

Comparative Tort Law

Global Perspectives

Edited by

Mauro Bussani

Professor, University of Trieste, Italy and Adjunct Professor, University of Macao, S.A.R. of the P.R. of China

Anthony J. Sebok

Professor, Cardozo School of Law, Yeshiva University, New York, USA and Distinguished Research Professor, College of Law, Swansea University, UK

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13. Causation theories and causation rules

Marta Infantino

1. INTRODUCTION

It is a firm tenet of Western tort law that there is no liability without (proof of) causation. No matter what the legal system, no matter what the ground of litigation, the success of a plaintiff's claim is always said to be dependent upon whether, and to what extent, a causal link is established between the defendant's activity and the plaintiff's loss.

Despite its ubiquity, or perhaps because of it, causation is one of the most debated topics in Western tort law. Questions lying beneath the apparent simplicity of the causal inquiry are indeed manifold. Would the injury have occurred without the defendant's activity? May the plaintiff's susceptibility to injury be taken into consideration? If so, to what extent? What other factors should be considered? What proof should be given, and by whom? How far can liability for consequences be extended? What reasons should be taken into account in drawing the line between the harmful consequences which can be attributed to the defendant and those which cannot? Should 'freakish' causal sequences be treated under the same rules as 'ordinary' accidents? Under what conditions does the causation requirement provide the defendant with socially appropriate incentives to reduce the risk of harm and to moderate her level of activity?

This chapter is a comparative analysis of the ways in which Western legal systems address these questions, as well as others which fall under the umbrella of causation. To this end, we will start with reminding the reader of the role that causation plays in the broader, trans-legal scientific debate over the chains of events that make up any social phenomenon. In the following sections, the overview of the theories and rules embodying the Western response to causation problems in tort law (section 3) will call for some refinements over the part that these theories and rules play in articulating that response (section 4). We will therefore examine who, in the West, actually makes causation theories and rules (section 5), against what cultural backgrounds (section 6) and through what technicalities (sections 7 and 8). Conclusions will ensue (section 9).

2. WHAT NON-LEGAL SCIENCES TELL US

Causation is not central to (tort) law only; it also lies at the heart of many non-legal sciences – from philosophy to physics. Lawyers and legal scholars have long been fascinated by the ubiquity of the causal inquiry, and by the relationship between the forms that causation takes across different scientific fields. However, this is the place neither to assess the appropriateness of such fascination, nor to explore the cultural reasons underlying efforts to substantiate the legal discourse over causation with

notions taken from non-legal branches of knowledge.¹ Rather, we briefly recall here some insights that studies on causation in (tort) law can get from neighbouring sciences, and that are useful to appreciate the inherent flexibility of causal judgments in tort.

Jurists, of course, have long been aware of the relativity of causal investigations. Good tort lawyers have always known how to exploit this relativity strategically to the advantage of their clients. Legal scholars, in turn, have always paid tribute to the contingency of judgments on causation. All the studies on the topic repeat that, given a certain sequence of events, both the observer's cultural background and the level of detail she chooses to look at change the interpretation which she will give to the causal connections between the events within the same sequence.² From the 1920s onwards, such awareness has been further enhanced by American legal realism's delving into the open-ended and policy-imbued nature of the causation requirement.³ In 1960, Coase's article on the problem of social costs revolutionized – among other things – causation thinking. Coase challenged the traditional, unidirectional way of considering causal relationships ('a rancher causes harm to a farmer'), and proposed instead a reciprocal view of causal connections ('the presence of both parties, the rancher and the farmer, is necessary for the harm to occur, and therefore both parties are a cause of it').⁴ More recently, legal anthropologists have started examining how ideas and practices about causation, as cultural by-products, vary across legal traditions and social settings, as well as across social groups within these traditions and settings.⁵ But the most valuable contributions to the understanding of the Western mode of conceiving causal correlations in the law come from 'outer' perspectives, such as those of mind and social sciences.

Cognitive sciences, for instance, seem promising in shedding light on how people develop ideas about accidents and their causes. In particular, cognitive sciences illuminate the psychological biases affecting our way of reading and giving meaning to world events, inside and outside the courtroom. In this regard, cognitive sciences teach us to recognize the most frequent attribution errors we make in expressing judgments on causation – from our tendency to accept attributions that easily match with our

¹ The appropriateness of the attitude mentioned in the text, as well as the reasons underlying it, have been critically analysed by many. See, among others, C. Quézel-Ambrunaz, *Essai sur la causalité en droit de la responsabilité civile*, Dalloz, 2010, 9–10, 25–26, 59–60; J. Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 *Vand. L. Rev.* 969 f. (2001); H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 2nd ed., CUP, 1985, 30, 96–97, 341.

² Compare, for instance, P. Trimarchi, *Causalità e danno*, Giuffrè, 1957, 30–32, and J. Stapleton, *Choosing What We Mean by 'Causation' in the Law*, 73 *Mo. L. Rev.* 433, 438–440 (2008).

³ The locus classicus is L. Green, *Rationale for Proximate Cause*, Vernon Law Book, 1927.

⁴ R. Coase, *The Problem of Social Costs*, 3 *J. L. Econ.* 1, 2 (1960).

⁵ See, for instance, D.M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 *Loy. L.A. L. Rev.* 33, 37–39, 41–46, 54–60 (2010) (with special regard to Thai culture).

pre-existing knowledge, to our unconscious preference for findings which enable self- or group-affirmation, even if this preference comes at the cost of accuracy.⁶ Similarly promising in enriching our approach to causation in tort law is the neurosciences' critique of traditional models of categorizing human behaviour. Neurosciences challenge our understanding of intention, knowledge and control, and of the effects they should have on causal attribution in intentional torts and negligence. By showing that (what appears as) a person's choice may often be the result of a predetermined series of neurological events, neurosciences warn us that there exists a large gap between what actually moves people to action, on the one hand, and how people make sense of their behaviour, on the other hand.⁷

Explaining human behaviour is also at the core of sociological studies on the social structure of disputes, that is, on pathways from perceived injures to remedies, via grievances, claims, disputes and remedial institutions.⁸ These studies explore how people's socio-biological characteristics (class, gender, age, experience, personality, risk preferences, visions of justice, and so on) affect their perception of experiences as injurious, the mechanisms of blame attribution and the actions they decide to take in response to misadventure.⁹ Obviously, processes of naming, blaming and claiming mainly take place outside lawyers' offices and courts. Sometimes people end up at insurance companies' offices, which are in many countries the first providers of compensation for tort accidents,¹⁰ but the great majority of potential disputes do not even reach that phase.¹¹ What injured people do before resorting to institutionalized mechanisms of dispute resolution, however, remains extremely interesting from our

⁶ J. Hanson and M. McCann, *Situationist Torts*, 41 *Lo. L. Rev.* 1345, 1359 f., 1370 f. (2008) (exploring the effects that such insights may have on tort law theory and practice).

⁷ J.M. Eggen and E.J. Laury, *Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine*, 13 *Columbia Science & Technology L. Rev.* 235, 253 ff. (2012).

⁸ The Urtext is the article of W.L.F. Felstiner, R.L. Abel and A. Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 *L. & Soc. Rev.* 631–654, esp. 633–637, 641 (1980–1981); see also M. Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *Md. L. Rev.* 1093, 1099 (1996); H.M. Kritzer, W.A. Bogart and N. Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 *L. & Soc. Rev.* 499, 501 (1991); H.M. Kritzer, *Propensity to Sue in England and in the United States of America: Blaming and Claiming in Tort Cases*, 18 *J. L. & Soc.* 400, 401–402 (1991); but see also the remarks (centred on causation) of M. Bussani and M. Infantino, *Tort Law and Legal Cultures*, 63 *Am. J. Comp. L.* (2015) (forthcoming); J.M. Fraley, *Re-examining Acts of God*, 27 *Pace Envtl. L. Rev.* 669, 676–689 (2010); D.M. Engel, *Lumping As Default in Tort Cases*, 37–39, 41–46.

