



Some Problems Raised by the *Condictio Sine qua Non* and Adequate Causation Theories in Civil Liability

Algunos problemas que plantean las teorías de la equivalencia de las condiciones y de la causalidad adecuada en la responsabilidad civil

CRISTIÁN AEDO BARRENA*

RENZO MUNITA MARAMBIO**

Abstract

In this work we intend to highlight some questionings regarding the application of the theory of the equivalence of the *condictio sine qua non* as well as the theory of adequate causation in the resolution of complex causal issues. These complex issues involve factual characteristics that do not allow determining harmful effects for later qualifying them as damages (at least from a sensible sense of justice). Regarding the first theory, it is stated that since there are damages whose origin can only be attributed to omissions, the causal approach of mental suppression loses relevance; The same thing happens in contexts of alternative or hypothetical causation, in which it is essential to resort to statutory criteria to respond to these complex issues. Regarding the latter theory, it is argued that it reveals complexities, mainly its connection with foreseeability, which can be seen both in the context of the *an debeat* and of *quantum respondentur*, which are part of the stages of any liability judgment. This occurs when determining the scope of those who are deemed liable. In this latter case the distinction between adequate causation and negligence is not really appreciated; the same occurs in the determination of damages; if this latter theory were followed, the principle of comprehensive damage provided for by our legal system would be violated, at least for non-contractual liability, in accordance with the provisions of article 2329 of the Civil Code (CC).

Keywords: *condictio sine qua non*, adequate causation, regular causation, predictability, probability.

* Universidad Católica de la Santísima Concepción, Chile (caedo@ucsc.cl). ORCID: <https://orcid.org/0000-0003-0556-0632>. Article received on June 14th, 2022, and accepted for publication on September 7th, 2022. Translated by Fluent Traducciones. This article is part of Regular Fondecyt project No. 1231292, titled “El riesgo como elemento articular de la responsabilidad civil extracontractual”, in which Cristián Aedo Barrena is the main researcher and Renzo Munita Marambio is the co-researcher; Regular Fondecyt project No. 1220697, titled “Criterios de distinción entre obligaciones resarcitorias e indemnizatorias en situaciones extra contractuales de intromisión en derecho ajeno”, in which Cristian Aedo Barrena, is a co-researcher; and of the Initiation to Research Fondecyt project No. 11190188, titled “La creación de riesgo no permitido como solución normativa causal en la causalidad difusa y alternativa en el ámbito sanitario: una propuesta para el sistema chileno”, in which Renzo Munita Marambio is the main researcher.

** Centro de Derecho Regulatorio y Empresa, Universidad del Desarrollo, Chile (renzomunita@udd.cl). ORCID: <https://orcid.org/0000-0003-2156-1416>.

How to cite this article:

AEDO BARRENA, Cristián & MUNITA MARAMBIO, Renzo (2023). “Some Problems Raised by the *Condictio Sine qua Non* and Adequate Causation Theories in Civil Liability”, *Latin American Legal Studies*, Vol. 11 N° 1, pp. 297-352.

Resumen

En este trabajo se pretenden poner en relieve algunos cuestionamientos a la aplicación de la teoría causal de la equivalencia de las condiciones como de la causalidad adecuada en la resolución de asuntos causales complejos, entendiendo por ellos aquellos en los que la condición en análisis no revela en sí misma la nocividad suficiente para ser tenida como origen del agravio, al menos desde un sensato sentido de justicia. Respecto de la primera, se afirma que al existir daños cuyo origen no pueden sino ser atribuidos a omisiones, el planteamiento causal de la supresión mental pierde relevancia; ocurriendo lo mismo en contextos de causalidad alternativa o hipotética, en los que resulta indispensable recurrir a criterios normativos. A propósito de la segunda, se sostiene que esta revela complejidades, principalmente en el entendido de su vinculación con la previsibilidad, lo que se aprecia tanto en el contexto del *an debeat*, como del *quantum respondetur*, etapas de todo juicio de responsabilidad. Así ocurre en la determinación de la órbita de responsables, ya que no se aprecia en realidad cuál es la distinción entre causalidad adecuada y culpa; como en la referente a la órbita de daños, pues de seguirse aquello se infringiría el principio de la reparación integral del daño que contempla nuestro ordenamiento, al menos para la responsabilidad extracontractual, en atención a lo dispuesto en el art. 2329 del CC.

Palabras clave: *equivalencia de las condiciones, causalidad adecuada, regularidad causal, previsibilidad, probabilidad.*

INTRODUCTION AND PLAN

Everyone knows that causation is one of the most complex conditions of civil liability. In this sense, one of its obscurities can be addressed by analyzing the way in which causation is theoretically explained. In this regard, both the theory of *conditio sine qua non* and the theory of adequate causation stand out, which are precisely criticized for the way they address causal connections.¹

In relation to the foregoing, it is worth mentioning that the Chilean legislator, in addition to not defining causation, does not take sides with any theoretical approach related to the explanation of causal connections. This statutory situation forces the courts of justice to decide on one of the two theories when solving specific cases. However, as will be explained, these legal theories do not provide exact answers to factual situations. Instead, they help determine the general laws for groups of situations. In turn, the law focuses on the factual connections of a fact in particular.²

¹ In connection with the problem described and as seen in criminal proceedings: ROXIN (1997), p. 346; CASTALDO (2008), p. 27-38. In civil proceedings, noting the complexity of the requirement and citing relevant legal opinion: MUNITA (2022), p. 226; TRIMARCHI (1967), pp. 5-6; 32-33, notwithstanding the one that will be cited in this work for the specific problems.

² See HART & HONORÉ (2002), pp. 10-12. In the same vein, QUÉZEL-AMBRUNAZ (2010), pp. 59-60, 176-177.

In a comparative perspective, the French reform project to the civil liability statute of March 2017 lacks further explanations in this regard. Indeed, article 1239 of the reform project establishes the following: “La responsabilité suppose l’existence d’un lien de causalité entre le fait imputé au défendeur et le dommage./ Le lien de causalité s’établit par tout moyen”, which leads Bicheron to affirm that: “la haute juridiction continuera-t-elle à appliquer l’une ou l’autre théorie, au gré de sa politique jurisprudentielle, ce qui ne remplit pas l’objectif de prévisibilité et donc de sécurité juridique annoncé par le garde de Sceaux.”³

Nonetheless, a different approach is adopted by the Belgian reform project, since it is based on a causation logic that is identified with the equivalence of conditions, particularly in article 5162, where it provides a rule that indicates the following: “Tel est le cas lorsque le dommage ne serait pas survenu sans ce fait”; said criterion also warns of a correction according to the provisions of article 5,163 regarding Concours avec des causes suffisantes, which orders: “Un fait générateur de responsabilité qui serait une cause du dommage si un ou plusieurs autres faits générateurs qui constituent eux-mêmes une cause suffisante du dommage n’étaient pas survenus, est considéré comme une cause de celui-ci.”⁴

Thus, the purpose of this work is to analyze the main objections with which the theories described above are criticized. Accordingly, the work begins with the factual approach of the equivalence of conditions **(I)**; and culminates with comments on the statutory formulation of the theories with a focus on adequate causation **(II)**.

I. CONDUCTIO SINE QUA NON

1.1 Traditional formulation of the theory

The approach is based on the reflections of Von Buri and Mill, and in general terms, implies attributing an identical causal relevance to any of the links or conditions that caused the harmful effects, in such a way that each one of them is considered as a necessary cause of the damage.⁵

³ BICHERON (2016), p. 74. See the *Project de Reforme de la responsabilité civile* to the *Code Napoleon*, from 2017. The civil liability reform project introduces a title II related to civil liability (it contains a joint treatment of contractual and non-contractual liability) in the new articles 1232 to 1299-3 (in total, 80 articles). The reform, therefore, transits from a historical tradition of brief regulation (of 5 provisions and great caselaw development) to a very broad regulation.

⁴ *Avant-Projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil* from 2018. For an analysis of the Belgian civil liability system, see COUSY & DROSHOUT (2005), pp. 27 *et seq.*

⁵ Mill develops his causation theory as the axis of his inductive logic. Mill considers that causation implies that there is a multiplicity and combination of phenomena and facts, a meeting of circumstances, positive and negative. See MILL (1860), p. 346. Regarding Von Buri, he considers that causation is represented by the sum of conditions that generate an event. His arguments on causation are found in VON BURI (1873), pp. 1-2. Von Buri considers that causation is determined by the sum of all the forces: “Unter Causalzusammenhang wird man wohl den Proceß der Entfaltung einer Erscheinung begreifen dürfen. Will man den Causalzusammenhang einer concreten Erscheinung ermitteln, so muß man in geordneter Reihenfolge sämtliche Kräfte feststellen, welche für die Entfaltung der Erscheinung irgend eine Wirksamkeit geäußert haben. Die ganze Summe dieser Kräfte ist dann als die Urfache der Erscheinung anzusehen. Mit demselben Rechte läßt sich aber auch jede einzelne

As Barros expresses, among the multiple conditions that contribute to a result, all must be considered necessary for the production of the same, even if separately considered are not capable of producing the harmful effect.⁶ In this way, the necessity of the condition is determined by a test where facts are hypothetically suppressed: we must evaluate if, after mentally suppressing the condition, the damage would not have occurred.⁷ The idea of necessity, as Castresana explains, derives from the philosophical foundation of the theory, in the sense that the causal connection is a necessary element between two facts, insofar as it belongs to the world of the laws of nature, which in turn is inferred by thought.⁸

Although the theory of the *conditio sine qua non* and its test operates in the case of liability for negligence, and strict liability, regarding liability arising from negligence, the necessary cause is inferred from the negligent act to the extent that there is an intimate connection between the negligent act and the cause.⁹ In this way, the question of negligence is not separated from causation. Traditional French legal opinion analyzes the causal connection between the conduct of an individual and the damage from the point of view of negligence. By way of analogous reasoning, the factual stand point of the victim is also a causal problem, provided that negligence is determined as one the causes of the damage.¹⁰ Accordingly, the

diefer Kräfte für sich allein schon als die Urfache der Erscheinung betrachten, denn die Existenz derselben hängt so sehr von jeder Einzelkraft ab, daß, wenn man aus dem Causalzusammenhang auch nur eine einzige Einzelkraft ausscheidet, die Erscheinung selbst zusammenfällt. Es verleiht daher jede Einzelkraft der, wenn man von ihr abieht, todten Masse aller übrigen Einzelkräfte erst die Lebenskraft, es macht jede Einzelkraft alle übrigen causal.”

⁶ BARROS (2020), p. 396. See also BARAONA (2008), pp. 61-63; BARCELONA (2012), pp. 127-128; MAZEAUD *et al.* (1977), t. 2., vol. II, p. 18; PREVOT (2010), p. 164; ROXIN (1997), p. 347; VISINTINI (2019), p. 408.

