

## CHAPTER FOUR CAUSATION

### 4.3. ISSUES RELATING TO THE SEQUENCE OF EVENTS

#### 4.3.3 VOLUNTARY INTERVENTION OF THIRD PARTY - PURSUIT AND RESCUE CASES

##### *Introductory Note*

As mentioned above, cases where a third party voluntarily “intervenes” in the sequence of events are a specific subset of subsequent events which allegedly “break the chain of causation” (for the sake of simplicity, interventions by the victim himself or herself are also included in that subset, unless otherwise mentioned).<sup>1</sup> The present subsection studies them in greater detail. Obviously, while third parties almost always intervene voluntarily and deliberately, their intervention is not just for that matter a completely new and independent causal factor. First, the general principles governing the impact of third-party intervention on causation are reviewed with the help of a French and a German case. Two particular issues are then surveyed which have attracted much attention, especially in German law, namely intervention in pursuit of the tortfeasor and intervention to rescue the victim or the tortfeasor.

*Cass. civ. 2e, 17 March 1977<sup>2</sup>* **4.F.33.**  
*Sarl Les transports héandais v. SA Les grands travaux du Forez*

THIRD-PARTY INTERVENTION IN THE “CHAIN OF CAUSATION”

#### **Vandalism with stolen excavator**

*The causal link between the fault of the alleged tortfeasor and the injury to the plaintiff is broken when the intervention of a third party introduces a new risk which was not normally foreseeable.*

*Facts:* The defendant was the owner of an excavator which was left overnight in an open yard and with the keys in the ignition. A vandal took the excavator and used it to damage the buses which the plaintiff had left in the yard. The plaintiff sued the defendant for damages.

<sup>1</sup> *Supra*, 4.3.2., Introductory Note under a).

<sup>2</sup> D 1977.Jur.631. Translation by Y.P. Salmon.

*Held:* The court of first instance allowed the action. The court of appeal reversed and 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 [plaintiff's] claim, despite its finding that the [defendant] was negligent in leaving the key in the ignition of a particularly dangerous vehicle which was parked in an open yard. According to the plaintiff, such negligence stands in a direct causal relationship with the harm that resulted when the thief used that vehicle; the behaviour of the thief was more or less foreseeable and could not thus break the direct causal relationship. Moreover, it is claimed that the acts of vandalism by the thief would not have been normally unforeseeable.

However, the court of appeal found that, following the wrongful appropriation, the thief rammed the vehicle — in succession — against two of the [plaintiff's] cars, against other vehicles as well as against buildings used as a garage. The damage sustained by the [plaintiff] was therefore due to acts of vandalism. Furthermore, the court of appeal added that the exceptional and peculiar behaviour of the thief hence introduced a new and unnecessary risk, which was not normally foreseeable for the [defendant]. Given these findings and statements, the court of appeal could rightly hold that, since the driver of the vehicle entered into a course of voluntary wrongful conduct which was independent of the conduct of the owner, the favourable conditions under which the [driver] could take control of the excavator were without causal relationship with the alleged harm..."

#### *Notes*

(1) The annotated case is part of a large stream of French case-law concerning causation in situations where the owner of a vehicle negligently leaves it in a position to be stolen and a thief, having stolen the vehicle, somehow causes injury to someone while using it. In all likelihood because no useful recourse can be brought against the thief, the victim then sues the owner of the car on the basis that his or her fault resulted in the injury to the victim. Earlier case-law tended to allow these claims, on the basis of *équivalence des conditions* (but for the fault of the owner, the car would not have been stolen and the victim would not have been injured).

In 1943, the Cour de cassation ruled that, in the absence of particular circumstances to the contrary, the conduct of the thief must be seen as the cause of the injury.<sup>3</sup> This ruling was confirmed in subsequent cases,<sup>4</sup> and extended to analogous situations, such as the theft of an aircraft<sup>5</sup> or even the theft of a chequebook, where a third party suffered a loss because the cheques made by the thief were not honoured.<sup>6</sup>

(2) In the annotated case, the Cour de cassation set out fully the reasoning at the root

<sup>3</sup> This was in the wake of Cass. civ., 2 December 1941, *Connot v. Franck*, *infra*, Chapter VI, **6.F.8**.

<sup>4</sup> See Viney and Jourdain, *Conditions* at 173-4, para. 357; Jourdain at 160/12, para. 55 as well as the comment of A. Robert under the annotated case, D 1977.Jur. 631.

<sup>5</sup> Cass. civ. 2e, 21 March 1983, Bull.civ. 1983.II.89.

