

CHAPTER FOUR CAUSATION

4.2. ESTABLISHMENT OF CAUSAL LINK

4.2.1. OPERATION OF THE *CONDITIO SINE QUA NON* (“BUT FOR”) TEST

Introductory Note

a) The “but for” test is deceptively simple, especially since it is often illustrated with cases of direct infliction of harm through a positive act: in a case where A, whether intentionally or accidentally, has run into B and B has suffered injury through the collision, it goes without saying that if A had not run into B, B would not have suffered the injury in question. Yet upon examining the application of the “but for” test to the whole range of situations where civil liability may arise, it quickly becomes apparent that its operation is often fraught with difficulties. For instance, in cases where the injury is alleged to have resulted from an omission of the defendant, it may be difficult to determine what would have happened if the defendant had not “omitted to act”, i.e. had acted (this issue is discussed in the third case below). In fact, German and English authors point out that the “but for” test is to be seen as no more than a rule of thumb.¹

For instance, as soon as the injury becomes more remote from the allegedly wrongful act than in the above example, the “but for” test shows some strains. In the well-known US case of *Palsgraf v. Long Island Railway Co.*,² the plaintiff, who was standing in a train station, was injured when a package containing fireworks was accidentally thrown by an employee of the defendant from a departing train onto the tracks, where it exploded; the blast from the explosion dislodged some scales from a weighing machine, who fell on her. But for the act of the employee of the defendant, the injury would not have occurred, but, for that matter, it might just as well be said that but for the plaintiff standing where she was at that time, the damage would not have occurred either. As Hart and Honoré point out, common sense dictates that some distinction be drawn between real causes and mere occasional factors.³ The main weakness of the “but for” test is not so much that it identifies too many causes, but that it does not provide a basis to distinguish between real causes and other factors.⁴ The first case below discusses that issue.

¹ See Larenz at 433; Rogers at 218-9.

² (1928) 248 NY 339, 162 NE 99.

³ Hart and Honoré at 32ff.

⁴ von Bar II at 461, para. 437.

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b) In addition to the cases where the “but for” test may seem to lead to excessive results, as seen in the above paragraph, the operation of the “but for” test is also problematic in a number of cases where the defendant argues that the injury to the plaintiff would have occurred even if the defendant had acted lawfully (so-called *rechtmäßiges Alternativverhalten* under German law). At issue here is whether this suffices to negate the existence of a causal link between the conduct of the alleged tortfeasor and the injury to the plaintiff. One English and one German case are reproduced below in order to illustrate that problem.

c) Broadly speaking, the “but for” test loses much of its usefulness in cases where the free and willing conduct of the plaintiff or a third-party is also present in the causal nexus between the tortfeasor’s conduct and the injury suffered by the plaintiff.⁵ In those cases, in examining hypothetically what would have happened but for the conduct of the alleged tortfeasor, one inevitably comes up against the difficulty of assessing what the free and willing conduct of the plaintiff or of the third party in question would have been under that hypothesis. For practical purposes, this wide class of cases can be broken down into a series of sub-classes.

Cases where a third party (or the victim) voluntarily **intervenes following** the conduct of the alleged tortfeasor are dealt with in greater detail below under the heading “Voluntary Intervention of Third Party”.⁶

Sometimes the plaintiff contends that the alleged tortfeasor has committed a breach of a **duty to inform** the plaintiff, and that accordingly the plaintiff chose a course of action which was damaging to him or her on the basis of wrong or incomplete information. It must then be shown that but for the breach of the duty to inform, the plaintiff would truly have taken another course of action. A case has been included below on this point.

Sometimes, the defendant is sued because he **influenced or helped** another party to engage in a conduct which was damaging to the plaintiff. A typical example is the English tort of unlawful interference with a subsisting contract, where the plaintiff claims for the damage which, following some form of intervention by the defendant, he or she has suffered because the other contracting party has broken a contractual obligation owed to the plaintiff.⁷ Strictly speaking, it is the decision of the other contracting party which caused the damage to the plaintiff, and it cannot necessarily be assumed that the other contracting party would not have acted similarly had the alleged tortfeasor not

⁵ The so-called “psychological causation” (*psychisch vermittelte Kausalität*) under German law: see Staudinger-Medicus, § 249 at 45, para. 61.

⁶ *Infra*, 4.3.3.

⁷ See *supra*, Chapter II, **2.E.46.** and notes thereafter. Other legal systems also impose civil liability for interference with contracts, under conditions which sometimes differ from one system to the other: see *supra*, Chapter II, **2.G.51., 2.F.53.** and 2.4.5., under the heading “Interference with a contractual relationship”.

