

Risks and Side Effects: Five Questions on the ‘New’ Hungarian Tort Law

The rules of extra-contractual liability did not remain unaffected by the overwhelming reform of the Hungarian private law, which resulted in the codification of the New Civil Code in 2013. According to the Statement of Reasons provided by the legislator, the amendments and changes in this field set the following three objectives. The first was to incorporate those liability rules which were already part of the legal system but had been accommodated by other acts so far (for example, the rules on product liability or environmental damage). The second goal was to include the sound solutions developed in the ‘judge-made law’, i.e. by the case law of the court practice. Finally, the legislator’s ambitions also covered the introduction of new rules and solutions (partly transplanted from other legal systems) in order to give satisfactory answers to problems of liability law which before could be provided neither by the legislator nor by the case law (for example the foreseeability doctrine, alternative liability and Non Cumul, i.e. the exclusion and prohibition of parallel damage claims on the basis of extra-contractual liability between contracting parties).

Paradigmatic changes can hardly be envisaged; however, some amendments are significant enough to raise questions on the justification, efficacy and usefulness of the new rules and tools.

After a short introduction giving an overview on the structure and basics of extra-contractual liability (I) as regulated by the new Hungarian Civil Code (Act V of 2003 on the Civil Code, hereinafter referred to as NHCC), we analyse the amendments of the rules on extra-contractual liability by posing five questions, provocative to some extent (II): 1 Did we really codify the case law? 2 Do we really know what the ‘new’ tools are for? 3 Are the ‘new tools’ really necessary? 4 Did we tie up all of the loose ends? 5 Did we consider all the risks and side-effects? This critical ‘questionnaire’ is followed by a short summary on our conclusions (III).

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I The Landscape: an Overview on the Structure and Basics of Extra-contractual Liability in the Hungarian Civil Code

The Hungarian extra-contractual liability regime follows the French model in many aspects. The general rule on delictual (extra-contractual) liability is a *'big general clause'*, which neither restricts liability for particular losses caused by specific wrongful conducts (as is the case in the tort law of the common law jurisdictions), nor limits the duty to pay damages for the infringements of particular assets, goods and values specified by the law (enumeration of protected goods, *System der geschützten Rechtsgüter*), as is stipulated in s 823 para 1 of the German BGB. According to s 6:519 NHCC, 'any person who causes damage to another person wrongfully shall be liable for such damage. The tortfeasor shall be relieved of liability if able to prove that they were not at fault.' As such, this is a fault-based liability rule with presumed fault. The doctrine of 'adequate cause' plays a very important role in keeping the floodgates closed, i.e. in rejecting absurd and exaggerated damage claims.

There is also another general clause, which establishes a *general strict liability* for damages caused by *highly dangerous* or *extra hazardous activities*. As is stated in s 6:535 para 1 NHCC, the operator is relieved of this liability only if they are able to prove that the damage occurred due to an unavoidable event that falls beyond the realm (or scope) of their highly dangerous activities.

The above specified basic liability rules are supplemented by a couple of other *special* (still *fault-based*) *liability structures*, including liability for employees,¹ agents,² obligors of other contracts,³ shareholders⁴ and executive officers⁵ of legal persons; liability for the actions of public authorities (public officials, judges, public prosecutors, bailiffs and public notaries);⁶ liability for the acts of non-culpable persons⁷ and, last but not least, liability for damages caused by animals.⁸ The NHCC contains detailed provisions on product liability in accordance with Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.⁹ There is also a 'quasi delictual' rule on damages caused by parts of the building that have fallen off or by any other deficiency in the building (building damages). The owner is liable for such damage, unless they are able to prove that the regulations pertaining to construction and maintenance

¹ S 6:540 paras 1 and 3.

² S 6:542.

³ S 6:543.

⁴ S 6:540 paras 2 and 3.

⁵ S 6:541.

⁶ S 6:548–6:549.

⁷ S 6:544 para 1.

⁸ S 6:562 para 1, however a strict liability applies to damages caused by 'dangerous animals' (cf. s 6:562 para 2) and by so-called huntable animals (S 6:563).

⁹ S 6:550–6:559.

have not been violated and that they have not acted wrongfully (and they were not at fault either) in the course of construction and maintenance.¹⁰

As far as the damages to pay are concerned, *'lump sum compensation in cash'* is the rule; however, the court can award *periodic payment* for recurrent future loss, namely for 'loss of income' and 'loss of maintenance' (the latter if the primary victim dies). If the extent of damage cannot be precisely calculated, the court can award general damages (based on appraisal) that would be sufficient to compensate the aggrieved party. There is no longer a rule on 'non-pecuniary damages' in the new code. This legal phenomenon was very much stressed by inherent contradictions, and so the legislator decided to replace it by the so-called '*sérelemdíj*,' i.e. *pain and suffering* (*Schmerzensgeld, solatium doloris*). According to s 2:52 para 2 NHCC, the rules on liability and damages apply to the prerequisites of this 'pain and suffering' – as to the (liable) person obliged to pay for the pain and suffering and to the exculpation in particular – but also that no proof of any (non-pecuniary or immaterial) disadvantage or loss has to be provided beyond the infringement of a personality right. (The evidence on some kind of immaterial disadvantage was required in the practice of the former Civil Code.) Section 2:52 para 3 NHCC contains the factors the judge will consider while deciding on the amount of pain and suffering, generally at their free discretion. These are as follows: the circumstances of the case, in particular the severity of the infringement; the repetition of the infringement; the degree of fault; and the impacts of the infringement on the victim and on their environment.

II Five Provocative Questions

1 Did We Really Codify the Case Law?

As one of the legislator's goals was to incorporate the sound solutions developed by the courts, it might be useful to check whether this goal has been achieved and how these achievements can influence everyday court practice again. The examples elaborated below show that there are some contexts wherein the real and true judge made solutions have not been included into the code but rather some mutations of them.

a) New rules, which truly represent former judicial solutions

First, minors and those who do not have *capacity of discernment* due to mental illness or similar are not responsible for the damage caused by them. It is their custodian with whom liability lies. The notion of 'lack of capacity of discernment' or '*non-culpability*' had not been defined by

¹⁰ Cf. s 6:560, which is followed by another rule (s 6:561) on the liability for damages caused by fallen, thrown or dumped objects. The liability lies with the tenant or other user of the dwelling or premises. If the tenant or user identifies the person who caused the damage, they shall bear liability as a surety. The tenant or user shall be relieved of liability if they prove that the person who caused the damage was on the premises unlawfully (i.e. they were a trespasser).

statutory law before. Now s 6:544 para 1 contains a statutory definition as follows: ‘Any person whose discretionary ability is limited to an extent whereby that person is unable to comprehend the consequences of their actions leading to the damage shall not be held liable for the damage they caused.’ This statutory definition reflects the concept, developed by the courts, that culpability must be checked in every case in such a way that it can be assumed or rejected for the ‘wrongful’ conduct in question, because the ‘tortfeasor’ might be able to comprehend the consequences of some of their actions while they cannot foresee those of their other acts and omissions.¹¹ Minors aged 12 and above are generally able to predict the consequences of their conduct; however, this general statement is not without exceptions. Additional important achievements of the case law have been fixed in the NHCC in this regard. S 6:537 para 2 (related to the liability for damages caused by dangerous activities) states that contributory negligence cannot be applicable if a non-culpable person (victim) has contributed to the occurrence of the damage. The operator who is fully liable for the damages suffered by the aggrieved party in this case shall be entitled to lodge a claim for compensation against the guardian (custodian) of a victim lacking discernment.

Second, the principle of ‘*compensatio lucri cum damno*’ (i.e. that the amount of damages to be paid shall be reduced by any financial advantage of the aggrieved party resulting from the wrongful conduct), has already been applied in the case law, too. Now this doctrine has become a part of the statutory law on extra-contractual liability. The principle as the rule is however supplemented by an exception, whereby the court can abstain from its application if this were deemed redundant, having regard to the circumstances of the case. For example, if the aggrieved party is supported by family members, charitable organisations or similar, it can be presumed that the supporters do not intend to provide financial aid to the tortfeasor but to the victim. Their donations have a sharply defined purpose, a kind of contractual ‘*donatio inter vivos*’ that is definitely not aimed at the enrichment of the tortfeasor. The deduction of this kind of donation is not justified and so the exemption applies.

