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DOI: 10.18836/2178-0587/ear.v2n2p188-203

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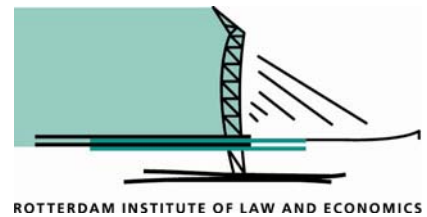


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Economic Analysis of Law Review

Wrongfulness as a Necessary Cause of the Losses - Removing an Alleged Difference between Strict Liability and Negligence

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RESUMO

Em vários artigos de Análise Econômica do Direito sobre responsabilidade civil extracontratual ênfase tem sido dada a uma suposta diferença entre responsabilidade objetiva e subjetiva. Na responsabilidade objetiva o ofensor é responsável pelas perdas de uma vítima independentemente de seu nível de cautela. Já no caso de responsabilidade subjetiva, o ofensor não é responsabilizado se tomou, ao menos, o nível de cautela juridicamente exigido. De acordo com a literatura predominante na AED, essa característica da responsabilidade subjetiva criaria uma descontinuidade nos custos privados esperados do ofensor. Nesse artigo, argumento que essa descontinuidade inexistente na realidade, pois os Tribunais, ao aplicarem a responsabilidade subjetiva, exigem que a negligência seja a causa necessária do acidente. Assim sendo, se o modelo adotado na análise econômica da responsabilidade civil não reflete a essência do desse corpo de regras, não será capaz de gerar previsões adequadas ou recomendações úteis.

Palavras-chave: Nexa de Causalidade, Indenização Incompleta, Prova, Alternativa Legal, Responsabilidade Objetiva, Responsabilidade Subjetiva.

JEL: K13, K29.

ABSTRACT

In several Law and Economics publications in the area of tort law, emphasis is being placed on an alleged difference between strict liability and negligence. Under strict liability, an injurer is liable for the losses of the victim, irrespective of his level of care. Under negligence, the injurer is not liable if he took at least the legally required care level. According to the mainstream Law and Economics literature, this feature of negligence causes a discontinuity in the expected private costs of the injurer. In this paper, I argue that this discontinuity does not exist in reality, because courts, when applying the negligence rule, require that the negligence was a necessary cause of the accident. After all, if the model adopted in economic analyses of tort law does not reflect the essence of this body of law, it will not be able to yield correct predictions or valuable policy recommendations.

Key words: Causation, Incomplete Compensation, Judgment Proof, Lawful Alternative, Negligence, Strict Liability.

R: 28/6/11 **A:** 31/8/11 **P:** 16/11/11

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1. Introduction

In several Law and Economics publications in the area of tort law, emphasis is being placed on an alleged difference between strict liability and negligence. Under strict liability, an injurer is liable for the losses of the victim, irrespective of his level of care. Under negligence, the injurer is not liable if he took at least the legally required care level. According to the mainstream Law and Economics literature, this feature of negligence causes a discontinuity in the expected private costs of the injurer. This discontinuity subsequently forms the basis for several analyses which argue that negligence provides different incentives than strict liability. For example, incomplete compensation would corrupt care incentives under strict liability more severely than under negligence, due to this discontinuity. The reason is that even with incomplete compensation, under negligence, the difference between the costs of taking due care and the costs of being liable may still be large enough to make taking due care more attractive.

In this paper, I argue that this traditional wisdom overlooks an important insight which was already expressed by Mark Grady (1983) and Marcel Kahan (1989).² According to these authors, the alleged discontinuity does not exist in reality, because courts, when applying the negligence rule, require that the negligence was a necessary cause of the accident.³ This implies that losses which also would have occurred had the injurer taken due care do not form part of the expected private costs of the injurer when acting negligently. It is exactly those costs which form the discontinuity. With this paper, I want to focus the attention on this important insight and I will discuss the relevance of this insight for several topics in the economic analysis of tort law where allegedly negligence provides better care incentives than strict liability. The ‘correction’ suggested by Grady and Kahan is occasionally mentioned in the literature, but it seems that often only lip-service is paid to it (a noticeable exception being Dari-Mattiacci and Mangan (2008)). I therefore think that it is important to focus attention on this, in my view, rather neglected topic in the Law and Economics literature, because it results in significantly different conclusions than the standard approach.⁴

Given that Law and Economics analyzes law from an economic point of view, the question which approach is better can only be answered by looking at tort law in practice. If courts indeed require the negligence to be the cause of the losses, the approach described by Grady and Kahan is a better description of actual tort law and hence should be used by Law and Economics scholars. If, on

² Also see Grady, M.F. (1987), ‘Discontinuities and Information Burdens: A Review of The Economic Structure of Tort Law by William M. Landes and Richard A. Posner, (56) *George Washington Law Review*, p. 658-678; Marks, S. (1994). ‘Discontinuities, Causation and Grady’s Uncertainty Theorem’, (23) *Journal of Legal Studies*, p. 287-301; Miceli, T.J. (1997). *Economics of the Law*, New York: Oxford University Press, p. 22, 23; Miceli, T.J., (2004). *The Economic Approach to Law*, Stanford: Stanford University Press, p. 59-61; Dari-Mattiacci, G. (2008), & Mangan, B.M. (2008). ‘Disappearing Defendants versus Judgment-Proof Injurers’, (75) *Economica*, p. 754 ff; Schäfer, H.-B. (2009), & Müller-Langer, F. (2009). ‘Strict liability versus negligence’, in: Faure, M. (2009). (Ed.), *Tort Law and Economics. Volume 1 Encyclopedia of Law and Economics*, 2nd Edition, Cheltenham: Edward Elgar 2009, p. 7.

³ Grady (1983) does not only argue that causation should be included into the analysis, but also that a breach of duty should not be seen as a failure to meet the optimal care level, but a failure to meet a care level proposed by the plaintiff and accepted by the courts as leading to lower total accident costs than the actual care level. In the current paper, I will only refer to the causation arguments, and leave the ‘untaken precaution’ arguments aside. Also see Marks (1989).