⁹ W.L.F. Felstiner, R.L. Abel and A. Sarat, *The Emergence and Transformation of Disputes*, 641; but see also R.A. MacDonald, *Access to Civil Justice*, in P. Cane and H.M. Kritzer (eds), *Oxford Handbook of Empirical Legal Studies*, OUP, 2012, 492, 510–515.

¹⁰ M.J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 *U. Pa. L. Rev.* 1147, 1213 f., 1222 f. (1992); R. Lewis, *Insurance and the Tort System*, 25 *Leg. Stud.* 85, 88 (2005); G. Wagner, *German Report*, in id. (ed.), *Tort Law and Liability Insurance*, Springer, 2005, 87, 88; F. Werro, *Les fondements de la responsabilité civile: quoi de neuf?*, in id. (ed.), *Quelques questions fondamentales du droit de la responsabilité civile: actualités et perspectives*, Stämpfli, 2002, 15, 16.

¹¹ M. Galanter, *Real World Torts*, 1099–1109.

perspective. The analysis of possible or actual disputants' behaviour helps explain why certain stories, but not others, are heard by courts. It confirms that causal attributions imply assumptions about injuries, wrongdoing and responsibility which are inherently flexible and culturally specific. It reminds us that theories and rules on causation are always part of wider cultural frameworks, which set the boundaries of what may be claimed against, and attributed to others. It is therefore on these frameworks, and on the impact they have on official Western dispute resolution processes, that we will concentrate our attention from now on.

3. THEORIES AND RULES

In tort law, in all Western legal traditions, causation is assigned the function of establishing a link between the defendant and the harm complained of by the plaintiff, and of determining the precise range of losses for which the defendant may be held liable, screening out those for which he cannot be held responsible.¹²

This function is everywhere conceived as an autonomous segment of the tort process, to be performed by applying to the facts of the case the set of theories and rules specifically devoted to this purpose. The elements composing such sets vary, within and across legal systems. Some notions of causation are employed everywhere; others take the forefront in the reasoning of certain legal systems only. There are principles borrowed from, or developed in parallel to, contract law or in criminal law; others have pure tort law origins. A handful of rules do not credit any distinction between the 'factual' causation stage, in which it should be determined whether the defendant's act factually caused the plaintiff's loss, and the 'legal' causation stage, focused on the extent to which the defendant should pay for damages which she has contributed to producing. Still, the majority among them imply that the causal investigation is a two-pronged process, with a few rules devoted to 'factual' causation and the others centred on 'legal' causation. Some causation formulas are supposed to apply in any tort law case, while others are expected to be useful only under specific circumstances. There are causation theories which are commonly invoked for maintaining a causal connection which would otherwise not be easily established, and causation theories displaying their utmost quality in denying any link between the harm and the activity which allegedly caused it – for, as Winfield and Jolowicz might put it, causation rules are as much about non-causation as they are about causation.¹³

The following are a few illustrations.

¹² The possible citations are endless. In the comparative perspective, suffice it to refer to A.M. Honoré, *Causation and Remoteness*, in *International Encyclopedia of Comparative Law*, vol. XI, ch. 7, Martinus Nijhoff, 1971, 3, 7.

¹³ P.H. Winfield and J.A. Jolowicz (W.V.H. Rogers ed.), *Winfield and Jolowicz on Tort*, 15th ed., Sweet & Maxwell, 1998, 3 ('the law of torts is as much about non-liability as it is about liability').

The basic criterion to grasp the factual aspects of the inquiry on causation is unanimously found to be the *'but-for'* test.¹⁴ According to this test, the defendant is the cause of the plaintiff's damage when, in the absence of the former's wrongful activity, the latter would not have suffered the same harm. Yet, despite its proclaimed centrality, the but-for test is often replaced by other formulas in cases where it would end up absolving the defendant, notwithstanding the compelling reasons to grant recovery to the plaintiff. The most typical example is the 'alternative causation' scenario, in which the plaintiff can prove that it was one of the defendants who caused the damage, but is not able to identify exactly who did it. Such a situation calls for the application of causation approaches other than the but-for test, which are deemed more adequate than the but-for in delivering justice under the circumstances.¹⁵ Moreover, the but-for test is everywhere complemented by a number of other theories and rules, the task of which is to select, among the but-for causes of the harm, only those which may trigger liability.

In common law and civil law countries alike, the reasoning based on the concept of 'sphere of the risk' invites assessment of causation according to whether the defendant has exposed the plaintiff to certain dangers of harm.¹⁶ With the exception of France, on both sides of the Atlantic guidelines for causation include the multi-faceted notion of 'foreseeability', which makes the defendant liable only for harm whose occurrence was foreseeable to him,¹⁷ as well as arguments about the 'scope of the rule', under which recovery is allowed only for damages that can be considered within the scope of protection of the rule the tortfeasor infringed.¹⁸ Other canons are employed in some legal experiences only. In common law countries, this is for instance the case of the theory of 'proximate cause', according to which a causal connection between two events A and B can be legally established only if the event A, as a but-for condition for event B, was so close to it as to become legally significant.¹⁹ But this is also the case of the American 'substantial factor' (U.S.) and of the Anglo-Canadian 'material contribution to the risk' tests, which are charged with assigning responsibility to any defendant whose carelessness turns out to be a non-trivial but-for cause of the plaintiff's injury.²⁰ On the civil law side, the language of proximate cause has a kind of equivalent in the adjectives 'direct'/'indirect' to which France and French-influenced jurisdictions resort in order to include/exclude the recoverability of losses classified

¹⁴ See, in a comparative perspective, J. Spier and O.A. Haazen, *Comparative Conclusions on Causation*, in J. Spier (ed.), *Unification of Tort Law: Causation*, Kluwer, 2000, 127.

¹⁵ See H. Aberkane, *Du dommage causé par une personne indéterminé dans un groupe déterminé de personnes*, in *Rev. trim. dr. civ.*, 1958, 516 f.; H. Cousy and A. Venderspikken, 'Causation under Belgian Law', in J. Spier (ed.), *Unification of Tort Law: Causation*, 23, 30; F.D. Busnelli and G. Comandé, *Causation under Italian Law*, *ibid.*, 79, 83–84; J. Stapleton, *Choosing What We Mean by 'Causation' in the Law*, 442.

¹⁶ J. Spier and O.A. Haazen, *Comparative Conclusions on Causation*, 136–137.

¹⁷ J. Spier and O.A. Haazen, *Comparative Conclusions on Causation*, 134–135.

¹⁸ J. Spier and O.A. Haazen, *Comparative Conclusions on Causation*, 136–141.

¹⁹ See, among others, J.A. Page, *Torts. Proximate Cause*, Thomson West, 2003, 30 f.; W.V. Horton Rogers, England, in J. Spier (ed.), *Unification of Tort Law: Causation*, 40 f.