<sup>6</sup> Cass. civ. 2e, 7 December 1988, Bull. civ. 1988.II.246.

of this line of case-law: even if the defendant may have been at fault in leaving its excavator unguarded with the key in the ignition, it was not “normally foreseeable” for the defendant that a third party would take control of the excavator and vandalize buses parked in the yard. The vandal “introduced a new and unnecessary risk” which did not necessarily flow from the defendant’s fault. As authors have noted, the Cour de cassation clearly follows some form of adequacy reasoning, which relies on the normal foreseeability of the sequence of events.<sup>7</sup> However, in certain cases, courts consider that the fault of the owner was so gross that the causal link between that fault and the injury brought about by the thief remains,<sup>8</sup> leading authors to believe that the use of adequacy reasoning aims in fact at ensuring that liability is attached to the most severe fault, which can work to the disadvantage of the victim if the most severe tortfeasor is unknown or cannot pay damages.<sup>9</sup>

(3) The state of the English law of negligence as concerns third-party intervention in the sequence of events is surveyed by Stephenson LJ in *Knightley v. Johns*, further below.<sup>10</sup> That issue is dealt with as part of the remoteness stage (cause-in-law), where policy concerns may come to bear. In essence, the intervention of a third party will constitute a *novus actus interveniens* (i.e. “break the chain of causation”) only if it cannot be seen as the natural and probable result of the negligence of the defendant. In contrast, if the intervention of the victim consists in the very act which the defendant was under a duty to prevent, then it will not constitute a *novus actus interveniens*.<sup>11</sup> In addition, the more deliberate and unreasonable the third-party intervention, the more likely it is to constitute a *novus actus interveniens*.<sup>12</sup> Even then, it is suggested by some authors that that criterion is not sufficient, and that the true question is one of policy, namely “whether the defendant should properly bear responsibility for the third party’s intervention”.<sup>13</sup> In the end, the impact of third-party intervention falls to be considered

<sup>7</sup> See Viney and Jourdain, *Conditions* at 173-4, para. 357; Jourdain at 160/12, para. 57 as well as the comment of A. Robert under the annotated case, D 1977.Jur. 631.

<sup>8</sup> Viney and Jourdain, *Conditions*, *ibid.* and Jourdain, *ibid.* at para. 56 refer to Cass. civ., 20 November 1951, D 1952.Jur.258, where the owner left his van parked at night in a bad neighbourhood, facing downhill, so that a mere push enabled the van to be put in motion, so that it rolled down to cause damage. See also Cass. comm., 28 February 1989, Bull.civ. 1989.IV.70. *Contra*: Cass. civ. 2e, 11 January 1995, Bull.civ. 1995.II.21, where the intentional fault of the third party was regarded as the cause of the damage even if the owner of the car had committed a gross fault.

<sup>9</sup> Viney and Jourdain, *Conditions*, *ibid.*

<sup>10</sup> *Infra*, 4.E.36.

<sup>11</sup> *Reeves v. Commissioner of Police of the Metropolis* [1999] 3 All ER 897 (HL): here the victim committed suicide while in police custody, the police being under a duty to care to prevent such accidents from happening.

<sup>12</sup> *Clerk & Lindsell on Torts* at 56-7, para. 2-28; Rogers at 226-7.

<sup>13</sup> *Clerk & Lindsell on Torts* at 57-8, para. 2-29. See also Rogers at 228-9.

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under both causation and duty of care.<sup>14</sup>

*BGH, 10 December 1996*<sup>15</sup>

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### THIRD-PARTY INTERVENTION IN THE “CHAIN OF CAUSATION”

#### **Theft from damaged armoured vehicle**

*Under a normative approach, an injury cannot be imputed to the defendant if a third party subsequently intervened to cause the injury in a way which does not represent the realization of the risk created by the defendant’s conduct.*

*Facts:* The armoured vehicle of the plaintiff was involved in a collision with another vehicle; the person driving that other vehicle was responsible for the accident. After the accident, the armoured vehicle was lying upside down in a ditch alongside the road. The two occupants of the armoured vehicle escaped from the vehicle but were in shock. It subsequently turned out that two money containers had been stolen from the vehicle during the short lapse of time when it was not under surveillance. The plaintiff sought to recover the amount stolen from the civil liability insurer of the person who was responsible for the accident.

*Held:* The court of first instance dismissed the claim. The court of appeal upheld the decision of the court of first instance. The BGH allowed the appeal against the decision of the court of appeal and remitted the case for further consideration.

*Judgment:* “The present case is characterized by the fact that the wrongful conduct of [the person responsible for the accident] in and of itself merely created a source of danger for the contents of the armoured vehicle. The damage itself — the theft of the two money containers — was inflicted through the action of a third party. In order to determine liability in such cases, this chamber has developed rules of assessment. In these cases, it is conceivable that injury could stand in a causal relationship with the conduct of the wrongdoer from a purely natural point of view [i.e. “cause-in-fact”], while having been decisively triggered by the completely unusual and improper conduct of another person. According to the rules of assessment mentioned before, one could then exceed the limits until which the consequences of subsequent intervention can be imputed to the conduct of the first wrongdoer, as a consequential damage. In this respect, a normative assessment is required, from which it results that, if the risk of damage created by the first wrongdoer either was not realized through the subsequent intervention or had already been completely abated, then the link between the conduct of the first wrongdoer and the subsequent intervention is only ‘circumstantial’, even almost

<sup>14</sup> *Clerk & Lindsell on Torts* at 58, para. 2-30. See also Rogers at 229-30. In *Smith v. Littlewoods Organisation Ltd.*, *supra*, Chapter III, **3.E.5.**, for instance, the issue was whether the defendant was under a duty of care to prevent third parties from entering upon its property so as to cause damage to adjoining properties.

