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Causation and Liability

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Summary

- ***Do not Take Causation in Vain***

John FLEMING wrote, "*Causation has plagued courts and scholars more than any other topic in the law of torts,*" (1998), pg. 218). The criticism is justified. Causation is one of many legal criteria used to impose liability for damages on someone. However, it is a mistake to consider the doctrine as the most important if not the only criterion: ***Causation is taken in vain***. All legal systems rely on a variety of provisions to establish the duty to compensate or redress a loss, but few rely solely on causation as a basis for liability. Occasionally, causation may not even be required:

> a) The burden of compensating (partially or completely) the victim of an injury or loss is frequently imposed on someone who did not cause the harm. For example, parents have the duty to provide for their children to the best of their ability. The State, or society as a whole, is also expected to provide assistance. If a child requires immediate medical attention, then the neighborhood doctor is expected to pay a visit if contacted by the parents. In summary: *One does not respond only because one caused the damage*.
>
> b) The general rule for civil liability is that a third person has to have caused the harm in order to be held liable for it (art. 1902 of the Spanish Civil Code). Additionally, even when causation is required it often does not suffice as a condition. In other words: *One does not always respond even though one caused or contributed to the damage*.

- ***The Case of the Century***

In Spain, a case that involved the fatal poisoning of hundreds of people is a paradigmatic example of imputing damages to those who did not cause them. First, the Supreme Court (Second Chamber) on April 23 of 1992, found the defendants liable despite the fact that the reason for the spread of the disease could not be verified. Years later, on September 26 of 1997, the Supreme Court (Second Chamber) sentenced a custom's employee, and subsequently the State, to provide compensation totaling more than three billion euros (€3,381,805,000[1]). The case of the century was therefore decided twice, with causation only as a peripheral issue.

> In the 1970s, the Spanish government permitted the importation of colza oil for industrial use only. In order to protect the national production of olive oil, colza oil could not be imported as a foodstuff and it had to be "denaturalized" with castor oil. In 1973 several companies asked the government to allow the substitution of the expensive castor oil with cheaper naphthalinic mineral oils in the denaturalization process. The Central Customs Laboratory agreed to the change because the new denaturalizers could be easily identified and clearly made the colza oil inappropriate as a foodstuff.

[1] According to the exchange rate on February 18, 1999.

The cheaper oils adopted for the process included toxic aniline oils, such as the Azul de Ceres. Unfortunately, one of the companies decided to reverse the process of denaturalization and to sell the resulting oil as a cheap foodstuff. However, something went wrong in the process of refinement, storage, or transport of the denaturalized oil. As a result, hundreds of people died and thousands were seriously affected. The cause of the failure was never proven, it was simply determined according to clues. The defendants were found guilty of a criminal offense and had to pay damages, but they were insolvent (***Sentence of the Supreme Court (Second Chamber) on April 23, 1992***).

The relatives of the deceased and the surviving victims gathered the funds necessary for a second criminal lawsuit. This lawsuit targeted a state employee in order to require the State to provide compensation. The second lawsuit was first decided by the national Court of Appeals (Sentence on May 24 of 1996), and later by the ***Supreme Court on September 26 of 1997 (also in the Second Chamber)***. The previous director of the Central Customs Laboratory was found guilty because he authorized the denaturalization of the colza oil with aniline oils. The Spanish Government was held vicariously liable. Nevertheless, the investigation of the laboratory's actions made it clear that its only objective had been to classify the substances and to determine an appropriate tariff. The laboratory was not directly responsible for public safety (art. 1 of the RD 1915/1979). The courts found both a liable party in order to alleviate the plaintiffs' need for social assistance.

- ***The Multiplicity of Causes***

Why is causation a weak criteria for the imputation of damages? Because there are usually too many causes leading up to any given event. Typically there is an entire series of causes, each of which plays an essential role in producing the damage. Causation is simply too broad as a criterion for imputation.

The following concept of total cause is taken from one of the best Spanish philosophy of science textbooks of the last decade: "[E]very event generally has multiple causes ... The *total cause* of an event *e* is the sum ... of all the events c_1, c_2, ... c_n such that, of each c_i ($1 \leq i \leq n$) it is certain that if c_i had not occurred, and everything else had remained the same, *e* also would not have occurred" (José A. DÍEZ and C. Ulises MOULINES, (1997), pg. 146).