⁷ BARROS (2020), p. 396; BIANCA (2012), p. 143; SALVI (2019), p. 235; PUPPE & WRIGHT (2017), p. 36; TRIMARCHI (2019), pp. 453-455; YZQUIERDO (2019), p. 215. By way of illustration, it is relevant considering what the Court of Appeals of Rancagua ruled in *Peña y Campos con Hospital Regional Rancagua* (2020). The court provided the following: “11th. That, as the highest court ruled, in order to account for liability arising from public services not delivered properly, it is necessary that between said nonperformance and the damage produced there is a causal connection, which requires a necessary and direct relation. Accordingly, it has been held that a fact is a necessary condition for a certain result when, had it not existed, the result would not have occurred either”; Paragraph 12th provided the following: “In this case, according to the death certificate and lethal mortality statistics attached to the proceedings, issued on February 24th, 2015, it is established that the immediate cause of death of the patient L.F.P.S. was a multiorgan failure, which was caused by urosepsis, which, in turn, is a consequence of the treatment arising from a complicated TBI. In other words, according to the precise terms of the aforementioned official certificate, issued by the Civil Registry and Identification Service, it is concluded that it was the urosepsis that produced the multi-organ failure that caused death, which is a urinary tract infection that, as was already analyzed, was caused by public services not delivered properly by the hospital (defendant). This deficient provision of public services consisted in use of a prolonged urinary catheter (CUP) without having the prior medical personnel authorization to verify the prevention and control measures established in the protocols and regulations that govern the matter.”

⁸ CASTRONOVO (2018), pp. 356-357.

⁹ For Chilean Law, see BARAONA (2008), p. 64; DOMÍNGUEZ ÁGUILA (2001), pp. 13 *et seq.*; SAN MARTÍN (2018), pp. 50-51.

¹⁰ In this regard, MAZEAUD *et al.* (1977), pp. 1-2: “In order to enforce the civil liability of the defendant, the plaintiff will not be released of proving other situations by the fact of having suffered damages or accrediting that the act was committed negligently by the defendant. A third and final requirement must be met: the existence of a cause-effect connection between the negligence and the damage: it is specified that the damage suffered is the consequence of the negligence committed.” It also regards an approach to the continental legal

traditional Chilean legal opinion, led by Alessandri, when analyzing causal connections, considers that causation is configured when negligence or willful misconduct can be connected with the harmful result.¹¹ In this way, causation is inferred from negligence or willful misconduct, not based on mere conduct.¹²

In the case of strict liability,¹³ the test where facts are suppressed hypothetically can also be performed. Accordingly, the necessary cause can be determined from the behavior. Such behavior must then be analyzed according to the applicable legal figure in order to comply with what is demanded from these types of provisions.¹⁴

Regarding its statutory characteristics, it can be seen how the theory of *condictio sine qua non* requires discriminating different factual causations. Beyond proximate causation¹⁵ (understood as a criterion of causal connections) or the proportion in uncertain causal connections, we are interested in referring to the internal limitation of the theory itself. Similarly, we are concerned on addressing legal professionals who must consider within the range of conditions which in their opinion seems more relevant than others at the time of accrediting or not causation.

In this sense, it should be kept in mind that within the framework of Anglo-Saxon legal systems, in which the logic of the *condictio sine qua non* is identified with the criterion

system, which can be seen in several systems, INFANTINO & ZERVOGIANNI (2017), pp. 592-593. For the Anglo-Saxon system, see CANE (2003), p. 120; GREEN (2017), p. 8-9; PUPPE & WRIGHT (2017), p. 36-37.

¹¹ ALESSANDRI (2005), pp. 174; 176: “In order for an individual to be held liable (subject to criminal or quasi-delict liability) for a fact or omission committed by it, the circumstance of having been committed with willful misconduct, negligence or even not causing damages is not enough to attribute any type of liability. It is necessary that between the willful misconduct or negligence, on the one hand, and the damage, on the other, there is a causal connection, i.e., damage must be a consequence or effect of that willful misconduct or negligence (...) Criminal or quasi-delict liability gives rise to compensation when damage can be attributed to the willful misconduct or negligence of its author.”

¹² The treatment is explained in part by the lack of development of a behavioral theory. Alessandri, for example, does not consider behavior (action or omission) among the requirements of liability; to the contrary, such issues related to behavior are associated, precisely, with negligence and willful misconduct. In effect, the treatment of both the omission and commission are relegated to negligence. See in this regard, ALESSANDRI (2005), pp. 143-146.

¹³ Faced with the development of a certain activity, we would be facing strict liability as long as all the risks are assumed by the author of the damage; while the victim does not have the possibility of assuming care measures or these are marginal. See BASOZABAL (2015), pp. 56-57; PAPAYANNIS (2012), pp. 704-705. For Chilean Law, PINO (2011), p. 23. This explains why strict liability is enshrined precisely in activities in which the potential risk is inherent to the activity, or in activities involving abnormal or dangerous risk. See BARROS (2020), pp. 475 *et seq.*; BIANCA (2012), pp. 688-689; CASTRONOVO (2018), pp. 454-455; REGLERO (2008), pp. 2283-2285; VINEY (2008), pp. 7 *et seq.* This is enshrined, for example, in the Principles of European Law on Civil Liability from 2005. The fundamental provision, article 1:101. As noted by BASOZABAL (2015), p. 56, dangerousness implies that the potential damaging party cannot avoid the damage, even if it takes reasonable care measures. However, the figure of abnormal risk or dangerous activity has been questioned as a confusing or misleading category, considering that it would involve liability for negligence. In such cases, evidence accrediting the breach of diligence is not needed. In this regard, CASTRONOVO (2018), pp. 455-456; MUNITA (2019), pp. 137-142.

¹⁴ BASOZABAL (2015), pp. 82-85; MELCHIORI (2020), p. 51.

¹⁵ For this issue, see especially AEDO (2018), pp. 394-401; AEDO (2020), pp. 118-119.

called *but for test*,¹⁶ some authors have proposed introducing criteria to discriminate between necessary conditions, from those that can be qualified as remote.¹⁷

Indeed, legal opinions that stand for the *but for test*, or the *sine qua non* criteria can operate if, among the necessary but not sufficient conditions, the defendant's conduct can be isolated to explain the harmful result. However, the criterion faces problems in connection with causal overdetermination, *i.e.*, when the various conditions can independently explain the result.¹⁸ For example, the tremors cause flooding because they generate cracks in the dikes; that requires an explanation. Indeed, we must acknowledge that a tremor (as an isolated condition of the damage caused) is an insufficient cause, since the fissure in the dam is not capable of generating the flood by itself; it is necessary that other conditions or variables contribute to the result. Thus, all of said conditions or variables configure a criterion of causal regularity, namely: construction material of the dam, intensity of the tremor, cubic meters of water. Therefore, under this criterion of causal regularity, the tremor can be effectively understood as a necessary condition of the damage, because without it, the other conditions are not sufficient for the occurrence of the flood.¹⁹

To tackle this problem, Hart and Honoré proposed the test called NESS (necessary element of a sufficient test), *i.e.*, a cause will be deemed a necessary condition within a set of sufficient conditions to produce a result.²⁰ For Wright, the idea of causation is constructed in the same way as regularity parameters: "A fully specified causal law or generalization would state an invariable connection between the cause and the consequence: given the actual existence of the fully specified set of antecedent conditions, the consequence must follow. In other words, the fully specified set of antecedent conditions is sufficient for the occurrence of the consequence";²¹ then, supplementing the indicated point of view, the author provides the following: "The essence of the concept of causation under this philosophic account is that a

¹⁶ In this regard, see GREEN (2017), p. 9; PUPPE & WRIGHT (2017), pp. 34-35.

¹⁷ HONORÉ (2015), p. 1486: In this line, Honoré formulates a clarifying illustration: "Even supposing that the alleged cause constitutes the adequate condition for obtaining the result (for example, a necessary condition), liability cannot be extended indefinitely. A physician cannot be held liable for the death of a child, which has been born through said physician's failure to prescribe an effective contraceptive to the mother. Some consequences are too remote. How can we define the appropriate criteria to limit remote consequences?"

¹⁸ In the same sense, BANFI (2017), p. 735; BÁRCENA (2013), p. 160; FUMERTON (2003), p. 1275; MOORE (2003), pp. 1189-1190; MOORE (2011), p. 144; PUPPE & WRIGHT (2017), pp. 37-38.

¹⁹ According to Mackie, the foregoing can be explained as follows: "That is, what is typically called a cause is an inus condition or an individual instance of an inus condition, and it may be a state rather than an event. A regularity theory that is to have any chance of being defended as even a partial description of causation in the objects must deal in regularities of this complex sort. And such a theory has considerable merits. It seems quite clear that there are many regularities of succession of this sort, and that progress in causal knowledge consists partly in arriving gradually at fuller formulations of such laws." And further down he states: "We do not know the full cause of death in human beings, but we do know, about each of a considerable number of items, that it is an inus condition of death, that, as we ordinarily say, it may cause death." MACKIE (2002), pp. 64; 66.

²⁰ HART & HONORÉ (2002), pp. 106 *et seq.* In HONORÉ (2013), p. 1075, he indicates what is to be understood, for the purposes of the theory by necessary condition: "A condition can be necessary only in the sense of constituting an element within the group of jointly sufficient conditions for the production of a consequence. The condition is necessary because it is required to complete this set of consequences."

²¹ WRIGHT (1985), p. 1789; WRIGHT (1988), pp. 1021 *et seq.*

particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.”²² Accordingly, Moore also supports this same causal regularity to build the causal connection between antecedent and consequent conditions.²³ Also in the same context, we must cite Mackie, who calls INUS (Insufficient but Necessary part of an Unnecessary but Sufficient) to that condition that, despite being insufficient (when isolated), is a necessary element for the production of damage if it is part of a group of conditions that taken together are regularly sufficient to cause said damage.²⁴

We must note that the explanatory statement of the Belgian reform bill expressly refers to the INUS criterion as well as to the NESS.²⁵ This reveals that the Belgian authority

²² WRIGHT (1985), p. 1790. The separation between Hart and Honoré and Wright is stated, albeit hesitantly, by HONORÉ himself (2013), p. 1077, based on the following considerations: “Perhaps this idea differs from our position in one aspect. Wright seems to require that all the conditions belonging to the set thereof be antecedents of the result, whereas it seems to me that in order for those conditions to be sufficient some of them must persist until the result occurs. An example of this is the condition of an icy road as a factor in a traffic accident. This difference of opinion, if indeed there is one, does not affect the value of the NESS test, which is widely accepted by tort theorists.”

²³ MOORE (2003), p. 1198.

²⁴ MACKIE (2002), p. 78, points out: “This is true even of physical and mechanical examples. One can judge that this (very hot) stone was cracked by water being poured over it without being committed to any generalization, meaning only that the stone would not in the circumstances have cracked had the water not been poured on, and that this pouring was causally prior to the cracking in the sense explained in Chapter 2. It is, of course, even more obviously true of mental examples; I can judge that Bill’s warning shout made me stop short of the precipice without generalizations of any sort being involved.” HONORÉ (2013), p. 1076. exemplifies Mackie’s approach as follows: “A certain dose of strychnine will produce death given certain physiological conditions of the body, but only (1) in the absence of an antidote and (2) in the absence of some other cause. of death that intervenes before the poison takes effect. The amount of the dose, the physiological conditions of the body, and the absence of an antidote, the absence of some other intervening cause of death, etc., are all INUS members of a group of conditions that together are sufficient to produce death.”