<sup>15</sup> NJW 1997, 865. Translation by A. Hoffmann and Y.P. Salmon.

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‘accidental’. In all fairness, the wrongdoer cannot be expected to assume liability towards the victim for the consequences of the subsequent intervention as well [references omitted].

...The armoured vehicle was specifically designed to provide protection for the two money containers; that protection was lost when the vehicle was damaged as a consequence of the illegal overtaking maneuver [of the wrongdoer]. The door on the driver side of the overturned vehicle lay partly open as a result of the accident, and so offered... unauthorised persons the opportunity to get inside the vehicle and access the money containers. A further consequence of the accident was that, due to their injuries, the driver and his colleague could no longer discharge their task of guarding the vehicle. The theft of the two money containers from the scene of the accident became possible only when both means of safeguarding the contents of the armoured vehicle [armour and guards] were set aside. This means that... the damage arising from the subsequent intervention constituted the realization of a risk created by the wrongful conduct of the [person responsible for the accident] and still present at the time of the subsequent intervention.”

#### Notes

(1) This case was chosen because it provides a good illustration and a recent summary of the principles generally applicable to third-party intervention under German law. As the BGH recalls, the starting point is that this is not a matter for the *conditio sine qua non* stage (*Kausalität im natürlichen Sinne*), but rather a question of normative judgment (*wertende Betrachtung*), since there are limits as to how far the consequences of intervention by third parties can in all fairness be imputed to the defendant. For the BGH, the key issue is how the third-party intervention relates to the risk created by the conduct of the defendant: if the intervention was no more than a realization of that risk, then it can be imputed to the defendant (provided the other conditions for liability are met). By contrast, if the intervention is only coincidentally, almost randomly, connected to the conduct of the defendant, then the defendant cannot be made liable for the damage caused by the third party.

(2) In the annotated case, the BGH carefully outlines how the traffic accident disabled the two elements which ensured the security of the money carried in the armoured vehicle, namely the protective door and the attention of the two attendants. It created a risk of theft, which materialized through the action of a third party. Accordingly, the defendant, the insurer of the person who caused the accident, could be held liable for the stolen money.

(3) The *Grünstreifen* (grass verge) cases, one of which was reproduced in an earlier section, constitute one of the few categories where German courts will generally deny causation.<sup>16</sup> Applying the above principles, they otherwise tend to find that intervention

<sup>16</sup> *Supra*, 4.G.2. Some authors disagree with the *Grünstreifen* case-law: see Note (2) thereafter.

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by a third party does not “break the chain of causation”.<sup>17</sup>

*BGH, 13 July 1971*<sup>18</sup>

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### *HERAUSFORDERUNG* CRITERION

#### **Pursuit in train station**

*The Herausforderung (invitation) criterion is decisive in cases where a third party voluntarily intervenes in the chain of causation. The intervention must have been “invited” (or “provoked”) by the conduct of the defendant, and the risks that it involved must have been proportional to its purpose. The defendant is responsible only for the eventuation of risks resulting from the intervention, over and above those incidental to everyday life.*

*Facts:* The plaintiff, a train station supervisor, caught the defendant without a train ticket, and accordingly asked the defendant either to pay the price of a ticket (with the supplement for tickets purchased on board a train) or to produce his identity card. The defendant sought to run away from the plaintiff and ran down the flight of stairs from the platform to the station exit. The plaintiff chased the defendant and grabbed him as he was going down the stairs. The defendant fell and the plaintiff tripped over him. The plaintiff suffered injury when he landed at the bottom of the stairs. The plaintiff sued the defendant for the ensuing damage.

*Held:* The court of first instance and the court of appeal both allowed the plaintiff’s claim (with a deduction of one-third for contributory negligence). The BGH dismissed the appeal from the decision of the court of appeal.

*Judgment:* “The injurious result (physical injury) caused by the defendant’s conduct can... objectively be imputed to the defendant in the legal sense [i.e. “legal cause”].

a) For this, it is decisive that, when the defendant started to run away without any need for it, he could see that he created a situation of increased danger of injury for the plaintiff in a manner which can be imputed to him. He *invited* the lawful pursuit by the plaintiff, although he could recognize and avoid the considerable risk of danger [references omitted]. In any case, the plaintiff was entitled to pursue the defendant... In contrast, the defendant cannot invoke any interest worthy of protection in support of his running away...

For the assessment of imputability, it is relevant that the actual ground for imputing liability on the defendant is the creation of a specific increased source of danger, on the basis of which the pursuer suffers from an interference with protected rights or *Rechtsgüter* [reference omitted]. In dangerous situations of that kind... it is almost inevitable that the

<sup>17</sup> See Staudinger-Medicus, § 249 at 46-8, para. 68-71; Münchener-Grünsky, § 249 at 376-7, para. 57; Soergel-Mertens, § 249 at 262, para. 140-1.

<sup>18</sup> BGHZ 57, 25. Translation by A. Hoffmann and Y.P. Salmon.

intervention... of third parties... will be invited [reference omitted]...

b) The plaintiff established a new source of danger and took the risk of suffering injury when he decided to intervene, i.e. to engage in a pursuit. That does not in and of itself exclude that the defendant would be burdened with the consequences of the injury to a protected *Rechtsgut* which he caused.