⁴ With ‘standard’, I refer to the analysis of negligence in which the requirement of causation is *not* included. See e.g. Shavell, (1987:6, 33); Schäfer, H.-B., & Ott, C. (2004). *The Economic Analysis of Civil Law*, Cheltenham: Edward Elgar, p. 150 ff; Shavell, S. (2004). *Foundations of Economic Analysis of Law*, Cambridge, Massachusetts: The Belknap Press of Harvard University Press, p. 181; Cooter, R., & Ulen, T. (2008). *Law and Economics*, 5th Edition, Boston: Pearson Education, p. 342.

the other hand, negligence turns out to make injurers liable for all losses, whether or not caused by their negligence, the mainstream approach with the discontinuity is better. I will discuss the way in which Dutch, Belgian and German tort law deal with this issue, and I will conclude that Grady's and Kahan's approach indeed better reflects tort law in these countries. This implies that Law and Economics scholars, if they want to be able to provide relevant insights and relevant arguments, should change the way in which they view and model negligence. After all, if the model adopted in economic analyses of tort law does not reflect the essence of this body of law, it will not be able to yield correct predictions or valuable policy recommendations.

In Section 2 I discuss the argument made by Grady and Kahan and will compare this with the standard economic approach to negligence. In Section 3 I apply the proposed approach to several specific topics in tort law and assess the impact of it. In Section 4 I describe the way in which tort law in the three abovementioned countries deals with the issue under consideration. In Section 5 I conclude.

2. The Requirement that Negligence is a Necessary Cause of the Accident

2.1. The View of Grady and Kahan

Kahan in the first two pages of his article very clearly describes the issue at hand: for an injurer to be liable, negligence law requires that he has acted negligently and that his negligence was a necessary cause of the accident. The standard Law and Economics models focus on the first requirement and neglect the second. Therefore, "in these models, once an injurer exercises slightly less than due care and becomes negligent, he finds that his liability increases discontinuously – from no liability to liability for the harm done in all accidents in which he is involved" (Kahan, 1989:428). In other words, an injurer who acted negligently becomes liable for *all* expected accident losses at that care level, also for those losses that would have occurred even if the injurer would have taken due care.

Kahan clarifies the issue at hand with an example. Suppose that cricket fields are supposed to have a fence of 10 feet high around it to avoid too many balls from causing losses in the neighborhood. If the fence is too low, according to the standard theory, the field owner becomes liable for *all* losses caused by balls flying over the fence. According to Kahan, however, under common law, the owner is only liable for accidents caused by his negligence, hence for balls which fly over the fence at a height of at most 10 feet. Hence, if a fence is one inch too low, the owner is only liable for losses caused by balls which fly over the fence at a height between 9 feet 11 inch and 10 feet, and *not* for balls which fly over at a greater height. Grady explains that both approaches apply a different concept of causation. In the approach advocated by Grady and Kahan, negligence of the injurer has to be a *necessary cause* of the losses. In the standard approach, the idea of a *causal link* is applied: more care could have avoided the accident or at least could have lowered the accident probability (Grady, 1983:804, 805).

In the standard model, assuming a unilateral accident situation, costs of care C are assumed to be linearly increasing in care level x . So, $C'(x) > 0$ and $C''(x) = 0$. Expected accident losses L are decreasing in x , at a decreasing rate, so $L'(x) < 0$ and $L''(x) > 0$ (and of course, $L \geq 0$). Total costs of accidents are denoted by $C(x) + L(x)$ and they are minimized at x^* , where $C'(x) + L'(x) = 0$. Under the negligence rule in the standard model, the expected private costs $P(x)$ of the injurer, assuming that the court sets due care equal to optimal care, are:

$$P(x) = \begin{cases} C(x) & \text{if } x \geq x^* \\ C(x) + L(x) & \text{if } x < x^* \end{cases}$$

Given that $C(x) + L(x) > C(x)$, the injurer will not choose $x < x^*$. Given that $C'(x) > 0$, the injurer will not choose any $x > x^*$ and hence chooses to take the optimal care level x^* .

Kahan's argument entails that the second element of $P(x)$ above is not correct, because this assumes liability for all expected accident losses once the injurer is negligent. According to Kahan, the injurer will not be liable for losses which would also have occurred had he taken due care. This changes the expected private costs of the injurer into:

$$P(x) = \begin{cases} C(x) & \text{if } x \geq x^* \\ C(x) + L(x) - L(x^*) & \text{if } x < x^* \end{cases}$$

Obviously, assuming that courts make no mistakes in determining due care at the optimal level, the injurer will still take due (= optimal) care. After all, given that $L(x) > L(x^*)$ for any $x < x^*$, $C(x) + L(x) - L(x^*) > C(x)$ for any $x < x^*$, so that the injurer will not choose any $x < x^*$. And given that $C'(x) > 0$, the injurer will choose to take the optimal care level x^* rather than any $x > x^*$.

This line of reasoning can also clearly be shown graphically (also see Grady, 1983: 810, 813). In Figure 1 below, the standard graph is depicted, where the bold lines indicate the expected private costs of the injurer under a perfectly functioning negligence rule. In Figure 2, Kahan's argument is incorporated. The expected private costs of the injurer when being negligent shift down by the expected accident losses at the due care level. Applied to Kahan's example, these are the losses caused by balls flying over the fence at a height of at least 10 feet. In both situations, the expected private costs are minimized when taking due care.

Comparing the two figures, it is clear that with a perfectly functioning negligence rule, where the court makes no mistakes in assessing true care and due care, the outcome of the analysis does not change if the requirement that the negligence is a necessary cause of the losses is introduced. The lowest point on the expected cost curve of the injurer is still reached at x^* .

