

## On juridical causation in Civil Liability due to non-performance and unlawful conduct

1. – A few years ago, in the columns of this journal, I had the opportunity to meditate once again on this topic with an essay entitled «Intorno al rapporto di causalità nel torto civile» (1).

I have studied this subject in depth on various occasions as I am not convinced by the current opinion of the causal relationship in civil law which is borrowed from the authors of criminal law who do not distinguish the conception of legal causation from naturalistic causation.

The opinion that binds the action to the natural event that can explain at the most the *an debeat* but does not link the fact (of omission or committed) with the loss, understood in the *an* and in the *quantum debeat*, is widespread, even in civil law.

Underlying this dominant way of thinking there is the error of considering that man can emerge from himself and enter into direct contact with things and the natural phenomena that happen in time.

It forgets that causation does not exist in *rerum natura* (2) and is only a model of our mind, with which we usually link an antecedent to a consequence, on the basis of the frequency with which one anticipates the other (3).

From the continual observation of phenomena and of their representation, which occur in time, we obtain an inductive principle, which explains this succession (4).

Proceeding backwards, we make hypotheses and plausible diagnoses concerning the causal antecedent, which we verify using the deductive method (5).

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From «Rivista di Diritto Civile» 2001, II, p. 409 ff.

(1) I refer, for completion, to my article: *Intorno al rapporto di causalità nel torto civile*, in *Riv. dir. civ.*, 1995, II, 481.

(2) G. GORLA, *Sulla così detta causalità giuridica: fatto dannoso e conseguenze*, in *Studi in onore di A. Cicu*, Milan 1951, 433.

(3) D. HUME, *Opere filosofiche*, Bari 1992, 63 ff.; Kant, *Critica della Ragion pura*, Milan 1995; PH. N. JOHNSON-LAIRD, *Modelli mentali*, Bologna 1983, 107.

(4) J. STUART MILL, *Sistema di logica deduttiva e induttiva*, Turin 1988, 1, 457.

(5) G. VALCAVI, *op. cit.*, 485.

The congruence of their results will confirm or exclude our initial hypothesis.

Causation, thus understood as a mental model, will therefore be applied to the successions in general of highly varied phenomena, natural, economic, social, juridical and so on and so forth.

2. – The concepts of juridical and material causation represent two different applications of the more general concept of causation.

Material causation, unlike juridical causation, is the model that links the conduct of man to the natural event, when the latter follows the former and is necessarily presumed.

This does not recur and cannot be surmised in all the cases in which man's conduct is not followed by a natural event, as in illegal conduct, in particular in the case of omission.

By way of example, breach of contract can be mentioned (art. 1453 Civil Code) and the omission of acts dictated by the laws.

The strained interpretation of those who, to keep the naturalistic model, conceive causation (6) in the omission, as the relationship that links the so-called omitted dutiful conduct to a natural event, that would be consequent to it, is not agreed with. It can never consist of the performance of the asset which would follow on the omitted duty.

Moreover, this opinion would end up by giving a reductive idea of the loss, which we will discuss shortly, in the cases in which it is circumscribed within the limits of what the ancients called «*circa rem*» (7) but not *extra rem*, and more in general of that understood today.

Juridical causation, unlike material causation, mentioned here, is, on the other hand, the model laid down by the legislator that concerns the succession of the phenomena, in the context of the case in point described and their ideal frequency (8).

The causal antecedent is not represented here by the mere conduct, but «by the fact» which is jointly the conduct and the natural event, when this exists or the conduct without the event when it does not exist.

Here the event is not the natural one which may not exist, as has been seen, but the juridical one, i.e. the «damage» which always exists (9).

(6) F. REALMONTE, *Il problema del rapporto di causalità nel risarcimento del danno nella responsabilità civile*, Milan 1967, p. 28, p. 42, p. 97, ff.; P. TRIMARCHI, *Causalità e danno*, Milan 1967, p. 14, p. 15, 19, 20.

(7) F. PASTORI, *Gli istituti romanistica come storia e vita del diritto*, Milan 1992, 1042; S. PEROZZI, *Istituzioni di diritto romano*, Rome 1928, II, 337.

(8) On this point the dispute between Gorla and Carnelutti is recalled, with regard to the criticisms of their respective idealistic position and of naive realism.