To be sure, there are... cases in which the defendant cannot be burdened with liability, even though a causal link exists and the scope of the rule (*Schutzzweck der Norm*) establishing liability gives no reason to limit liability [references omitted]; among others, reference is made to cases where the injury arises from an autonomous or 'free' decision of the victim (or a third party) himself or herself. These cases are mostly dealt with using the notion of "'interruption" or break in the chain of — adequate — causation' [references omitted]. That notion remains significant, whether it is seen as a part of adequate causation or as a separate heading of imputability [references omitted]. It is also established that this notion can be relevant not only — as in most cases — to determine the scope of liability (*Haftungsausfüllung*), but also earlier on to establish liability (*Haftungsbegründung*) [references omitted].

In the case at hand, the pursuit — and thus the physical injury — follows from the plaintiff's own autonomous and free decision. In such a situation though, imputing the injury to the defendant does not seem to be justified if the original course of events giving rise to the liability of the defendant (*haftungsbegründende*) did not invite (*herausfordern*) the decision of the victim (or of a third party), whereby a new source of danger was created [reference omitted]. Then the original course of conduct (by the defendant) merely constitutes an occasion for, and gives an opportunity to, the victim (or third party) to be exposed to an additional risk unrelated to the accident [references omitted]. But if the autonomous decision of the victim (or third party) is invited (*herausgefordert*) by the original course of events giving rise to the liability of the defendant, then as a rule the liability of the defendant is not excluded solely because the victim (or third party) intervened in the course of events [reference omitted]. Moreover, it does not matter whether the pursuer realised the risk of injury to himself or herself, as in the case here.

c) The above distinction and limitation is generally accepted. It aims at avoiding that, in cases of psychological causation (*psychisch vermittelte Kausalität*) where an autonomous decision of the victim (or a third party) came into the chain of events, the defendant be made answerable for all the injurious consequences which resulted from his or her conduct — provided it is wrongful. The imputability of the injury to the defendant is thus not self-evident for those cases. Rather, the parameters of the normative assessment must be delineated more precisely. A first parameter was already stated, namely that the intervention of the victim or third party must have been *invited* (*herausgefordert*) [emphasis in original]. In order to establish such an invitation, it does not suffice that the victim or the third party was actually induced to intervene. Apart from that psychological causation, it is necessary that the intervening party felt induced to act, and in the manner chosen. Whether an intervention was indeed invited in that sense will depend on the circumstances of the case. [The BGH then illustrated that proposition with the distinction between cases where a third party intervenes against a danger to life and health, where the *Herausforderung* element is almost always present, and those where a third party chases the author of an accident who sought to flee, where the *Herausforderung* element is less clear.]...

This chamber does not need to decide whether the required proportionality between the

purpose of the intervention and the apparent risk is to be assessed in the same fashion for the various groups of cases — for example cases of rescue and those of pursuit [reference omitted]... How the risk eventually materialized is not decisive; what matters is the apparent level of danger at the time when the risk [of intervention] was taken.

d) To the extent that it is justified to impose liability upon the person who was pursued, it is limited to the *exceptional* risks of the pursuit. In contrast, that person does not have to bear the normal risk of the intervening party, at least not in pursuit cases (that conclusion already arises as a consequence of the requirement that the injury be linked to the basis for liability [i.e. the *Schutzzweck* test]) [references omitted]...

[The BGH then proceeded to review the application of these principles to the facts and agreed with the court of appeal that the conduct of the defendant was the cause of the plaintiff's harm.]”

#### Notes

(1) The annotated case is very significant, since it introduced *Herausforderung* as the criterion by which to assess whether the intervention of a third party or of the victim in the sequence of events was independent of the conduct of the defendant or not.<sup>19</sup> The *Herausforderung* criterion plays a decisive role in the pursuit and rescue cases, but it is also used in other cases of intervention by a third party.<sup>20</sup> It is difficult to render *Herausforderung* accurately, but “invitation” may be the best translation.

(2) The BGH outlined its reasoning under a) of the annotated judgment. By running away from the train station supervisor, the defendant created a situation of increased danger for the plaintiff, since he *invited* or *provoked* (*herausforderte*) the plaintiff to chase him (which the plaintiff was lawfully entitled to do). That *Herausforderung*, as the BGH noted, is the sole ground why the injury which the plaintiff suffered as a consequence of the pursuit was to be imputed to the defendant (*Zurechnungsgrund*). The BGH then developed this reasoning further.

(3) Under b) of the annotated judgment, the BGH made it clear that the *Herausforderung* (invitation) criterion operates as a separate ground for imputability (*Zurechnungsgrund*). It matters not whether the conduct of the defendant is an adequate cause of the injury to the plaintiff or whether the injury to the plaintiff comes within the scope (*Schutzzweck*) of the protective norm in question: in cases where the injury depends on the voluntary decision of the victim or a third party to intervene in the course of events, the *Herausforderung* criterion alone will be decisive for imputability.