Figure 1: Negligence in the standard theory

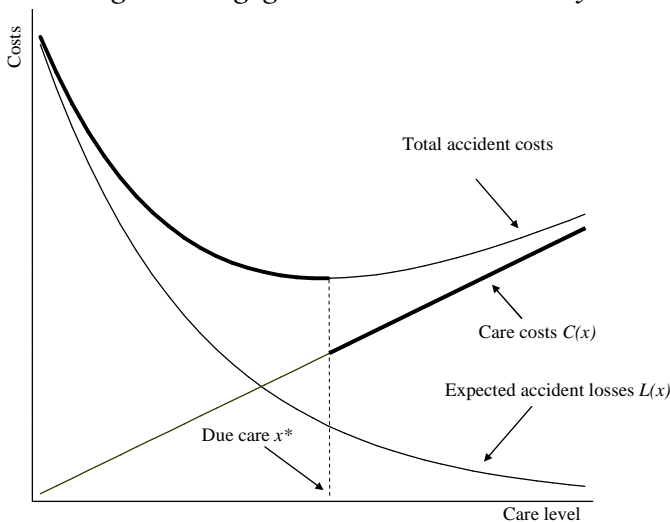
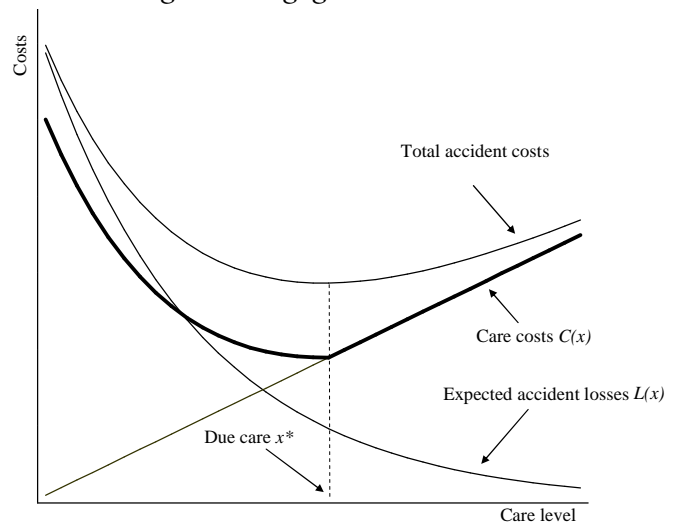
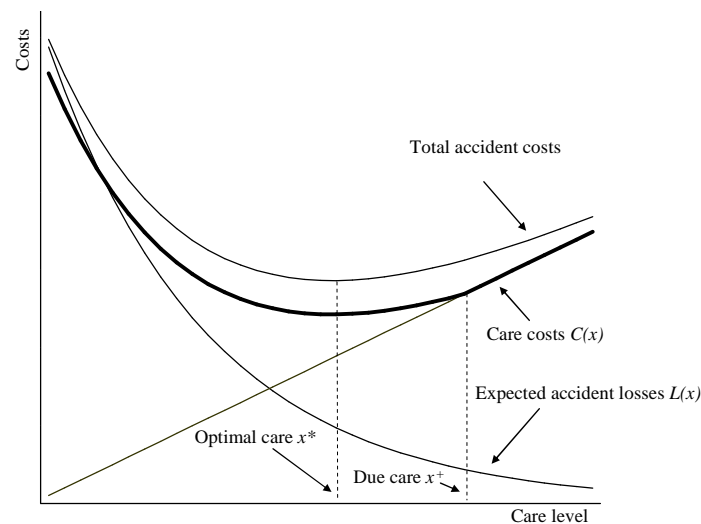


Figure 2: Negligence with causation



It is also easy to see that, if the court by mistake would set the due care level too low, in both approaches the injurer would take this (too low) due level of care. After all, the lowest point on the expected cost curve in both figures shifts to the left. However, if the court would set the due care level too high, both approaches may differ in outcome. In the standard theory, the injurer will take this (too high) level of care up to the due care level where taking due care becomes more expensive than the sum of care costs plus expected liability when taking optimal care (hence, the care level where $C(x^+) = C(x^*) + L(x^*)$, with x^+ denoting the too high care level and $x^+ > x^*$). In the situation, however, where it is required that the negligence is a necessary cause of the losses, the injurer will *not* take the too high due care level, but he would rather choose to take optimal care. After all, his expected costs when taking optimal care are $C(x^*) + L(x^*) - L(x^+)$, while his expected costs when taking due care are $C(x^+)$. Given that $L(x^*) < L(x^+)$, we know that $C(x^*) + L(x^*) - L(x^+) < C(x^*) < C(x^+)$. This situation is depicted in Figure 3 below.

Figure 3: Negligence with causation and a too high due care level



For the current paper, the most important feature of the requirement that negligence has caused the losses is the fact that the discontinuity in the expected costs of the injurer has disappeared. I will therefore in this paper not spend further attention to the differences in conclusions between both approaches when courts may make mistakes in the setting of due care.

The removal of the discontinuity in my view implies that the difference between strict liability and negligence is not as great as depicted in the standard Law and Economics framework. Of course, under negligence, it remains necessary to establish whether the injurer has taken adequate care measures whereas this is not done under strict liability. And obviously, the injurer can escape liability under a negligence rule by taking due care whereas under strict liability he can only lower the probability of being held liable. But the discontinuity which forms the basis of several alleged differences between the impact of strict liability and negligence does no longer exist if negligence is required to be a necessary cause of the losses. In Section 3 I will return to these alleged differences.

It should be noted that a discontinuity may still exist if the courts make mistakes in assessing causation and hold an injurer liable for losses which his negligence did not cause. The likelihood of such mistakes is influenced by the exact legal framing of the issue. If the plaintiff has to prove causation between negligence and losses, this problem may appear less often than if the defendant

has to prove that his negligence was *not* a cause of the losses. Of course, if the plaintiff cannot prove causation in cases where negligence *is* the cause of the losses, the opposite problem may occur and the injurer then faces a too low probability of being held liable.

