

CHAPTER FOUR CAUSATION

4.2. ESTABLISHMENT OF CAUSAL LINK

4.2.3 BURDEN OF PROOF

Introductory Note

As will have become apparent from the previous sections, causation is perhaps the area of tort law where the rules concerning the burden of proof can have the greatest impact on the outcome of cases.¹

In the legal systems studied here, the starting point is of course that the plaintiff must bear the burden of proving causation between the conduct of the alleged tortfeasor and the injury which was suffered. Very often, however, the actual sequence of events which led to the injury will be so obscure that, even with the best will in the world, it is not possible to draw any conclusions as to causation: the conduct of the alleged tortfeasor may have played a role in the injury, but there may also have been other causes, so that it is not possible to assess with any certainty even whether the “but for” test is met or not. In these cases, the plaintiff will accordingly fail, unless he or she can somehow benefit from specific rules concerning the burden of proof of causation which would either lessen the burden of proof or shift it on the defendant. This section surveys those rules. The first case deals with German law, the following three cases concern French law, and the last one shows the state of English law on the matter.

¹ The rules on the burden of proof also have an impact as regards issues of negligence (ie the breach of a duty of care under the tort of negligence in English law), *faute* (under French law) or *Rechtswidrigkeit* and *Verschulden* (under German law). See for instance *infra*, Chapter VI, 6.3.1.A., for an examination of how the rules on the burden of proof have been used to create a specific regime of products liability under German law, as well as 6.3.1.C., for an inquiry into the same issues under English law.

BGH, 4 October 1983²

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Icy pavement

Under German law, the plaintiff can benefit from a relaxation of the burden of proof up to its reversal (Beweiserleichterung bis zum Beweislastumkehr) in certain cases or rely on prima facie evidence (Anscheinsbeweis).

Facts: On 17 February 1979 at around 21:00, the plaintiff slipped on a pavement adjoining the defendant's property and suffered injury. Pursuant to a city ordinance, the defendant was responsible for ensuring that between 7:00 and 20:00 the pavement was treated with salted grit if it became icy. Shortly before the plaintiff's accident, rain had fallen, which had resulted in the formation of a layer of ice on the pavement. The plaintiff alleged that the defendant had failed to fulfil its obligation to maintain the pavement in a safe condition and that the accident had happened as a result of that failure. The defendant responded with evidence that rain had continued to fall after 20:00, so that even if the defendant had put salted grit down on the pavement up to 20:00, the pavement would still have been icy when the plaintiff passed.

Held: The court of first instance allowed the plaintiff's claim as to two-thirds. The court of appeal reversed and dismissed the claim. The BGH upheld the judgment of the court of appeal.

Judgment: "The court of appeal did not... err as to the burden of proof. It correctly concluded that it is incumbent upon the plaintiff to prove causation between the breach by the defendant of its obligation to put salt on the sidewalk and the fall..."

b) The principles of evidence applicable to claims based on § 823(1) BGB are equally valid for claims based on § 823(2) BGB. Here as well, the rule is that the one who claims to have suffered injury through the breach of a protective enactment must prove that there is a causal link between that breach and the injury in question; it is certainly not for the wrongdoer to prove that there is no such link [references omitted].

aa) It is true that the BGH has *reversed* the burden of proof (*Beweislastumkehr*) of causation within narrow limits in certain situations, if and insofar as the nature and content of the protective norm (and of the course of conduct it prescribes) require the wrongdoer to bear the burden of evidencing the facts of the case (and the risks attached thereto), because his course of conduct rendered the evidence unclear. For gross negligence in treatment by physicians or comparable professionals, a relaxation of the burden of proof therefore comes in question [references omitted]. However, that line of case law has no bearing in the present case, in the absence of any of the particular circumstances which led the BGH to depart from the usual allocation of the burden of proof within the limits mentioned above. There is no general principle according to which the risk that the evidence could not suffice to shed light on the

² NJW 1984, 432. Translation by A. Hoffmann and Y.P. Salmon.

facts of the case would be borne by the party who created that risk through his or her wrongful conduct [reference omitted].

bb) In the case of a breach of the obligation to put grit salt the sidewalk, the victim cannot therefore be relieved from the burden of proving causation between the failure to put salt on the sidewalk and the accident. At most her burden of proof can be relaxed under certain circumstances by accepting a *prima facie* case (*Anscheinsbeweis*)...