Legal writers have experienced difficulties fitting the *Herausforderung* criterion into the theoretical framework for causation, not knowing whether it should be superimposed

<sup>19</sup> It appears that this criterion has been inspired by works from E. von Caemmerer, “Die Bedeutung des Schutzbereichs einer Rechtsnorm für die Geltendmachung von Schadensersatzansprüchen aus Verkehrsunfällen” DAR 1970, 283 and K. Larenz (see at 451-5). For a thorough discussion of pursuit cases, see Staudinger-Schäfer, § 823 at 74-89, para. 103-19.

<sup>20</sup> See *supra*, 4.G.2., where the BGH also uses the *Herausforderung* criterion.

on the main theoretical elements (equivalency, adequacy and “scope of rule” (*Schutzzweck der Norm*) theories) or whether it is not rather a concretization of these elements for a specific series of cases.<sup>21</sup>

(4) Under c) of the annotated judgment, the BGH dealt with the conditions under which the *Herausforderung* criterion will be met. Thus, it does not suffice that the third party (or the victim) was led to intervene; the circumstances must have been such that the third party *ought* to have felt “invited” to intervene in the way that he or she did. In that respect, the BGH drew a distinction between rescue and pursuit cases, since the *Herausforderung* criterion is less readily met in the latter cases. In any event, the ascertainable risk attached to the intervention must be proportional to the purpose of the intervention.

In this respect, the soundness of the BGH position in pursuit cases has itself been questioned. For instance, in the annotated case, the old train supervisor put his health in jeopardy to chase a young person who had to pay a DEM 20 administrative fine. Certain authors have wondered whether such behaviour should be encouraged at all by imposing civil liability on the person pursued, especially since trying to escape is not as such prohibited by law.<sup>22</sup> Other authors have reacted strongly, arguing that society cannot afford to allow persons who have broken the law and thereafter provoked pursuit to escape civil liability for any resulting injury sustained by their pursuers.<sup>23</sup>

(5) Finally, under d) of the annotated judgment, the BGH underlined that the defendant can be made liable only for the *supplementary* risk which the pursuer (or rescuer) undertook in addition to the normal risks of everyday life. This proved to be the stickiest issue in the subsequent case-law.<sup>24</sup> In BGH, 13 July 1971, for instance, a fugitive 16-year old girl had been arrested and was being brought to a doctor for a forensic examination. She escaped upon leaving the police car, and a policeman chased her. In so doing, he slipped on freshly mowed grass and injured himself. The BGH found that the injury could not be imputed to the girl, since slipping on grass was part of the *normal risks of chasing (normales Verfolgungsrisiko)*.<sup>25</sup> Many commentators have criticized the judgment, finding that the BGH had not sufficiently taken into account that the policeman did not happen to be on the lawn by chance but rather because it was the most direct way to chase the girl.<sup>26</sup>

A number of commentators generally agree with the BGH case-law on

<sup>21</sup> Staudinger-Schäfer, § 823 at 86, para. 115; Lange at 153-5.

<sup>22</sup> See K.-P. Martens, “Die Verfolgung des Unrechts”, NJW 1972, 741.

<sup>23</sup> See Staudinger-Schäfer, § 823 at 87-9, para. 116, 118.

<sup>24</sup> Some of the main cases, in addition to those mentioned in the text, are BGH, 29 October 1974, BGHZ 63, 189, NJW 1975, 168, JZ 1975, 374; BGH, 13 January 1976, NJW 1976, 568; BGH, 25 January 1977, VersR 1977, 430 and BGH, 18 November 1980, VersR 1981, 161.

<sup>25</sup> NJW 1971, 1982.

<sup>26</sup> See Staudinger-Schäfer, § 823 at 83-4, para. 113 and the other authors cited therein.

*Herausforderung* in pursuit cases, subject to minor criticism.<sup>27</sup> Other commentators, however, find that, at least in cases involving the police force, the BGH tends to burden the persons who provoke a pursuit with too much of the risk undertaken by the pursuers, given that these are professional law-enforcers whose profession is naturally fraught with some risk.<sup>28</sup> The BGH answered those criticisms in a recent judgment, finding that the person seeking to escape law enforcement officers “must take into account that the pursuer will take more risks [than a normal person] and that the ensuing liability could possibly increase”.<sup>29</sup>

(6) Neither French nor English law evidences similar developments as regards pursuit cases.<sup>30</sup>

*Court of Appeal*<sup>31</sup>  
*Knightley v. Johns*

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#### CAUSATION IN RESCUE CASES

##### **Riding wrong way through tunnel**

*A person is not responsible for the damage caused through the action of rescuers in exceptional cases where their mistakes go beyond what must be reckoned with and constitute negligent conduct “breaking the chain of causation”.*

*Facts:* The defendant drove negligently in a two-lane, one-way highway tunnel and overturned his car in the middle of the tunnel. A passer-by called the police, who sent a number of officers to the scene of the accident. A police inspector arrived at the scene of the accident from the entrance of the tunnel, but forgot to close the tunnel to traffic before driving in, as was required by written operational instructions. He ordered the plaintiff and another police officer, both on motorcycles, to drive against the flow of traffic to the entrance of the tunnel in order to close it to traffic. In the course of doing so, the plaintiff was hit by an incoming car. The plaintiff sued the defendant, among others, for the damage resulting from his collision with the incoming car. The defendant argued that the actions of the police in dealing with the emergency, in particular the instructions of the police inspector, had “broken the sequence of events”

<sup>27</sup> Staudinger-Medicus, § 249 at 45, para. 62-4; Soergel-Mertens, § 249 at 260, para. 140; Münchener-Grunsky, § 249 at 379-80, para. 62-64a; Lange at 136-8.