²⁵ It reads in the explanatory statement: “Ces dernières années, cependant, le test de la csqn est mis en doute comme critère de sélection unique et suffisant afin d’établir le lien causal dans le droit de la responsabilité civile. Comme il sera démontré plus amplement dans les commentaires sur l’art. 5.163, le test de la csqn apparaît en effet inadéquat dans certaines circonstances. Ceci est plus particulièrement le cas quand plusieurs faits sont, indépendamment les uns des autres, suffisants pour faire naître le dommage. Supposons qu’un plombier et un électricien, entrepreneurs indépendants, doivent exécuter le même jour certains travaux pour permettre la réception d’une maison en construction. Aucun des deux ne se présente au travail. La réception de la maison n’est pas possible. Est-ce l’inexécution de son obligation par le plombier qui est la cause du dommage ou est-ce celle de l’électricien ? Chacun des deux peut faire valoir que le dommage serait également survenu sans sa faute. Même si le plombier avait achevé son travail, la réception n’aurait pas pu avoir lieu vu la faute de l’électricien. On ne peut donc maintenir que le dommage ne serait pas survenu sans la faute du plombier. Il en va de même pour l’électricien. Le résultat selon lequel aucun des deux ne serait responsable du dommage n’est pas acceptable. Pour remédier à des problèmes logiques de ce genre, d’autres critères sont proposés ou utilisés dans la littérature et dans la doctrine et la jurisprudence étrangères pour remplacer ou compléter le test de la csqn. Parfois on considère comme suffisant qu’un fait ait fourni une contribution substantielle (était un « substantial factor ») à la survenance du dommage. La doctrine de Hart et Honoré et de R. Wright, a été très influente à cet égard, notamment mais pas seulement dans les pays de common law. Wright part de la constatation qu’un dommage n’est pas le résultat d’un seul facteur causal, mais d’un ensemble de circonstances qui, ensemble, sont nécessaires et suffisantes pour sa survenance. Ils en concluent que, en droit de la responsabilité, on doit considérer comme cause chaque événement qui est nécessaire pour former un ensemble d’antécédents qui est

acknowledges its use as an effective tool for the purpose of controlling or avoiding the distortions shown by the equivalence of conditions, which is a universal criterion and commonly used in Belgium and in other latitudes.²⁶ Martín-Casals note the same observation when commenting on the NESS criterion: “Ce test donne une explication plus complète et plus satisfaisante que la *conditio sine qua non*, más n’est utilisé que pour corriger le critère de la *conditio sine qua non*, et non pour la replacer, in raison de son caractère pratiquement universal. For cette raison, l’article 5.163 devrait se terminer en disant, non pas comme il dit maintenant, que le fait générateur dupliqué ‘es considéré comme une cause du dommage’ (...), mais qu’ ‘il est aussi une cause’ du dommage (par application du NESS test).”²⁷

Notwithstanding what has been provided herein, the alleged statutory correctness focused on regularity, in the INUS, NESS, or the predictability as we will return to below, attempt to contain the defects of a theory that does not offer guarantees in all events. This phenomenon has motivated the development of an essentially-normative causation theory focused on the adequacy of events, as we develop below.

1.2 Questionings and corrections

We will refer to three of the points of questioning that the theory in reference displays, namely: counterintuitive nature (1) its broad scope (2) and its insufficiency to provide coherent solutions to special assumptions (3).²⁸

1.2.1 A counterintuitive thesis: the problem of counterfactuals

To tackle this problem, we must bear in mind that, on the philosophical level, and in relation to causation in general, two approaches can be distinguished—which are especially discussed in Common Law—and that translate into important legal theses.

alors suffisant pour expliquer la survenance du dommage (NESS – Necessary Element of a Sufficient Set). La condition INUS (insuffisant but necessary part of a condition which is itself unnecessary but sufficient) a également été présentée comme une alternative au test de la condition sine qua non”, *Avant-Projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil from 2018*, pp. 91-92.

²⁶ This is what follows from the following (also from the Belgian project): “Dans cet avant-projet, on a cependant décidé d’utiliser l’exigence d’une condition sine qua non comme point de départ logique en vue de l’établissement du lien causal en droit de la responsabilité. Celui-ci est universellement reconnu comme utile en Belgique et à l’étranger, dans le domaine contractuel aussi bien qu’extracontractuel, et est bien ancré dans notre jurisprudence et dans la doctrine. Les limites que le concept présente du point de vue logique sont corrigées par l’art. 5.163”, *Avant-Projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil from 2018*, pp. 92-93.

²⁷ MARTÍN-CASALS (2020b), p. 391.

²⁸ For critics in this regard, see ANARTE (2002), pp. 29-40; BÁRCENA (2013), pp. 91 *et seq.*; BARROS (2020), pp. 444-445; BATTISTA (2014), p. 96; CAPECCHI (2012), pp. 160-162; CASTALDO (2008), pp. 21-27; ENGISCH (2008), p. 21; QUÉZEL-AMBRUNAZ (2010), pp. 40-41; REYES (2005), pp. 229-234; ROXIN (1997), pp. 350-351. For Common law matters, see HONORÉ (2002), pp. 94 *et seq.*; WRIGHT (1988), pp. 1020-1022; WRIGHT (2008), p. 1303.

On the one hand, it is considered that causation responds to a linguistic and social construction, and that it has no ontological basis.²⁹ Hart and Honoré, according to said premises, defend a causal construction based on common sense, since there is nothing that causation can tell us, beyond ordinary language.³⁰ On the other hand, Moore has proposed the thesis of causation based on an ontology. For the author, therefore, causation is a metaphysical question, which operates in the world, which is expressed through language, and which has repercussions, in terms of deservedness, on moral and legal liability.³¹ The causes for deservedness, such as probability or others, would not be properly causal, since causation survives separated from the law.³²

From these intellectual constructions, it can be affirmed that the equivalence of the conditions, especially from the test where facts are suppressed hypothetically, has a counterintuitive essence. It is possible to estimate it as such, since it is not clear how, by means of a hypothetical judgement (counterfactual by nature), an ontological causal explanation can be configured. It should be noted that what is relevant in a liability lawsuit should be focused on what actually happened, not the other way around.³³

In this sense, Moore points out the following: “Counterfactuals, given their nature, are difficult to prove with any degree of certainty, because they require the investigator to speculate regarding what would have happened if the accused had not done what he/she made. Suppose a person intentionally destroys a life preserver on a tugboat sailing out to sea. If a crew member falls overboard and drowns, was the defendant’s act of destroying the life preserver a necessary condition of the former’s death? If the life preserver had been there, could anyone have used it?; if thrown far enough or if someone had managed to get it close enough to the victim for her/ to reach him, would this have saved the latter’s life? Frequently, we lack the precise information that would allow us to verify if the intentional act of the

²⁹ This is a formulation that comes from Kant’s transcendental hypothetical judgment. In this scheme of thought, justice will be conceived as refraining from invading the “sphere of freedom” of another. An approach of this type is found, regarding the foundations of the regime, in Weinrib. For Weinrib justice and law (which for him are synonyms), are completely autonomous of any external principle. He adds that the essence of justice, and, consequently, of law, is an immanent rationality, which can take the form of corrective justice or distributive justice. see WEINRIB (2000), pp. 11; 24; WEINRIB (2012), pp. 82 *et seq.*; For this matter, see MILLER (2021), pp. 17-18; WRIGHT (1992), pp. 640-641.

³⁰ This is the position held by HART & HONORÉ (2002), pp. 26 *et seq.* It is undeniable how the debate is connected between the philosophical approaches of Kant, on the one hand, and Hume, on the other. See PONCE & MUÑOZ (2014), pp. 10-17. Precisely, for the analysis of the approach of Hart and Honoré and their connections with Hume’s philosophy, see MACKIE (2002), pp. 118 *et seq.*

³¹ For the relationship between morality and law, especially in the field of civil liability, see CANE (2003), pp. 12-14.

³² MOORE (2011), pp. 325 *et seq.*

³³ As affirmed by SALVADOR & FERNÁNDEZ (2006), 5th paragraph: “The practical problem of this test lies in its counterfactual nature. It requires the court to determine a hypothetical causation: what would have happened if the defendant had not acted as he/she did? What would have happened if he/she had not omitted the behavior that was expected of him/her? These questions pose serious evidence problems.”

accused marked, in this sense, a difference.”³⁴ As Moore says in another work, there is no law that connects the antecedent with the consequent.³⁵

Furthermore, the counterfactual judgment which mentally suppresses conditions faces more problems when it deals with an omission. What is relevant here is the understanding of the nature of causation. In the words of Castronovo, causation has two souls with which it is understood in Western culture.³⁶ Indeed, following Moore,³⁷ if causation is a relation of thought or a category of thought, which subsists only in language and not an ontological category, causation can be affirmed in the omissions, with the application of the theory of equivalence and its hypothetical judgment (in an inverse manner).³⁸ If, on the other hand, causation is an ontological category, the omission cannot be causally linked to the damage caused, since causation is a category of being, and not a relationship of thought.³⁹

1.2.2 *Its broad nature or its inherent generosity*

One of the most repeated criticisms of the theory in question is its excessive scope. In our opinion, this criticism is expressed in two ways. Firstly, we consider that it is a thesis that does not provide the legal certainty that the legal system requires. In this sense, each condition of the network of connections that lead to the damage are perfectly traceable as its cause. Secondly, the proposed thesis is not satisfactory, because if the mechanism involves a total and absolute equivalence of factors, when a judge decides on the issue it will necessarily and arbitrarily focus on one or another of the conditions. Thus, it will ignore the understanding and the purpose of causation as a certain and direct causal relation requirement.

As we have seen, the scope of this theory extends to the point that one cannot discriminate from among the different necessary conditions those that are directly related to the result.⁴⁰ Yzquierdo, for example, on the subject states:

³⁴ MOORE (2011), p. 141. An in-depth treatment of causal counterfactuals, as well as the idea developed by Hume, can be found in MOORE (2003), pp. 1218-1219. In this work, Moore delves into the generalization of counterfactuals, and the need to adapt his concepts to fit the causal relation.

³⁵ MOORE (2003), p. 1198.

³⁶ CASTRONOVO (2018), p. 357.

³⁷ MOORE (2003), pp. 122-1223. Moore warns precisely that this thesis can be supported by Hume's philosophical version (analytical) in the probabilistic perspective of causation.

³⁸ See, AEDO (2020), p. 136; FUMENTON (2003), pp. 1278-1279; GIMBERNAT (2000), pp. 34-35; GIMBERNAT (2018a), pp. 373-376; NAVAS (2015), p. 690.

³⁹ For this matter, AEDO (2020), p. 136; ANARTE (2002), p. 403; CORCOY (2018), p. 394; DE ÁNGEL (1995), pp. 58-59; DÍAZ REGAÑÓN (2003), pp. 20-24; DÍAZ REGAÑÓN (2006), pp. 58 et seq.; GIMBERNAT (2000), pp. 42-43; GIMBERNAT (2018b), pp. 47 et seq.; MOORE (2003), pp. 1223; 1226, who expresses it through a synthetic but accurate formula: “Once one fully appreciates that there is no such thing as a negative event as a particular, that there are only uninstantiated types of events, most of the temptation to regard omissions as causes should evaporate.”

⁴⁰ HART & HONORÉ (2002), pp. 109-110: “In this doctrine as an account of ordinary thought we found three defects. First there are types of causal relation between human actions (e.g., interpersonal transactions and provision opportunities) which require a different analysis. Secondly, even in the common cases of causation to which the main features of Mill's doctrine are applicable, the generalizations implied in singular causal

The criterion is really excessive, not only from the philosophical point of view, but also, and above all, from the legal point of view, because by making the individual liable for all the consequences, conclusions are reached that reason itself cannot admit. For example, according to this theory, in a case involving the negligence of a doctor when treating an injury, the liability would extend not only to the doctor but also to the party that caused the injury; the fortuitous event would not serve as a defense either; the negligence of the injured party itself would not be relevant to mitigate liability, etc.⁴¹

In short, an important sector of legal opinion agrees on the uselessness and excessive scope of the theory,⁴² except for the clarifications that have been introduced in the Anglo-Saxon sphere that, according to our opinion, do not save the theory of the third objection, which we will analyze below.