In order to be able to assume that a typical sequence of events gives rise to a *prima facie* case, a general maxim of common knowledge (*Erfahrungssatz*) must first be established through inferences from general circumstances, and it can then be applied to the concrete facts of the case [reference omitted]. According to common knowledge and experience, the injury must thus be a typical consequence of the — established — basis for liability; this happens frequently in cases where a protective enactment has been breached. If it is thus established that the defendant violated a protective enactment which is supposed to address a typical source of risk, and that the very injury [which the enactment is meant to prevent] occurs subsequent to that violation, then a *prima facie* case has been made that the violation caused the injury to occur [references omitted].

[The BGH concluded that, since the accident occurred some time after the end of the obligation to maintain the pavement at 20:00 and icy rain had possibly continued to fall in the meanwhile, the plaintiff could not make good his case on the basis that the defendant must have broken its obligation if she fell on ice on the pavement in front of its property.]”

Notes

(1) This case has been chosen because it provides a good overview of the rules applicable to the burden of proof on causation in German law. The BGH began by recalling (under b)) the basic principle that the plaintiff must prove the causal link between the conduct of the alleged tortfeasor and the injury. The plaintiff had shown that the defendant had failed in its obligation to put salted grit on the pavement, but since the accident had occurred a hour after the expiry of that obligation for the day and rain had continued to fall in icy conditions, it could not be shown with certainty that the defendant’s failure had caused the plaintiff’s accident. The BGH thus examined whether the plaintiff could benefit from any of the exceptions to the general rule concerning the burden of proof.

(2) A first exception (under aa)) concerns a relaxation of the burden of proof up to its reversal (*Beweiserleichterung bis zum Beweislastumkehr*). As a matter of principle, if the conduct of the defendant is such that it has put the plaintiff in a position where he or she cannot prove causation, fairness dictates that the plaintiff be relieved of the burden of proof, up to the point where the burden could even be put on the defendant. However, as the annotated case makes clear, that principle does not apply generally to all civil liability cases: its application is restricted to a limited class of cases, namely medical

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liability cases (and those involving other health professionals).³ Even then, the plaintiff must prove that the physician committed a gross fault in treatment before the burden of proof can be relaxed or reversed.⁴ According to BGH case-law, a gross fault occurs only when “the physician unequivocally contravened established rules of medical treatment or ignored proven medical knowledge, and thereby committed a mistake which appears incomprehensible to the objective observer, because it simply should not be committed by a physician”.⁵ As long as the plaintiff can then show that the injury which occurred is a typical consequence of such gross fault, it will be up to the physician to show that the injury did not in fact result from the gross fault.⁶ Moreover, if the physician intentionally or negligently failed to make measurements or tests or preserve their results, the plaintiff can also benefit from a presumption that the measurements or tests would have indicated a course of conduct other than that which the physician took.⁷

(3) The plaintiff can also rely on a *prima facie* case (*Anscheinsbeweis*), whereby (as discussed under bb) of the annotated judgment) recourse is made to common knowledge and experience to show that the injury which occurred is a typical consequence of the conduct for which the liability of the defendant is sought. As the BGH notes, in cases such as the annotated case where liability is based on § 823(2) BGB (violation of a *Schutznorm*), it will often happen that a *prima facie* case can be made (e.g. the defendant failed to provide the plaintiff with a compulsory protective device and the plaintiff suffered from the kind of injury which the protective device is meant to prevent). In the annotated case, however, the BGH found that, since the plaintiff fell an hour after the expiry of the obligation to put abrasives on the pavement, the actual course of events was not so typical that general experience would support the *prima facie* inference that the injury is due to the failure to put salt on the pavement. In any event, even if the plaintiff makes a *prima facie* case, it is always open to the defendant to answer by showing that

³ As mentioned above, the possibility of *Beweiserleichterung bis zum Beweislastumkehr* in medical liability cases under German law aims to alleviate the same concerns relating to evidentiary difficulties as have been addressed with *perte d'une chance* under French law: *supra*, **4.F.15.-17.** and notes thereunder.

⁴ It will be noted that accordingly failures to comply with the duty to inform the patient properly, which are not faults in medical treatment, are excluded from the application of this principle, although the plaintiff can benefit from some relaxation of the burden of proof there as well: see *supra*, **4.F.14.**, Note (3) and G. Müller, “Beweislast and Beweisführung im Arzthaftungsprozeß” (1997) 50 NJW 3049 at 3052.

