

1 The Place and Space of Causation

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1.1 Introduction

No matter what the legal system, no matter what the ground for litigation, it is a firm tenet of tort law that there can be no liability without causation. The success of a plaintiff's claim is always said to be dependent upon whether, and to what extent, a causal link is established between the defendant's activity and the plaintiff's loss.¹

Despite the apparent simplicity of such an inquiry, questions lying beneath the assessment of causation are manifold. Would the injury have occurred without the defendant's act?² What to do in cases in which an injury would have occurred anyway, but later in time? And in which cases would the injury have occurred even if the defendant had behaved properly? Is chance enough for establishing causation, and, if yes, what degree of chance is required? When the plaintiff's susceptibility to injury has contributed to the final result, should it be taken into consideration? What other factors should be taken into account? What proof should be given, and by whom? What

¹ The possible citations are endless. In the comparative perspective, suffice it to refer to A.M. Honoré, 'Causation and Remoteness', in *International Encyclopedia of Comparative Law* (Tübingen: Mohr Siebeck, 1971), vol. XI, ch. 7, pp. 3, 7, and to M. Bussani and M. Infantino, 'Tort Law and Legal Cultures' (2015) 63 *American Journal of Comparative Law* 77 at 93–8.

² What triggers the defendant's liability might be an act, an omission or even 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 (on this point, see also Chapter 7, Section 7.2(b)), and that everywhere the general tort law rules are fault-based, in the following 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.

should be done when no definite proof is available? How far can liability for consequences be extended? What criteria and elements should be taken into account in drawing the line between harmful consequences which can be attributed to the defendant and the ones which cannot?

These are the kinds of questions to which this volume aims to provide an answer as far as European jurisdictions are concerned. Needless to say, the above problems are not always framed or understood by European tort law systems in the same way. In some countries, cases in which the same result would have occurred, even if the defendant's conduct had been lawful, trigger the application of a specifically tailored doctrine³ that is virtually unknown in many other places and where the same scenario escapes any unitary categorization. While many jurisdictions have special rules applying to the evaluation of mere chances or to the victim's susceptibility to the injury, others have none.⁴ The very notion of 'causation' is in some places treated as merely factual, and in others it is deemed to cover also matters of legal appreciation.⁵

Such variety in classifications and approaches explains why the questionnaire at the core of this research copes with factual and evidentiary issues ('To what extent can the plaintiff's harm be traced back to the defendant?'), as well as with issues of 'legal' causation and remoteness ('How far can the defendant's liability go?') that in some countries might qualify as falling outside the causation field.

The questionnaire is only concerned with causation in tort law. It does not extend to how causation is understood outside the tort law realm. Nor does it investigate how causation is conceived of outside courtrooms. However, since doctrines developed for other branches of the law (most of all, contract and criminal law), as well as economic and cultural insights, may all influence the interpretation and application of causation rules in courts, we will devote the next section of this chapter to the analysis of the forms that this influence may take.

³ This is the 'lawful alternative conduct' defence: see Austria, Germany, Portugal and cf. Lithuania, case 1. See also Chapter 7, Section 7.2(c) and Chapter 7, fn. 52–53.

⁴ As far as liability for mere chances is concerned, see Czech Republic, cases 6 and 17; Germany, case 17; Greece, cases 7 and 17. A rule on the victim's susceptibility is absent in Lithuania: see Lithuania, cases 14 and 15. See also Chapter 7, Sections 7.4(b) and 7.5(b).

⁵ See Chapter 7, Sections 7.2(c) and 7.6.

1.2 Causation, Cognition, Culture

Causation is a pervasive concept. It does not lie only at the heart of tort law and legal processes of liability attribution, but also permeates our approach to everyday life, allowing us to reconstruct and interconnect what happens around us. Moreover, causation shapes, although in different forms, the lenses through which many non-legal disciplines – from physics to philosophy, from medicine to neurobiology to linguistics, to mention but a few – look at their own worlds.

