Placing the Burden of Proof of a Hypothetical Cause

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1 Theme and Presentation of the Problem

1.1 A Series of Recent Judgments

Recently the Norwegian law of tort has been subjected to a number of Supreme Court judgments concerning rather difficult and complicated questions of causation, pertaining partly to the presentation of the problem, partly to the requirement of causation, and partly to the question of proof. As regards the latter question, the standard of proof in civil cases in Norwegian law requires as a general rule a preponderance of probability (balance of probabilities). And in the law of tort the general rule is that the injured party must satisfy this standard of proof, i.e. that the injured party bears the burden of proof or the persuasive burden. In the event of doubt whether the standard of proof has been satisfied, certain rules relating to the shifting of the burden of proof apply, i.e. the persuasive burden is placed on the person causing the damage.[1]

One of the recent judgments is the Thelle judgment in Rt. (Supreme Court Reports) 2000, p. 418. The Court concluded that there was in fact a causal connection between a car collision and a whiplash injury, on the basis of a shifting of the burden of proof of a hypothetical cause, i.e. the person causing the injury had not satisfied the burden of proof in regard to the hypothesis that the injured party's persistent health disorders would have arisen independently of the collision. But the claim against the vehicle (third-party) insurer must

1 As regards such questions in the law of tort, cf. Lødrup, *Lærebok i erstatningsrett* (Textbook of the Law of Tort), 4th edn. 1999 (cited as Lødrup) pp. 316 ff and pp. 327 ff; Nygaard, *Skade og ansvar* (Damage and Liability), 5th edn. 2000 (cited as Nygaard), pp. 335 ff, cf. pp. 318-323. Generally as regards the principle of a preponderance of probability and a reversed burden of proof, see, inter alia, Skoghøy, *Tvistemål* (Civil Proceedings), 1998, pp. 654 ff; Hov, Rettergang I (Legal Proceedings), 1999, pp. 261 ff; Michelsen, *Sivilprosess* (Civil Procedure), 1999, pp. 211 ff.

nonetheless fail because the health disorders were unforeseeable. There have also been several judgments given against the person allegedly liable, inter alia, because the person causing the damage must bear the persuasive burden in regard to the hypothesis that the damage would have been avoided if he had acted as he should have done, e.g. the DNB Fund judgment in Rt. 2000, p. 679. There are also several judgments concerning the extent of the damage, in which the person allegedly liable bears the persuasive burden in regard to the hypothetical development without the damage, i.e. the development that would have taken place if the damage had not occurred, e.g. the Stokke judgment in Rt. 1999, p. 1473 (one judge in five dissenting as to the assessment of evidence).

1.2 Three Categories of Rules of Causation

It is important, in this instance as in others, to present the problem precisely. What is the question of causation? In claims for damages there may be three categories of questions of causation, which must not be intermixed.

The first category comprises the general requirement of a factual chain of causation. This is a chain of events that really happened, and it is therefore of a *historical nature.* This factual/historical connection links the damage to a factual event or act that forms part of the basis of liability. This category covers both the requirement *of* a factual/historical chain of causation and the legal requirement *relating to* such a connection. Thus the question of proof of such a connection comes under this category, as also do further legal requirements relating to the connection, including essentiality and limits to remote and secondary damage. The factual/historical connection is thus the subject of further judicial consideration.

The second category of causation entails the requirement of a *hypothetical* connection in cases where liability is based on *fault or error.* This requirement is *additional* to that of a factual/historical connection. It is a basic element in the definition of fault or error that the person concerned should have acted otherwise. He should have performed an *alternative act.* This supposes a specific course of action that would have satisfied the requirement of proper conduct at the critical moment. But a *minimum requirement* for being able to claim that the alternative act should have been performed is that it would have been *effective,* i.e. it would have affected, prevented or eliminated the factor that is the starting point of the factual/historical chain of causation, and thereby prevented this factor from contributing to the damage. In other words he should have neutralized this factor forthwith. The question of effective action is thus related to a *hypothetical* or supposed connection. In order to distinguish it terminologically from the factual/historical chain of causation, I will use the term *preventive connection*. Thus this entails a requirement of a connection of a *hypothetical nature.*

These two categories of causation contain the *conditions* governing liability. Liability depends on whether the answer to the question whether the conditions have been fulfilled is affirmative or negative.

The third category of causation, however, is concerned with *the extent* of the damage.[2] In the event of liability for loss of wages or business income it is important to ascertain the difference between the situation as it is *with* the existing damage and the situation as it would be *without* such damage. The situation or development *with* the existing damage will have a *factual* basis, but the situation or development *without* such damage must rest on a *hypothetical* basis.

1.3 Presentation of the Problem

The purpose of this article is to try to present the problems attending these three different categories of rules of causation precisely in relation to the contents of recent judgments, including questions of the burden of proof and the persuasive burden, and to give a systematic survey or outline thereof.

> The terms "proof" and "burden of proof" relate primarily to a clarification of what really happened, i.e. a clarification of factual or historical events. A hypothesis, on the other hand, is not *a fact* that is to be *proved.* In this instance the problem of "proof" is *to support the hypothesis.* But also in this process of providing support one will rely on, inter alia, precepts of a factual nature and rules of experience etc. in this field. In the case of both proof of fact and providing support for a hypothesis the term *persuasive burden* should be used to connect the risk of failure to persuade in relation to these two issues.

1.4 Illustration of the Three Categories of Causal Factors

1.4.1 The Lier judgment in Rt. 1967, p. 697 can illustrate all three categories of rules of causation. In some municipal apartment blocks the privy bins were full and had to be emptied. The municipal official responsible hired a man with a vehicle to do this. The said man emptied three vehicle loads into or beside a stream, which provided water to, inter alia, a chicken farm and a trout hatchery. The municipality applied temporary measures to provide an alternative supply of water, but the chickens and the trout gradually perished so that the business came to a halt. The owner alleged that the cause of this was the pollution; he claimed damages from the municipality and succeeded in his claim.

1.4.2 The *first* category of rules of causation relates, as mentioned above, to *the factual or historical chain of causation.* In this instance the starting point is that the municipal official hired the man with the vehicle. This fact serves as both the basis of the liability and the starting point of the factual chain of causation. As regards the latter, the problem was best dealt with in the district court. As regards the damage to the chicken rearing, the court concluded "there can hardly

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2 For further discussion of the distinctions in principle between rules that determine the conditions for right or obligation and rules that determine the extent, cf. Nygaard, *Rettsgrunnlag og standpunkt* (Legal Basis and Standpoint), 1999, pp. 27-28 and pp. 331 ff.

be any doubt" that pollution was the cause thereof. But as regards the trout hatchery the municipality contended that "a considerable quantity of the dead fish must be attributed to the plaintiff's own defective water-supply system and not to the pollution." Thus in this instance a competing or alternative cause of the damage was alleged, for which the municipality was not liable, but the district court did not accept this as a cause of the death of the fish:

> "*The court* finds, however, on the basis of the established evidence that the wholly preponderant part of the fry died as a result of the pollution and the temporary plant with a new hose that the municipality installed in order to limit the harmful effects of the pollution. At any rate the court takes the view that when, as in this instance, it is a matter of so marked pollution as the depositing of 4 cubic metres of manure into the stream, the municipality must bear the full burden of proof that the fish mortality was due to other reasons. But the municipality has not produced any such proof" (p. 707).

Thus in this judgment the district court applies a reversed burden of proof as a subsidiary justification of the factual chain of causation between the pollution and the damage done to the fish, as the Court of Appeal also did p. 712. The Supreme Court proceeded on this basis. See further subsection 2.5 on reversing (shifting) the burden of proof.

It was also alleged on behalf of the municipality that the emptying into the stream was so *unforeseeable* that the municipality should not be held liable, i.e. the question of a legal limitation of the factual/historical chain of causation arose. In this regard too the answer was negative. The leading judgment stated:

> "The municipality's argument that the emptying into the stream was such a senseless and extraordinary act that it was beyond any expectation, and that the municipality cannot for that reason be liable for the consequences, can obviously not succeed. In the existing circumstances, it was not beyond what was foreseeable that P would get rid of the loads in a manner that might entail elements of danger" (pp. 700-701).

1.4.3 The *second* category is the hypothesis of effectiveness or *the preventive connection* in the case. The municipality was held liable because the municipal official had erred in connection with hiring the man with the vehicle. The fact was that he had made it a condition for the payment for the job that the man should document that the bins had been emptied. But as regards the question of fault on the part of the municipal official, the following questions require an answer: Should he have acted otherwise? What should he have done to prevent the man from emptying the loads into the stream? In this regard the Supreme Court found that the municipal official should have made it a condition for payment that the man substantiated that he had emptied the loads in accordance with the health regulations. But the question immediately arose: Would that have helped? Would this alternative course of action have prevented the man from emptying the loads as he did? The Supreme Court arrived at an affirmative answer, putting this way:

> "If this procedure had been followed, I must assume that P would not have got rid of the loads as he did" (p. 700).

The requirement of a preventive connection was thus in this instance manifested in the expression "I must assume." This presumably means that it was more probable that the man would have emptied the loads in a proper manner if this condition for payment had been imposed than that he would have emptied the loads into the stream nonetheless. This category of causation will be further discussed in section 3.

