PARTIES (*BETEILIGTE*) TO A DELICT

Fall on rough track

The second paragraph of § 830(1) BGB may also apply in cases where the liability lies in the failure to maintain a track properly.

Facts: On 16 January 1953, the plaintiff went out to buy some milk. She had to go by way of a street that had not yet been completed. Because heavy machinery was blocking the way for pedestrians, people had taken the habit of walking on a narrow strip of land belonging to the defendant and adjacent to the street. The resulting track was not in a proper state and was icy at the time when the plaintiff passed by. The plaintiff fell and injured herself. She claimed that she fell on the track, which had not been correctly maintained by the defendant; in reply the defendant alleged that the plaintiff fell while walking on the street, for which the city was responsible. It was not possible to ascertain precisely where the plaintiff fell.

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

Judgment: "If it is not possible to discover which one of several parties to a delict actually caused the damage by his unlawful act, each of them will be responsible for the damage (second sentence of § 830(1) BGB). This provision aims to overcome an evidentiary problem faced by the victim in a situation where it remains uncertain, inter alia, which of several persons, each of whom could have been the author of the harm, actually caused it [reference omitted]. It is based on the idea that the claim of someone who was injured by one of several parties to a delict should not fail just because the identity of the actual tortfeasor cannot be discovered with certainty [reference omitted]. The only conditions [for the application of the second sentence of § 830(1) BGB] are that *one* of the several parties actually caused the injury, that the injury could possibly have been caused by each and everyone of them and that fault could be established for each of them, if he were the actual tortfeasor.

The notion of 'participation' in the second sentence of § 830(1) BGB means . . . that several persons—between whom there is no legal connection since each acted independently of the others [reference omitted]—have committed an unlawful act that could have caused the injury; that one of

[211] See Viney and Jourdain, *Conditions* at 210–3, para. 380; Jourdain at 160/20–1, para. 100–2; Le Tourneau and Cadiet at 272, para. 833.

[212] *Cook* v. *Lewis* [1951] SCR 830, (1952) 1 DLR 1, SCC.

[213] *Clerk & Lindsell on Torts* at 48, para. 2–13; Markesinis and Deakin at 185. Rogers at 186–7, however, expresses some reservations about the applicability of the Canadian decision in England.

[214] BGHZ 25, 271. Translation by A. Hoffmann and Y. P. Salmon.

these acts, that is the unlawful act of one of these persons, actually caused the injury; that the conduct of each of these persons could have caused the injury and that the actual author of the course of conduct that led to the injury cannot be ascertained [references omitted]. The only prerequisite is thus a course of events [i] which is made up of several independent unlawful acts, [ii] which constitutes a single transaction and is coherent as regards time and place, and [iii] during which the event that led to injury took place [references omitted] . . .

In light of the above, the defendant also 'participated'—in addition to the municipality—in the general condition of the track at the place of the accident, and thereby in the physical injury of the plaintiff. There can be no doubt that the course of events was coherent as regards time and place and constituted a single transaction. Uncertainty remains only as to whether, within the narrowly defined place of the accident, the event which led to the physical injury of the plaintiff arose on the property of the municipality or on the adjacent property of the defendant. The second sentence of § 830(1) BGB aims to relieve the claimant of this very inability to produce conclusive evidence, because it is fairer to let liability fall on all of those who culpably participated in the joint creation of the risk and who could each have caused the damage, rather than leave the victim without compensation [reference omitted]."

Cass. Civ, 5 June 1957
Litzinger v Kintzler

LIABILITY FOR COLLECTIVE ACTION
Hunting accident

Attendu que... la cour d'appel relève, pour... condamner solidairement [les défendeurs], que 'la cause réelle de l'accident résidait dans l'action concertée des sept défendeurs qui ont participé à un tir qui ne constituait pas un acte normal de chasse, dans des conditions d'imprudence et de maladresse qui leur étaient imputables à tous';

Attendu que la responsabilité personnelle conjointe desdits défendeurs a été ainsi suffisamment et à bon droit déterminée, sans qu'il fût, par suite, aucunement nécessaire... d'identifier parmi eux l'auteur du coup de feu ayant occasionné la blessure; qu'en effet, plusieurs individus peuvent par une action concertée, ou même spontanément sous l'effet d'une excitation mutuelle, se livrer à une manifestation dont chacun doit partager la responsabilité des conséquences dommageables, en tant qu'elles procèdent, soit d'un acte unique, auquel tous ont participé, soit d'une pluralité d'actes connexes, que la cohérence dans leur conception et leur exécution ne permet pas de séparer;

Cass. civ. 2e, 5 June 1957[202]

Litzinger v. *Kintzler*

LIABILITY FOR COLLECTIVE ACTION

Hunting accident

A group of hunters may be held liable for concerted action in which they were collectively engaged and which resulted in injury, even if the actual author of the injury is not known.

Facts: The plaintiff and the seven defendants went deer hunting together. At 16:00, as the hunt came to an end, the plaintiff left the other defendants to return to his home. The seven defendants decided to fire a salvo to mark the end of the hunt. The plaintiff was hit by a shot from the salvo and almost lost an eye as a consequence. It was not possible to determine from which of the defendants the shot came. The plaintiff sued all seven defendants for damages.

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

Judgment: "In order to condemn [the defendants] jointly and severally (*solidairement*), the court of appeal finds . . . that 'the real cause of the accident lies in the concerted action of the seven defendants who participated in the firing of a salvo that did not qualify as a normal act of hunting, with a level of imprudence and carelessness that is imputable to all of them.'

The joint and several liability of the defendants was thus sufficiently made out and correctly found. It was not necessary to go further and identify which one, among them, had fired the shot that caused the injury. Indeed, several individuals may, in a concerted action or even spontaneously as a consequence of shared exhiliration, indulge in a course of action for which, if harmful consequences ensue, each of them must bear responsibility. Indeed such consequences will result either from a single course of action in which all participated, or from a series of connected courses of action which cannot be separated given that their conception and execution are so closely related