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*Source / Izvornik:* **Croatian Yearbook of European law & Policy, 2012, 8, 369 - 410**

**Journal article, Published version**

**Rad u časopisu, Objavljena verzija rada (izdavačev PDF)**

*Permanent link / Trajna poveznica:* <https://um.nsk.hr/um:nbn:hr:118:829988>

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*Download date / Datum preuzimanja:* **2025-03-14**

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# MEMBER STATE LIABILITY FOR BREACH OF EU LAW BEFORE ENGLISH COURTS\*

Marjeta Tomulić Vehovec\*\*

*Summary: This article discusses the problem of establishing a causal link between breach and damage in cases of Member State liability for breach of EU law before English courts. It tackles the presumption that the condition of direct causal link is left to national courts to determine. The author examines EU legal rules concerning Member State liability and their interaction with national law. As an example of a national law, the author examines English law, particularly the rules which are relevant for causation in Member State liability cases. The results show that the Member State liability principle and the conditions established by the Court of Justice of the EU are likely to influence the establishment of a causal link before national courts in Member State liability cases.*

## I Introduction and scope

The aim of this article is to show that the rules relating to fault liability in the sense of a sufficiently serious breach of EU law influence the establishment of a causal link between that breach and any damage sustained.<sup>1</sup> The rationale of such an argument is to show that in Member State liability cases, the condition of direct causal link is not fully decentralised and left to national courts to determine.

In Member State liability cases, the Court of Justice has left the condition of causal link to be established by national courts. But which law should be applied? The Court established three conditions of liability: 1 the rule of EU law must confer rights to the individual; 2 the breach must be sufficiently serious; 3 there must exist a direct causal link between the breach committed by the Member State and the resulting damage.

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\* This article was produced as a result of research conducted in 2010 at the Institute Suisse de Droit Comparé in Lausanne, Switzerland and the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. The author would like to express her gratitude to the Institutes for their grants and the opportunity of carrying out research and studying on their premises.

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<sup>1</sup> A causal link connects the breaching conduct with the ensuing damage. Therefore, the rules of causation are influenced by the standard of liability and damage. This article will closely examine the connection between fault liability and the establishment of causal link. While the issue of damage is also very important for causation, it will not be examined in detail here due to the vastness of the subject.

It concluded that these 'are necessary and sufficient to found a right in individuals to obtain redress.'<sup>2</sup> It specified that

it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to ... lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.<sup>3</sup>

The EU principles of equivalence and effectiveness must always be respected. Therefore, EU law should be primarily applied. If it has gaps, then national law may be used but always respecting the basic principles of EU law. EU law does not clearly lay down rules concerning causation. In *Brasserie*, the Court generally established a parallel between the conditions for liability of EU institutions and that of Member States.<sup>4</sup> It even indicated a test for a sufficiently serious breach which may be used in both groups of cases. However, without any particular justification, no particular parallel was defined for the condition of a direct causal link. The Court only concluded '[a]s for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.'<sup>5</sup> Despite this general unification and the obvious commonalities between the two sets of conditions, the cross-fertilisation of case law is limited.<sup>6</sup> Significant differences remain. The discretion available to EU institutions and Member States is very different, which influences liability. Serious breach factors known in Member State liability cases are not applied in EU liability cases. Thus, in terms of the aim of this work, where the condition of a sufficiently serious breach of the Member State influences the establishment of a direct causal link, the liability of the EU will be disregarded. In Member State liability cases, the Court precisely determined the criteria based on which it will determine the existence of a sufficiently serious breach, and those criteria are to some extent applied in causation. EU Liability is not established in the same way and will therefore be left out of this analysis.

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<sup>2</sup> Joined cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, para 66.

<sup>3</sup> Emphasis added. Joined cases C-6/90 and 9/90 *Francovich, Bonifaci and others v Italy* [1991] ECR I-5357, para 42.

<sup>4</sup> *Brasserie* (n 2) paras 42, 47 ff.

<sup>5</sup> *Brasserie* (n 2) para 65.

<sup>6</sup> W van Gerven, 'Taking Article 215(2) EC Seriously' in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998) 35.

It will be first shown how a causal link is established in the English legal system and then parallels will be drawn with the condition of direct causal link in EU law. The causal tests used in national law in cases in which the tortfeasor's liability is based on fault and when it is strict will be examined. This is because the same situation is encountered within the condition of sufficiently serious breach, which can be fault-based if discretion was available or strict if there was no discretion. The presumption of this article is that the Court has, to a certain extent, stipulated the causal test that national courts should use. The reason for such a presumption is that the questions of fault, negligence and responsibility for the resulting damage are determined in English law by the same test.<sup>7</sup> Translated into EU law, this would mean that factors which help define the sufficient seriousness of a breach are also factors which should help define the extent of the responsibility of the State. A connection will be shown in national law between duty, the standard of care and causality. This link is unbreakable and should also be respected in the application of EU law.

The application of the Member State liability principle will be explained through the structure of English tort law. The use of the term English law refers to the law of England and Wales. National law cannot be disregarded, because it serves as the basis for the application of EU law. English law does not abstractly define certain rights as continental systems do. It only defines various torts. These torts each have a set of conditions which have to be satisfied in order for a claim to succeed. Therefore, the main issue in the application of the Member State liability principle is, which one of these incompatible torts may be best adapted to suit EU law? To cut a long story short, it will be shown that it is really irrelevant whether an existing breach of statutory duty tort is adapted or a completely new 'Eurotort' is devised. There are certain rules on fault liability and strict liability in national law which are always applicable across all relevant torts. Based on the results of the interaction between the relevant national causal rules and the principles of EU law, an attempt will be made to try and construct a framework of causal tests which could possibly be used in Member State liability claims.

## **II The Member State liability principle and causation**

The Member State liability principle was pronounced by the Court in the *Francovich*<sup>8</sup> case some twenty years ago. Since then, the Court has substantively examined this principle in fewer than forty cases. The

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<sup>7</sup> HLA Hart and T Honoré, *Causation in the Law* (2<sup>nd</sup> edn, Clarendon Press 1985) 255.

<sup>8</sup> *Francovich* (n 3).

number seems to be low, but if we consider that Member State liability cases are first examined at the national level, their number is in reality more significant than appears at first sight. In addition to other conditions, national courts should determine whether there is a direct causal link between the breach of the obligation borne by the Member State and the damage sustained by the injured party. This issue is regulated by both procedural and substantive rules. Member States possess procedural autonomy, but EU law has priority in regulating the substantive issues. If EU law has gaps, recourse to national law is possible in order to fill them, but only under the condition that such rules respect the principles of effectiveness and equivalence stipulated by EU law.<sup>9</sup>

The Court has repeatedly held that it is for national courts to determine the existence of a direct causal link. However, that does not decentralise the condition, because a causal link is based primarily on EU law.<sup>10</sup> Causation depends on two elements: the facts of the case and substantive law. In other words, the facts of the case are examined through questions posed by the law. National courts are best suited to observe the facts of the case, but the independent application of national causal rules could amount to renationalisation of the whole principle. This is especially so because causal questions concerning consequence, effect, cause, remoteness and superseding cause are never solely questions of fact. The answer to these questions is to be found in analysing the limits of liability set by the legal rules which apply to the particular case. More precisely, the national judges need to analyse the scope, purpose or policy behind the rules of Member State liability. A causal link cannot be found by subsuming the facts of the case to some general definition of causal connection. The court must find such answers by scrutinising the character of the EU law rules and determining whether Member State liability should be extended to the damage which occurred in the way that it did.<sup>11</sup>

‘[I]n many important branches of the civil law causal connection enters into the definition of civil wrong [e.g. sufficiently serious breach] and it must be established to show *existence* of liability as distinct from

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<sup>9</sup> On the issue of lack of procedural autonomy for Member States in general, see CN Kouris, ‘Do the Member States Possess Judicial Procedural “Autonomy”?’ (1997) 34 CMLR 1389, 1393, 1396, 1404, 1405.

<sup>10</sup> Opposing views are given by Biondi and Farley, who consider that a causal link is the condition which has to be established based on evaluation of the facts and acquired evidence. For that reason, they conclude the Court maintains control over the first two conditions of Member State liability in damages while fully decentralising the third one. See A Biondi and M Farley, *The Right to Damages in European Law* (Vol 5 of Kluwer European Law Collection, Kluwer Law International 2009) 55.

<sup>11</sup> For general views on causal questions in law, see Hart and Honoré (n 7) 4.

its *extent*.<sup>12</sup> Therefore, when the Court established tests and factors to be used to determine the sufficiency of serious breach, to a certain extent it also determined causal connection. This is particularly true for substantial causal rules which govern the choice as to which standard of proof is to be applied. For example, a causal link may be presumed or proven in a certain case, but the selection as to which route the national court will take in establishing causation depends on the prior qualification of liability. EU law rules regulating the purpose of conferred rights and sufficiently serious breach are the substantive rules which the national court must apply when qualifying the liability of the Member State. Therefore, the Court did not fully decentralise the third condition and leave it entirely to national courts.

### **III The relationship between EU and national law in a Member State liability claim**

A Member State liability claim is derived directly from EU law.<sup>13</sup> Tort law is a product of common law. It has been created in the course of judicial practice. The purpose of tort law is to compensate the claimant for the wrongful action of the defendant.<sup>14</sup> EU law does not regulate how national law is to be applied to a Member State liability claim; it is for each Member State to regulate it for itself, providing that it respects the principles of equivalence and effectiveness. The basis for the liability of the State must be found within individual torts or remedies. If a claimant wants to file a claim in a certain tort, he has to satisfy the particular configuration of that tort. EU law requires national law to match a national law remedy to an already existing right. English law functions in exactly the opposite way; it has an existing remedy and the rights are defined in their light. In addition to all this, the English legal system is in constant development through case law and often the trend of the law is not determined. This national law has developed a particular 'allergy' towards fixed rules, and functions mostly based on the principles developed in case law. This means that sometimes only indications are given of what may be included in a rule and what may not. Often, one problem may be resolved in more than one way and at various levels of legal examination of the case. This makes English law slippery ground

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<sup>12</sup> Hart and Honoré (n 7) 7.

<sup>13</sup> '[T]he State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.' See *Brasserie* (n 2) para 67.

<sup>14</sup> A Dugdale, 'United Kingdom' *International Encyclopedia of Laws, Tort Law* (11<sup>th</sup> supp 2007) 14.

for application of EU law, because the Court of Justice is always at least one step behind. To illustrate, in *Brasserie* in 1996, the Court stipulated that the proof of abuse of power in the tort of misfeasance in public office was contrary to the principle of effectiveness of EU law.<sup>15</sup> However, the basic requirements of this tort changed in *Three Rivers*<sup>16</sup> in 2001 when the test for misfeasance was broadened. Now it is not certain whether this tort is still contrary to the principles of EU law or not. Probably it is, but until the Court has a new chance of deciding on this issue, it is for national judges to examine and conclude in each case.

### **A) Application of English law torts in conformity with EU law**

The statute entitled the European Communities Act 1972 (herein-after: ECA) incorporated EU law into national law.<sup>17</sup> This text prevails over the sovereign power of Parliament, and any issue of EU law in legal proceedings before national courts is to be decided according to the case law of the Court.<sup>18</sup> Hence, the ECA serves as the basis for the application of EU law and the Member State liability principle which is inherent in the Treaties. Only if EU law has intended to confer rights on individuals will a statutory duty exist according to the ECA, and a private action for damages be available. Public bodies have powers and duties given to them by statutes. The granting of statutory powers also means conferment of discretion. The ECA empowers the public administration to make amendments to United Kingdom law in order to implement EU law. This is an important new source of administrative power and consequently a new head of government liability.<sup>19</sup>

In practice, this means that EU law, as far as it regulates, has precedence over national law, which should be automatically disapplied if it contravenes EU law. A Member State liability claim is an independent claim in EU law, and any national rules which are applicable to it are to be adapted from any comparable national State liability claim. The result

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<sup>15</sup> '[A]ny condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature.' *Brasserie* (n 2) para 73.