1.4.4 The *third* category of rules of causation regulates the *extent of the damage.* In this instance it was a question of loss of business because the means to carry on business were destroyed. The business loss is the difference between the business income *without* the damage and the business income *with* the damage. The amount of the business income *without* the damage must be based on a hypothetical evaluation. In this instance the basis seems to have been that the business would have continued as before. But as regards the business income *with* the damage, the situation was that the business had been closed down since the damage occurred and had not been resumed at the time of judgment. In this regard the Court applied a normal period for cessation of business in such a case and used here the term foreseeable. The leading judgment stated, inter alia:

> "It cannot be said to be unforeseeable that a person who loses his means of production by a harmful act may find difficulty in obtaining money with which to procure new means and that it may for this reason take some time before he can start production again. But I am of the opinion that it by far exceeded what can normally be expected that for a business of the nature and size concerned in this case, for so long a period as has now expired since the damage occurred - about 4 years - it should prove impossible to procure the means to get the business going, at least to a limited extent to start with … I am therefore left with the conclusion that it is natural and correct to reckon that Mrs T suffered a certain loss for which compensation is due also in the period subsequent to autumn 1964" (p. 703).

Thus the passage quoted supports a legal limitation of the development *with* the damage.

Another judgment relating to the hypothetical development *without* the damage can be mentioned, the butting case judgment in Rt. 1997, p. 883, concerning the assessment of loss of income following personal injury. In this case the person causing the injury had alleged several circumstances that would have resulted in a low level of health and income even without the injury, e.g. illness in childhood, low metabolism, and sick reports because of ischias trouble, and also the possible after-effects of a car accident that may have caused a whiplash injury. But the leading judgment rejected this as being insufficiently substantiated, and put the persuasive burden on the person causing the damage by stating, inter alia:

> "If such matters - which probably many people suffer from are to have effects on compensation, there must at least be a preponderance of probability that they will

> develop in a clearly negative direction. I find this not to be the case here. The fact that the injured party bears the burden of proof that the conditions for compensation exist is inapplicable to such an argument" (p. 887).

This category of causation will be further discussed in section 4.

2 Placing the Burden of Proof of the Factual/Historical Chain of Causation

2.1 Connection Between the Damage and the Causal Factor Allegedly Responsible

The causal factor allegedly responsible may, for example, be an active step, like the action of the municipal official in the Lier case when he hired the man with the vehicle, cf. subsection 1.4.2. Thus this factor forms part of the basis of liability, while at the same time constituting the starting point of the factual/historical chain of causation in question which leads to the damage.[3]

2.2 The Causation Requirement

The contraceptive pill judgment II in Rt. 1992, p. 64, is a judgment concerning the factual/historical chain of causation. A 23-year-old woman suffered a serious cerebral thrombosis after using the pill. She claimed damages from the producer of the pill and succeeded in her claim on the basis of non-statutory strict liability (with two judges in five dissenting). In this judgment the Supreme Court formulated a general requirement as to causation, and on this point the Court was unanimous.

This requirement is repeated and partly specified by the Supreme Court in the judgment in Rt. 2000, p. 915, which concerned dermal injury following use of the lotion Dispril. The injured party was 10 years old at the time of injury and claimed damages from the producer. The producer admitted strict liability, but questions concerning the chain of causation and time-barring of the claim were disputed. She succeeded in her claim, but two of the five judges dissented on the issue of the chain of causation. In regard to the general requirement as to causation it is stated in the leading judgment:

> "In dealing with the issue of causation I will first comment on the legal starting point. This is specially discussed in Rt. 1992, p.64, the contraceptive pill judgment II, where it is stated in the leading judgment on p. 69:
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> "The requirement as to causation between an act or omission and an injury is usually fulfilled if the injury would not have occurred if the act or the omission had supposedly not taken place. The act or omission is thus a necessary condition

3 For further discussion of the factual causal factor included in the basis of liability, see particularly Nygaard, Hagen, Nome: *Årsak og bevis ved ansvar for skade* (Cause and Proof in Regard to Liability for Damage) 1986 (cited as Årsak og bevis), pp. 18-20.

> for the occurrence of the injury. In the chain of causation that leads to an injury, there may - when the requirement as to causation is defined in this way - be several causes and therefore also several matters possibly entailing compensation."
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> This statement implies that the Norwegian law of tort is generally based on the *sine qua non* rule and not on the main-factor rule, the result of which is - as stated in the leading judgment - that several persons may be liable for, causing an injury. In that case they are all jointly and severally liable. The contraceptive pill judgment II nevertheless permits of some concession to the main-factor rule, since a limit is set to the factors that are insignificant in the context (p. 70):
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> "If the use of the contraceptive pill had appeared to be an inessential element in the history of the injury in relation to some other factor that is deemed to be predominant, there might be grounds for disregarding the use of the pill in assessing liability even though it too was a condition for the injury."
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> Later in the leading judgment the reservation is expressed in the form that the factor in question must have "been so essential in the pattern of causation that it is natural to attach liability to it."
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> I concur in the legal premises presented here" (p. 920).

Apart from what was said about the Norwegian law of tort being based on the *sine qua non* rule, I naturally agree that our causation system entails that several persons may be liable for causing the same damage, and that in that case they are all jointly and severally liable. I also agree that the main-factor rule does not apply in the form that only the predominant factor is responsible, though inessential factors must be disregarded.

One of my objections to the *sine qua non* rule is that it is based on a *hypothesis*. According to the *sine qua non* rule the causation requirement is usually fulfilled if the damage would not have occurred if the factor allegedly responsible were removed. In my view it is neither fitting nor natural to present in a hypothetical form a requirement for a chain of causation that is of a factual/historical nature. What has really and factually happened is conclusive. If one goes deeper into this, as was done in the leading judgment in the Dispril case in relation to the question of proof through reference to the experts and the judge's own evaluation, it is not a question of hypotheses. The question was whether Dispril had the capacity to lead to or contribute to such injury, and if so whether such causal capacity had materialized in this case. For my part I have drawn a conclusion from this to the effect that the causation requirement should in this instance be presented in a *factual* form, i.e. that the causal factor allegedly responsible by itself or in combination with other factors must have causal capacity, and that this causal capacity has materialized by causing the injury.[4] In the complex of causation there may also be other factors that have by themselves or in combination with other factors had a causal capacity that has materialized, so that several persons may be liable for the same injury, and in that case the liability may be joint and several.

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4 For further discussion see, inter alia, Nygaard, pp. 326 ff and *Årsak og bevis*, pp. 25 ff.

2.3 Requirement of Proof of the Preponderance of Probability

The allegation of fact in question and the factual chain of causation must be supported by proof of a *preponderance of probability*.[5] I cannot here go into the general principles of proof, but will briefly mention a couple of examples to illustrate our outline.

In the Dispril judgment in Rt. 2000, p. 915, the statements and opinions given by the experts are thoroughly examined in the leading judgment, which concluded that there was a chain of causation:

> "On the basis of the collective written and oral statements of the experts as to the probability that Dispril - subject to diverse prerequisites - has been a contributory cause of the syndrome, as compared with the rest of the evidence submitted, I have to come to the conclusion that there is a preponderance of probability in favour of such a chain of causation" (p. 925).

Neither in this conclusion nor in the considerations preceding it in the leading judgment is there a trace of the hypothetical formulation relating to the *sine qua non* rule. A similar impression is given by the contraceptive pill judgment II in Rt. 1991, p. 64.

The problem of proof must be to establish whether the requirement of causation outlined in subsection 2.2 has been satisfied, i.e. in my view whether the causal factor allegedly responsible, e.g. the use of Dispril, by itself or in combination with other factors, had the capacity to cause the injury, and whether this causal capacity has materialized. Proof of the causal capacity depends mostly on scientific documentation of the harmfulness in relation to the vulnerability of what has been injured, e.g. the pill's capacity to cause a cerebral thrombosis in the category of women to which the injured party belongs. The lower limit is whether the factor can be *excluded* because it has no causal capacity. The final point is whether this causal capacity has materialized by causing the specific injury. In this regard the question of proof is whether on a balance of probabilities it has materialized, e.g. the contraceptive pill judgment in Rt. 1992, p. 64, on pp. 75-78. But the contribution from this materialization may be disregarded if it is an inessential feature of the causation, cf. subsection 2.4.

2.4 The Criterion of Inessentiality

Even though the causal capacity has materialized by contributing to the injury, cf. subsection 2.3, it may nevertheless be disregarded if it only makes an inessential contribution to the harmful result, cf. the citation in subsection 2.2 from the contraceptive pill judgment II in Rt. 1992, p. 62, to which the Court adhered in the Dispril judgement in Rt. 2000, p. 915.

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5 Cf. inter alia, Lødrup, pp. 319 ff; Nygaard, pp. 335 ff.

