EXPERT REPORT ON CHILEAN LAW

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INTRODUCTION

I am a professor of law specialised in civil law and legal theory. I have taught civil law in different Chilean universities since the beginning of my academic career, right after I finished my PhD at the University of Edinburgh, in 1999. I have been asked to provide expert opinion and advice by some of the most prominent Chilean legal firms and also by public and regulatory bodies. Indeed, when he published his *Tratado de Responsabilidad Extracontractual*, prof. Enrique Barros asked me to present it in formal act at the Universidad de Chile, as can still be seen on the Law Faculty website[1]. I am also regularly asked to provide advice on issues related to my areas of expertise by the Chilean Congress. For more details, I refer to my CV which is attached as *Appendix A*.

I have been asked to prepare an expert report on certain matters under Chilean law. Although my assignment is restricted to explaining the contents of the law, not to apply it to any particular facts, I understand that my report will be relied upon in relation to an on-going litigation between Arica Victims KB and Boliden Mineral AB before the District Court of Skellefteå in Sweden.

The following questions/areas will be addressed in this report:

I. ON NEGLIGENCE
   1. On the standard for assessing negligence
   2. On the proof of negligence
      The general rule
      The exception: legal presumptions of negligence
      Presumption of negligence in environmental matters
      Presumptions of negligence regarding the action of third parties

II. ON CAUSATION
   1. Dealing with insignificant Contributions to a damage: Concurrence of causes and contributory causation
   2. Contributor's liability

[1] See http://www.derecho.uchile.cl/postgrado-y-postitulo/doctorados/facultad-de-derecho/65948/publica cion-del-tratado-de-responsabilidad-extracontractual-del-profes (a printout of this webpage is included in Appendix A).

While preparing this report, I have had access to an expert report prepared by Prof. Ramón Dominguez Águila, dated 9 March 2016. I have also had access to extracts from the parties' submissions in the above litigation, providing a basic understanding of their main themes of argumentation.

I. ON NEGLIGENCE

1. ON THE STANDARD FOR ASSESSING NEGLIGENCE

§ 1. *General rule: the model of the 'bonus pater familias'.* According to Article 44 of the Chilean Civil Code, negligence is failure to comply with a standard of due diligence, "such diligence and care that men ordinarily display when dealing with their own affairs" (Article 44, first paragraph). The generic model is that of a *bonus pater familias* (Article 44, third paragraph). This is a generic reference, because its precise content can only be ascertained in view of the concrete circumstances of a particular case[2].

However generic, is not devoid of any content. The notion of *bonus pater familias* is a general and flexible standard that makes reference to a reasonable and prudent subject, the actions of whom take into account extrinsic circumstances such as place, means, risks, costs, nature of the activity, rights and interests in play[3]. At the core is the idea of "good judgment" as foresight, that is, as the ability to notice the level of risk involved in an activity and to show the corresponding disposition to take reasonable measures to prevent the possible associated damage. A person is prudent not because he/she eliminates all possible risks, but because he/she takes reasonable measures in an effort to minimize them: a *bonus pater familias* takes risks, but not excessive risks.

In applying the *bonus pater familias* standard, it is important to put oneself in the position of the person, whose actions are to be measured against the standard. It is the information available to and the circumstances surrounding that person at the time of his/her actions, which are of primary relevance. One must of course avoid assessing those actions and the ability to foresee risks with the benefit of hindsight, i.e. with knowledge of facts that only evolved later. Further, if the actions took place in a particular business or industry context, one should also

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2 "The judge shall compare the conduct of the agent with that observed in a prudent man of identical profession or position located in the same place, time and with other external circumstances". Alessandri, *De la Responsabilidad Extracontractual en el Derecho Civil chileno* (Santiago: Ediar-Conosur, 1983), vol. I, p. 172.

3 Aedo, "El Concepto Normativo de la Culpa como criterio de distribución de riesgos. Un Análisis jurisprudencial", in 41 *Revista Chilena de Derecho* (2014).

take into account the norms and general standards of behavior that may have applied in that business or industry at the relevant time.

§ 2. *Ascertaining the concrete content that corresponds in the case to the generic concept* is a judicial task par excellence. For this reason, the criteria that judicial decisions have adopted to qualify an action as negligent[4] do not necessarily operate as formal requisites, rather as general guides.

§ 3. *The specific conditions of the agent, and of the activity itself, are relevant* to ascertain whether his/her action was negligent, both in contractual and extra-contractual contexts. The requirements of the activity itself are also relevant. Thus, for example, "[i]f anyone develops an activity that requires particularly demanding professional skills or a certain knowledge or qualified practical experience, the expectation his behaviour has to satisfy is correlatively greater[5]".