<sup>16</sup> *Three Rivers District Council & Ors v Bank of England* [2004] UKHL 48.

<sup>17</sup> '[R]ights, powers, liabilities, obligations and restrictions' as well as all remedies and procedures deriving from the Treaties, 'are without further enactment to be given legal effect ... recognised and available in law, and be enforced, allowed and followed accordingly', and this includes 'any enactment passed or to be passed'. See European Communities Act 1972 sub-s 2 (1) and (4).

<sup>18</sup> Sir W Wade, *Administrative Law* (9<sup>th</sup> edn, OUP 2004) 193-94.

<sup>19</sup> Wade (n 18) 213-15, 744.

of the *Francovich* case law is that State 'liability can be imposed in a wider range of situations than those so far recognised by English courts.'<sup>20</sup> EU law requires that individuals have the right to use a remedy in damages to compensate for losses due to the breach of their EU rights.<sup>21</sup>

The question is then through which tort may individuals seek damages?

The tort of misfeasance in public office depends on the intention or recklessness of the tortfeasor.<sup>22</sup> If applied in EU law, this tort limits the possibility of acquiring damages with its requirement for intentional or reckless unlawful conduct.<sup>23</sup> The Court of Justice of the EU determined in the *Brasserie* case that this tort is not applicable to the liability of legislative bodies.<sup>24</sup> Due to the set requirement of intentional or reckless unlawful conduct, this tort would probably be inapplicable where breach of EU law is committed by administrative<sup>25</sup> or judicial authorities. In 2001, the *Three Rivers*<sup>26</sup> case lowered the requirements for misfeasance for the first time, which might affect the application of EU law. But until the Court decides differently, it will be held that this tort is incompatible with the application of a Member State liability claim.

The tort of negligence does not seem to be suitable, because there has to exist a negligent breach committed in the exercise of an administrative or legislative function. However, for such a negligent breach to be committed, the public authority has to have a duty of care, and 'legislative functions probably impose no duty of care at all'.<sup>27</sup> The duty of care generally cannot exist in the case of pure economic loss (the damage must be actual).<sup>28</sup> Hence, damages cannot be awarded for such type of harm, which consequently limits liability in EU law as well.<sup>29</sup> In addition, Member State liability does not depend on the finding of fault in the

<sup>20</sup> S Deakin, A Johnston and B Markesinis, *Tort Law* (5<sup>th</sup> edn, Clarendon Press 2003) 405.

<sup>21</sup> C Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell 2004) 588-89, paras 15-058, 15-059 and 15-083.

<sup>22</sup> *Three Rivers* (n 16).

<sup>23</sup> AG Tesauo in *Brasserie* (n 2) para 7.

<sup>24</sup> *Brasserie* (n 2) para 73.

<sup>25</sup> '[I]t may be taken on the basis of the Court's wording, that the misfeasance tort is also incompatible with the [EU] law in case of liability for acts of the administration.' See C van Dam, *European Tort Law* (OUP 2006) 498, at 1804-5.

<sup>26</sup> *Three Rivers* (n 16).

<sup>27</sup> Wade (n 18) 769.

<sup>28</sup> C Walton, R Cooper and SE Wood, *Charlesworth & Percy on Negligence* (11<sup>th</sup> edn, consultant ed R Percy, Sweet & Maxwell 2006) (with 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> supp up to date on 19 June 2009) 15, para 1-29.

<sup>29</sup> AG Tesauo in *Brasserie* (n 2) para 7.

sense in which it is defined in the tort of negligence, which renders this tort unsuitable.<sup>30</sup>

The tort of breach of statutory duty is deemed to be the most adequate of all the national remedies provided by English law. Despite the initial reservations that this tort was not compatible with the application of EU law, views have changed.<sup>31</sup> Craig has argued that national courts should adapt domestic heads of liability to the requirements of EU law.<sup>32</sup> This is exactly what the High Court did in *Factortame 7* when it applied the tort of breach of statutory duty:

In Community law, the liability of a State for a breach of Community law is described as non-contractual. In English law there has been some debate as to the correct nature of the liability for a breach of Community law. In our judgment it is best understood as a breach of statutory duty.<sup>33</sup>

More precisely, ‘the cause of action [of the Member State liability claim] is sui generis, it is of the character of a breach of statutory duty.’<sup>34</sup> The three conditions of Member State liability, argues Craig, can be incorporated within the three conditions of breach of statutory duty, namely the existence of a statutory duty, the breach of that duty and the causing of damage.<sup>35</sup>

The ‘Eurotort’ seems to be more and more frequently used as a basis for claims.<sup>36</sup> Craig considers that the remedies in damages with an EU law element ‘can be treated as giving rise to an autonomous cause of action, without the necessity of fitting them into any pre-existing domestic heads of liability’.<sup>37</sup> The Member State liability cases decided in national courts have been dominated by the Court’s jurisprudence. Hence, Stanton reasons that the new head of liability, the ‘Eurotort’, is now a part

<sup>30</sup> M Hoskins, ‘Rebirth of the Innominate Tort?’ in Beatson and Tridimas (n 6) 93.

<sup>31</sup> AG Tesaro in *Brasserie* (n 2) para 7; Hoskins (n 30) 96; K Stanton, ‘New Forms of the Tort of Breach of Statutory Duty’ (2004) 120 LQR 324, 326.

<sup>32</sup> See P Craig, ‘Once More Unto the Breach: The Community, the State and Damages Liability’ (1997) 113 LQR, 67-94; for criticism, see J Allison, ‘Transplantation and Cross-fertilisation’ in Beatson and Tridimas (n 6), 169-182; also see AM Dugdale (ed), *Clerk & Lindsell on Torts* (19<sup>th</sup> edn, Sweet & Maxwell 2006-2007) paras 9-45 and 9-47.

<sup>33</sup> *R v Secretary of State for Transport ex parte Factortame Ltd* (No 7) [2000] EWHC Technology 179, para 80.

<sup>34</sup> *Factortame* (n 33) para 84. Scholarly opinion supports this view. See P Leyland and G Anthony, *Textbook on Administrative Law* (5<sup>th</sup> edn, OUP 2005) 103.

<sup>35</sup> Craig (n 32) 93.

<sup>36</sup> K Oliphant, ‘England and Wales’ in H Koziol and BC Steininger (eds) *European Tort Law* (Springer-Verlag 2008) 233.

<sup>37</sup> P Craig, *Administrative Law* (5<sup>th</sup> edn, Thomson Sweet & Maxwell 2003) 934.

of domestic proceedings and references to breach of statutory duty are a redundancy.<sup>38</sup>

As a last resort, there have been proposals for legal reform. The Law Commission in Consultation Paper No 187<sup>39</sup> of 2008 proposed a reform of the public and private rules for administrative redress. Aiming to simplify the area of State liability, it suggested that the torts of misfeasance in public office and breach of statutory duty should be significantly limited, while the tort of negligence should be allowed to expand. The Commission drew inspiration from the *Francovich* case law and the condition of 'sufficiently serious breach', but the test was adapted for the purposes of English law. Even though this proposal failed due to strong criticism, some conclusions may be drawn. First, obviously English law on State liability should be modernised, as the two public law torts are excessively limiting. Consequently, this problem affects Member State liability claims. Second, if the tort of negligence in English law could be modernised by applying conditions drawn from EU law, then perhaps a Member State liability case could be introduced based on a tort of negligence.

### ***B) Strict or negligence-based liability determines which tort***

There are two possibilities in English law for the introduction of a Member State liability claim before national courts. The first is the application of the tort of breach of statutory duty in an adapted form. The second is the application of the Eurotort. However, both these solutions are the same in practice. Whether it is the adaptation of the old tort or the building of a completely new one, the applicable rules of English law will always be used in the same way. Extra contractual liability or tort liability always revolves around three issues: 1) whether a certain obligation towards the plaintiff exists; 2) whether that obligation has been breached; and 3) whether a causal link exists between the damage and the breach. EU law determines the first two conditions and Member States have very little room for the application of national law. The issue of causal link is not entirely left to national law. The condition of sufficiently serious breach also influences causality. Depending on whether the basis of liability in EU law is fault-based or strict, adequate national rules will be applied and these are always found in the tort of breach of statutory duty or the tort of negligence. In cases of fault liability, causal rules are borrowed from the tort of negligence and in strict liability depend largely on the wording of the statute. Therefore, both torts of negli-

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<sup>38</sup> Stanton (n 31) 329-30.

<sup>39</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com, Consultation Paper No 187, 17 June 2008) < [http://www.justice.gov.uk/lawcommission/docs/cp187\\_Administrative\\_Redress\\_Consultation.pdf](http://www.justice.gov.uk/lawcommission/docs/cp187_Administrative_Redress_Consultation.pdf) > accessed 10 September 2012.

gence and breach of statutory duty will be examined. The emphasis will be put on causal inquiry, but since this is not an independent condition of liability, other relevant parts of these torts will be presented as well.

#### **IV Member State liability claims in English law**

The application of a Member State liability claim in English law will be examined on the assumption that the tort of breach of statutory duty will serve as the basis for the claim in national law. This tort can be based on fault or strict liability depending on the relevant statute. If the statute leaves a certain margin of discretion, it is fault-based and this tort overlaps with the tort of negligence. If an obligation of result is stipulated, liability is strict and the rules of tort of breach of statutory duty apply. The situation is essentially the same if the Eurotort is the basis of a Member State liability claim. If liability is based on fault, rules regulating the tort of negligence apply, and if liability is strict, the wording of the relevant EU legislation applies. National courts are bound by the rulings of the Court and the rules stipulated thereby. A remedy in EU law will have to be available before national courts for breach of EU law. It is clear now that an *ultra vires* administrative action which is not actionable as a breach of statutory duty will confer a right to an action in damages if the case is one of EU law and that law requires reparation.<sup>40</sup>

A Member State liability claim depends on three conditions: 'the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.'<sup>41</sup>

##### **A) Conferment of rights on the individual**

This condition of the Member State liability principle depends entirely on EU law. National courts only declare whether a rule of EU law confers rights on individuals or not. In an English law claim of breach of statutory duty, the claimant must first establish a cause of action. However, if EU law confers rights on individuals, a remedy must be available before national courts and any incompatible conditions of national law will have to be set aside.<sup>42</sup>

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<sup>40</sup> Wade (n 18) 786-87.

<sup>41</sup> *Brasserie* (n 2) para 51.

<sup>42</sup> The condition of national law 'is whether from the provision and structure of the statute an intention can be gathered to create a private law remedy'. See the reasoning of Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, para 3. This is irrelevant in EU law, because the Member State liability principle itself gives individuals the right to claim damages where their rights have been breached and damage caused.

### **B) Sufficiently serious breach or fault-based liability**

The condition of sufficiently serious breach is based on fault if the rule of EU law does not provide for strict liability. This condition of Member State liability relies somewhat on national law. In this sense, national law may affect the application of EU law. When liability is fault-based, the tort of breach of statutory duty and tort of negligence inevitably intertwine in practice. Thus, the relevant English tort law will be discussed first and EU law will follow.