In the Lie judgment in Rt. 1998, p. 1565, which concerned a whiplash injury, the conclusion in the leading judgment, in which the majority concurred, with two judges in five dissenting, was as follows:

> "As a factor in the negative development of her health the "contribution" from the accident in 1988 plays too modest a part in the whole picture to provide grounds for compensation, cf. in this respect Nils Nygaard, Skade og ansvar (Damage and Liability), 4th edition, Oslo 1992, p. 338, to the effect that what he calls "the contribution from the materialization" must not be an inessential feature of the resulting injury" (pp. 1582-1583).

The indoor atmosphere judgment in Rt. 2000, p. 620, concerns a claim for damages from a teacher against the municipality for injury caused by alleged poisoning and a bad indoor atmosphere on the school premises. The claim did not succeed. In the leading judgment it is stated:

> "In my view the indoor atmosphere and the exposure to DCB in the textile designing room appear to be an uncertain and in any case a scarcely essential element in the development of A's mental illness - and subsequently of MCS - in an otherwise very complex pattern of causation. I therefore find that I must disregard these matters in assessing liability, cf. Rt 1992, p. 64, on p. 70" (p. 631).

In the Dispril judgment in Rt. 2000, p. 915, the assessment of essentiality is formulated in the leading judgment as follows:

> "There are in my opinion no grounds for considering that Dispril has had so little effect on the course that it would be unnatural to attach significance to it in connection with the right to compensation. It is - in my view - a matter of two factors that have both been necessary in order to produce a very rare side-effect. The fact that such an effect very rarely occurs is not conclusive. The rare side-effects with a great capacity to cause harm are indeed an important group of cases in the context of strict liability for medical products, cf. NOU 1980:29 Produktansvar (Product Liability), p. 205" (925).

The passage cited contains a specially interesting point in this regard, namely that in the assessment of essentiality it may be important to establish whether the causal factor allegedly responsible was a necessary prerequisite for the occurrence of the injury. But this has nothing to do with the hypothetical formulation of the *sine qua non* rule as a general requirement of causation.
According to these judgments it should be clear that the requirement of a factual/historical claim of causation contains a qualitative or qualificatory requirement that entails that the causal factor allegedly responsible is not an inessential feature of the causation.

2.5 Placing of the Persuasive Burden for a Factual/historical Chain of Causation

2.5.1 If doubt finally arises as to whether there is a preponderance of probability in regard to the chain of causation, the question of proof may be solved by means of the rules relating to the burden of proof or the persuasive burden. For the factual/historical chain of causation the principal rule is that the injured party bears the persuasive burden. But in certain cases there may be grounds for shifting the burden of proof, i.e. to let doubt rest on the person causing the damage, who will then bear the persuasive burden.[6]

2.5.2 Shifting the burden of proof requires special justification, which may be based on *a consideration of the need to secure evidence.* The persuasive burden may be placed on the person causing the damage if he can be blamed for the fact that the causal relationship has become so obscure, cf. the Skien judgment in Rt. 1960, p. 1201 (on p. 1203) where the houseowner was held liable for injury caused by a tenant falling and being injured because of lack of gritting in the yard. The houseowner had to bear "the liability for it all being allowed to happen in this way and had himself to bear the risk of the increased difficulties of proof which this may have entailed". Cf. also Rt. 1982, p. 414 (on p. 417), concerning injury through ice drift or through the person causing the damage neglecting to preserve items of evidence, cf. Rt. 1988, p. 244 (on p. 248), concerning a deficient case history. Likewise where the person causing the damage should have secured knowledge or information about the factual circumstances, cf. the vitamin E judgment in Rt. 1972, p. 1350 (on p. 1356); cf. also Rt. 1989, p. 674 (on p. 682), concerning the failure to enter the alleged method of treatment in the case history. Also in the cases where circumstances make it difficult for the injured party to obtain evidence to which the person causing the injury has the best access, doubt may fall on the latter. This was specified in the ulnar nerve judgment in Rt. 1980, p. 1299 (on p. 1305), without it having any effect on the outcome of the judgment.

Otherwise the circumstances may provide grounds for a *presumption of causation.* If the injured party can show that the course of events in itself makes it probable that there is a causal connection, even though some circumstances are otherwise obscure, there may be grounds for presuming a causal connection, so that the person causing the damage must establish another probable cause, cf. NOU 1982:19, p. 100. This must be acceptable especially where an alleged cause represents a major potential source of damage, as in the Lier judgment in Rt. 1967, p. 697, cited above in subsection 1.4.2, where the court as a step in its justification of shifting the burden of proof emphasized that 4 cubic metres of manure had been emptied into the stream.

2.5.3 There is an example of a statutory presumption of causation in section 59, first paragraph, of the Pollution Act. In this instance *the person causing the*

6 For further discussion of the persuasive burden resting on the person causing the damage, see Lødrup, pp. 327 ff; Nygaard, pp. 318-323 and pp. 337-338.

damage bears the persuasive burden in regard to the chain of causation, but the basis or starting point is that *the injured party* bears the persuasive burden on several points. The latter bears the persuasive burden of proving that the damage has in fact occurred. He also bears the persuasive burden of proving that the harmful act/pollution was done (incidence of the alleged cause), and that the act/discharge was apt/had the capacity to do damage (causal capacity). What *the person causing the damage* has the persuasive burden for is that this causal capacity has materialized in the damage. In terms of the Act the polluter is liable "if it is not established that another cause is more probable."[7]

In the preparatory work on section 59, first paragraph, there was some discussion of how this provision would stand in relation to current non-statutory law. The Ministry of Justice seemed to go very far towards deeming it to be in accordance with current rules of causation and of the burden of proof.

> "Even though section 62a of the draft [section 59, first paragraph, of the Act] entails a new system in relation to current law, its content will reflect the rules of causation and of the burden of proof that must be deemed to result from current law. The Ministry cannot see that objection can be raised to explicit statutory provisions because they do not express anything other than what is already deemed to apply. The predominant goal is to clarify a very crucial issue in regard to liability to pay compensation – with the procedural cost-saving and preventive effects this must be presumed to have. With reference to the efforts to reflect current rules of causation and of the burden of proof through this provision, the argument concerning the possibility of an unfortunate contaminatory effect on other fields relating to the law of tort also seems to be exaggerated. The Ministry therefore initially agrees that there is a need to enact such a provision as the Committee has here proposed." Cf. Proposition to the Odelsting No. 33 (1988-89) pp. 63-64.

That the burden of proof provision in section 59, first paragraph, corresponds to current non-statutory law seems at any rate to be the case in regard to pollution damage up to the time the Act was passed, cf. the Lier judgment that is cited in subsection 1.4.2. Also the judgment in RG 1968, p. 23 (on p. 27), concerning alleged damage to a fur farm through overflying aircraft, which the Ministry used as an example, cf. Proposition to the Odelsting No. 33 (1988-89) p. 64.

2.5.4 In the Thelle judgment in Rt. 2000, p. 418, the vehicle (third-party) insurer was found not liable for an alleged whiplash injury. The court concluded that there was a factual/historical chain of causation, on the basis of a reversed burden of proof, but dismissed the claim because the harmful development was remote and secondary. In this case there were in my view no grounds for shifting the burden of proof on this point. This judgment is further discussed in section 5.

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7 Cf. RG 1968, p. 23, cf. NOU 1982:19, pp. 257-258; Ot. prp. (Proposition to the Odelsting) No. 33 (1988-89) pp. 63-64; Innst. O. (Recommendation to the Storting) No, 85 (1988-89), p. 11.

3 Placing the Persuasive Burden of Proving a Hypothesis of Effectiveness/Preventive Connection

3.1 Connection Between Alternative Action and the Factor Allegedly Responsible

In cases where liability is incurred on the basis of an error, e.g. in a case of liability for fault, *the error* must be a cause of the damage. But this question has two aspects.

The first is that here too the requirement of a factual/historical chain of causation applies, cf. subsections 1.2 and 2.1, i.e. an effective connection between one causal factor that is included in the basis of liability and the damage. This causal factor too is a fact, e.g. a factual act, or a state of affairs, an object or an installation.

The second is that the person allegedly at fault should have acted otherwise. He should have performed *the alternative action* in a proper manner as required and in this way neutralized the causal factor allegedly responsible, so that his contribution to the damage would have been prevented or avoided. This is a hypothetical requirement that the alternative action should be effective, cf. subsection 1.2.

> This also applies if the only alternative course is to *let be*, or *refrain* from action, e.g. in the butting case judgment in Rt. 1997, p. 883, where the injury occurred because the person causing the injury butted the other person so that he fell down in the street. In such cases it is clear that taking the alternative course, to let be or refrain, would have avoided or eliminated the factual act that led to his contribution to the injury.

3.2 Varying Requirement of Probability in Regard to a Hypothesis of Effectiveness/preventive Connection

The requirement of a preventive connection is thus a requirement of supposed effectiveness. The requirement of effectiveness may be formulated in different ways.

In the Lier judgment in Rt. 1967, p. 697, the expression “I must assume” that the alternative action would be effective was used in the leading judgment, as mentioned above, cf. subsection 1.4.3.