2. LIABILITY FOR THE ACTION OF ANOTHER AND CULPA IN ELIGENDO/IN VIGILANDO

§ 4. *Sometimes one agent's negligence implies somebody else's negligence.* In principle, negligence is personal: each one has the duty to show due care towards others, and each one is liable if a negligent action of his/her has caused damage to another. But in reality, the duties and therefore the ambit of relevant action of each one of various individuals involved in a given action depend upon the activity in which they participate. In activities performed by a plurality of agents, it is possible that one participant's negligence be attributed to another.

Since the general rule is that negligence is personal, this is an exceptional solution. Its status as exception does not mean that is a minority of cases in quantitative terms, but that special conditions must be fulfilled for the negligence of one to count as negligence of another. With respect to a given member of such a group (A), the liability he/she has for the action of another member (B) is based on the nature of the relationship between them; insofar as B is fully independent from A, A will only be liable for his/her own actions; correspondingly, if A is in a position to give instructions to B, who in fact assumes a position of

4 Including: intensity of the damage; probability of the damage; value of the action that provokes the damage; cost of avoiding the accident; type of relationship between the author of the damage and the victim; and expert activity.

5 Barros, *op. cit.*, p. 89.

subordination vis-a-vis A, then A might be liable for B's actions. Of course, this is usually the case when B is a member of an organization under the control of A.

§ 5. *Culpa in eligendo/vigilando.* When there is such a relation of dependence, duties to elect and monitor the dependents and subordinates are triggered. If the dependent is not appropriately elected and/or monitored, the superior (or indeed the organization itself) might show *culpa in eligendo* and/or *culpa in vigilando/in inspiciendo.* Breach of these duties is presumed when the presumption of negligence for an action of another applies, as explained below (at § 21). This means that in order to make the superior liable for the acts of the subordinate, what ought to be proven is: (a) a negligence of the subordinate (B), and (b) the dependency relationship between the subordinate (B) and the superior (A). If the plaintiff manages to prove these two elements, then the court will presume *culpa in eligendo* and/or *culpa in vigilando/in inspiciendo* on the part of the superior and his/her liability will be declared, unless positive proof of diligence on his/her part is satisfactorily submitted.

§ 6. *There is no relation of this kind between the parties to a contract of sale.* To determine whether in a particular case a person may incur in culpa *in eligendo* or *culpa in vigilando/in inspiciendo,* then, it is necessary to determine whether the situation is such that the relationship between the immediate agent and the other is hierarchical enough to make the latter liable for the actions of the former.

Sometimes the situation is clear. If the only link between them is a contract of exchange, like the sale of the thing that caused the damage, it seems clear that no such relations of dependence is at hand[6]. This implies, as will be explained below (at § 24), that the negligence of the buyer in his/her handling of the bought thing will not be attributed to the seller. This general point about exchange contracts is not refuted but, on the contrary, confirmed by the fact that sometimes specific regulation imposes special duties on sellers of certain things (like alcohol, firearms, and the like). This special regulation is needed precisely because in general the seller does not have duties in *eligendo/in vigilando.*

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6 A contract of exchange is a contract that implies a discrete transaction, rather than a relationship that extends over time. See *infra*, fn. 26.

Indeed the seller is under no general duty to evaluate the aptitudes of the purchaser; in the majority of cases, in fact, it is assumed that the seller has no interest in the specific person with whom it contracts[7]. This is the reason why the seller cannot, for example, claim that a contract of sale is void by mistake as to the person of the buyer[8]. As there is no duty to elect the person who is the buyer, nor is there a duty to monitor or inspect him/her, and less so, to make efforts aimed at securing that the buyer will use the thing in a reasonable and careful manner. To claim the contrary would be to distort the contract of sale as a tool of commercial trade, thereby placing on the shoulders of the seller duties that are disproportionate in relation to the risks and advantages that are normally understood to be incorporated into the same.

§ 7. *The negligence of the purchaser, then, does not allow to presume the negligence of the seller.* Thus a proper understanding of the contract of sale and its legal and economic function leads to the conclusion that the scope of issues that fall under the seller's control does not include the actions performed by the buyer with the bought thing once it has become his/her property. It follows from this that given the relation between seller and buyer, the negligence of the buyer in his/her handling of the thing bought is not enough to presume negligence on the part of the seller.