Negligent behaviour usually refers to careless or faulty conduct, but it can also relate to a state of mind (to distinguish it from intention) or to a breach of duty to take care imposed by statute or common law.<sup>43</sup> The tort of negligence regulates any such conduct. Where the statute leaves a certain amount of discretion, liability depends on negligence and the tort of breach of statutory duty automatically overlaps with the tort of negligence. More precisely, the duty to take care in English law can arise from statute or from common law. Depending on the case, a statutory duty may be more or less extensive or the same as the common law duty of care.<sup>44</sup>

The tort of negligence differs from other torts in that it does not protect a particular interest, but is based on the conduct of the defendant. That is why it can be imposed on many different interests if they are harmed by the conduct in question. Consequently, it is possible that this tort overlaps with other torts. Lord Browne-Wilkinson considered the overlap between the tort of breach of statutory duty and the tort of negligence in *X (Minors) v Bedfordshire CC*.<sup>45</sup> He categorised such actions as those which are based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it. In other words, if claimants can show that a duty of care was owed to them, they can bring an action in negligence despite the fact that the defendant acted in accordance with his statutory powers.<sup>46</sup>

<sup>43</sup> Walton, Cooper and Wood (n 28) 3, para 1-01.

<sup>44</sup> Walton, Cooper and Wood (n 28) 13, para 1-24.

<sup>45</sup> '(A) actions for breach of statutory duty simpliciter (i.e. irrespective of carelessness);

(B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;

(C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;

(D) misfeasance in public office, i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.' See *X (Minors) v Bedfordshire CC* [1995] 2 AC 633, 730-31.

<sup>46</sup> Dugdale (ed) (n 32) para 8-01; also C Booth and D Squires, *The Negligence Liability of Public Authorities* (OUP 2006) 289-90, para 6.32.

There are opposing views which state that 'English law has asserted that breach of statutory duty is a tort in its own right distinct from negligence.'<sup>47</sup> However, where the tort of breach of statutory duty concerns conduct based on fault, the two torts overlap. In fact, there is a presumption that liability in negligence will arise if an activity authorised by statute is performed negligently.<sup>48</sup>

If the tort of breach of statutory duty is adapted to fit the requirements of EU law, then the overlapping issues of the tort of negligence will also have to be adapted. '[T]he plaintiff will then also have to show the requisites of a common law duty of care, in particular satisfying the requirement that it is fair, just and reasonable to impose this duty.'<sup>49</sup> Would this mean that in addition to sufficiently serious breach, the claimant will have to prove the negligence of the public authority? This would amount to an additional hurdle for the claimant and should be excluded altogether. Indeed, negligence could be excluded as a condition of liability because it overlaps with the first and third conditions set by the Court. In fact, the condition of sufficiently serious breach of EU law is richer and better worked out than its national counterpart.<sup>50</sup>

### *1) Careless performance of a statutory duty*

If the claimant alleges that the exercise of statutory powers was carelessly performed, he has to demonstrate that there would have been a duty of care in common law in the same circumstances.<sup>51</sup> It is at this point that the elements of tort of negligence enter a case that initially started as a breach of statutory duty. The careless performance of a statutory duty includes an existing statutory duty and a negligent breach of it. A tort of negligence is established if the facts show that the defendant: a) owed a duty of care towards the plaintiff; b) that the defendant was negligent in breach of that duty; and c) that the breach caused damage to the plaintiff which was not too remote a consequence of the negligence in law.<sup>52</sup> The claim can allege one of two issues. First, that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act. Second, which is

<sup>47</sup> Stanton (n 31) 333.

<sup>48</sup> *Geddis v Proprietors of Bann Reservoir* [1878] 3 AC 430 (HL).

<sup>49</sup> Craig (n 32) 92-93.

<sup>50</sup> Craig (n 32) 94.

<sup>51</sup> V Harpwood, *Modern Tort Law* (7<sup>th</sup> edn, Taylor and Francis 2008) 195.

<sup>52</sup> *X (Minors) v Bedfordshire CC* (n 45) 712 (Evans LJ). In addition, in negligence actions a judge may use presumptions of public policy and broader public interest, which can result in the failure of an action in negligence. See G Anthony, *UK Public Law and European Law* (Hart Publishing 2002) 142.

more common, that in the course of carrying out a statutory duty, the defendant has brought about such a relationship between himself and the plaintiff as to give rise to a duty of care in common law. A further variant in cases of vicarious liability is a claim by the plaintiff that, whether or not the authority is itself under a duty of care to the plaintiff, its servant in the course of performing the statutory function was under a common law duty of care for breach of which the authority is vicariously liable.<sup>53</sup>

This categorisation of the tort of breach of statutory duty is relevant for EU law if a Member State liability claim is to be applied in national law by way of adaptation of this tort. The category of careless performance of a statutory duty includes cases where a statutory duty allegedly exists and there is a negligent breach of it. Therefore, even if the tort of negligence is considered inadaptable to EU law by itself, it is relevant as a part of the tort of breach of statutory duty. When national courts deal with a Member State liability claim which is based on fault, they have to apply national rules which are relevant for such a matter. Fault-based liability of the State is regulated within the tort of negligence. This is true no matter which national tort serves as the basis for the application of EU law. Let us examine the elements constituting the negligent breach of a statutory duty.

#### a) Duty owed

The notion of the duty of care does not have an equivalent in civil-law-based legal systems. Causation, fault or damage accomplishes the task that the duty of care performs in English law. Policies are introduced through this concept and clearly determine the outcome of the case. For example, sometimes the policy of English law is to protect only certain kinds of damage, such as physical injury and damage to property (to the detriment of pure economic loss).<sup>54</sup>

This test is concerned with the relationship between the parties and asks whether the nature of this relationship required a duty of care. In other words, it asks whether the duty towards the claimant existed and whether it aimed at protecting him. Specifically, it has to be proven that the courts recognise as actionable such careless causing of the kind of damage as the claimant's damage, to such a type of person as the claimant, and by the type of person as the defendant. The test includes three

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<sup>53</sup> *X (Minors) v Bedfordshire CC* (n 45) 730, 735.

<sup>54</sup> Deakin, Johnston and Markesinis (n 20) 77.

stages: foreseeability;<sup>55</sup> proximity;<sup>56</sup> and inquiry into whether it is fair, just and reasonable<sup>57</sup> to impose such a duty.<sup>58</sup>

However, the duty of care is restricted where the defendant is responsible for public services (other areas include psychiatric injury or distress, birth of an unwanted child, attempted rescue, omission in assistance or protection of the victim and pure economic loss), and generalised policy reasons will not be enough for the establishment of a duty, and attention will also have to be given to the particular circumstances of the case.<sup>59</sup> This restriction of the duty of care means that in such cases, the tort of negligence has special treatment. The additional area of inquiry relates to justiciability and reasonableness in the exercise of statutory discretion.<sup>60</sup> The House of Lords endorsed a strict public law hurdle in cases where public authorities exercising discretionary powers may have acted negligently.<sup>61</sup> The public authority had to act contrary to public law or outside their area of discretion, ie irrationally, in order to be

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<sup>55</sup> The judge considers whether the harm was reasonably foreseeable for the defendant. This stage seems like the concept of the expected standard of a reasonable person which is used in other legal systems (eg French or German). A general class of relationship must be determined within which this particular case may be assessed. The claimant has to fall within the class of persons who might suffer such a kind of loss and towards whom the notional duty exists. It is a question of the reasonable foreseeability of harm and what would a reasonable person in the defendant's position have foreseen. In the words of Lord Diplock, 'I should therefore hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity'. See *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, 38; see also Dugdale (ed) (n 32) paras 8-06, 8-07.

<sup>56</sup> Proximity is determined based on the 'neighbourhood principle', meaning that the duty is owed 'to persons so closely and directly affected' by the defendant's act that he should have thought about them. However, the element of proximity cannot be divorced from foreseeability, because these two together constitute the basis of the neighbourhood principle. Depending on the circumstances of the case, the forms which proximity takes may consist of physical as well as causal closeness. See Dugdale (ed) (n 32) paras 8-12, 8-16.

<sup>57</sup> This test was developed in *Caparo Industries PLC v Dickman* [1990] 2 AC 605 (HL) 617-18. The test which helps determine if it is fair, just and reasonable to impose a duty of care upon a defendant allows the judge to consider issues of legal policy. The judge has to apply a test of ordinary reason and common sense according to his own belief. See Dugdale (ed) (n 32) para 8-17.

<sup>58</sup> Dugdale (n 14) 18. See the same author in Dugdale (ed) (n 32) para 8-05.

<sup>59</sup> Dugdale (ed) (n 32) para 14-12; Deakin, Johnston and Markesinis (n 20) 376.

<sup>60</sup> Walton, Cooper and Wood (n 28) 841, para 11-09.

<sup>61</sup> '[T]he minimum pre-conditions for basing a duty of care upon the existence of a statutory power ... are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised ... [T]he fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation.' See *Stovin v Wise* [1996] UKHL 15, 29.

subject to a claim of negligence. This irrationality was taken as a guide for the assessment of the justiciability of the claim. In this sense, issues of public law liability influence liability in tort but do not determine it.<sup>62</sup>

Common law does not recognise liability for pure omissions, that is to say for conduct where a person just sat by and observed the harm occurring but did not help in creating it.<sup>63</sup> However, this principle does not apply to public services if the particular circumstances of the case justify reliance of members of the public on them.<sup>64</sup>

Would this national law test of the duty of care be applicable in a Member State liability claim? EU law grants a right to damages if the three conditions of Member State liability are met. Hence, the intention of Parliament to create a right to compensation or not should be irrelevant in EU law. In English law, where a statute does not expressly give a right of action, the intention of Parliament is interpreted by the courts.

Low intensity judicial review in order to determine whether there has been a breach of Community law at all, fulfils, therefore, much the same function in E.C. law as does the explicit usage of justiciability in the U.K. ... The E.C.J.'s requirement that the rule of law infringed should be intended to confer rights on individuals could, without difficulty, accommodate many of the issues which are presently considered under the heading of whether it is fair, just and reasonable to impose a duty of care.<sup>65</sup>

In addition, the requirements of national law seem to be inapplicable in EU law because the State's duty to comply with EU law is so wide that a relationship between the State and an individual would not be found to be proximate, nor would it be held that imposition of a duty would be fair, just and reasonable.<sup>66</sup>

National law restrictions on the liability of public bodies should not be applicable in EU law. But it is important to note that EU law endorses comparable restrictions. The first restriction of liability, which excludes any general duty to protect from harm, conflicts with the first condition of liability. If a provision of EU law conferred certain rights on individuals, then that right would have been upheld, and there would be no need to analyse whether a duty in national law existed or not. The second restriction, which relates to justiciability, conflicts with the second condition of EU law. The discretionary power is given within EU law and based

<sup>62</sup> Booth and Squires (n 46) 13, 14, para 1.13.

<sup>63</sup> *Maloco v Littlewoods Organisation Ltd* [1987] UKHL 3, 23.

<sup>64</sup> Dugdale (ed) (n 32) paras 8-43, 8-49.

<sup>65</sup> Craig (n 32) 93.

<sup>66</sup> K Stanton and others, *Statutory Torts* (Sweet & Maxwell 2003) 262, para 6.065.

on the public policy which serves EU law. Therefore, this restriction of national law is not applicable. The third restriction, relating to immunity from the negligence liability of public authorities, is not acceptable in EU law. The principle of Member State liability applies to all public authorities and national public interest immunities are not applicable in these cases. Conditions of liability in EU law are the same for all, and the Court has indicated where they should be adapted to fit the function of judicial bodies.