1.2.3 *The assumptions in which the *condictio sine qua non* theory fails*

There are several cases in which the test where facts are suppressed hypothetically, which suppresses excessive causal concurrence, turns out to be flawed. One can think of projections of hypothetical causation (in which the causal relation that causes the result would not alter the same result that, with a probable possibility or certainty, would have been produced by another cause⁴³) or of alternative causation (involving a situation in which two

statements are not statements of “unconditional and invariable sequence” and the sense in which the cause is sufficient to produce its consequence cannot be defined in this strict way. The generalization involved are statements of general connections between broadly described types of events which are brought to bear on particular cases distinguished from counter-examples in the manner described in Chapter III. Thirdly, “the cause” is not “selected” from a set of jointly sufficient conditions previously identified, but we have come, through experience of counterexamples or with the aid of scientific theory, to identify certain conditions without which our broadly formulated generalization fail but with which they hold good.”

⁴¹ YZQUIERDO (2019), p. 217. In a similar sense, MALAURIE *et al.* (2017), p. 59, they argue that: “elle pousse trop loin les implications de la responsabilité. Retenir toutes les causes tendrait à rendre chaque homme responsable de tous les malheurs qui ravagent l’humanité. Civilement (dans une perspective philosophique ou religieuse, la question est différente) ce n’est vrai, ni possible; quand on est responsable de tout, on n’est responsable de rien (...)”

⁴² See, for example, ROXIN (1997), pp. 350-351, who highlights that it is a useless legal opinion, which does not contribute anything to understand causation. Engisch criticizes him for its uselessness, in the sense that the causal relations must be described or known in advance in order to mentally eliminate them. See ENGISCH (2008), p. 21. Regarding its systematic genesis, as FRISCH (1995) points out, pp. 30-31, that an attempt was made to replace the theory of equivalence with a proper legal causation. The natural concept should be displaced by a broader legal concept. This was developed in a series of ways: considering the last condition, or the condition that determines the result, or the most efficient or the appropriate one. Other attempts proposed to replace the theory of equivalence -not by another legal causation-, but based on this perspective, i.e., adding to the theory of equivalence an additional judgement, based on normative provisions, and proposing ways of discarding it. These ways of discarding normative provisions operated through relevance theory, whose most important representative was Mezger: the causal relations that do not seem to fit the types would be irrelevant; or, through the theory of proximate causation, which from the systematic-material point of view, according to the author, is a category of the previous one. Without prejudice to what will be analyzed regarding proximate causation, in relation to relevance theory, see MEZGER (1958), pp. 113-115.

⁴³ For the problem of alternative and hypothetical causes, see ROXIN (1997), pp. 350-351: “Thus, for example, if someone is accused of having carried out an illegal shooting in war and himself/herself alleges that, if he/she had refused, another would have carried out the shooting in exactly the same way, then one can mentally

autonomous causal relations operate indistinctly and are capable of producing the result). Thus, for example, from the perspective of the commission of damages by an indeterminate member of a certain group, French caselaw has resolved ordering reversing the burden of proof of causation, and in short, providing that the members of the group must prove that they did not cause the damage.

The issue entails the impossibility of attributing causation to a health establishment, when within the period of time in which a patient was hospitalized in two or more facilities, he/she developed an infectious condition. This approach does not allow to determine in which of said health establishments he/she contracted the infectious condition.⁴⁴ As indicated, the court reversed the burden of proof when determining causation. Accordingly, the health center (defendant) must demonstrate that its action has not caused the damage for which compensation is claimed. We understand that ultimately the liability is determined according to a legal presumption, since it is probable that the defendant was not actually the cause of the damage. And certainly, the solution constitutes a palliative to the problem of causal uncertainty.⁴⁵ Accordingly, this approach involves a different path to the indiscriminate use of the loss of chance criterion (which is a criterion used to explain the causation of uncertain causal relations or that are difficult to determine). Among our national legal opinion, while for Barros,⁴⁶ joint and several liability can take place in alternative causal relations, Corral, on the other hand, rejects said approach.⁴⁷

Probably the most complex problem is related to omission, to which we have already referred. Apart from what has been stated, it has been proposed that causation can be fulfilled only with normative criteria, especially that which involves the creation of unauthorized risks.⁴⁸ One of us, however, has argued that such a criterion cannot be distinguished from negligence, which would directly solve the causal problem.⁴⁹ Another author has understood

suppress the fact without the result disappearing (...) And the same happens in the textbook case of alternative causation, in which A and B, acting independently of each other, put poison in C's coffee; if C dies as a result of said action, but the dose given by A or B would have caused death in exactly the same way, the behavior of each of them can be mentally suppressed without the result disappearing." For the problem of hypothetical causation, see PUPPE (1994), pp. 36 *et seq.*

⁴⁴ MUNITA (2018), pp. 760 *et seq.*

⁴⁵ MUNITA (2018), pp. 743 *et seq.*

⁴⁶ BARROS (2020), p. 445.

⁴⁷ CORRAL (2004), p. 200: "Another assumption occurs when the actions of the individuals, on the other hand, can all be considered causes of the damage, even though they were carried out independently, for example, if two industries dump their toxic waste into a stream, which intoxicates those who they drink from it. In this case, it seems that, since both behaviors are causes of the damage, they should contribute to its repair in proportion to the damage caused by their behaviors."

⁴⁸ ROXIN (1997), pp. 363-364. For its formulation in civil liability, PANTALEÓN (1991), p. 1561. See SAN MARTÍN (2021), pp. 152-154; this author has shown very well how in cases of natural disasters, Chilean caselaw has resolved problems of causal omission resorting to the guarantor figure, which is indistinguishable from the duty of care.

⁴⁹ AEDO (2020), pp. 133-137. For more insights on the connection between the judgment of culpability and causation in Chilean Law, see also BARAONA (2008), pp. 78-79; SAN MARTÍN (2018), pp. 50-51; SAN MARTÍN (2021), p. 156. For comparative law, CAPECCHI (2012), pp. 136 *et seq.*; HONORÉ (2013), p. 1079; JAKOBS (1997), pp. 26-27. For the historical tradition, see AEDO (2015), pp. 61 *et seq.*

that the aforementioned criterion can in turn be supplemented by the thesis of increased risk.⁵⁰ Accordingly, said thesis may be applied in cases in which the projection of the lawful alternative behavior (expected conduct) allows to infer that the omission has not increased the risks in connection with the situations that led to the damage. In said case, the acquittal of the defendant may be considered, for example, in the context of a hypothetical informed consent.⁵¹

II. ADEQUATE CAUSATION

2.1 Formulation of the theory

This theory is normally attributed to Von Kries,⁵² however, this approach was also studied by Thon, Rümelin and Traeger, which implies acknowledging that in its origins the thesis cannot be characterized under a single concept.⁵³ This is what Quézel-Ambrunaz affirms when he maintains that “il n’y a pas une, mais des theories of causalité adequate, or, if l’on préfère, the formulation actuelle est le résultat d’une évolution”.⁵⁴

⁵⁰ For the criterion of increased risk, see ROXIN (1997), pp. 366 *et seq.* A detailed analysis of the criteria in GIMBERNAT (2018b), pp. 13-63.

⁵¹ MUNITA (2022).

⁵² VON KRIES (1866), pp. 24 *et seq.*

⁵³ See THON (1894); RÜMELIN (1900), pp. 65 *et seq.*; TRAEGER (1929), pp. 117 *et seq.* With Von Kries, the theory of adequate causation went from a statistical regularity criterion to a predictability one. In other words, the criterion of probability was replaced with one characterized by predictability. As seen in Thon, said latter criteria distinguishes negligence when determining the generality of events that are predictable. The judgment of probability is, according to Traeger, *ex ante* and is based on all the circumstances that would be known by an average observer. REYES (2005), p. 235-237 warns that adequate causation is a criterion that was based on probability and not on predictability. This last criterion created confusion in the German Supreme Court. He adds that adequacy has ceased to be considered a matter of causation, to become one of proximate causation. Some authors have resorted to adequate causation to determine a legally disapproved risk; others have resorted to adequate causation to determine if said risk translates into a criminally disapproved result, while for others it is a concept equivalent to the realization of risks. The author even criticizes adequate causation when having to determine a disapproved risk, since there are multiple cases in which inadequate causal relations can configure a disapproved risk and thus serve as the proximate causation of a result, as seen in the trajectories of firearms. In this regard, GESUALDI (1997), p. 75, states: “It was said that adequate causation requires a selection of the conditions that are understood as causes of different facts. In order to perform said selection, certain authors have followed a subjective causal relation, i.e., considering predictability in relation to the subject, and others, on the other hand, consider abstract standards.” MELCHIORI (2020), p. 94, argues that: “For some authors, probability and predictability are two concepts that tend to supplement each other or are even used interchangeably as synonyms. However, for the theory of adequate causation, what really matters is predictability. Others prefer to analyze the facts from a more objective, scientific perspective, and substitute the concept of predictability for that of probability: the adequate cause is the one that most likely generates the result.” In a similar sense, BELTRÁN (2004), p. 262; DíEZ-PICAZO (1999), p. 336. For the analysis of adequate causation in the criminal field, see GIMBERNAT (1962), pp. 545 *et seq.*

⁵⁴ QUÉZEL-AMBRUNAZ (2010), pp. 73; 75. Indeed, the author explains that the theory has two formulations: that of adequacy according to a standard of predictability, *i.e.*, a subjective formulation and an objective one, based on probabilistic regularity, which aims to overcome criticism directed at confusion generated by the theory of culpability.

The current approach is supplemented by accepting that the causal relation is made up of conditions that, unlike the previous thesis, are not all equivalent. Indeed, according to the equivalence of the conditions, a conduct is or is not a condition of the damage. Thus, the equivalence of the conditions never considers the greater or lesser extent of causal relations. For adequate causation, a conduct may be understood as the cause of the damage to the extent it can be proven by means of a judgment retrospectively or *ex-ante*, considering predictability, probability, or life experiences. In this light, we will refer to said approach as the adequacy judgment, which is also commonly known as posthumous prognosis. In other words, the adequacy of the theory relies on the fact that there will be conditions that more or less likely will be able to generate the damage.⁵⁵

Thus, adequate causation aims to correct the distortions generated by causal positions exclusively focused on factual aspects. Accordingly, adequate causation relies on the proximate causation criterion.⁵⁶ It could be argued by those who deny that proximate

⁵⁵ *Oñate con Caro* (2019), in which the aforementioned theory is expressly accepted, thus, rejecting the civil liability action filed against an organizer of Chilean-style races, due to damages generated by the displacement of the vehicle of one of the attendees, in the following terms: “15th.- That the establishment of the causal relation, clearly complex, is made difficult in this case due to the undoubted existence of at least two possible causes, given the presence of external factual elements that would allow eliminating the damage attributable to the defendant. Thus, it must be determined if the damage was caused by the lack of adoption of “control measures and necessary supervision to maintain the safety of attendees” by the organizer of the event or was caused by the action of a third party. This, since the other argument regarding the absence of necessary authorizations for the development of the activity has been ruled out. In order to overcome the problem that arises from the multiplicity or plurality of causes and to be able to discriminate from among all the causes that have the potential of generating the damage, legal opinion recalls that the cause in question must constitute a necessary and direct element of the damage. Based on this requirement, in order to consider an individual a necessary condition to generate the damage, the theory of the equivalence of conditions has traditionally been supported (which understands all causes as equivalent, to the extent that each one is a necessary condition for the production of damage). However, given the frequent coexistence of causes and succession or sequence of events that can contribute to the production of a harmful result, authors have resorted to criteria such as adequate or efficient causation to support the alleged liability that can be attributed to the author of a fact for the consequences that have derived from it. According to this criterion, in order for the conduct to be attributable to the individual, it is required that his/her action effectively constitutes the cause of the damage and must not involve a mere condition that contributed to producing it. It is thus necessary to figure out, among the multiple potentially harmful factors, which is the fact that produced the damage in order to determine the criminal liability of the conduct. “Recital 16th. - That the above clarifications have been made to resolve the controversy that, in this case, revolves around the statutory determination of the defendant’s alleged and proven conduct, i.e., if the defendant’s omission to adopt security measures (in connection with the parking of the vehicles that were present in the event) has the effect of causing the damages claimed by the plaintiff. In such case, it is necessary to resort to one of the criteria that have been proposed for the solution of this debate, i.e., the one that addresses the efficient or adequate cause. In other words, despite the fact that the detrimental result may have been generated by various conditions, only one of them is its necessary cause, so that, in this case, it is necessary to determine whether the infringement that the defendant is accused of has produced the loss and the damages arising thereof.”