Third, in the former Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter referred to as FHCC) the rule and the exception regarding the modes of ‘compensation’ had been turned upside down, because the statutory rule of ‘*restitutio in integrum*’ was awarded much less frequently than the statutory exception, of *compensation in terms of money*. The legislator now adjusted the rule to the reality and compensation in terms of money became the rule de jure as well.¹²

¹¹ Havasi Péter, in Wellmann György (ed), *Az új Ptk. magyarázata VI/VI, Kötelmi jog, Harmadik, Negyedik, Ötödik és Hatodik Rész* (HVG-ORAC 2013, Budapest) 478.

¹² Cf. S 6:527 para 1: ‘The tortfeasor shall provide compensation in cash, unless compensation in kind is justified by the circumstances.’

b) New rules which are thought to be incorporations of the case law,
but in reality are not

As referred to above, there is a general strict liability regime for damages caused by *extra-hazardous (or dangerous) activities*. The liable person is not necessarily the one who actually carried out the respective activity that caused the damage, but the so-called 'operator'. The former Civil Code did not contain any statutory definition of the notion of the 'operator', therefore flexible criteria came into being in the court practice; this agglomeration of aspects and decisive factors was applied but always adjusted to the particular case in question. Sometimes one aspect was accented and the next time another, as the case at hand required. The components of the notion of 'operator' included the following: who was the owner of the equipment being used to carry out the activity; in whose interest the activity was carried out and who profited from that (profit and responsibility shall go hand in hand); who was able to control, coordinate, regulate and influence the activity; and who was entitled to make the fundamental decisions on how, where and when the dangerous activity was carried out.¹³

The legislator seems to have picked out one component of the above listed diverse criteria and to have highlighted this aspect as the sole decisive factor on the core question of who is to be considered as the operator. According to s 6:536 para 1 'The person *in whose interest* the hazardous activity is carried out shall be recognised as the operator.'

Despite the statements made in the commentaries of the NHCC (according to which the legislator did not want to change the notion of 'operator' as it emerged in court practice and so the earlier case law can be referred to accordingly¹⁴; moreover, the legislator also refers to the previous court practice in the Statement of Reasons, making an impression indirectly that they are convinced of having maintained this flexible court practice), it is our understanding that highlighting one criterion can overwhelmingly change the interpretation and application of the rule. Let's tackle this by a few examples.

If a rental car caused an accident, the car rental company was considered as the operator and no court came to the idea to qualify the renter (leser) as the operator. However if the only question asked is in whose interest the dangerous activity (operating, driving a car) had been, it would be difficult to deny that it happened also – at least partly – in the interest of the renter (leser). Is it sound and just to consider the renter (leser) to be the operator?

The solution chosen by the lawmaker might be evaluated as even more unjust in the following imagined situations. Let's suppose that two friendly couples visit a concert together. They live quite far from another; nevertheless, the couple who arrived by car offers the other couple a lift, i.e. to bring them home by car. On the way they run over a pedestrian. There would have been no doubt according to the former court practice that the owner, the driver of the car, had been the

¹³ Lábady Tamás, in Vékás Lajos, Gárdos Péter (eds), *Kommentár a Polgári Törvénykönyvhöz* (Wolters Kluwer 2014, Budapest) 2274.

¹⁴ Lábady Tamás, in Vékás Lajos (ed), *A Polgári Törvénykönyv magyarázatokkal* (Complex 2013, Budapest) 949; Havasi (n 11) 468.

operator. However, if one takes the statutory definition seriously and poses only that particular question, of in whose interest the car was driven, then the answer may be that it was in the sole interest of the couple who had been given a lift, otherwise the couple having the car would not have gone in that particular direction at all. The detour had been only made in the interest of the couple without a car. Another imagined example results in an even less justified solution. Let's suppose a female neighbour is in the very late stages of pregnancy, but her husband is abroad on a business trip. In the middle of the night the childbirth begins and the lady asks her neighbour to bring her to the nearest hospital. The car runs a pedestrian over on the way. The question reads again as follows: in whose interest was the car operating? Was it in the driver's (neighbour's) interest? Hardly; their interest would have been to sleep in their bed. It was rather the lady's interest to get into the hospital as fast as possible. Is she deemed to be the operator? That remains to be seen.

Moreover, the commentaries confirm that response No 40 of the Civil Law Department of the Supreme Court seems to be overruled by the new statutory definition. This response referred to cars in joint conjugal property. The essence of the response was that not necessarily both spouses were to qualify as the operator, but only that spouse who regularly drove the car. Yet, in reality, the family car is used in the interest of both spouses, of the whole family, hence all family members can qualify as operators.¹⁵

Further difficulties can arise from the difference of the operator's notion as it is regulated in the NHCC on the one hand and in s 3 No 35 of Act LXII of 2009 on Liability Insurance in Respect of the Use of Motor Vehicles on the other hand. According to the latter statutory notion, 'operator shall mean the person shown in the document issued by the competent authority of the country where the motor vehicle is based as having custody of the vehicle (authorised operator, holder of authorisation), or, failing this, the owner of the vehicle.'

2 Do We Really Know What the 'New' Tools Are For?

There is a new rule on the *liability* (of the legal person) *for the tortious conducts* of executive officers, and on the *officers' personal liability* towards third parties. As it is regulated in s 6:541: 'If an executive officer of a legal person causes damage to a third party in connection with their office, liability in relation to the injured person lies with the executive officer and the legal person, jointly and severally.'

There was no such a rule in the former Civil Code; however, another liability rule for the wrongful acts of the agent covered also the tortious conducts of the executive officers, provided they were acting within the frame of a 'mandate', i.e. a civil law contract and not as the employees of the legal person. If they were employees of the company, the aggrieved party could sue the legal person only, but not the employee directly. In the new code, there is a direct liability of the executive officer, jointly and severally with the legal person, irrespective of the legal relationship between the legal person and the officer, in other words, it does not matter whether

¹⁵ Lábady (n 14) 949.

they are an employee or a mandatee. Another relevant provision must be quoted in this respect. S 30 para 1 of the former Act IV of 2006 on Companies stated that (only) the company was responsible for the damage caused by the executive officer to a third party when acting in their capacity as executive officer. This provision has been overruled by the above cited s 6:541 NHCC. There is no particular explanation for this change. There is no other section in the NHCC which could have spread so much panic and fear in business circles as did the new s 6:541 NHCC. At least three different interpretations came up regarding this rule.

According to the broadest interpretation, the new rule has an undesirable side-effect: the legislator may have created a legal basis for the direct and personal liability of executive officers for the companies' debts. This could be seen as piercing the corporate veil, whereby the stab hits the executive officers. Such personal and direct liability would be a sword of Damocles over the executive officers' heads.¹⁶ (The panic resulted in the slight increase of taking out Directors and Officers (D & O) liability insurance in Hungary.) Those authors who opted for this interpretation made critical remarks about the new rule being at the same time too harsh towards executive officers and superseding the special liability rules concerning the activity of executive officers in the NHCC and in other Acts, for example Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings. S 3:118 NHCC provides for the liability of executive officers in respect of third parties as follows. 'In the event of a business association's dissolution without succession, creditors may bring action for damages up to their claims outstanding against the company's executive officers on the grounds of non-contractual liability, should the executive officer affected fail to take the creditors' interests into account in the event of an imminent threat to the business association's solvency.' According to this special provision (and to the collateral rules in the Insolvency Act), the creditors have to file a declaratory action beforehand, then they have to wait until the end of the liquidation procedure, and only after the closure of this procedure can they file the damage claim against the executive officers of the company. Why would the creditors submit themselves to this complicated multi-stage procedure if they can claim damages on the basis of s 6:541 immediately?