## 2) *The standard of care - breach*

National law does not have a definitive concept of the standard of conduct which will give rise to liability. In situations where a margin of discretion is left by the statute, the breach of statutory duty will be fault-based. For example, if the statute uses the phrase 'in so far as is reasonably practical', the standard of care is then set in negligence or somewhere between negligence and strict liability.<sup>67</sup> Indeed, civil law claims arising out of breaches of statutes may be confined to the existing common law of negligence, eg where the breach of statutory duty is based on fault. The test of carelessness (from the common law of negligence) is then used.<sup>68</sup>

The national law standard of care in cases of breach of statutory duty may be reasonable care or an obligation to take reasonably practical action. The breach of a duty of care will arise where the conduct of the defendant is unreasonable in the sense that it falls below the appropriate standard of care: 'the standard of normally careful behaviour in the profession, occupation or activity in question.'<sup>69</sup> This flexible test is adjustable to the particular circumstances of each case. 'It is a question of what courts think is a reasonable standard of care for society to enforce against its citizens through the mechanisms of tort law.'<sup>70</sup> If the defendant's conduct fell below the threshold set by this objective standard of care, the defendant acted unreasonably and a breach of duty occurred. However, the tort of breach of statutory duty does not really have a single standard of breach. It has many of them. They can vary from absolute liability to close to negligence, which is why 'they cannot serve as a model for torts built by analogy to them.'<sup>71</sup> That is why in cases of Member State liability the standard of liability can be determined within

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<sup>67</sup> Harpwood (n 51) 193-94.

<sup>68</sup> RA Buckley, *The Law of Negligence* (4<sup>th</sup> edn, LexisNexis Butterworths 2005) 340, para 16.08 and 351, para 16.31; see also Dugdale (ed) (n 32) para 9-55.

<sup>69</sup> Deakin, Johnston and Markesinis (n 20) 80.

<sup>70</sup> P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 42.

<sup>71</sup> Stanton (n 31) 332.

the meaning of sufficiently serious breach as defined by the Court.<sup>72</sup> The statute (breach of which gives rise to a statutory duty) will, in such cases, be that of EU law.

The standard of liability depends on the provisions of the relevant statute but also on the risks that ought to have been foreseen, and the probability of the occurrence of those risks and of harm as their consequence.<sup>73</sup> Risk refers to the chance, possibility or probability that some undesirable event will occur. Essentially it is all about the assessment of probabilities. Negligence is decided based on the balance between the value of the activity and the risk, and will be established if the conduct consists of imposing an unreasonable level of risk. The value or benefit of the activity is determined in the light of the interests of society. To conclude, the circumstances of each case are grouped according to three sets of criteria to help determine the level of care: objectivity; balancing of costs and benefits; and community values and expectations. The level of care expected is that of an objective reasonable person.<sup>74</sup> The balance between costs and benefits is determined by asking whether the protection given to the claimant justifies (in terms of reasonableness) the cost incurred by the defendant. The common practice or reasonable expectations of the community influence the judgement.<sup>75</sup>

Finally, before going on to EU law, one last emphasis should be made concerning national law. The parallel must be drawn between this objectively set standard of care and the defence of contributory negligence. The same objective standard of care that was applied here should be applied at the level of contributory negligence when analysing whether a claimant has failed to take reasonable care of his own interests so as to justify a reduction in damages.<sup>76</sup>

In Member State liability cases, the individual will have the right to reparation of loss if the breach of EU law was sufficiently serious (among other conditions of liability). In *Brasserie*, the Court determined the test for the expected standard of conduct in an area where the Member State has wide discretion. The degree of discretion is not always the same, but the greater it is, the greater the chance that the breach will not be suf-

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<sup>72</sup> Craig (n 37) 884-85.

<sup>73</sup> Booth and Squires (n 46) 230, para 5.02.

<sup>74</sup> If, exceptionally, extraordinary unreasonableness is required as a standard of care, the judge asks if the defendant acted so unreasonably that no reasonable authority could have acted in this way. This creates a higher threshold in comparison to ordinary unreasonableness where, in the courts view, the majority of people qualified to have an opinion on the matter would consider certain conduct as unreasonable even though some might see it as reasonable. See Cane (n 70) 41, 55.

<sup>75</sup> Dugdale (n 14) 17-18; Cane (n 70) 42, 44-45.

<sup>76</sup> Dugdale (ed) (n 32) para 8-130.

ficiently serious.<sup>77</sup> This condition is a form of fault liability defined within EU law. Indeed, it includes certain objective and subjective factors connected with the concept of fault in various national legal systems, but it depends on the goals and purposes of the EU. That is why the reparation of loss or damage caused to individuals by a Member State cannot be dependent on any national concept of fault going beyond that of a sufficiently serious breach of EU law.<sup>78</sup> National courts have to adapt examination of Member State liability cases accordingly.

A practical example of analysis of this condition may be found in the *British Telecommunications*<sup>79</sup> case, where the national court posed a preliminary question concerning an incorrectly implemented directive in UK law. The Court had enough facts to determine the sufficient seriousness of the breach of EU law. The analysis of the factors of sufficiently serious breach revealed that the directive was:

imprecisely worded and was reasonably capable of bearing ... the interpretation given to it by the United Kingdom in good faith... That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it. Moreover, no guidance was available to the United Kingdom from case law of the Court as to the interpretation of the provision at issue, nor did the Commission raise the matter when the 1992 Regulations were adopted.<sup>80</sup>

The Court showed how to apply the factors of sufficiently serious breach to the specific circumstances of the case in order to determine whether a breach had occurred. National courts followed the Court in later cases of Member State liability.

National courts adopted the condition of sufficiently serious breach as a set standard of expected conduct of the State within EU law. They set national concepts of fault, such as carelessness and negligence, aside. In *R v Department of Social Security Ex p Scullion*, the national court decided that the State was liable in damages for breach of EU law due to the failure to implement the Equal Treatment Directive. The national court decided to 'adopt a basket or global approach weighing the various factors'<sup>81</sup> of sufficiently serious breach suggested by the Court in *Brasserie*. The breach was therefore found to be sufficiently serious to give rise to state liability.<sup>82</sup>

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<sup>77</sup> *Stanton and others* (n 66) 242, para 6.036.

<sup>78</sup> *Brasserie* (n 2) paras 75-80.

<sup>79</sup> Case C-392/93 *British Telecommunications* [1996] ECR I-1631.

<sup>80</sup> *British Telecommunications* (n 79) paras 43-44.

<sup>81</sup> *R v Department of Social Security Ex p Scullion* [1999] 3 CMLR 798 QBD 814, para 43.

<sup>82</sup> The national court considered five factors in the assessment of the sufficient seriousness of the breach: (1) the clarity of the relevant Directive; (2) the Government not seeking legal

In *Factortame* (No5),<sup>83</sup> Lord Clyde considered the factors of serious breach given by the Court in *Brasserie*<sup>84</sup> but analysed them more thoroughly. He said that one single factor may or may not be decisive for the existence of a sufficiently serious breach. Nevertheless, it may be concluded that the behaviour of the State was particularly grave based on one factor so serious that it justified establishment of liability. His very thorough analysis gives an excellent example of the application of Member State liability conditions by national courts. The judge used the factors of sufficiently serious breach as suggested by the Court, but even where he added new factors he did so within the aims and purpose of EU law.<sup>85</sup>

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advice; (3) the principle of equal treatment which was breached was of fundamental importance; (4) the fact that particularly vulnerable members of society were gravely affected had been foreseen by the Government; (5) the absence of consultation with the EU Commission despite the views of the Commission and the judgments of the Court of Justice indicating that the rules on entitlement to ICA were discriminatory. See *R v Department of Social Security Ex p Scullion* (n 81) Sullivan J, 799-800.

<sup>83</sup> In this case, the State appealed to the House of Lords who had to determine whether the State's breach of EU law was sufficiently serious to give rise under EU law to the right to compensatory damages. See *R v Secretary of State for Transport, ex p Factortame Ltd* (No5) [1999] 3 WLR 1062.

<sup>84</sup> 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.' See *Brasserie* (n 2) para 56.

<sup>85</sup> 'Some of those factors can be identified as follows.

1... the nature of the breach. [This may relate to] the importance of the principle which has been breached ... or ...

2. ... the clarity and precision of the rule breached. If the breach is of a provision of Community law which is not framed in clear language and is readily open to construction, then the breach may be the less serious. Questions of the clarity of the rule may require to be associated with questions of the complexity of the factual situation. The application to complex facts even of a rule which is reasonably clear in itself may render the situation open to doubt.

3. ... the degree of excusability of an error of law. That could arise on account of the ambiguity of a Community text. It could also arise out of the uncertainty of the law in some particular area, where there is little or no guidance and evident room for difference of opinion.

4. Another factor relating to the clarity of the law is the existence of any relevant judgment of the court on the point. If there is settled case law, the failure to follow it may add to the seriousness of the breach. On the other hand if the point is novel and is not covered by any guidance from the court then liability should less readily follow.

5. ... the state of mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily. A deliberate intention to infringe would obviously weigh heavily in the scales of seriousness. An inadvertent breach might be relatively less serious on that account ...

6. The behaviour of the infringer after it has become evident that an infringement has occurred may also be of importance. At the one extreme the immediate taking of steps to undo what has been done and correct any error which has been committed may operate to

To conclude, the Court gave an initial list of factors for the assessment of breach in *Brasserie*.<sup>86</sup> The list is not exhaustive and it serves to provide guidance to the national court. However, this does not mean that national courts are free to use their national factors of fault or carelessness which they use in national law to determine blameworthiness of conduct. National concepts of fault and consequently the policies behind them are excluded from application in Member State liability cases. Factors of breach which are used for assessment of the degree of seriousness always have to relate to EU law and reflect its policies. Lord Clyde's elaboration of factors of breach clearly supports this view, particularly when he explained the factor of intentional or involuntary behaviour. He said that 'the purpose of the infringer should be considered. If the purpose was to advance the interests of the Community, a breach committed with that end in view might be seen as less serious than one committed with the purpose of serving merely national interests.'<sup>87</sup> In cases involving EU law, national judges should put their 'EU shoes' on and regard similar situations differently than in purely national law.

Opposing views exist regarding the use of national law in establishing the existence of the sufficiently serious breach condition. With regard to opposing views, an interesting decision was made recently in a case of sufficiently serious judicial breach of EU law. In *Cooper v HM Attorney General*, the court refused to exclude purely national factors from ex-

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mitigate the seriousness of the breach. At the other extreme a persistence in the breach, the retention of measures or practices which are contrary to Community law, especially where they are known so to be, will add to the seriousness of what has been done. Indeed, in paragraph 37 of the judgment in *Factortame III* the court stated that persistence in a breach despite a judgment finding an infringement or clear case-law on the point, "will clearly be sufficiently serious."

7. Another aspect relates to the identity of the persons affected by the breach ...

8. A further consideration is the position taken by one of the Community institutions in the matter. It may be that one of the institutions has ... "contributed towards the omission:" ... In the present context this is not to be seen as bearing upon the third of the three necessary conditions for liability which the court has prescribed, namely the existence of a direct causal link between the breach and the damages sustained. Here it is a factor relating to the seriousness of the breach. ... [I]t is presented as a mitigating factor and it is wide enough to include various kinds of actions on the part of the institution concerned. But it also includes the giving of information or advice and in that connection the factor could operate in either direction so far as the seriousness of the breach is concerned. Advice from the Commission that the state would not be acting in breach of Community law in taking a particular step would plainly be a mitigating factor. The decision to persist in a proposed step in the face of warnings from the Commission that the state would be in breach of Community law in so doing would add to the seriousness of the State's action.