<sup>28</sup> RGRK-Steffen § 823, para. 94; Kötz at 68-9, para. 162.

<sup>29</sup> BGH, 12 March 1996, NJW 1996, 1533.

<sup>30</sup> In French law, see Cass. crim., 2 December 1965, Gaz. Pal. 1966.Jur.132. There the victim was thrown off his moped in trying to avoid a collision with the defendant’s car. The victim got up and ran after the car, but collapsed after a hundred metres or so from cardiac arrest. The claim of the family of the victim against the defendant was dismissed for lack of causation. Under German law, this could be seen as an instance where the injury came from the realization of a risk that was not specific to the pursuit and thus should not be imputed on the defendant.

<sup>31</sup> [1982] 1 WLR 349, [1982] 1 All ER 851.

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between his conduct and the damage to the plaintiff.

*Held:* The court of first instance held the defendant liable for the plaintiff's injuries. The Court of Appeal overturned the judgment of the court of first instance.<sup>32</sup>

*Judgment:* STEPHENSON LJ: “[Stephenson LJ reviewed the facts and found that the police inspector had been negligent and that his negligence was a cause of the injuries to the plaintiff.]

Now comes the question the [court of first instance] decided first: were they causes concurrent with the negligence of the first defendant or were they new causes which broke the chain of causation? [Stephenson LJ then reviewed the authorities thoroughly, including *Haynes v. Harwood* [1934] 2 K.B. 240 from which he quoted with approval the following passage:]

If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley v. Baxendale* (1854) 9 Exch. 341, the accident can be said to be ‘the natural and probable result’ of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence; it is only a step in the way of proving that the damage is the result of the wrongful act. There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

...I conclude from these rescue cases that the original tortfeasor, whose negligence created the danger which invites rescuers, will be responsible for injury and damage which are the natural and probable results of the wrongful act, and that those results include injury and damage from accidents of a kind or class which might normally be foreseen or contemplated, though the particular accidents could not be expected. There is no difference between what is natural and probable and what is reasonably foreseeable either in the act of rescue or in the steps taken to accomplish it. If it is natural and probable that someone will come to the rescue it is also foreseeable; if it is foreseeable that in doing so he may take a particular kind of risk or cope with the emergency in ways not precisely foreseeable, his acts will be natural and probable consequences of the wrongful act which created the emergency...

In *The Oropesa* [1943] P. 32, 39 Lord Wright... said:

To break the chain of causation it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that.

[Stephenson LJ then reviewed the authorities after *The Wagon Mound (No. 1)*,<sup>33</sup> in order to see

<sup>32</sup> For the sake of completeness, it should be added that the police inspector had also been joined as a defendant to the action, and that the plaintiff recovered from him and the police force.

<sup>33</sup> *Supra*, 4.E.4.

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[4.3]

if his conclusion was affected by that judgment.]

In my judgment, therefore, we are still bound to follow [the] approach in *Haynes v. Harwood*, getting what assistance we can from the epithets used by Lord Wright in *The Oroposa* [1943] P. 32 to distinguish a new cause breaking the chain from another link in the chain...

At one end of the scale is wanton interference or disregard for the rescuer's own safety, which will break the chain; at the other, reasonable conduct which... will not. But there may be many intervening actions which cannot be characterized as either reasonable reaction or wanton intermeddling and recklessness...

The question to be asked is accordingly whether that whole sequence of events is a natural and probable consequence of the... defendant's negligence and a reasonably foreseeable result of it. In answering the question it is helpful but not decisive to consider which of these events were deliberate choices to do positive acts and which were mere omissions or failures to act; which acts and omissions were innocent mistakes or miscalculations and which were negligent having regard to the pressures and the gravity of the emergency and the need to act quickly. Negligent conduct is more likely to break the chain of causation than conduct which is not; positive acts will more easily constitute new causes than inaction. Mistakes and mischances are to be expected when human beings, however well trained, have to cope with a crisis; what exactly they will be cannot be predicted, but if those which occur are natural the wrongdoer cannot, I think, escape responsibility for them and their consequences simply by calling them improbable or unforeseeable. He must accept the risk of some unexpected mischances...

I am... of the opinion that the inspector's negligence was not a concurrent cause running with the... defendant's negligence, but a new cause disturbing the sequence of events leading from the... defendant's overturning of his car to the plaintiff's accident and interrupting the effect of it...

In my judgment, too much happened here, too much went wrong... to impose on the... defendant liability for what happened to the plaintiff in discharging his duty as a police officer, although it would not have happened had not the... defendant negligently overturned his car. The ordinary course of things took an extraordinary course...

I would for these reasons allow the appeal..."