To be sure, the ‘mainstream’ Law and Economics literature sometimes does refer to the ideas of Grady and Kahan, but still the model with the discontinuity is presented as the standard model. For example, Shavell (2004:253) mentions the idea as “an additional, somewhat subtle feature of the causation requirement under the negligence rule” and only treats it in a footnote. In addition it should be noted that Stephen Marks (1994) has argued that yet another alternative exists. In that alternative, courts do not ask whether the losses would also have occurred had the injurer taken *optimal* care, but whether they would have occurred had the injurer taken another care measure which is not necessarily optimal, but at least socially preferable to the actual care measure. Even though the incentives differ between the approach of Kahan and Marks, both share the idea that an injurer is not held liable if his negligence (be it established by comparing actual care with optimal care (Kahan) or with what Grady would label an ‘untaken precaution’ (Marks)) is not a necessary cause of the losses. In order to be able to focus on the impact of this idea, and not to complicate matters further by applying the idea of the untaken precaution as well, in the current paper I apply the approach of Kahan. Likewise, I do not consider the additional complications discussed by Dari-Mattiacci and Mangan by distinguishing between care measures which affect the accident probability and care measures which affect the magnitude of the losses. Hence, in the current paper I assume that the magnitude of the losses does not depend on x .

3. Alleged Differences between Strict Liability and Negligence

3.1. Incomplete Compensation

A first example of an alleged difference between strict liability and negligence is the topic of incomplete compensation. In the Law and Economics literature, it is well established that, in order for strict liability to provide the correct care incentives, damages should fully reflect the losses. Strict liability induces the injurer himself to make a weighing between the costs of care and the expected accident losses for which he is strictly liable. He will only make a correct weighing (hence, choose the point where the marginal costs and benefits of care are the same) if he bears the full accident losses. If he only bears a fraction of the losses because tort damages do not encompass all losses, he weighs the full costs of care against a fraction of the expected accident losses and will take a too low care level. After all, he does not search for the level of x where $C'(x) = -L'(x)$ (hence, he searches for x^*), but for the level of x where $C'(x) = -\vartheta L'(x)$ (denoted by \tilde{x}), where ϑ is the fraction of compensated losses ($0 \leq \vartheta \leq 1$). Because $L''(x) > 0$, $\tilde{x} < x^*$.

According to the literature this problem does not necessarily occur with negligence.⁵ As long as taking due care is cheaper for the injurer than taking lower care and hence being liable, he will take due care. This means that the injurer will take due care as long as $C(x^*) < C(x) + \vartheta L(x)$ (where $x < x^*$). There is a range of ϑ where the fraction of compensated losses is still large enough to make taking due care worthwhile for the injurer. In that range, negligence provides better care incentives than strict liability, at least according to the standard approach.

⁵ E.g. Visscher, L.T. (1998). ‘The Problem of Uncompensated Losses. The Case of Dutch Traffic Liability’, in: C. Ott and G. von Wangenheim, *Essays in Law and Economics IV: Public Law, Private Law and Adjudication*, Antwerp: Maklu, p. 215; Schäfer and Müller-Langer (2009:8).

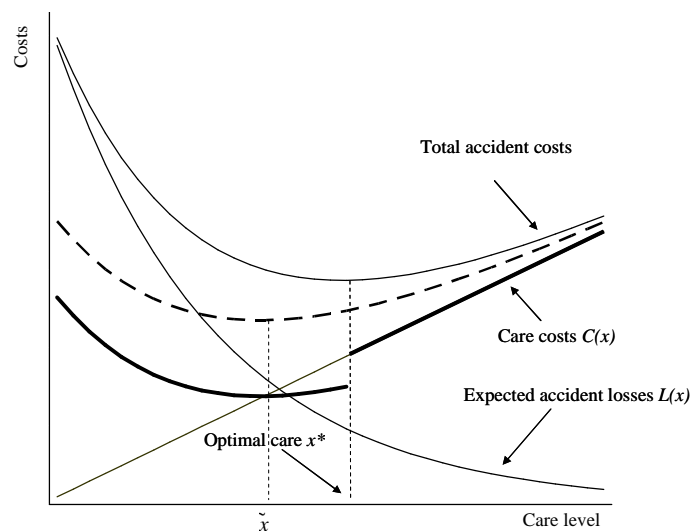
However, when incorporating the requirement that the negligence is a necessary cause of the losses, this difference with strict liability disappears. Under strict liability the expected private costs $P(x)$ of the injurer are $C(x) + \vartheta L(x)$, which are minimized at \tilde{x} . Under negligence,

$$P(x) = \begin{cases} C(x^*) & \text{if } x = x^* \\ C(x) + \vartheta L(x) - L(x^*) & \text{if } x < x^* \end{cases}$$

We already know that the injurer will not take any $x > x^*$, so we can ignore that possibility. Given that $L(x^*)$ is a constant, we know that, if an injurer would decide to take any $x < x^*$, he would choose \tilde{x} . The relevant question therefore is: what is lower: $C(\tilde{x}) + \vartheta L(\tilde{x}) - L(x^*)$ or $C(x^*)$? It is easy to see that the injurer will take \tilde{x} . After all, this is the care level that minimizes $C(x) + \vartheta L(x)$, so that $C(\tilde{x}) + \vartheta L(\tilde{x}) < C(x^*) + \vartheta L(x^*) < C(x^*) + L(x^*)$. Subtracting $L(x^*)$ from all terms, shows that $C(\tilde{x}) + \vartheta L(\tilde{x}) - L(x^*) < C(x^*) + \vartheta L(x^*) - L(x^*) < C(x^*)$. Therefore, if the requirement that negligence is a necessary cause of the losses is introduced, incomplete compensation results in the same - too low - care level under strict liability and negligence.

The fact that negligence no longer can provide optimal care incentives if damages do not reflect all losses can also be shown graphically, see the bold lines in Figure 4 below. For comparison, the dashed line indicates the expected private costs of the injurer under strict liability with incomplete compensation. It can easily be seen that both rules provide the incentives to take \tilde{x} .