What then remains is the application of the test to the facts of the case.' See *R v Secretary of State for Transport, ex p Factortame Ltd* (n 83).

<sup>86</sup> *Brasserie* (n 2) para 56.

<sup>87</sup> *R v Secretary of State for Transport, ex p Factortame Ltd* (n 83).

amination of the breach. Arden LJ held that these national factors also include the facts of the case, and if these were excluded, the issues would then have to be decided in a 'factual vacuum'.<sup>88</sup> The existence of a sufficiently serious breach should not be viewed in such a factual vacuum or by completely excluding national law. It is true that the facts of the case are relevant and sometimes can include national legal decisions. However, the use of national legal concepts should not reverse the effect of EU law. This could cause a distortion and different application of EU law across Member States. The same judge also held that domestic law is the lens through which EU law should be viewed, but this is questionable. If that would mean that national interests and policies should be put first, then this would be completely unacceptable for EU law. In fact, it is quite hard to understand how English law could serve as a lens to view EU law when they so profoundly differ in basic concepts such as torts and rights.

The judgements of the High Court and the House of Lords are important in many ways. They show that in Member State liability cases national courts must disregard national law and apply EU law. It is also clear that the liability of Member States depends primarily on the conditions stipulated by the Court. The particular analysis of the condition of sufficiently serious breach also shows that it is determined by EU law, and that the factors used for its establishment are those determined by the Court. What this means is that not only national factors of fault are excluded from application in Member State liability cases but also all national policy reasons behind them. National law may protect the State from liability towards individuals due to various national policy reasons (opening a floodgate of claims which would burden the courts, protection of national finances, freedom of the State to perform the tasks within its competence without fear of liability, etc), but this is not a part of EU law. To conclude, the conditions of Member State liability should be consistently applied so that supplementary conditions of national law would not be imposed in such a way that they call into question the right to reparation founded on the EU legal order.

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<sup>88</sup> '[W]hen the court is considering whether a breach is manifest, or sufficiently serious, the court is not restricted to asking itself whether there was a clear infringement of the case-law of the Court of Justice. It is able to look at all the relevant considerations. One of those factors indeed includes whether the breach was intentional, by which what must be meant is that it was deliberately intended to cause a breach of Community law. In dealing with that point, it is relevant to consider whether the court's decision was in accordance with other decisions in its domestic law. Domestic case law will in particular carry weight where it purports to interpret and apply the relevant Community law ... [D]omestic law is the lens through which the national judge sees Community law and if the Court of Justice had intended that any such consideration should be excluded, it would in our judgment have said so. Moreover, even if domestic decisions were not relevant, we would have reached the same answer.' See *Cooper v HM Attorney General* [2010] EWCA Civ 464, paras 73, 111, 123.

Finally, those factors which in national law are used to determine fault (the standard of care within the tort of negligence) are also used to determine legal causation. Hence, if in a Member State liability case national factors of fault are excluded at the level of sufficiently serious breach, they should also be excluded at the level of causation. This leads us to the issue of causation, which will be examined below.

### **C) Breach per se or strict liability - 'pure' tort of breach of statutory duty**

The tort of breach of statutory duty is usually referred to as the strict liability tort in English law. However, this does not always describe absolute or no fault liability.<sup>89</sup> The general principle of no fault liability does not exist in common law, but is relatively frequently provided for by statute. The basic principle here is that Parliament, by means of a statute intended to create a private cause of action, protects a limited class of individuals. The basis of liability depends on precise stipulation in each statute, because they are never applied by analogy. The elements of strict liability are: the conduct which creates the risk of injury; materialisation of the risk; and the injury (damage) caused by this materialisation of the risk. The risk theory in English law is based on strict liability. Its purpose is the protection of certain individuals who suffer harm. This is for the overall benefit of society.<sup>90</sup>

The tort of breach of statutory duty is based on strict liability if the mere breach of a provision of the statute is enough for a right of action in tort to be recognised. In other words, if the rule defines an obligation to reach a certain result, liability is strict. The relevant statute defines the standard of breach which is required for liability to be incurred. Consequently, this also determines the test to be used in a causal inquiry. This will be discussed below.

In the *Scullion* case, which concerned EU law, the national court held that 'a breach can be "manifest and grave" so as to make it sufficiently serious without it being intentional or negligent.'<sup>91</sup> This shows that national courts accepted strict liability (in the absolute sense) in Member State liability cases. The category of the breach of statutory duty simpliciter seems to be a breach based on strict liability. Hence, it satisfies the strict liability limb (or the second limb) of Member State liability for breach of EU law. This case is similar to *Rechberger*,<sup>92</sup> where EU law

<sup>89</sup> Stanton (n 31) 331.

<sup>90</sup> Walton, Cooper and Wood (n 28) 839, para 11-06; T Weir, *An Introduction to Tort Law* (2<sup>nd</sup> edn, OUP 2006) 91, 93, 937.

<sup>91</sup> *Scullion* (n 81) para 65.

<sup>92</sup> C-140/97 *Walter Rechberger v Austria* [1999] ECR I-3499.

imposed on a Member State a strict obligation of result. The national rule that a statute has to create such a right of action is rendered meaningless, because in that respect EU law takes over and guarantees a remedy in damages if all the requirements of EU law are met. The condition of national law which seeks the protection of a limited class of individuals is also irrelevant in a case of EU law, because the first condition of the Member State liability principle states that 'the rule of law infringed must be intended to confer rights on individuals'.<sup>93</sup> That is, if the relevant rule of EU law intends to confer rights on individuals, the remedy exists. Hence, a national judge will apply the tort of breach of statutory duty simpliciter as a basis for a claim for Member State liability in damages if the basis of liability is strict. The substantive conditions of existence of the remedy are those determined by EU law. To conclude, the question in this tort is always one of statutory construction. However, when EU law is involved, then it is EU law statutory construction that is examined.

#### **D) Causation if liability is based on fault**

In English law, the term causation is sometimes used to describe only cause in fact, not legal causation. Remoteness often defines legal cause. The issue of causation in the tort of breach of statutory duty in national law is regulated by the same rules as used in the tort of negligence.<sup>94</sup> In this sense, Lord Reid stated 'I can find neither reason nor authority for the rule being different where there is breach of a statutory duty.'<sup>95</sup> Even if there is doubt in the meaning of the term, 'the test of losses which are too remote in respect of breach of statutory duty is the same as the test for negligence.'<sup>96</sup> On the contrary, some authors evoke the national condition of the breach of statutory duty relating to the intention of Parliament to define the interest to be protected by the statute, and consider that this effectively resolves issues which might be deemed remoteness of damage in other contexts.<sup>97</sup> However, in a case involving EU law, this condition would be replaced by the establishment of the first condition of liability. It is the scope of the norm of EU law which confers the right on individuals which defines the interest to be protected by the statute. The issue of causation has developed mostly within the tort of negligence. Hence, this article will mostly, but not exclusively, concentrate on this tort.

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<sup>93</sup> *Brasserie* (n 2) para 51.

<sup>94</sup> *Harpwood* (n 51) 169.

<sup>95</sup> *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; for the same reasoning see also *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; see also *Holtby v Brigham & Cowan (Hull) Ltd* [2000] EWCA Civ 111.

<sup>96</sup> T Downes, 'Trawling for a Remedy: State Liability under Community Law' (2006) 17 *Legal Studies* 286, 301.

<sup>97</sup> *Stanton* (n 31) 339.

English tort law routinely analyses causation in two stages. *Re Polemis*<sup>98</sup> was considered the authority on factual causation. However, this causal test changed in *Wagon Mound (No 1)*, when the test of remoteness of damage was also required for liability to be determined.<sup>99</sup> The first stage is factual causation or the ‘but-for cause’, which is concerned with the question of ‘whether the defendant’s fault was a necessary condition of loss occurring.’<sup>100</sup> The first part of causal inquiry relies heavily on the facts of the case. It is crucial to prove the existence of damage and whether the breach of the defendant’s duty was the cause of it. If it was, the causal inquiry generally proceeds to the second stage, where the judge determines the legal cause of loss by assessing whether the link between the defendant’s conduct and the resulting damage was sufficiently close. If the damage was so remote that the defendant could not have foreseen the occurrence of such a particular kind of damage, he will not be held liable. That is, the concept of foresight arises particularly in relation to the duty of care and the breach of duty of care.<sup>101</sup>

However, ultimately it is the law that defines causation. More precisely, the particular rules which define liability also shape the issue of causation in each particular case. As Lord Hoffman explained:

in what sense is causation a question of fact? In order to describe something as a question of fact, it is necessary to be able to identify the question. For example, whether someone was negligent or not is a question of fact. What is the question? It is whether he failed to take reasonable care to avoid such damage as a reasonable man would have foreseen might result from his conduct. That question is formulated by the law. It is the law which says that failure to take reasonable care gives rise to liability. And the question is then answered by applying the standard of conduct prescribed by the law to the facts.<sup>102</sup>

Therefore, the particular framework of legal rules that regulates a certain situation also defines causation. Deakin and others consider that ‘[i]n a doctrinal sense, it is impossible to write about causation without acknowledging that inherent in the law’s account of causation is also a view of what constitutes *fault*.’<sup>103</sup>

<sup>98</sup> *In Re Arbitration between Polemis and Furness Withy Co* [1921] 3 KB 560.

<sup>99</sup> *Wagon Mound* [1961] UKPC 1 [1961] AC 388.

<sup>100</sup> Deakin, Johnston and Markesinis (n 20) 185.

<sup>101</sup> Harpwood (n 51) 24; Deakin, Johnston and Markesinis (n 20) 185.

<sup>102</sup> *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 51.

<sup>103</sup> Deakin, Johnston and Markesinis (n 20) 188.

The problems relating to causation are complex and difficult, because the meaning of the term causation is not unified in law. In addition, many elements that are not strictly connected with the meaning of causation enter the final decisions of the courts. In law, there is also the issue of defining which harm is reparable and the type of causal connection. The type of reparable harm is usually determined by the relevant rule of EU law that is breached, and involves legal policy. The type of causal connection relates to the causal theories used. These are the theory of *causa sine qua non*, or the but-for cause, and the adequacy theory. The said theories are used in the English legal system and indicated in the case law of the Court. The determination of both harm and causal connection involves the scope, purpose and legal policy of legal rules. These are not strictly causal issues but are usually dealt with under causation.

Rules which shape and define Member State liability are rules of EU law, and these same rules have to determine the issue of causation as well. Causal rules in English law consist of substantive and procedural ones. They are heavily intertwined, which otherwise would not be a problem but for the application of EU law. Member States enjoy the principle of procedural autonomy, while EU law, to a certain extent, defines substantive rules. Hence, national judges are left with a difficult task of disentangling one from the other. The Court said that regarding causation 'it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.'<sup>104</sup> What does this mean in practice? Andenas and Fairgrieve say that causation, the same as the other conditions of liability for breach of EU law, is primarily determined by EU law, while national rules of causation which do not provide an effective standard of protection within EU law will be discarded.<sup>105</sup> However, causal requirements vary depending on the basis and purpose of liability, to use the words of Lord Hoffmann quoted below. The basis and purpose of Member State liability is found in EU law. These questions cannot be separated, and that is why national rules, at least substantive ones, on causation are inapplicable. In other words, national procedural rules on causation should be applied by respecting the basis and purpose of Member State liability in EU law. 'One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which

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<sup>104</sup> *Brasserie* (n 2) para 65.