“intervened”. In such cases, under English law, the “but for” test is relaxed and cause-in-fact rather depends on whether the alleged tortfeasor provided the person who caused injury to the plaintiff with the *opportunity to cause harm*.⁸ The BGB even contains a specific provision to overcome these problems: § 830(2) BGB states that “[i]nstigators and accomplices shall be assimilated to co-authors”.⁹ As pointed out in legal writing, § 830(2) BGB is intended to relieve the plaintiff of the burden of proving causation with respect to each and every person who may have induced or aided the commission of a wrongful act.¹⁰ As regards French law, there seems to be no obstacle which would prevent a finding that the causal link is present in such cases.

d) The “but for” test is widely recognized as inadequate in cases where many causes account for the damage, eg the actions of two tortfeasors combined to cause injury to the plaintiff, as in cases where two car drivers commit a mistake at the same time, causing the victim to be involved in a car accident.¹¹ Each tortfeasor could then argue that the injury would have happened even but for his or her conduct, since the other cause of the injury would have remained operative. Legal writers generally agree that the “but for” test cannot be allowed to operate so as to discharge both alleged tortfeasors in such cases.¹² These cases will be studied in greater detail further below.¹³

*BGH, 2 July 1957*¹⁴

4.G.11.

HINWEGDENKEN PROCESS

Diverticulum

Under German law, in order to assess whether the injury would have occurred but for the conduct of the alleged tortfeasor, that conduct is “assumed away” (hinweggedacht) from the course of events. No distinction is to be made between “true causes” and “mere coincidences” at that stage of the inquiry.

Facts: The plaintiff’s husband was injured by the defendant’s vehicle, and as a result had to undergo abdominal surgery. In the course of the operation, the doctors noticed a diverticulum in the small intestine, and proceeded to remove it. The operation resulted in complications, which ultimately proved fatal. The plaintiff sued the defendant for funeral expenses and loss of maintenance.

⁸ Hart and Honoré at 186ff.

⁹ § 830(2) BGB is discussed in greater length *infra*, 4.4.1.

¹⁰ Staudinger-Belling/Eberl-Borges, § 830 at 3, para. 2.

¹¹ See *infra*, **4.G.41.** as well as **4.E.40.**

¹² See e.g. Staudinger-Medicus, § 249 at 56, para. 96; Larenz at 434; Rogers at 199-200. See also Viney and Jourdain, *Conditions* at 204-6, para. 375.

¹³ See *infra*, 4.4.2. and 4.4.3.

¹⁴ BGHZ 25, 86. Translation by A. Hoffmann and Y.P. Salmon.

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Held: The court of first instance and the court of appeal allowed the claim. The BGH reversed and rejected the claim.

Judgment: "...This court cannot agree with the appellant when he claims that the chain of causation between the accident and the death of the plaintiff's husband has been broken, because the fatal complications would have been induced not by any intervention rendered necessary by the accident... but rather by the removal of the... diverticulum, which was carried out merely 'on the occasion' of such intervention, was unrelated to the accident and was unnecessary for the preservation of life. In order to determine whether an event, especially a course of conduct, is a *conditio sine qua non* for a certain result, the sole test is whether, if that event is assumed away, 'the resulting situation falls outside of the range of situations to which legal consequences are attached, or at least changes in a significant fashion for the purposes of legal assessment' [reference omitted]. Accordingly, at *this* stage of the inquiry, it is not appropriate to seek to distinguish between events which were the 'real cause of the damage' and those which were a 'mere circumstance' smoothing the way for the real cause to produce its effects...

In applying these principles, the court of appeal correctly concluded that there was a — indirect — causal link between the accident caused by the defendant and the death of the plaintiff's husband, although the... diverticulum, the removal of which resulted in the death of the patient, cannot be attributed to the accident. Without the abdominal surgery made necessary by the accident, the diverticulum would not have been discovered and surgically removed — at least not at that time — so that an invagination of the area around the suture of the removed diverticulum, which led to an extreme paralysis of the intestine section preceding it and to a fibrine peritonitis, would not have occurred either.

[The BGH then proceeded to review the issue of adequate causation and, contrary to conclusions of the lower courts, found that the accident was not the adequate cause of the death of the plaintiff's husband, because the removal of the diverticulum had been necessitated not by the accident, but by another medical condition.]”