Figure 4: Negligence with causation and incomplete compensation



3.2. Judgment Proof

According to standard theory, if an injurer is judgment proof this is more problematic under strict liability than under negligence. Allegedly this is caused by the fact that under strict liability an injurer can only lower the probability of being held liable, whereas under negligence he can escape liability altogether (e.g. Shavell, 1986:45 e 1987:167). In this section, I denote expected accident losses by $p(x)L$, which is different from the notation used in earlier sections, because there L denoted the expected accident losses. In the current section, L denotes the accident losses and $p(x)$ the accident

probability. Under strict liability, the benefits of taking due care (x^*), rather than a lower level of care (x), are $p(x)L - p(x^*)L$, whereas the costs are $C(x^*) - C(x)$. As known, x^* is the care level where marginal costs and marginal benefits of care are the same. Given that $p'(x)L < 0$, $p''(x)L > 0$ and $C''(x) = 0$, if the actual costs of liability of an injurer are limited by his wealth level W where $W < L$, the injurer will take $x < x^*$. This is in essence the same result as in the section above on incomplete compensation, because there his expected liability was based on $\vartheta p(x)L$ with $0 \leq \vartheta < 1$. Under negligence, according to Shavell, there exists a critical level of wealth above which the injurer will still take due care, even though he is judgment proof. As long as it is cheaper for the injurer to take due care and bear $C(x^*)$ than to be negligent and bear $C(x) + p(x)W$, the injurer will still take due care. The critical level of wealth therefore equals $[C(x^*) - C(x)] / p(x)$.

However, if the approach of Grady and Kahan is followed, the benefits of taking due care are lower than in the standard model. After all, one indeed escapes liability, but if one would have been negligent, one would not have borne full liability. Instead, one only bears liability in the cases in which the negligence has caused the losses. These cases have a probability of $p(x) - p(x^*)$ of happening. This then makes the weighing of costs and benefits the same under negligence and strict liability because in both cases the benefits of taking due care consist of $[p(x) - p(x^*)]W$. This implies that the alleged benefit of negligence that it provides better care incentives under negligence, does no longer exist.⁶ The reason is not, as suggested in the literature, that the injurer can no longer escape liability altogether (because he can still do that by taking due care, whereas under strict liability he can only lower the probability of being held liable), but that the costs of being negligent are lower than in the standard model, and the discontinuity in costs no longer exists.

3.3. Other topics

Besides the two topics discussed above, papers on other topics appear in which it is also suggested that under negligence, an injurer becomes liable for *all* accident losses as soon as he is negligent.

For example, in an interesting working paper which was presented at the 2010 Annual Conference of the German Law and Economics Association, Deffains and Rouillon analyze the situation where an injurer cannot only invest in precaution, but also in evasion strategies (Deffains and Rouillon, 2010). Hence, he cannot only lower the accident probability, but also the probability that he will be held liable. In analyzing the incentives provided by strict liability and by negligence, the authors argue that under negligence, the costs of the injurer consist of the costs of precaution and of evasive actions in case the injurer takes due care or more. In case the injurer would be negligent, he would bear his costs of care measures and evasive measures as well as the expected accident losses multiplied by the probability of being held liable. It is clear that the authors do not subtract the expected accident losses which would also have occurred, had the injurer taken due care. Hence, the approach of Grady and Kahan is not followed.

Dari-Mattiacci and Mangan study, among other issues, the 'disappearing defendant', hence the problem that the probability of injurers of being held liable is lower than 100% (which, incidentally, could be caused by evasion strategies as analyzed by Deffains and Rouillon). They explain that according to the standard theory, this is less of a problem under negligence than under

⁶ If taking care measures reduces the resources of the injurer available for paying damages, negligence may even lead to a worse outcome than strict liability. See Dari-Mattiacci and Mangan (2008:756).

strict liability, but that this difference disappears if it is required that negligence is a necessary cause of the losses. The analysis is in essence the same as in Section 3.1 above, because the injurer now only faces a certain probability of being held liable (Dari-Mattiacci and Mangan, 2008:749, 756). If we would denote this probability by ϑ , expected liability can be written as $\vartheta L(x)$, which is the same as in Section 3.1. Hence, following Grady's and Kahan's approach also removes the difference between strict liability and negligence in case of a too low probability of being held liable.

4. Negligence and Causation in the Netherlands, Belgium and Germany

In this section, I will analyze whether the approach of Grady and Kahan gives a better description of how tort law operates in the Netherlands, Belgium and Germany, or if the standard approach which does not regard negligence as a necessary cause of the losses is actually followed. This is important, because, if Law and Economics wants to be able to provide relevant insights into the working of tort law, it should base the analyses on the way in which tort law actually operates. As became clear in Section 3 above, alleged differences between the working of strict liability and negligence might not exist in practice and hence arguments based on such differences would then be void. This section will also show that the Law and Economics literature enables solving a problem in legal literature. In Section 4.1, regarding the Netherlands, it will become clear that the (legal) theory which argues that the negligence has to be a necessary cause of the losses in order for liability to exist is interpreted wrongly and therefore rejected in Dutch legal literature. The framework of Law and Economics enables to show the correct interpretation.

Before discussing the situation in the Netherlands, Belgium and Germany, a few words on the USA are in place. Looking at US case law and the discussion in the publications of Grady, Kahan and Marks, it is safe to assume that it is indeed required that negligence is a necessary cause of the losses. In *Lineberry v. North Carolina Ry. Co.* (187 N.C. 786, 123 S.E. 1 (1924)), a boy had given another boy, with whom he was playing, a push, causing the latter to fall under an onrushing train. The fact that the train was speeding was not considered to be the necessary cause of the accident because the accident would also have happened if the train had been travelling at the correct speed. In both *Rouleau v. Blotner* (84 N.H. 539, 152 Atl. 916 (1931)) and *Peterson v. Nielsen* (9 Utah 2d 302, 343 P.2d 731 (1959)), the defendant - driver of a vehicle - took a turn without first giving a signal and an accident ensued. In both cases, however, it was found that the plaintiff would not have seen any signal anyway so that the accident would also have happened if the defendant had signaled his/her intention to make a turn. In *City of Piqua v. Morris* (98 Ohio St. 42, 120 N.E. 300 (1918)), the defendant had storage reservoirs for large volumes of water. These reservoirs were fitted with overflow wickets allowing surplus water to be run off. The wickets became clogged due to the defendant's negligence. During a storm of unforeseen proportions the reservoirs overflowed, the wickets were unable to discharge the surplus water and the land of the plaintiff was damaged. The flooding was so severe, however, that the water could not have been discharged even if the wickets had worked properly.