<sup>105</sup> M Andenas and D Fairgrieve, 'Misfeasance in Public Office, Governmental Liability, and European Influences' (2002) 51(4) ICLQ 757, 774.

determine which acts give rise to liability.<sup>106</sup> By analogy, rules which determine what one is liable for in EU law are set within the first and second conditions of the Member State liability principle and together form a part of the third condition: direct causal link. If rights that EU law confers on individuals are breached in a manner that is sufficiently serious, the standard of behaviour that is set will inevitably influence causal inquiry as well.

A Member State liability claim may be based on fault liability (sufficiently serious breach) or strict liability (breach *per se*). The first form of liability analyses the conduct of the defendant and considers his blameworthiness through factors of serious breach. The second form of liability is based on the obligation of result stipulated in a norm, where failure to reach it triggers liability. These two forms of liability depend on the relevant legislative texts. If a rule of EU law leaves a certain margin of discretion to the Member State, liability will be analysed through fault factors. However, if the rule puts an obligation of result upon that State, liability will be strict. Consequently, causal inquiry has to be adjusted. In the first case, causal inquiry will consist of two steps: factual and legal causation. In the second case, this inquiry will stop at factual causation, because legal causation is irrelevant. In English law, the tort of breach of statutory duty is normally considered as a strict liability tort, where only factual causation is relevant. If liability is fault-based, causal inquiry resembles that in the tort of negligence. In the words of Lord Reid:

[a] plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty.<sup>107</sup>

### 1) Factual causation

In national law, factual causation must be proven first. This means that an unbroken chain of consequences between the defendant's conduct and the injury must be shown.<sup>108</sup> There are, naturally, exceptions to the general rule, but they are rare.<sup>109</sup> The 'but-for' test helps in estab-

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<sup>106</sup> Lord Hoffmann in *Kuwait Airways Corporation v Iraqi Airways Company and Others* [2002] 2 AC 883, para 128.

<sup>107</sup> *Bonnington Castings Ltd v Wardlaw* (n 95). For the same reasoning, see also *Fairchild v Glenhaven Funeral Services Ltd* (n 95); *Holtby v Brigham & Cowan (Hull) Ltd* (n 95).

<sup>108</sup> There are exceptions to this rule. Eg in cases where multiple tortfeasors are involved, this test breaks down. See *Deakin, Johnston and Markesinis* (n 20) 186.

<sup>109</sup> This would be the case where the burden of proof is shifted onto the creator of the risk. See *McGhee v National Coal Board* [1973] 1 WLR 1. There is also the exception of super-

lishing the relevant chain by asking: but for the defendant's act would the damage have occurred? If on the balance of probabilities it is likely that it would have occurred anyway, then the defendant's act is not considered as the cause of damage. If the answer is no, the defendant's conduct is considered as a factual cause.<sup>110</sup> The evidence must show that it was more likely than not that the defendant's conduct caused damage. Generally, the claimant has the burden of proof, while in some exceptional cases judges may use reasons of policy and fairness to conclude that the defendant's conduct increased the risk of damage and can thus be treated as proof of causality.<sup>111</sup> In national law '[t]he question of fact is whether the causal requirements which the law lays down for that particular liability have been satisfied. But those requirements exist by virtue of rules of law.'<sup>112</sup>

In *Gallagher*, which involved the application of EU law, the Court of Appeal reached only the level of factual causation. The claimant could not show on the balance of probabilities that his lost chance was caused by a breach of the State. The national court applied this causal test by comparison to the national causal test used in the tort of negligence but with necessary changes for the purposes of EU law. More precisely, the court said that 'Mr Gallagher has established a breach of Community law, but he could not show that that breach probably caused him to be excluded from the United Kingdom when he would not otherwise have been excluded.'<sup>113</sup> Hence, the court did not use just any act, but specifically the act to which the element of sufficiently serious breach of EU law applied. Further limitation to legal causes was irrelevant.

Before one can answer the question of fact, one must first formulate the question. This involves deciding what, in the circumstances of the particular case, the law's requirements are. Unless one pays attention to the need to determine this preliminary question, the proposition that causation is a question of fact may be misleading. It may suggest that one somehow knows instinctively what the question is or that the question is always the same. As we shall see, this is not the case. The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations

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vening or overtaking causes, where the direct chain of consequences inevitably breaks. In such cases, joint tortfeasors are held jointly and severally liable to the victim. See Deakin, Johnston and Markesinis (n 20) 192-94.

<sup>110</sup> Dugdale (n 14) 70. See also *Hotson v East Berkshire Area Health Authority* [1988] UKHL 1.

<sup>111</sup> Dugdale (ed) (n 32) para 2-06.

<sup>112</sup> Lord Hofmann in *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 52.

<sup>113</sup> *Gallagher* [1996] 2 CMLR 951, 965.

represent legal differences, driven by the recognition that the just solution to different kinds of case may require different causal requirement rules.<sup>114</sup>

If we apply this reasoning by analogy to EU law, it is the law that formulates the question. The question for the test of factual causation would thus be: *would the damage have occurred but for the sufficiently serious breach of the defendant?* The test applies the standard of conduct set within EU law and not any concept of fault, carelessness or negligence.

In conclusion, the third condition of the Member State liability principle which determines the issue of direct causal link is a rule of law, and is a constitutive part of the conditions of liability. It is not a question of fact (not exclusively at least). It cannot be established based on judicial intuition, a sense of logic or justice. Causal inquiry in such cases is determined by EU law, and national judges should disregard national causal rules which would introduce national liability requirements into a Member State liability case, unless they would offer a higher measure of protection to the individual. However, national causal procedural rules are relevant as they help determine the steps of causal inquiry. Therefore, the two-step procedure of causal analysis used in English law will be described further, as it is relevant for the application of EU law.

## 2) Legal causation

The law has three rules for narrowing down a defendant's liability: '*rules of remoteness, intervention and purpose.*'<sup>115</sup> Remoteness or foreseeability will be dealt with first, as it is particularly important in liability based on negligence or fault. Breaking of the causal chain due to intervening causes will be briefly mentioned as part of the inquiry into legal causes. Risk or the protective scope of the norm will be treated within the context of strict liability, ie liability without proof of fault.

### a) Foreseeability or remoteness

When the cause in fact is determined, there still remains the question of whether the link between the defendant's conduct and the resulting damage was sufficiently close.<sup>116</sup> This step of causal inquiry is also referred to as the direct, proximate, foreseeable or remote cause to describe the relationship between conduct and loss. It is used for the tort of negligence, but also for the tort of breach of statutory duty.

<sup>114</sup> Lord Hofmann in *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 52.

<sup>115</sup> Weir (n 90) 82.

<sup>116</sup> Deakin, Johnston and Markesinis (n 20) 185.

The expression 'foreseeability' is commonly used in everyday life to describe some moral standard of responsibility such as the standard of a reasonable man. This term is also used by legal practitioners in order to establish the causal link between the breach of a rule and damage. National judges define 'foreseeability' in their judgments.<sup>117</sup> Such definitions are then applied by analogy to all other cases. The test on reasonable foreseeability within the context of remoteness is based on the judge's perception that an individual should or should not be made liable in tort for damage.<sup>118</sup> Foreseeability is primarily important in order to establish negligence or fault, but it is also relevant for determining the extent of the tortfeasor's liability. Extent refers here to the consequences of the initial harm and the duty of the tortfeasor to repair the resulting loss.<sup>119</sup>

The test of remoteness in fault-based cases is the scope of reasonable foreseeability. The Privy Council introduced this test in the *Wagon Mound (No 1)* decision.<sup>120</sup> In cases of economic loss, the scope of duty also functions as the remoteness limit on recovery if the duty of care relates to economic loss.<sup>121</sup> The *kind* of damage should have been reasonably foreseeable to the defendant. If it was not, it is judged too remote and causality is not established. Damage is deemed too remote if 'it is not of the same type as would normally be anticipated in similar circumstances, or if it occurred in an unusual way.'<sup>122</sup> In the case of breach of statutory duty, the intention of the legislator to protect the type of interest harmed must be established, which makes the finding of foreseeability of damage even simpler.<sup>123</sup> In other words, this confirms that the type or class of harm may be determined by reference to rules which designate certain conduct as negligent. Fault factors set the expected standard of conduct (which is relevant for determining negligence) but can also be used to establish whether a certain type of harm could have been foreseeable.<sup>124</sup> Finally, the kind of damage can be stretched or shrunk, depending on policy considerations.<sup>125</sup>

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<sup>117</sup> This is also the case in all other legal systems. Causality is very rarely referred to in statutes because of its elusive character, and then if it is, the reference is very general.

<sup>118</sup> Deakin, Johnston and Markesinis (n 20) 187.

<sup>119</sup> See Hart and Honoré (n 4) 255.

<sup>120</sup> *Wagon Mound* [1961] UKPC 1 [1961] AC 388.

<sup>121</sup> Dugdale (n 14) 75, 77, 78, 80.

<sup>122</sup> Dugdale (ed) (n 32) para 2-107.

<sup>123</sup> Downes (n 96) 301.

<sup>124</sup> Hart and Honoré (n 4) 257-58.

<sup>125</sup> For example, in cases of physical harm the test is less strict and asks for foreseeability of any physical harm. Not so for property loss or pure economic loss, where that specific harm must be foreseeable. There exist variations of this view. See Deakin, Johnston and Markesinis (n 20) 210, 212.

The issue of remoteness is particularly significant in the presence of fault liability, because it establishes the relationship between the degree of fault and damage. The defendant will not be held liable for extremely unusual consequences of his acts, because the relationship between fault and damage would be disproportionate. That is, negligence (or the expected standard of conduct) influences causality because once negligence (or the breach of that standard) has been established, consequences have to be quite exceptional for liability not to be recognised.<sup>126</sup>

Foreseeability can be assessed in terms of a narrower or wider view. If the narrower view is adopted, foreseeability of harm is measured only in as much as it is needed to establish negligence, in other words, whether the harm caused is of the type which falls under the protective scope of the norm violated. That is, whether the right to reparation exists. Here, culpability for harm and compensation for the damage which ensued are separated. If, on the other hand, the wider view is adopted (in England it was as of 1961),<sup>127</sup> culpability and compensation are assessed based on the same test. In this instance, the only relevant causal question is whether the defendant's act was a necessary condition of damage - whether the defendant could reasonably have foreseen and prevented harm. This wider view regulates more closely the establishment of a causal link. The rule is at the same time limiting and extending in terms of liability, which means it is much more precise. It is limiting in that it determines on one hand that a defendant is not liable for harm that he could not have foreseen. On the other hand, it is extending in that it extends the defendant's liability to only that harm which was necessarily caused by his act. Thus, in such a view, the causal rules are much more definite and less is left to the judges' intuition.<sup>128</sup>

Two years after *Wagon Mound (No 1)*,<sup>129</sup> the House of Lords decided on *Hughes v Lord Advocate*<sup>130</sup> and extended the scope of liability in saying that if the accident is of a different kind and type from anything the defendant could have foreseen, he will not be held liable for it. Thus, what needs to be foreseeable is the type of harm not the manner in which it occurs.

'The courts appear to be using (or possibly misusing) the language of cause to decide (yet again) questions of policy, such as ... which outcome will best promote loss prevention in that context in the future.'<sup>131</sup>

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<sup>126</sup> Weir (n 90) 83.

<sup>127</sup> *Wagon Mound* (n 120).

<sup>128</sup> Hart and Honoré (n 4) 256.

<sup>129</sup> *Wagon Mound* (n 120).

<sup>130</sup> *Hughes v Lord Advocate* [1963] UKHL 8.

<sup>131</sup> Deakin, Johnston and Markesinis (n 20) 185.