(9) For the loss as an event of illegal conduct, *inter alia*: CARNELUTTI, *Il reato e il danno*, Padua 1926, 19 ff.; G. BETTIOL, *Diritto Penale*, Padua 1978, 304 ff.; G. DELITALA, *Scritti di diritto*

This distinction has been known ever since the times of the classical Roman jurists who kept the «ruptio» of the damage distinct (10).

The damage is certainly a creation of our mind, i.e. it is an abstraction, no different from the fact and it is more particularly the infringement of that interest that should have prevailed and which on the contrary has been sacrificed.

The damage is certainly outside the fact or causal antecedent, because it represents its consequence, but it is inside the case in point described by the legislator, which includes the overall fact, the damage and the juridical cause.

The only thing that is outside the case in point is the penalty of the damage (11).

Some authors have emphasized the naturalistic event, up to the point of denying the reality of the damage or have degraded it to a mere quality of the natural event which, as has been seen, may not exist and which is, in any case, a different concept (12).

Nor do we agree with the opinion of those who deny the existence of loss of anticipated profit, because it would be a *non ens et nullae sunt causae non entis* (13).

We will have inside the fact the material causation between conduct and natural event and outside it, but in the case in point, we will have the juridical causation running between the fact and the loss. The juridical causation will co-exist here along with the material one.

Where, on the other hand, the antecedent consists of a fact of omission or more in general, conduct without an event, we will only have the material causation.

This observation explains the reason why the author of these lines does not accept the opinion of those writers who maintain the existence of a dual causal nexus, between the conduct and the natural event on the one hand and the event and the damage on the other (14).

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*penale*, Milan 1976, 126 ff.; A. ROCCO, *L'Oggetto del reato*, Rome 1932 and the authors quoted therein; F. CARRARA, *Programma di diritto criminale*, Florence 1907, 1, 193.

(10) C. FERRINI, *Enciclopedia Giuridica*, 1880-1890. *Danni (azioni di)*, 81 ff.: id. *Manuale delle Pandette*, Milan 1952, 457, ff. 576 ff.

(11) Cataudella, entry *Fattispecie* in *Enciclopedia del diritto*, Milan 1966, XVI, in the same sense the authors mentioned in note 9, C. MAIORCA. *Noviss. Digesto*, entry *Fatto giuridico - Fattispecie VII* no author but Turin 1961, p. 122; against P. NUVOLOSE, *Il sistema del diritto penale*, Padua 1982, 173.

(12) *Inter alia*: F. REALMONTE, *op. loc. cit.*

(13) V. CARBONE, *Il rapporto di causalità nella responsabilità civile*, Turin 1987, I, p. 139, id., *Il fatto dannoso nella responsabilità civile*, Naples 1967, p. 167.

(14) C.M. BIANCA, *Dell'inadempimento delle obbligazioni* in *Commentario Scialoja e Branca*, Bologna 1979 under art. 1223 Civil Code; V. CARBONE in *Danno e responsabilità*, 1996, p. 430 ff.; notes 37 and 39. That of the dual nexus is the dominant opinion in German legal literature; EN-

The consequence of juridical causation consists of and is one with the damage, understood in its quantum, because the dimension of the damage must be explained and related to the cause (15).

What has been said so far on the distinction in general between material and juridical causation, on their conceptual diversity and on their possible coexistence, in my opinion, can be considered valid both for civil and for criminal law, whilst returning more extensively to this on another occasion.

In material offences, the natural event does not require any explanation in the cases of murder, injury, damage and so on.

In formal offences, we have conduct without an event (articles 365, 674 section 2 etc. Criminal Code).

There is juridical causation between the fact-offence on the one hand and the criminal damage on the other.

However, the distinction between civil and criminal is represented by the different causal rules which have been specifically laid down by the legislator for the former by articles 1223 and 2056 of the Civil Code and for the other by articles 40 and 41 of the Criminal Code (16).

3. – It now has to be added that the identification of the material cause and of the juridical cause are based on different rules, regarding the ideal frequency of the succession of the phenomena deemed necessary or sufficient to recognise the relationship of cause and effect.

In material causation, which is juridically irrelevant, we must refer only to the methods and rules of the natural sciences.