⁵ Müller, *ibid.* at 3052, citing among others BGH, 4 October 1994, NJW 1995, 778; BGH, 11 June 1996, NJW 1996, 2428.

⁶ Müller, *ibid.* at 3052; Münchener-Grunsky, § 249 at 418, para. 134; Staudinger-Medicus, § 249 at 110, para. 245.

⁷ Müller, *ibid.* at 3053-4, citing among others BGH, 21 November 1995, NJW 1996, 779 (missing x-ray pictures) and BGH, 13 February 1996, NJW 1996, 1589 (missing ECG graphs). See also BGH, 6 October 1998, NJW 1999, 860.

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the course of events did not actually correspond to the typical sequence on which the plaintiff relies (without necessarily evidencing what the actual cause of injury was); since the burden of proof is not modified by an *Anscheinsbeweis*, it is then up to the plaintiff to provide complete evidence as to causation.⁸

(4) The plaintiff can also benefit from a third specific rule concerning the burden of proof as regards causation, set out in § 287 of the *Zivilprozeßordnung* (ZPO, Ordinance on Civil Procedure, not discussed in the above judgment).⁹ § 287 ZPO applies only to the *Haftungsausfüllung* stage (e.g. typically to damage consequential on the primary injury), and it enables the court to rule on the scope of injury on the basis of the evidence before it (even if it is incomplete and forces the court to make an estimate). Furthermore, § 287 ZPO also enables the court to decide on the basis of the balance of probabilities, whereas the general rule otherwise applicable (§ 286 ZPO) is the full conviction of the court.

*Cass. civ. 2e, 15 November 1989*¹⁰

Hirou v. Audinet

and

*Cass. civ. 1re, 16 February 1988*¹¹

Anquetil-Lelièvre v. Houivet

and

*Cass. civ. 2e, 13 October 1971*¹²

Agent judiciaire du Trésor v. Pozin

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Mere temporal coincidence between the conduct of the alleged tortfeasor and the damage to the plaintiff does not suffice to establish causation. A rebuttable presumption of causation arises when a breach of an obligation of result is alleged. The court can infer causation if no cause other than the conduct of the alleged tortfeasor can explain the injury.

A. *Cass. civ. 2e, 15 November 1989*

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⁸ See Münchener-Grunsky, § 249 at 420-2, para. 136-9; Staudinger-Medicus, § 249 at 110-1, para. 247; Staudinger-Schäfer, § 823 at 94-9, 103-4, para. 130-2, 134-6, 145.

⁹ See Münchener-Grunsky, § 249 at 422-3, para. 140-1; Larenz at 519-22; Stein/Jonas/D. Leipold, *Kommentar zur Zivilprozessordnung*, 21st ed. (Tübingen: Mohr, 1997) at § 287.

¹⁰ Bull. civ. 1989.II.206. Translation by Y.P. Salmon.

¹¹ Bull. civ. 1988.I.42. Translation by Y.P. Salmon.

¹² D 1972.Jur.117. Translation by Y.P. Salmon.

Shed burns down

*Facts:*¹³ A shed belonging to the plaintiff was destroyed by fire shortly after a group of employees of the defendant (a scrap metal recycling company) had completed work using a blowlamp near the shed and had left the site. The plaintiff sued the defendant for the damage resulting from the loss of the shed.

Held: The court of first instance and the court of appeal dismissed the claim. The Cour de cassation upheld the judgment of the court of appeal.

Judgment: “The court of appeal is criticized for having rejected the claim of the plaintiff, even though the employees of the defendant were negligent and careless when they used a blowlamp which creates sparks to cut a machine made out of metal that was leaning against a wooden shed; the fire would not have happened without the use of a blowlamp or if the site had been cleaned and checked...

However... the court of appeal finds that the employees of the defendant had left the site when the fire was discovered. In the absence of more precise information, it cannot be excluded that the fire would have been caused by the occurrence of a circumstance or an event completely independent of the presence of the employees of the defendant in the area of the shed. It goes on to hold that a sufficiently serious doubt remains as to the cause of the fire, and states that a mere coincidence between two events cannot prove the existence of a causal link.

On that basis, the court of appeal could conclude that the plaintiff had not proved causation between the alleged creation of sparks and the fire...”

B. Cass. civ. 1re, 16 February 1988

4.F.21.