The judgment in Rt. 1962, p. 994, deals with injury arising from a complicated tumour operation performed by an inexperienced assistant surgeon. An alternative course was that the chief surgeon should “have been summoned when the operator became aware of how complicated it was” (p. 997). In regard to the preventive connection it was said that “the probability of the injury arising must have been considerably less if the chief surgeon had performed or taken over the operation, and that must be sufficient to satisfy the requirements that must be made ..." (p. 998).

In the HIV judgment in Rt. 1990, p. 768, the State represented by the Directorate of Health was allegedly liable for injury caused by HIV infection after a blood transfusion at a hospital, but was found not to be liable. One of the factors on which the allegation was based was that there was a *factual/historical* chain of causation between the man's HIV infection and the fact that the blood bank gave his wife a blood transfusion. This connection was not disputed. But the allegation of *fault* rested on the contention that the Directorate of Health staff, when performing their controlling and supervisory function, should inter alia, have sent out a circular to the blood banks earlier than they had done. In the leading judgment the question was raised of *the preventive connection* (the expression used was causal connection) "between the alleged negligence - that the circular was sent out too late - and the potential liability factor - the infusion of infected blood" (p. 773). The conclusion was that there was no such connection, i.e. that the sending out of the circular at an earlier date would not have prevented HIV-infected persons from donating the blood that was used in the blood transfusion given to the wife.

The judgment in Rt. 1998, p. 1538, concerned a 26-year-old family man who underwent a back operation, which caused injury to the nethermost nerve roots in his back, which affected, inter alia, his sexual functions. He claimed damages from Norsk Pasientskadeerstatning, (Norwegian System of Compensation for Injury to Patients), but his claim failed (with two judges in five dissenting). The main issue in the case was whether the surgeon had committed an *error* by neglecting his duty to give information. On this point the Court was unanimous, and gave an affirmative answer, but the Court was divided on the issue of whether the requirement of a preventive connection was satisfied. The majority was of the opinion that if the patient had been given the information in question he would nonetheless have assented to the operation. The minority was of the opinion that he would have refused the operation if he had been given adequate information, so that the failure to inform was the cause of the injury. I would have voted with the minority, since I am of the opinion that the requirements imposed by the majority for supporting the hypothesis were too strict (p. 1548).

The Dahl judgment in Rt. 2000, p. 253, concerned a right of recourse claim by the vehicle (third-party) insurer of a motorcycle whose rider was killed, against the State represented by the Public Roads Administration. The question was whether the latter was liable in damages in relation to the accident, and the answer was affirmative, with two judges in five dissenting. The accident occurred through the motorcycle overturning because of, inter alia, asphalt edges along the road at the exit to a tunnel. As regards the *factual/historical* chain of causation, the majority found, as stated in the second judgment delivered:

> "that between the freshly laid track fillings and the rest of the roadway, there were, at any rate on parts of the stretch of road where the accident occurred, asphalt edges of between 1 and 2 centimetres. In my opinion this must be regarded as the main cause of the accident. In addition there is the fact that the freshly laid asphalt was partly very slippery" (p. 266).

The alternative action that the roads administration's staff should have taken was that

> "at the exit to the tunnel a danger sign should have been erected giving warning of asphalt edges running alongside and/or of a slippery surface on the wet roadway" (p. 267).

If this action had been taken

> "he would most probably have reduced speed further. If the speed had been lower, he would probably have managed to master the difficult road conditions, and the accident would then have been avoided. The conclusion must then be that there is a chain of causation between the negligence entailing damages for which the State is liable and the injury incurred" (p. 267).

3.3 Placing the Persuasive Burden of Proving the Hypothesis of Effectiveness of the Preventive Connection

3.3.1 The persuasive burden of proving the preventive connection will as a general rule rest on *the injured party*, almost as in the case of proving the factual chain of causation, cf. subsection 2.5. Exceptionally - and here too as in the case of a factual connection - the persuasive burden falls on *the person causing the damage.* Doubt whether the alternative action would have prevented the person causing the damage from contributing to the injury will in this case be cast on the person causing the damage.

But it is possible that the persuasive burden of proving the preventive connection will fall on the person causing the damage more often in this instance than in the case of proving the factual chain of causation. This will probably be connected with the condition that the preventive connection raises the question whether the alternative action would be effective, as a minimum requirement in the basis of liability. The requirement of supporting the hypothesis seems at any rate to be more directly affected by how strong a degree of *protection* the injured party should have than in the case of the factual/historical chain of causation. For further discussion see Nygaard p. 320, cf. pp. 197-199.

I will refer to some judgments in which the Court concluded that the person causing the damage must bear the persuasive burden, i.e. he was required to establish that his contribution to the injury would not have been avoided if he had taken the alternative action.

3.3.2 In the Gimlemo judgment in Rt. 1962, p. 415, the State was sued for injury caused by tuberculosis infection during military service. Some of those infected succeeded in their action, and we shall concentrate on two of them. The date when these two were infected was not clear, but in the leading judgment the following was, inter alia, stated concerning the proof of the factual/historical chain of causation:

> "It must, however, be justified to count on - as the Court of Appeal has done - a relatively strong degree of probability that S and T were first infected by A some time after joining" (p. 420).

It was therefore clarified that the infection both came within the Defence Force's sphere of liability and that it could be the starting point of the chain of causation. But what should the Defence Force have done to prevent these two being infected? What was the alternative course? There was a problem with the X-raying capacity in the camp. In the case of these two it was found that the responsible officials in the camp should have sought assistance in radiography from the Bergen Health Board, but the question remained whether this would have prevented the injury. In the leading judgment it was stated thus:

> "In other words the question is whether the accident could have been avoided although the X-raying had been carried out as early as the first days after joining" (p. 420).

The term "although" in this citation corresponds to "if", but it seems to have been chosen with a view to the question whether prevention would have occurred although the performance would have taken some time. On this point the Court places the persuasive burden on the person causing the damage:

> "I agree with the Court of Appeal that it must rest on the Defence Force to establish that there is no chain of causation between the injury and the error for which the Defence Force is in this case liable" (p. 420).

3.3.3 The heifer judgment in Rt. 1984, p. 466, concerned a case where the gate to a private level crossing stood open so that 4 heifers went onto the railway line and were run over. Their owner claimed damages from the Norwegian State Railways (NSB) and succeeded in his claim on the basis of fault. The *factual/historical* chain of causation was that the gate stood open, the heifers went onto the railway line, and were run over. *The alternative action* was that NSB should have impressed on those entitled to use the crossing that the gates must be closed, i.e. NSB should have "protested about the matter to the rightful users and sent a report to the regional manager". The question of *preventive connection* must in this instance be whether this would have prevented the damage. NSB denied this, contending that the damage would have occurred regardless of whether this was done. But the Supreme Court concluded that doubt on this point must be cast on NSB. The leading judgment states it thus:

> "My comment on this is that of course it cannot be proved that the accident would not have occurred in that case, and it is also difficult to know how greatly reduced the risk of accidents would have been. But I find that the uncertainty that must prevail in this instance must involve the railway, whose conduct has been deplorably passive. At any rate it cannot be found that a protest and report as mentioned above, - a system that the railway itself has prescribed as a step to security - would have been an unsuitable means of reducing the risk of accidents. - Had a protest and report been made in this matter, it is very possible that measures would have been taken to reduce the danger, e.g. by locking the gates

> of the person entitled to use the crossing, or by his taking up the question of opening the gates with those he knew were accustomed to use the level crossing, or possibly by measures taken after considering the matter at a higher level in NSB" (p. 471).

3.3.4 The house in Spain judgment in Rt. 1996, p. 1718. A Norwegian purchased a house in Spain. The purchase was effected by a Norwegian estate agent, and payment was to be made in advance, through the agency of a Norwegian bank in exchange for a bank guarantee from the Spanish vendor. The Norwegian bank used an electronic means of transmission that did not allow for making a reservation concerning a bank guarantee. The money was lost. The purchaser claimed damages from the bank and succeeded on two grounds, one of which is related to our theme. *The factual/historical chain of causation* in this instance was that the bank received the money and passed it on, but that it came into the wrong hands and was lost. *The alternative action* the bank should have taken was to ensure that the reservation relating to a bank guarantee arrived in time before the disbursement. The question of *the preventive connection* must be whether this would have prevented the bank from contributing to the loss. The bank denied this, contending that the money would have been lost even if this had been done, because the Spanish guarantee would have been worthless. The Supreme Court concluded that doubt about this must be cast on the bank and referred to the heifer judgment. The leading judgement states it thus:

> "Firstly it is contended that if Banco Santander had required Tropical Invest to furnish a bank guarantee, there is a preponderant probability that the company would have furnished the same guarantee as it did three months later in the case of Per Monsen, which then proved to be worthless. I find that the bank cannot avail itself of this argument, since it is not definite that the outcome would have been the same. Banco Santander would - as a local bank in Almunecar - be better able to prevent an invalid bank guarantee being furnished and could also be held liable if it had not carried out adequate inquiries. I would add: When this bank pleads in its defence that the damage would also have arisen under an alternative and hypothetical course of events which the bank would not be liable for, such great uncertainty is attached to the alternative course that the uncertainty must involve the bank, cf. also Rt 1984, p. 466, which is based on a similar view" (p. 1725).