This can be said of any discrete exchange relationship, *i.e.* a relationship the content of which is limited to the exchange of one thing for another: it does not impose on one party duties of care because it does not impose on the other duties of subordination. Non-existent duties may not be presumed to have been breached.

§ 8. *Limitations to the previous observations.* The previous observations recognize two limits. (1) The first is that for liability for the action of another to obtain what is relevant is not the formal legal nature of the relationship between the parties, but the reality of things (see further, *infra* at § 22).

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7 With the exception of contracts *intuito personae* that are executed precisely because of the qualities of the other party.

8 Art. 1455 of the Civil Code: "Mistake regarding the person with whom one has the intention to contract does not produce a defect in the consent, except if consideration of this person is the principal cause of the contract".

(2) The second limitation is that the seller of the thing with which the buyer caused the damage may be liable if he/she acted with malicious intent or fraudulently (*dolo*) or gross negligence (by selling a knowingly defective thing in the expectation that, or indifference to the possibility that its use by the buyer will cause damage to a third party)[9]. In this case, he/she will be liable either as an accomplice of the buyer, or to the buyer because of a breach of contract, or solely to the victim, in case the buyer is innocent. Be this as it may, this liability (that in accordance with the general rules cannot be legally presumed) is liability for one's own action and not for the act of another. Thus the considerations above, on the circumstances in which liability for the act of another might arise, do not apply.

(3) Lastly, if the buyer defrauds a third party and the seller in some way profits from it, the seller is liable to the third party up to the amount of his/her profit. This is a specific rule about fraud (dolo) that generally applies to all cases of fraud: those who have concocted it are liable for all damages suffered by the victim, while those who, without concocting it, have profited from the fraudulent act are liable up to the extent of the profit obtained[10]. This is generalized from a rule regarding formation of contract:

> Article 1458. Fraud makes consent void if concocted by one of the parties, and if it clearly appears that without it the parties would not have reached an agreement.
>
> In all other cases it gives rise to an action for compensation against those who concocted it or those who have profited from it; against the former for the total value of the damages, and against the latter up to the profit they made out of the fraudulent act.

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9 Malicious intent (*dolo*) in civil matters has been interpreted more broadly than that indicated by the wording of Article 44 of the Civil Code ("the positive intention of inferring injury upon a person or the property of another"). Therefore, this concept includes actions in which the damage to third persons is understood as being included (or in which there exists "consciousness that the act is contrary to the law"), despite that the objective of the action is not inherently to damage another, rather to obtain a personal advantage. Alessandri (1943), *op. cit.*, p. 164.

10 "Artículo 1458. El dolo no vicia el consentimiento sino cuando es obra de una de las partes y cuando además aparece claramente que sin +él no hubieran contratado. En los demás casos el dolo da lugar solamente a la acción de perjuicios, contra la persona o personas que lo han fraguado o que se han aprovechado de él; contra las primeras por el total valor de los perjuicios, y contra las segundas hasta concurrencia del provecho que han reportado del dolo". The accomplice responds for the total amount, jointly and severally, in accordance with Article 2317 of the Civil Code. There is controversy as to whether the obligation of those who have profited from fraud is compensatory or restitutory in character. See Barrientos, Javier, *Código Civil. Edición concordada con observaciones históricas, críticas, dogmáticas y jurisprudenciales* (Santiago: Thomson Reuters, 2014).

§ 9. *Summary.* The general rule for assessing negligence is *bonus pater familias.* This is a flexible standard which implies a reasonably prudent person in the same position, *i.e.* the same point in time, place, industry and other relevant circumstances. A *bonus pater familias* is willing to take reasonable risk, but avoids taking excessive risk.

1. According to the principles of *culpa in eligendo, vigilando* and/or *inspiciendo,* one may also be liable for the actions of other persons, provided that there is a relationship of dependence.

2. However, generally speaking, no such relation exists between parties to an exchange contract, such as e.g. a contract of sale. Consequently, as a general rule, a seller cannot be held liable for the subsequent negligence of the buyer in handling the goods.

3. ON THE PROOF OF NEGLIGENCE

THE GENERAL RULE

§ 10. *General rule: the person who alleges negligence must prove it.* The general rule is that negligence should be proven, it is no presumed. This means that the claimant who alleges negligence has the burden to prove it[11]. In order to prove negligence, the claimant must prove one or various facts that constitute a breach of a determined duty of care. To obtain a favourable sentence, the claimant that seeks compensation must prove all the elements upon which the obligation to compensate relies. This is, indeed, a general point about obligations. In accordance with Article 1698 of the Civil Code[12], a person who alleges that an obligation has arisen must prove the existence of said obligation, that is to say: prove the facts which give rise to it.