A common error is to connect civil liability with the responsibility for having caused damages. One of the most universal examples of the legal imposition of the principle ***he who does it, pays (Verursacherprinzip)*** –liability based solely on having caused the damages- is the legal rule according to which ***the manufacturers and importers of defective products are liable for the damages caused by the defect*** (article 1 of the *Law 22/1994, July 6, of Civil liability for damages caused by defective products*[2] and of the *Directive 85/374/CEE, July 25 of 1985, of Civil liability for damages caused by defective products* and *Restatement of Torts Third Section 402a §1 a) Products Liability*). Nevertheless, one is not held responsible based solely on having caused the harm. The manufacturer is not liable if it is impossible to know about a product's defect at the time it is placed on the market.

According to the last section of art. 6.1 of Law 22/1994, "Neither the manufacturer nor the importer is liable if they can prove: e) That the scientific and technical knowledge available when

the product was placed on the market was not enough to discover a defect." In other words, one has to know or be able to know that damage can be caused in order to be held liable for having caused the damage. This defense cannot be used by manufacturers or importers of drugs and foodstuffs because they are always liable for damages caused by their products.

- ***The Venom is in the Dose***

The basic *Common Law* rule on Evidence in a civil trial finds the defendant liable if she is more than 50% likely to have caused the damage (preponderance of the evidence). This doctrine might be mistaken under several circumstances. Let us suppose the following case of multiple tortfeasors that involves: i) Many small producers, each with a small market share and therefore a minimal risk of sole liability, ii) One large producer with a market share of over 50% (Steven SHAVELL (1998), pg. 212). We are now given a situation in which damage is caused by a particular firm in the industry but there is no concrete evidence as to which firm caused the damage. According to the preceding rule, the smaller producers are only motivated to adopt the most basic precautions. The small producers easily evade all prospective liability given the small possibility that they can be held solely liable for the damage. In contrast, the principal producer would be highly motivated to adopt all precautions because she would be found solely liable in the case of damages because she has more than half of the market share. SHAVELL proposes a system of proportional liability that is based on each participant's probable role in causing a harm, regardless of how small (***Market Share Liability***).

Similarly, if various agents act in sequence and damage results, then the first to act should not be held solely liable (Lewis A. KORNHAUSER and Richard L. REVESZ (1998), pg. 371). All actions taken after the first to act are compounded and can result in serious damages. For example, cutting down half a forest does not necessarily cause a problem but cutting down the remaining trees is catastrophic. Spanish courts have traditionally applied a principle of joint and several liability in the cases involving multiple agents, which does not consider the actions of the second agent as more dangerous than those of the first: The venom is in the dose.

Contribution among tortfeasors limits the preceding conclusion, if the legal system functions reasonably well and the defendant has not become bankrupt. We will return to the issue of vicarious liability.

- ***Legal Criteria and Doctrines on Imputation of Damages***

Lawyers have created more flexible imputation criteria to adjust to the problematic principle of causation. However, most of the new imputation criteria proposed remain

[2] BOE num. 161, July 7, 1994.

open and few positive legal provisions have resulted from them. Some of the most important to date include:

a) Arts. 154, 269, 389, 1596, 1903, 1905 and following in the Civil Code, which delimit the basic social roles of parents, tutors, owners, managers, and teachers.
b) Guidelines that regulate certain activities by assigning tasks and clearly delimiting acceptable positions: For example, the art. 33 of the *Law 1/1970, April 4, of Caza (Hunting)*; the art. 1 of the *Law 22/1994, de responsabilidad por productos defectuosos (products' liability)*; the arts. 139 and following of the *Law 30/1992, November 26, of Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (LRJAP; basic administrative procedure act).

Legal scholars have discussed imputation criteria for more than a century and some proposals have occasionally been used in legal theory. The following proposals, with slight modification, are taken from the work of the German criminal law professor Günther JAKOBS (1993), pgs. 195 and foll., and (1996), pgs. 90 and foll.:

a) Adequate causation or adequacy: A cause is only legally relevant if it is not highly improbable. This thesis is used by the First Chamber (Civil) of the Spanish Supreme Court with few restrictions.