Bad car repair

Facts: The plaintiff left his car with the defendant repairman for a check-up and maintenance. One month and some 6000 km later, the car broke down on a busy highway because the oil dipstick had not been put back in place and oil had escaped through the hole. The plaintiff sued the defendant for damages.

Held: The court of appeal dismissed the plaintiff’s claim. The Cour de cassation upheld the judgment of the court of appeal.

Judgment: “An obligation to achieve a specific result (*obligation de résultat*) entails at the same time a presumption of fault and the presumption of causation between the services rendered and the alleged harm. In the present case, it is evident from the judgment under appeal that the vehicle broke down because of the failure to put the oil dipstick in place. [However,] the vehicle had covered more than 6000 km since the intervention of the repairman almost one month before, from which the court of appeal deducted the absence of a causal link.

¹³ In this case, both parties were trustees in charge of liquidating the respective companies which were involved in the accident (*syndic de la liquidation*). For the sake of simplicity, it will be assumed that the two companies are the actual plaintiff and defendant.

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In light thereof, the judgment under appeal is legally justified...”

C. Cass. civ. 2e, 13 October 1971

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Supersonic bang

Facts: After military aircraft had produced a series of supersonic bangs, the wall of one of the plaintiff's buildings collapsed. The plaintiff sued the French State for damages.

Held: The court of first instance allowed the plaintiff's claim. The Cour de cassation upheld the judgment of the court of first instance.

Judgment: “The lower court established that the wall collapsed just after several ‘bangs’ had been heard coming from an aircraft for which the French state is responsible. It was established that there had been neither earth tremor, nor storm, nor hurricane, that the weather was normal and that no quarrying, drilling, large-scale works, logging or subterranean work was taking place in the area. It was further established that there had been no landslide, no heavy traffic, no explosion, no machines operating next to the wall, and finally that the age of the building could not play a role in the assessment of liability. On the basis of those findings, the decision states that since no event which could cause the collapse of the building had been shown, serious, precise and converging presumptions led to the conclusion that the damage was directly related to the ‘bangs’. On the basis of those presumptions... the trial judge could infer... a causal relationship between the actions of the aircraft and the damage.”

Notes

(1) In the first annotated case, the Cour de cassation reiterated the basic rule concerning the burden of proof as it applies to causation, namely that the plaintiff must establish that the conduct of the alleged tortfeasor caused the injury to him or her, i.e. that the conduct was a necessary condition of the injury (*conditio sine qua non*).¹⁴ The Cour de cassation agreed with the lower courts that there was no causal link, since the workers had left the site when the fire was discovered and the plaintiff could not put forward any convincing explanation of the sequence of events which would link the use of blowlamps to the fire.

(2) As under German law, a number of specific rules come to the aid of the plaintiff. Many of those rules are sector-specific. For instance, the Act of 30 October 1968 creates a presumption of causation for certain illnesses which may result from nuclear accidents.¹⁵ More importantly, case-law has created presumptions of causation as

¹⁴ Viney and Jourdain, *Conditions* at 181-3, para. 362; Jourdain at 160/14, para. 64-5; Starck, Roland and Boyer at 450, para. 1091.

¹⁵ Act 68-243 of 30 October 1968, JO, 31 October 1968. Viney and Jourdain, *Conditions* at 184, para. 364; Jourdain at 160/15, para. 73.

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regards work accidents,¹⁶ traffic accidents,¹⁷ liability for things¹⁸ and liability for children.¹⁹

The second annotated case deals with one such presumption of causation, concerning *obligations de résultat*. It will be recalled that such obligations bind the debtor to produce a certain result: they are the rule in the contractual realm.²⁰ When the result in question is not achieved, not only is it presumed that the debtor of the obligation is at fault, but it is also presumed that the injury to the plaintiff has been caused by the fault of the debtor, as the Cour de cassation stated in the second annotated case. Yet in that case the debtor of the *obligation de résultat* (the car repairman) was able to defeat the presumption of causation by showing that the car had been on the road for a month and had been driven for over 6000 km since the check-up. In the wake of that decision, commentators have noted that the presumption of causation in cases of *obligation de résultat* is thus a rebuttable presumption of fact. In such cases, a presumption of fault also arises from the fact that the result in question has not been realized, but that presumption is stronger than the presumption of causation: it can only be defeated by establishing that a cause external to the defendant was the source of the injury.²¹