> Article 1698. The existence or extinction of obligations must be proven by those who aver the former or the latter (first paragraph)[13].

In the case of an obligation to compensate, the negligence of the defendant is undoubtedly one of those elements (the others typically

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11 Supreme Court, 16.10.1954, 60 *Revista de Derecho y Jurisprudencia*, 1st sect., p. 488. "The proof of a quasi-delict or negligent act (culpa cuasidelictual o aquiliana) falls upon the claimant, and that of lack of liability or extenuation falls upon the defendant". See also Barros, *Tratado de Responsabilidad Extracontractual* (Santiago: Editorial Jurídica de Chile, 2008), p. 141.

12 Unless otherwise indicated, all references to Articles are to Articles of the Civil Code.

13 "Incumbe probar las obligaciones o su extinción a quien alega aquéllas o ésta".

being the damage allegedly resulting from the negligent act and the causal link between the two). This implies that if the claimant is unable to prove negligence on the part of the defendant, the judge should dismiss the claim for compensation.

THE EXCEPTION: LEGAL PRESUMPTIONS OF NEGLIGENCE

§ 11. *Legal presumptions of negligence.* The above general regime may, in exceptional circumstances, be altered by the existence of legal presumptions of negligence that invert the *onus probandi*. That is to say, the claimant may be exempted from the burden of proving negligence and instead the defendant may need to prove its own diligence. In these cases, the evidence should initially be directed to establish that this is indeed a case in which negligence is to be presumed, which will be for claimant to prove. Having proven that we are indeed dealing with an act of this type, it will be the defendant who should prove its diligence (*i.e.* its fulfilment of the relevant duties of care).

§ 12. *Legal and judicial presumptions.* There is a distinction between legal and judicial presumptions, and this distinction is explicitly formulated in Art. 1712[14]. Legal presumptions are legal rules that invert the burden of proof in certain cases characterized in the abstract, as explained above (§ 2). The rule of Article 2329, as we will see, is a legal presumption, and it is applied in the abstract to a set of cases whose precise specification corresponds to legal doctrine. Judicial presumptions, on the other hand, are, citing Article 1712, "those deduced by the judge". They are not legal rules, rather means of proof based on how a particular case evolves, by virtue of which the judge may consider that the burden for proving a certain fact may have shifted based on the establishment of other facts. As they are means of proof, they arise and are justified concretely in a particular case. Herein below, I will discuss *legal* presumptions of negligence.

§ 13. *The Presumption of Negligence.* Although this point is somewhat controversial in legal doctrine, today the dominant position is that the

14 "Article 1712. Presumptions might be legal or judicial. Legal presumptions are subject to Article 47. Those that are deducted by the judge must be grave, precise and consistent" ("Artículo 1712. Las presunciones son legales o judiciales. Las legales se reglan por el artículo 47. Las que deduce el juez deberán ser graves, precisas y concordantes").

extra contractual system of liability of the Civil Code contains, in Article 2329, a generic presumption of negligence. The generic nature of this presumption has evolved over time and does not change that, in cases where Article 2329 is found not to apply, the burden of proof continues to fall upon the claimant, in accordance with the general rule (*supra*, 1). According to Article 2329,

> As a general rule, all damage that may be attributed to wrongdoing or negligence of another person, should be repaired by it[15].

§ 14. *The system of extra contractual liability is an evolving system.* When discussing, as we shall be doing, issues like presumptions of negligence and liability for the actions of third parties, it is important to remember that Chile's is a codified legal system. The legal regime regarding tortious liability is contained in Book IV, section 35, articles 2314-2334 of the Code Civil, which date back to 1855. Remarkably, not a single article of section 35 has been modified in any significant way since the Code Civil was passed in 1855. But there are few legal fields which during the last century have evolved more significantly than the law of torts, both in Chile and in other countries. In theory, such an evolution would be led by legislative intervention, but it has not been uncommon, again in Chile and in other jurisdictions, that given the failure of the legislature to act, legal doctrine and judge-made law, emanating from particular decisions in particular cases, have been the medium of such evolution. This is particularly the case in the Chilean law of torts.

The reason why this is important here is twofold. *In the first place*, because it implies that in many relevant aspects of tortious liability there is a significant difference between the regime that would result from an isolated reading of section 35 and what is actually current Chilean law.