The narrow interpretation of s 6:541 NHCC is represented first and foremost by the members of the Codification Committee. They emphasise that it is not the executive officer who is personally and directly liable for the company's debts but the other way round: it is the company that is responsible (jointly and severally with the executive officer) for the wrongful conduct performed personally by the officer. The justification of the company's liability is that it was the officer's capacity and their status of acting on behalf of the company that enabled them to perform the wrongful conduct.¹⁷ Moreover, it is stressed that the rule covers delictual liability only, i.e. all damage claims which can be traced back to the company's breach of contract are excluded

¹⁶ Sárközy Tamás, 'Az új Ptk. jogi személy könyvének néhány problémája' (2013) 5 *Ügyvédek Lapja*, 2–7, 4–5. Kemenes István, 'A vezető tisztségviselő deliktualis kártérítési felelősségéről II. (Kételyek a Ptk. 6:541. §-ával kapcsolatban)' (2014) 12 *Céghírnök*, 3–5, 5.

¹⁷ Lábady (n 13) 2286–2287; Kisfaludi András, 'A jogi személy vezető tisztségviselőinek felelőssége az új Polgári Törvénykönyvben' in Csehi Zoltán, Koltay András, Landi Balázs, Pogácsás Anett (eds), *(Lex Cathedra et Praxis, Ünnepi Kötet Lábady Tamás 70. születésnapja alkalmából* (Pázmány Press 2014, Budapest 307–338) 335, 337.

from the scope of s 6:541. Therefore, the contractual creditors of the company can sue the officers directly only under s 3:118 NHCC (and according to the collateral rules in the Insolvency Act) if all the preconditions therein are met. The exponents of this theory give some banal examples, that s 6:541 applies if the officer, while taking part in a business meeting, steals the notebook of a third party or if the executive officer gets involved in a punch-up at the Directors Ball and hurts someone seriously. In these imaginary cases, it was their capacity as an executive officer that enabled him to carry out the wrongful conduct and the aggrieved third parties were not in a contractual relationship with either the company or the executive officer.

There is a kind of middle course between the two different interpretations as specified above. The question is whether s 6:541 applies if, for example, hazardous waste (produced by the company as by-products) is stored wrongfully on the adjacent land instead of being transported as prescribed to a hazardous waste deposit; or software is being downloaded illegally by the employees of the company; or the company joins a cartel and thereby causes losses to third parties. If one of these wrongful conducts was ordered by the executive officer himself, or by someone else but the officer knew or should have known all about it, it can be hardly disputed that the damage was caused by the personal conduct of the executive officer to third parties who are definitely not the creditors of the company. Even if the broad interpretation that the executive officers are directly and personally liable for the company's debts can indeed be rejected, it would be rather difficult to deny their liability, as per this last interpretation, for such extra-contractual wrongful acts as in these imaginary cases (hazardous waste, illegal software download, cartel).

3 Are the 'New Tools' Really Necessary?

a) Some tools which are definitely useful

First, in the FHCC there was no explicit regulation of how is *liability to be divided* or, to be more precise, how the damages should be portioned out or prorated in the following three situations. The first case is the victim's contributory negligence.¹⁸ The second one is the internal relationship between joint tortfeasors after they, or one of them, paid the damages awarded by the court to the aggrieved party within the frame of their joint and several liability.¹⁹ The third situation is when the court exceptionally does not establish joint and several liability, although the loss had been caused by joint tortfeasors. The court is entitled to do so if the aggrieved person has themselves contributed to the occurrence of the loss or if establishing joint and several liability appears unjustified in exceptional circumstances.²⁰ The NHCC provides for a uniform three-stage regime for all the above-specified three situations. The liability shall be borne in proportion to the degree of the fault. If the degree and thereby the proportion of the fault cannot be assessed,

¹⁸ S 6:525 NHCC.

¹⁹ S 6:524 para 3 NHCC.

²⁰ S 6:524 para 2 NHCC.

the liability shall be prorated in proportion to the respective contributions (involvements) to the event(s) which resulted in the injuries and losses (i.e. to the causal chain). If the proportion of their contribution cannot be determined either, the liability and the duty to pay or bear the damages shall be divided into equal shares. In our opinion, this codified solution can bring the uncertainty in this field to an end, even though an additional question arises, namely whether the 'proportion of the contribution' (to the causal chain) is a question of fact only (i.e. subject to the factual causation, 'but-for-test' only) or a question of law as well at the discretion of the judge (i.e. subject to legal causation theories such as adequacy, proximate cause, etc.)

Second, in s 6:524 para 4, the joint and several liability is extended beyond the joint tortfeasors to the so-called *cumulative* and *alternative causation* (or liability) as well. The rule itself provides as follows: 'The provision applicable to joint tortfeasors shall apply *mutatis mutandis* also if any one of the activities carried out at the same time would in itself be sufficient to cause the damage, or if the particular activity that in fact caused the damage cannot be identified.' The rule covers two different situations. The cumulative causation is if any one of the activities carried out concurrently (at the same time) would in itself be sufficient to cause the damage. As if two hunters hit a third one and each shot in itself would have caused the fatal result; or two plants let polluting chemicals flow into the river and each pollution in itself would have been sufficient to cause the mass death of fish.²¹ The policy reason behind the rule is quite obvious: none of the hunters, polluters, i.e. tortfeasors can be relieved of liability with reference to the action of the other(s), which would have been sufficient in itself to cause the damage, too. The alternative causation as referred to in the second half of the above cited rule reads as follows: joint and several liability applies also if there were several tortfeasors involved carrying out an activity and the particular activity that in fact caused the damage cannot be identified. In these cases, lack of evidence would strip the victim of being awarded damages. There are sound policy reasons whereby the justification of this new rule can be explained. All tortfeasors involved committed an act which should arouse the disapproval of society. It was surely one of them who really caused the injury. It would be a windfall to the tortfeasor being relieved of liability just because there was someone else who also carried out a wrongful act. Moreover, all of them endangered the victim and the respective danger led to the injury. Joint and several liability also serves prevention, which is one of the main goals of liability law.²² Joint and several liability had been already applied under the FHCC by analogy, in cases now to be subsumed under the new rule. (Schoolkids threw wooden screws and one of them hit the victim's eye, but nobody knew who threw that particular wooden screw.²³ Friends threw fireworks simultaneously and one exploded

²¹ Nochta Tibor, in Csehi Zoltán (ed), *Az új Polgári Törvénykönyv magyarázata, Kommentár a 2013. évi V. törvényhez* (Menedzserpraxis 2014, Budapest) book 6, 505.

²² Boronkay Miklós, 'Felelősség potenciális károkozásért: gondolatok az alternatív okozatosságról' in Csehi Zoltán, Koltay András, Landi Balázs, Pogácsás Anett (eds), *(Lex) Cathedra et Praxis, Ünnepi Kötet Lábady Tamás 70. születésnapja alkalmából* (Pázmány Press 2014, Budapest, 41–60) 42–44. Art. 3:103 (Alternative Causes) para 1 of Principles of European Tort Law also covers this situation; however, each activity is regarded as a cause to the extent corresponding to the likelihood that it may have caused the victim's damage; i.e. a kind of proportional liability applies instead of joint and several liability.

²³ BH 1995. 214.

near to the arm of one of them, causing serious injuries. Who threw that particular firework never emerged.)²⁴ In our opinion, this is a sound solution one can agree with. Some details will undergo judicial interpretation and evaluation, for example what does it mean that the respective activities must be carried out the same time, or whether the activities being carried out must be the same (homogenous cumulative or alternative causation) or also different activities being carried out the same time suffice to apply joint and several liability (heterogeneous cumulative or alternative causation).

Third, according to s 6:532, compensation shall be due immediately upon the occurrence of the damage. It means that the tortfeasor has to pay default interest from the point in time when the damage occurred. S 6:534 allows the judge to award damages based on the value conditions prevailing *at the time of the verdict* if the value conditions between the time when the tort was committed and the time when the court verdict was passed underwent substantial changes due to the passage of time or other circumstances. This is nothing else but the inclusion of sound court practice into the Civil Code.²⁵

b) Foreseeability doctrine: where there is doubt

The new Civil Code introduced the so-called foreseeability clause or doctrine both into contractual and the extra-contractual liability.²⁶ In the field of extra-contractual liability, foreseeability is not an autonomous rule but it is built in into the notion of proximate cause. According to s 6:521, ‘no causal relationship shall be deemed to exist in respect of any damage that the tortfeasor could not and should not have foreseen.’ The new rule raises several questions.