(3) In a number of cases, French courts will relax the burden of proof resting on the plaintiff. A common theme in these cases, as expounded by Viney,²² is that someone commits a fault whereby a *dangerous situation* is created, and that subsequently the victim is injured in a way which appears to be the normal and foreseeable consequence of the risk which was created by the fault in question. Even if causation cannot be proved with certainty, courts will generally conclude that there is a causal link between the fault and the injury on the basis that the injury was objectively probable or foreseeable.²³ That

¹⁶ Viney and Jourdain, *Conditions* at 184-5, para. 365 and Jourdain at 160/16, para. 77 mention two presumptions, which can be rebutted by the employer. Firstly, injury appearing during and at work is presumed to be work-related, and secondly, injury occurring shortly after a work accident is presumed to flow from it. Jourdain considers that the presumption is so weak that it should rather be characterized as a relaxation of the burden of proof.

¹⁷ In the wake of the Act of 5 July 1985 (*Loi Badinter*), *infra*, Chapter VI, **6.F.18.**, civil courts will presume that a vehicle involved in an accident also caused the accident. Here as well, the presumption is no more than a weak rebuttable presumption: Viney and Jourdain, *Conditions* at 186-7, para. 365-1; Jourdain at 160/16, para. 78. Here as well, Jourdain considers that the presumption is so weak that it should rather be characterized as a relaxation of the burden of proof.

¹⁸ Cass. civ., 9 June 1939, DH 1939.II.283: a thing which has contributed to an injury is presumed to have caused it. However, Viney and Jourdain, *Conditions* at 187-9, para. 366, consider that this presumption has been undermined to a large extent by subsequent case-law. See also Jourdain at 160/17-8, para. 79-81.

¹⁹ Viney and Jourdain, *Conditions* at 189, para. 366-1; Jourdain at 160/15, para. 74.

²⁰ *Supra*, Chapter II, **2.F.17.**, Note (2).

²¹ Viney and Jourdain, *Conditions* at 190-91, para. 367; Jourdain at 160/15-6, para. 75-6.

²² Viney and Jourdain, *Conditions* at 192-4, para. 369. See also Jourdain at 160/17-8, para. 82-5.

²³ *Ibid.*

reasoning has been followed for instance in cases dealing with car accidents (before the Act of 5 July 1985), with dangerous objects left with third parties or with persons left under the supervision of another.²⁴

Other situations where the burden of proof on the plaintiff is relaxed include breaches of duty to inform,²⁵ medical liability and other cases where *perte d'une chance* is used as a head of damage²⁶ as well as cases where the tortfeasor is an unidentified member of a limited group of persons.²⁷

(4) Finally, French law is broadly receptive to all kinds of evidence relating to the causal link, including proof by elimination,²⁸ of which the third annotated case is a good example. The plaintiff there proceeded to show that no cause could possibly explain the collapse of the wall other than the supersonic bangs made by French military aircraft, even if there was no evidence as to how those bangs could have led to the collapse of the wall.²⁹ Proof by elimination has also been used in cases dealing with HIV-infection following blood transfusions.

*House of Lords*³⁰

4.E.23.

Wilsher v. Essex Area Health Authority

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Excess oxygen

The plaintiff must prove on a balance of probabilities that the conduct of the alleged tortfeasor was a cause-in-fact ("but for" test) of the injury which he or she suffered.

Facts: The plaintiff was a premature child, who was put in a special care unit after birth, since he required extra oxygen. A catheter had to be inserted into one of his arteries in order to monitor his blood oxygen level. Unfortunately, the physician mistakenly inserted the catheter into a vein, so that the reading was too low and the supply of oxygen to the tent was accordingly excessive. The error was not corrected until the following day. Subsequently, there were further occasions when the level of oxygen in the plaintiff's blood was too high, again reflecting an excessive supply of oxygen. All in all, five periods were found where the blood oxygen readings were too high. The plaintiff developed retrolental fibroplasia

²⁴ Both Jourdain and Viney and Jourdain, *Conditions, ibid.*, mention numerous cases of each category. For further discussion of such cases, see *infra*, Chapter V, 5.2. (persons under the supervision of another) and Chapter VI, 6.2.2. (car accidents).

²⁵ *Supra*, **4.F.14.** and notes thereunder.

²⁶ *Supra*, **4.F.15.-17.** and notes thereunder.