> In the following case, the plaintiff entered an ATM booth around midnight and was robbed and injured (SC, 1st. 1.4.1997). The plaintiff claimed 90,152 euros compensation from the bank that owned the ATM because the door's latch was broken. The claim was partially awarded in the first instance but was completely rejected by the Court of Appeals (Audiencia Provincial). The SC agreed with the decision of the Court of Appeals based on the following reasons related to adequate causation: "(…) to determine the precise and direct link between the perpetration and negligence –cause- and the resulting damage –effect-, the legal doctrine applies the principle of adequate causation. This principle requires the result to be a natural consequence from the agent's determination of will; (...) whether one could have known that her actions would cause the resulting effect should be assessed in each case, and if the cause in question is considered necessary, the damage produced is considered a necessary consequence (...) Additional proof is required to connect the defendant's conduct with the damage caused, and therefore justify her having to provide compensation" (F. J. 2). Adequate causation leads without transition to fault, as a violation of a duty of care.
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> However, adequacy is difficult to define. The legally acceptable degree of probability can be anywhere between 0 and 1. Supporters of adequacy also disagree as to whether a determination of probability is subjective and related to prevention of the specific result, or if it is objective in the sense that a knowledgeable person should have been able to predict the probability of the result.

b) Tolerable risk: We live in societies characterized by strict divisions of labor and many different forms of social interaction. To some degree, these complex forms of interaction arise because we tolerate certain risky behavior and do not hold the risk-taker responsible for his/her actions.

The tolerable risk doctrine is especially relevant in criminal law due to the seriousness of the consequences of a criminal conviction. JAKOBS explains that if you do not personally take on any risks, then you cannot expect others to put themselves at risk for you. For example, an individual who does not want to assume any risk related to road traffic and conditions, when sick cannot expect a visit from a doctor if the roads are icy and the doctor would be held criminally liable for any accidents he was involved in on the icy road.

In contrast, the legal consequences associated with civil liability are less severe than those of criminal liability. The primary purpose of the tolerable risk doctrine is to distribute the costs derived from the conduct in question among - defendant, victim, both parties, everyone involved, or society as a whole. The results vary considerably. In some cases, the defendant is not held liable for the consequences resulting from her actions, despite having caused serious harm to the victim. For example, the exercise of fundamental rights, such as freedom of speech and of the press, affect third parties. In other cases, although the activity in question is not prohibited, the defendant or third party has to pay the costs associated with the damage caused. Consider the following example in terms of strict liability: A pharmaceutical laboratory is obliged to contribute to a fund that compensates the one out of every million patients who is seriously harmed by a generally beneficial vaccine. The cost incurred by the laboratory to support the fund is reflected in the price of the vaccine.

To evaluate whether the creation of a particular risk is permissible, the law considers its costs and benefits according to normative criteria as well as economic standards (see JAKOBS, Kip VISCUSI (1996), pg. 1423).

The standard, writes JAKOBS, determines what is usual or the best possibility but does not resolve the valuation problem (*"Der technische Standard bestimmt das Übliche oder auch Bestmögliche, erledigt aber das Bewertungsproblemen nicht"*). In his opinion, the majority of risks that are currently permitted cannot be empirically analyzed in terms of cost-benefit, regardless of the fact that in numerous cases the exact magnitude of risk can be determined. The balance would be impossible to calculate because there is no social model precise enough to use as a criterion of comparison. For example, JAKOBS finds that the benefits derived from driving for a leisure-related activity, and not for a work-related activity, cannot be compared to the benefits of a society without traffic caused by leisure-driving because it does not exist. Drivers planning their weekly free time or their move between residences understand that there is an opportunity cost involved in leisure-driving. The opportunity cost is not difficult to calculate nor is it necessary to think of an imaginary society. Nobody participates in activities when the opportunity cost is higher than the benefits derived. A bad economy cannot provide good law (cfr. KIP VISCUSI, (1992).