The scientific method deems that a natural event is produced by a cause «when there is a constant succession without exceptions, between the two classes of phenomena, to which the concrete phenomena in question belong» (17).

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NECERUS-LEHMAN, *Recht der Schuldverhältnissen*, Tübingen, 1958; CAMMERER, *Das Problem der Überholenden Kausalität*, Karlsruhe 1962; STOLL, *Begriff und Grenzen der Vermögensschadens*, Heidelberg 1976; Grunsky in *Riv. crit. dir. priv.* 1982, 641. It is maintained in common law by HART-HONORÉ, *Causation in law*, Oxford 1962, p. 79, note 15.

(15) On the other hand, for the causal relationship between non-performance, illegal behaviour and damage being one: in our legal literature the most notable are: POLACCO, *Le obbligazioni*, Rome 1915, 588; CHIRONI, *Colpa extracontrattuale*, Turin 1966, II, 314, in French legal literature: MEAZEUD TUNC, *Traité théorique et pratique de la responsabilité civile*, Paris 1963, II, 407; SAVATIER, *Traité de la responsabilité civile*, Paris 1959, II, 5. In common law: PROSSER, *Handbook of the law of Torts*, St. Paul Minn., 1964, p. 240.

(16) In this sense, some of the many authors who put the damage quoted above in note 9, at the centre of the causation. In the sense, on the other hand, of the necessary link with a natural event, in criminal law; F. STELLA, *La descrizione dell'evento*, Milan 1970, p. 45 ff.; ANTOLISEI, *Il rapporto di causalità nel diritto penale*, Milan 1934; A. SANTAMARIA, *Enciclopedia del diritto*, Milan 1966, XVI, entry *Evento*, p. 118 and ff.

(17) AMSTERDAMSKI, entry on *Causa-effetto* in *Enc. Einaudi* II, pp. 823, B. DE FINETTI, entry

This constant sequence without exceptions implies that the judgement of material causation must be susceptible to a counter-example, i.e. it can be «falsified» according to a well-known statement by Popper (18) for there to be a confirmation and therefore certainty.

This explains why a Judge will appoint an expert witness in the particular science to which the rules that he will apply belong, to recognise the causal relationship between conduct and the natural event.

The source, method and ideal frequency at the basis of the relationship of juridical causation, which is between the fact committed or omitted, mentioned above and the damage, which belong to the same legal case in point, described by the legislator and to which the punishment is correlated, are different.

The source is provided by the laws, fixed by the legislator and these must be followed, therefore the source is not represented by the natural sciences.

The ideal sequence of the phenomena of juridical causation is not constant without exceptions as in material causation, but is that which is based on normality and therefore is of the probabilistic type, which only indicates the number of favourable cases with respect to the possible ones.

The rule underlying juridical causation is therefore that of probability, which is inferred from the rules of experience which belong to the average cultural heritage of society.

The decision of probability, on the subjective level, is translated into that of foreseeability.

Both can be *a priori* or *a posteriori* with respect to the fact considered. The *a posteriori* probability includes the case under examination in the frequency and is known as Bayesian probability (19). The decision of *a posteriori* causation leads, on the subjective level, to the posthumous prognosis, compared to that of mere foreseeability which is *a priori*.

The confusion between juridical causation and material causation and the respective rules, is at the basis of the recent debate in the courtrooms, on whether reference should be made for both to scientific laws or to the laws on probability (20).

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on *Probabilità*, *ibid.*, X, p. 1146 ff.: STUART MILL, *op. cit.*, p. 726; K. POPPER, *Logica della scoperta scientifica*, Turin 1970.

(18) K. POPPER, *Poscritto alla logica della scoperta scientifica*, Milan 1994, p. 293 ff., 313 ff., 357 ff.

(19) *Enciclopedia Einaudi III*, entry on *Caso-probabilità*, p. 672; DE FINETTI, *Teoria della probabilità*, Turin 1970, p. 78 ff.

(20) In recent decades, the probabilistic criterion has oscillated from the statistical one (Supreme Court III, 3rd June 1980, no. 3622) to that based on a rule of experience (Court of Cassation, 3rd March 1987 no. 1228) and lastly, to probable probability (Court of Cassation, 16th November 1993, no. 11, p. 287).