²⁷ *Infra*, **4.F.42.** and notes thereunder.

²⁸ Viney and Jourdain, *Conditions* at 214-6, para. 382; Jourdain at 160/14-5, para. 67-9.

²⁹ Compare with BGH, 27 January 1981, *infra*, **6.G.3.**, where the airwaves produced by a military helicopter caused a roof to collapse.

³⁰ [1988] 1 AC 1074.

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(RLF), which caused him to be almost blind. He sued the health authority responsible for the physicians and the hospital personnel. The defendant argued that the plaintiff at some point or another during his stay at the hospital also suffered from other conditions which could have led to RLF.

Held: The court of first instance and the court of appeal allowed the claim. The House of Lords reversed the decision of the court of appeal and remitted the case for further consideration.

Judgment: LORD BRIDGE³¹: “After a brief reference to the evidence..., the [court of first instance] expressed [its] conclusion in the following passage:

‘On the basis of the evidence I find that the defendants fail to show that the first and third periods of exposure did not do any damage; *indeed the probability is that they did*. As to the second, fourth and fifth periods the position is more doubtful. The trouble is the lack of data. The blood gas readings were not sufficiently frequent to enable us to assess whether the excessively high readings were a peak or whether they indicate a longer period; indeed, it is possible that the true figure went higher. The defendants, in my view, have failed to show that these periods did not cause or materially contribute to [the plaintiff’s] RLF.’ [Emphasis added by Lord Bridge]

[Lord Bridge then discussed the judgment of the court of appeal, which relied on *McGhee v. National Coal Board*.³²] Much of the academic discussion to which [*McGhee v. National Coal Board*] has given rise has focused on the speech of Lord Wilberforce... He said at [[1973] 1 WLR 1 at 6]:

‘But the question remains whether a [claimant] must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk of caused or materially contributed to the disease while his employers cannot positively prove the contrary. In this intermediate case there is an appearance of logic in the view that the [claimant], on whom the onus lies, should fail... The question is whether we should be satisfied, in factual situations like the present, with this logical approach. In my opinion, there are further considerations of importance. First, it is a sound principle that where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him *unless he shows that it had some other cause* [emphasis added by Lord Bridge]. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences.’

[Lord Bridge quoted another passage from *McGhee v. National Coal Board* and concluded:] My Lords, it seems to me that both these paragraphs, particularly in the words I

³¹ Lord Fraser, Lord Lowry, Lord Griffiths and Lord Ackner concurring.

³² [1973] 1 WLR 1, [1972] 3 All ER 1008, HL.

have emphasized, amount to saying that, in the circumstances, the burden of proof of causation is reversed and thereby to run counter to the unanimous and emphatic opinions expressed in *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613 to the contrary effect. I find no support in any of the other speeches [in *McGhee v. National Coal Board*] for the view that the burden of proof is reversed and, in this respect, I think Lord Wilberforce's reasoning must be regarded as expressing a minority opinion... [Lord Bridge then reviewed the other speeches in *McGhee v. National Coal Board*.]

[T]he majority [in *McGhee v. National Coal Board*] concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the [claimant's] injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one...

I am quite unable to find any fault with the following passage in [the] dissenting judgment [of Sir Nicolas Browne-Wilkinson V.-C. in the court of appeal]:

'...In the present case the question is different [from *McGhee v. National Coal Board*]. There are a number of different agents which could have caused the RLF. Excess oxygen was one of them. The defendants failed to take reasonable precautions to prevent one of the possible causative agents (e.g. excess oxygen) from causing RLF. But no one can tell in this case whether excess oxygen did or did not cause or contribute to the RLF suffered by the plaintiff. The plaintiff's RLF may have been caused by some completely different agent or agents, e.g. hypercarbia, intraventricular haemorrhage, apnoea or patent ductus arteriosus. In addition to oxygen, each of those conditions has been implicated as a possible cause of RLF. This baby suffered from each of those conditions at various times in the first two months of his life. There is no satisfactory evidence that excess oxygen is more likely than any of those other four candidates to have caused RLF in this baby...

The position, to my mind, is wholly different from that in the *McGhee*... case where there was only one candidate (brick dust) which could have caused the dermatitis, and the failure to take a precaution against brick dust causing dermatitis was followed by dermatitis caused by brick dust...'

[Lord Bridge concluded that the case should be remitted to the court of first instance to retry the issue of causation on the basis of the decision of the House of Lords.]"