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15 Article 2329 continues listing particular cases of application of the general principle quoted in the main text: "The following persons are especially obligated to carry out this reparation: 1. Those who carelessly fire a firearm; 2. Those who remove the slabs of cement from a drain or pipe in the street or on the road, without taking the necessary precautions so that the persons who transit there by day or night do not fall; 3. The person who is obligated to construct or repair an aqueduct or bridge that crosses a road, who have it in a state of causing damage to those who transit across it". The Spanish wording of the whole Article is as follows: "Art. 2329. Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona, debe ser reparado por ésta. Son especialmente obligados a esta reparación: 1º. El que dispara imprudentemente un arma de fuego; 2º. El que remueve las losas de una acequia o cañería en calle o camino, sin las precauciones necesarias para que no caigan los que por allí transitan de día o de noche; 3º. El que, obligado a la construcción o reparación de un acueducto o puente que atraviesa un camino lo tiene en estado de causar daño a los que transitan por él".

Article 2329 is a prime example, but there are others, like Article 2322, which on its face is a rule about domestic servants but has been interpreted as a rule concerning liability of dependents generally (including employees), and also Article 2317, on joint and several liability (see below, at § 45ff). As a result, it is not uncommon that in matters related to Chilean tort law, there are two rules: one that corresponds to the wording of the original rule contained in the Civil Code, and one that corresponds to such process of evolution.

Secondly, this process of legal evolution, since it is the result of the sum of legal doctrine and decentralised decisions by individual courts in particular cases, lacks the fixation and irrevocability (barring, of course, formal legal reform) of general and abstract legal provisions. This means that the two rules mentioned above (the original, Civil Code rule and the new, evolved rule) should not be thought of as two successive rules, one valid until it is replaced by the other, but as two simultaneously existing rules, one of them being the dominant.

§ 15. *Scope of the presumption of Art. 2329.* The presumption of negligence that legal doctrine has deduced from Article 2329 has been interpreted both narrowly and broadly [16]. In accordance with the first, the presumption would only be applied to highly dangerous activities[17]; in accordance with the second, Art. 2329 contains a broad presumption of negligence regarding the agents' own action[18]. Subject to the proviso introduced above (at § 14 in fine), it is at this point possible to say that there is no significant judicial nor doctrinal disagreement as to the presumption of negligence in the first case (highly dangerous activities). As to the application of Article 2329 to the second case, this is clearly the

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16 The interpretation made of this norm has evolved from that which could be understood as a simple reiteration of the general rule of liability, to another according to which the rule would be a presumption of negligence generally applicable to dangerous activities, to a much more general presumption of negligence, that applies whenever "the damage comes from an act that, due to the nature or circumstances of its occurrence, it is susceptible of being attributed to the negligence or intentional maliciousness (*dolo*) of the agent." This last interpretation in Alessandri, *De la Responsabilidad extracontractual en el Derecho Civil chileno* (Santiago: Imprenta Universitaria, 1943), p. 292.

17 A theory constructed by Prof. Carlos Ducci in the 30's, indicating that the dangerousness would be an indication of negligence. Ducci, *Responsabilidad civil (extracontractual)*, graduate thesis, Faculty of Law of the University of Chile (Santiago: El Imparcial, 1936).

18 Alessandri, Arturo, *op. cit.*

direction in which both legal doctrine and judicial decisions are moving, though it is less settled[19].

At any rate, the scope of this presumption is limited by the wording of Art. 2329 itself (quoted *supra*, § 13).

This article applies to the following cases: (i) cases of unusually dangerous activities, where one also speaks of 'inherent negligence' (*culpa inclusiva*)[20]; and (ii) cases where experience *prima facie* shows that a damage is more likely due to negligence than facts that escape the control of the agent. In this second hypothesis, it is required that *the damage be one which would not occur in the ordinary course of events in the absence of negligence by the agent*[21]. This is an empirical point that must be established in the individual case, by reference either to common knowledge and experience or to evidence submitted by the claimant. Since the likelihood of negligence is to be established already on a *prima facie* basis, *i.e.* already on "the face of" the case and without having to assess its full merits, it presupposes a certain degree of obviousness or typicality. In more complex or atypical cases, it is not a rule that can ordinarily be applied. In such cases, one would instead have to revert back to the general rule, which puts the burden of proof on the claimant.