Nevertheless, continues JAKOBS, this (for him) unreal cost-benefit analysis is substituted by historically legitimized risks. Certain types of risky behavior find legitimization and social acceptance in tradition, not based on seniority but on an agreement reached (*Übereinkommensein*). The assumed risk is only tolerable when a potential victim is vaguely identified as a statistic. For example, the highway police know *ex ante* the approximate number of fatal traffic accidents that occur during any given weekend. However, this information does not make them responsible for the accidents. On the other hand, their responsibility would be clearly defined if they knew the risk that a particular person was taking or of a particular accident occurring.

The most widely accepted interpretation of tolerable risk is that if a person's behavior does not surpass this risk, then it is not prohibited by the fact that the person understands that a risk is involved.

In Spanish civil liability law, this doctrine is frequently applied by the Third Chamber of the Supreme Court. The SC tries to limit the consequences of almost half a century of doctrinal and legal cases that insist on the purely objective liability of the government, in other words, that it responds:

i) Objectively.
ii) For having clearly caused damages.
iii) As much in a case of action as one of omission.
iv) Without any exceptions based on competing co-causes that are more important or influential.
v) Whether or not the public service functioned normally.

Accordingly, the only way to deny the liability of the government is to deny the existence of a causal link. The judges of the Third Chamber dismiss cases that lack a causal link that directly ties the damages to a necessary compensation by public funds.

For example, the SC, 3rd, 5.6.1998, denied the proposed causal link between the plaintiff slipping on an escalator and the maintenance defects of this very escalator at the Airport of Madrid-Barajas. The SC, 3rd, 7.2.1998, also denied a proposed causal link between the Andalucian Board's prohibition of the sale of crustaceans from the Andalucian coast due to a high level of water contamination, and the damages suffered by the "Andalucian Employment Cooperative," dedicated to the cultivation and sale of mussels. Another illustrative case involved a teenager who jumped into the ocean from the breakwater and drowned (SC, 3rd, 29.10.1998). His mother sued the Regional Government of Cantabria for not designating the area as dangerous. The argument used against her case was that the ocean always presents a danger but the entire coastline cannot be marked. The same argument was applied to the riverbanks: The parents of a 13-year-old girl who drowned in the Trueba river claimed 40,080 euros from the Medina de Pomar (Burgos) City Council (SC, 1st, 8.3.1997). The SC upheld the sentences of the lower courts and rejected the plaintiff's appeal.

The Spanish Third Chamber has historically rejected the appeals of victims of criminal offences because crimes are considered to be committed as voluntary acts of delinquents, and are not related to an improper functioning of the State's public safety measures. The SC, 3rd, 16.12.1997, initiated a change which may lead to an expansion of the traditional limits. It sentenced the Central Administration of the State to provide a compensation of 75,121 euros to the plaintiff, whose husband was killed in a robbery committed by two inmates on a permission of leave issued by the prison.

Various recent sentences find the government liable based on adequate causation. The SC, 3rd, 14.7.1998, found the City Council of Castellón de la Plana liable for

damages in the following case. The plaintiff, a furniture salesman, was granted a building license to construct a hotel. Months later, he was denied the municipal activity license for not abiding by the community's hotel building regulations. The SC, 3rd, 26.9.1998, sentenced the Government of Canarias to award the parents of a 7-year-old boy 45,076 euros. The boy died at the public school he attended when he climbed onto the stairway railing and fell from the second floor.

c) ***The principle of trust***: Despite our experience that everyone makes mistakes, we trust that the conduct of others will be appropriate. In other words, an individual observes certain precautionary measures with the expectation that others will observe similar measures: One's own diligence presupposes that of others.

The principle of trust cites the assumption of risk and the *Regressverbot* (prohibition of return), and the social division of labor would be impossible without it. One should anticipate some negligence on the part of others and that the negligent person will always pay.

The principle of trust is essential to assure that the rules of responsibility lead to a NASH equilibrium in bilateral accidents. In other words, a situation in which several agents interact, and each one chooses the best possible strategy given the best strategies adopted by the rest.