3.3.5 The SR bank judgment in Rt. 1998, p. 186, concerned the right to realize a third-party security provided for a loan that a restaurant business received from the bank. The central issue in the case was whether the bank was liable in damages to the business for its conduct in connection with the realization of another security that the business itself had provided. The point was that this claim for damages should make realization of the third-party security unnecessary. The bank was found to be liable in damages, and realization of the third-party security was refused. The question of liability in damages arose from the fact that the bank closed down the business as a step in the realization of the security that the restaurant itself had provided. The closing was in this instance the central factor in the basis of liability and also the starting point of the *factual/historical* chain of causation leading to the injured party's loss, cf.

subsection 2.1. *The alternative action* in this instance was in particular that the bank should have given the business time for reflection before the closing. The question of *the preventive connection* must in this instance be whether such a period for reflection would have prevented the loss. The bank denied this, contending that the restaurant business was in such a bad financial position that it would have come to an end in any case. But in the leading judgment the persuasive burden was placed on the bank in regard to this issue, and reference was made to the heifer judgment and the house in Spain judgment. The leading judgment states it thus:

> "I am of the opinion that in the type of situation now confronting us, where the bank has acted illegally and so as to entail liability in damages and where a borrower has lost an investment the bank should be liable in damages unless it can be established that the loss would have occurred nonetheless, cf. concerning such hypothetical and alternative possibilities of loss Rt 1984, p. 466, and Rt 1996, p. 1718" (p. 192).

3.3.6 In the DNB Fund judgment in Rt. 2000, p. 67, the bank was found liable in damages for faulty advice given to two investment clients. What the consultant did, and what the case was concerned with, was to advise investment in unsecured negotiable promissory notes in Investa. Thus in this instance the *factual/historical* chain of causation led from the factual advice he gave over a two-year period to the loss suffered by the clients as a result of Investa's compulsory composition paying creditors a 25% dividend. What the consultant should have done, i.e. *the alternative action*, was to find "an independent basis for his investment advice concerning Investa"/"have carried out his own analyses of Investa". This should have applied to each successive case of advice given over the whole period. The question was then whether this would have *prevented the bank from contributing to the loss.* In this instance the Supreme Court placed the persuasive burden on the bank, and referred to the house in Spain judgment. The leading judgment stated:

> "We are here confronted with the type of hypothetical course of events where the bank must bear the burden of proof for the uncertainty attached to the alternative course, cf. Rt 1996, p. 1718. I cannot see that the bank has satisfied this burden of proof"(p. 689).

3.3.7 Cf. also Rt. 1994, p. 60, where the municipality was found liable in damages for the plaintiff's loss as a result of the rejection of his application for an extension of the opening and licensed hours for an existing discothèque. The *factual/historical* chain of causation in this instance led from the rejection decision to the applicant's loss resulting from the non-extension. *The alternative action* in this instance was to deal with the case properly, which would probably have resulted in the extension being granted. Any doubt whether the extension would have been granted must be cast on the municipality. The applicant succeeded in his claim. The leading judgment states it thus:

> "Any possible doubt about what the municipal board would have decided at this meeting should in this case be cast on the municipality, which has not clarified what restrictions should apply" (p. 67).

Cf. also Rt. 1997, p. 343 (p. 364). Also Rt. 1997, p. 574, where the Court placed the persuasive burden on the person causing the damage; but the latter satisfied the burden of proof and was found not to be liable (p. 579).

3.4 Summing up

The case law referred to in section 3 relates to cases where liability is based on error or fault. In such cases a hypothetical element enters into the question of causation, in addition to the factual/historical connection. The basic definition of error or fault contains a requirement that the person concerned should have acted otherwise, so that his contribution to the damage would have been avoided or prevented. This applies to both physical injury and damage purely to property. This hypothetical or supposed chain of causation cannot be proved in the usual sense. The question entails supporting the hypothesis whether it is probable that the alternative action would have prevented the damage by neutralizing the factual causal factor allegedly responsible. I call this the preventive connection or the hypothesis of effectiveness.

The principal rule is that the injured party, bears the persuasive burden also for the preventive connection, but in certain situations the persuasive burden will be placed on the person causing the damage.

To sum up what has been outlined in section 3 concerning the persuasive burden of proving the preventive connection placed on the person causing the damage, it is evident that the justification for so placing it can vary somewhat. In the heifer judgment in Rt. 1984, p. 466, reference was made to the deplorably passive conduct of the person causing the damage. In the SR bank judgment in Rt. 1998, p. 186, reference was made to the fact that the person causing the damage had acted "illegally and so as to entail liability in damages." Such a factor hardly exceeds what is needed as a basis of liability, but it is thus used as a justification for placing the persuasive burden on the person causing the damage. In the other judgments, the Gimlemo judgment in Rt. 1962, p. 415, the house in Spain judgment in Rt. 1996, p. 1718, the DNB Fund judgment in Rt. 2000, p. 679, and the discothèque judgment in Rt. 1994, p. 60, it is perhaps more a matter of an objective placing of the persuasive burden, and one notes that the persuasive burden is in these judgments placed on the stronger party in the relationship, i.e. that the latter is more likely to be subjected to the risk of doubt. This also applies in some degree to the heifer judgment and the SR bank judgment.

As compared to the persuasive burden of proving the factual/historical chain of causation, it seems that less is required before the persuasive burden of proving the preventive connection is placed on the person causing the damage. This may be connected with the question whether the degree of *protection*

against damage given to the injured party seems to be strengthened in this instance, cf. subsection 3.3.1.

4 Placing the Burden of Proof of the Extent of the Income or Business Loss

4.1 Paying for Repairs and Expenses

We will now assume that the primary damage has materialized and that a factual/historical chain of causation as outlined in section 2 exists, and in the case of liability for fault that there is in addition a preventive connection as outlined in section 3.

The primary damage usually results in costs or expenses. In the case of *property damage* the first question thus concerns the costs of replacement or repairs. In the case of *personal injury* the corresponding problem relates to the question of damages payable for expenses in connection with or caused by the injury.

The question now arises of the *extent* of the loss caused by any further development of the damage.

4.2 Loss of Wages or Business Income

The primary damage suffered by the injured party is thus the first end-point in the factual/historical chain of causation, e.g. in the Lier judgment in Rt. 1967, p. 697, that the fry perished so that the business came to a halt; or that the collision from behind caused a cervical trauma; or that the contraceptive pill caused a cerebral thrombosis. But this primary damage may then develop further, e.g. in the form of business loss or income loss to follow. The question of the factual/historical chain of causation then presents itself in *two stages.*

The primary damage, i.e. the end-point of the first stage, has an important function in that it fulfils a minimum requirement of *damage as a condition of liability*, e.g. in the case of alleged whiplash injury, that the allegedly injured party has suffered a cervical trauma as a result of the collision. If he did not suffer a cervical trauma, the person allegedly liable must be exonerated from the allegation of liability for whiplash injury. The injured party bears the persuasive burden of proving this primary injury, cf. inter alia subsection 2.5.3. The question whether the collision was a cause of the trauma will follow the usual rules applicable to the factual/historical chain of causation, cf. section 2.

The next stage, the development of the damage arising from the primary damage, will relate to the *extent* of the consequences of the damage. This question splits into two parts. The extent of the development of the damage will be revealed by ascertaining the difference between the development *with* the damage and the development *without* the damage. I shall briefly outline these two courses of development:

The development *with* the damage is consequent upon the *factual/historical* development of the damage. Here too the usual rules concerning a factual/historical chain of causation apply, cf. section 2. Thus in this instance it is a question of a chain of causation leading from the primary damage to the subsequent development of the damage or secondary damage, cf. inter alia Rt. 1991, p. 697 (on p. 702), where the Court concluded that cerebral damage caused by an assault was not a cause of the cerebral haemorrhage that occurred some time later; or, for example, that destruction of the means of production is a cause of business loss; or that the cervical trauma is a cause of health disorders and loss of income. Or it may possibly be a question of limiting remote and secondary consequences of the damage, cf. subsections 1.4.4 and 5.3.2 with reference to the Lier judgment in Rt. 1967, p. 697, and the neurosis judgment in Rt. 1940, p. 82, where the liability in both cases covered the factual development of the damage as far as it was foreseeable. This then is the course of development of the damage with the existing damage.

The course of development *without* the damage lies on the *hypothetical* plane. One starts with what would be a normal course of development, and by considering the question of probable deviations from this. Here a limitation of the extent of the damage may be included in as much as the liability cannot cover a course of development that would have occurred regardless of the damage.

The extent of the damage shall also be assessed in terms of *financial* loss. In the case of personal injury the usual rule is that in assessing loss of income it is a question of ascertaining the difference between the probable level of income *without* the damage and the probable level of income *with* the existing damage. The same will apply in the case of business loss or property damage or other damage to assets, where the means of production are destroyed or removed. This differential system applies to both actual and future loss. The principle involved in relation to our outline is most apparent in the case of *actual loss*. The object in this instance is to ascertain the difference between the real or historical income level following the damage, on the one hand, and the hypothetical level on the other. As regards the level *with* the existing damage it is a matter of proof of what is factual or real or historical. But as regards the income level *without* the primary damage or trauma, there is in reality no question of proof or fact. In this instance it is a matter of supporting a hypothesis, but here too the concept of probability is used as an aid. The principal rule is that the injured party bears the burden of proof in regard to both these levels of income.

