

4.F.8.

CAUSATION

Cass. civ. 2e, 20 June 1985¹³⁴
Ghigo v. Surdin

4.F.8.

CERTAIN CAUSAL LINK

Sent home barefoot

The causal link between the conduct of the alleged tortfeasor and the harm to the plaintiff must be certain.

Facts: The plaintiff, a teenager, was caught committing theft in the defendant's store. As a form of punishment, the defendant sent her home barefoot. The plaintiff was so psychologically disturbed by the events that, upon arriving at her home, she jumped out of a window, inflicting grave injury upon herself. She and her parents sued the defendant for the resulting damage.

Held: The court of first instance rejected the action. The court of appeal reversed and allowed the action. The Cour de cassation quashed the decision of the court of appeal and remitted the case to a lower court.

Judgment: "... [The court of appeal] held the defendant—at least partly—liable under Art. 1382 C.civ., after it found that he was at a fault in seeking to bring the theft to the attention of the parents through a course of action which humiliated [the plaintiff] and was inappropriate under the circumstances. It found that the fault of the defendant had contributed, together with the age of the plaintiff and her strict family environment, to affect her seriously enough to cause her to act as she did.

In relying on such a reasoning, from which it is not clear that the fault of the defendant had contributed with certainty to the realization of the injury for which compensation was claimed, the court of appeal failed to give a legal basis to its decision."

Notes

(1) In the annotated judgment, the Cour de cassation quashed the judgment of the court of appeal on the basis that it had not been shown with certainty that the fault of the shopkeeper in imposing a humiliating punishment on the plaintiff was the cause of the plaintiff's actions. Here as well, the judgment is fairly terse and does not give much insight into the reasoning which may have led the court to its conclusion.

It appears that the court of appeal had identified as causes of the plaintiff's actions, together with the acts of the shopkeeper, her strict family environment and her age, and had not gone further into which of these causes had really contributed to the damage. In other words, the Cour de cassation was not satisfied that the punishment inflicted by the shopkeeper was really a *conditio sine qua non* of the plaintiff's conduct ("but for" test).

(2) In affirming that the causal link between the harm and the allegedly faulty conduct must be certain, the annotated judgment actually reaffirms the applicability of the equivalence theory under French law: the alleged fault must be such that the harm would not have occurred but for it.¹³⁵ However, as will be seen in the next sections, under French law,

¹³⁴ Bull. civ. 1985.II.125. Translation by Y. P. Salmon.

¹³⁵ French doctrine generally agrees with this position: Viney and Jourdain, *Conditions* at 169, para. 353; Jourdain at 160/6, para. 22; Starck, Roland and Boyer at 449, para. 1089; Le Tourneau and Cadet at 271, para. 828.

GENERAL APPROACH

[4.1]

the impact of the requirement of causation must be certain is softened by a series of exceptions:

- first, evidentiary rules allow plaintiffs to overcome difficulties in establishing the certainty of causation;¹³⁶
- secondly, even where there is uncertainty as to the causal link, the concept of *perte d'une chance* can be used in a number of cases to characterize the harm in such a way that such uncertainty is overcome;¹³⁷
- thirdly, in cases where the actual identity of the wrongdoer is uncertain, a number of means have been devised to avoid that liability would be denied because of that uncertainty.¹³⁸

Cass. civ. 2e, 20 December 1972¹³⁹
Pagani v. Zucchini

4.F.9.

EXPLANATORY/ADEQUACY THEORY

Explosives in the shack

The conduct of the alleged tortfeasor must be at the origin of the harm for there to be a causal link between the two.

Facts: The plaintiff, a child, stole explosives from a shack belonging to the defendants, and injured himself while playing with them. The shack was not locked and was left in a state of disrepair such that it was possible to enter it at will. It had not been established how and by whom the explosives were placed in the shack. The plaintiff sued the defendants for the resulting damage, on the basis that they were at fault in failing to keep a proper watch over their shack and its contents and ensure that it was not freely accessible.

Held: The court of first instance rejected the claim. The court of appeal reversed the judgment of the court of first instance and allowed the claim. The Cour de cassation quashed the judgment of the court of appeal and remitted the case to a lower court.

Judgment: "In holding the defendants partly liable under Art. 1382 C.civ., the [court of appeal] took note of the state of disrepair of the shutter of the shack window and did not overlook that the detonators might have been left in the shack without the knowledge of the defendants. It [went on to] state that it did not matter that the origin of the explosives could not be established, since the defendants failed to watch over their shack and the things which may have been within it and failed to preclude access by third parties *efficiently and under normal conditions*. [For the court of appeal,] those failures constituted a fault and made the defendants liable; the plaintiff also contributed to the realization of the injury through his fault in manipulating the explosives.

However, there is no causal relationship between the injury which forms the basis of the claim and the alleged cause, that is to say the opportunity given [through the fault of the defendants] for a third party to leave the explosives [in the shack] and for the plaintiff to remove them.

It follows from the above that in holding as it did, the court of appeal contravened Article 1382 C.civ."

¹³⁶ See *infra*, 4.F.20.-22. and notes thereafter.

¹³⁷ See *infra*, 4.F.15.-17. and notes thereafter.

¹³⁸ See *infra*, 4.F.42. and notes thereafter.

¹³⁹ JCP 1973.II.17541. Translation by Y. P. Salmon.