The most adequate rule for cases involving minors and incompetents as tortfeasors will be addressed on another occasion.

d) ***The prohibition of return (Regressverbot) and the position of guarantor:*** It is not enough to review the causes of a particular event and to charge only one person for the consequences of an act that involved the illicit behavior of a third party. For example, a debtor pays back what she owes her creditor, and the latter commits a crime with a weapon purchased with the debtor's money. This series of events does not make the debtor liable for the creditor's crime. The doctrine in question can only be thoroughly analyzed in terms of crime authorship and participation, topics unrelated to the focus of this paper. It suffices to note that the defendant would not be liable unless she was in the position of guarantor at the time the events occurred. Under the negligence rule, an individual's precautionary duties towards others either, are defined institutionally by the law (parents, teachers, employees, owners, hosts, friends), or are first established socially and then legally for each sphere of human activity.

e) ***Protection of the norm (Schutzbereich der Norm):*** The violation of a legal rule that does not have the goal of protecting against a certain risk cannot be used as the basis for liability when that risk materializes. JAKOBS prefers to mention the realization of risk in cases of comparative risk but the basic idea is that the norm involved can take on one or more risks but not all of them.

SC, 1st, 8.10.1998: A worker was fatally run over by a cargo truck that he was guiding when he stepped into the truck's blind spot. The autopsy revealed that the victim had 4.8 grams of alcohol per liter of blood in his system. In the claim, his widow and children unsuccessfully alleged that the truck driver did not have the driver's license for mining machinery required by the art. 117

(R. D. 863/1985, April 2) of the *Reglamento General de Normas Básicas de Seguridad Minera* (basic norms of mining safety). "The absence of the permit in question is irrelevant in this case" (F. J. 2). The SC upheld the lower court's rejection of the lawsuit. Apparently, nobody considered that the victim initiated the operation of the cargo truck and that its driver should not have lost sight of him while maneuvering.

SC, 1st, 21.11.1998: A 32-year-old, married and the father of two young children, fatally fell off the lifebuoy from which he was painting the facade of a building on the sixth floor. His firm had not supplied him with even the most basic safety devices. The firm also did not have a fiscal license, registration book, Social Security membership, or accident insurance (OM March 9, 1971). The widow sued the firm and the owner of the building for 150,253 euros in compensation. Both defendants were sentenced in the lower courts to provide a compensation of 90,151 euros. The owners were later acquitted by the Court of Appeals. The SC rejected the plaintiff's appeal against the building's owner on the grounds that the lack of administrative licenses was irrelevant with regard to the cause of the accident. In addition, the owner is not obliged to control whether companies have upheld the workplace safety regulations.

f) ***Victim's consent and the assumption of risk:*** The agent is not liable for damages if the victim could and did consent to the act that caused the harm. The defendant is also not liable if the victim can and does assume the risk of damage in a given situation. The classic example deals with sport injuries.

In the case decided by the SC, 1st, 12.3.1998, the parents of a 17-year-old who drowned in a pond close to where he worked received no compensation. On a hot July afternoon, the boy decided to cool off in the pond. Unfortunately, he did not know how to swim and the police found him dead the following day. The parents claimed 60,101 euros from the carpentry firm that employed their son. The lower courts rejected the plaintiff's lawsuit and the SC did not admit their appeal.

- ***Causation and Omission***

The doctrine of causation has always conflicted with the theory of omission. In fact, the majority of legal commentators deny that there is something like causation by omission. For our purposes, it is enough to assume that if the law establishes a duty to act, he/she who does not comply with that duty will be held liable.

The practical problem of extending the analysis of the cause to the omission is that it forces one to assume a hypothetical causation (what would have happened if the defendant had taken action?) and this causes serious problems of proof. The concept of action supposes the cause of the effects and the concept of omission supposes its absence. We can prevent something from happening if we take action. What would have happened if we had not taken action? Or else we can leave something out. What more could we have done but did not? See, Jesús MOSTERÍN, (1987), pg. 141.

Philosophically, there are many ways to avoid dealing with the problem of causation by omission. The following is cited from DÍEZ y MOULINES (1998), pg. 253: There are *contributing* causes that contribute to an effect occurring, and *counteracting* causes that prevent an effect from occurring. For example, smoking is a contributing cause of lung cancer and exercise is a counteracting cause. However, these characteristics can be altered in the presence of other causes: Sand is a contributing cause of road accidents but it acts as a counteracting cause on an icy road.

