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## Opening Remarks

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## OPENING REMARKS - WELCOME

BERTRAND LOUVEL\*

Professors, lawyers, dear colleagues, ladies and gentlemen:

“A formidable Siren” wrote Professor Dejean de la Bâtie: the notion of causation in law “willingly misleads those seduced by its subtlety.” If a consensus exists on this proposition, it is undoubtedly on the difficulty of addressing this “always irritating” question, apparently “unsolvable” for some, “a formidable mystery” that is among “the most illusive in our law.”

From the Latin *cavere*, cause calls one to “be on your guard,” to “defend oneself.” It plays with the ambiguity inherited from the Greek *aitia* which, in the same word, evokes the enigma of fault and of the origin of things such as the reason for being or the motivation of an act. Should we then be surprised to see Georges Ripert describe all effort to theorize on the subject “absolutely futile research”?

Faced with such a challenge, the temptation of an “evacuation of the causal link” is strong, through the use of presumptions and the introduction of new concepts such as “implication” or “imputation.” The need to establish a relation of cause and effect between an act or product and damage has been increasingly called into question.

Respected scholars have called for the courts to abstain from all causal analysis. Some have desired to confound the notion of causality with that of damage, or to renounce or to replace it by a bar to the proceedings justified by the remoteness between the harm and the original cause. Equity and risk are proposed as alternatives, when one claims to apply in this domain the Aquilian theory of relativity.<sup>1</sup>

Nonetheless, the idea of causality remains omnipresent. Perhaps because it appears to be a requirement of reason or an imperative of justice, it remains entrenched as a general condition of liability. It must be said that the role of this “constant” in liability law has increased with the develop-

\* Premier Président of the Court of Cassation, France. Translation by Andrea Richard, *Estour-nal*.

1. It corresponds to the fact that “an action alleging liability for fault is allowed only to the extent that the alleged damage is of the nature that the law intends to prevent by making the defendant’s conduct unlawful.” RAYMOND LEGEAIS, *GRANDS SYSTÈMES DE DROIT CONTEMPORAINS. APPROCHE COMPARATIVE* 326 (2d ed. 2008).

ment of “objective” [strict] liabilities. Thus, the need to grasp a notion of causality that marks the limits of the obligation of reparation appears more crucial than ever.

Of course, a number of authors continue to promote a pragmatic approach, evoking a “question of common sense more than science.” In his assessment, Esmein places causality in the realm of “feeling.”

Case law would work itself out in the same empirical manner, focusing, in the words of Carbonnier, on “a moral rather than material causality.” Certainly the Court of Cassation, like many of its foreign counterparts, exercises in this matter extensive control, verifying motivations as well as the soundness of conclusions drawn by trial judges based on evidence. Conscious of the difficulty of the exercise, it will not allow itself to be locked into any one system.

Proponents of the equivalence of conditions and adequate causation theories may oppose each other all they like, they will not manage to convince all sides. Some have tried, without much success, to reconcile their contributions, invoking one to decide the merits and the other to arbitrate the delicate question of proof. Opinions also differ concerning the role to be accorded to a causality which, in the litigation of civil liability, appears to be “one tool of adjustment among many.”

Faced with the difficulties of an often debated scientific reality, the courts have, over time, gradually resolved to consider that such a causal link may be established across the remaining uncertainty regarding its existence. The courts accept to compensate the loss of chance and are led to be satisfied with probabilities.

It must be said that the art of judging is, in essence, that of dealing with uncertain, undetermined and doubtful situations, of which there is only an altered image that the parties portray. Decision-making proceeds, in a certain manner, through a weighing of probabilities when, from the clues provided by each party and behavioral norms, the magistrate is forging an idea of the possible chain of events under the circumstances.

According to the writings of eminent jurists and philosophers in the past, causation could mean a power of production linking one object to another which would be its result. David Hume, on the other hand, suggested a simple “law” of succession founded on repeated occurrences, which has to be built rather than observed.

Evoking probabilities, as we have just done, follows the same path.

What counts in liability law, where reparation is conditioned by the existence of a causal link between the original event and the damage, is, writes one author, that one can provide a “satisfactory explanation” for the

appearance of the second (the damage) from the observation of the first (the original event). A “causal explanation,” inspired by Karl R. Popper’s work in the philosophy of science, is based on a general law which permits explanation of a particular event based on the identified circumstances.

Admittedly, jurists and scientists do not use the same criteria or the same requirements to judge the satisfactory or unsatisfactory character of such an explanation. But are their approaches so radically different?

After all, their objectives differ, and the judge, contrary to the researcher, cannot remain uncertain. There is no room for denial of justice in the matter. It is his task, according to a formula dear to the economic analysis of law, to select the “efficient” causes of the damage, those which explain it *best*.

Another important question is the evaluation, once damage has been determined, of the burden to be borne by each party in repairing it.

The distinction between being liable and determining the amount eventually to be paid by the defendants is familiar to lawyers, but nonetheless challenging.

In this domain as well, we cannot agree with the observation that the theories of equivalence of conditions and adequate causation offer help as keys to the apportionment of the burden of reparation. It is undoubtedly fair to assert here that a distinction must be made between an event’s causal nature with respect to the realization of the damage and the extent of its contribution to the damage.

Confronted with this delicate question of apportionment, judges too often find themselves forced to make a certain approximation—sometimes under the cover of frequently contested indicative scales—when assessing the share to be borne by each party.

It is of interest whether economic science, and the quantification tools at its disposal, can here also offer interesting perspectives.

The “Damage” project supported by the National Research Agency carries this ambition. It is the result of a partnership of excellence, uniting BETA and the François Gény Institute of the University of Lorraine with the Center for Economic and Legal Research at the University of Panthéon-Assas (Paris).

The Court of Cassation is pleased to contribute to the success of such an undertaking by sharing its database of the rulings of the Courts of Appeal, “Jurica.” We are also sensitive to the trust of each of the institutions involved in the project in choosing to meet mid-way through the project in our jurisdiction to discuss and share the results of their work.

We are glad to see such distinguished personalities with such diverse backgrounds respond to our invitation.

Please allow me to welcome each of them, as well as to thank the wise craftsmen of these meetings, Monsieur the professor Samuel Ferey and Madame the professor Florence G'sell.

Welcome, Mesdames and Messieurs, to this Grand Chambre.

All my best wishes for every success in your work.