²⁰ Compare, respectively, *Restatement of Torts, Liability for Physical and Emotional Harm*, 3d, § 27; M. Stauch, 'Material Contribution' as a Response to Causal Uncertainty: Time for a Rethink, 68 *Cambridge L. J.* 27 f. (2009); L.M. Collins, *Causation, Contribution and Clements: Revisiting the Material Contribution Test in Canadian Tort Law*, 19 *Tort L. Rev.* 86 (2011).

accordingly.²¹ And a similar ambition to restrain the range of but-for causes is shared by another theory, the ‘adequacy theory’, which is widespread throughout the civil law tradition, and suggests to qualify as causes of an event only those factors which appear apt to produce a result such as the one that actually occurred.²²

All these theories partake of the aspiration to convey principles in theory applicable to any tort law case. Alongside such theories, every jurisdiction provides a complementary set of rules designed to supersede the general ones under specific conditions. Within the set of narrower tests, there are rules taking into account the subjective state of mind of the parties, such as the principles stating that a defendant’s ‘intended consequences are never too remote’, and that ‘a third party’s malicious act always breaks the causal chain’ between the plaintiff’s injury and the defendant’s fault which enabled the third party to perpetrate the wrong.²³ Other directives focus on natural factors. According to one, mostly valid in personal injury cases, the defendant shall ‘take the victim as she finds her’, that is, shall be held liable even though a plaintiff’s weakness makes the injury greater than would normally be the case.²⁴ Another states that the causation requirement is not satisfied, and therefore the defendant should be relieved from liability, ‘for the losses which the plaintiff would have naturally suffered anyway’, sooner or later, because of some non-tortious cause.²⁵ Still another deals with ‘*force majeure*’ ‘natural’ events, providing that the occurrence of unforeseeable, extraordinary acts of nature always interrupts the causal connection between the plaintiff’s harm and the defendant’s act.²⁶

4. A TRANS-SYSTEMIC CONVERGENCE

In spite of their variety, the theories and rules just surveyed have many things in common. Whatever their disciplinary, geographical or substantive breadth, they all represent an effort to lay down, for a broader or narrower assortment of situations, guidelines for courts to follow in answering causation questions raised by tort law conflicts. Theories and rules about causation share the same assumption, that is, that causation problems are to be solved through the application of fixed, all-embracing tests, whose application should be understood in isolation from issues pertaining to

²¹ T. Honoré, Causation and Remoteness, 40–44.

²² S. Galand-Carval, Causation under French Law, in J. Spier (ed.), *Unification of Tort Law: Causation*, 53, 54 f.; H. Cousy and A. Vanderspikken, Causation under Belgian Law, 24 f.; F.D. Busnelli and G. Comandé, Causation under Italian Law, 81; U. Magnus, Causation in German Tort Law, *ibid.*, 63, 65; H. Koziol, Causation under Austrian Law, *ibid.*, 11, 12; P. Widmer, Causation under Swiss Law, *ibid.*, 105, 106 f.

²³ A.M. Honoré, Causation and Remoteness, 65 f., 110–111.

²⁴ As to European jurisdictions, U. Magnus and M. Martín-Casals, *Comparative Conclusions*, in *ibid.* (eds), *Unification of Tort Law: Contributory Negligence*, Kluwer, 2004, 259, 290–291; in the United States and Canada, respectively, J.A. Page, *Torts. Proximate Cause*, 83 f., and L.N. Klar, *Tort Law*, 4th ed., Carswell, 2008, 435, 486 ff.

²⁵ A.M. Honoré, Causation and Remoteness, 86 f.

²⁶ A.M. Honoré, Causation and Remoteness, 90–93.

other elements of the cause of action.²⁷ Yet, what theories and rules about causation also have in common across Western legal systems is the challenge posed to this assumption by actual adjudication of tort law disputes.

In any legal system, theories and rules on causation often overlap and conflict with one another, for their respective theoretical and practical boundaries are far from being stable or neat. Their lack of consistence aside, what emerges in the comparative perspective is that fixed, pre-arranged formulas – no matter what the legal framework – have difficulty in accommodating ‘real’ problems of causation, for the role and relevant features of the causal connection are everywhere bound to change according to the legal framing of the whole circumstances of each case.²⁸ This is not to say that efforts to lay down formulas for causation are all misguided, or all so vague as to permit courts to attach them any meaning. Theories and rules on causation are not irrelevant or meaningless – but they show their relevance and meaning only against the factual, legal and policy context of ‘real’ tort law conflicts.

Indeed, evaluations of causation in Western tort law are always influenced by context, and by the considerations that the context raises as to the other elements of the tortious cause of action. These considerations may stem from a variety of factors, depending on the peculiarities of each tort law case. It may be the nature or the magnitude of the loss (*i*). The more important the plaintiff’s prerogatives are deemed to be (e.g., life, health, personality), and the more serious the attack on them, the larger is the causation range; conversely, the lower the rank enjoyed by the plaintiff’s position and the lighter the offence, the more the causation range retracts.²⁹ Causation analysis may be dependent upon the defendant’s subjective behaviour (*ii*). Countless examples show that the defendant’s state of mind, the degree of her negligence, or the special skills or knowledge she possesses may play a defining role in keeping/stretching the causal connection below/beyond its usual reach.³⁰ The type of accident may also matter (*iii*). Special causation criteria may apply to particular sub-species of tort law actions – from medical malpractice claims to traffic accidents to work-related accidents – whose

²⁷ This corresponds to a long-standing, Western way of thinking of, and approaching, tort law problems, which elsewhere has been labelled the ‘modular’ view: see M. Bussani and M. Infantino, *Fault, Causation and Damage in the Law of Negligence: A Comparative Appraisal*, in A. Colombi Ciacchi, C. Godt, P. Rott and L.J. Smith (eds), *Haftungsrecht im dritten Millennium – Liability in the Third Millennium. Liber Amicorum Gert Brüggemeier, Nomos*, 2009, 145 ff.; M. Bussani, M. Infantino and F. Werro, *The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law*, 20 *King’s L. J.* 239, 249–252 (2009).

²⁸ See B. Markesinis and H. Unberath, *The German Law of Torts. A Comparative Treatise*, 4th ed., Hart, 2002, 686–691; J. Stapleton, *Legal Cause*, 1008–1009; G. Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven*, 43 *U. Chi. L. Rev.* 69, 103–106 (1975); L. Green, *Rationale for Proximate Cause*, 135–141, 171–176, 190–194.

²⁹ V.V. Palmer and M. Bussani, *Pure Economic Loss. New Horizons in Comparative Law*, Routledge-Cavendish, 2009, 36–39; M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, CUP, 2003, 21–23.

³⁰ U. Magnus, *Causation in German Tort Law*, 67–68; G. Viney and P. Jourdain, *Les conditions de la responsabilité*, in *Traité sous la dir. de J. Ghestin*, 3rd ed., LGDJ, 2011, 191 f., 202; H. Cousy and A. Venderspikken, *Causation under Belgian Law*, 24; P. Trimarchi, *Causalità e danno*, 107; T. Weir, *An Introduction to Tort Law*, 2nd edn, OUP, 2006, 68; W.S. Malone, *Ruminations on Cause-in-Fact*, 9 *Stan. L. Rev.* 60, 72–73 (1956).

rules may be more or less deviant from the ordinary standard for liability.³¹ But the appreciation of the causal connection may also be affected – to mention but a few other factors – by: (iv) the parties’ relative loss-bearing capacities, with regard to the resources that are available to them or, as the case may be, to the presence of insurance coverage; or by (v) the number of victims and tortfeasors; or by (vi) the level of (un)certainly surrounding the evidence about the sequence of events, as well as the standard of certainty which is required in respect of such evidence.³² The list could be further enriched by including features from outside the cause of action. The framing of the causation inquiry may be influenced, for example, by (vii) the general characteristics of the tort law systems, which determine whether issues should be framed as pertaining to causation or as falling under the umbrella of some other element of the cause of action.³³ And one should mention also (viii) the substantive and procedural technicalities of the tort law adjudication mechanisms, (ix) the importance attached to the presence of alternative private or public law remedies, and (x) the attention paid to (what are perceived as) the potential externalities of the decision and the social costs entailed by either denying or imposing liability.³⁴

The above list is far from complete. Yet it should already be clear that any comparative study of causation in Western tort law should focus on the interplay between causal judgments and factors such as those just mentioned. Such a study would highlight how this interplay impacts on the role, style and outcomes of causation-based reasoning within each jurisdiction, as well as on the patterns of convergence and divergence between the decisions these reasonings help make.

5. THE LEGAL ACTORS OF CAUSATION

Throughout the whole Western legal family, rules about causation in tort are crafted by the same legal actors: legislators, scholars and, above all, judges. The exact contribution made by these actors to the production and application of causation rules everywhere depends upon the role that they are called to play within a given jurisdiction, and by their reciprocal interactions. Yet there are some commonalities which are shared across national divides, and which are worth exploring here.