The first structural issue is whether foreseeability is a *question of fact* or a *question of law*. If it is a question of fact, an additional problem arises, with whom the burden of proof lies. The victim has to prove that the loss was foreseeable to the tortfeasor or, to the contrary, the tortfeasor must provide evidence that the losses were not foreseeable to them. The wording of the rule seems to include both factual (‘could not’) and normative foreseeability (‘should not have’). With reference to the latter, the losses are foreseeable even if the particular tortfeasor did not foresee them in the respective case, but a reasonable man in their shoes should have foreseen them; this is undoubtedly a question of law and interpretation at the discretion of the judge. As far as the question of fact is concerned, the wording is rather ambiguous on the burden of proof. What does ‘no causal relationship shall be deemed to exist’ mean? This is surely not an instruction towards the courts to investigate the factual foreseeability *ex officio*, because this would contradict the general principle of civil procedural law, whereby the court is bound to the request of evidence filed by the parties and so the court cannot initiate taking evidence *ex officio*. An answer can be drawn from the systematic interpretation of the rule. Foreseeability is considered

²⁴ BDT 2010. 2221.

²⁵ Csöndes Mónika, in Osztovits András (ed), *A Polgári Törvénykönyvről szóló 1959. évi IV. tv. magyarázata* (Opten 2011, Budapest) 1453.

²⁶ The foreseeability clause of contractual liability is dealt with in another paper. Cf. Ádám Fuglinszky, ‘The Reform of Contractual Liability in the New Hungarian Civil Code: Strict Liability and Foreseeability Clause as Legal Transplants’ (2015) 79 (1) *The Rabel Journal of Comparative and International Private Law*, 72–116.

and regulated as part of the causal connection, i.e. proximate cause. The proximate cause between the tortious conduct and the damage in general must be proven by the plaintiff, i.e. by the aggrieved party. Consequently, the foreseeability (to be more precise, the factual side and/or factual bases of foreseeability) of the losses as part of the causation must be proven by the aggrieved party.

There was no explicit foreseeability clause applied in the Hungarian liability law so far, but there was a need – as in every legal system – to find reasonable, fair and sound methods to limit the principle of full or total compensation. However, within the frame of the so-called theory of *adequate cause* applied frequently in the court practice, foreseeability was (and is) an implied factor; according to this view the law shall hold somebody as liable only for those consequences they could foresee while performing the wrongful conduct, otherwise prevention – one of the main goals of the law on damages – cannot prevail. In some judgments, foreseeability is even addressed by name.²⁷ We forecast that the achievements of the judicial practice on causation will not disappear and be replaced by foreseeability; on the contrary: they will be used simultaneously. It will therefore not be easy to find and declare the differences between them and to identify the particular role allocated to them in limiting liability. According to our understanding, the outreach of foreseeable damages must be narrower than that of direct consequences, thus foreseeability shall not be treated as only the express derivative of what has so far been practiced under the guise of proximate cause. We assume proximate cause and foreseeability as a model with two concentric circles: the outward defensive wall (against completely unfounded damage claims) is the criterion of proximate cause, and foreseeability serves as a kind of inward defensive line, thus: all losses that are foreseeable are necessarily causal but, at the same time, not all causal consequences are foreseeable to the tortfeasor or to the reasonable man in their shoes.

As elaborated on elsewhere, through transplanting the foreseeability doctrine, the immanent difficulties of its application are imported as well.²⁸ Without addressing all the details here, the most important issues are touched upon as follows. It is obvious that if the particular loss, in precise terms and its exact value (i.e. the exact amount of damages) must have been foreseeable, nothing will be ever foreseeable, since nobody is an oracle capable of predicting the future. If only the foreseeability of some kind of damages of some value is required, all consequences can be deemed to be foreseeable. 'In some sense everything is foreseeable, in another sense nothing.'²⁹ The scope and range of the foreseeable depends on the 'focal length' of the judicial practice's lens.

²⁷ The Győr Regional Court of Appeal decided recently on a misfeasance in public office case, wherein the plaintiff sued the bailiff for not fulfilling their duties appropriately. He claimed some additional costs for a loan. He argued that, in consequence of the bailiff's dereliction of their duties, some debts could not be enforced and therefore he needed to take out a loan with a bank in order to buy a special vehicle for his wife who could not use public transport due to her disability. The plaintiff stated that if the bailiff had fulfilled their duties properly, the debt would have been enforced and there would not have been a necessity to take out the loan to buy the adapted car. The court dismissed the lawsuit due to lack of foreseeability. This court referred explicitly to foreseeability as part of the proximate cause considerations (GYIT-H-PJ-2012-33).

²⁸ Fuglinszky (n 26) 96–105.

²⁹ H.L.A. Hart, Tony Honoré, *Causation in the Law* (2nd edn, OUP 1985, Oxford) 256–257 with reference to other scholars too.

Neither of the above-mentioned extremes is acceptable and helpful when shaping a flexible, fair and predictable law. As far as the Hungarian legislator's intentions can be abstracted, the *type* and the *order of magnitude* of the loss have to be foreseeable in order to hold the wrongdoer liable.³⁰ Both notions, however, the 'type' and the 'order of magnitude', need interpretation. The broader the categories, the more damages will be foreseeable and vice versa. The common law experience might serve as a pattern on this point (focusing on the 'type of consequence' but not on the 'specific consequence', in other words on the 'class or character of the injury').³¹ Moreover, it is not always fair and sound to require the foreseeability of both factors. In the common law jurisdictions the so-called *thin skull doctrine* prevails, by which, with regard to personal injuries, the foreseeability of the type suffices; the defendant cannot exculpate himself from liability by reference to their lack of knowledge of the weaknesses and health preconditions of the plaintiff.

It does not turn out from the wording ('the tortfeasor could not and should not have foreseen') whether the loss must be foreseen as a 'possible consequence' of the wrongful conduct or the application of a probability criterion should be considered. The latter approach would provide a useful tool to keep the floodgates closed. However, it would raise several questions. Is the degree of probability a question of fact, i.e. that of natural sciences requiring expert evidence, or is it an issue of law and policy? Where should the bottom line of the required *minimum degree of probability* be positioned? (The criterion of real risk was mentioned in an earlier version of the Statement of Reasons to the draft Civil Code, but in the official materials of the NHCC, this is no longer the case.)³² Whatever the trend in the Hungarian judiciary is going to be, the practical usefulness (or to the contrary, its superfluity) of the foreseeability doctrine must be argued out through meticulous case law.

4 Did we Tie up all of the Loose Ends?

An overwhelming reform of the codified private law is a good occasion to evaluate the court practice, to review all uncertain issues and to assess the needs where the amendment of the statutory law is sought. There are several open issues in the court practice of extra-contractual liability, where the legislator's intervention should have been at least considered; in this way the legislator should have traded off the gains of inserting new solutions into the Civil Code against the disadvantages, thereby restricting the free discretion of the judge among them. The Hungarian legislator seems to have missed this chance, as is highlighted here by reference to a couple of examples.

³⁰ Cf. Lajos Vékás, 'About Contract Law in the New Hungarian Civil Code' 6:1 (2010) ERCL 95–102, 101. (Vékás refers to the foreseeability as part of the new contractual liability regime, however his statements in this respect are relevant to extra-contractual liability as well.)

³¹ See for example *H Parsons (Livestock) Ltd v Uttley Ingham & Company Ltd* [1977] EWCA Civ 13, [1978] QB 791 (although this was a contractual matter). The *Hughes v Lord Advocate* [1963] UKHL 1 (21 February 1963) this was a negligence case.

³² Cf. *A T/5949 sz. törvényjavaslat indokolása* (2008) § 5:477, 1265.

a) Does partial causation exist?