Notes

(1) In the annotated judgment, the BGH sets out how one assesses, under German law, whether the conduct of the tortfeasor is a *conditio sine qua non* of the plaintiff's injury: the conduct of the tortfeasor must be “assumed away” (*hinweggedacht*) from the course of events, and one must then consider whether, on that assumption, the result (the injury to the plaintiff) still falls within the same legal category (e.g. injury to the body, health, etc., property damage or another result to which civil liability may be attached) and retains the same legal significance (e.g. the injury to the body does not become negligible when the conduct is assumed away). In the annotated case, but for the accident caused by the defendant, the victim would not have suffered injury.

In cases where the alleged wrong is an omission, the omission is assumed away, or in other words the act which the alleged tortfeasor should have done is “assumed into”

(*hinzugedacht*) the chain of events.¹⁵

A difficulty arising with the *Hinwegdenken* process, namely whether and, if so, how much other circumstances can be changed for the purposes of the test once the conduct of the alleged tortfeasor is assumed away, is discussed below in connection with another case.¹⁶

Other legal systems have not formalized the “but for” test to the same extent as German law, but there is no reason to believe that they would not follow a process similar to the *Hinwegdenken* process of German law.¹⁷

(2) In the annotated case, the defendant submitted before the BGH that, when it comes to determining whether the conduct of the defendant was a *conditio sine qua non* of the injury of the plaintiff, a distinction should be drawn between “true conditions” and “mere coincidences”: the diverticulum was present in the intestine of the plaintiff before the accident and would probably have been noticed and removed in the course of any operation to the plaintiff’s abdomen; the defendant had merely, through the accident, created the occasion of the plaintiff’s abdominal operation. The BGH rejected that submission out of hand, holding that such a distinction could not be made at the first stage of the inquiry into causation, namely at the stage of natural causation (*Kausalzusammenhang im natürlichen Sinne*), as opposed to the further stage of legal causation (*Kausalzusammenhang im rechtlichen Sinne*).

Much like German law in this respect, English law tends to limit the ambit of the “but for” test at a later stage (cause-in-law). These two systems use for that purpose concepts such as reasonable foreseeability for English law or the various theories described above for German law.¹⁸

As discussed before, while it does not break the inquiry into two stages as is explicitly done under English law and usually under German law, French law as well often moderates the “but for” test by applying another theory than *équivalence des conditions*, be it adequacy or efficiency.¹⁹ In cases where the theory of *équivalence des conditions* is applied, however, it appears that the “but for” test which underlies this theory will be applied as rigorously as under German or English law.²⁰

(3) In the annotated judgment, the BGH found that the car accident for which the defendant was responsible was a logical cause of the injury to the plaintiff, but (at the second stage of inquiry) that it was not the adequate cause of such injury. In a later case,

¹⁵ Staudinger-Medicus, § 249 at 33, para. 30.

¹⁶ See *infra*, 4.G.13., Note (4).

¹⁷ Indeed Honoré at 74-6, para. 117 uses the developments under German law as a starting point for his comparative discussion of the issue.

¹⁸ See *supra*, 4.E.4.-5. and notes thereafter (English law), as well as 4.1.1., Introductory Note under d) to f).

¹⁹ See *supra*, 4.1.3., Introductory Note under f) to h).

²⁰ See *supra*, 4.F.7. and Note (2) thereunder.

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the BGH revisited its reasoning in the annotated judgment, and held that causation should have been denied not on the basis of lack of adequacy, but rather because the intervention on the diverticulum had not been “invited” (*herausgefordert*) by the car accident.²¹

*House of Lords*²² **4.E.12., 4.G.13.**
Koninklijke Rotterdamsche Lloyd NV v. Western Steamship Co. Ltd.
(The Empire Jamaica)
and
*BGH, 24 October 1985*²³

INJURY EVEN WITH LAWFUL CONDUCT OF DEFENDANT (*RECHTSMÄßIGES ALTERNATIVVERHALTEN*)

Causation may be denied in cases where the injury would have occurred even if the alleged tortfeasor had behaved lawfully.

A. House of Lords, *The Empire Jamaica* **4.E.12.**

Uncertificated officer at the helm

Facts: The steamship “Empire Jamaica”, registered in Hong Kong, collided with another ship, the “Garoot”, in the Java Sea. At the time of the collision, the Empire Jamaica was steered by an uncertificated officer (*i.e.* without a certificate of competency). The owners of the Garoot sued those of the Empire Jamaica for damages; in order to escape an exclusion clause, they had to show that the owners of the Empire Jamaica were at fault. They argued that the owners of the Empire Jamaica were at fault in breaching the Hong Kong regulations dealing with certification. A point in argument was whether the ship was in violation of Hong Kong regulations, which required ships of that tonnage to be manned by at least three certificated officers, although it was possible to request an exemption from the public authorities (which had not been requested in that case).