The ubiquity of causation has traditionally fascinated legal scholars, as demonstrated by the many studies on causation which have made substantial efforts in trying to substantiate the legal discourse with notions taken from non-legal branches of knowledge, mainly from philosophy and physics.⁶ This scholarly quest for scientific legitimization, however, has rarely produced meaningful results. Legal reasoning, most of the time, follows its own logic and requires only basic familiarity with the physical, (neuro-)biological and psychological processes sustaining causal attributions.⁷ When a deeper insight about these processes is required, lawyers and courts tend to empower experts to provide them with the information needed.⁸

This volume does not deal with the relationships between the forms that causation takes across different scientific fields. Yet, what is worth stressing here is the inherent context-dependency of reasoning about causation. Causal attributions, be they legal, lay or scientific, never occur in a vacuum. Rather, they are always performed within knowledge structures that affect the causal relationships which are drawn. In this light, judgments about causation inside and outside courtrooms appear to be determined not only by the allegedly ‘objective’ sequence of events

⁶ For a (critical) overview of this approach, see, among others, C. Quézel-Ambrunaz, *Essai sur la causalité en droit de la responsabilité civile* (Paris: Dalloz, 2010), pp. 9–10, 25–6, 59–60; J. Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54 *Vanderbilt Law Review* 941 at 969; H.L.A. Hart and A.M. Honore, *Causation in the Law*, 2nd ed. (Cambridge: CUP, 1985), pp. 30, 96–7, 341.

⁷ L. Green, ‘Are There Dependable Rules of Causation?’ (1929) 77 *University of Pennsylvania Law Review* 601, 620 ff.; more recently, T. Weir, *An Introduction to Tort Law*, 2nd ed. (Oxford: OUP, 2006), p. 72; B. Markesinis and H. Unberath, *The German Law of Torts*, 4th ed. (Oxford-Portland: Hart, 2002), p. 687.

⁸ See the works quoted in the previous footnote, as well as M. Taruffo, *La semplice verità. Il giudice e la costruzione dei fatti* (Bari: Laterza, 2009), esp. p. 213 f.; C. Miller, ‘Epidemiology in the Courtroom: Mixed Messages from Recent British Experience’ (2012) 11 *Law, Probability and Risk* 85–99; W. Mummenhoff, *Erfahrungssätze im Beweis der Kausalität* (Cologne: Heymann, 1997), pp. 44, 47.

to be evaluated, but also by the constraints limiting the evaluator's knowledge structure in giving meaning to those events.⁹

Scholars often underline this point. It is commonplace in legal studies on causation that, given a certain sequence of events, both the observer's background and the level of detail he chooses to look at change the interpretation he will give to the causal connections between the events within the same sequence.¹⁰ Similarly, socio-legal inquiries about people's reaction to injuries have long demonstrated that people's social and biological characteristics (class, gender, age, experience, personality, risk preferences, visions of justice, and so on) have an impact upon their perception of experiences as injurious, the mechanisms of blame attribution, as well as their response to misadventure.¹¹ Yet the context-dependency of causation assessments goes further than that. What legal studies on causation rarely stress is the extent to which our taken-for-granted intuitions about causation are profoundly shaped by cognitive biases and cultural practices.

As unconscious mental errors in our strategies for processing information, cognitive biases pervade causation reasoning. We ordinarily

⁹ J.D. Hanson and M. McCann, 'Situationist Torts' (2008) 41 *Loyola Law Review* 1345 at 1369–75; M. Chamallas and J.B. Wriggins, *The Measure of Injury* (New York: NYU Press, 2010), pp. 125, 128; J.K. Robbennolt, 'Apologies and Reasonableness: Some Implications of Psychology for Torts' (2010) 59 *DePaul Law Review* 489 at 492, 511; J.D. Hanson and D. Yosifon, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics and Deep Capture' (2003) 152 *University of Pennsylvania Law Review* 129 at 136–9.

¹⁰ For instance cf. P. Trimarchi, *Causalità e danno* (Milano: Giuffrè, 1967), pp. 30–32; J. Stapleton, 'Choosing What We Mean by "Causation" in the Law' (2008) 73 *Missouri Law Review* 433 at 438–440; F. G'sell, 'Causation, Counterfactuals, and Probabilities in Philosophy and Legal Thinking' (2016) 91 *Chicago-Kent Law Review* 503 at 503–4. The contingency of causation judgments had been particularly investigated by American legal realists' emphasis on the open-ended and policy-imbued nature of the causation requirement: the *locus classicus* is L. Green, *Rationale for Proximate Cause* (Kansas City: Vernon Law Book, 1927). The realists' challenge was then taken to a further level by law and economics, with Ronald Coase's proposal to replace the unidirectional way of considering causal relationships ('a rancher caused harm to a farmer') with a reciprocal view of causal connections ('since the presence of both the rancher and the farmer is necessary for the harm to occur, it can be said that both the rancher and the farmer caused the harm'). See R.H. Coase, 'The Problem of Social Costs' (1960) 3 *Journal of Law & Economics* 1 at 2.