⁵⁶ In relation to what has been indicated, following the words of Castán: “This doctrine of adequate causation - prior examination or application in the absence of another guideline - belongs to the field of proximate causation, since it is characterized by legal assessments that predominate over material or factual considerations in connection with the specific case”. As resolved in *Fadda y otra con Inmobiliaria Las Rocas S.A.* (2021): “9th.- Indeed, and as explained by the authors cited in the previous paragraphs, the doctrines of adequate causation

causation is a criterion of causation⁵⁷ that the theory of adequacy or adequate causation contains in its name an essential contradiction.⁵⁸ In this regard, Rojas and Mojica, add that: “it provides some parameters according to which it is possible to choose, within a certain group of causes, which is the one that is legally most relevant.”⁵⁹

2.2 Criticism of the theory: the question of predictability

Various criticisms have been leveled at the theory. In this sense, its reductionism is observed, because if eventually the origin of the damage related to a condition that is not adequately relevant, it will not be possible to determine the individual’s liability, leaving him/her unpunished; In addition, it is criticized for its dubious applicability in certain matters.⁶⁰ The theory in question is also subject of criticism in connection with the hypothetical judgment with which adequate causation is identified, since what is really important in causation is to analyze what actually happened and not what would have happened, which is what is really reasoned when probabilities are analyzed.⁶¹ For this reason, Roxin criticizes the theory, in the sense that the adequacy judgment is not always sufficient to determine whether an individual is liable for the damage caused. Thus, in some cases, Roxin indicates - such as in hypothetical causation - that the problem of the causal relation

or proximate causation provide good legal reasons to determine which of the conducts or facts that make up the natural or factual causation of the accident (in this case, defective construction or tremor) are directly and sufficiently attributable to the damaging event. Accordingly, as has been reasoned up to now, the doctrine of the equivalence of the conditions (that provides a factual causation criterion) is not enough to attribute the damage to an individual, however, it is essential, in the face of several alleged causes to legally qualify which of these is the one that is most reasonable to be considered as a causal explanation of the damage, considering its legal causation in the case under study”; in the same sense, recital No. 12th provides: “That, from the background described, and related to the other evidence provided, it is possible to observe that the origin of the mobility conditions of the soil in which the plaintiff’s house was located relate to the construction of the building by the defendant and an insufficient containment system; the occurrence of the tremor only demonstrates the lack of structural support. However, it cannot be established that said facts were determining factors in connection with the claimed damages. Nonetheless, they regard a condition of vulnerability derived from the activity of the defendant who carried out an excavation that eliminated the supporting condition of the soil without developing, according to its professional duty, a containment work that had the necessary quality to prevent, at all times, the movement of the soil derived from the accumulation of sand from the dune and thus helping prevent damage to the construction of the neighboring house, whose existence was aware of.”

⁵⁷ This means delimiting causation to the factual aspects and determining those liable, and separating that judgment from one of proximate causation, which delimits the damages for which one can respond. See in this regard PANTALEÓN (1991), p. 1563; YZQUIERDO (2019), p. 222.

⁵⁸ GALÁN (2018), p. 583.

⁵⁹ ROJAS & MOJICA (2014), p. 213.

⁶⁰ In this regard, FAVRE-MAGNAN (2019), p. 239: “Cette définition présente cependant parfois des difficultés d’application dans certains domaines, par exemple en matière médicale où la recherche de la causalité même simplement matérielle (un traitement est-il à l’origine des effets secondaires observés?) implique des connaissances très techniques sur l’état de la science, qui seules permettent de reconstituer avec précision l’enchaînement des causes. La Cour de cassation a ainsi, comme les experts, hésité à admettre que le vaccin contre l’hépatite B puisse causer (provoquer) l’apparition d’une sclérose en plaques, mais les juges se contentent aujourd’hui de présomptions graves, précises et concordantes pour admettre l’existence d’un lien de causalité.”

⁶¹ QUÉZEL-AMBRUNAZ (2010), pp. 82 *et seq.*

could be solved by considering other normative causal criteria (or proximate causation). For example, through the thesis of no recourse, no matter how suitable the causal relation was.⁶²

However, the main criticism to which this approach has been subject to is that, in its most widespread formulation, it would rely on a judgment of predictability. This situation generates the need to distinguish the relevance of the aforementioned criterion from the role it plays in the judgment of culpability. To address this issue, it is essential to remember that causation fulfills two functions in the liability judgment⁶³. Thus, if it is involved in the determination of the *an debeatur*, it will also be used to determine the *quantum respondeatur*⁶⁴. Then, the question that arises is related to the way in which predictability is involved in both stages (*an debeatur* and *quantum respondeatur*) or if it is actually applicable.

2.2.1 Predictability in the *an debeatur*?

Proponents of adequate causation in this area have argued that it is possible to distinguish the judgment of culpability from the judgment of causation. Corral, for example, considers that while the predictability of causation makes it possible to analyze the objective result after the events, with respects to negligence the predictability would refer to the harmful general results.⁶⁵ Notwithstanding the foregoing, an important part of modern, Chilean and comparative legal opinion openly questions the introduction of predictability in causation

⁶² ROXIN (1997), p. 361.

⁶³ AEDO & MUNITA (2022).

⁶⁴ The traditional Chilean doctrine is unanimous in the sense that causation affects the extent of reparation. In this regard, Chilean doctrine considers that the damage must be direct. See ALESSANDRI (2005), p. 395; AEDO (2018), pp. 386-388; AEDO (2020), pp. 119-120; BARAONA (2008), pp. 69-70; BARROS (2020), p. 394; CÁRDENAS (2005), pp. 558-559; DÍEZ SCHWERTER (1998), pp. 71-73; SAN MARTÍN (2018), p. 31.

⁶⁵ CORRAL (2004), p. 193: “We think that the difference lies more in the content. In the causal relation, the objective result that occurred after a behavior is analyzed: this is the result that we are interested in relating, through predictability in connection with the individual’s actions. On the other hand, in negligence, predictability will refer to the harmful general consequences that allow a human action to be qualified as reckless.” It is difficult to think that the negligence could be related to the harmful general consequences and, therefore, it involves an ex-ante judgment. Rather, if the negligence standard is built from the delimitation of the specific risks of the activity, it would involve an ex-post judgement. For this question, we refer to the work of one of us: AEDO (2018), pp. 348-351, with the caselaw cited. Regarding natural disasters, see the connection that SAN MARTÍN (2021), pp. 161-162 makes of negligence with risk management, when these are in the scope of control of the possible damage. The risk activity that is analyzed cannot involve ex-ante risks, as rightly explained by WRIGHT (2008), pp. 1296; 1312-1313. According to the author: “Risks are merely abstract ex ante statistics that report the frequency of occurrence of some harm given a specified set of conditions. Unlike the actual occurrence of such harm, risks per se do not constitute an actual setback to another’s equal external freedom through an invasion of the other’s rights in his person or property, as is required for an interactive justice wrong. Treating the risk exposure as the legal injury, but only when the risked harm actually occurs and only in the problematic causation situations, is an ad hoc solution that, among other problems, fails to explain why recovery is contingent on the actual occurrence of the risked harm and why the damages are based on the ex post actual harm rather than the ex-ante expected harm.”

and links it to the judgment of culpability.⁶⁶ It seems to us that this is a majority opinion.⁶⁷

We believe that the criterion of predictability, when separated from negligence, becomes unnecessary when determining the *an debeatur* if it is considered that, in a system of negligence, it is precisely negligence that helps determine those liable. Indeed, regarding liability arising from negligence, it is essential that said condition can be attributable and that the judgment of predictability can be performed in connection with it. This will allow determining that the individual has been in a position to predict or anticipate the risks that have configured his/her behavior.

Thus, in a negligence system, negligence is considered as a normative element that helps explain causal problems. In turn, faced with omission, it is impossible to distinguish negligence from the breach of the guarantor role or the creation of prohibited risks.⁶⁸ For this reason, it is difficult to think that negligence can relate to the harmful general consequences

⁶⁶ PREVOT (2010), pp. 162-163. Adds: “When negligence is described as objective, it refers either to its appreciation *in abstracto*, which to a certain extent is not feasible, since despite what it might seem, there is no pure or absolutely objective conception of negligence or, of an iridescent system that is both abstract and concrete at the time of determining the real action of the individual with what is expected from it. Thus, when performing an abstract type of comparison, flexible, circumstantial, and specific, it does not take into consideration its special physical and psychological characteristics. That is our view of what is understood today by objective negligence. In short, the fact that the theory of adequate causation has never completely removed the suspicion of indiscreetly mixing causation and culpability is nothing new. An attempt has been made to clear up doubts by describing that the phenomenon of causation has a common element with that of negligence: predictability. The difference would be that, in the first case, predictability is considered in the abstract, while in the latter, is valued specifically. However (and here the author cites Piaggio), the attempt runs into insurmountable difficulties since, according to the conceptual instrument used, the consideration of predictability for the purposes of the causal relations is not so abstract, nor is the appreciation of the negligence so concrete. Thus, the space that remains between both approaches becomes practically imperceptible.” We have also declared in that regard (one of us). AEDO (2018), p. 412.

⁶⁷ See, *inter alia*, DÍEZ-PICAZO (1999), p. 336, categorically affirms that: “The discourse on predictability belongs to the field of negligence if it regards a generic damage. We must bear in mind that the predictability of the generic damage is sufficient for liability to exist. Thus, any predictability on the development of the causal relations, both on the supervening causes and with respect to their way of operating, is not necessary.” In the same sense, REGLERO CAMPOS (2008), t. I, p. 736. According to BARROS (2020), pp. 399-400 predictability regarding non-contractual liability becomes an element that is too vague and imprecise. He also explains how in proximate causation a different concept of predictability has been accepted than that of negligence: “Everything indicates that the idea of adequate causation is more general than that of predictability and that it is advisable to restrict the relevance of the latter to situations involving negligence.” See also CATALDO & PÜTZ (2020), p. 338. DE CUPIS (1975), p. 247; GOLDENBERG (1984), p. 38. Predictability is also criticized when compared to proximate causation. In this regard, see REYES (2005), pp. 286-287. First, there is a clear difficulty in determining it since predictability will depend on how the question about the same is formulated. A second problem is determining a general life experience, since the mere development of some activities, such as driving a motor vehicle, would make an individual the author of a dangerous situation just by participating in it, since statistics show the frequency of death and injuries from driving motor vehicles. The author proposes not to consider this criterion, precisely because it leads to the theory of adequate causation.