Most civil liability cases result from omission, in other words, from liability for someone else's actions (*vicarious liability)*. The problem arises of whether we should speak of liability for not observing one's duty to watch out for other people's actions or rather of other people causing harm within our realm of influence and liability.

> The second focus is preferable: The idea is that if an employer and a bankrupt employee are in their standard roles and can negotiate freely, then the existence of a system of vicarious liability would be irrelevant. However, it is very relevant in practice because i) The victim knows which firm caused her harm, but not which particular employee; ii) Employees are usually insolvent; iii) In the absence of liability, the employer would hire the most insolvent job applicants (*judgement proof*); iv) There are many transaction costs between employers and workers.

- ***Causation and Economics: Cause, Strict Liability and Negligence***

The economic analysis of causation in tort law is concise and starts as positive analysis: ***Person A causes harm to person B when the conduct of A is a variable that appears in the utility functions of both***. For example, A enjoys smoking which bothers B, and causes both A and B to become sick (see, for example, Robert COOTER and Thomas ULEN, (1996), pg. 266).

Afterwards, the analysis becomes normative and focuses on the economic objective in judging who is liable for the cause, which is to advance the economic efficiency. This precedes from non-economic contexts (doctors, chemists, etc.) and decides which ***tortfeasor can avoid the harm with the least cost*** (Guido CALABRESI, (1975), pg. 71; William LANDES and Richard POSNER, (1987), pg. 228). But this form of dealing with the matter reduces causation to negligence and the other way around. SHAVELL explains this as (1998), pg. 212), "***the socially desirable level of care itself implicitly reflects causation***; care is socially valuable only to the degree that it can reduce accident losses in circumstances where losses would otherwise result".

This result was already well-known from traditional legal analysis (James BUCKLAND (1935), recently: Marc A. FRANKLIN and Robert L. RABIN, (1996), pg. 293). The requirement of proximate cause (that the cause is not too remote), limits the potential number of people who should take precautions with respect to the victim. Those obliged to take care are identified on the basis of causation. Typically, tort law texts and *casebooks* deal with the precautionary duties twice: In defining negligence and in analyzing causation.

> A possible criticism of causal analysis is related to economic efficiency (Thomas MICELI 1997, pg. 22). The judge formulates the question of the comparative causal link *ex post*, after the event occurred. In contrast, the normative doctrine of civil liability in *Law & Economics* poses *ex ante* the question about the most efficient rule to prevent accidents. As a result, the idea of causation seems incompatible with or at least removed from the most efficient rule. It restricts the liability

of the defendant because her behavior was not the material cause of the damages, even though she was the person most capable of preventing them.

The criticism is probably unfounded because a strict application of the rule of causation would make one half of humanity liable for what happens to the other half. In any case, as shown by MICELI (1996), pg. 473, (and by many others before him: GRADY, (1984), LANDES/POSNER (1987), SHAVELL (1987 and 1998) and KAHAN (1989); afterwards: Warren F. SCHWARTZ, (1998) pg. 559), there is no interference between the eventual causal test –that is too coarse in our opinion- and the efficiency rule of Hand: ***To find the defendant liable only for the damages resulting directly from her negligence, and not for all damages, will not negatively affect her future behavior because she will still find it more attractive to satisfy the standard of care*** that results from Hand's formula.

This example will clarify the preceding: The duty of care requires the defendant to build a 3-meter-high wall but the defendant does not comply. She is consequently liable for all damages caused due to the lack of a wall. However, she is liable for not building a wall 3-meters-high but she is not liable for the damage caused because a 6-meter-high wall was not built. In this interpretation, the potential tortfeasor takes the appropriate precaution by erecting a wall 3-meters-high but not higher: The wall has to reach exactly 300 centimeters because one centimeter more would cost more euros than the costs saved from avoiding accidents due to the extra centimeter. In practice, judges usually do not recognize this distinction.

- ***Attack upon the Fortresses of Strict Liability***

We need to go one step further. We have now observed that legal systems do not hold someone liable based solely on having caused the harm. The majority of the systems introduce important restrictions, such as the doctrine of ***proximate causation*** in the ***Common Law*** and the ***Zurechnungslehre*** in the ***Civil law***.