Held: The lower courts and the House of Lords found that the owners of the Empire Jamaica were not at fault and accordingly that the exclusion clause applied.

Judgment: LORD MORTON OF HENRYTON: “[Lord Morton agreed with the court of first instance and the court of appeal that the uncertificated officer was in fact competent to discharge the duties with which he was charged, including steering the ship.]

My Lords... I am satisfied that if the [owners of the Empire Jamaica] were in breach of the [Hong Kong regulations] in shipping [the uncertificated officer] without obtaining exemption..., that breach had no causal connection whatsoever with the collision. It is clear that

²¹ BGH 21 February 1978, BGHZ 70, 374 at 376. Staudinger-Schäfer, § 823 at 70, para. 98.

²² [1957] AC 386.

²³ BGHZ 96, 157. Translation by A. Hoffmann and Y.P. Salmon.

if the respondents had applied for exemption, [the public authorities] would either have granted exemption at once or (more probably) would have said: ‘You do not need any exemption...’. ...[T]he result is that if the [defendants] had taken the step which, according to the [plaintiffs], they ought to have taken, [the uncertificated officer] would still have been on duty in the early morning of 1 September 1951, and the collision would still have occurred.”

B. BGH, 24 October 1985

4.G.13.

Early payment

Facts: The defendant notary was entrusted by the plaintiff with the execution of a property transaction under which the plaintiff purchased a parcel of a larger piece of land. The contract of sale specified that payment was to be due only upon the fulfillment of a series of conditions. On 19 May 1982, the defendant wrote to the plaintiff that all those conditions were fulfilled, and that accordingly the purchase price of DEM 1.5 million was due. On 26 May 1982, the plaintiff paid the price. Contrary to the advice given by the defendant, however, not all the conditions were in fact fulfilled: due to an oversight by the defendant, the preliminary notice of conveyance (*Auflassungsvormerkung*) in favour of the plaintiff was not yet listed in the land registry as it should have been; and it was not until 24 November 1982 that the conveyance was properly listed in the land registry. The plaintiff sued the defendant, arguing that the defendant was at fault in advising that the purchase price be paid in May whereas it became necessary to pay it only in November, and claiming damages for the cost of financing the purchase price for that six-month period.

Held: The court of first instance dismissed the claim. The court of appeal reversed the decision of the court of first instance, and allowed the claim in part. The BGH confirmed the judgment of the court of appeal.

Judgment: “[The BGH first dealt with the issue of liability, finding that the notary had committed a breach of official duty (*Amtspflichtverletzung*) which made him liable for any damage caused, pursuant to the first sentence of § 19(1) of the *Bundesnotarordnung* (BNotO). It then examined causation.]

a) ...The course of events leading to liability consisted in an action, namely the issuance of an incorrect statement that the payment was due. A conduct causes damage if the damaging result would not have occurred if that conduct is assumed away...

[The defendant argued before the BGH that, for the purposes of that assessment, account had to be taken of the fact that the defendant was also bound to effect the proper inscription in the land registry, which he did not do timeously, so that, if the defendant had discharged his duties correctly, payment would in fact have been due on 26 May 1982.]

According to established case law, whether a breach of official duty [by a notary] caused the damage depends on how things would have evolved, had the notary discharged his duties correctly, and what the financial situation of the party concerned would be in this case [references omitted]...

[The BGH then reviews the case law of the RG.] It is not possible to infer from this case law that, in cases of breach of official duty, the causal link in the ‘logical’ sense [i.e. cause-in-fact] must be assessed differently than in the rest of the law of liability [reference omitted]. This chamber thus shares the view of the court of appeal that when assessing causation, only the

wrongful conduct is to be assumed away, without assuming any additional circumstances — here how the preliminary notice of conveyance would have produced effects if it had been registered properly. The... point of law raised does not concern... causation... but imputation; in the law of liability, it falls to be considered under the heading of *rechtmäßiges Alternativverhalten*... [i.e. whether the injury would still have occurred even if the defendant had behaved lawfully] It is all... about, once a causal link has been found to exist, the extent to which, upon a normative assessment, it is fair to impute upon the wrongdoer the consequences his or her wrongful conduct.

b) Controversy... reigns... as to whether and under what conditions a claim for damages can be defeated by arguing *rechtmäßigen Alternativverhalten* [references omitted]. The chamber follows the view that the protective scope of the norm of conduct that was breached in a given case will be decisive as to whether and to what extent that argument is relevant in that case [references omitted]...