The theory of *condicio sine qua non* or of the equivalence of conditions, as an expression of the scientific method, is applicable to material causation, but is not so for juridical causation, where it would multiply the number of causal factors out of all proportion (21).

In theory the criterion of adequacy or normality could appear to correspond more with juridical causation. This criterion is based on the rules of probability and foreseeability, but on close examination it is also revealed as not immune from criticism (22).

The confusion is all the more clear in the opinions of legal literature and case law, according to which for material causation a decision of probability would be sufficient, in civil as in criminal proceedings, where the judge would be «authorized to have recourse to a series of tacit nomological assumptions and to take as present unknown or only guessed initial conditions». This is because, reasoning otherwise, «the preventive-repressive aims in criminal law would be frustrated» (23). In material causation it

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(21) The theory of *condicio sine qua non*, inaugurated in criminal law by von Buri and in Italy by Yannini, dominates in today's criminal case law, where it is combined with the criterion of efficient causation, in the case of article 41 Criminal Code. However, it is typical of that sector of criminal law centred not on the damage but on the natural event where it appears the result of a series of concauses, of which the different causal efficacy cannot always be identified, as in traffic offences. In addition, it does not appear to have been adopted by the Italian system, even in criminal law, in the case of complicity in negligence where article 113 Criminal Code requires the author of the concause to have caused the conduct of others and the merger into one lawsuit (Criminal Court of Cassation, section IV, 21st April 1988 *inter alia*). This theory has been maintained in civil law by some authors such as RIMARCHI *Condicio sine qua non, causalità alternativa ipotetica e danno* in Riv. Trim., 1964, p. 1431 and assimilated in case law by Civil Court of Cassation 39th March 1985, no. 2231; Civil Court of Cassation 16th June 1984, no. 3619, *inter alia*. The author is also particularly critical of this theory in criminal law, because it is reduced only to a negative criterion suitable for excluding the causal nexus between unconditioning events and the natural event, but not positive to recognize the existence of the causal charge to natural events linked between them only to a *condicio sine qua non*. It is all the more inapplicable in civil law where the relationship is between non-performance, illegal behaviour and the direct and immediate damage and not with the natural event.

(22) Many rulings such as Civil Court of Cassation 1st June 1991, no. 6172; Civil Court of Cassation 10th December 1982, no. 6761 and Civil Court of Cassation 14th April 1991 no. 2847 in our case law have been inspired by the different theory of adequate causation. This theory, taken from criminal law, has its origins in von Kries and has been accepted by our most authoritative penalists such as Delitalam Bettiol, Carnelutti, Nuvolose and others. However, it is susceptible to criticism, in criminal law as well, because this criterion is reduced to a judgement of *a priori* prognosis and not *a posteriori* diagnosis of the natural event in the offences committed with an event. The author underlines that article 1223 Civil Code requires a direct and immediate link between non-performance, illegal behaviour and, in particular, the damage. Therefore, the criterion of efficient causality, with the damage, appears to have greater correspondence.

(23) Criminal Court of Cassation, section IV, 25th March 1975 in the Vajont case: Criminal Court of Cassation, section IV, 6th December 1990, in the Stava case, in Foro it., 1991, II, paragraph 36.

is not possible to make do with probabilistic decisions, all the more so *a priori*, but reference must be made to scientific rules.

Nor is it possible to agree with that trend that has recently come back into favour for juridical causation, according to which the so-called probable probability should be accepted (24). Here the decision of probability is degraded to that of mere possibility, i.e. to that of plausibility which is precisely that of anyone who forms a hypothesis but fails to verify its confutation, as must be the case in any causal search and assessment.

At this stage, clear disagreement is expressed with the opinion that accepts, in civil law, the model of causation, currently existing amongst criminal lawyers, which is imbalanced in favour of material causation to the detriment of juridical causation. From this point of view, articles 1218 and 2043 Civil Code cannot be considered a duplicative echo of articles 409 and 44 of the Criminal Code, whilst the terms of criminal causation must be reconsidered (25).

The causation of civil lawyers diverges, moreover, from that of the criminal lawyers, because it seeks out the nexus with the damage in the *an* and in the *quantum*, as stated in this decision and not only with the mere *an debeat*, to apply the penalty, as in criminal law.