Legal systems do not pay much attention to the fact that the two doctrines are relevant both under Negligence and Strict liability, and therefore, the latter cannot be fully defined in terms of causal liability. And if this is the case, as we suspect, then a large part of the area that falls under the umbrella of strict liability belongs to negligence. This means that strict liability, based solely on having caused damages, should be understood within negligence: ***There is no sharp distinction between Strict Liability (SL) and Negligence (N)***. Liability rules are placed in a continuum that spans from negligence, with consideration to the personal circumstances of the agent (subjective guilt) and to objective guilt, to strict liability based solely on having caused the damages. The rules can be subsequently extended further. Although infrequently, the rules may reach the point of arbitrary imputation of liability to a person who could not have reduced the probability of the accident occurring. A good example is the colza oil poisoning case holding a custom's employee *in extremis*.

If this is indeed the situation, then the basic decision of who is a potential tortfeasor is pre-economic (cfr. Robert COOTER, 1987, pg. 524) or at least clearly normative: The person who can most easily prevent the damages from occurring should respond.

Are there recent developments in the area of torts that show the impossibility of distinguishing between civil liability and negligence? The answer appears to be affirmative:

a) The generalized assumption in the *Restatement of Torts (Third) Products Liability* that risk utility, namely negligence, is the only feasible criterion for identifying design defects and mistakes in product warnings and instructions. An old fortress of *Strict Liability* has fallen (See, James HENDERSON and Aaron TWERSKY, 1998).

b) The doctrinal recognition that State liability for public inaction, in other words, for omissions, is always negligence-based (Marcos GÓMEZ PUENTE, (1997), pg. 767). Another fortress falls: How many are left?

- ***Freak and Coincidental Accidents and Adequate Causation***

As we have said, the doctrines of proximate causation (*Common Law)* and of adequacy (*Civil law)* are used to limit the number of individuals who are held liable based on having caused damages. The doctrines are often cited in cases of **rare accidents**. One reason given for either limiting a defendant's liability or not holding her liable, is that this condition will not reduce the incentives of possible defendants because the accident is impossible to prevent.

> Additionally, as shown by KAPLOW and SHAVELL (*Economic Analysis of Law* (1999), pg. 11), it is not clear that courts can reasonably distinguish between foreseeable and unforeseeable accidents. A second consideration is that the court can diminish or increase the degree of concretion of the accident's details, thereby modifying their predictability and resulting in an absurdity. Any accident can become unique through the simple act of describing it in all of its details.

The restrictive doctrines of causation also limit liability in cases of coincidental accidents. For example, a bus travelling over the speed limit is damaged or destroyed by a tree that falls on top of the bus as it passes: To find the defendants not liable for such risky accidents does not affect their precautions nor does the lack of compliance with the speed limit increase the risk of damage.

> The recent Spanish cases which could be analyzed in light of the two issues we have raised were decided based on the following criterion: The court decides whether the plaintiff should be compensated in some form, and later limits or excludes the negligence of one or all defendants. It is also important to have insurance. Consider the following case decided by the SC,1st, 8.10.1996: A short-circuit caused a fire in the textile studio of the defendant in the early morning of June 23, 1988. The fire spread to two adjacent studios, a painter's and a locksmith's, which suffered significant damages. The locksmith and painter claimed 145,623 euros in compensation from the owner of the textile studio and from his insurance company. The firm that owned the textile studio had neither a municipal activity license nor the corresponding technical certificate of security. The claim was rejected in the first instance. The plaintiffs appealed and the provincial

Court of Appeals sentenced the defendant to pay 12,183 euros. The SC partially repealed the sentence and upheld the sentence against the insurance company but acquitted the owner of the textile studio: **"The absence of a cause"**, said the SC, **"impedes a sentence of liability based on guilt"** (F. J. 2). In other words: If negligence is to be denied then causality is also denied, and vice versa.