..The official duty breached by the defendant aimed not only at protecting the plaintiff against unwanted encumbrances of her land. It was furthermore supposed to avoid that the plaintiff make a premature payment and suffer the losses connected therewith... The contract did not provide for... payment before certain conditions were fulfilled; the financing costs which arose [from premature payment] put the plaintiff in a worse financial situation than her legal position under the contract warranted. The defendant cannot escape liability for such worsening by arguing that he could and should have duly ensured that the conditions for payment to be due were fulfilled. For the plaintiff's claim concerning the damage ensuing from premature payment, it is decisive that the defendant did not actually ensure that the conditions for payment to be due were fulfilled."

Notes

(1) In the first annotated case, it was alleged that the defendants had failed to ensure that their ship was manned by a sufficient number of certificated officers in accordance with Hong Kong regulations. An accident occurred at a time when the ship was steered by an uncertificated officer. Under the "but for" test, the issue was therefore whether the collision would have taken place if the defendants had complied with the regulations, which would presumably have meant that the ship would have been steered by a certificated officer at the time of the collision. The defendants argued that they could have requested an exemption pursuant to the regulations in question in order to sail with the actual complement of officers, and that they would in all likelihood have received the exemption, so that the collision would have taken place even if they had complied with the regulations.

As the speech of Lord Morton shows, the House of Lords accepted the defendants' argument. Rogers notes that the House of Lords was impressed by the fact that the uncertificated officer was experienced, so that the accident would have taken place in any event; in the end, the House did not interpret the Hong Kong regulation very strictly, since the very purpose of such regulations is usually to replace the case-by-case

assessment of the abilities of officers by a prior certification or authorization system.²⁴

(2) As demonstrated by the second annotated case under b), German legal writing has devoted much attention to the problem of *rechtmäßiges Alternativverhalten* (ie whether injury could have occurred even if the defendant had behaved lawfully) and has tried to organize the conflicting case-law on that issue. Accordingly, when ruling on this point in 1985, the BGH was essentially faced with a choice between various doctrinal views on whether the defendant should be allowed to invoke in his or her support the argument that the same injury could have been inflicted even if the defendant had acted lawfully.²⁵

The BGH chose to follow the view that the admissibility of that argument depends on the scope of the rule (*Schutzzweck der Norm*) in question.²⁶ In the annotated case, the defendant had argued that, if he had acted lawfully and in compliance with all his duties, he could and should have secured a proper listing in the land registry at the time when he notified the plaintiff that the purchase price was due. On the basis of a scope of rule analysis, however, the BGH found that the purpose of the statutory provision in question (the first sentence of § 19(1) BNotO) was not only to protect the plaintiff against mistaken transactions relating to immovable property, but also to avoid economic losses stemming from payment before the due date. In this respect, the defendant could not argue that he could have secured a proper listing in the registry on time, since in fact he had not done so and had thereby caused the plaintiff to incur losses.

(3) As Medicus points out, using the scope of rule (*Schutzzweck der Norm*) approach in this context means that the defendant should be able to rely on the *rechtmäßiges Alternativverhalten* argument only when the purpose of the norm in question was not to prevent the occurrence of damage (*Verletzungserfolg*) as such, but was rather only to prevent it occurring in a certain way (*Verletzungsart*).²⁷ In the second annotated case, the purpose of the first sentence of § 19(1) BNotO included prevention of damage such as in fact occurred (i.e. early payment because of violation of an official duty). By contrast, if one were to examine the first annotated case from the perspective of German law, it is likely that it would be found that the purpose of the Hong Kong regulations was not to prevent collisions at sea from happening at all, but rather to prevent them from happening due to mistakes by unqualified officers. The BGH would thus in all likelihood have reached the same result as the House of Lords.

Yet the House of Lords and the BGH differ in their theoretical approach to the issue. In the first annotated case, the House of Lords examined the arguments of the defendant as part of causation-in-fact, i.e. the “but for” test, even if, as Rogers noted, the matter

²⁴ Rogers at 218-9.

²⁵ See for instance the differing — and sometimes conflicting — views of Staudinger-Medicus, § 249 at 63-64, para. 111-4, Münchener-Grünsky, § 249 at 391-4, para. 87-90b and Soergel-Mertens, § 249 at 271-3, para. 160-6.

²⁶ This view was put forward by Medicus, § 249, *ibid.* among others.

²⁷ *Ibid.*

pertained more to statutory interpretation than causation-in-fact.²⁸ More recently, in *South Australia Asset Management Corporation v. York Montague Ltd.*, the House of Lords approached the issue in a manner reminiscent of the “scope of rule” theory.²⁹ In the second annotated case, the BGH expressly found that the *rechtmäßiges Alternativverhalten* argument was indeed a matter for the normative assessment (*wertende Betrachtung*) of causation (under a)).