4. – The observations made so far on the priority of juridical causation with respect to material causation, of the damage with respect to the natural event, the anti-juridical fact as a whole, instead of the simple conduct (as the causal antecedent), are confirmed in the historical excursus of legal thought, from Roman law to the present day.

Roman jurists placed the damage and not the physical event at the centre of civil contract and tortious liability, i.e. on the one hand «*omnis utilitas, quae circa rem consistit*» (D 19.1, 21.3; D 19.2, 19.2; D9.2.21) and «*damnum iniura datum*» and not the physical event on the other.

This was the case whether the illegal fact was purposeful or not.

In the earliest phase, they emphasised purposeful conduct with a natural event and thus the physical contact of the agent with the thing (*corpore, corpori*). However, in this case too the jurists placed the *damnum* (or property damage) and not the *ruptio* (or physical event) at the centre of the causal relationship (26).

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(24) Court of Appeal, Genoa, 10th March 1997, *Il danno e responsabilità*, 1996 p. 470. For a general idea, K. POPPER, *Congetture e confutazioni*, Milan 1972, p. 36.

(25) RIMARCHI, *op. cit.*, *loc. cit.*; F. REALMONTE, *op. cit.*, *loc. cit.*; G. FERRINI, *Enciclopedia giuridica, Danni (azioni di) op. cit.*, *loc. cit.*

(26) S. PEROZZI, *Istituzioni di diritto romano*, Milan 1928, II, p. 335; E. BETTI, *Diritto Romano*, Padua 1935, p. 417 ff.; G. PUGLIESE, *Istituzioni diritto romano*, Turin 1990, p. 605 ff.

Subsequently, purposeful conduct (*corpori* but not *corpore*) took on importance to which was granted action *in factum o utilis ad exemplam legis aquilae* (Gaius III, 219) (27).

In Justinian law, the compensation of damage which was neither *corpore* nor *corpori* was admitted and it has come down to us for all tortious damage. Moreover, the damage could be compensated only within the limits of the *duplum*.

In the final analysis, causation in Roman law was juridical and was not identified with material causation.

The causal relationship indicated above included loss and loss of anticipated profits, and the damage had to be a direct and immediate consequence of the illegal action (D 19.1.21.3 cit.).

Damage *circa rem* or intrinsic damage (*propter rem habitam*) were in themselves direct and immediate, as was the case of wine which became vinegar, due to a defective barrel or the slave who was killed after he had been named as heir. Similarly in tortious liability, the damage had to be a direct and immediate consequence.

Causal interruption was regulated by D 9.2.25.1 and 43.24.7.4. Alternative hypothetical causation was contemplated by D 19.210.1.

These principles passed on to the jurists of common law (including Bartolo and Donello) in whom the distinction between damage *circa rem* and damage *extra rem* was consolidated and where causation was confused with foreseeability.

It was still in favour in the time of Pothier but was then abandoned «because it gave rise to too many contradictions,» so that Pacifici-Mazzoni, in his time, concluded that «the distinction has no place».

5. – The spirit of modern times, characterized by *favor debitoris*, therefore damage by non-fulfilment, in juridical causation had to be justified by «una causa proxima et non remota» was expressed by Charles Dumoulin and above all by Pothier (28), whilst in criminal law it found an echo in Oertman and in Birkmeier (29).

The point of arrival of this process was the wording of art. 1151 of the Napoleonic Code, adopted by the French Council of State without discussion for its obviousness, whereby «in the case in which the non-performance comes from the intentional wrongdoing of the debtor, the damage and interest, relative to the loss suffered by the creditors and the gain of

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(27) POTHIER, *Traité des obligations*, Paris 1777, no. 1660, CHARLES DUMOULIN, *De eo quod interest in Opera Omnia*, Paris, 1681.

(28) OERTMANN, *Zur Leber Vom Kausalzusammennhang*, Tubingen 1886, p. 268.

(29) POTHIER, *op. cit.*, *loc. cit.*, in the steps of Paul, who excluded the responsibility for the death of slaves by the debtor who had not supplied the wheat.



which it was deprived, must not be extended unless to what is an immediate and direct consequence of the non-fulfilment of the agreement.»

The method assimilated by this legislator was that of juridical causation which links the fact as a whole (purposeful or out of negligence) to the damage (whether actual damage or loss of anticipated profits) and not that of material causation (within the purposeful fact) which links the conduct with the natural event.