### Notes

(1) In the annotated case, at the first stage of the causation inquiry, it could be said that both the conduct of the defendant in overturning his car in the tunnel and the negligence of the police inspector in failing to close the tunnel and ordering the plaintiff to ride against the flow of traffic were causes-in-fact of the injury to the plaintiff (under the "but for" test). The key issue addressed in the above excerpts relates to the remoteness stage, namely whether the two causes-in-fact were concurrent causes, in which case both the defendant and the police inspector were jointly liable,<sup>34</sup> or whether the negligence of the police inspector constituted a *novus actus interveniens* which "broke the chain of causation", in which case only the police inspector will be liable,

<sup>34</sup> See *infra*, 4.F.38.-39., Note (5).

#### 4.E.36.

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since the injury of the plaintiff will be found to be too remote a consequence of the conduct of the defendant.

(2) Stephenson LJ based his reasoning on two cases, *Haynes v. Harwood*<sup>35</sup> and *The Oropesa*.<sup>36</sup> In the first case, a policeman had been injured when he tried to stop a runaway horse which had negligently been left unattended by the defendants. It turned out that a little boy had scared the horse. The Court of Appeal refused to find that the act of the little boy was a *novus actus interveniens*, since that act was precisely a “natural and probable” consequence of the negligence of the defendants. In *The Oropesa*, the ship of the same name had collided with another ship, The Manchester Regiment, on which the victim was active. The captain of The Manchester Regiment decided to leave the ship on one of the lifeboats with a small crew, including the victim, in order to go to The Oropesa to arrange the rescue of The Manchester Regiment. The lifeboat capsized on the heavy sea and the victim drowned. The parents of the victim sued the owners of The Oropesa. The Court of Appeal found that the actions of the captain of The Manchester Regiment in leaving his ship on a lifeboat were perhaps not foreseeable, but were certainly not unreasonable, so that they did not constitute a *novus actus interveniens*. There is some tension between the tests proposed in these two cases, since *The Oropesa* expressly leaves aside the foreseeability test, which may be thought to have underpinned *Haynes v. Harwood*. Stephenson LJ in the annotated case chose not to deal with that point.

(3) Stephenson LJ proposed a scale of assessment for the actions of rescuers, ranging from wanton conduct to reasonable conduct. The turning point on that scale is determined by the test of “natural and probable consequence” or “reasonable foreseeability”, which he sees as equivalents. Questions to be taken into account include whether the conduct of the rescuer was negligent (leaving room for mistakes given the emergency context) — in which case it is more likely to constitute a *novus actus interveniens* — and whether it took the form of a positive act rather than an omission — in which case, again, it is more likely to constitute a *novus actus interveniens*.

Applying that test to the facts of the case, Stephenson LJ found that the negligence of the police inspector was of such scale as to put it beyond the range of innocent mistakes that a rescuer must be allowed to make; it constituted a *novus actus interveniens*. The annotated case constitutes one of few instances where the actions of a rescuer were found to have “broken the chain of causation”.<sup>37</sup>

<sup>35</sup> [1935] 1 KB 146, CA.

<sup>36</sup> [1943] P 32, [1943] 1 All ER 211, CA.

<sup>37</sup> See *Clerk & Lindsell on Torts* at 59-60, para. 2-33: as noted there and as mentioned above, rescue cases are often also considered under the assessment of the duty of care (see also at 240-3, para. 7-24 and 7-25).

## HERAUSFORDERUNG IN RESCUE CASES

**Kidney donation**

*The Herausforderung criterion also encompasses measures which were freely taken some time after an accident to help the victim, provided that they remain closely related to the “invitation” created by the conduct of the defendant.*

*Facts:* The plaintiff, 13 years old at the time, was injured while playing sport and was taken to the hospital. Because of a suspected intra-abdominal injury, the surgeon proceeded to perform a laparotomy. He found that the left kidney was damaged, and decided to remove it. As it turned out, the plaintiff was born without a right kidney, and as a result of the removal of her left kidney she had to be put on dialysis. A few weeks after the accident, after having consulted physicians, the plaintiff’s mother decided that she would give a kidney to her daughter. The kidney transplant was successful. The mother assigned her rights against the defendant to her daughter, who sued for the material damage sustained by her mother. At issue was whether the free decision of the mother to give a kidney to her daughter had “broken the chain of causation” between the fault of the defendant in removing the daughter’s only kidney and the damage suffered by the mother.

*Held:* The court of first instance and the court of appeal allowed the plaintiff’s claim. The BGH upheld the judgment of the court of appeal.

*Judgment:* “[The BGH first recalled the principles developed in its case-law on rescue and pursuit cases, as seen above under BGH, 13 July 1971, which centre around the concept of *Herausforderung*.<sup>39</sup>]

dd) In the case at hand, those legal principles justify that the defendant be made answerable for the kidney donation and the injury to body and health suffered by the plaintiff’s mother, since they are connected to conduct for which the defendant is responsible. The kidney donation arose specifically because [the defendant] injured the plaintiff and brought the plaintiff’s mother into a situation in which she must have felt invited to make such a sacrifice for her child. Undoubtedly, the mother’s behaviour must be praised highly from a moral perspective, and the law cannot but approve of it and acknowledge it. From a medical perspective, it was justified to donate a healthy kidney in order to attempt to improve the physical condition and health of the plaintiff and to at least considerably shorten the dialysis treatment; that prognosis is reasonably and appropriately balanced with the self-inflicted injury which the plaintiff’s mother took upon herself. Her decision was specifically based on thorough consultations with the physicians in charge of the plaintiff.

ee) Contrary to the opinion of the [defendant], imputability cannot be denied on the ground that the plaintiff’s mother did not decide to donate a kidney under the immediate pressure of

<sup>38</sup> BGHZ 101, 215. Translation by A. Hoffmann and Y.P. Salmon.