The *future* level of income *with* the existing damage must be based on a stipulation of the possibilities of earning income that the injured party actually has following the damage, on the basis of his abilities, education, practice, age, opportunities for re-education, and other circumstances. But in contrast to actual loss, it is not now a matter of proof of a historical fact, but of a future stipulation based on certain assumptions that are presented as facts at the date of assessment or determination. As regards the level of income *without* the damage it will be a stipulation in the form of a hypothesis and its support.

4.3 Hypothesis in Regard to the Business or Income Situation Without the Damage

4.3.1 As regards the situation *without* the damage, it is, as mentioned above, not a question of proof of a fact. It is a question of *supporting a hypothesis:* What would the situation of the injured party be in regard to his business or health if the damage had not occurred?

4.3.2 In the case of *property damage* there may in addition to the costs of repairing the primary damage be certain consequences of the damage, inter alia in the form of loss of business or of a catch. The Eystein judgment in Rt. 1939, p. 736, is an example of loss of a catch. During herring fishery the fishing boat Skalmen tangled with and tore Eystein's seine. This was the primary damage. The seine was full of herring and the catch was lost. This was the *factual/historical* chain of causation. The Skalmen was held liable on the basis of fault for the damage done to the net and the loss of the catch. *The alternative action* in this instance was that the Skalmen should at the critical moment have manoeuvred in a different manner, a manner that would effectively have prevented it from tearing the net. The loss of the catch was a *consequence* of the damage to the net. As regards the *extent of the catch loss* the Supreme Court concurred in the extent found by the district court (from which there had been a direct appeal). As regards the proof of fact and the historical or factual course of events the district court stated:

> "The court finds it proved that before it was damaged by the "Skalmen" the "Eystein"'s net contained so much herring that the "Eystein" would have had a full cargo. The court finds it further proved that the whole catch was lost and that this occurred as a consequence of the "Skalmen" colliding with the net. Shipowner Sjong has testified that in fine weather the "Eystein" carries a cargo of 1360 hl. Below deck it holds 800 hl. The court finds that it can base the cargo capacity on this evidence" (p. 739).

Thus the court found the historical fact proved that before the damage occurred the Eystein had a catch amounting to a full cargo. i.e. 1360 hl., and that the catch *with* the damage was nil.
The *hypothetical* course of events from the moment of the damage and onwards, i.e. the hypothesis concerning what the extent of the catch would have been *without* the damage, was based on the assumption that the Eystein would not have landed more than the amount that lay below deck, i.e. 800 hl. This then comprised the catch loss in this case.

> The Supreme Court concurred with the district court as regards the catch loss. In this regard the district court stated: "The court finds, however, that it must assume that the "Eystein" - in view of the weather that night - would not have reached the place of delivery with a full cargo, namely 1360 hl. It is assumed that it would not have arrived with more than could have been stored below deck, namely 800 hl. And the court must assume that the "Eystein" would have proceeded to the place of delivery when it had taken in the catch" (p. 439).

> The supreme Court puts it this way: "As regards the amount of the loss there are many uncertain factors, such as would the "Eystein" have gone to Bergen during the unfavourable weather, and whether the deck cargo would have gone overboard. In consideration whereof I find it appropriate to arrive at the same amount of compensation as the district court" (p. 737).

4.3.3 *As regards personal injury* I will mention the Lie judgment in Rt. 1998, p. 1565, as an example of a hypothetical assessment of the extent of working capacity *without* the damage. In the leading judgment it is stated inter alia:

> "Even on the supposition that the collision in 1988 had not occurred, it must in my view be found to be preponderantly probable that L would have been disabled. The considerable and predominant disorders she suffered, which could not under any circumstances be properly attributed to this collision, indicate this" (p. 1582).

4.4 Placing the Burden of Proof of the Hypothetical Level Without the Damage

4.4.1 As regards *the persuasive burden* in regard to the situation without the damage, the starting point is that doubt concerning the extent will rest on the injured party. But it does happen that the person causing the damage alleges that special circumstances cause the hypothetical level in the state of health, business or income to be lower than the injured party alleges. In this case the doubt may shift to the person causing the damage.

4.4.2 The butting case judgment in Rt. 1997, p. 383, referred to in subsection 1.4.4, illustrates this. Also the Stokke judgment in Rt. 1999, p. 473, which concerned a whiplash injury after a collision that occurred 10 years before the judgment. The vehicle (third-party) insurer had paid the full damages for the first 7 years as actual damage. The case concerned a claim for damages for further loss of income because of the collision. The plaintiff was 100% permanently disabled. The Court of Appeal concluded that without the damage she would have been 50% disabled in future because of her own state of health. The collision was the cause of her losing the remaining 50% of her working capacity, and the Court of Appeal awarded her damages for this loss. The Supreme Court confirmed this result, with one judge in five dissenting. Before the Supreme Court the insurer agreed "that the person causing the damage bears the burden of proving that the injured person would have developed an occupational disability independently of the accident" (p. 1477). And it is specified in the leading judgment that "when the person causing harm argues that existing damage would wholly or partly have arisen independently of the harmful act, doubt on this point must affect the person causing the damage, cf. in this respect also Rt. 1997, p. 883, see p. 887" (p. 1479). But the majority

concluded that the person causing the damage had fulfilled the requirement of supporting this hypothesis.[8] On this point the leading judgment states:

> "In view of this I have decided that there are sufficient grounds for concluding that Ellen Stokke would have been partly occupationally disabled even if the accident had not occurred, and I maintain that her occupational incapacity would have been 50%" (p. 1485).

4.4.3 The Nordseter housing-cooperative judgment in Rt. l997, p. 825, is a judgment concerning the extent of damage caused purely to property. The housing cooperative claimed damages from the builder for cement-related damage resulting from defective building control and succeeded in its claim. The factual cause was an inadequate covering of cement around the iron reinforcement. As regards the hypothetical situation without the damage, the Supreme Court found that any doubt rested on the person causing the damage. The leading judgment states, inter alia:

> "OBOS has argued that the rust damage would have arisen even if the building had satisfied the standard of cement covering required. The damage has simply occurred at an earlier date. In such a case - it is contended - the loss is not related to the costs when the improvement was made, but to these costs being incurred a certain number of years too early. As a theoretical model this can provide a correct starting point for calculation of the loss. My view, however, is that the person causing the damage must bear the burden of proving that one may alter the starting point that compensation shall be paid for the expenses incurred as a result of the damage inflicted. As will be evident from what follows, there is no reason to alter this starting point in the case before us" (p. 836).

4.4.4 Rt. 1998, p. 740. The lawyer A was held liable in damages for his client's losing a financial claim because the lawyer failed to act within a statutory period of limitation. The extent of the financial loss was also disputed. It was obvious that the client suffered financial loss because his claim was time-barred. But the lawyer contended that his client's loss had been covered through the factual development that subsequently occurred. The court placed the persuasive burden in regard to the loss on the lawyer, inter alia, by pointing out that the alternative development was not clear. The leading judgment stated:

> "When the situation is as it is in this instance, where initially financial loss has been incurred, which, however, it is contended has been balanced by matters occurring a good 2 ½ years later, and where it is very difficult for the injured party to prove what the alternative development in the company would have been, I am of the opinion that the doubt attached to the question of financial loss must rest on A" (p. 748).

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8 The most important material for the hypothetical assessment was the documentary information provided by the health service, and the experts appointed in the case. The minority concluded that the medical documentary proof of reduced working capacity without the damage was not good enough and were in favour of awarding full damages. I for my part agree with the minority; the burden of proof placed on the person responsible for the damage was in my view too leniently discharged in this case.

4.5 Summing up

When speaking of the factual/historical chain of causation leading to the damage, one thinks in the first place of the primary damage suffered by the injured party, e.g. destruction of the means of production, or damage to working capacity. But the primary damage may then be the cause of a subsequent development of loss or damage in the form of loss of income or business. This is pertinent to the situation *with* the damage, and is a continuation of the factual/historical chain of causation. The extent of the loss of business or income is the difference between the situation *with* and the situation *without* (the primary) damage. The situation *without* the damage must be based on a *hypothetical* assessment.

Initially the injured party bears the persuasive burden for both the factual development *with* the damage and the hypothetical development *without* the damage.

As regards the development *without* the damage, several of the judgments mentioned above indicate that the persuasive burden shall in certain cases be placed on *the person causing the damage.* In this regard different considerations seem to apply than in the case of placing the persuasive burden as outlined in sections 2 and 3 for the factual/historical chain of causation and for the preventive connection. The starting point seems to be that one supposes a form of normal development if the damage had not occurred. But if the person causing the damage alleges that the development would have resulted in the hypothetical level being lower, so that the difference in damage would be less, the latter must bear the persuasive burden of proving this. The person causing the damage bears the persuasive burden of proving his allegation. The substance of this form of persuasive burden seems at any rate in the case of personal injury to be that the person causing the damage must satisfy a requirement of there being a preponderance of probability in favour of his allegation. As is stated in the leading judgment in the butting case in Rt. 1997, p. 883, on p. 887, "there must at least be a preponderance of probability that they will develop in a clearly negative way".[9] This formulation is meant to cover the future development without the damage. But the same must apply in the case of loss suffered, that there must be a preponderance of probability that the development would have followed such a course without the damage. Probably must the same also apply in the case of business loss after property damage or damage caused purely to assets.