§ 16. *Damage caused within the sphere of control of the defendant.* When claimant seeks to have the presumption applied in this second hypothesis, it is particularly relevant that the particulars of the action with respect to which negligence is to be presumed are under the control of the person who is acting[22]. Thus, the presumption of negligence in this second case only applies to the facts and activities subject to the actual control of the person who acted, otherwise it would presume the negligence of a person who has no capacity either to fulfil or breach the relevant duties of care. In other words, *the negligent action would otherwise be presumed from a person who by definition could not, with respect to the facts, have acted*

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19 See, in general, Barros, *op. cit*, pp. 147ff.

20 It has been claimed that "the presumption concurs in those cases where a dangerous activity is verified or generates a risk". In such cases, the negligence is consubstantial to the exercise of the activity and has been named 'included negligence'. De la Maza, *Responsabilidad civil. Casos prácticos* (Santiago: Abeledo Perrot, 2010) p. 27.

21 Barros, *op. cit.*, p. 154. On the notion of "general course of events", see *infra*, at § 41ff.

22 Barros, *op. cit.*, p. 153.

negligently. Therefore, *control* constitutes the fundamental ground of the presumption.

§ 17. *Control as the criterion that limits the presumption*. Together with being the main ground of the presumption, control of the source of damage also serves as a limitation to it. This is relevant for cases to which the presumption of Article 2329 is applicable and with respect to which diverse agents have successively intervened. Here, the presumption of negligence shall only apply to those persons who have had actual control of the activity that was the direct cause of the damage in accordance with the above interpretation of Article 2329.

§ 18. *Legal doctrine holds that the presumption derived from Art. 2329 does not operate as legal presumptions usually do*. A rule containing a legal presumption would usually identify a given fact or circumstance and provide that given that fact or in those circumstances something is to be presumed. As is clear from its wording, Article 2329 does not have this structure. Because of this, it operates in fact as a judicial presumption of sorts, in the sense that its application is to be decided concretely in the particular case rather than abstractly. The legal requirements of seriousness, precision and consistency applicable to judicial presumptions (Art. 1717), however, are treated in a more relaxed way, since otherwise the function of the rule contained in Art. 2329 would disappear[23]. This is because, as was already pointed out (*supra*, § 14), the Chilean system of civil liability has been built on a creative interpretation of a scarce number of rather old legal rules.

PRESUMPTION OF NEGLIGENCE IN ENVIRONMENTAL MATTERS

§ 19. *Presumption of negligence because of breach of regulations in Law 19,300*. Sometimes the standard of diligence is, in full or in part, fixed in regulatory standards or norms. This is called "negligence by infringement" ("*culpa infraccional*"). It is generally accepted by doctrine that in cases of negligence by infringement, failure to comply with such applicable

23 *Ibid.*

regulatory standards constitutes a presumption of negligence[24]. In environmental matters, Law N°19,300, within its scope of application, expressly establishes a presumption of negligence by infringement of norms of environmental protections[25]. In order for the presumption to apply, the victim must prove that a breach of the applicable regulatory standards applicable at the time of the relevant action has occurred; a mere assertion thereof will not be sufficient.

§ 20. *In regimes of negligence by infringement, compliance excludes the presumption of negligence.* In other words, compliance with the applicable norms of the time of the action prevents the forming of a presumption of negligence against the agent; This is a logical consequence of the previous point: if breach of the norms allows negligence to be presumed, it would be irrational for compliance to have the same consequence.

Notice that this does not mean that compliance *excludes* negligence: it only excludes a presumption of negligence. That is to say, if the defendant has complied with the applicable norms, his/her negligence (which may be established regardless of such compliance) should be proven by the claimant, in accordance with the general rule.

PRESUMPTIONS OF NEGLIGENCE REGARDING THE ACTION OF THIRD PARTIES

§ 21. *Liability for the act of a third person.* Besides the presumption of negligence regarding the agents' own action, the law contemplates cases in which negligence is presumed regarding the act of a third party. These

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24 See Corral, Hernán, *Lecciones de Responsabilidad Civil Extracontractual* (Santiago: Editorial Jurídica de Chile, 2003).