4.1 The Netherlands

4.1.1. Legal Doctrine

In Belgium and Germany, the approach under consideration is called the "doctrine of the lawful alternative", which nicely describes the way in which Law and Economics has analyzed this

topic. In the Netherlands, the idea is known as the “doctrine of Demogue-Besier”, named after the French privatist René Demogue and the Dutch Advocate-General Besier. Contrary to what the name suggests, Demogue and Besier never worked together on developing this doctrine, nor did they individually formulate any theory. Demogue (1924:2) calls for a causal connection between the wrongful aspect of the act and the losses: “*Ainsi il ne suffit pas qu’une personne ait contrevenu à certain règlements, il faut que sans cette contravention le dommage n’eut pas lieu*”. Applying this to the cricket field: it is not sufficient that the owner has breached the standard of due care which must be observed in society by erecting fencing that is too low, it is also necessary that the loss would not have occurred without this negligence. Besier has put forward this idea in a number of “conclusions”, advices to the Supreme Court. In one case⁷ he writes:

The Court of Appeal correctly ruled that there must be a connection between the wrongfulness of the act and the loss before damages can be awarded due to tort. A causal connection between the act, notwithstanding its wrongfulness, and the loss is not sufficient and would have preposterous consequences. If someone hunts without a hunting license or drives a vehicle on the public highway without a tax disc, he is certainly committing a wrongful act, but it does not follow that he is then obliged to compensate every loss caused by a shot from his gun or by a collision with his vehicle. More is needed for this to be case: he must also have caused the loss by his negligence.

In another case,⁸ in which a speeding vessel was involved in a collision, Besier clearly explains that in order to assess whether the injurer is liable due to negligence, one should assess if the same losses would have happened in the counterfactual case where the injurer would have acted in accordance with the applicable norm. If the same losses would have occurred, the negligence is no necessary cause of the losses and liability should be declined:

Even where a prescribed regulation has been violated, it is nonetheless very possible that in a specific case the [...] required causal connection between this error and the accident is lacking. The District Court decided [...] that in this specific case, there was no evidence of such a causal connection between the high speed of the “Monte Santo” and the accident, [...] while the Court of Appeal goes even further by stating (...) ‘that there was no causal connection between the speed of the “Monte Santo” and the accident. (...). There is, incidentally, nothing to indicate that had the “Monte Santo” been travelling at a lower speed, exactly the same would not anyway have happened as actually occurred.

This way of reasoning corresponds to the approach taken by Kahan: if the lawful behavior would not have avoided the losses, the negligence is not a necessary cause and there should be no liability.

It is noteworthy that Dutch legal literature has interpreted the doctrine of Demogue-Besier wrongly. One wrong interpretation compares the actual behaviour with the situation in which it is assumed that this behavior was allowed. In this interpretation, one does not change the behavior, but one changes the legal norm. Obviously this interpretation always leads to the conclusion that the same losses would have happened, because one does not change the behavior. To clarify this wrong interpretation with Kahan’s example: one does not ask the question what would have happened if the fence would have been high enough (hence, 10 feet), but what would have happened in the fence was allowed to be so low (hence, changing the due care standard from 10 feet tot 9 feet 11). Obviously a ball which flew over the fence at a height between 9 feet 11 and 10 feet, would still fly

⁷ This is the case *d’Ansembourg*, Supreme Court 25 May 1928, *Nederlandse Jurisprudentie* 1928, p. 1688.

⁸ This is the case *Monte Santo*, Supreme Court 17 June 1932, *Nederlandse Jurisprudentie* 1932, p. 1464.

over that fence if it was allowed to be so low. Therefore, this wrong interpretation would always result in declining liability, thereby frustrating the potential care incentives of the negligence rule. Therefore, the doctrine of Demoge-Besier is generally rejected in Dutch literature. Applied to the *Monte Santo* case, in the literature one finds the following (wrong) line of reasoning (e.g. Lankhorst, 1992:60.): what would have happened if the vessel's actual speed had been permitted. The damage then continues to exist to its full extent, so that there would be no causal connection between the wrongfulness and the damage. Obviously the correct question, as is explicitly stated by Besier himself, is what would have happened if the vessel would have sailed at the correct speed.

The second wrong interpretation consists of a comparison between the actual situation and the situation in which the injurer did not act at all. Even though this interpretation has to be discarded, it is not as strange as it may sound at first. After all, "not acting" often is a lawful alternative, just as "acting according to the relevant norms" would have been. How should one determine with which counterfactual situation the actual behaviour should be compared: acting correctly, or not acting at all? If someone drives a car without a license and an accident occurs that is not attributable to the actor's driving then the proposed approach would mean that it would be necessary to assess whether the same loss would have arisen if the lawful act, in this case driving with a license, had been performed. But one could ask the question why it is not the *driving* that is the element that must be assessed. After all, staying at home without a driving license is also a lawful act, so it could just as rightfully be contended that the loss that has arisen while driving without a license must be compared with the loss that would have arisen if the actor had stayed at home without a driving license and then it must certainly be concluded that the loss has definitely been caused by the actor's tort.⁹

In answering this question, it is useful to refer to the well-known insight from Law and Economics literature that strict liability results in a better activity level of the injurer than negligence. It is necessary to consider whether the aim of the relevant legal standard is to ensure that an optimal level of care is exercised or whether it is (also) concerned with reducing the activity level of the injurer. In the latter case, strict liability is to be preferred and the doctrine of Demoge-Besier should not be applied. If, however, the reproach made is not that someone performs a certain activity too much, but only that, given the performance of a certain activity, he exercised too little care then logically the comparison must not be made with the non-performance of the act but rather with the performance of the act in conformity with the required level of care. Someone who has never obtained a driving license is expected not to drive a car at all and strict liability is indicated if he nonetheless does so.¹⁰ On the other hand, someone who has a driving license and left it at home and causes damage *can* invoke the defense that leaving the driving license at home was not the cause of the damage. Generally speaking, the problem cited above can be resolved by first asking the question which part of the act concerned is actually the element that is undesirable. For example, in the *Monte Santo* case, it is the excess speed in situ that is undesirable, not the fact that the vessel is travelling as such. In every act there is always an element that can be identified as making that act undesirable. It must then be assessed whether there is a causal connection between that element and the losses (also see Kahan, 1989:428-429).