(5) Under French law, causation will also be denied if it can be shown that the injury would have occurred even if the defendant had behaved lawfully.³⁰ Commentators generally consider this as an application of the adequacy theory,³¹ which means that French law, like German law, would position this problem outside of the realm of the “but for” test.

(6) Under a) in the second annotated judgment, the BGH also addressed the operation of the *Hinwegdenken* process in complex cases. In certain cases, if the allegedly wrongful conduct is assumed away, it is not possible to know with any degree of certainty whether the result would be different unless some further assumptions are made. Honoré gives as an example the case where a ship is not provided with lifebuoys, and a passenger falls overboard and drowns.³² Assuming away the omission of the shipowner to equip the ship with lifebuoys, it is still not certain that the passenger would not have drowned, unless it is also assumed that the crew would have used a lifebuoy, that the passenger would have seized it and that the subsequent rescue manoeuvres would have been undertaken and successful. The second annotated case involved another variant of this problem, namely that the defendant could also have complied with his obligation to obtain a proper listing in the land registry, in which case the notice to the plaintiff would actually have been on time when it was issued in May 1982; accordingly the plaintiff would not have suffered any damage, since he would have had to pay in May 1982 anyway if the defendant had complied with all his obligations. The BGH took a relatively strict line, holding that as a matter of principle no further assumptions are to be made for the purposes of the “but for” test beyond the assumption that the plaintiff acted lawfully (under a)). Any further assumptions, including arguments based on *rechtmäßiges Alternativverhalten*, are to be made at the later stage of normative

²⁸ Rogers at 219.

²⁹ *South Australia Management Corporation v. York Montague Ltd.* (sub. nom. *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co.*) [1997] AC 191 at 212-5, [1996] 3 All ER 365 (HL). See J. Stapleton, “Negligent Valuers and Falls in the Property Market” (1997) 113 LQR 1.

³⁰ See among others Cass. civ. Ire, 8 April 1986, D 1986.IR.312, Gaz. Pal. 1986.Pan.125, note by J. Huet at (1987) RTDciv 552. In that case, children had bought fireworks in violation of a city ordinance forbidding the sale of fireworks to unaccompanied children. The children subsequently caused damage with the fireworks. The Cour de cassation found that causation had not been shown, since the children could have caused the same damage even if they had bought the fireworks with their parents.

³¹ Jourdain at 160/11, para. 44; Huet, *ibid.*

³² Honoré at 75, para. 117, referring to *New York Central v. Grimstad*, 264 F. 334 (2nd Cir., 1920).

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assessment (*wertende Betrachtung*). While this solution appears appropriate in the second annotated case, it would seem somewhat strict in the example given by Honoré, since it could very well lead to a denial of liability.

*Cass. civ. Ire, 3 November 1983*³³
SA Agence Wasteels v. Gombert

4.F.14.

OPERATION OF THE “BUT FOR” TEST IN CASES OF DUTY TO INFORM

No insurance against fire in hotel

In cases involving a failure to provide information, the conduct of the defendant may be the cause of the plaintiff not having been put in a position to act upon correct information.

Facts: The victims bought package holidays from the defendant travel agency, including a stay at an Italian hotel. According to the evidence, the travel agency had not checked whether the hotel was properly insured against injury to guests. The victims were killed when the hotel was destroyed by arson. The owners of the hotels were insolvent. The heirs and relatives of the victims thus sued the defendant, arguing that, if the defendant had inquired about the insurance cover of the hotel and warned the victims about the lack of such cover, the victims would have taken out their own insurance and avoided the ensuing loss to their heirs and relatives.

Held: The court of first instance allowed the claim. The court of appeal reversed that judgment and dismissed the claim. In a first judgment in this case, the Cour de cassation quashed the decision of the court of appeal and remitted the case back to the court of appeal.³⁴ The court of appeal then confirmed the decision of the court of first instance. In the annotated judgment, the Cour de cassation upheld the second judgment of the court of appeal.

Judgment: “The contested judgment... allowed the claim on the ground that the travel agency had failed to check if the hotel owner had taken out liability insurance... and had likewise failed to give its clients the opportunity to take out individual policies. The agency was thus found liable to repair all damage resulting from the lack of any recourse against an insurer. [The court of appeal] observed ‘that it is not excluded’ that if the insolvent hotel owner had been insured ‘the victims or their heirs and relatives would have been able to obtain compensation from the damage which they sustained’.

