are typical or usual to the relevant activity, and additionally it is not necessarily required that such consequences result every time (Koziol & Steininger, 2009). Whereas, an event is not an adequate cause of the damage if it could engender the damage in question only under particularly unique, improbable circumstances which would have been disregarded had events followed their usual course (von Bar & Clive, 2010).

Foreseeability in Strict Liability Model. Contrary to the general (fault-based) liability model, one’s ability to foresee the damage is not taken into consideration in the strict liability model. Such proposition is explained by the fact that the purpose of the strict liability is to extend liability to those who would not be held liable under the general model of liability (Kārklīņš, 2017). The basic idea of the strict liability is rooted in a proposition that a person shall be held liable for damage regardless of whether lack of required care is determined in the activity of such person either by negligence or intent. Since none of these legal concepts are relevant in the strict liability model, it is only fair that the strict liability is sometimes referred to as the no-fault liability model or the risk liability model. However, it would be very premature to claim that in the strict liability model elements of fault, including the foreseeability, have no relevance.

Firstly, the above analysed doctrine of adequate causation is applied not only in the general (fault-based) model of liability, but also in the strict liability model. The framework of strict liability in of itself does not discard the necessity to evaluate preconditions of causation (Torgāns & Kārklīņš, 2015). As was already indicated, the doctrine of adequate causation incorporates the principle of foreseeability. It can therefore be concluded that the elements of fault have relevance in the strict liability regime as well.

Secondly, although the strict liability model is characterised by an exhaustive list of justifying circumstances that exclude liability, it is worth mentioning that it is the *force majeure* that is the most common excuse for exclusion of strict liability. Thus, for example, according to paragraph 2 of Article 2347 of the CL, the person possessing the source of increased danger will not be held liable for the damage caused if it was a consequence of *force majeure*. One of the relevant aspects in determination of *force majeure* is the person's inability to reasonably foresee the event (Vīnzarājs, 1932). Thus, another element of fault can also be recognised in the strict liability model.

It follows that challenges arise there when attempting to distinguish the general (fault-based) liability model from the strict liability model (it must be noted that there exist other considerations as well that prevent one from separating both of these models of liability; however, thorough analysis of these considerations deserve a separate article). It is argued that "requiring foreseeability for causation in cases of strict liability would let in a negligence element via the backdoor of causation", while pointing out that negligence is usually looked at from an *ex ante* and in causation from an *ex post* perspective (van Dam, 2013). The theoretical distinction between negligence and strict liability cannot be maintained and a clear distinction between the two concepts is neither useful nor feasible – these frameworks are no longer opponents but need to cooperate (van Dam, 2013).

Due to similar reasons, it is not possible to precisely distinguish the preconditions of liability – "fault" and "causation" – considering that the nature of foreseeability in both concepts, although with some certain nuances, are quite similar. It must also be considered that the causation is largely affected by the other preconditions of liability (including by the fault). It must therefore be stressed that the more negligently someone behaves, the easier the courts tend to attribute remote or unforeseeable consequences to such behaviour. Whereas, if intent is established, the tortfeasor will be liable for all consequences, regardless whether they are believable – it is sometimes said that intention to injure the plaintiff disposes any question of remoteness (Winiger, Karner & Oliphant, 2018). Likewise, the causation is influenced also by the type of damage and nature of the protected right and interest – the causation is easier to establish in personal injury cases, not in property damage cases. Furthermore, causation is also closely related to the injured party's contributory negligence. The said considerations perfectly illustrate why causation does not have a shape of its own – it is an elastic feature which can be stretched and shrunk according to the magnitude of the other requirements (van Dam, 2013).

Conclusions

1. The basic form of fault – negligence – focuses on the question of whether the possible tortfeasor has observed appropriate care in its behaviour in relation to the injured party, taking into account the risk of damage. One of the main components of the concept of negligence is the foreseeability of damage, which

was prevalent as early as the Roman law. The principle of foreseeability is relevant also in *force majeure* circumstances, thus excluding liability. Additionally, the principle of foreseeability is recognised also as a precondition of causation (specifically, it is a principle in both the test of remoteness of damage and doctrine of adequate causation). However, foreseeability as a precondition of causation is analysed only after the negligence itself is established (and the foreseeability of damage which is evaluated within its framework). Hence, in the second component of foreseeability a completely different precondition of civil liability – causation – is evaluated by determining, amongst other things, whether the caused damage by itself meets requirements of ordinary course of business. In other words, when causation is being determined, the tortfeasor's negligence is already established. This second component of foreseeability is used as a measure to adjust the amount to be compensated, since all discussions about whether the person is liable at all are over. Instead, the discussion here is about the fairness of the number of damages to be compensated.

2. Since in Latvian contract law such corrective measure is *expressis verbis* introduced in Article 1779.¹ of the CL, it follows that in Latvian contract law there exist (at least) three components of foreseeability: 1) an element of negligence (fault); 2) an element of *force majeure*; 3) an element of causation within context of remoteness of damage. In contrast to the contract law, in Latvian tort law such principle of foreseeability as a component of the test of remoteness of damage within the framework of precondition to causation has not been *expressis verbis* introduced in the CL. However, such principle of foreseeability in Latvian tort law exists through the medium of doctrine of adequate causation (the principle of foreseeability within the doctrine of adequate causation and the test of remoteness of damage (Article 1779.¹ of the CL) are almost identical concepts). Hence it can be concluded that in Latvian tort law (same as in contract law) there exist three components of foreseeability: 1) an element of negligence (fault); 2) an element of *force majeure*; 3) an element of causation within the context of the doctrine of adequate causation.
3. Foreseeability of damage as a component of negligence (fault) can be summarised as follows: the more severe the expected damage and the higher the possibility that such damage will be caused, consequently the higher is the risk that the damage will be caused and the higher is the possibility to foresee such damage. Likewise, the higher the risk of damage, the more serious preventive measures (care) must be implemented. Importantly, the degree of probability has to be established from the perspective of the moment directly before the harmful event. Namely, this level of possibility, same as the other components of negligence, have to be evaluated from an *ex ante* perspective. In the analysis of risk of damage, the degree of danger of the performed activity has to be taken into consideration as well. Finally, it is important to highlight

the sphere of risk, which is one of the most significant aspects when in determination of negligence, considering lack of security measures (lack of care) can be attributed only to somebody in whose sphere of risk the risk of damage was in the first place.

4. The principle of foreseeability is one of the main reasons for why it is impossible to precisely distinguish the general (fault-based) liability model from the strict liability model, as well as to distinguish “fault” from “causation” as preconditions of liability. The distinction between fault-based and strict liabilities is neither useful not feasible – these frameworks are no longer opponents but need to cooperate.

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