According to the Hungarian concept of causation, a loss is either causal consequence of the wrongful conduct or not, but there is no 'more-or-less' causation. An apportionment of liability (or that of the damages) between the wrongdoer and the aggrieved party is possible only if the aggrieved party also contributed (at least negligently) to their own losses or failed to mitigate them as required by law.³³

In the court practice of damage claims filed by employees against their employers under the Labour Code,³⁴ the prior condition (predisposition) of the victim, i.e. their state of health, is considered and the damage to be paid is reduced accordingly if predispositions or earlier injuries fatefully contributed to the injury.

Over and above, there are some published judgments wherein the court divided the damage in proportion to the involvement of the wrongful conduct in the causal chain on the one hand and of the natural event therein on the other hand.³⁵ There is no statutory basis for passing such a verdict. The court should have decided on whether there was either proximate (or adequate) causal connection between the wrongful conduct and the loss suffered or else that the natural event was simply the predominant root of and reason for the damage incurred.

The efforts of the court not to reject the claim but not to admit it *in toto* either are understandable: the losses were partly caused by the wrongful conduct and it really seems unfair to follow the 'all-or-nothing' approach in this kind of case. However the statutory basis of the respective court practice is still missing. For this reason, it would have been useful if the legislator had provided the courts with a hint, possibly even with an express option, that it can divide the liability (damages), as is already practised on rare occasions.

b) Is loss of chance an autonomous head of loss?

The notion of 'loss of chance' is not completely unknown in Hungarian legal scholarship and practice. However, the Civil Code (neither the former not the new one already in force) does not mention this category. The court practice could not avoid facing cases wherein the loss of chance had to be addressed. The respective court did not have any other choice but to decide whether the loss of chance should be acknowledged at all as a head of loss and if yes, whether

³³ Cf. s 6:525 NHCC.

³⁴ Act I of 2012 on the Labour Code. Cf. Supreme Court BH 2006. 241., similarly in medical malpractice law, cf. Curia BH 2013. 267.

³⁵ Cf. Judgment No. DIT-H-PJ-2008-24., Pf.II. 20.617/2007/4. of the Debrecen Regional Court of Appeal. The forest of the plaintiff had been already weakened by inland waters as, at a later date, in the course of spraying chemicals on the neighbouring fields (conducted improperly by the defendant) some spray (harmful to trees) was blown by the wind over to the forest. Neither the inland waters nor the chemical spray alone would have been sufficient to kill the forest. The court ordered damages to be paid proportionally. In another case (cf. Pécs Regional Court of Appeal PIT-H-PJ-2008-86, Supreme Court BH 2010. 64.), the exterior wall of a house cracked due to the extreme amount of rainwater on the one hand and to the municipality's omission, it not having completed the rainwater pipe system, on the other hand. The court, instead of rejecting or admitting the claim *in toto* (i.e. applying the 'all-or-nothing approach'), here also ordered the payment of damages proportionally.

it should be considered as a pecuniary or a non-pecuniary loss. The legal literature distinguishes three case groups.³⁶

The first group covers cases wherein the *loss of profit* could not be proven with sufficient probability; in other words, the causal connection between the wrongful conduct and the loss suffered was seen as rather loose. The courts seem to be reluctant to recognise any loss in the respective cases. They reject the claim due to lack of evidence.³⁷ There is a special liability rule in s 165 para 2 of Act No CVIII of 2011 on Public Procurement, which states that if the rules on public procurement had been infringed and the (unsuccessful) tenderer claims only their expenses incurred in connection with the preparation of their tender and with their participation in the award procedure, it shall suffice to provide proof to the extent that the other party (i.e. the tendering authority) breached the rules on public procurement, this was really connected to the contract and, finally, that the infringement had a direct impact on their chances of winning the contract. However, this eased requirement of proof covers the claim for expenses only. If the tenderer claims the loss of profit beyond their expenses (that they would have gained if they had won the tender), it is still their task to present sufficient evidence that they would have won if the tendering authority had not infringed the rules. To give sufficient proof of this is hardly ever possible.

If an *attorney* fails to meet the deadline for filing a statement of claim, an appeal or revision, the client loses the chance of winning the case. It never emerges whether they would have won the case or not. The client definitely lost the opportunity. The prevailing view (represented also by the Supreme Court, now Curia) is that the claim is to be rejected, because the plaintiff cannot prove the causal chain between the attorney's omission and the loss suffered. The client may have lost the case, even if the attorney had not missed the deadline.³⁸ Additionally, the courts emphasise that the court procedure on the damage claim cannot be equivalent to a kind of appeal whereby that particular procedure will be concluded in a disguised form (wherein the defendant is not the original one but the negligent attorney), which could not take place due to the omission of the attorney.³⁹ In recent practice however, the courts do not want to let the client go without some compensation and so they tend to qualify the wrongful conduct (omission) of the attorney as an infringement of personality right which can be seen as a basis for awarding non-pecuniary damages (pain and suffering or *solatium doloris*, as it is called in the NHCC). The amounts awarded are very low, particularly in relation to the value of the original claim, which cannot be pursued due to the attorney's default.⁴⁰ As such, the courts do not recognise

³⁶ Jójárt Eszter, 'Az esély elvesztése, mint kár' (2009) 12 Jogtudományi Közlöny 518–533.

³⁷ If the plaintiff lost the chance to participate in a competition for subvention (or the rules of the tender were not obeyed by the contracting authority), they cannot claim any damages (loss of profit), because it was not absolutely certain that they would have won the competition if the rules had been obeyed (Supreme Court BH 1991. 74., similarly EBH 2005. 1220.). There is no evidence that the plaintiff would have been hired if they had received the language-course certificate on time (the language school had delayed sending it to him, cf. Supreme Court BH 1999. 551.).

³⁸ Cf. Supreme Court BH 2009. 355., BH 2013. 89.

³⁹ Cf. Supreme Court BH 2012. 90.

⁴⁰ 100 000 Hungarian Forints (HUF, i.e. approx. EUR 330) in the Supreme Court case BH 2012. 90., HUF 150 000 (approx. EUR 500) in the Curia case BH 2013. 89.

loss of chance as a standalone proprietary position or good, which also deserves protection via the law of damages. They do not even seem to think of applying a proportionate award, i.e. to award damages to the client in proportion to the chances lost, projected to the original value of the claim. The personality right approach represented by the Curia is not perfect either because, on the one hand, the amounts awarded as non-pecuniary damages are completely unrelated to the original value of the claim and, on the other hand, the withdrawal of the chance to win the case is not really an infringement of any personality right.

Finally, the third case group, that of *medical malpractice* cases, is to be dealt with. In the typical scenario, the doctor makes a diagnostic mistake (they do not recognise the illness the patient succumbs to) and therefore does not opt for the appropriate therapy which might have cured the patient. The patient might have recovered, or at least they might have lived longer, or in other cases: they might have recovered earlier, might have remained and lived longer without the symptoms; the residual injuries might not have occurred, etc.⁴¹ The courts give three different answers to this type of claim. Either they reject it because the plaintiff could not provide sufficient evidence to expound with convincing probability that the injury would not have occurred but for the doctor's default, or they lower the required level of probability and award damages in full, or, sporadically (i.e. very rarely) some courts award damages in proportion to the estimated chance that the failed or omitted treatment might have helped the patient.⁴² This third solution is equivalent to the implied acceptance of the loss of chance as a position of value protected by the law, which might be useful as it spares the parties from producing evidence on hypothetical situations.⁴³ This approach seems to cut the Gordian Knot indeed but there is just one problem with regard to this: there is no legal basis to pass such a verdict. In other words, no matter how convincing this view is, it represents a *contra legem* approach. Nowadays, the prevailing view developed by the Szeged and Pécs Regional Court of Appeal is to consider the loss of chance of recovery as a personality right infringement and to award non-pecuniary damages again (*solatium doloris* in the new Code), where there setting the exact amount is at the free discretion of the judge.⁴⁴ A guideline provided by the legislator regarding this case group would also have been useful.

⁴¹ As to the groups cf. Bodonovich Klára 'A gyógyulási esély elvesztése mint kár, a bírói gyakorlat tükrében' (2014) 3 *Iustum Aequum Salutare* 29–49, 31.