The travel agency claims that the court of appeal was wrong to rule in this way, given that it is clear from the very findings of the court of appeal that the only ground for holding the agency liable was the loss of a chance when the plaintiffs were deprived of a recourse against an insurer, the result of which was not certain. Accordingly, the plaintiffs could not be granted

³³ Bull. civ. 1983.I.253. Translation by Y.P. Salmon.

³⁴ Cass. civ. Ire, 19 December 1979, Bull.civ. 1979.I.328.

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full compensation.

However, the court of appeal stated ‘that, given the absence of insurance, (the travel agency) should have averted its clients to the risks which they were running by not being insured, in case of injury during their stay at the hotel’; furthermore, ‘its negligence in the execution of its duty to advise its clients (has) a causal relationship with the absence of compensation of their damage’, since it did not ‘give them the opportunity’ to protect themselves against the realization of the aforementioned risk by ‘taking out insurance themselves’. In so ruling, the court of appeal... did not award damages for the loss of a chance which would have existed at the time of the wrongful conduct, but for the realization of the risk that the said conduct had caused the clients of the agency to run.”

Notes

(1) This case had a long history. It went twice to the Cour de cassation. On the first occasion, on 19 December 1979, the Cour de cassation quashed the judgment of the court of appeal, which had concluded that there was no causal link between the fire at the hotel and any negligence by the defendant travel agency and, in particular, its failure to check whether the hotel had insurance cover against fire. The Cour de cassation found that the court of appeal had failed to examine whether the fault of the travel agency could not be linked to the “loss of a claim against an insurer for the civil liability of the hotel”, and remitted the case to the court of appeal. The court of appeal then followed the line of reasoning outlined by the Cour de cassation and found that the travel agency was liable. In the annotated judgment the defendant travel agency was thus appealing against the second court of appeal decision. The Cour de cassation this time upheld the decision of the court of appeal.

(2) The travel agency argued that, if it was to be made liable for depriving the plaintiffs of a claim against an insurer, then the amount of damages should be reduced to account for the uncertainty surrounding that claim, i.e. the damage to the plaintiffs should be analyzed as the loss of a chance (*perte d'une chance*). Indeed, breaches of a duty to inform, at least in the medical field, often result in *perte d'une chance*.³⁵ The Cour de cassation disagreed, finding that the damage consisted not in the loss of a chance, but rather in the loss of recourse against insurers, which had been put at a risk by the fault of the travel agency.

The decision of the Cour de cassation was criticized by commentators.³⁶ First, the court sidestepped in a somewhat artificial way the argument put forward by the travel agency; that argument was by and large sensible, especially if one considers that travel insurance often does not extend to damage caused by criminal acts such as arson, so that it is by no means certain that the plaintiffs would have had a valid claim against the

³⁵ See *infra*, 4.F.16.-17. and Chapter II, 2.F.11.

³⁶ See G. Durry, commenting the first decision of the Cour de cassation in that case at (1980) 79 RTDciv. 354 at 356-8 and the annotated judgment at (1984) 83 RTDciv. 315 at 322-4.

insurer even if they had taken out insurance. Secondly and more importantly, the court assumed without more that the victims would have taken out insurance if they had been informed by the travel agency that the hotel was not insured against civil liability.

Authors note that the annotated case is part of a considerable number of cases where French courts simply ignore the uncertainty relating to the decision which the plaintiff would have taken had he or she been properly informed.³⁷ According to them, these cases can be reconciled with the general principles of causation only if they are seen as cases where the burden of proof is eased and causation is presumed.³⁸ Furthermore, in a small number of cases, the courts have denied causation on the basis of the uncertainty surrounding the decision which the plaintiff would have taken if properly informed.³⁹ Finally, a third strand of case-law has also emerged, particularly in the realm of medical liability⁴⁰ but also elsewhere,⁴¹ where the courts, as was suggested by the defendant in the annotated case, have used the device of *perte d'une chance* to reflect in the quantum of damages the uncertainty surrounding the decision which would have been taken on the basis of proper information.

(3) It appears that English and German law are somewhat stricter than French law as regards causation in cases of breach of a duty to inform, especially in medical liability cases. Under English law, in medical liability cases, the plaintiff must prove, in order to succeed, that he or she would not have consented to treatment had the physician provided proper information.⁴² As *Allied Maples Group Ltd. v. Simmons & Simmons* shows, the same holds true in professional advice cases: the plaintiff must establish that he or she

³⁷ Viney and Jourdain, *Conditions* at 194-6, para. 369-1 and Jourdain at 160/18, para. 89 cite, in addition to the annotated case, Cass. civ. 1re, 7 March 1978, Bull.civ. 1978.I.94; Cass. civ. 1re, 11 February 1986, Bull.civ. 1986.I.24, JCP 1987.II.20775, Gaz. Pal. 1986.Jur.297; Cass. civ. 1re, 16 July 1986, Bull.civ. 1986.I.209; Cass. civ. 2e, 19 March 1997, Bull.civ. 1997.II.89, as well as the two cases decided by Cass. civ. 1re, 26 mars 1996, *supra*, Chapter II, **3.F.34.** and Bull.civ. 1996.I.155.