25 "Article 52, Law 19,300. Liability on the part of the agent of environmental damage is legally presumed if there has been infringement of norms of environmental quality, of emission norms, of prevention or decontamination plans, of special regulations applicable to cases of environmental emergency, and of norms for environmental protection, preservation or conservation established in this statute or in other statutory or regulatory provisions" (second paragraph omitted). ("Artículo 52, Ley 19300. Se presume legalmente la responsabilidad del autor del daño ambiental, si existe infracción a las normas de calidad ambiental, a las normas de emisiones, a los planes de prevención o de descontaminación, a las regulaciones especiales para los casos de emergencia ambiental o a las normas sobre protección, preservación o conservación ambientales, establecidas en la presente ley o en otras disposiciones legales o reglamentarias". For Corral, "the broad final provision (of Art. 52) will determine that the prior references are considered to be merely illustrative and by way of example. In summary, the presumption arises from the breach of any legal norm or regulation that refers to the conservation or protection of the environment". Corral, "El daño ambiental y responsabilidad civil del empresario en la ley de bases del medio ambiente", in 23 *Revista Chilena de Derecho* (1994), p. 171.

rules apply when one person is liable for the actions of another. When this is the case, the negligence of the latter allows the negligence of the former to be presumed.

That one person be liable for the action of another is, of course, an exceptional case. The general rule is that each party is only liable for his or her own actions. As seen above (at § 4ff) this exceptional case occurs when there is, between two given persons, a relationship of dependence or care by virtue of which an act of the subordinate may be attributed to the superior person. In these cases, once the negligence of the subordinate has been proven, the negligence of the superior can be presumed.

Liability for the act of a third person will be described in further detail presently. It should be pointed out, however, that it is usually excluded when parties are linked by an exchange contract alone, because the legal relationship between the parties to such contracts can normally not be understood in terms of dependence or care[26].

The presumption of negligence of the superior is especially important when dealing with activities that are typically carried out by organizations, rather than by persons individually considered[27]. In this regard, the Supreme Court has determined, referring to the concept of businessperson, that it "is intrinsically linked with the idea of a person

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26 Contracts can be transactions or relations. When they are transactions, "the contract is born and gets extinguished at the same time", says Jorge López Santamaría in his influential book *Los Contratos, parte general* (Santiago: Editorial Jurídica de Chile, 1986), at p. 101. "The most typical example is sale of chattels: at the same moment in which the parties agree, the seller hands the thing over to the buyer and the buyer pays the price. These contracts area usually called "contracts of immediate execution" ("contratos de ejecución instantánea"), and here I am calling them "exchange contracts". In other cases, however, a contract formalizes a relation that extends over time (*e.g.* a supply contract between a manufacturer and its providers, a labour contract, and the like). These are called "contracts of continuous performance" ("contratos de tracto sucesivo"). The distinction between contracts as transacions and contracts as relations, which underpins the traditional distinction between "contratos de ejecución instantánea" and "contratos de tracto sucesivo" is theoretically strong. See, form example Atiyah, Patrick: *An Introduction to the Law of Contracts* (Oxford: Oxford University Press, 1995), pp. 50-53.

27 Barros, *op. cit*, para. 41: "many of the typical risks that are generated in the contemporary social domain are provoked by businesspeople organized as legal persons. The rules on liability for the act of a third person as established in the modern codes have received particularly significant qualifications when discussing *liability of the businessperson*. In turn, the company organized as a legal person does not only respond for the acts of its dependents, according to the rules of liability for acts of third persons, but also for its own acts due to the negligence attributable to its organs, representatives and agents".

that executes a work", and in relation to the dependency requirement, it assumes that this refers to all persons that "serve under his/her orders"[28].

In the current social and economic conditions, liability for the act of third parties is a fundamental element in regimes of tortious liability. This, however, must not lead the interpreter to forget that, legally speaking, it is still an exceptional case: the general rule is that every person is only responsible for his/her own actions. In order to establish liability for the actions of third persons, the link of dependence or care must be proven[29].

§ 22. *The relationship of dependence is factual, not legal.* The existence of a relationship of dependence is a question of fact and ought to be proven according to the general rules of evidence. The fact that two people are united by a legal relationship that normally does not imply subordination is, thus, not sufficient to exclude liability for the act of another; what is important is the factual, not the legal, relationship as that relationship can be proven.

Consider, for example, the case of agency or lease of services: these contracts do not typically imply a relationship of dependence (this is one of the main differences between these contracts and those of labour law), and therefore by themselves they do not serve as a pointer to the relation of dependency. But this is not to say that they prove that there is no dependency, for what is relevant is what happened in fact, rather than legal form: if it can be proven that the agent or contractor did in fact act under the instructions of the principal, the latter might be liable for the actions of the former[30].

To the contrary, the existence of contracts that normally imply subordination would normally be enough to prove that this relationship in fact exists. This is the case regarding labour contracts: the employer is liable for the actions of the employee (actions performed in his capacity

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28 Supreme Court, 11.12.1958, 55 *Revista de Derecho y Jurisprudencia*, segunda parte, section 4ª, 209.