⁹ See Wertheim, W.F. (1930). *Aansprakelijkheid voor schade buiten overeenkomst (noncontractual liability for loss)*, Eduard IJdo: Leiden, p. 131. Cf also Telders, B.M. (1929). Het verband tusschen onrechtmatigheid en schade bij art. 1401 B.W. (the connection between wrongfulness and loss in relation to Section 1401 of the Dutch Civil Code), *Weekly Magazine for Private Law, Notarial Practice and Registration (WPNR)*, p. 170.

¹⁰ Naturally, this does not exclude a possible defence of contributory or comparative negligence.

Especially the first wrong interpretation of the doctrine of Demogue-Besier became influential in the Netherlands and resulted in the situation that the idea that one should require that the negligent element of the behavior is a necessary cause of the losses is generally rejected in Dutch legal doctrine.

4.1.2. Case Law

If one evaluates Dutch case law, a different picture emerges. Generally speaking, it can be stated that case law is more in line with the correct interpretation of the doctrine of Demogue-Besier than the literature. A clear example is given by the Amsterdam Court of Appeal.¹¹ The Dutch Railways had built a transformer station in the vicinity of a hotel, thereby reducing the beauty of the view. The Building Regulations were contravened since the transformer station had been located 3.30 meters closer to the hotel than was permitted. In the literature it is (wrongly) argued that application of the doctrine of Demogue-Besier would result in the question being asked whether there would be any loss if the transformer station were to stand at precisely the same location, but then lawfully.¹² The Court of Appeal argued correctly that the loss would have arisen to the same extent if the transformer station had been built in conformity with the Building Regulations, therefore if the transformer station had been located 3.30 meters further from the hotel.

In another case of a speeding vessel,¹³ a collision took place between two vessels. One of the vessels had been travelling too fast, but, according to the Court of Appeal, there was no causal connection between the speed and the collision. The excess speed had actually reduced the likelihood of a collision. The lawful act, travelling at a lower speed, is substituted for the actual act. As the damage would be the same, or even more serious, there is no causal connection between the speed violation and the damage.

Case law which is in the legal doctrine cited to demonstrate a rejection of the doctrine is also in line with the economic interpretation of the doctrine of Demogue-Besier. For example, in a case¹⁴ with a rolling scaffold which, contrary to the applicable regulation, was not fitted with a locking device to secure the wheels, the scaffold unintentionally started to move, resulting in injury to the employee. The District Court found that the causal connection between the non-compliance with the regulations and the accident was lacking because the movement of the scaffolding could also have been avoided by other than the prescribed measures. Entirely in conformity with the correct interpretation of the doctrine of Demogue-Besier, the Supreme Court ruled that the District Court had employed an incorrect criterion: "The District Court was required in relation to this criterion, as regards this causal connection, to examine whether the accident would also have happened if the regulation had been complied with and the wheels had therefore been fitted with a brake system".

4.2 Belgium

In Belgium, a *condicio sine qua non* relationship is required between the fact on which liability is based (e.g. a fault) and the losses as they have occurred in the concrete case. This requirement makes (economic) sense, because even if different behaviour, such as a lawful

¹¹ 3 December 1959, *Nederlandse Jurisprudentie* 1960, 501.

¹² See Schellen, J. (1972). *Juridische causaliteit (legal causation)*, Kluwer, Deventer, p. 74.

¹³ Supreme Court 29 January 1978, *Nederlandse Jurisprudentie* 1978, 285.

¹⁴ Supreme Court 23 March 1991, *Nederlandse Jurisprudentie* 1991, 420.

alternative, would not have avoided the accident, it may have lead to lower losses. For example, if a speeding motorist hits a pedestrian and it is established that a non-speeding motorist would also have hit the pedestrian but with lower losses as a result, the speeding can still be regarded as a cause of the high losses which actually occurred (Van Quickenborne, 2007:44). Given that the negligence here indeed has caused losses which the lawful alternative would not have caused, liability is warranted.

Van Quickenborne (2007:46) describes the doctrine of the lawful alternative in Belgium as follows: When asking the question whether an act is the necessary cause of the losses as they have occurred in the concrete case at hand, one should not ask whether the losses would not have occurred had the act not have been committed at all, but rather if the losses would not have occurred if the act had been committed correctly. In the words of Storme (1990:229): one formulates the hypothesis which is closest to the actual events, however without the wrongful aspect of it. Storme warns against adding “other elements” to the facts; one should only remove the wrongful aspect. The relevant question is not if the losses *could* have occurred if the wrongful element is eliminated, but if they *would* have occurred. One answers this question by substituting the “normal case”, where the injurer would have acted lawfully.

Hence, it is not the act in itself that is regarded as problematic, but the wrongfulness of the act. In a case of speeding, it is not driving the car that is the problem, but driving it too fast. Therefore, one should inquire whether the same losses would also have occurred when driving at the correct speed, not whether they would have occurred without the driving.

In a ruling from 2008, the Belgian Supreme Court (Cass. 28 May 2008, *R.A.B.G.* 2009, 656-658) clarifies how the theory of the lawful alternative should be applied. The lower court ruled that the driver of a vehicle was held liable for the losses inflicted to several other vehicles, because he was driving drunk, had no insurance, did not have a registration of his vehicle and did not have the vehicle technically checked. These were mistakes without which the accident would not have occurred in the same way as it actually did. The appellate court based the causal connection on the fact that the losses would not have occurred if the driver would not have driven his car in the first place (which, given his condition and the problems with the vehicle, he indeed should not have done). The appellate court does not want to investigate whether the accident would have occurred in the same way if the driver would have been sober and if the vehicle would have been insured, registered and technically checked, because in the view of the appellate court it would then change the concrete circumstances of the case. The Supreme Court however considers that, in assessing the causal connection, the court has to think away the wrongful aspect and replace it by the correct behaviour. Therefore, the appellate court should exactly have asked the question if the accident would have occurred in the same way if the driver would have been sober and if the vehicle would have been insured, registered and technically checked. This ruling reaffirms earlier rulings, such as that from 19 December 2007, where the Supreme Court (Cass. 19 December 2007, *J.T.* 2008, nr. 6301, 160) states that the appellate court in that case correctly and without changing the concrete facts of the case has asked whether a traffic accident would also have occurred had the vehicle involved be insured (instead of applying the hypothesis that the uninsured vehicle would not have participated in traffic).