¹¹ W.L.F. Felstiner, R.L. Abel, and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980–81) 15 *Law & Society Review* 631–654, esp. at 633–637, 641; but see also R.A. MacDonald, 'Access to Civil Justice', in P. Cane and H.M. Kritzer (eds.), *Oxford Handbook of Empirical Legal Studies* (Oxford: OUP, 2012), pp. 492, 510–15; M. Galanter, 'Real World Torts: An Antidote to Anecdote' (1996) 55 *Maryland Law Review* 1093 at 1099–109.

tend to accept causal attributions that easily match our pre-existing knowledge and alter our attributions in light of the attributions that others make against the same facts. We also unconsciously tend to modify our sympathy towards the victim depending upon the total number of victims, and to prefer findings which enable our group's affirmation, i.e. to react with less negativity towards individuals associated with an injury when these individuals are seen as members of our group.¹² In other words, causation judgments tend to reflect our implicit motives, and our need to defend, bolster and rationalize the interests of ourselves and those of the group(s) to which we think we belong.¹³

But our understanding of causation, including our legal understanding, is also deeply affected by the society we live in – that is, by societal considerations and visions about human behaviour, nature and justice.¹⁴ Suffice it to think of how changes in knowledge and technology have influenced our perceptions about the notion of justice by including events once considered 'natural' or uncontrollable among the circumstances that someone is now supposed to prevent or regulate. Because of the improved human capability of understanding and (to some extent) controlling diseases, hurricanes, earthquakes and climate, these events have ceased to appear to be unalterable fates, and have come to be seen instead as having their origins in human action or inaction, as the products of inappropriate policies or interventions. The growth of human knowledge, advances in technical feasibility and rising expectations of amenity and safety may thus expand the sphere of what is considered an injury caused by a human agent, propelling the so-called 'natural' events from the realm of fate into the realm of accidents for which someone could be held responsible.¹⁵

Many other examples could be given, but the point is clear enough. Causal attributions always imply assumptions about injuries, wrongdoing and responsibility, which are inherently context-dependent. Context-dependency explains not only why causation reasoning is dependent upon the cultural framework in which it places itself, but also why many

¹² Hanson and McCann, 'Situationist Torts', 1345, 1359 f., 1370 f. (exploring the effects that such insights may have on tort law theory and practice).

¹³ Ibid. at 1370.

¹⁴ See, for instance, D.M. Engel, 'Lumping As Default in Tort Cases: The Cultural Interpretation of Injury and Causation' (2010) 44 *Loyola Los Angeles Law Review* 33 at 37–9, 41–6, 54–60 (with special regard to Thai culture).

¹⁵ M. Galanter, 'The Dialectic of Injury and Remedy' (2010) 44 *Loyola Los Angeles Law Review* 1 at 5–6; J.M. Fraley, 'Re-examining Acts of God' (2010) 27 *Pace Environmental Law Review* 669 at 683–9.

different ways of understanding causation can co-exist across legal domains and traditions – as we are now about to see.

1.3 Causation across Legal Domains

As is well-known, causation is a requirement for any form of legal liability. Although this volume focuses on tort, the evolution of causation rules in tort law has everywhere been related to developments in other legal domains, especially contract and criminal law.¹⁶

Needless to say, the quantity and quality of these interconnections, as well as the boundaries between each form of liability, have differed across time and legal systems. Tracing the history of such relationships within the jurisdictions herein surveyed would be a fascinating enterprise, worth (more than) a volume in itself.¹⁷ It is equally outside the scope of this book to investigate the extent to which, in a synchronic manner, contractual remedies (including those provided through private insurance) and criminal sanctions might cooperate and compete with tort liability in performing the latter's functions.¹⁸ What space and competence allow us to say is what follows.