⁴² Cf. the comparative analysis of Dósa Ágnes, 'A gyógyulási esély csökkenésének értékelése a kártérítési jogban', in Nótári Tamás (ed), *Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára*, (Lectum Kiadó 2010, Szeged) 49. To the three possible solutions see also Bodonovich (n 41) 32–35, 37, 45–46, 48. She cites a judgement of the Bács-Kiskun County Court, wherein the court awarded 30% of the claimed damages, in proportion to the estimated chance of recovery (which had been lost).

⁴³ Cf. Dósa (n 42) 55–57.

⁴⁴ Cf. Szeged Regional Court of Appeal SZIT-H-PJ-2007-12 and SZIT-H-PJ-2007-61, and also the Supreme Court BH 1999. 363.

c) Does the victim's contributory negligence apply to the claims of the dependants for loss of maintenance?

According to s 6:529 para 1 NHCC, if the tort results in death, any person who was supported by the person who died in consequence of the wrongful conduct can claim the loss of maintenance. S 6:525 para 1 prescribes that if the aggrieved party fails to fulfil their obligations to prevent and mitigate the losses, an apportionment of damages shall be ordered according to the degree of their fault; if the proportion of the fault cannot be determined then in the proportion of the tortfeasor's and the victim's involvement in the causal chain; and finally, if the proportion of their involvement cannot be assessed either then the tortfeasor and victim shall cover (and bear) the damages equally.

Both the former and the new Code are silent on the issue of whether, if the primary victim dies, and they contributed negligently to their death (for example through acting with fault as a joint causer of the accident wherein they lost their life, or as they jumped down from a moving train etc.), the rule on apportionment of damages in s 6:525 para 1 applies to the loss of maintenance claim of the dependants. Shall the contributory negligence of the (dead) primary victim be projected and thereby attributed to the dependants? There is also an important theoretical question in the background, of whether the claim for loss of maintenance is a kind of accessory claim stuck to the loss suffered by the primary victim or, to the contrary, this is a standalone and independent claim of the dependants which is however affiliated to the death of the primary victim on a factual basis but not in the sense of law. The Code does not give answers to these questions.

The views of the Budapest-Capital Regional Court of Appeal and those of the Curia (the highest court in Hungary) diverge. According to the former, it is about a completely independent claim. The family members who were supported by the late primary victim did not contribute to the losses they suffered through the death of their supporter in any way. As such, there is no reason to divide or apportion the damages, and full compensation is to be awarded.⁴⁵ The Curia gives the contrary point of view, namely that the claim for loss of maintenance is still affiliated to the accident in which the primary victim died, i.e. it is in close logical connection with their contributory negligence.⁴⁶ Both approaches can be represented; for us, the latter is more

⁴⁵ The point of view of the Budapest-Capital Regional Court of Appeal is summarised by one of the judges, cf. Csóka István 'A károsulti közrehatás értékelése hozzátartozói károk esetén' [2013] Fővárosi Ítéltábla döntései, Különszám a Fővárosi Ítéltábla megalakulásának 10. évfordulójára, 31–32. According to the assessment provided in two commentaries on the new Civil Code, the court practice seems to have a tendency to follow this former concept, despite the approach to the contrary represented by the Curia, cf. Orosz Árpád, in Osztoivits András (ed), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja*, Vol. IV (Opten 2014, Budapest) 86–87, and Harmathy Attila, in Wellmann György (ed), *Az új Ptk. magyarázata VI/VII., Kötelmi jog, Harmadik, Negyedik, Ötödik és Hatodik Rész*, 2nd revised and expanded edition (HVG-ORAC 2014, Budapest) 506.

⁴⁶ Cf. Csóka (n 45) 31–32, with reference to the following judgements of the Curia: Pfv.III.20.983/2010/6.; Pfv.III.20.760/2009/3.; Pfv.VIII.21.850/2011/4.; Pfv.III.20.238/2007/5.; Pfv.VIII.21.175/2011/3., Pfv.III.20.394/2012/6., Pfv.IV.21.760/2012/9., BH 2012. 151. i.e. Pfv.III.22.053/2010/5. Similarly Tókei Balázs, 'A LB ítélete az egészségügyi szolgáltató felelősségéről' (2011) 2 Jogesetek Magyarázata 27.

convincing. It would be difficult to accept that, if the primary victim survives, their contributory negligence is taken into consideration to their disadvantage in the form of division or apportionment of the damages, but if they die, the same contribution will not be reflected in any way. If the dependants enjoyed the support of the primary victim, they should also share the consequences of their contributory negligence. Of course, the opposite view also deserves deliberation. Due to this uncertainty, it would have been helpful if the legislator had decided on this point.

d) Are losses caused by 'wrongful legislation' claimable?

It remains to be seen whether legislation can ever be considered as a wrongful act under the new Civil Code. The question is even more relevant if an Act enacted by the parliament or a decree given out by the government or by a government minister is declared to be unconstitutional and therefore the Constitutional Court annuls the respective statute.

During the socialist era this question was not asked at all. After the democratisation of the country a few judgments on this issue have been published. According to the prevailing view (represented also by the Supreme Court so far) the process and result of legislation underlies public law only. Legislation does not lead to the emergence of a private law relationship of any kind, even less to the accrual of a claim for damages on the basis of extra-contractual liability. If the judicial power awarded damages to somebody and ordered the legislature to pay these damages then that would be a gross violation of the constitutional principle of separation of powers. This would also mean the restructuring of budgetary resources, which belongs to the exclusive competence of the legislator.⁴⁷

The Codification Committee, led by Lajos Vékás, did not share this view, and in order to make a clean sweep on this point and to disambiguate that the liability of the legislator cannot be *per se* excluded, proposed to introduce a new rule, which would have explicitly prescribed the lawmaker's liability if a statute had been declared to be unconstitutional and had been annulled by the Constitutional Court retroactively to the time of being enacted. (If the annulment had taken place *ex nunc*, the liability would have applied only to losses incurred after the date of the annulment.) Liability would have been imposed on the lawmaker also if they had omitted to enact a statute despite the fact of being ordered to do so by the Constitutional Court. The draft of NHCC provided by the Committee was silent on the issue of whether this was meant as a fault-based liability or a kind of strict liability. However, this and other details have lost their importance, as the respective rules were eventually left out of the new Civil Code as it has been enacted.⁴⁸

⁴⁷ Menyhárd Attila, 'Az állam kártérítési felelőssége és állami immunitás' in Nochta Tibor, Fabó Tibor, Márton Mária (eds), *Ünnepi tanulmányok Kecskés László professzor 60. születésnapja tiszteletére* (PTE ÁJK 2013, Pécs) 400–403. See also the practice of the Supreme Court: BH 1994. 312., BH 1998. 334., BH 2002. 264. (with reference to the omission by the state of enacting a statute), EBH 2010. 2130.

⁴⁸ Lábady Tamás, in Vékás Lajos (ed), *Az új Polgári Törvénykönyv Bizottsági javaslata magyarázatokkal* (Complex 2012, Budapest) 514–515.

Being aware of the reluctance of courts to rule against the legislator, and regarding the fact that the specific rule on the legislator's liability was taken out of the draft Civil Code, the legislator made an unexpected observation in the Statement of Reasons to the new Code. The legislator namely takes the view therein that it is possible to claim damages for losses incurred by the impacts of unconstitutional statutes or by the legislator's omitting the duty of member states to implement an EU directive. The legal basis of the claim is nothing else but the general rule on extra-contractual liability (i.e. the big general clause in s 6:519, which is a fault-based liability with presumed fault). It is more than questionable whether the courts will follow this statement, as they have rejected the damage claims so far. A specific rule could have definitely changed this judicial attitude.