The formula adopted was clarified in the relationship of direct and immediate causation, from which that of indirect causation was to be excluded.

In this regard, the teaching of Pothier is particularly clear for whom, in the case of a cow stricken by the plague and that had infected the other animals in the barn which died, the damage deriving from the failure to cultivate the ground, the consequent lack of crops and the difficulties was to be excluded (30).

The damage corresponding to the value of the dead livestock or of the wine that has become vinegar was deemed to be direct following infection by the pestiferous cow or by the wine coming into contact with the defective barrel and was therefore liable to compensation, whilst the other was not because it was inconsequential damage.

A logic all of its own underlies article 1151 of the Napoleonic Code, in that if the inconsequential contractual damage were considered liable to compensation, the debtor's situation would have considerably worsened, despite the declared orientation of moderation towards the debtor, as the limit of the *duplum* of Justinian memory had been abolished.

French legal literature and case law subsequently extended the rule to tortious damage, perhaps straining the wording of the law (Demolombe, Ripert and, in the opposite direction, Aubry and Rau, Planiol, Esmein (31)).

Many French authors, from Marcadé to Zachariae, from Baudry-Lacantinerie to Demogue, Ripert, Duranton, Troplong, Savetier, Mazeau and Marty have written on the significance and scope of «direct and immediate damage» (32).

Marcadé concluded that direct and immediate damage must be understood as that which «derives directly from the malicious wrongdoing, as its

(30) DEMOLOMBE, *Cours de code Napoléon*, Paris 1873, p. 268; RIPERT, *Traité de pratique de droit civil français*, Paris 1902, VI, no. 445. p. 352.

(31) On the undisputed acceptance of the wording in the French Council of State, see *Discussions du code Napoléon dans les Conseils d'Etat*, Paris 1808, II, p. 264. On the authors mentioned: MARCADÉ, *Spiegazione del codice di Napoleone*, Palermo 1856, II, 1, p. 332 ff.; ZACHARIAE, *Corso di diritto civile*, Paris 188, II, p. 626, DEMOGUE, *Traité des obligations en général*, Paris 1932, no. 281, op. 316, ESMEIN, *Rev. Trim. droit civil*, 1934, p. 317; G. MARTY, *rev. cit., op. cit.*, 1939, P. 685; SAVATIER, *Théorie des obligations*, 1967, p. 285.

(32) GREGOIRE, *Le droit anglo-américain de la responsabilité civile*, Brussels no. 117, 119.

sole cause and which is so close to that there can be no interference from any other cause extraneous to the wrongdoing of the debtor».

Lalou said that «direct damage must be understood as that which has the sole cause in the fact producing the damage and indirect damage as that which emerges when there is a crime or nearly a crime».

Colmet de Santerre, with great sagacity of spirit, wrote that the law excluded that it was possible to proceed from «conjecture to conjecture» otherwise the debtor would also have ended up being responsible for the suicide of the creditor.

Much less clear was the orientation of French case law, with regard to which Esmein wrote that «the courts provided without a precise criterion, out of pure sentiment».

Article 1151 of the Napoleonic Code was taken up by article 1107 of the Spanish Civil Code, by article 2100 in the Mexican code, by article 1242 in the Sardinian code, by article 1105 in the code of the Kingdom of the Two Sicilies, by article 1124 in the Parma code and by article 1201 in the Estense code.

In German countries, article 1323 of the Austrian Civil Code and article 249 of the German code, unlike the legislations that were inspired by Pothier, did not introduce any limit for the causation, foreseeability and avoidability of the damage.

In Great Britain (the land of Hume and Mill), they went from the theory of foreseeability, defined in 1850 by Justice Pollock to that of the direct relationship in 1921 of the Appeals Court in the *Re Polemis and Furness* ruling and in 1961, they returned to the theory of foreseeability with the *Overseas Tankship* decision (33).

In countries with Common Law, an important work on causation is *Causation in Law* by H. H. Hart and Tony H. Honoré.

6. – The phrase of the relationship of «immediate and direct causation» between the fact and the damage of article 1151 of the Napoleonic Code has been translated into article 1229 of the Civil Code of 1865 and its significance became clear again, to the extent that there is no explanatory note in the ministerial report, in the parliamentary proceedings and in the commission of coordination that preceded it.