Our national reports make clear that in some jurisdictions the impact of the interrelationship of tort, contract and criminal law on each other

¹⁶ In some countries, causation in tort has been influenced by doctrines applied in areas of the law other than contract and criminal law, such as administrative law in France. On this point, see Quézel-Ambrunaz, *Essai sur la causalité*, p. 4.

¹⁷ Some observations on the relationships between these domains can be read, for instance, in E. Hondius, 'Professional Liability', in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law. Global Perspectives* (Cheltenham: Elgar, 2015), pp. 226–30; L. Tichý, 'Causality in Contract: Differences from Tort', in Id. (ed.), *Causation in Law* (Prague: Univerzita Karlova, 2007), pp. 171–85; M. Dyson, 'Tort and Crime', in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law; Global Perspectives* (Cheltenham: Elgar, 2015), pp. 93–122; S. Steel, 'Causation in Tort and Crime: Unity or Divergence?', in M. Dyson (ed.), *Unravelling Tort and Crime* (Cambridge: CUP, 2014), pp. 239–44.

¹⁸ It is well known, for instance, that many tort law claims do not even reach courts, insofar as they are settled at a preliminary stage by insurers. Insurance law thus governs a relentless, mostly extra-judicial law-making process, with its own rules on attribution of causation and liability. On this point, see M.J. Saks, 'Do We Really Know Anything about the Behavior of the Tort Litigation System – And Why Not?' (1992) 140 *University of Pennsylvania Law Review* 1147 at 1213 ff., 1222 ff.; and also I. Ebert, 'Tort Law and Insurance', in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law; Global Perspectives* (Cheltenham: Elgar, 2015), pp. 144–50; R. Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85 at 88; G. Wagner, 'German Report', in Id. (ed.), *Tort Law and Liability Insurance* (Munich: Springer, 2005), pp. 87–8.

seems to be little or non-existent, while in others there is ongoing dialogue between the three domains.

In many countries the general rules on causation in tort and contract are basically the same, either because the legislature so provides¹⁹ or because of the interpretive work of courts and scholars.²⁰ In some specific fields (typically those of medical malpractice and workplace accidents), the distinction between the tort and contract liability regime is significant for a number of issues – e.g. burden of proof, presumption of fault, period of limitation and recoverable damages²¹ – but is of limited relevance for causation assessment. Many of our rapporteurs answered to hypotheticals on medical malpractice (cases 1 and 17) and on work accidents (cases 7 and 12) without even mentioning whether the claim would be framed in tort or in contract.²² Those who mentioned the applicable regimes did it without emphasizing any substantial difference brought about by the choice of the regime on the assessment of causation.²³

The interaction between tort and criminal liability appears equally multifarious. While many reports never refer to criminal law, in many others theories and doctrines drawn from criminal law play an important role in assessing causation in tort.²⁴ A clear illustration comes from

¹⁹ For instance, Art. 361 of the Polish Civil Code on adequate causation is included in the title of Book Three of the Polish Civil Code on ‘Liabilities’.

²⁰ French courts and scholars are used to drawing from a provision of the Civil Code on contracts (Art. 1231–4, former Art. 1151 *Code civil*), the basic guideline for evaluating causation in tort. See, among others, Quézel-Ambrunaz, *Essai sur la causalité*, pp. 450–2; G. Viney and P. Jourdain, *Les conditions de la responsabilité*, 4th ed. (Paris: LGDJ, 2013), pp. 247–8. Of course this does not exclude that there might also be differences between the two regimes: for instance both the French and Bulgarian reports emphasize that foreseeability of damage is a requirement in contract but not in tort: see Bulgaria, case 2 and France, case 10.

²¹ For some illustrations of these issues, see Austria, Germany, Lithuania and Portugal, case 1, as well as Czech Republic, case 17.

²² See for instance Italy, cases 1, 7, 12 and 17.

²³ For instance, case 1 is framed under contract law in Austria and the Netherlands, under tort law in Greece and Poland, and under a mixture of the two regimes in Germany, Lithuania and Portugal. On the same lines, see M. Stauch, *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Oxford-Portland: Hart, 2008), pp. 22, 155 (stressing the comparative indifference of medical liability rules to their contractual or tortious nature); Tichý, ‘Causality in Contract’, p. 172 (noting the widespread assumption that rules of causation do not differ among the two regimes).