These policies include the search for an economically efficient framework of liability, and systems of loss shifting or loss spreading which reflect national social values and concerns about allocations of risk and responsibilities.<sup>132</sup> The law imposes certain obligations based on the legal policy behind them and causal inquiry should be shaped accordingly. There is a fine line between general causal rules and policy reasons, and a right balance must be struck in each case based on the particular circumstances. To illustrate, in *Fairchild v Glenhaven Funeral Services Ltd*, Lord Hoffmann said 'I think it *would be both inconsistent with the policy of the law imposing the duty and morally wrong for your Lordships to impose causal requirements which exclude liability*.'<sup>133</sup> Hence, causal inquiry was shaped based on the breach of duty imposed by the statute and the policy behind the creation of such a duty.

There are differences and similarities in proving the existence of duty, the breach of it, and legal causation. Denning LJ observed in *Roe v Minister of Health* that

the three questions, duty, causation, and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence.<sup>134</sup>

In the tort of negligence, the duty of care requirement overlaps with remoteness of damage. Foreseeability is a factor considered in relation to the duty of care, the breach of the duty of care and again in causal inquiry when establishing the legal cause of damage.<sup>135</sup> Lord Hoffmann explained his reasoning of this problem:

The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place.<sup>136</sup>

<sup>132</sup> Deakin, Johnston and Markesinis (n 20) 188.

<sup>133</sup> This was a case where the damage concerned death, and in such cases courts are always more likely to recognise liability than in damage to property. The claimants contracted lung cancer (mesothelioma) due to inhalation of asbestos fibre and consequently fell gravely ill or died. See *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 63, emphasis added.

<sup>134</sup> Denning LJ in *Roe v Minister of Health* [1954] EWCA Civ 7.

<sup>135</sup> Dugdale (ed) (n 32) paras 2-107 and 2-108; Weir (n 90) 83; Harpwood (n 51) 24.

<sup>136</sup> *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 56.

The very important factor of foreseeability thus draws a connecting line through the entire tort of negligence.<sup>137</sup> The standard of care is the primary element that defines causation.<sup>138</sup> 'The question of causation cannot be divorced from that of duty. The policy underlying the duty may influence the application of causation principles.'<sup>139</sup> Culpability and compensation are assessed based on the same test.<sup>140</sup> When assessing breach, the judges are expected to determine the risk and thereby come to a conclusion on the negligence of the conduct. Risk refers to the chance, possibility or probability that some undesirable event will occur in the future. These factors of risk are assessed by reference to an objective standard, a reasonable person. On the other hand, within causal inquiry, these same factors of chance, possibility, and probability constitute the requirement of foreseeability. But in this case, they relate to the present case, not some objectively created standard. As Deakin and Markesinis conclude, 'the test of foreseeability of damage is no more *conclusive* in regard to causation than it is as a test for duty and breach'.<sup>141</sup>

In the case of EU law, the situation should be the following. Legally relevant causes are determined in the second step of causal inquiry. The test of reasonable foreseeability is used in national law and may be adjusted to fit EU law as well. The test of reasonable foreseeability considers whether the kind of damage that occurred was a reasonably foreseeable consequence to the defendant Member State. The national judge should anticipate similar circumstances and consider whether the damage is of the same type as would normally be expected. If it is not, it will be deemed too remote. The 'kind' of damage can be stretched or shrunk, depending on policy considerations. The policy considerations used should be those of EU law.

To draw a parallel between national and EU law, if in English law '[t]he question of causation cannot be divorced from that of duty [and the] policy underlying the duty may influence the application of causation principles',<sup>142</sup> then this affects EU law as well. National policies are a result of national social values and concerns about allocations of risk and responsibilities.<sup>143</sup> However, these do not necessarily mirror the allocations of risk and responsibilities in EU law. In fact, it is very hard to imagine how a supranational entity uniting numerous Member States

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<sup>137</sup> H McGregor QC, *McGregor on Damages* (18<sup>th</sup> edn, Sweet & Maxwell 2010) para 4-002.

<sup>138</sup> Harpwood (n 51) 193-94.

<sup>139</sup> Dugdale (ed) (n 32) para 8-11.

<sup>140</sup> Hart and Honoré (n 4) 256.

<sup>141</sup> Deakin, Johnston and Markesinis (n 20) 188.

<sup>142</sup> Dugdale (ed) (n 32) para 8-11.

<sup>143</sup> Deakin, Johnston and Markesinis (n 20) 188.

could have the same concerns about allocations of risk and responsibilities as each of its individual nations. One of the purposes of the Member State liability principle is to make Member States respect EU law and the individual rights given by that law to their citizens. Certainly, Member States would not have this anywhere on their own national agenda. The policies of EU law are shaped around its own social values and concerns about allocations of risk and responsibilities. Therefore, causal rules applicable in EU law should mirror the policies of EU law.

In cases of Member State liability, whether they are based on the tort of breach of statutory duty or Eurotort, national conditions of duty and breach of duty are replaced by conditions of conferment of rights on individuals and sufficient seriousness of breach, all of which are governed by EU law. In the context of EU law, 'the duty may be described in general terms as a duty not to act in grave and manifest disregard of [EC law] obligations.'<sup>144</sup> Hence, sufficiently serious breach influences the establishment of causality. Factors indicating the existence of serious breach in EU law are also factors indicating the existence of causation:

- if the Member State acted with intention to breach EU law, this was one of the factors that caused harm;
- if the Member State acted outside of its discretion given by EU law, this was one of the factors that caused harm;
- if the error committed by the Member State was inexcusable, this was one of the factors that caused harm;
- if the Member State failed to abandon national measures contrary to EU law, that was one of the factors that caused harm.

Two factors that are not mentioned in the above list cannot be considered as fault factors attributable to the tortfeasor. More precisely, clarity and precision of the norm of EU law and the position of an EU institution which may have contributed towards the omission do not relate to the wilful conduct of a Member State. The norm is either clear or not clear, and the position of the EU institution exists or does not. However, these two factors help in assessing the amount of discretionary power that the Member State had. Discretion and fault are inversely proportional. The greater the discretion, the smaller the possibility of sufficiently serious breach.

Causal requirements vary depending on the basis and purpose of liability, which are elements determined within the relevant legal system. The basis and purpose of Member State liability is found within EU law. The purpose of the causal requirement rules is to produce a just result

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<sup>144</sup> Downes (n 96) 300.

by delimiting the scope of liability in a way which relates to the basis of liability for the conduct. These questions cannot be separated, and that is why national rules, at least the substantive ones, on causation are inapplicable. In other words, national procedural rules on causation should be applied by respecting the basis and purpose of Member State liability in EU law. Rules which determine what one is liable for in EU law are set within the first and second conditions of the Member State liability principle and together form a part of the third condition: direct causal link. The standard of behaviour that is set for consideration of sufficient seriousness of the breach will inevitably influence causal inquiry as well. For example, by means of fault factors (which are relevant for determining negligence), it can also be determined whether a certain type of harm could have been foreseeable (which is relevant for legal causation).<sup>145</sup> In a Member State liability case, the judge will have to apply the above-mentioned factors of causation in order to create an expected standard of behaviour and compare the conduct that led to the harm with what was expected.

The reasons why the Court considers certain conduct of a Member State to be sufficiently serious relate also to the purpose of the causal requirements in that same case. Legal causation should limit liability for the same purpose which is used to determine sufficiently serious breach. Sufficiently serious breach of EU law and its purpose in a certain case is determined by the relevant legal norm and the use of factors set by the court. Hence, these same factors may be used when determining an adequate (or legal) causal link. These factors were created by the Court to fit the purposes and policies of EU law.

#### b) Intervening acts

*Novus actus interveniens* is considered to have occurred when an act of the tortfeasor creates a danger which is triggered by the subsequent act of another person and results in damage that would not have occurred but for the intervention. The question relevant for causation is at what moment the person originally responsible for a harmful situation ceases to be liable for its ulterior effects and the intervener takes the blame. This moment seems to happen when the danger comes to the notice of a person who can and should prevent it. This is not so when the intervener still reacts to the danger created by the original tortfeasor. In the event of further harm, it is important to establish whether such harm was also foreseeable or not. Ulterior harm will be held as unforeseeable if it was wholly unexpected or if it was due to a *novus actus interveniens*.<sup>146</sup>

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<sup>145</sup> Hart and Honoré (n 7) 257-58.

<sup>146</sup> Weir (n 90) 84-87.

The main feature of a *novus actus* is that it erases the initial wrongdoing of the defendant. But there is no simple test. Two approaches to finding a *novus actus* exist: a) the causal approach asks whether this new act was reasonable (in the voluntary sense). The more unreasonable the intervening conduct, the more causative such a *novus actus* is; b) the approach regarding fault asks whether the intervening act was foreseeable. The more foreseeable it was, the less causative it will be considered. However, if a duty to act existed to prevent the interference that occurred, such interference will not be considered as a *novus actus*.<sup>147</sup>

In EU law, when determining the legal cause of damage, a judge asks whether there was some other intervening event which was so unreasonable, judging from the aspect of risk created by the defendant's conduct, that it breaks the chain of causation. This is also applicable in EU law, and the Court applied the concept of *novus actus interveniens* in *Brinkmann*.<sup>148</sup> This indicates that the Court used a two-stage causal inquiry and determined factual and legal causation. Unfortunately, in that case the Court reached a different conclusion than that which would most probably have been reached by an English judge had he handled the case. The Court considered that the application of EU legislation by national administrative bodies broke the causal chain even though such an act was not wholly unreasonable and unexpected when the legislator failed to act and implement EU law. Obviously, causal inquiry was put to use for the purposes of EU policy, and the Court did not see any benefit in sanctioning desirable behaviour by the Member State administration. This notion serves the same purpose in national law:

[T]he real question is, what is the damage for which the defendant under consideration should be held *responsible*. The nature of his duty (here, the common law duty of care) is relevant; causation, certainly, will be relevant - but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it the defendant's duty to guard the claimant ... *Novus actus interveniens* ... [is] no more and no less than [a tool or mechanism] which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the claimant has suffered.<sup>149</sup>

This leads to the conclusion that national judges should use national causal procedural rules for the purposes of satisfying EU law policies.

<sup>147</sup> Dugdale (ed) (n 32) paras 2-78 and 2-96.

<sup>148</sup> C-319/96 *Brinkmann Tabakfabriken* [1998] ECR I-5255.

<sup>149</sup> Laws LJ in *Rahman v Arearose Ltd & Anor* [2000] EWCA Civ 190, para 33.

### c) Purpose

The purpose due to which a rule was created helps narrow the scope of liability down, and it is also referred to as the scope of the rule test. In a case of breach of statutory duty, this rule is quite simply applied. If the occurring kind of harm is the consequence of the established negligence and falls within the protective scope of the rule breached, then a causal link will be held to exist. This is easily applicable in cases of statutory duties but more complicated in the case of common law duties in English law. Common law duties are not generally applicable rules made for use in future cases. Therefore, in such cases instead of the scope of the rule, the scope of duty is the key issue which limits liability. Loss has to be the very thing that the obligation was trying to prevent.<sup>150</sup>

The scope of duty or the rule is sometimes presented as a causal problem in fault-based liability cases. In such cases, an additional limitation may exist to the already established legal cause. The court may ask if the damage is within the scope of protection of the tort. As Denning LJ reasoned in *Roe v Minister of Health*, the question that should be posed is: 'is the consequence fairly to be regarded as within the risk created by the negligence?'<sup>151</sup> If it is, then liability exists, but if it is not, then no liability will arise.