The phrase was to be identical with article 1223 in the present-day Civil Code.

It has turned out to be virtually irreplaceable, to indicate the sequence of every type of damage that also includes loss of anticipated profit.

How can the «loss of indirect earnings» be compensated, protecting what Dernburg called «the dreams of earning»?

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(33) H.L. HART HONORÉ, *Causation in law*, Oxford, 1985, p. 93.

The phrase of direct and inconsequential damage encountered the favour of case law which extended it to tortious damage and of jurists such as Pacific Mazzoni, Giorgi, Ricci, Matteri and many others (34).

There were also critical voices who deemed it restrictive, Gabba and Chironi, in the footsteps of Sintenis and Windscheid, proposed replacing it by «necessary consequences». Moreover, here it did not include the essence of the juridical causation because it was focused on the different requisite of non-avoidability, today codified by article 1227, section 2, Civil Code (35).

Coviello went even further and suggested deleting the words «direct and immediate» because it was absorbed by foreseeability (36). The author of these lines has observed earlier that the foreseeability Coviello was concerned with was that of the time of non-fulfilment, whilst article 1228 of that code referred to the moment of the formation of the contract as does the present-day article 1225 of the Civil Code.

This would have excessively limited the area of indemnifiable wilful damage and, on the contrary would have extended too far that of the negligent damage, with the consequences of wilful and negligent non-fulfilment becoming equal.

7. – The new legislator has aligned himself with the previous one, having taken for article 1223 Civil Code the same wording as article 1229 of the abrogated code, which places in the case to point the cause identified in the wrongful fact (which is identified in the non-fulfilment or in the delay) and the event in the damage, i.e. the loss suffered by the creditor and the loss of profit, as they are the direct and immediate consequence.

The wording adopted by this regulation, as by article 2056 Civil Code, in the wake of the previous article 1229, refers to legal and not material causation.

Committing tort, non-fulfilment or delay, are not significant in civil law in their physical reality as an action or omission but only in terms of a normative case in point, i.e. as committing an act that is prohibited or as the omission of an obligatory act.

We disagree with those who deem that the articles 1223-2056 Civil Code should be jointly considered and integrated with articles 40 and 41 of

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(34) PACIFICI MAZZONI, *Istituzioni di diritto civile*, Turin, IV, p. 488; GIORNI, *Teoria delle obbligazioni*, Florence 1924, II, P. 187 ff.; RICCI, *Corso teorico pratico di diritto civile*, Turin 1912, VI, p. 275; MATTEIM *Il codice civile italiano*, Venice 1874, IV, under article 1229, p. 317.

(35) GABBA, *Contributi alla teoria del danno e del risarcimento*, in *Nuove questioni del diritto civile*, Turin 1904; CHIRONI, *La colpa nel diritto civile odierno*, Turin 1879, p. 486.

(36) N. COVIELLO, *Intorno alla risarcibilità dei danni indiretti e mediati*, in *Giur. It.* 1897, I, sections 23 and ff.; D. MANDRIOLI, *Le conseguenze immediate e dirette dell'inadempimento doloso*, in *Riv. Dir. comm.*, 1921, I, p. 56.

the Criminal Code, because «there is no interruption between the various branches of law».

In the civil case in point, material causation is of significance in the committed fact, as a link between the conduct and natural event considered as a whole, whilst that between the fact and the damage, represents the juridical causation, which will coexist with the former. This is also the only form of causation that can be hypothesized for facts of omission or mere conduct.

It has already been stated that the damage is an abstract-empirical representation, as the wrongful fact, which is its cause, and there can be no agreement with the opinion of those who go as far as to deny the existence of the loss of profit, because they are alleged to be abstractions. They are undisputable realities.

Nor can the damage be degraded to the level of a mere adjective of a natural event, which may not have occurred, as in facts of omission, and the wording used of «damaging event» is equivocal. The loss and loss of profit, which are the contents of the damage, are real phenomena.

Legal literature discusses the distinction between «damage-event» which is alleged to be within the case in point and «damage-consequence» which would lie outside it (37). The damage-consequence can be justified only by those who admit the indemnifiability of the inconsequential damage, which I do not agree with.

The so-called «unjust damage» is a pleonastic expression, because it is such in that it derives from a wrongful fact.