²⁴ The boundary might be relevant to other purposes: for instance in Sweden pure economic losses can be awarded in tort only if the defendant’s act or omission is ‘punishable under criminal law’ (Tort Liability Act, Chapter 2, Section 2). On the frequent overlapping between tort and crime in the field of causation, see also M. Dyson, ‘Tortious Apples

Italy, where tort law scholarship and case law are used to ground causation arguments (in the silence of the Civil Code) in the principles enshrined in Arts. 40 and 41 of the Penal Code for causation in crime.²⁵ Similarly, Spanish scholars and judges derive the rule on the victim's comparative negligence from Art. 114 of the Spanish Penal Code.²⁶ The Bulgarian, French and Italian reports all quote criminal manuals and opinions to support their conclusion about causation in tort.²⁷ More generally, it should be kept in mind that the set of causation theories to which continental European tort lawyers have unconditionally adhered to throughout the twentieth century (and beyond) were largely inspired by those propounded by German criminal law professors in the previous century.²⁸

None of the above, however, means that the distinction between the role of causation in tort, contract and crime is entirely flattened. Quite the contrary. Despite the frequent interaction between, and the not-so-rare overlapping of, liability procedures, actions and regimes, causation assessments in contract and criminal law remain substantially different from those characterizing the corresponding inquiry in tort.

Suffice it to remind ourselves that liability in contract is usually dependent upon conditions which are fixed before the wrong – i.e. the breach – occurs, as a function of the parties' expressed or presumed understanding. In this context, once the breach has been proven, both identifying the prospective defendant and fixing the range of consequences for which he should be liable are relatively simple tasks – much simpler than in tort law cases, where the processes of selecting the defendant and defining the extent of recoverable damages lie at the core of many causation problems.²⁹

An even larger distance runs between causation in tort and its criminal counterpart. Under criminal law, causation assessments are traditionally

and Criminal Oranges', in Id. (ed.), *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge: CUP, 2015), pp. 416, 442.

²⁵ Italy, cases 3 and 9. Part of the literature has however argued against the practice, on the assumption that rules of causation in criminal law are not suitable for tort law cases: see, for instance, G. Alpa, *La responsabilità civile. Parte generale* (Turin: Utet, 2010), pp. 316–17; S. Rodotà, *Il problema della responsabilità civile* (Milan: Giuffrè, 1960), p. 57.

²⁶ Spain, case 3. ²⁷ Bulgaria, case 9, France, case 12, and Italy, cases 5, 7 and 9.

²⁸ On the impact that German criminal law theories have had on the legal literature, see Markesinis and Unberath, *The German Law of Torts*, pp. 106–7; Quézel-Ambrunaz, *Essai sur la causalité*, p. 22 f.; Alpa, *La responsabilità civile*, p. 327.

²⁹ G. Viney, *Introduction à la responsabilité*, 3rd ed. (Paris: LGDJ, 2008), pp. 423–7; M. Bussani, *La colpa soggettiva. Modelli di valutazione della colpa extracontrattuale* (Padua: Cedam, 1991), pp. 47–58; Hart and Honoré, *Causation in the Law*, p. 308.

subject to many more constraints than they are in tort. Among the many reasons, one may take into account, for instance, the bulk of interpretive, evidentiary and procedural guarantees that limit judicial discretion in the search for causes in criminal cases.³⁰ Or one may consider how criminal law's emphasis on subjective liability and personal punishment makes the criminal judge more interested in the accused's state of mind than in the consequences of the latter's act.³¹ This interest keeps off the criminal justice's radar screen a myriad of issues – from the attribution of responsibility for another's act, to the evaluation of the victim's participation in the injury, to the appreciation of the effects of the wrongful act – that taunt causation assessments in tort.

In sum, despite the various and deep interactions between causation problems in tort, contract and crime, the scope and purposes of causation assessments in tort have their own reasons, with which assessments of causation in contract and crime have often little to share.