⁶⁸ For these problems we refer to some works published by one of us. See, in particular, AEDO (2012), pp. 777 *et seq.*; AEDO (2017), pp. 501 *et seq.*; AEDO (2018), pp. 415 *et seq.* In a sense similar to the one exposed herein, with a deep and accurate reflection, see SAN MARTÍN (2018), pp. 49-54.

and, therefore, requires an *ex-ante* judgement. Instead, if the negligence standard is built from the delimitation of the specific risks of the activity, it would involve an *ex-post* judgement.⁶⁹

However, we consider that a point of separation can be outlined when analyzing predictability in connection with negligence, and probability with the adequacy criteria⁷⁰. In this sense, nothing prevents the existence of negligent behaviors (considering they violate the required standard of diligence) from generating specific risks and damages. Consequently, said risks and damages do not relate to the probability scheme derived from the valuation of what is considered regular or normal. Following this logic, Quézel-Ambrunaz expresses that: “*Selon la conception objective, c’est l’augmentation de la probabilité, ou de la possibilité de survenance du resultat qui est causale: il n’y a pas nécessairement confusion avec la notion de faute.*”⁷¹

However, we reiterate that in the case of causation, the applicable proximate causation logic should refer to probability, not to predictability.

2.2.2 Predictability in the quantum respondeatur?

A second possibility is to consider that predictability, understood as a transversal element, affects the determination of compensable damages, whether is considered a problem of causation or proximate causation.⁷² The idea of introducing a delimitation criterion regarding damages is common to continental liability systems. However, it should be noted that the adequacy of causation does not always operate with the predictability criterion. This is the criterion that operates in some cases in Germany, Austria, Portugal, *inter alia*.⁷³

In the South American sphere, what we support herein is legally enshrined in the Argentine Civil Code (CC) that, in addition to expressly following an adequate causation criterion, limits the compensatory aspect to foreseeable damages, which is precisely what our legislative technique does not allow. Accordingly, article 1726, on *Causal Relations*, provides the following: “Damaging consequences that have an adequate causal relation with the event that produces the damage are recoverable. Except as otherwise provided by law, immediate and mediate foreseeable consequences are indemnified”; in turn, the following rule provided

⁶⁹ For this question, we refer to the work of one of us: AEDO (2018), pp. 348-351, with the caselaw cited. That the risk activity that is being determined cannot regard the *ex-ante* risks of the same, as correctly explained by WRIGHT (2008), pp. 1296; 1312-1313. According to the author: “Risks are merely abstract *ex ante* statistics that report the frequency of occurrence of some harm given a specified set of conditions. Unlike the actual occurrence of such harm, risks *per se* do not constitute an actual setback to another’s equal external freedom through an invasion of the other’s rights in his person or property, as is required for an interactive justice wrong. Treating the risk exposure as the legal injury, but only when the risked harm actually occurs and only in the problematic causation situations, is an *ad hoc* solution that, among other problems, fails to explain why recovery is contingent on the actual occurrence of the risked harm and why the damages are based on the *ex post* actual harm rather than the *ex-ante* expected harm.”

⁷⁰ On this issue, see MUNITA (2018), pp. 743 *et seq.* As stated by BARROS (2020), pp. 379-380, the cases of probable causation are built on the basis of the increased risk or, as BARCELONA (2011) would say, p. 282, constitute a system based on the risk that has been created (and that, therefore, hypothetically, like any causal judgment, could have been avoided).

⁷¹ QUÉZEL-AMBRUNAZ (2010), p. 87.

⁷² See BARROS (2020), p. 423; PIZARRO WILSON (2004), pp. 121 *et seq.*

⁷³ See INFANTINO & ZERVOGIANNI (2017), p. 604.

for in the CC describes the types of consequences arising from recoverable damages using a terminology that reconnects the immediate consequences with the adequate causation. In this regard, article 1727 provides the following: “The consequences of an event that usually occur according to the natural and ordinary course of things are called in this Code ‘immediate consequences’”.

In the case of soft law, predictability is one of the keys with which the European Principles of Civil Liability describe the attribution of causation. The description in this regard can be seen specifically in article 3:201, which is a provision that establishes the following:

The question of whether an individual can be held liable and to what extent depends on factors such as the following: a) the predictability of the damage for a reasonable individual at the time the activity occurred especially considering the closeness in time and space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such activity.

According to the soft law provision indicated above, we can see that predictability is understood from a double perspective. One of said approaches describes the reasonable person standard, which is an issue that makes us think that said reasoning is more applicable to negligence than to causation; the other approach considers the concept of adequacy considering the causal relation of the damage with the behavior of the individual which, as is known, it is analyzed from the lens of the normal and ordinary course of events.

However, the introduction of predictability in the delimitation of damages may conflict with the principle of comprehensive repair.⁷⁴ According to said principle, all damage caused to the victim must be compensated, including unforeseen damage. As Brun graphically points out: “It is worth noting the injustice that this type of reasoning can lead to. Is it legitimate to deprive the victim of compensation by merely proving that the illegal act did not cause damage and was unpredictable? If the equivalence of the conditions is simplistic and too broad, the adequate causation is complex and too restrictive.”⁷⁵ Indeed, it should be kept in mind that Bello considered including unforeseeable damages within the compensable damages, according to the wording of article 2329 of the CC. According to this provision, given that the acts performed by reckless individuals (*actio in libera causa sua*) do not consider the interests of third parties in connection with acts performed by them, it does not make sense to reduce the *quantum respondeatur* to foreseeable damages. This reasoning allows borderline cases to be recognized as having sufficient compensatory grounds without having to resort to torts; i.e., without having to pay special attention to the characteristics of the

⁷⁴ In connection with the principle, see DOMÍNGUEZ (2019), pp. 111-118. RUBIO (2019), pp. 254-255. It should also be kept in mind, as Ruz Lártiga warns, comprehensive repair implies that, in accordance with the liability rules of our system, what must be repaired is the proven damage: “Comprehensive repair is not the repair of the damage itself but the repair of the proven damage; thus, what must be repaired is not only that which by its nature allows can be proven, but also that whose estimate has been sufficiently accredited.” RUZ (2009), p. 671.

⁷⁵ BRUN (2015), p. 235. See also ARAYA (2003), p. 30.

victim.⁷⁶ In the same sense, Martín-Casals share this approach by indicating that the theory of the equivalence of the conditions regard “a series of relevant factors that respond more to values and legal policy reasons than to the real and effective existence or absence of a causal relation”,⁷⁷ or as noted by Bárcena which provides that the criterion in question responds to “*moral or legal criteria*”⁷⁸ different from predictability (at least from our legal point of view).⁷⁹

However, the selection of relevant conditions, as has been indicated by Viney, Jourdain and Carval, may reflect a statutory approach that puts emphasis on the seriousness of the offenses committed; said statutory approach also includes a factual perspective, which is identified with the notion of proximate cause. This latter outlook could help understand the behavior of the victim and consequently allow it to be compensated.⁸⁰

In this regard, in comparative law, the purpose sought by the law has been used as a criterion for the adequacy of damages. The criterion has been used both in systems characterized by restrictive damages, such as Germany, semi-restrictive, such as the Italian, as well as in nonrestrictive systems, such as the Spanish.⁸¹ In Chilean law, Barros has also defended the purpose sought by the law⁸² as an essential criterion of normative causation (or proximate causation) when analyzing the delimitation of damages.

In our opinion, the use of the standard provided for by the law harmonizes better what is sought by a negligence system and one of strict liability. In connection with the negligence system, if negligence involves the delimitation of risks, the purpose sought by the law determines what type of damages must be compensated. Something similar occurs in strict liability. As indicated by Basozabal, considering the increased risks (abnormal), strict liability should not only provide limits for behavior but also for the damages that may arise

⁷⁶ For these reasons, we disagree with the criterion followed by the Supreme Court in *Holzmann con Agrícola Las Colinas de Tapihue Ltda.* (2015), which, following Cristian Banfi, ruled: 4th: “(...) predictability is a legal criterion that, when applied particularly to adequate causation, helps to temper the effects of the *sine qua non*, allowing to hold liable the author the damages that are not only a necessary consequence but also a direct consequence of his/her act. Consequently, the perpetrator of the crime will not be liable for unforeseen damages, because he/she could not anticipate or control them, i.e., they escaped the normal course of events.” In our opinion, however, we believe that direct damage is one thing and unforeseeable damage is another, which, in accordance with the principle of comprehensive reparation of damage, may well be the subject of compensation.

⁷⁷ MARTÍN-CASALS (2020a), pp. 222-223.

⁷⁸ BÁRCENA (2014), p. 187.

⁷⁹ In a similar sense and referring to the fact that they are legal policy criteria, PAPAYANNIS (2014), p. 141, in an interesting article in which he questions the Economic Analysis of Law as a coherent explanation criterion of causation, he indicates the following: “When analyzing causation, legal experts do not limit themselves to verifying the connection that I have indicated in the previous paragraph; In addition, they make *legal policy* considerations to decide if the result, factually connected to the defendant’s action, can be attributed to him/her. In general, remote causation, unpredictability, or the fact that the action has only advanced an inevitable result in time count as reasons to limit or eliminate, as the case may be, liability. This problem - which in continental law is addressed by the so-called *adequate causation* and in Anglo-Saxon law, by the *proximate cause* doctrine - has no connection with causal research in the strict sense.”

⁸⁰ VINEY *et al.* (2013), pp. 242 *et seq.*

⁸¹ INFANTINO & ZERVOGIANNI (2017), pp. 605-606.

⁸² BARROS (2020), pp. 408-409.

thereof.⁸³ Secondly, this would mean that civil liability, even in a non-restricted system like the Chilean one, protects lawful damages.⁸⁴

CONCLUSIONS

Two types of conclusions can be developed. On the one hand, and from the perspective of the theory of the equivalence of conditions, an attempt has been made to demonstrate that the thesis is insufficient. For example, it has been shown that when determining damages attributable to omissions, the factual element is absent; however, this also occurs in complex causal relations, such as those in which a scenario of alternative causation or hypothetical causation is analyzed. In those contexts, it is essential to resort to supplementary regulatory exercises that allow the integration, or not, of the factual requirement, which is essential in all civil liability lawsuits. It should also be noted that the test whereby facts are suppressed hypothetically is also a reasoning that leads to misunderstandings, since through it is intended to tackle the causal problem from a logic of isolation and fragmentation of adequate conditions, while, in reality, the negligent events normally can be inferred from regular causal relations.

On the other hand, and from the perspective of adequate causation, we have exposed that the recourse to predictability that is used both in causation and in negligence, in the field of *an debeat*, seems to us inconsistent. This, because the role that is attributed to predictability for the purposes of determining the *an debeat* is fulfilled by negligence. Nonetheless, in the context of determining those liable, causation may resort to a criterion different from predictability, which is that of probability. In this regard, negligent acts (predictable) that give rise to liability may be determined, despite not being able to attribute the damage caused. In turn, we rightly question the treatment of predictability in non-contractual liability, especially in the *quantum responder* stage, since that impacts the principle of comprehensive reparation of damage that can be inferred from the provisions of article 2329 of the Chilean Civil Code.

⁸³ BASOZABAL (2015), pp. 82-83.

⁸⁴ See AEDO (2006), pp. 478 *et seq.* For comparative law, DíEZ-PICAZO (1999), pp. 290 *et seq.*; DUGUÉ (2019), pp. 154 *et seq.*; LASSO (2018), pp. 82-87; ZIPURSKY (1998), p. 57.