We take the view that the legislator's liability does not infringe the principle of the separation of powers. Only the private law consequences of enacting unconstitutional statutes would be drawn. However, we support the view to conceptualise this liability regime as a fault-based liability, because the lawmaker cannot always foresee that a statute will be declared unconstitutional. It happens that a very narrow majority (of the Constitutional Court judges) makes the decision on the constitutionality or unconstitutionality of a particular set of regulations and the minority approach is also reasonable. The decision depends sometimes on discretion, for example if two fundamental rights collide and the collision can be dissolved only by the careful running of the so-called test of necessity and proportionality. In this view, unconstitutionality is a necessary but not always sufficient precondition of the lawmaker's liability. Liability is to be imposed only if the legislator (i.e. their employees, agents, etc.) was at fault,⁴⁹ for example if the reason for the act's being declared unconstitutional was of a procedural nature (cf. the so-called public law invalidity), or of a substantive nature, but in the latter case only if the unconstitutionality was or could have been foreseeable to the legislator due to the structure, principles and rules of public law, to the enactments of the EU or to the ECJ case law or, last but not least, due to the published judgements of the Constitutional Court.⁵⁰ Scholarly consensus can also play an orienting role in this respect.

5 Did we Consider all the Risks and Side Effects?

The legislator sets the goals and objectives as they decide on the introduction of new laws. However, care should be taken: besides the effect sought by the lawmaker, side effects can occur. In our view, the legislator has to identify and evaluate the possible side effects carefully in order to avoid that the new law results in more disadvantages than advantages. We do not intend to assert that, with regard to the so-called 'Non Cumul', the balance is negative; however this particular rule is a good example of how some undesirable side effects can be highlighted.

⁴⁹ Similarly Petrik Ferenc, *Közigazgatási bíróság – közigazgatási jogviszony* (HVG-ORAC 2011, Budapest) 172. He emphasises correctly that the unconstitutionality of an act does not necessarily include fault.

⁵⁰ Similarly Karsai Dániel, 'A jogalkotással okozott kárról' (2014) 6 *Jogtudományi Közlöny* 315: the unconstitutionality must be unambiguously foreseeable on the basis of the former judgments of the Constitutional Court.

a) The objectives of 'Non Cumul' in the new Civil Code

According to s 6:145 NHCC, where there is a contractual relationship between the plaintiff and the defendant, *parallel damage claims in extra-contractual liability are excluded*.⁵¹ There was no explicit rule on the relationship between contractual and extra-contractual liability in the former Code, and the distinction was of little relevance at all, because there were no significant differences between the two liability regimes. However, for various policy reasons, there are some essential differences between the two in the new Code and so it does make sense to draw a strong dividing line between them, in order to exclude the contracting party from eventually bypassing the rules of contractual liability and opting for the extra-contractual liability regime if it might be more favourable to him. Let's cite some examples.

Although the foreseeability limitation on damages is present in both regulations, the time of reference of the foreseeability is different. It is the time of concluding the contract as far as contractual liability matters,⁵² while there is no explicit rule on the time of foreseeability under the rules of extra-contractual liability. It is assumed that the time of reference cannot here be anything other than the time of conducting the wrongful conduct.

Moreover, according to s 6:174 Para 2 of the new code, the creditor can claim in the event of defective performance so-called direct damages (loss caused directly to the subject of the contract) only if the special prescription times provided for by the code for warranty claims had not yet elapsed and they could not get the defective performance remedied by specific performance (repair or replacement). The special prescription time is one year for a non-consumer contract and two years for consumer contracts, thus significantly shorter than the general prescription time, which expires in five years. (Nevertheless a five-year prescription period applies even to direct damages if the contractual object is an immovable; hence, there is no difference in the latter case.) All in all, the creditor could evade, via the extra-contractual bypass, these shorter prescription times and also their duty to claim specific performance first; in other words, they could evade the right of the defendant to remedy the defect in kind before being obliged to pay damages (i.e. to remedy it in terms of money) by the choice of extra-contractual liability.

b) The foreseeable side effects of 'Non Cumul'

There are, however, some crucial side effects which the lawmaker might have not considered. Before giving an overview on them, let's start with one possible side effect, which has been successfully counteracted by the legislator. The legislator recognised that the exclusion of parallel claims in tort can induce *difficulties in distinction* between obvious breaches of contract

⁵¹ S 6:145: [Exclusion of parallel compensation claims]

The obligee shall enforce their claim for compensation against the obligor in accordance with the provisions on liability for damages for loss caused by non-performance of an obligation, even if the obligor's non-contractual liability also exists.

⁵² Cf. s 6:143 para 2: 'Other pecuniary losses beyond the contractual item and the loss of profit must be compensated for to such an extent as the other party proves that the loss was foreseeable as a possible consequence of the breach at the time of conclusion of the contract.'

and other damaging occurrences, ‘accidents’ related to the contract but not having the clear character of a breach. For instance, if the painter or a mechanic doing repairs in the house breaks a valuable Ming vase, is it still a breach of contract connected compulsorily and exclusively to the contractual liability regime or does it qualify instead as an independent actionable wrong giving rise to an autonomous damage claim in tort after all? In order to avoid such harsh distinction issues, the legislator supplemented the Code with an additional interpretive rule (section 6:146 NHCC), which assigns (pecuniary) damage claims for all losses that occurred *in the course of the performance of the contract* compulsorily to the contractual liability regime. As a result, there is no distinction issue in the above mentioned example: the ‘accidental destruction’ of the Ming vase and all similar losses entitle the creditor to claim damages in contract only, but not in tort. Damages that occurred ‘in the course of the performance’ is a much wider notion than damages ‘caused by the breach of contract’. Now let’s focus on the side effects seemingly overlooked by the legislator.

Through the implementation of ‘Non Cumul’, the scope of the strict extra-contractual liability rule (for extra dangerous activities, s 6:535 et seq.) is going to be significantly restricted and many cases must be solved on the basis of contractual liability instead, although in these cases the injuries were caused by an *extra hazardous activity* (operation), but also in the course of the *performance of a contractual service*. For example: coming flying out of a waterslide or off a summer toboggan run was seen as being injured through an extra hazardous operation, and the operator of these kind of facilities was held liable for the injuries suffered on the basis of extra-contractual (strict) liability, irrespective of the contractual nature of the parties’ relationship. According to the rule on dangerous activities, the operator could be only relieved of liability by proving that the injury was due to an unavoidable event that fell outside or was beyond the scope of their (extra dangerous) activity. From now on, these waterslides, summer toboggan runs and similar cases will underlie only and exclusively contractual liability due to the Non Cumul principle (section 6:145). However, there is a difference between the exculpation prerequisites of the two liability regimes. While for breach of a contract, ‘an impediment beyond the control’ of the party in breach suffices (provided it was unforeseeable and the party could not be reasonably expected to avoid it), an unavoidable event ‘beyond the scope’ of the dangerous activity requires relief from liability. The two formulations, ‘beyond control’ and ‘beyond the scope of activity’, do not necessarily mean the same. Exculpation can be easier if only the former is required. There are many events which are beyond the control of the operator but not beyond the scope of the extra hazardous activity in question.

One might say that the waterslide and the summer toboggan cases are of low relevance; however, the same reflections come into one’s mind regarding all *passenger transport contracts!* Meeting with an accident and suffering injuries as a passenger thereby was designated to the strict extra-contractual liability for dangerous activities, as operating a car (taxi), coach or train was unambiguously qualified by the courts as performing a dangerous activity. From now on, the contractual and only the contractual liability regime is applicable, because there is an onerous or gratuitous passenger transport contract between the operator and the passenger, and the delictual bypass is closed and forbidden by s 6:145 NHCC. This is going to raise several questions. First, the difference in the exculpation clause of the two rules must be brought to mind

again ('beyond control' v. 'beyond the scope of activity'). For example, mechanical failure or the driver's sudden unconsciousness – depending on the circumstances of the case – can be considered as not being beyond the scope of the activity, but beyond the control of the operator. Second, serious policy inconsistencies arise in connection with gratuitous passenger transport contracts, such as giving a lift for free, taking a hitchhiker, etc. In the case of a gratuitous contract, there is no liability for breach of the contract without fault.⁵³ Hence, if the operator causes an accident but they are not at fault, the passenger's damage claim cannot be successful against them. Again: the extra-contractual bypass has been closed by the legislator in s 6:145, and so there is a possible combination of facts and circumstances where the victims of car accidents remain without any (legal) coverage. It might happen that the legislator recognises this gap and tries to fill it with a special rule re-qualifying the operation of a car as always performing an extra-hazardous activity, hence redirecting it in all cases very consequently to the domain of tort law,⁵⁴ according to the motto. Despite the fact that there might be a contract in the background, the outcome could be a more justifiable one if a tort law claim were allowed, but this solution – as any medicine – could have considerable side effects, too. First is the fragmentation of law: some situations wherein a car would be involved would be still subsumed under extra-contractual (strict) liability for extra-hazardous activities. Other dangerous activities, by contrast, would be deemed as contractual if carried out within the context of a contract and so fault-based liability would apply if the contracts were gratuitous ones. This solution would treat similar cases differently. By comparison, it seems to be better to outsource all harms occurring in car accidents and to bring them under a no-fault plan maintained by social security or private insurance companies.