A. Legislators

Let us start with some clarifications about the part that legislators (do not) have at the causation law-making process stage. Notwithstanding the centrality of causation in the adjudication of civil liability cases, its meaning is not explicitly addressed by most tort law legislators. This is no surprise in common law contexts, where statutory references

³¹ J. Spier and O.A. Haazen, *Comparative Conclusions on Causation*, 135–136.

³² J. Spier and O.A. Haazen, *ibid.*

³³ See below, section . 6.

³⁴ With regard to civil law countries, see M. Infantino, *La causalità nella responsabilità extracontrattuale*. *Studio di diritto comparato*, Stämpfli-ESI, 2012, 293–294; as to common law countries, J. Stapleton, *Legal Cause*, 1008–1009.

to causation are scant, and even when the requirement is mentioned it is formulated either in loose terms or with regard to very specific circumstances. It can seem more surprising that the same remark holds true for codified jurisdictions, where the black-letter words of the civil codes setting out the general architecture of tort law systems usually give no, or very little, guidance about what causation is.³⁵ The result is that, in civil countries, legislative rules on causation are traditionally the lodestar neither of legal theory nor of legal practice. To the contrary, it is doctrinal debates and judicial revirements that, more often than not, constitute the driving forces for legislative reforms.

One may wonder whether the circumspection of civil law legislators on causation rules is the result or the cause of this ‘inverted’ relationship between legal formants. What is certain, and deserves mention here, is that the succession of civil codes and code-like statutes in post-socialist countries displays an historical trend towards the increase of statutory attention to problems of causation. The phenomenon is already clear in the oldest codes of the continent. The French *Code Civil* of 1804 contained no rule about causation in tort, the only provision about causation – art. 1151, on the recoverability of the ‘immediate and direct consequences’ of a wrong only³⁶ – belonging to the part of the code dedicated to contract law. In 1811, the Austrian civil code was only slightly less timid, alluding to causation only in the case of multiple tortfeasors (§§ 1301 and 1302 of the *Allgemeine bürgerliche Gesetzbuch*).³⁷ Almost one hundred years later, the German civil code devoted three provisions to causation issues: §§ 254, 830 and 840 *Bürgerliches Gesetzbuch* – the last two covering tort cases involving multiple tortfeasors, the former laying down the general principles (applicable to contract law as well) on the victim’s comparative fault and her duty to mitigate the damage.³⁸ As a mixture of the French and the German models,³⁹ the Italian *Codice civile* of 1942 followed both of its inspirations, replicating the contents of art. 1151 of the French *Code civil* and of §§ 254 and 840 *BGB* in, respectively, its arts 1223, 1227 and 2055. But the trend is even more manifest in the civil codes and equivalent texts enacted in the second half of the 20th century. In the last 60 years, statutory rules about causation have multiplied. Cherry-picking among the possible illustrations, one cannot but recall art. 361(1) of the 1964 Polish civil code, specifying, in the tort law section of the code, that compensation is granted only for damages that were ‘adequately’

³⁵ A.M. Honoré, Causation and Remoteness of Damage, 11, nt. 91.

³⁶ The principle, however, is deemed by scholars and courts applicable in tort law as well: among others, G. Viney and P. Jourdain, *Les conditions de la responsabilité*, 195.

³⁷ B.A. Koch and P. Schwarzenegger, Multiple Tortfeasors under Austrian Law, in W.V. Horton Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors*, Springer, 2004, 9–10.

³⁸ U. Magnus, Multiple Tortfeasors under German Law, in W.V. Horton Rogers (ed.), *Unification of Tort Law: Multiple Tortfeasors*, 87; J. Fedtke and U. Magnus, Contributory Negligence under German Law, in U. Magnus and M. Martín Casals (eds), *Unification of Tort Law: Contributory Negligence*, Springer, 2004, 75–76.

³⁹ J. Merryman, *The Italian Style II: Law*, 18 *Stanford L. Rev.* 413 (1996); more recently, M. Infantino, *The Italian Legal Recipe: Basic Ingredients and the Bustle of Time*, 6 *J. Comp. L.* 70, 71–80 (2011).

connected to the defendant's behaviour.⁴⁰ The 1992 Dutch *Burgerlijk Wetboek* contains, among others, express provisions on several and joint liability in cases of 'indeterminate' causation (i.e., cases where an unknown member of a group of people causes a harm which could have been prevented by other members of the same group: art. 6:166 *BW*), and of 'concurrent' causes (i.e., cases where the harm appears to be the result of different factors, for each of which a different person might be responsible, but it remains unclear who actually did it: art. 6:99 *BW*).⁴¹ Both the just-mentioned scenarios were considered by subsequent legislators as well. Art. 186(4) of the Slovenian Law of Obligations of 2002, for instance, provides a similar answer to the indeterminate causation problem,⁴² whereas several and joint liability for the concurrent causation case is imposed by art. 138(1) of the Estonian Law of Obligations of 2002, and by art. 1.370 of the Romanian civil code of 2009.⁴³

There are many more examples, but these already suffice to demonstrate the growing relevance of tort law rules to the governance of contemporary societies, and the rising willingness of civil law countries' parliaments to play their part in that governance. Moreover, the increase in number and detail of legislative provisions on causation in tort gives some hints about the influence that the parallel accumulation of scholarly and judicial debates over causal problems can exert on statutory law-making processes. An influence that, as we will now see, often crosses national boundaries, nurturing transplants, borrowings and exchanges from one legal culture to another.

B. Scholars

There is little dispute that legal scholarship plays a major role in inspiring legislators', as well as courts', compensation choices.⁴⁴ Legal scholars' role in assembling the casebooks and textbooks on which prospective lawyers and judges are trained, conceptualizing the subject of torts and suggesting changes in liability doctrines, has always been crystal clear in civil law countries, and is nowadays widely recognized in common law jurisdictions as well.⁴⁵

Academic lawyers perform this role in different ways across and within jurisdictions. They maintain various kinds of relationships with their parliamentary and judicial fellows, adhere to diverse schools of methodology, have divergent views about their

⁴⁰ E. Bagińska, Overview of Polish Private Law. Tort Law and Property Law, in M. Bussani and U. Mattei (eds), *Opening Up European Law*, Carolina Ac. Press-Sellier-Stämpfli, 2007, 233, 241.

⁴¹ C. von Bar, Non-Contractual Liability Arising out of Damage Caused to Another, Sellier, 2009, 786–787.

⁴² B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds), *Digest of European Tort Law. Natural Causation*, I, Springer, 2007, 498.

⁴³ On these provisions, cf. C. Alunaru and L. Bojin, The Tort Law Provisions of the New Romanian Civil Code, 2 *J. Eur. Tort L.* 103 (2011) (Romania); B. Winiger, H. Koziol, B.A. Koch and R. Zimmermann (eds), *Digest of European Tort Law*, I, 430 (Estonia).

⁴⁴ M. Bussani, *European Tort Law—A Way Forward?*, in id. (ed.), *European Tort Law. Eastern and Western Perspectives*, Ant. N. Sakkoulas-Bruylant-Sellier-Stämpfli, 2007, 365, 378.