Notes

(1) It will be clear from Lord Bridge's speech that one of the key elements in the annotated case was the interpretation to be given to the earlier House of Lords decision in *McGhee v. National Coal Board*.³³ In that case, the plaintiff was exposed to brick dust in the course of his employment. Some exposure was inevitable, but the defendant, his employer, had negligently failed to provide for washing facilities where the employees could wash away the dust before leaving the plant. The plaintiff contracted dermatitis as a result of contact with brick dust. However, the evidence could not show whether the illness resulted from the exposure on work premises ("innocent" dust) or the continued

³³ *Ibid.*

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presence of dust after leaving the plant (“guilty” dust). The House of Lords found in favour of the plaintiff, with all five Law Lords expressing their opinion in separate speeches.

In *McGhee*, the speech of Lord Wilberforce received the most attention, in great part because of the passages to which Lord Bridge refers in the annotated case, where Lord Wilberforce stated the proposition that if a person negligently creates a risk and injury occurs “within the area of that risk”, that person should be liable unless he or she can show that the injury had another cause. Furthermore, where the evidence cannot deliver any conclusions, as in *McGhee*, it would be only fair to shift the loss from the victim onto the person who created the risk. In the annotated case, a unanimous House of Lords emphatically denied that the reversal of the burden of proof advocated by Lord Wilberforce in *McGhee* was part of English law.

(2) English law does not therefore allow the burden of proof of causation to be shifted onto the defendant, at least as regards the tort of negligence.³⁴ In the annotated case, Lord Bridge nonetheless reads *McGhee*, on the basis of the other four speeches delivered in that case, as allowing the plaintiff to rely on presumptions of fact to lessen the burden of proof. Lord Bridge explains the ruling in *McGhee* as follows: it was undisputed in *McGhee* that the plaintiff was in contact with some “guilty” brick dust which should have been washed away; the more a person is in contact with brick dust, the greater the likelihood of dermatitis; it was thus open to the court, “adopting a robust and pragmatic approach to the undisputed primary facts of the case”, to conclude that the “guilty” brick dust had “materially contributed” to the dermatitis, and thus that the defendant had to compensate the plaintiff for the *whole* of his injury.

(3) By contrast, in the annotated case, the House of Lords ultimately denied liability for lack of proof of a causal link. *McGhee* is distinguished from the annotated case in the passage from the judgment of Browne-Wilkinson VC (as he then was) in the court of appeal quoted by Lord Bridge: while in *McGhee* there was only one possible cause for the injury (brick dust, part of which was “innocent”, part of which was “guilty”), in the annotated case the evidence pointed to at least five possible causes,³⁵ none of which was more likely to have caused the damage than the others. As Browne-Wilkinson VC put it, “a failure to take preventative measures against one out of five possible causes is no evidence as to which of those five caused the injury”. The decision of the House of Lords in the annotated case has been criticized for having misconstrued *McGhee* and having

³⁴ Similarly, English courts are wary of shifting the burden of proof as concerns fault; the plaintiff is however entitled to rely on presumptions of fact to make his or her case. In that connection, the maxim *res ipsa loquitur* is often brought forward, but it has no legal value: see *infra*, Chapter VI, 6.E.31. and in particular 6.E.32.

³⁵ Namely excess oxygen, hypercarbia, intraventricular haemorrhage, apnoea and patent ductus arteriosus.

distinguished it improperly.³⁶

(4) In the end, *McGhee* as interpreted in the annotated case would thus stand for the proposition that it is sufficient for the plaintiff to show that the conduct of the tortfeasor, if it was not the sole cause of the injury, at least made a material contribution to it,³⁷ although the definition of “material contribution” is by no means clear.³⁸ In the light of the annotated case, it is clear that whenever the proof of causation is made difficult by the presence of many causes which could have led to the injury, the plaintiff may very well see his or her claim fail unless he or she is able to show at least that the conduct of the defendant could cause the injury and in fact materially increased the risk thereof.³⁹

³⁶ D.P.T. Price, “Causation — The Lords’ Last Chance?” (1989) 38 ICLQ 735.

³⁷ *Clerk & Lindsell on Torts* at 43, para. 2-06; Rogers at 207.

³⁸ Markesinis & Deakin at 170.

³⁹ *Clerk & Lindsell on Torts* at 44, para. 2-08.