<sup>39</sup> *Supra*, 4.G.35.

#### 4.G.37.

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an acute emergency, but rather had time to discuss it and to weigh the pros and cons carefully... It is after all not exceptional that a rescuer has enough time for reflection. However, help in coping with the damage — especially mere support in making good the damage — will usually fall outside of the concept of rescue, to be understood as an invited (*herausgefordert*) intervention to avert or reduce injury arising from a dangerous situation for which the wrongdoer is responsible... Whether the injury suffered by the one who wanted to reduce or at least contain the damage still qualifies as rescue and first aid must be assessed in the light of its relationship to the invitation and certainly also of the temporal and spatial dimensions. On the basis of the foregoing, a kidney donation to an injured child from a close relative — here the mother — will easily be seen as a response to an invitation (*Herausforderung*) to rescue the endangered life or health of the child. The mother's sacrifice is in substance linked with the menacing situation created by the physician when he removed the child's sole kidney. The delay between the two events arose not so much because other remedial measures had been taken after the occurrence of the injury to the child, but rather because the rescuing donation could not immediately take place and had to wait for some time later, according to the circumstances of the case. The kidney donation made by the plaintiff's mother must therefore be regarded as a consequence of the injurious course of conduct for which the defendant must assume liability [The BGH supported his conclusions by reference to cases from Canada and the United States, among others. It then held that its conclusion was affected neither by the full knowledge of the mother that she was going to suffer from physical injury through the kidney donation nor by the consent of the mother to the donation.]”

#### Notes

(1) The annotated case provides a good example of the application of the *Herausforderung* criterion in rescue cases.<sup>40</sup> Under dd), the BGH stated that the fault of the defendant had indeed put the mother in a situation where she *ought* to feel “invited” to give a kidney to save her daughter's life. The risk which the mother accepted in undergoing the operation and her loss as a result of the removal of her kidney was proportionate to the object of the operation.

It appears from the annotated case that, as may be expected, the *Herausforderung* criterion is applied more generously towards rescuers than pursuers.<sup>41</sup> It is irrelevant whether or not the rescuer (eg police, fire department, emergency medical services) was bound to intervene, and whether or not the rescue efforts were successful. Nor does it matter whether the rescue efforts were directed at the defendant himself or herself or at another person in need of help because of the situation which the defendant had created (so long as the defendant was negligent).<sup>42</sup> It seems that the defendant will escape liability for the damage suffered by the rescuer only if the rescue attempt was pointless from the

<sup>40</sup> Which has gradually come to be the main factor in the *Zurechnung*, as in pursuit cases: Staudinger-Schäfer, § 823 at 90-1, para. 121.

<sup>41</sup> Münchener-Grunsky, § 249 at 380, para. 64a. See also Soergel-Mertens, § 249 at 260-1, para. 138.

<sup>42</sup> See Münchener-Grunsky, § 249 at 377-8, para. 59 and 59a.

start or if the risk undertaken by the rescuer was “grossly disproportionate” to the object of the rescue.<sup>43</sup>

(2) Given that the threshold of *Herausforderung* is lower in rescue than in pursuit cases, the distinction between rescue efforts and mitigation of damage was bound to arise, as it did in the annotated case. There the defendant argued that the mother freely decided to give a kidney to her daughter, some time after the fault of the defendant and outside an emergency situation, and that accordingly the action of the mother did not constitute rescue. Under *ee*), the BGH recognized that a distinction had to be made between rescue and “damage control” or “damage regulation”, but found that it must be made on a case-by-case basis, taking into account the relationship between the action and the “invitation” (*Herausforderungslage*). In the annotated case, the BGH found that the gesture of the mother towards her child was a rescue measure “invited” by the fault of the defendant, and that it could accordingly be imputed to the defendant. Commentators have generally agreed with the decision of the BGH in the annotated case.<sup>44</sup>

(3) As to French law regarding rescuers, it appears that it broadly follows the same direction as English and German law.<sup>45</sup>

<sup>43</sup> E.g. an attempt to retrieve a suitcase from a burning car liable to explode at any moment: see Münchener-Grunsky, § 249 at 378, para. 59a.

<sup>44</sup> Soergel-Mertens, § 249 at 261, para. 128; Münchener-Grunsky, § 249 at 377, para. 59; D. Giesen, Note, JR 1988, 199. *Contra*: Stoll, Note, JZ 1988, 150.

<sup>45</sup> See Le Tourneau and Cadiet at 299, para. 1042. For a concrete examples, see Cass. crim., 25 June 1969, *infra*, Chapter VII, 7.F.22.