⁴⁵ See in particular S. Deakin, A. Johnston and B. Markesinis, *Tort Law*, 6th ed., OUP, 2008, 82–87; G.E. White, *Tort Law in America*, 2nd ed., CUP, 2003, 3 f.

mission, and are more or less open to inputs coming from non-legal sciences or from other legal experiences.⁴⁶ Yet, these differences aside, legal academia has everywhere contributed to make the law of causation in tort by trying to infer, from abstract ideas about recovery and/or the mass of case law, principles and guidelines as to how causation should be defined and assessed. In every country examined, legal academics have refined and debated notions and rules deemed useful to govern the entire sequence or specific segments of the causal connection, building and perfecting the repertoire of formulas designed to answer more or less general questions on causation. They have defended certain lines of thought and solutions; they have criticized others. And everywhere doctrinal efforts have been rewarded by very little achievement, insofar as none of the scholarly proposals has proved definitive in coping with problems of causation – with the result that in many quarters the very idea of finding formulas definite enough to solve causation dilemmas is believed to be, at best, wishful thinking.⁴⁷

Notwithstanding scholarly studies' failure in the quest for the perfect causation algorithm, what is worth noting from the comparative law perspective is the varying degrees of intellectual success and cultural diffusion that these studies have enjoyed. Some academic suggestions have remained purely intellectual exercises, since they never had their day in court or crossed the frontiers of the legal system where they were first made. But other elaborations had greater fortune, at least from a cultural point of view. Doctrines such as those conceived by German legal scholarship before the end of the 19th century, or those advanced by American legal scholarship, especially in the second half of the 20th century, have spread beyond the legal tradition which produced them, and exerted an in-depth and long-lasting effect on other tort law systems.

More specifically, the corpus of scientific knowledge generated by 19th century German (mostly criminal law) scholars inspired the theory and practice of causation in tort throughout the whole European continent, until the end of that century and far beyond.⁴⁸ Since the second half of the 20th century, German dominance has been supplanted by American legal doctrines and inventions – from law and economics to market share liability – in holding sway over Western causation discourses.⁴⁹ The circulation of these models can partly be explained by the impressive body of knowledge developed by German and American legal scholarship on the subject, and partly by the prestige generally attached by the importers to German and American intellectual products. German works on causation rode the wave of admiration that the Historical School of Law and the Pandectist School had elicited in the course of the 19th century in many continental European countries.⁵⁰ A few decades later, and especially after World War II, American-made approaches to, and rules on, causation

⁴⁶ M. Bussani, *European Tort Law*, 378.

⁴⁷ Among many others, see H.L.A. Hart and A.M. Honoré, *Causation in the Law*, 3; A. Tunc, *Note à App. Paris*, 18 avril 1955, in *D.*, 1956, 355.

⁴⁸ See A.M. Honoré, *Causation and Remoteness*, 31–32; P. Catala and J.A. Weir, *Delict and Torts: A Study in Parallel – Part IV*, 39 *Tul. L. Rev.* 701, 703, 708, 718–719 (1965).

⁴⁹ M. Infantino, *La causalità nella responsabilità extracontrattuale*, 62.

⁵⁰ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (trans. by T. Weir), 3rd ed., OUP, 1998, 154–156.

spread all over the West, as part of the American legal influence which, fuelled by the economic hegemony of the United States, was expanding throughout the globe.⁵¹

Some of the imported theories and proposals proved persuasive only within academic circles of the borrowing legal systems; others, through the vehicle of local scholarship, left a profound mark over rules made by the parliaments and/or courts of the country where the transplant occurred. Whatever their practical impact, what is important to stress is that, in both cases, the transplant of legal theories on causation into new legal environments has been possible thanks to the mediating role played by scholars. Indeed, transplanting law usually requires legal scholarship, insofar as it requires time and knowledge about the transplanted model. This time and this knowledge are ordinarily beyond the reach of domestic lawyers, who are weighed down by heavy work-loads and educated only about their national law. Legal scholars, by contrast, are usually endowed with time and skills to collect, translate and discuss ideas and suggestions from jurisdictions other than their own. Thus, it is generally upon legal scholars to make foreign legal discourses comprehensible to domestic lawyers, judges and legislators, and to provide these actors with selective information on the legal models developed in other legal systems.⁵² Our field is no exception.

From this perspective, the intellectual history of causation appears as nothing but a chapter in the history of legal ideas, of their circulation and adaptation in different environments, of the transformative processes they bring about and to which they are subject. In the meantime, scholarly debates on causation continue.

C. Courts

If legal scholarship sets the tone and the cultural framework for debates over causation in tort law, it is the courts that, against that framework, routinely ascertain whether and to what extent the harm allegedly suffered by the plaintiff may be considered as causally connected to the defendant, and shifted to the latter.⁵³ Underneath courts' opinions, obviously, lie the allegations, factual information and doctrinal reasoning routinely furnished by attorneys, but the lawyers' work remains more or less invisible in final judgments.⁵⁴

In all the countries considered, courts assess causation by relying on the traditional repertoire of catch-up theories and rules put forward by local academia or by

⁵¹ E multis, Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in D. Trubek and A. Santos (eds), *The New Law and Economic Development. A Critical Appraisal*, CUP, 2006, 4, 49 f.; U. Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 *Am. J. Comp. L.* 195 (1994).

⁵² M. Infantino, *Making European Tort Law: The Game and Its Players*, 20 *Cardozo J. Int'l & Comp. L.* 85–87 (2010).

⁵³ The paradox that the issues of causation which have inflamed scholarly debates for centuries are ordinarily assessed by courts in their apparently smooth routine work has been noted by many: C. Quézel-Ambrunaz, *Essai sur la causalité*, 19–20; G. Viney and P. Jourdain, *Les conditions de la responsabilité*, 184; R.W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 *Io. L. Rev.* 1001, 1002 (1988).

⁵⁴ J. Hanson and M. McCann, *Situationist Torts*, 1411–1412.

upper-level courts. Frequency and insistence of such reliance, it goes without saying, have varied across time and space. Like scholars, judges self-represent and perform their role in different ways. Differences often exist within the very same jurisdiction, because, for instance, of divergences between regional/federal tracks, generations of judges or the schools of thought to which they adhere. But the most evident divergences lie among jurisdictions. The requirements for becoming a judge, the career paths, the courts' hierarchy and composition, the manner in which judges deliberate and the appearance of their decisions, all differ. Depending on the legal tradition in which they work, courts may be expected to present legal arguments in an abstract, depersonalized manner, or to put themselves in the middle of human dramas, expressing their personal views on the matter. In some jurisdictions judges are educated to conceal the policy or equity considerations underlying their judgments; in others full transparency is the norm.⁵⁵ The legal culture to which judges belong determines the degree of respect that they show to scholarly opinions, to hierarchically superior courts' rulings, or to the legislature's actual and/or prospective choices.⁵⁶

All these factors influence the style, the form and even the substance of judgments on causation across Western countries. In civil law jurisdictions, liability rules are usually presented as controlled by the black-letter words that the legislator has used in the codes, or by the interpretation given to these words by legal scholarship. Judicial culture is not inclined to allow judges openly to discuss policy arguments. Principles of causation are presented in a dry, neat and abstract manner, and the decision is offered as the result of the application of these principles to the facts of the case (with a level of attention for the facts and the academic debates on the points raised by these facts that probably reach its minimum in France and its maximum in Germany). In contrast, in uncodified systems, judges are expected to review in detail the parties' allegations and the material they presented to defend their positions, and to deploy transparently and colourfully the policy considerations that, in their opinion, are involved in each case. In these countries, discussion of causation therefore implies – and is frequently replaced by discussion of – arguments as diverse as the fear of floodgates of compensation requests or fraudulent claims, the need to avoid excessive rise of insurance premiums, the opportunity to make the loss fall on the party who is insured, or who could have purchased an insurance policy at the cheapest price, and so on.

Here, however, comes a caveat. The foregoing does not mean that the significance of the facts of the case is reduced, or policy factors go unnoticed, by courts in civil law jurisdictions. Like their common law colleagues, judges in civil law traditions are inevitably exposed to the richness of the facts which make up any tort law conflict, and to the bundle of policy considerations that these facts implicate. In the civil law family, as in the common law one, nobody knows better than judges that the solution to problems of causation depends upon the balancing of considerations suggested by the circumstances of the case, rather than upon abstract principles and rules about causal sufficiency, adequacy, risk, and the like. Yet, instead of articulating such balancing in

⁵⁵ M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, 124; J. Morgan, *Lost Causes in the House of Lords: Fairchild v. Glenahaven Funeral Services*, 66 *Mod. L. Rev.* 277, 279 f. (2003).