III Conclusions

It is definitely too early to provide a general evaluation on the amendments of the rules on extra-contractual liability. It remains to be seen how the judicial interpretation and discretion is going to reflect the new rules. It cannot be excluded that the respective rules will undergo significant

⁵³ Section 6:147 [Liability for damages in connection with gratuitous contracts]

(1) In the case of gratuitous performance of a contract, liability for damages in the subject matter of the service shall apply if the obligee is able to prove the obligor's actionable conduct in non-performance, or that the obligor failed to provide information concerning any material characteristics of the service of which the obligee was unaware.

(2) In the case of gratuitous performance of a contract, the obligor shall be liable to provide compensation for any damage caused to the obligee's property by performance. The obligor shall be relieved of liability if able to prove that their conduct was not actionable.

⁵⁴ Such an attempt can be discerned from the Statement of Reasons on Section 121 of the Act No. CCXXXVI of 2013 on the amendment of specific financial acts related to EU law harmonisation; see also the Reasons at page 74 of the Draft Act T/13082. It is aforesaid by the reasons (with reference to the amendment of Act No. LXII of 2009 on Compulsory Third-Party Vehicle Insurance), that 'the injuries caused by the operation of a motor vehicle qualify as losses caused by extra-contractual conduct.' However, is a sentence *obiter dictum* in the reasons for an act with a completely different subject sufficient to break through the *Non Cumul* principle provided for by the new Civil Code? Such solutions are definitely sources of legal uncertainty and should therefore be repudiated.

changes while they become part of everyday court practice. That's why we restrict our faint-hearted forecast to answering our five questions on the basis of our first impressions.

1 Did we really codify the case law? One of the legislator's main objectives was to implement the sound solutions developed by court practice into the new Civil Code. In some cases this happened indeed without reservation, for example through the codification of the notion of *lacking capacity of discernment* (non-culpability) due to mental illness or minor age; the principle of '*compensatio lucri cum damno*' and as *compensation in terms of money* was codified as the rule instead of *in integrum restitutio in kind*. However the lawmaker did not succeed every time. In this article the notion of the 'operator' was emphasised as the liable person for damages caused by extra-dangerous activities. The flexible and complex system developed by the court practice (consisting of various criteria from which the appropriate cocktail could always be mixed in accordance with the particular case to be judged) has been replaced by the sole decisive factor of *in whose interest* the hazardous activity is carried out. This might wield significant and in some cases absurd influence on the court practice on liability for dangerous activities.

2 Do we really know what the 'new' tools are for? This is unfortunately not always the case. The legislator's intentions and instructions are not clearly comprehensible relating to the new rule on the *liability* (of the legal person) *for the tortious conducts of executive officers and on their personal liability (jointly and severally with the legal person)*. This new rule launched a very lively discussion among scholars and practitioners, first and foremost because three different interpretations came up regarding this rule. According to the broadest interpretation the legislator might have created the legal basis for the direct and personal liability of executive officers for a company's debts. The special and restricted liability rules of the Bankruptcy and Insolvency Act can be evaded thereby (at least according to this view). The members of the Codification Committee represent a much narrower interpretation: it is not the executive officer who is personally and directly liable for the company's debts but the other way round: it is the company who is responsible for the personal (delictual) wrongful conduct of the officer. It is their capacity as an executive officer that enabled them to carry out the (delictual) wrongful conduct. There is also a third interpretation to be placed somewhere between the two: if any kind of wrongful conduct whereby third parties (not being in a contractual relationship with the company) suffered any harm or loss was ordered by the executive officer themselves, or by someone else but the officer knew or should have known all about it, the company and the officer are liable jointly and severally. (Cartel cases, illegal software download and storing hazardous waste on the premises of third parties are mentioned as examples.) The first approach cannot be acceptable; nevertheless, it remains to be seen where the borderline is going to be drawn between the two other interpretations.

3 Are the 'new tools' really necessary? Some of the new rules seem to provide sound solutions and that's why they will probably find a ready welcome. For example, the three-stage guideline to the *apportionment (division) of damages* (proportion of fault, proportion of involvement in the causal chain, equal shares) in cases of contributory negligence of the aggrieved party; of joint tortfeasors as they account between themselves the damages already paid or as they pay damages to the victim if the court decided to set aside the joint and several liability. The same applies to *cumulative* and *alternative liability*, as well as to the free choice of the judge to

appreciate the amount of damages in accordance with their value at the time of passing the verdict (if they have changed significantly since the harm occurred). Although there is some doubt on the compatibility and usefulness of the *foreseeability doctrine* and on its transplantation into the Hungarian Civil Code, we are convinced that this rule will come up to expectations and will be a useful tool in the judges' hands to keep the floodgates closed.

4 *Did we tie up all of the loose ends?* Far from it. The legislator did not use the opportunity for an overwhelming reform to open all the boxes and to raise all the questions related to torts. Opening the boxes and raising the questions does not necessarily mean that all problems must be explicitly reflected in the Civil Code, i.e. far from all issues raised in and by tort law must or can even be regulated by codified rules. Tort law was and still is a judge-made law to a greater or lesser extent in all jurisdictions. Even so, it would have made sense to check whether there were some more or less crystallised case groups from which general solutions could have been derived, which reach the high level of abstraction needed to formulate a rule in the Civil Code; and it also might have some logic to come to the conclusion, in connection with other problems and cases, that it is still judicial practice which can handle these the best and develop the law step by step, i.e. case by case. This is because the diversity of life (and tort law cases) never can be covered in full by abstract written statutes. Our concern is that these kinds of questions have not been asked. As examples, we elaborated on *partial causation* (wrongful conduct and natural event together in the causal chain), *loss of chance* (in general and in particular in medical malpractice law and in connection with the professional liability of attorneys), on taking into consideration the *contributory negligence of the primary victim* to the disadvantage of the dependants who claim damages for loss of maintenance and, last but not least, on the case group at the frontiers of public and private law, of whether damages can ever be claimed for losses caused by (*wrongful*) *legislation* (if the respective source is declared to be unconstitutional and is annulled by the Constitutional Court).

5 *Did we consider all risks and side effects?* Our understanding is that the legislator has certainly not considered all risks and side effects. This statement was underpinned by a short analysis of the 'Non Cumul' principle (exclusion of parallel tort law damage claims between contracting parties). It is an understatement to say that the Non Cumul doctrine will induce significant changes in many aspects. In this article, the restructuring and the reassignment of cases from the strict extra-contractual liability regime for damages caused by extra-dangerous conducts to contractual liability was highlighted, if performing any kind of dangerous activity takes place within the context of the performance of a contract (for example operating an adventure park, a waterpark, cf. the waterslide and toboggan cases; operating a taxi, train or coach service). In this case, the possibility of exculpation is different ('beyond the activity' as it is regulated within the strict liability regime, will be replaced by 'beyond the control' as it is formulated in contractual liability). Passengers of gratuitous transport contracts who suffer injuries in the accident might stay without compensation if the operator (and the driver) was not at fault, because the contractual liability for losses caused by the breach of gratuitous contracts is a fault-based liability. The legislator seems to have considered enacting special rules on that group of cases. The issues discussed here might lead in the midterm even to the scholarly rethinking of the notion and concept of contract in Hungarian private law.