Van De Sype in her annotation under the 2008 ruling spends attention to the problem which Wertheim in the Netherlands addressed: why remove the wrongful aspect of the act, when not performing the act in the first place is also a lawful alternative? According to Van De Sype, one should assess what the content and goal of the contravened norm is: is an act *per se* forbidden, or does it merely have to be executed in a certain way? In the first case, the lawful alternative is not

engaging in the act, in the second case, it is engaging in the act in a permitted way. Given that driving a car in itself is not forbidden, one should compare the actual behaviour with the correct behavior: sober, insured, registered and technically checked. The difference with the example of Wertheim is that driving without having obtained a driver's license *is* in itself forbidden. As we have explained above, in such a case we advocate a rule of strict liability, so that the theory of the lawful alternative is not relevant. Of course, regarding "not committing the act" as the lawful alternative results in the same outcome, because the potential injurer who engages in the act nonetheless becomes in fact strictly liable.

In older case law, the Belgian Supreme Court sometimes applied a wrong line of reasoning. In a case from 1987,¹⁵ a driver entered a street which was only intended for local transport, even though he was passing through. Due to a dangerous situation which involved construction work, he was killed in an accident. The court held the construction company liable and found the relevant causal requirement, because also if the driver would have been local transport, he could have been involved in the accident just the same. This is, of course, true, but this is not the correct line of reasoning. After all, the driver should not have entered the street in the first place, so the lawful alternative here was not using this street. Then the accident would not have happened. Whether or not the theory of the lawful alternative leads to a desirable outcome in this case is a different matter.¹⁶

4.3 Germany

In Germany, the doctrine of the lawful alternative ("*rechtmäßiges Alternativverhalten*") is generally accepted, although injurers are not always successful in applying it (e.g. because they cannot prove that the losses would also have occurred had they acted correctly). Grechenig and Stremitzer (2009:336-371) illustrate the German acceptance with a (criminal) case¹⁷ in which a lorry driver overtook a bicyclist without keeping enough distance and in which the bicyclist was overrun by the lorry. However, the Supreme Court assessed that the same would have happened if the lorry would have kept enough distance, because the bicyclist was very drunk so that he was driving uncontrolled. Hence, the unlawful behaviour is replaced by the lawful alternative and given that the same losses would have occurred, the wrongful behaviour was not a cause of the losses. Gotzler gives the example of young schoolchildren who went to the theatre together with their teacher. A fire broke out, the children panicked and several children died. The teacher did not instruct them about how to act in case of fire, which was regarded as a fault. However, it was argued that even if the teacher would have properly instructed the children, experience shows that this mere instruction does not suffice to avoid the panic anyway (Gotzler, 1977:4).

According to the *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2007:354), German courts do not accept the argumentation of the injurer that he could have caused the same loss also in a lawful way. For instance, infringement of a patent is not allowed, even if the infringer could have obtained a forced license (RGZ 102, 390, 391.). In our view, liability in such cases indeed should not

¹⁵ Cass. 19 November 1987, *Arr. Cass.*, 1987-1988, 350, *Pas.*, 1988, I, 328, *R.W.*, 1987-1988, 1125.

¹⁶ It may be possible to argue that the level of danger caused by the construction work was acceptable given that only local traffic was allowed to enter the street. First, because of this restriction much less traffic will face the danger. Second, local traffic is more familiar with the specific circumstances of the construction work. Hence, dangers caused by construction work may be found acceptable in a street which is restricted to local traffic, but not if the street is open to all traffic. The mere death of the car driver therefore does not establish negligence of the construction company.

¹⁷ BGH 25 September 1957, *BGHSt* 11, 1, *JZ* 1958, 280.

be barred by the doctrine of the lawful alternative. After all, one should not ask the question “could the injurer also have caused the losses in a lawful way”, but rather “would the losses also have occurred had the injurer acted in a lawful way”. The correct comparison in the patent case is hence *not* infringing the patent (because, without the license, not-infringing is the lawful alternative). In the words of the *Münchener Kommentar* (2007:355): “it is required that the same result would have occurred had the lawful alternative been taken; the mere possibility that this result could have been caused in a lawful way, is not enough”.

Schiemann (2005:103) wrongly defines the doctrine of the lawful alternative when he writes that, in this doctrine, the injurer argues that he could have caused the loss also in a lawful way. The example he gives to argue that courts tend to reject the doctrine is exactly the patent case discussed above. Given that in that case the doctrine was applied incorrectly, the court was correct in rejecting it.

5. Conclusion

The approach as advocated by Grady and Kahan results in a removal of the discontinuity in the expected costs of an injurer under the rule of negligence. The removal of this discontinuity affects several alleged differences between strict liability and negligence, e.g. regarding incomplete compensation and problems of judgment proof. Looking at case law from the USA and from several European countries, it seems that the approach of Grady and Kahan better reflects the way in which negligence is actually applied. This implies in my view that the approach of Grady and Kahan, at least in these countries, is the better way of modeling negligence. However, the mainstream Law and Economics literature still analyzes negligence in the standard way, including the discontinuity, and at best only mentions the impact of requiring negligence to be a necessary cause of the losses in the margin. In my opinion, the approach of Grady and Kahan should become the mainstream approach. That would enable Law and Economics theory to provide a better description of tort law in practice and to provide better predictions and policy recommendations. A nice example of this is that the approach of Grady and Kahan turns out to be able to help legal scholars in finding the correct interpretation of the doctrine of the lawful alternative: one should not compare the actual case with the situation in which it is assumed that the actual behavior was allowed, nor with the situation in which the injurer would not have acted at all, but with the situation in which he would have acted in accordance with the applicable norm. If the same losses would then have happened, negligence is not a necessary cause of the losses and liability should be denied.

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