⁵⁶ M. Bussani, *European Tort Law*, 378.

their opinions, as common law courts do, civil law courts prefer to hide the fact-sensitive character of the causation analysis behind the impassive technicalities and alleged scientificity of causation rules.

We can understand this attitude only by taking into account judges' cultural necessity to qualify their decisions through their overall interpretative culture, in order to make the judgments acceptable to their peers and the other legal actors of the system. In common law countries, judges are expected to give open, often elaborate, accounts of the policy reasons which have dictated their conclusions. In civil law jurisdictions, where courts are officially invested with the power of applying (rather than making) the law, the judges' legalistic, dry and impersonal reliance on causation principles enables them to signify the existence of some limits to their discretion, balancing the attention to concrete circumstances against the need for conveying their decision in culturally acceptable terms. From this point of view, causation principles are often nothing more than a façade, a device that helps formulate judicial conclusions but does not really explain them. Delving beyond that façade, and highlighting the factors which everywhere shape the law of causation in tort, is what any comparative study on causation must do.

6. CAUSATION AND THE COMPARATIVE LAW OF LIABILITY REGIMES

In the comparative law of causation in tort, variations in the law-making process are not all that matters. Among the many other differences impinging on the way in which problems of causation are conceived and handled, a first source of variances relates to the structure(s) of tort law itself.

As far as negligence liability is concerned, there may be liability whenever a person causes damage to another (as in France and French-like jurisdictions), or there may be liability only in certain typical situations (as in Germany and in Scandinavian and common law countries).⁵⁷ Resort to strict liability rules may be routine (as in France) or exceptional (as in England).⁵⁸ Punitive damages awards are officially banned in continental Europe but constitute an attraction of the United States and, to a lesser extent, the English tort law system.⁵⁹ Other points of divergence may include class actions, contingency fees, jury trials and discovery procedures, which may all be

⁵⁷ Comparative literature on this issue is extensive. As regards the jurisdictions herein considered, suffice it to mention V.V. Palmer and M. Bussani, *Pure Economic Loss*. *New Horizons in Comparative Law*, 7, 46–61, 63–66; and M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, 120, 121–158.

⁵⁸ F. Werro and V.V. Palmer (eds), *The Boundaries of Strict Liability in European Tort Law*, Carolina Ac. Press, 2004, 419–425.

⁵⁹ As to the U.S., see A.J. Sebok, *Punitive Damages in the United States*, in H. Koziol and V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives*, Springer, 2009, 155 f.; in England, V. Wilcox, *Punitive Damages in England*, *ibid.*, 7–8; on continental Europe, U. Magnus, *Why is US Tort Law so Different?*, 1 *J. Eur. T. L.* 102, 106–107 (2010).

included in the basic vocabulary of tort law, as in the United States,⁶⁰ or be unknown or even forbidden in other jurisdictions.⁶¹

How do tort law cultures impact on legal systems' modes of dealing with issues of causation? Let us consider, for instance, the effect that different rules of fault liability may have on the role that causation plays in negligence.

As is well known, negligence liability rules such as that contained in paragraph 823 of the German *Bürgerliches Gesetzbuch*, or in the Swedish Tort Liability Act of 1972, Chapters 2:1 and 2:4, or in the Anglo-American tort of negligence, restrict recovery to damages which (have been caused by the defendant's fault, and) may be included within the list of protected interests mentioned in the code's article (Germany), or the scope of protection of criminal laws (Sweden), or the scope of the duty breached by the tortfeasor (Anglo-American countries). As a consequence, ordinary scholarly and judicial accounts of negligence liability place causation as an inquiry to be engaged in only once one has verified that the injury allegedly suffered by the victim satisfies the statutory or common law requirements for recovery.⁶² These approaches stand in contrast with that adopted in France, where codified clauses for negligence liability (articles 1382–1383 of the French *Code civil*) require no examination as to the plaintiff's rights infringed, or the criminal law violated, or the duties breached by the defendant's behaviour. Against this framework, causation analysis is performed in parallel and on an equal footing with the other elements of the negligence tort claim (i.e., damage and fault).⁶³

It is important to note at this point that presence or absence of preliminary conditions to the causal inquiry is key to understanding the varying emphasis placed on the causation element within the jurisdictions surveyed. In legal traditions where the liability recipe calls for preliminary examination over the rights, laws or duties infringed by the defendant, the space reserved for causal considerations is somewhat limited. Civil law systems whose tort law *Grundnorm* does not contain (or is interpreted as not containing) any requirement other than damage, fault and causation,

⁶⁰ J.G. Fleming, *The American Tort Process*, Clarendon Press, 1990, 101 f., 187 f., 235 f., plus, in the comparative perspective, U. Magnus, *Why is US Tort Law so Different?*, 102–124.

⁶¹ Only embryonic forms of procedural aggregations of claims are available in European countries: see K. Oliphant (ed.), *Aggregation and Divisibility of Damage*, Springer, 2010, 120–124, 163–164, 204–209, 287–288. No European continental system adopts U.S.-style contingency fees, yet conditional fee agreements are possible in England and prohibitions of contingency fees are being reformed throughout the continent: M. Reimann, *General Report*, in id. (ed.), *Cost and Fee Allocation in Civil Procedure*, Springer, 2012, 3, 45. While there is no jury and no pre-trial discovery in continental European civil procedure (N. Trocker and V. Varano, *Concluding Remarks*, in id. (eds), *The Reforms of Civil Procedure in Comparative Perspective*, Giappichelli, 2005, 243, 255–258), in England jury participation in tort litigation is reserved for very exceptional cases, and discovery is far less aggressive than it is in the United States (M. Lunney and K. Oliphant, *Tort Law: Text and Materials*, 4th ed., OUP, 2010, 787).

⁶² As to Germany, B. Markesinis and H. Unberath, *The German Law of Torts*, 9–12; as per Sweden, M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, 157; T. Weir, *An Introduction to Tort Law*, 2nd ed., CUP, 2006, 33; J.C.P. Goldberg, A.J. Sebok and B.C. Zipursky, *Tort Law. Responsibility and Redress*, 2nd ed., Aspen, 2008, 50–51.

⁶³ C. Quézel-Ambrunaz, *Essai sur la causalité*, spec. 2–3, 10; C. van Dam, *European Tort Law*, OUP, 2006, 278–279.

usually give a great weight to the latter.⁶⁴ In these countries, the judge who wishes to find for the defendant has no recourse to arguments based on rights, laws or duties; she should carve out an exception to the general presumption in favour of actionability. Rather than appealing overtly to the policy reasons mandating immunity from liability – something that she may not be allowed or prepared to do, for the reasons investigated above⁶⁵ –, she is more likely to resort to technical observations about the lack of or tenuousness of the connection between the injury and the allegedly wrongful behaviour, the presence of superseding factors breaking the chain of causation, the evidentiary uncertainties surrounding the occurrence of the plaintiff's loss, and so on.⁶⁶ Thus, the comparative picture confirms a phenomenon with which any domestic tort lawyer is familiar: what, under some circumstances, is considered as an issue of causation may, on other occasions, be scrutinized through the lens of another element of the cause of action, and vice versa.⁶⁷

The operational consequences of the diversity just sketched should not be exaggerated, though. True, the variety of tort law scenarios leaves its mark on the way in which issues of causation are approached. Nonetheless, underneath local variations, the problems and purposes that tort law confronts in Western 'mixed'⁶⁸ societies are pretty much the same, even if they are dealt with using different techniques (and, occasionally, with divergent results). As a consequence, the questions to which causation in tort law seeks to respond, as well as the core characteristics displayed by the causal inquiry in answering these questions, are roughly similar. Across national boundaries, what remains distinctive about causal evaluations in tort is their inherent flexibility, their context dependency and their sensitivity to the balancing of interests triggered by the specific circumstances of each tort law conflict.