5 The Thelle Judgment in Rt. 2000, p. 418

5.1 The Judgment

The Thelle judgment in Rt. 2000, p. 418, deals with the question outlined in section 2 concerning the factual/historical chain of causation and the question in

9 Also cited in the Stokke judgment in Rt. 1999, p. 1473, on p. 1479.

section 4 concerning the extent of the damage. I will take a brief look at the judgment, because it can cast further light on the questions outlined here.

The judgment is concerned with a whiplash injury to a 24-year-old woman. The collision occurred in October 1993. The cars were only slightly damaged. After the collision she had pains in the neck and head and was on 50% sick leave for a couple of weeks. Two months after the collision her condition had greatly deteriorated, and she gradually developed persistent health disorders. She claimed damages from the vehicle (third-party) insurer and succeeded in the city court and the Court of Appeal, but lost in the Supreme Court "because the causal connection between the collision with the very limited physical damage that it caused and A's persistent health disorders was too remote and secondary".

5.2 Reversed Burden of Proof of Factual/historical Chain of Causation?

The two experts appointed by the Supreme Court arrived at different conclusion in regard to the question of the factual/historical chain of causation leading from the collision to the persistent health disorders. One of them was a neurologist, and he was of the opinion that there was no causal connection. The other was a specialist in physiology and rehabilitation, and he was of the opinion that there was a causal connection. But both stated that the question of causation in this case was very difficult and the solutions uncertain, and each of them specified that the other's solution could not be excluded.

The conclusion reached in the leading judgment, in which the other judges concurred, was that there was a causal connection based on a reversed burden of proof. The judgment stated:

> "In coming to a decision concerning the question of causation from a legal point of view on the basis of the experts' assessments and conclusions, I wish to point out that the decisive factor for ascertaining the causal connection will be whether the collision was a necessary condition for the development of A's persistent disorders, cf. also Rt 1992 [page] 64. In view of the disagreement that exists between the experts on this point, and the doubt they have both expressed, I will specify that the person responsible for the damage - in this case Storebrand - must bear the persuasive burden of proving that the persistent disorders that exist would have arisen independently of the traffic accident, cf. Rt 1999 [page] 1473, see p. 1479. And on this basis I must conclude that the collision must be assumed to have been a necessary condition - as an originating cause - for the later development of A's chronic disorders. Adequate proof has not been given in this case that it was preponderantly probable that these disorders would have occurred even if the collision had supposedly not taken place. It is no doubt the case that a coincidence in time is not in itself conclusive proof of a causal connection, and that the symptoms displayed by A from December 1993 can occur spontaneously in persons from time to time, independently of whiplash injuries. But it cannot be established that A as a person was specially prone to develop such symptoms. She seems to have been a physically strong person before the collision and has even been described as a very lively person. Admittedly stress-like reactions have been noted in her medical journals on a couple of occasions some years before the traffic accident, but I cannot attach any importance to this. Professor Nordal

> [the neurologist] does not attach any decisive importance to these reports either" (p. 432).

My first comment is that I agree with the reference to the contraceptive pill judgment in Rt. 1992, p. 64. In the same way as in the pill case there was in the present instance a question of a factual/historical chain of causation. But what I find lacking is the specification made in the pill judgment that the causal factor allegedly responsible, in that case the contraceptive pill, "has been such an essential part of the pattern of causation that it is natural to attach liability to it" (p. 70). In the Thelle case the leading judgment later addressed the issue of essentiality, of subsection 5.3.2, cf. in addition my comments in subsection 5.4.2 on this subject.

My next comment is that the reference to the Stokke judgment in Rt. 1999, p. 1473, is misleading and can cause confusion. The Stokke judgment was concerned with a different issue and not with a reversed burden of proof of the factual/historical chain of causation. The Stokke judgment was concerned with *the extent* of the damage, and there the Supreme Court placed the persuasive burden on the person responsible for the damage as regards the state of Stokke's health *without* the damage, cf. subsection 4.4.2.

Shifting the burden of proof in the Thelle case in regard to the factual/historical chain of causation must then have had some other justification. It is not sufficient to shift the burden of proof that the causal relationship is not clear, e.g. the burden of proof was not shifted in the contraceptive pill case. In the Thelle case it was not as far as I can see the need to secure evidence that could justify shifting the burden of proof, nor were there grounds for a presumption of the cause, cf. subsections 2.5.2 and 2.5.3.

In my view it would not, however, be unexpected if one concluded that there was a preponderance of probability in favour of a factual/historical chain of causation, cf. inter alia, the statement in the leading judgment that "adequate proof has not been given in this case that it was preponderantly probable that these disorders would have occurred even if the collision had supposedly not taken place", and that "it cannot be established that A as a person was specially prone to develop such symptoms. She seems to have been a physically strong person before the collision and has even been described as a very lively person".

5.3 The Extent of the Damage

5.3.1 As regards the factual/historical chain of causation leading from the collision to the persistent health disorders, one should, as mentioned above, deal with the question in *two stages*, cf. subsection 4.2. The first stage must be whether the collision caused a cervical trauma. If so, this trauma may be called *the primary damage* on the part of the injured party. The latter bears, as mentioned above, the persuasive burden of proving this damage, cf. inter alia subsection 2.5.3, i.e. in the present instance that the injured party suffered a cervical trauma through the collision. The question whether the collision was *the cause of the trauma* must follow the usual rules concerning a factual/historical

chain of causation, cf. section 2. The crucial question in this regard would be whether such a collision had the causal capacity to produce such a trauma.

The next stage must be to inquire *whether the trauma was the cause* of the persistent health disorders. This too will follow the usual rules concerning the factual/historical chain of causation, cf. section 2 and subsection 4.2. A crucial question in this regard is whether the trauma had the causal capacity to induce the persistent health disorders, subject to a possible limitation in regard to remote and secondary harmful consequences, cf. subsections 1.4.4, 4.2 and 5.3.2.

This final stage is thus related to the development *with* the trauma, and it is an important aspect of the question of *the extent* of the damage. The extent of the development of the damage becomes apparent, as mentioned above, by ascertaining the difference between the development *with* the damage and the development *without* the damage, cf. subsection 4.2.

I shall here briefly take a further look at the question of extent.

5.3.2 As regards the situation *with* the damage, the Court thus came to the conclusion that there was a causal connection between the collision and the persistent health disorders, cf. subsection 5.2, but the insurer was found not liable because the persistent health disorders were too remote and secondary. The leading judgment presents the problem this way:

> "But a conclusion that the collision was a necessary condition for the incidence of the persistent health disorders is not by itself sufficient to sustain the existence of a causal connection entailing liability. It is also required that the damage arising as a consequence of the originating cause does not appear to be unforeseeable and remote" (pp. 432-433).

Thus there was in this instance a question of a judicial limitation, assessment after the factual/historical chain of causation had been clearly established. Thus the question is how far the liability covers the factual development *with* the damage. This presentation of the problem corresponds on the whole to a point in the Lier judgment in Rt. 1967, p. 697, which is outlined in subsection 1.4.4, to the effect that the factual development lay "beyond what can normally be expected" at the time of damage. I will also mention the similar presentation of the problem in the neurosis judgment in Rt. 1940, p. 82, where the injured party had gradually developed a neurosis after the damage. The last part of the development of the damage, which related to the neurosis "lay far beyond what the collision to which Ø was exposed could reasonably be supposed to lead to" (p. 89). But in the Thelle judgment the limitation seems to have been more strictly applied against the injured party than in these two judgments.

The judicial limitation assessment in the Thelle case was formulated as follows in the leading judgment:

> "The way I too comprehend the medical information in this case - as it emerged in the months nearest to the collision - is that we are confronted with a completely unusual course of illness on the part of A, which must to a considerable extent be due to circumstances that occurred some time after the collision. These

> circumstances may be regarded as causes that have a combined effect with the traffic accident, as Dr Ødegaard does, and as Professor Nordal in a way also sees it possible to do. In such a perspective the traffic accident that set off the course of injury cannot be regarded as a completely inessential cause, even if it is overshadowed by circumstances occurring later. For my part it is more natural to regard the course of A's illness in December 1993 as so unusual and the subsequent persistent disorders as so remote in relation to the original and very slight collision, and so secondary in relation to the limited soft tissue injury thereby incurred, that it is not reasonable to impose liability for compensation on the insurance company. This must also in my opinion apply if one finds, as Dr Ødegaard does, that the cervical pains may have given rise to muscular tensions and altered A's movement pattern, which has thereby significantly affected the atypical course of illness and the subsequent persistent disorders" (p. 433).