SC, 1st, 19.7.1996: September 12 of 1987, a tractor towing a large cargo of straw made its way up a street in Valmadrigal, Valladolid. Shortly thereafter, the straw rubbed against a low-tension cable that had lost its insulation and hung above the street. The straw caught fire on contact and the entire cargo load burned. Some sparks flew and were carried by the heat and the wind through the window of a neighboring house. The curtain then caught fire and the house burnt to the ground. The residents of the house claimed 105,857 euros from the tractor driver, the owner of the tractor, and the owner **of the trailer**, as well as the "Electromolinera de Valladolid" for the explosion of the electrical line. In the first instance, the defendants were sentenced to pay the plaintiffs a compensation of 59,748 euros. The Court of Appeals upheld the sentence but **acquitted the owner of the trailer** on the grounds that "it is too much to attribute liability *supervision* to the owner of a vehicle that on its own is immobile". The Supreme Court absolved the defendants from the payment of the legal expenses but did not modify the damages judgment.

SC, 1st, 16.2.1998: On the morning of January 7, 1991, a few alarmed neighbors entered the apartment of Salomé and Asunción and found them lifeless on the floor. The heat was suffocating because the doors and windows were closed airtight and the gas burners of the heater were on. The two women died shortly after being checked into a hospital in Bilbao. The victims' relatives sued the Municipal Gas Factory and the Bilbao City Council. Months before the accident, the victims had replaced the apartment windows with ones that had airtight closures. During the trial, it was revealed that the gas installation was faulty and had not been checked in the last three years. The first instance rejected the claim for "lack of causal evidence". However, the Court of Appeals sentenced the defendants to provide a compensation of 60,101 euros to the plaintiffs. The Supreme Court later reduced the amount of the compensation to 42,071 euros, **"taking into account that the victims' actions contributed to the cause of the accident"** (F. J. 5).

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- ***Sentences of the First Court of the Supreme Court***

Date	**Ar.**	***Ponente***	**Parties**
1ª, 19.7.1996	5654	Eduardo Fernández-Cid	Benito R. y otros v. Juan Antonio L., Guillermo L., "Electromolinera de Valmadrigal, SL" y "Winterthur, SA"
1ª, 8.10.1996	7059	Alfonso Barcalá	"Guardian Assurance, SA" v. Carmen B. y "Mare Nostrum, SA"
1ª, 8.3.1997	2482	Luis Martínez-Calcerrada	José M. y Marcelina S. v. Ayuntamiento de Medina de Pomar

1ª, 1.4.1997	2724	Pedro González Poveda	Ángel M. v. Jaime R. y "La Caixa"
1ª, 16.2.1998	985	Antonio Gullón Ballesteros	Amaya y Javier B. v. "Fábrica Municipal de gas de Bilbao, SA" y Antonio M.
1ª, 12.3.1998	1286	Luis Martínez-Calcerrada	Juan T. Y Carmen Ch. v. Diego R.
1ª, 8.10.1998	7559	Eduardo Fernández-Cid	Inés S. v. Antonio A., "Antonio Aragonés, SA" y "La Unión y el Fénix, SA"
1ª, 21.11.1998	8817	Alfonso Barcalá	María del Rosario F. v. Comunidad de propietarios del edificio Nautilus y "Mapfre, SA"
2ª, 23.4.1992	6783	Emrique Bacigalupo	Afectados del Síndrome Tóxico v. RAPSA y RAELCA
2ª, 26.9.1997	6366	Gregorio García Ancos	Afectados del Síndrome Tóxico v. Laboratorio Central de Aduanas, Manuel H. y Federico P.
3ª, 16.12.1997	8786	Juan Antonio Xiol	Ana María S. v. Administración General del Estado
3ª, 7.2.1998	1444	Jesús Ernesto Peces	Cooperativa Andaluza de Trabajo Asociado v. Junta de Andalucía
3ª, 5.6.1998	5169	José Manuel Sieira	María de los Ángeles R., María de los Ángeles A. y Ricardo A. v. Aeropuertos Nacionales
3ª, 14.7.1998	5754	Juan Manuel Sanz	María Isabel E. y Jesús L. v. Ayuntamiento de Castellón de la Plana
3ª, 26.9.1998	6836	Francisco José Hernando	Emilia F. y Tomás Y. v. Comunidad Autónoma de Canarias
3ª, 29.10.1998	8421	José Manuel Sieira	Herminia P. v. Ayuntamiento de Suances