7. BURDEN AND STANDARDS OF PROOF

The core flexibility that accompanies causal judgments throughout Western jurisdictions is reflected in, and partially comes from, the malleability of the evidence rules sustaining findings of causation.

Obviously, these rules vary greatly across different legal systems. The adversarial versus inquisitorial model of the proceedings; the presence or absence of the jury; the emphasis placed on oral or documentary proofs; the role assigned to expert opinions and scientific evidence; the procedures and devices devoted to evidence taking – all these factors have some bearing on the evidence rules that, in any legal system, support

⁶⁴ M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, 127–128; M.S. Moore, *Causation and Responsibility. An Essay in Law, Morals, and Metaphysics*, OUP, 2009, 83.

⁶⁵ See above, section 5.3.

⁶⁶ M. Bussani and V.V. Palmer, *Pure Economic Loss in Europe*, 128.

⁶⁷ B. Markesinis and H. Unberath, *The German Law of Torts*, 214–216; D.B. Dobbs and P.T. Hayden, *Torts and Compensation. Personal Accountability and Social Responsibility for Injury*, 5th ed., West, 2005 (rist. 2006), 245.

⁶⁸ G. Calabresi, *Torts—The Law of the Mixed Society*, 56 *Tex. L. Rev.* 519 (1978).

causation assessments. Only the elasticity with which these rules are interpreted and applied against the specific considerations raised by each case is constant through this variety.

Determining who bears the burden of proving what, and according to what standard, is always important in dispute settings. It is even more so with regard to causation in tort law conflicts. To be sure, technically speaking, the very idea of ‘proving causation’ is somewhat imprecise. As the U.S. Restatement (Third) of Torts: Liability for Physical and Emotional Harm reminds us, causation ‘is not a phenomenon that can be seen or perceived; instead, it is an inference drawn from prior experience and some, often limited, understanding of the other causal factors – the causal mechanisms – required for the outcome’.⁶⁹ Objects of proof are the events and the (ir)regularity of their sequence, whereas the causal connection is a corollary of what such events and sequence suggest to the observer.⁷⁰ Be it as it may, this does not reduce the validity of the claim that most of the problems falling under the umbrella of causation in tort are nothing more than problems of proof concerning the source and nature of the victim’s injuries.⁷¹

Traditional teachings about the burden of proving causation in tort say that it is the victim who must prove (more correctly, who must offer elements of proof supporting the argument for) the connection tracing her loss back to the defendant’s activity while it is up to the latter to show that some concurring or superseding factor broke that chain of events.⁷² In both cases, the standard of proof would be similar, and conveyed by the tests of the ‘*degré suffisant de probabilité*’ in France,⁷³ of the ‘*überwiegende Wahrscheinlichkeit*’ in Germany,⁷⁴ of the ‘balance of probabilities’ in England⁷⁵ and of the ‘preponderance of evidence’ in American and Canadian jurisdictions.⁷⁶ Roughly speaking, all these criteria imply that, for (dis)proving causation in tort law, one should persuade the trier of fact that it is more likely than not that something has (not) happened.

Yet the point is that everywhere, through different technicalities and devices, such basic principles prove adaptable to the circumstances of the case, and easy to adjust against the needs these circumstances raise. Especially in civil law jurisdictions, courts may ask for experts’ testimony to supplant or refine the party-appointed experts’ findings.⁷⁷ In civil law and common law countries alike, judges may, when necessary,

⁶⁹ Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 28 (2010), cmt. a (speaking on factual causation).

⁷⁰ Among many others, M. Taruffo, *La prova del nesso causale*, Riv. crit. dir. priv., 2006, 101–103; W.L. Prosser, *Handbook of the Law of Torts*, West, 1971, 242.

⁷¹ See, among many others, C. Quézel-Ambrunaz, *Essai sur la causalité*, 252, with D.A. Fisher, *Insufficient Causes*, 94 Ky. L. J. 276, 317 (2005–2006).

⁷² In general, A.M. Honoré, *Causation and Remoteness*, 148 f.

⁷³ G. Viney and P. Jourdain, *Les conditions de la responsabilité*, 248–250.

⁷⁴ U. Magnus, *Causation in German Tort Law*, 64.

⁷⁵ M. Stauch, ‘Material Contribution’ as a Response to Causal Uncertainty, 27.

⁷⁶ See respectively R.W. Wright, *Causation, Statistical Probability, and the Burden of Proof*, 41 Loy. L.A. L. Rev. 1295, 1311–1316 (2008), and L.N. Klar, *Tort Law*, 432–433.

⁷⁷ Compare F. G’sell-Macrez, *The French Rules of Medical Liability Since the Patient’s Rights Law of March 4, 2002*, 86 Chi.-Kent L. Rev. 1093, 1112–1114 (2011); R. Goldberg,

complement the parties' submissions by appealing to common sense notions about how events connect one to the other,⁷⁸ or by referring to presumptions establishing prima facie relationship between facts,⁷⁹ or by relying on a (dis)proof of causation by exclusion of any other possible explanation of the events.⁸⁰ In light of the peculiarities of each case, judges may raise or lower the standard of proof, requiring incontrovertible certainty of the facts alleged, or contenting themselves with a less stringent demonstration of what happened.⁸¹ When circumstances so mandate, courts may even go so far as to shift the burden of proof from the party who would have borne it according to ordinary rules to the other.⁸² In all these situations, it is the context of each case that determines whether and to what extent rules on evidence and standard of proof of causation may deviate from those normally applicable. Once again, flexibility and context dependency are key to understand operative rules about causation in tort.

8. DUAL CAUSATION?

We have so far referred to causation in the singular. What we need to add to the picture is that all Western countries acknowledge a fundamental divide running through the causal inquiry, and breaking it down into two different sub-species of investigation. Neither the practice of splitting the causal connection nor the meaning assigned to the division, however, is homogeneously distributed across Western legal systems.

Let us start with the rate of recurrence of the distinction. At one extreme, we find French law, where the separation between the '*lien entre le fait du défendeur et le dommage initial*' and the '*lien entre le dommage initial et ses conséquences ultérieures*' is only seldom mentioned in the literature and in the case law.⁸³ At the other extreme,

Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability, Hart, 1999, 122–127; W. Mummenhoff, Erfahrungssätze im Beweis der Kausalität, Heymann, 1997, 44, 47.

⁷⁸ H.L.A. Hart and A.M. Honoré, Causation in the Law, 18; P. Trimarchi, Causalità e danno, 7, 115.

⁷⁹ S. Galand-Carval, Aggregation and Divisibility of Damage in France: Tort Law and Insurance, in K. Oliphant (ed.), Aggregation and Divisibility of Damage, Springer, 2010, 143, 154–155; Restatement of Torts, 3d, PEH, § 28, cmt. B; S. Hedley, Negligence: Causation and Damage, in K. Oliphant (ed.), The Law of Tort, 2nd ed., Butterworths, 2007, 782, 783, 784–785; E. Pawloski, Der prima-facie-Beweis bei Schadensersatzansprüchen aus Delikt und Vertrag, Schwartz, 1966, 13 f.

⁸⁰ C. Quézel-Ambrunaz, Essai sur la causalité, 253–254; T. Weir, Recent Developments in Causation in English Tort Law, in Mélanges Blanc-Jouvan, Société de législation comparée, 2005, 887, 894 f.; W.P. Keeton (ed.), Prosser and Keeton on the Law of Torts, West, 1984, 269.

⁸¹ I. Giesen, The Burden of Proof and Other Procedural Devices in Tort Law, in H. Koziol and B.C. Steininger (eds), European Tort Law Yearbook 2008, Springer, 2009, 49, 54.

⁸² E multis, in Europe, C. von Bar, The Common European Law of Torts, OUP, 1998, I, 491–492; as to North America, A.M. Linden and B. Feldthusen, Canadian Tort Law, 8th ed., Butterworths, 2006, 118; K.S. Abraham, Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform, 73 Va. L. Rev. 845, 861 (1987).