In Member State liability cases, the first condition of liability requires that the EU law confers certain rights on individuals. In a way, by determining this condition, the national judge will also identify the type of interest that the EU law intended to protect. This will consequently make the finding of foreseeability of damage even simpler. In EU law, the first condition of liability and the relevant legal rule will provide the scope within which liability may arise in EU law. It will serve to determine the purpose or determine the scope of the rule. This test will provide a final limitation of legal causation and consequently liability.

In the case of adapting the national tort of breach of statutory duty to fit the purposes of EU law, the situation differs depending on whether the breach of EU law is based on fault or strict liability. If the basis of liability is fault, as indicated above, the statutory right and its breach must be determined based on EU law. Consequently, the degree of fault determined on the basis of EU law influences causal inquiry. If, on the other hand, liability is strict in the sense that only an obligation of result and no discretion was given to the Member State, then causality is quite simply established based only on the factual chain of consequences, and any legal limitation of it is determined solely by the scope of the rule.

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<sup>150</sup> Weir (n 90) 88-90.

<sup>151</sup> *Roe v Minister of Health* [1954] EWCA Civ 7.

### 3) Defences

English law offers various defences to defendants. Some of them turn on causal issues, some on damages. Contributory negligence is relevant to causation where liability is fault-based, while mitigation of damages relates to the establishment of damages. However, they are two sides of the same coin.<sup>152</sup>

Contributory negligence may be introduced as a defence by the defendant, and leads the court back to causality in the sense that it can indicate a *novus actus interveniens* which breaks the causal chain. It is important to emphasise that the word 'negligence' is used here to describe careless conduct or lacking reasonable care, not a breach of duty to take care.<sup>153</sup> This defence in English law relies only on the contributory negligence of the claimant, not of a third party. The same objective standard of care that was applied in negligence should be applied when establishing contributory negligence and analysing whether the claimant has failed to take reasonable care of his own interests so as to justify a reduction of damages.<sup>154</sup>

Mitigation of damage is a defence introduced by the defendant which leads the court to reconsider the issue of damages. The effect of this defence is that the amount of damages payable by the defendant is reduced. The principle is that 'you cannot claim compensation for items of damage you could reasonably have avoided or for expenditure needlessly incurred'.<sup>155</sup>

The defence of contributory negligence may be applied in a case of Member State liability but with caution. There exists the possibility of introducing incompatible elements of national law into an EU law claim. Essentially, by using this defence, the defendant reopens the issue of causality, because it proves that damage was caused due to the fault of the claimant.

However, in practice, it is difficult to envisage circumstances in which an individual claimant might be held to have contributed to his loss caused by a breach of a treaty obligation by a Member State ... The

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<sup>152</sup> The defence of illegality states that nobody can pursue a cause of action if it relies on his own illegality. There also exist other defences, but the '[d]efences based on consent, ranging from assumption of risk (*volenti non fit iniuria*) to exclusion clauses and notices, are not available as a defence to the tort of breach of statutory duty [because] a person cannot escape from responsibility for a duty which has been placed upon him by Parliament by obtaining another person's agreement which purports to exempt him from any liability created by that duty.' Stanton (n 31) 336-37.

<sup>153</sup> Walton, Cooper and Wood (n 28) 9, para 1-14.

<sup>154</sup> Dugdale (ed) (n 32) para 8-130.

<sup>155</sup> Weir (n 90) 128.

defence might also be held to create an unacceptable barrier to the enforcement of community law in the United Kingdom.<sup>156</sup>

Nevertheless, in the event of this defence, national judges should determine in what amount the fault of the claimant diminishes the sufficiently serious breach of the defendant. However, is the national concept of fault on the part of the individual applicable? There is no certain answer for now.

In respect of the principle of mitigation of damages, the Court said that

in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.<sup>157</sup>

As for the other defences, the claimant's consent to harmful conduct is irrelevant in EU law, as it cannot be introduced under a breach of EU law. The defence of the claimant's illegality would, in the author's opinion, be available in a Member State liability case if it respected the basic principles of EU law.

### ***E) Causation if liability is strict***

The standard causal two-step inquiry consisting of the cause in fact and legal cause is present in cases of strict liability as well. The first step is always the same and consists of proving the factual chain of consequences. Strict liability implications become visible in the second step. That is why Honoré asserts that the risk theory has two aspects when applied in practice. On one hand, it is restrictive because recovery of damages is possible only if harm is within the risk that the duty is intended to guard against. On the other hand, it is extensive because it does away with all causal tests if the harm is within that risk. In other words, if the defendant's act is a necessary condition of the resulting harm, this is enough to establish liability.<sup>158</sup>

The foreseeability test cannot be used to determine the extent of liability in cases of strict or absolute liability.<sup>159</sup> It all depends on the statute. Liability will be deemed strict if a provision uses the words 'must' or

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<sup>156</sup> Stanton (n 31) 336.

<sup>157</sup> *Brasserie* (n 2) para 84.

<sup>158</sup> Hart and Honoré (n 7) 287.

<sup>159</sup> McGregor (n 137) 109, para 6-012.

'shall' with reference to a certain duty.<sup>160</sup> If liability is strict, the test of foreseeability is irrelevant. Once strict liability is established, all resulting damages may be claimed regardless of the foreseeability of a certain kind of damage. In such cases, national courts apply the *Gorris v Scott*<sup>161</sup> test. The damage that occurred must be of the kind that the statute was aiming to prevent. The manner of occurrence is generally irrelevant. Causation and damage in a strict liability tort such as breach of statutory duty do not create a big hurdle because fault is not required.<sup>162</sup> The only limit that the courts apply is the scope or purpose of the norm test, and reparation of damage will be allowed if the harm is within the risk prescribed by the norm.<sup>163</sup>

The Court reasoned in *Rechberger*<sup>164</sup> that EU law placed an obligation of result upon Member States. This created the basis of strict liability. The Court continued and said that

[i]n those circumstances, the Member State's liability for breach of Article 7 of the Directive cannot be precluded by imprudent conduct on the part of the travel organiser or by the occurrence of exceptional and unforeseeable events ... Such a guarantee [as required by the directive] is specifically aimed at arming consumers against the consequences of the bankruptcy, whatever the causes of it may be.<sup>165</sup>

What this means is that fault does not play any role in cases of strict liability. Foreseeability is irrelevant if liability occurs automatically when a certain result imposed by the statute is not reached. In this sense, English law and EU law are compatible. The only emphasis that should be made at this point is that in cases of EU law the national judge should analyse whether the particular provision of EU law imposed the obligation of result on the State. If it did, the basis of liability is strict and causation is only factual.

In national law, the standard of care is the primary element that defines causation. If that is so, then there is no dilemma in Member State liability cases. When breach of EU law is based on strict liability, then the provision of EU law determines the standard of care. However, in strict liability cases, the standard of care should not be an issue at

<sup>160</sup> Harpwood (n 51) 193-94.

<sup>161</sup> *Gorris v Scott* [1874] LR 9 Ex 125.

<sup>162</sup> R Rebhahn, 'Public Liability in Comparison - England, France, Germany' in H Koziol and BC Steininger (eds), *European Tort Law* (Springer-Verlag 2006) 78.

<sup>163</sup> Weir (n 90) 100; Hart and Honoré (n 7) 286.

<sup>164</sup> 'It]t should be pointed out that Article 7 of the Directive imposes an obligation of result, namely to guarantee package travellers the refund of money paid over and their repatriation in the event of the travel organiser's bankruptcy.' See *Rechberger* (n 92) para 74.

<sup>165</sup> *Rechberger* (n 92) paras 74-75.

all, as it is the realisation of the risk prescribed in the norm that triggers liability. In EU law, the two bases of liability are clearly divided and the standard of care is only relevant in the analysis of sufficiently serious breach. This is not the case in national law, because the breach of statutory duty may be based on strict or fault liability. In addition, even in cases where liability should be strict (in the absolute sense) in English law, fault very often finds a way in. This is why scholars elaborate on the standard of care even in cases of strict liability. However, in EU law, the matter is for now clear, and strict liability puts an obligation of result on the Member State which renders the standard of care irrelevant.

### **F) Damages**

The issue of damages will be touched upon only briefly. This condition also influences the establishment of causal link, but it would be going outside the primary aim of this article if such interaction was discussed, as it is a rather complex one.

The Court has only given general indications of which harm may be reparable and which may not. It is clear that national rules setting an upper limit to the amount of damages that can be claimed are invalid in cases of EU law.<sup>166</sup> Pure economic loss is not excluded but Member States may put limits on it, provided that the principles of effectiveness and equality of EU law are respected.<sup>167</sup>

On the availability of exemplary damages, the Court has said that 'such damages are based under domestic law ... [A]n award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.'<sup>168</sup>

Reparation for loss or damage caused by breach of EU law must be commensurate with the loss or damage sustained by the individual, which does not exclude pure economic loss. The national court may also inquire into the issue of mitigation of damages and determine whether the injured individual was reasonably diligent in avoiding or limiting loss or damage and if he or she used the available legal remedies in time.<sup>169</sup>

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<sup>166</sup> Craig (n 37) 929.

<sup>167</sup> *Brasserie* (n 2) paras 83, 87; *Stanton and others* (n 66) 248-49, paras 6.045, 6.046.

<sup>168</sup> *Brasserie* (n 2) para 89.

<sup>169</sup> *Brasserie* (n 2) paras 82, 84, 87.

## V Conclusion

It has been shown that English law uses the same tests when determining whether a defendant was negligent and whether that defendant was responsible for a particular loss. Therefore, in a Member State liability case, the questions whether a defendant has committed a sufficiently serious breach and whether he has caused damage must also be determined by the same test. Causal requirements are a result of the rules of law which define the existence of liability. That is why the issue of causality in EU law cannot be divorced from the question of sufficiently serious breach and the rule of law which confers rights on the individual. It cannot depend entirely on national law.

In English law, causation is established in two stages: factual causation and legal causation. Even though this issue depends on the facts of the case, it is the law that formulates the question. The question for the test of factual causation in EU law would thus be: *would the damage have occurred but for the sufficiently serious breach of the defendant?* Rather than any concept of fault, carelessness or negligence, the test applies the standard of conduct set within EU law. In the second stage, where causes are limited to only legally relevant ones, foreseeability is again the key factor used to determine the extent of the defendant's liability (just as it was a key factor in determining the breach of the duty of care and carelessness). Legal causation or remoteness is determined based on reasonable foreseeability of the kind of damage that occurred in the case at hand. The role of 'foreseeability' in EU law is played by the factors of sufficiently serious breach which help establish a certain expected standard of conduct in each case. Therefore, factors indicating the existence of serious breach are also factors which should be used for determining the existence of legally relevant causation:

- if the Member State acted with intention to breach EU law, this was one of the factors that caused harm;
- if the Member State acted outside of the discretion given by EU law, this was one of the factors that caused harm;
- if the error committed by the Member State was inexcusable, this was one of the factors that caused harm;
- the failure of the Member State to abandon national measures contrary to EU law was one of the factors that caused harm.

Therefore, the basis, content and function of the test of foreseeability that is used in determining breach on the one hand and legal causation on the other is the same. The basis is always the defendant's conduct, the content is a certain expected behaviour, and the function in ques-

tion is the assessment of probabilities. In the logic of Lord Hoffmann,<sup>170</sup> the concept of sufficiently serious breach, while helping regulate which conduct will be considered as breaching EU law, also influences the creation of causal rules in each particular case. The two cannot be divorced, because legally relevant causation has the purpose of limiting liability in accordance with the reasons why liability is provided for in the first place.

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<sup>170</sup> 'The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place.' See Lord Hoffman in *Fairchild v Glenhaven Funeral Services Ltd* (n 95) para 56.