BIBLIOGRAPHY CITED

- AEDO BARRENA, Cristian (2006). *Responsabilidad Extracontractual* (Librotecnia).
- AEDO BARRENA, Cristian (2012). “La función de la culpa en el sistema de responsabilidad civil: una lectura desde el Derecho romano es posible”, en ELORRIAGA DE BONIS, Fabián (coord.), *Estudios de Derecho Civil VII, Jornadas Nacionales de Derecho Civil IX*, (LegalPublishing), pp. 777-795.
- AEDO BARRENA, Cristian (2015). “La culpa como criterio de distribución de riesgos sociales ¿Hay en la culpa una infracción a un deber jurídico?”, en VIDAL OLIVARES, Álvaro; SEVERIN FUSTER, Gonzalo & MEJÍAS ALONSO, Claudia (coords.), *Estudios de Derecho Civil X* (Thomson Reuters), pp. 811-826.
- AEDO BARRENA, Cristian (2017). “La creación de riesgos no permitidos en la imputación objetiva: ¿un problema de culpa? Hacia un sistema funcional”, en CORRAL TALCIANI, Hernán & MANTEROLA DOMÍNGUEZ, Pablo (eds.), *Estudios de Derecho Civil XII* (Thomson Reuters), pp. 501-516.
- AEDO BARRENA, Cristian (2018). *Culpa aquiliana. Una conjunción de aspectos históricos y dogmáticos* (Thomson Reuters).
- AEDO BARRENA, Cristian (2020). “La recepción de la creación de riesgos no permitidos en el derecho chileno, como criterio de imputación objetiva, ¿puede distinguirse de la culpa?”, *Revista Chilena de Derecho Privado*, N° 35, pp. 117-145.
- AEDO BARRENA, Cristian & MUNITA MARAMBIO, Renzo (2022). “Funciones de la causalidad en la responsabilidad civil. Un esbozo”, *Revista Actualidad Jurídica*, N° 46, pp. 285-313.
- ALESSANDRI RODRÍGUEZ, Arturo (2005). *Responsabilidad Civil Extracontractual en el Derecho Civil Chileno*, (Editorial Jurídica de Chile, 2ª ed.).
- ANARTE BORRALLO, Enrique (2002). *Causalidad e imputación objetiva. Estructura, relaciones, perspectivas* (Publicaciones Universidad de Huelva).
- ARAYA JASMA, Fernando (2003). *La relación de causalidad en la responsabilidad civil* (LexisNexis).
- BANFI DEL RÍO, Cristian (2017). “La causalidad en casos de responsabilidad civil por mesotelioma: una mirada al derecho chileno e inglés”, en MARÍN, J. & SCHOPF, A. (eds.), *Lo público y lo privado en el derecho. Estudios en homenaje al profesor Enrique Barros Bourie* (Thomson Reuters), pp. 721-758.
- BARAONA GONZÁLEZ, Jorge (2008). “La causa del daño en la jurisprudencia reciente (con especial referencia a la responsabilidad extracontractual)”, en CORRAL TALCIANI, Hernán, *Cuadernos de extensión jurídica N°15: La relación de causalidad* (Facultad de Derecho de la Universidad de los Andes), pp. 59-113.
- BARCELLONA, Mario (2011). *Trattato della Responsabilità Civile* (UTET).
- BARCELLONA, Mario (2012). *Corso di Diritto Civile. La responsabilità extracontrattuale* (UTET).
- BÁRCENA ZUBIETA, Arturo (2013): “La causalidad en el derecho de daños”, *Universitat de Girona*, en: <https://www.tesisenred.net/handle/10803/108448>.
- BÁRCENA ZUBIETA, Arturo (2014). “El derecho de daños como banco de pruebas de una disputa filosófica sobre la causalidad”, en PAPAYANNIS, Diego M. (coord.), *Causalidad y atribución de responsabilidad* (Marcial Pons), pp. 183-214.
- BARROS BOURIE, Enrique (2020). *Tratado de responsabilidad extracontractual* (Editorial Jurídica de Chile, 2ª ed.).
- BASOZABAL ARRUÉ, Xabier (2015). *Responsabilidad extracontractual objetiva: parte general* (BOE).

- BATTISTA, Giovanni (2014). “Los contrafácticos en el derecho. Un inventario de problemas”, en PAPAYANNIS, Diego M. (coord.), *Causalidad y atribución de responsabilidad* (Marcial Pons), pp. 77-102.
- BELTRÁN PACHECO, Jorge (2004). “Estudios de la Relación Causal en la Responsabilidad Civil”, *Derecho & Sociedad*, N° 23, pp. 260-266. Disponible en: <https://dialnet.unirioja.es/servlet/articulo?codigo=7792497> [visitado el 24/11/2021].
- BIANCA, Massimo (2012). *Diritto Civile* (Giuffrè, 5ª ed.).
- BICHERON, Frédéric (2016). “Les dispositions communes aux responsabilités contractuelle et extracontractuelle”, en MEKKI, Mustapha (coord.), *Avant-projet de réforme du droit de la responsabilité civile: l’art et la technique du compromis. Réponse à la consultation publique* (LGDJ - Lextenso Éditions), pp. 65-76.
- BRUN, Philippe (2015). *Responsabilidad Civil Extracontractual* (trad. Cynthia Téllez & Eduardo Cárdenas, Pacífico Editores).
- CANE, Peter (2003). *Responsability in Law and Morality* (Hart Publishing).
- CAPECCHI, Marco (2012). *Il nesso di causalità. Dalla condicio sine qua non alla responsabilità proporzionale* (Cedam, 3ª ed.).
- CÁRDENAS VILLARREAL, Hugo (2005). “Reflexiones sobre la teoría de la imputación objetiva y su aplicabilidad en el ámbito del derecho de daños”, en VARAS BRAUN, Juan Andrés & TURNER SAELZER, Susan (coords.), *Estudios de Derecho Civil I. Jornadas nacionales de Derecho Civil. Valdivia* (LexisNexis), pp. 533-562.
- CATALDO, Andrea & PÜTZ, Audrey (2020). “Les meandres du lien de causalité dans le projet belge”, en DUBUISSON, Bernard (coord.), *La réforme du droit de la responsabilité en France et en Belgique* (Bruylant), pp. 333-364.
- CASTALDO, Andrea (2008). *La imputación objetiva en el delito culposos de resultado* (trad. Antonio Bonanno, B de F.).
- CASTRONOVO, Carlo (2018). *Responsabilità civile* (Giuffrè).
- CORRAL TALCIANI, Hernán (2004). *Lecciones de responsabilidad civil extracontractual*, (Editorial Jurídica de Chile, 1ª ed.).
- CORCOY BIDASOLO, Mirentxu (2018). *El delito imprudente. Criterios de imputación del resultado* (B de F., 2ª ed.).
- COUSY, Herman & DROSHOUT, Dimitri (2005). “Fault under Belgian Law”, en WIDMER, P. (ed.), *Unification of Tor Law: fault* (Kluwer Law International), pp. 27-51.
- DE ÁNGEL YÁGÜEZ, Ricardo (1995). *Algunas previsiones sobre el futuro de la responsabilidad civil (con especial atención a la reparación del daño)* (Civitas).
- DE CUPIS, Adriano (2020). *El daño. Teoría general de la responsabilidad civil* (Olejnik).
- DÍAZ REGAÑÓN GARCÍA ALCALÁ, Calixto (2006). *Responsabilidad objetiva y nexo causal en el ámbito sanitario* (Comares).
- DIEZ-PICAZO, Luis (1999). *Derecho de Daños* (Civitas).
- DÍEZ-SCHWERTER, José Luis (1998). *Daño Extracontractual* (Editorial Jurídica de Chile).
- DOMÍNGUEZ ÁGUILA, Ramón (2001). “Aspectos de la relación de causalidad en la responsabilidad civil con especial referencia al derecho chileno”, *Revista de Derecho Universidad de Concepción*, N° 209, pp. 7-27.
- DOMÍNGUEZ HIDALGO, Carmen (2019). “Contenido del principio de reparación integral del daño: algunas consecuencias, en especial, para el daño moral”, en DOMÍNGUEZ HIDALGO, Carmen (ed.), *El principio de reparación integral en sus contornos actuales. Una revisión desde el Derecho chileno, latinoamericano y europeo* (Thomson Reuters), pp. 103-122.

- DUGUÉ, Marie (2019). *L'intérêt protégé en Droit de la responsabilité civile* (LGDJ).
- ENGISCH, Karl (2008). *La causalidad como elemento de los tipos penales* (trad. Marcelo Sancinetti, Hammurabi).
- FAVRE-MAGNAN, Muriel (2019). *Droit des obligations. Responsabilité civile et quasi-contrats, volumen II* (Presses Universitaires de France, 4^a ed.).
- FRISCH, Wolfgang (1995). *Tipo penal e imputación objetiva* (Marcial Pons).
- FUMERTON, Richard (2003). "Moore, Causation, Counterfactuals, and Responsibility", *San Diego Law Review*, Vol. 40, Issue 4, pp. 1273-1282.
- GALÁN CORTÉS, Julio César (2018). *Responsabilidad Civil Médica* (Thomson Reuters, 6^{ta} ed.).
- GESUALDI, Dora Mariana (1997). "De la antijuridicidad a las causas de justificación", en BUERES, Jesús Alberto & KEMELMAJER DE CARLUCCI, Aída (dirs.), *Responsabilidad por daños en el Tercer Milenio. Homenaje al profesor Doctor Atilio Aníbal Alterini* (Abeledo-Perrot), pp. 143-151.
- GIMBERNAT ORDEIG, Enrique (1962). "Causalidad en el Derecho penal", *Anuario de Derecho penal y Ciencias Penales*, Tomo 15, Fascículo 3, pp. 543-580.
- GIMBERNAT ORDEIG, Enrique (2000). "La causalidad en la omisión impropia y la llamada «omisión por comisión», *Anuario de Derecho penal y Ciencias Penales*, Tomo 53, Fascículo 1, pp. 29-132.
- GIMBERNAT ORDEIG, Enrique (2018a). *Estudios sobre el delito de omisión* (B de F).
- GIMBERNAT ORDEIG, Enrique (2018b). *El comportamiento alternativo conforme a Derecho. De la causalidad a la imputación objetiva* (B de F).
- GOLDENBERG, Isidoro (1984). *La relación de causalidad en la responsabilidad civil* (Astrea).
- GREEN, Sarah (2017). *Causation in negligence* (Hart Publishing).
- HART, Herbert & HONORÉ, Tony (2002). *Causation in the law* (Oxford University Press, 2^a ed.).
- HONORÉ, Anthony (2002). *Responsibility and fault* (Hart Publishing).
- HONORÉ, Tony (2013). "Condiciones necesarias y suficientes en la responsabilidad extracontractual", *Revista Chilena de Derecho*, Vol. 40, N°3, pp. 1073-1097.
- HONORÉ, Tony (2015). "La causalidad en el derecho", en FABRA ZAMORA, Jorge Luis & RODRÍGUEZ BLANCO, Verónica (eds.), *Enciclopedia de Filosofía y Teoría del Derecho, volumen dos* (UNAM), pp. 1479-1499. Disponible en: <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3796/21.pdf> [visitado el 24/11/2021].
- INFANTINO, Marta & ZERVOGIANNI, Eleni (2017). "Summary and Survey of the Results", en INFANTINO, Marta & ZERVOGIANNI, Eleni (ed.), *Causation in European Tort Law* (Cambridge University Press), pp. 587-666.
- JAKOBS, Günter (1997). *La imputación objetiva en el Derecho penal* (trad. de Rubén Villela, reimpresión 1^a edición, Editorial Ad-Hoc).
- LASSO, Anna (2018). *Riparazione e punizione nella responsabilità civile* (Edizioni Scientifiche italiana).
- MACKIE, John (2002). *The cement of the universe* (Oxford University Press).
- MALAUURIE, Philippe; AYNÈS, Laurent & STOFFEL-MUNCK, Philippe (2017). *Droit Des Obligations* (LGDJ, 9^a ed.).
- MARTÍN-CASALS, Miquel (2020a). "Acotaciones sobre la relación de causalidad y el alcance de la responsabilidad desde una perspectiva comparada", en SANTOS, María José;