The opinion that would like to limit the damage to the conclusion of the *an debeat* alone and not to the *quantum debeat* as well, cannot be accepted. The *an debeat* is only one step of the decision of causation, in the economy of the intellectual engagement of the judge.

Articles 12223 and 2056 of the Civil Code, considered jointly, have established that the link between the fact and the damage must be direct and immediate, like the previous legislators who adopted the rule «*in iure proxima et non remota causa spectator*».

The causation of importance for law is that which complies with the text of the law, which also prevails over the probabilistic justification a posteriori, which we discussed earlier.

The critical observations by Gabba and Chironi on the expression «direct and immediate damage» were also recalled earlier, but there is no reason for these observations, after article 19 of the final bill by Grandi, which

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(37) For the damage event: Court of Cassation, all Divisions sitting together 27th February 1962 no. 390 in *Riv. Dir. civ.* 1963, II, p. 599, FORCHIELLI, *Il rapporto di causalità nell'illecito civile*, Padua 1960, p. 21; CARNELUTTI, *Perseverare diabolicum*, *Foro it.*, IV, paragraph 99. For the damage-consequence; G. GORLA, *op. cit.*, P. 433.

spoke of «necessary consequences» was dropped by the legislative assemblies which, overcoming these objections, restored the old expression whereby the causation relationship must be direct and immediate (38).

The adoption of the wording of article 1223 Civil Code shows the unchallengeable will of the current legislator.

The adjective «direct» indicates the relationship of consequentiality and logical univocity between the wrongful fact and the damage, as is the well-known case of the death of the infected livestock by the pestiferous cow or the wine that has turned into vinegar on contact with the defective barrel.

As for the criticism of the adjective «immediate», it is agreed that the physical event can take on a definitive form, following the development with the passing of time. Articles 1223 and 2056 Civil Code nevertheless pertain to the relationship between the fact, after its evolutive stabilization and the damage that must be direct and immediate.

We do not agree, as stated, with that opinion, however widespread and authoritative it may be, which replaces the legislative expression of the direct and immediate relationship with the meta-juridical one of the *condicio sine qua non*, which moreover would be combined with the criterion of effective causation, in the event that an interruptive fact were to intervene.

This theory also reveals its unacceptability, as in the case of the subject who knocks over or injures a person who subsequently dies, due to a fire in the hospital where he was admitted or an unlawful act by third parties, but is summoned to be responsible for the death.

Confirmation is again represented by the common opinion that requires the relationship of direct and immediate causation for the compensation *lucrum cum damno*.

As far as the compensation of inconsequential damage is concerned, acknowledged in legal literature and in case law, where it is part of the logic of normality, it has to be observed that articles 1223 and 2056 Civil Code have excluded the general principle that *causa causae est causa causati* and that, furthermore, the limitation to normal inconsequential damage has no point, because an abnormal causation is of no significance for direct or for inconsequential damage (39).

As for the introduction of juridical causation, one significant conjecture is that expressed by article 1227, section 2, Civil Code, whereby that part of the damage which could be avoided by the creditor and did not avoid it cannot be indemnified (40).

(38) See my *Intorno al rapporto di causalità nel torto civile*, *op. cit.*, p. 491, note 37.

(39) DE CUPIS, *Il danno*, Milan 1966m II, p. 200.

(40) Art. 1227, section 2, Civil Code, by placing at the responsibility of the damaged party the burden of avoiding the aggravation of the damage creates a factor of interruption of the re-

Summing up, we can conclude that the discipline of juridical causation is not only limited to the regulations as per articles 1223 and 2056 Civil Code, but on the subject of contracts it also includes articles 1218, 1225, 1227 section 2 and on tort, articles 2043, 2056, with reference to articles 1223 and 1227, section 2, Civil Code.

*Also by the author on the same subject:*

- «Intorno al rapporto di causalità nel torto civile» - In *Rivista di Diritto Civile* 1995, II, p. 481.

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relationship of causation under way, with regard to the development of the *quantum debeatur*, More in general on the interruption of the relationship of causation, see: U. GIULIANI BALESTRINO, *La cd interruzione del nesso causale, come fatto normativo* in *Scritti in memoria di R. Dell'Andro*, Bari 1994, p. 397.