1.4 The Law-Makers of Causation Rules

Rules on causation in European tort laws are everywhere the result of the dynamic interaction between legislative instructions, judicial practices and scholarly suggestions. Whilst the contribution of these legal formants to the production of causation rules is nurtured and constrained by the role that they are called to play within European jurisdictions, there are some shared features in their division of labour that are worth exploring here.

Let us start with some clarifications about the part that legislators (do not) play on the stage of European law-making of causation rules. Notwithstanding their centrality in the adjudication of civil liability cases, causation issues are not explicitly addressed by most tort law legislative texts. This obviously applies to common law contexts, where statutory references to causation have traditionally been scanty.³² Yet this is valid

³⁰ E. Dreyer, 'Causalité civile et pénale' (2007) 40 *Revue Lamy de droit civil* 35 ff.; C. Salvi, 'Responsabilità extracontrattuale (dir. vig.)', in *Enciclopedia del diritto*, vol. XXXIX (Milan: Giuffrè, 1988), pp. 1185, 1249.

³¹ An interest that explains why criminal liability may attach to mere attempts to commit crimes, and to crimes which do not require a wrongful consequence to be caused: Quézel-Ambrunaz, *Essai sur la causalité*, pp. 218, 221–2, 224–6; Dreyer, 'Causalité civile et pénale', 35 ff.; Alpa, *La responsabilità civile*, pp. 316–7; Hart and Honoré, *Causation in the Law*, pp. 325–6.

³² It should however be noted that one of the most important Irish pieces of legislation in tort law (the Civil Liability Act 1961) deals almost exclusively with causation issues.

for codified jurisdictions also, where the black-letter words of the civil codes setting out the general architecture of tort law systems usually give very little, or no, guidance as to how causation should be intended.³³ True, from the French *Code civil* to the latest European codifications, one can detect a trend towards the increase of statutory attention to problems of causation and the progressive stratification of rules that are transplanted from one codification to the other.³⁴ Nevertheless this increase in the number of statutory rules on causation has not changed the fact that, in civil and common law countries alike, legislative rules on causation are the lodestar neither of legal theory nor of legal practice. On the contrary, it is usually judicial opinions and doctrinal debates that, although in different forms across countries, make up the pillars of causation reasoning.

That it is up to courts to ascertain whether and to what extent the harm suffered by the plaintiff may be considered as causally connected to the defendant, and shifted to the latter, is a truism.³⁵ What is equally banal, but less often noted, is that the judicial approach to tort law, and hence to causation, is closely related to the style and form with which courts perform their functions against their overall interpretative culture. Depending on the legal tradition in which they work, courts may be used to defer to the legislature's actual or prospective choices,³⁶ to rulings of hierarchically superior courts, to scholarly opinions, to international or foreign authorities,³⁷ or to meta-legal factors.³⁸ Judges might be expected to discuss causation arguments in an abstract,

³³ Honoré, *Causation and Remoteness*, p. 11, fn. 91.

³⁴ For an overview of the trend mentioned in the text, see M. Infantino, 'Causation Theories and Causation Rules', in M. Bussani and A.J. Sebok (eds.), *Comparative Tort Law; Global Perspectives* (Cheltenham: Elgar, 2015), pp. 279, 287–8.

³⁵ Under courts' opinions lie the allegations, factual information and doctrinal reasoning routinely furnished by lawyers, who are another important building block of tort law architecture: Hanson and McCann, 'Situationist Torts', 1411–2.

³⁶ See for instance German courts' deference to the legislative branch mentioned in Germany, case 5.

³⁷ Cf. the Dutch, English and Lithuanian reports' references to the European Court of Human Rights case law, the Czech and Lithuanian reports' numerous references to the PETL, the Czech report's reference to German legal scholarship, the Dutch report's reference to English cases, the Portuguese report's reference to the Draft Common Frame of Reference and German statutory law and legal doctrine, and the Spanish report's mention of American theories.

³⁸ Openness to policy considerations is a shared trait of the Danish, English, Irish, Dutch and Swedish reports. For more in general, on judicial styles in tort law, see C.P. McGrath and H. Koziol, 'Is Style of Reasoning a Fundamental Difference between the Common Law and the Civil Law?' (2014) 78 *Rabels Zeitschrift* 709, 714–21; M. Bussani, 'European