³⁸ A solution alluded to in Cass. civ. 1re, 17 February 1987, Bull.civ. 1977.I.56.

³⁹ Cass. civ. 1re, 25 November 1971, Bull.civ. 1971.I.296, JCP 1972.II.17375; Cass. civ. 1re, 2 October 1984, Bull.civ. 1984.I.245, annotated by J. Huet at (1986) 85 RTDciv. 117; and Cass. comm., 25 February 1986, JCP 1986.IV at 127.

⁴⁰ See among others *infra*, **4.F.16.** On this point, see S. Porchy, "Lien causal, préjudices réparables et non-respect de la volonté du patient" D 1998.Chron.379.

⁴¹ Jourdain mentions at 160/18, para. 88, Rennes, 9 July 1975, D 1976.Jur.417, concerning the failure by a bank to inform a prospective borrower that the insurer did not wish to insure his loan. Viney and Jourdain, *Conditions* add at 195-6, para. 369-1: Cass. comm., 10 December 1996, Bull.civ. 1996.IV.307 (financial intermediary); Cass. civ. 1re, 13 November 1996, Resp. civ. et assur. 1997.Com.32 (loan); Cass. civ. 1re, 4 February 1997, Resp. civ. et assur. 1997.Com.113 (insurance for sport players); Cass. civ. 2e, 19 March 1997, Bull.civ. 1997.II.89 (insurance for sport players). See also M. Fabre-Magnan, *De l'obligation d'information dans les contrats, Essai d'une théorie* (Paris: LGDJ, 1992) at 477, 487, para. 601ff., 612ff.

⁴² *Clerk & Lindsell on Torts* at 433, para. 8-41.

4.F.14.

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would have acted otherwise but for the failure to provide proper advice or information.⁴³

(4) Under German law, the plaintiff must also demonstrate that he or she would have taken a different decision if properly informed. An exception is made, however, with regard to medical liability, where the plaintiff is helped by a reversal of the burden of allegation and proof: once the plaintiff proves that the physician failed to inform him or her properly, he or she must show plausibly only that he or she would not have consented to the treatment but for that failure, and it is up to the physician to allege and to prove that the plaintiff (and not a hypothetical “reasonable” patient) would have consented even with proper information.⁴⁴ Alternatively, the plaintiff can avoid having to discharge even that lesser burden of proof by pleading that the failure to provide proper information infringed the plaintiff’s right to self-determination, part of the set of *Persönlichkeitsrechte* protected by § 823(1) BGB,⁴⁵ but then damages can only be sought for non-material injury.⁴⁶

⁴³ *Supra*, Chapter II, 6.E.75. Accordingly, in *South Australia Management Corporation v. York Montague Ltd.* (sub. nom. *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co.*) [1997] AC 191, [1996] 3 All ER 365 (HL), a case concerning inaccurate valuations provided to a lender, the House of Lords was critical of the findings of the court of appeal, which assumed too readily that the lender would not have lent at all had the information been accurate. It seemed more realistic to presume that the lender would have lent a lesser sum or, if it had not lent at all, that the money would have been lent to another person, so that the loss for which the valuer was responsible could not exceed the difference between the inaccurate valuation and the true valuation.

⁴⁴ G. Müller, “Beweislast und Beweisführung im Arzthaftungsprozeß” [1997] NJW 3049 at 3051; Münchener-Grünsky, § 249 at 393-4, para. 90a. Staudinger-Medicus, § 249 at 64, para. 114 considers however that in these cases it should not be open to the physician to argue that the patient would have consented in any event, since the view of the court should not be substituted for what is a highly personal decision. Soergel-Mertens, § 249 at 273, para. 166 considers that the argument should be open to the physician only when the patient did express consent on the basis of incomplete information, but not when the patient did not (or was not given the opportunity to) express consent at all.

⁴⁵ See on this point in general *supra*, Chapter II, 2.2.1.

⁴⁶ See OLG Jena, 3 December 1997, MDR 1998, 536. Contra Münchener-Grünsky, § 249 at 393, para. 90a, who considers that the courts should abstain from awarding damages even for a violation of the general *Persönlichkeitsrecht* when it is established that the patient would have consented had he or she been properly informed.