- MERCADER, Jesús R. & DEL OLMO, Pedro (dirs.), *Nuevos retos del derecho de daños en Iberoamérica* (Tirant Lo Blanch), pp. 215-264.
- MARTÍN-CASALS, Miquel (2020b). “Les meandres du lien de causalité dans le projet français et belge. Point de vue de droit espagnol et de droit comparé”, en DUBUISSON, Bernard (coord.), *La réforme du droit de la responsabilité en France et en Belgique* (Bruylant), pp. 385-402.
- MAZEAUD, Henri; MAZEAUD, Leon & TUNC, André (1977). *Tratado teórico y práctico de la responsabilidad civil delictual y contractual* (trad. 5th ed. francesa Luis Alcalá-Zamora y Castillo, Ediciones Jurídicas Europa-América).
- MELCHIORI, Franco (2020). *Las teorías de la causalidad en el daño* (Jose María Bosch Editor).
- MEZGER, Edmund (1958). *Derecho Penal. Parte General* (trad. Conrado Finzi, Editorial Bibliográfica Argentina).
- MILL, Stuart (1860). *A system of logic. Ratiocinative and Inductive*, (John Parker, West Strand, 3^a ed.).
- MILLER, Paul (2021). “The New Formalism in Private Law”, *The American Journal of Jurisprudence*, Vol. 66, Issue 2, pp. 175-238.
- MOORE, Michael (2003). “For What Must Be Pay? Causation and Counterfactual Baselines”, *San Diego Law Review*, Vol. 40, Issue 4, pp. 1181-1272.
- MOORE, Michael (2011). *Causalidad y responsabilidad. Un ensayo sobre derecho, moral y metafísica* (Trad. Tobías Schleider, Marcial Pons).
- MUNITA MARAMBIO, Renzo (2018). “Causalidad incierta, alternativa y flexibilidad probatoria”, en BAHAMONDES OYARZÚN, C.; ETCHEBERRY COURT, L. & PIZARRO WILSON, C. (eds.), *Estudios de derecho civil XIII* (Thomson Reuters), pp. 737-771.
- MUNITA MARAMBIO, Renzo (2019). “Sobre el recurso a máximas generales aplicables a la indemnización por daños derivados de actividades peligrosas o de objetos (peligrosos o no)”, en CÉSPEDES MUÑOZ, Carlos (dir.), *Estudios de Derecho privado en memoria del profesor Nelson Vera Moraga* (Thomson Reuters), pp. 125-147.
- MUNITA MARAMBIO, Renzo (2022). “El incremento del riesgo como criterio complementario a la creación del riesgo no permitido en el análisis de la causalidad en las omisiones en contextos médico-sanitarios”, *Revista Chilena de Derecho Privado*, N° 38, pp. 225-262.
- NAVAS, Iván (2015). “Acción y omisión en la infracción de deberes negativos en Derecho penal”, *Política Criminal*, Vol. 10, N° 20, pp. 678-693.
- PANTALEON PRIETO, Fernando (1991). “Causalidad e imputación objetiva: Criterios de imputación”, en AA.VV., *Centenario del Código Civil, Tomo II* (Asociación de profesores de Derecho Civil), pp. 1561-1591.
- PAPAYANNIS, Diego (2012). “Derechos y deberes de indemnidad”, *Doxa. Cuadernos de Filosofía del Derecho*, núm. 35, pp. 691-716.
- PAPAYANNIS, Diego (2014). “Causalidad, probabilidad y eficiencia en los juicios de responsabilidad”, en PAPAYANNIS, Diego M. (coord.), *Causalidad y atribución de responsabilidad* (Marcial Pons), pp. 139-182.
- PINO EMHART, Alberto (2011). “Justicia distributiva, responsabilidad civil y terremotos”, *Derecho y Justicia*, N° 1, pp. 1-28.
- PIZARRO WILSON, Carlos (2004). “Comentarios a la sentencia de la Corte Suprema de 26 de enero de 2004”, *Gaceta Jurídica*, N° 283, pp. 121-137.

- PREVOT, Juan Manuel (2010). “El problema de la relación de causalidad en el derecho de la responsabilidad civil”, *Revista chilena de derecho privado*, N°15, pp. 143-178.
- PONCE ANDAUR, Arnaldo & MUÑOZ VALDÉS, Héctor (2014). “La causalidad desde Hume a Kant: de la disolución absoluta del concepto a su constitución como ley”, *Praxis Filosófica*, N° 38, pp. 7-25.
- PUPPE, Ingeborg (1994). “Causalidad” (trad. Jesús-María Silva Sánchez), *Cuadernos de Análisis Jurídicos. Estudios de Derecho Civil. Escuela de Derecho de la Universidad Diego Portales* (Ediciones Universidad Diego Portales).
- PUPPE, Ingeborg & WRIGHT, Richard (2017). “Causation in the Law: Philosophy, Doctrine, Practice”, en INFANTINO, Marta & ZERVOGIANNI, Eleni (eds.), *Causation in European Tort Law* (Cambridge University Press), pp. 17-59.
- QUÉZEL-AMBUNAZ, Christopher (2010). *Essai sur la causalité en droit de la responsabilité civile* (Daloz).
- REGLERO CAMPOS, L. F. (2008). *Tratado de Responsabilidad Civil, cap. II: Los sistemas de responsabilidad civil, tomo I* (Thomson-Aranzadi, 4ª ed.).
- REYES, Yesid (2005). *Imputación objetiva* (Temis, 3ª ed.).
- ROJAS-QUINONES, Sergio & MOJICA-RESTREPO, Juan Diego (2014). “De la causalidad adecuada a la imputación objetiva en la responsabilidad civil colombiana”, *Revista Universitas*, N°129, pp. 189-238.
- ROXIN, Claus (1997). *Derecho Penal. Parte general: Fundamentos. La estructura de la teoría del delito, tomo I* (trad. Diego Luzón Peña, Miguel Díaz, García Conlledo & Javier de Vicente Remesal, Civitas, 2ª ed.).
- RUBIO VARGAS, Francisco (2019). “El principio de reparación integral y la valoración del daño moral: el baremo estadístico jurisprudencial chileno”, en DOMÍNGUEZ HIDALGO, Carmen (ed.), *El principio de reparación integral en sus contornos actuales. Una revisión desde el Derecho chileno, latinoamericano y europeo* (Thomson Reuters), pp. 235-272.
- RÜMELIN, Max (1900). *Die Verbendung der Causalbegriffe in Straf-Civilrecht* (Lübingen).
- RUZ LÁRTIGA, Gonzalo (2009). “La reparación integral del daño ¿mito o realidad?”, en PIZARRO WILSON, Carlos (coord.), *Estudios de Derecho Civil IV* (LegalPublishing).
- SALVADOR, Pablo & FERNÁNDEZ, Antonio (2006). “Causalidad y responsabilidad” (3ª ed.), *Indret*, 1/2006. Disponible en: https://indret.com/wp-content/themes/indret/pdf/329_es.pdf [visitado el 24/11/2021].
- SALVI, Cesare (2019). *La responsabilità civile* (Giuffrè, 3ª ed.).
- SAN MARTÍN NEIRA, Lilian (2018). *La culpa de la víctima en la responsabilidad civil* (Der Ediciones).
- SAN MARTÍN NEIRA, Lilian (2021). “Responsabilidad civil por daños derivados de fenómenos naturales. Una revisión jurisprudencial”, *Revista Chilena de Derecho Privado*, N° 36, pp. 141-186.
- THON, Auguste (1894). *Von dem Begriffe der Verursachung*.
- TRAEGER, Ludwig (1929). *Der Kausalbegriff im Straf-und Zivilrecht* (Mamburg).
- TRIMARCHI, Pietro (1967). *Causalità e danno* (Giuffrè).
- TRIMARCHI, Pietro (2019). *La responsabilità civile: atti illeciti, rischio, danno* (Giuffrè, 2ª ed.).
- VINEY, Geneviève (2008). *Introduction à la responsabilité* (LGDJ, 3ª ed.).
- VINEY, Geneviève; JOURDAIN, Patrice & CARVAL, Suzanne (2013). “Les conditions de la responsabilité”, en GHESTIN, Jacques, *Traité de droit civil* (LGDJ, 4ª ed.).
- VISINTINI, Giovanna (2019). *Fatti illeciti. Fondamenti e nuovi sviluppi della responsabilità civile* (Pacini Giuridica).

-
- VON BURI, Maximilian (1873). *Ueber Causalität und deren Verantwortung* (Verlag).
- VON KRIES, Johannes (1866). *Die Principien der Wahrscheinlichkeits-Rechnung. Eine Logische Untersuchung* (Akademische Verlagsbuchhandlung).
- WEINRIB, Ernest (2000). "Restitutionary Damages as Corrective Justice", *Theoretical Inquiries in Law*, Vol. 1, N° 1, pp. 1-37.
- WEINRIB, Ernest (2012). *The idea of Private Law* (Oxford University Press).
- WRIGHT, Richard (1985). "Causation in Tort Law", *California Law Review*, vol. 73, N°6, pp. 1735-1828. Disponible en: https://www.jstor.org/stable/3480373?seq=1#metadata_info_tab_contents [visitado el 24/11/2021].
- WRIGHT, Richard (1988). "Causation, responsibility, risk, probability, naked statistics, and proof: pruning the bramble bush by clarifying the concepts", *Iowa Law Review*, Vol. 73, pp. 1001-1077.
- WRIGHT, Richard (1992). "Substantive Corrective Justice", *Iowa Law Review*, Vol. 77, pp. 625-711.
- WRIGTH, Richard (2008). "Liability for possible wrongs: causation, statistical probability and the burden of proof, in Symposium, the frontiers of Tort Law", *Loyola of Los Angeles Law Review*, Vol. 41, pp. 1295-1343.
- YZQUIERDO TOLSADA, Mariano (2019). *Responsabilidad civil extracontractual* (Dykinson).
- ZIPURSKY, Benjamin (1998). "Rights, Wrongs and Recourse in the Law of Torts", *Vanderbilt Law Review*, Vol. 51, N° 1, pp. 1-100.

CASES CITED**Chile:**

Fadda y otra con Inmobiliaria Las Rocas S.A. (2021). Corte Suprema, Rol N°16680-2018, de 12 de febrero de 2021.

Holzmann con Agrícola Las Colinas de Tapihue Limitada (2015). Corte Suprema, Rol N°26201-2014, 13 de julio de 2015.

Oñate con Caro (2019). Corte Suprema, Rol N°45023-2017, 21 de marzo de 2019.

Peña y Campos con Hospital Regional Rancagua (2020). Corte de Apelaciones de Rancagua, Rol N° 496-2019, 5 de mayo de 2020.

LEGISLATION CITED**Argentina:**

Ley 26.994, Código Civil de la Nación Argentina. Boletín Oficial de la República Argentina, 8 de octubre de 2014.

Chile:

DFL 1 Ministerio de Justicia, que fija texto refundido, coordinado y sistematizado del Código Civil. Diario Oficial, 30 de mayo de 2020.