Here the judge addresses two methods of limitation: The first relates to an assessment of essentiality, the second to an assessment of foreseeability. The judge applies the latter. He is of the opinion that it is "more natural to regard the course of A's illness in December 1993 as so unusual and the subsequent persistent disorders as so remote in relation to the original and very slight collision, and so secondary in relation to the limited soft tissue injury thereby incurred, that it is not reasonable to impose liability for compensation on the insurance company". As regards the criterion of inessentiality, the presumption is that the collision and the causes of deterioration have a combined effect, so that the question is whether the collision is an inessential causal factor in relation to the persistent health disorders. In this regard the judge states: "In such a perspective the traffic accident that set off the course of injury cannot be regarded as a completely inessential cause even if it is overshadowed by circumstances occurring later". But he does not go into further detail about this.

In my view the judge should also have made an assessment of essentiality, but in combination with the assessment of foreseeability. The latter assessment is made at the time of judgment, when one knows what happened. One thinks back to the time the trauma occurred and asks what could then have been the foreseeable consequences of the trauma in the future. This is an *anticipatory perspective.* What is it then that can make the development unforeseeable? It will be that other causal factors intervene and make the development different from what it could have been expected to be at the time the trauma occurred. What then shall a decision that the development was unforeseeable be based on? In this regard it is in addition important to concentrate on the time of judgment and to look back at the causes that collectively caused the health damage. This is an *ex post facto* or *causal perspective.* In this perspective the causal factor allegedly responsible - in this case the trauma - is compared with the causal factors that were unexpected in the anticipatory perspective - in this case the causal factors behind the reactions two months after the trauma; and if the unexpected factors are *predominant* in the collective causal pattern, this may provide grounds for disregarding the factor allegedly responsible. The fact that they predominate when viewed in the causal perspective will usually mean that they were unforeseeable when viewed in the anticipatory perspective. The causes viewed in the causal perspective may thus act as a guide to what was

unforeseeable when viewed in the anticipatory perspective. In the judicial limitation against remote and secondary consequences of the damage both these perspectives should be used in combination with an assessment based on judicial policy of where the line should be drawn in the type of case in question. For further discussion see Nygaard pp. 350 ff and p. 355 ff.

5.3.3 As regards *the hypothetical development*, i.e. the development *without* the damage, as mentioned in subsection 4.3, it provides the basis for both the butting case judgment in Rt. 1997, p. 883, and the Stokke judgment in Rt. 1999, p. 1473, and for more recent judgments, to the effect that if the person causing the damage alleges that the development would wholly or partly have been the same as it actually is, independently of the cause of damage allegedly responsible, then he bears the persuasive burden of proving this.

In the Thelle judgment the Court concluded that the liability did not cover the factual/historical situation, cf. subsection 5.3.2, and therefore there was no question of assessing the hypothetical development without the trauma.

5.4 Summing up

5.4.1 The Thelle judgment can be criticized on certain points, especially as regards its presentations of the problem. If these had been different, the result of the judgment might perhaps have been otherwise.

5.4.2 As mentioned in subsection 5.2, it is misleading and likely to cause confusion when the Stokke judgment in Rt. 1999, p. 1473, which concerned the persuasive burden placed on the person causing the damage of proving the hypothetical cause of its extent, is used as a solution of the question of the factual/historical chain of causation. It is also possible that it can have a sidetracking effect in that the view of the reversed burden of proof in this case may have prevented the criterion of inessentiality in accordance with, inter alia, the contraceptive pill judgment from attracting proper attention. In my view a crucial point in the question of the factual/historical chain of causation must be whether the trauma, cf. subsection 5.3.1, "has been such an essential feature of the pattern of causation that it is natural to attach liability to it", to use the formulation in the contraceptive pill judgment, cf. subsections 2.2 and 2.4. If the answer to this had been affirmative, the factual/historical chain of causation leading from the collision to the persistent health disorders would probably have been sufficiently validated. If in addition the question of limitation against remote and secondary consequences of the damage had been raised in this case, it would in my view be doubtful whether it would have provided independent grounds for dismissing the claim, since many of the factors that made the development unforeseeable would have been absorbed in the assessment of essentiality in regard to the factual/historical connection. Cf. subsection 5.3.2.

5.4.3 As regard *the extent of the damage* I shall mention a couple of points, in connection with this judgment. Thus in the case of loss of business or income

one seeks to ascertain the difference between the development *without* the damage and the development *with* the damage. But *each* of these two dimensions or levels may have *its own limitation rules.*

For the factual/historical development *with* the trauma, the limitation may be done by applying rules that draw the line against remote or secondary damage. In this regard it happens that the term foreseeable is used in inquiring whether the factual consequences of the damage come within the category of what is foreseeable. The Lier judgment in Rt. 1967, p. 697, and the neurosis judgment in Rt. 1940, p. 82, inter alia, come under this set of rules, cf. subsection 5.3.2.

For the hypothetical development *without* the damage the limitation can be done by applying rules for ascertaining any decline in the level of health or business that would have taken place even if the damage had not occurred. According to the circumstances, the person causing the damage may bear the persuasive burden in this instance. The butting case judgment in Rt. 1997, p. 883, the Stokke judgment in Rt. 1999, p. 1473, and the Nordseter housing-cooperative judgment in Rt. 1997, p. 825, inter alia, come under this set of rules.

Both sets of rules fix limits for the extent of the damage, but they are based on different grounds and may produce different results. One must therefore ask: How are they related to each other? The answer is, inter alia, that each has its own area of application. The limitation rule for the factual consequences of the damage *with* the existing damage will require that there is a factual/historical chain of causation leading to the secondary or remote consequences of the damage. The limitation rule may in this case draw the line against such consequences of the damage. Legally speaking, the extent of the factual consequences of the damage cannot exceed what this limitation demarcates. As regards the limitation rule for the hypothetical development of the damage *without* the existing damage, the prerequisite is that the cervical trauma in question has *not* occurred, and that any development of the damage must therefore be due to other causes than the trauma allegedly responsible. The problem presented by this hypothesis is whether the consequences of the damage would have occurred in any case. This limitation rule too can thus draw the line for the extent of the damage. Such extent cannot exceed what the hypothesis proposes. The injured party cannot claim damages for that part of the loss of business or income that would have occurred independently of the trauma incurred.

When should these two sets of rules for limitation be applied then? When is one to use the one and when the other? In principle both can be applied in one and the same case. One is constantly trying to ascertain the difference between the income or business level *with* and the corresponding level *without* the damage. The point of these rules of limitation is to reach a decision of the question how far the consequences of the damages are relevant in the law of tort in determining the extent of the damage. But if one set of rules leads to the extent being reduced to nil, there is no need to go further into the other; this was the presentation of the problem used for the development *with* the trauma in the Thelle judgment in Rt. 2000, p. 418, cf. subsection 5.3.3.

One example of both sets of rules being applied is the Lie judgment in Rt. 1998, p. 1565. The legally relevant development *with* the damage was in this

case limited in accordance with the criterion of inessentiality for the factual/historical chain of causation, cf. subsection 2.3 where the conclusion concerning this is cited. The legally relevant development *without* the damage produced the same result, cf. subsection 4.3.3, where the conclusion in regard to the hypothetical limitation rule in relation to other causes is cited.

If there *is* an authentic factual/historical chain of causation leading to the consequences of the damage, the hypothetical development without the damage may nevertheless show that the level of the health or business result would have declined, e.g. as the majority found in the Stokke judgment in Rt. 1999, p. 1473, which is referred to in subsection 4.4.2, with a decrease in working capacity of 50%, or the Eystein judgment in Rt. 1939, p. 736, which is referred to in subsection 4.3.2, with a decrease in the catch to 800 hl.

5.4.4 The approach to the problem in the Thelle case should in my view have been firstly to deal with question of causation in two stages, with the first stage extending to the cervical trauma and the second from the trauma to the persistent health disorders, cf. subsection 5.3.1. As regards the latter stage this approach should have been made closer to that in the contraceptive pill judgment II in Rt. 1992, p. 64, in regard to the question of the preponderance of probability and the question whether the trauma was a sufficiently essential cause, cf. subsections 5.4.2 and 5.3.2. The answer would have been either affirmative or negative to the question whether the trauma was the cause. If the answer had been negative, the vehicle (third-party) insurer would have had to be found not liable; it would then have been unnecessary to proceed further with the case. If the answer had been affirmative, the justification would, inter alia, have been that the trauma was a sufficiently essential cause. It would then in my view have been doubtful whether the claim could be dismissed on the grounds of a special issue of unforeseeable development, since many of the factors that should have made the development unforeseeable would have been absorbed beforehand in the argument concerning the assessment of essentiality in regard to the factual/historical chain of causation, cf. subsections 5.3.2 and 5.4.2, cf. subsection 2.4. The situation *with* the existing trauma could thereby have been clarified.

Then there is the hypothetical question concerning the plaintiff's state of health *without* the trauma. In this regard the Court should have adopted the same approach to the problem as in the Stokke judgment in Rt. 1999, p. 1473. The question must be whether she would have been an invalid during this period even *without* the trauma, and in that case how ill. For this hypothetical clarification the persuasive burden would have rested on the person responsible for the damage, i.e. he would have been liable if there were no preponderance of probability to this effect.