⁸³ G. Viney and P. Jourdain, Les conditions de la responsabilité, 197.

the frequency with which German scholars and judges split causation into *'haftungs-begründende Kausalität'* and *'haftungsausfüllende Kausalität'*⁸⁴ is second only to that with which the Anglo-American context differentiates 'cause in fact' from the 'remoteness of damage' issue (England)⁸⁵ and '(f)actual cause' from 'proximate cause' (United States).⁸⁶

These partitions carry meanings which only partially overlap with one another. In continental Europe, it is often said that the first segment of causation ties the tortfeasor's act to the victim's injury, while the second brings together the injury and the damages that stemmed from it.⁸⁷ The explanation coexists with, and is sometimes substituted by, a different interpretation, where the first type of causation centres on whether the defendant's activity is a but-for condition of the plaintiff's loss, and the second type of causation comes into play, if the test is satisfied, to verify whether the activity may be considered the cause of the harm also from the legal point of view.⁸⁸ The latter reading is very close to the common law distinction between the cause in fact/(f)actual causation stage and the remoteness of damage/proximate cause phase. Here, the first step of the causation analysis focuses on whether the defendant's activity has factually caused the plaintiff's loss, whereas the second step – to be performed only if the answer to the preceding question is in the affirmative – evaluates the closeness of the connection and the reasons for awarding/denying compensation.⁸⁹

Their success and meaning aside, the distinctions just mentioned lend themselves to a variety of uses. Where recourse to jury trial in tort law was or is still widespread, as in the common law context, the partition between factual causation and proximate cause turns out to be somewhat useful in distributing the work between the judge and the jury, insofar as issues of law are always for the judge, while factual issues are for the jury whenever reasonable people could differ as to what the material facts of the case are.⁹⁰ In many countries, the divide between (f)actual and legal/proximate causation overlaps with the distinction between issues of facts and issues of law – that is, with the distinction which determines the conditions under which, and the extent to which, upper courts may review lower courts' decisions pertaining to causation.⁹¹

⁸⁴ U. Magnus, Causation in German Tort Law, 63 f.

⁸⁵ T. Weir, Recent Developments in Causation in English Tort Law, 887–889.

⁸⁶ L.N. Klar, Tort Law, 428–429; J.A. Page, Torts. Proximate Cause, VII, 3, 5 f.; H.L.A. Hart and A.M. Honoré, Causation in the Law, 85 f. In the U.S., many scholars, including those who drafted the third edition of the Restatement of Torts, prefer the expression 'scope of liability' over that of 'proximate cause': see Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Chapter 6, 'Scope of Liability (Proximate Cause)' (2010).

⁸⁷ See the authors mentioned above, fn. 83–84. This view is not entirely unknown to common law jurisdictions: see K. Oliphant, The Nature of Tortious Liability, in id. (ed.), The Law of Tort, 1, 15; and R.W. Wright, The Grounds and Extent of Legal Responsibility, 40 San Diego L. Rev. 1425, 1445–1446 (2003).

⁸⁸ C. von Bar, The Common European Law of Torts, OUP, 2000, II, 437 f.

⁸⁹ K. Oliphant, The Nature of Tortious Liability, 15.

⁹⁰ W.P. Keeton (ed.), Prosser and Keeton on the Law of Torts, 319–321. Yet it is always up to the judge to reconstruct the case, to disentangle factual from legal questions and to determine which assessments of facts are complicated enough to fall under the jury's responsibility: J.C.P. Goldberg, A.J. Sebok and B.C. Zipursky, Tort Law, 284.

⁹¹ M. Infantino, La causalità nella responsabilità extracontrattuale, 45–48.

Moreover, in jurisdictions where causation is conceived as a dual element, it is often stressed that different evidentiary rules apply to each component. Whereas the first branch of the causal inquiry requires (at least in theory: see above, section 7) full proof of the connection between the defendant's activity and the plaintiff's injury, this standard of proof can be relaxed with regard to the second species of causal relationship, which is often subject to the evidentiary criteria applicable in the appreciation and quantification of the loss.⁹²

Against this picture, the comparative law issue to be highlighted is neither the divergence between civil law and common law countries' views about the two-stage distinction, nor the multiplicity of uses to which the distinction leads. What deserves attention are the countless occasions on which the partition is ignored, manipulated or mixed up by courts and scholars, depending upon the necessities of each case.⁹³ Indeed, the boundary between the last event attributable to the defendant and the first of the harmful consequences it has generated, as well as the divide between factual appreciations and policy considerations, is far from being a bright line observable in each and every tort case. In many instances, efforts to split the causal inquiry into two fragments, one focused on causation as a requirement for liability and the other centred on causation as the factor determining the amount of compensation, would be in vain, for, as Viscount Simonds put it in *Wagon Mound No. 1*, 'liability is in respect of that damage and no other'.⁹⁴ Similarly, it is the very idea of isolating issues over cause in fact/(f)actual cause from issues of remoteness of damage/proximate cause that frequently appears ill-founded. Such an idea reflects the misleading impression that the first stage of inquiry is simply technical or evidentiary, while the second is truly legal and fuelled by policy-based arguments. Misleading impression because every phase of the causal investigation is normally guided by appreciation of both the facts under examination and the policy-based perspectives raised by the circumstances.⁹⁵

This is not to say that dividing the different stages of the causal inquiry is always unnecessary, or impracticable. There are instances in which distinguishing factual from legal causation, or issues over cause in fact/(f)actual cause from issues of remoteness of damage/proximate cause, is possible and useful, in theory as in practice. Rather, all the above is a reminder that in many cases there is no point in trying to separate the different levels, for what should be the purpose of one kind of causation is often performed by the other. As with regard to causation assessments in general, the alleged binary nature of the causal investigation is to be appreciated flexibly, and against the actual role that it is called to play in the specific conflict at stake.

⁹² Compare J.C.P. Goldberg, A.J. Sebok and B.C. Zipursky, *Tort Law*, 221 f. and 268 f.; U. Magnus, *Causation in German Tort Law*, 64; S. Galand-Carval, *Causation in French Law*, 56–57; S. Deakin, A. Johnston and B. Markesinis, *Tort Law*, 249 ff., 266 ff.

⁹³ A.M. Honoré, *Causation and Remoteness*, 20.

⁹⁴ *Overseas Tankship Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound no. 1)*, [1961] 2 WLR 126, per Viscount Simonds; but see also U. Magnus, *Causation in German Tort Law*, 63–64; P. Widmer, *Causation under Swiss Law*, 106.

⁹⁵ J. Stapleton, *Factual Causation*, 38 *Fed. L. Rev.* 467 (2010).

9. CONCLUSION

Causation in Western tort law is a fascinating subject for the comparativist. The study of theories and rules of causation – of the reasons for their establishment and applications, of the motives underlying their successes and failures, of the geographical breadth of their circulation – offers a mirror where macro-features of Western cultures of tort law clearly emerge.⁹⁶

Through this mirror, one can for instance detect scholars' trans-systemic striving for limiting the social costs of direct experimentation before the courts, by proposing and refining all-embracing, scientific-sounding theories and rules to solve problems of causation. In the mirror of the circulation that some of these scholarly models have enjoyed, one can see the migrations of legal thought throughout the world, the contexts of these migrations, the 'mixtures' to which they gave rise. But in the same mirror one can also perceive, underneath the veil of universal theories and rules, the trans-systemic efforts of the courts to base judgments on causation on the balancing of the interests involved in each tort law conflict – a tendency which confirms tort law adjudication as the paradigmatic decentralized place where Western 'mixed' societies make their collective choices.⁹⁷

⁹⁶ See, for instance, A.M. Honoré, *Causation and Remoteness*, 1 ff.; more recently, M. Infantino, *La causalità nella responsabilità extracontrattuale*, passim.

⁹⁷ G. Calabresi, *Torts—The Law of the Mixed Society*, 519 ff.