29 Excluded from this review are cases of negligence of incompetent persons. Since they cannot act in a legally relevant sense, their negligent action is directly attributed to the relevant carer. But in these cases carers are liable for their own action (failure to supervise the action of those at their care), not for the action of another.

30 The criteria assumed by the jurisprudence is that of imparting orders or instructions: Supreme Court, 19.6.1954, 51 *Revista de Derecho y Jurisprudencia* sec. 1ª, 216; Court of La Serena, 3.5.1978, 75 *Revista de Derecho y Jurisprudencia*, sec 4ª, 343; Court of Santiago, 22.6.1987, 84 *Gaceta Jurídica*, 78.

as employee, of course), because the labour relation is defined by the subordination of the employee to the employer.

When the contract does not expressly give one of the parties supervisory and directive powers, the decisive issue will always be the level of autonomy with which the subordinate is left to execute the commission. The more autonomous the contract, the more unlikely the principal will be held liable for the contractor's actions. Because of this, if the contractor is an expert hired precisely on account of its expertise, it will be more difficult to make the principal liable[31].

§ 23. *Liability regarding the action of third parties and culpa in eligendo.* Liability for the action of a third party is one thing and has been dealt with above (at § 21ff). But additionally, "nothing prevents the businessperson from being sued due to his personal negligence for having elected an independent contractor that was not knowledgeable of the risks that it was commissioned to manage"[32]. This is what is called *culpa in eligendo*. Cases of *culpa in eligendo* are cases of liability for one's own actions (the action here is failure to choose wisely), not cases of liability for actions of other people. The distinction is, however, of theoretical rather than practical consequence, as the conditions for *culpa in eligendo*, for liability for the action of third parties, and for the presumption of negligence of the principal are the same (see *supra*, § 4).

§ 24. *Liability for an act of another in exchange contracts.* In the case of an exchange contract, as is typically the contract of sale, the legal relationship between the parties cannot be understood to be one of dependency or care. To the contrary, the interests of the parties are clearly distinguished and it is clear that none of them will be disposed to act in furtherance of the interests of the other, beyond what was explicitly agreed in the contract and what can be read into it in good faith. Consequently, the typical relationship between buyer and seller prevents, *prima facie*, holding the seller liable for the actions of the buyer.

However, the point made above, (*supra*, § 22) that dependence is a matter of fact, should be reiterated. The existence of a contract of sale does not by itself exclude a relationship of dependence and care between

31 Barros, *op. cit*, p.186.

32 Barros, *op. cit*, p. 187.

the parties. There may in fact be other relationships between them, which, if proven, can establish that there is in fact a relevant dependency.

§ 25. *Rebutting the presumption of negligence for the action of another.* Where a presumption of negligence for the act of a third person has been established by the claimant, to discredit it, the defendant must prove, in accordance with Articles 2320 and 2322, that "with the authority and care that is both demanded from and conferred upon them [*i.e.* the superiors or carers] by their position, they would not have been able to prevent the [dependent's] action" (Article 2320, paragraph 5)[33]. This is a condition that has been interpreted in a rather strict manner, virtually transforming the liability for the act of a third person in general, and in particular the liability of the businessperson for the act of its dependents (such as its employees), into an instance of strict or vicarious liability.

§ 26. *Summary.* The general rule, and the starting point under Chilean law, is that the person who alleges negligence must prove it.

1. Exceptionally, negligence can be presumed in (i) cases of unusually dangerous activities, and (ii) cases where general experience *prima facie* shows that a damage is more likely due to negligence than facts that escape the control of the agent.

2. When dealing with regimes of negligence by infringement of norms (*culpa infraccional*), compliance excludes the presumption of negligence. This is *e.g.* the case under Law N° 19,300 which deals with environmental matters.

3. There is, in certain cases, a presumption of negligence for the actions of third parties, in relationships of dependence or care (such as a labour relationship or within a business organization). Concerning this liability for the act of a third party, two points should be noted:

(a) In cases of exchange contracts, such as a contract of sale, the legal relationship between the parties can normally not be understood to be one of dependence and care (but rather a relationship of two independent actors acting out of self-interest), entailing that said presumption will not apply, and

(b) The presumption of negligence for the act of another only applies to those persons (or indeed, organizations) who have had actual

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33 "Artículo 2320 (parapgrph 5). Pero cesara la obligación de estas personas si con la autoridad y el cuidado que su respectiva calidad les confiere y prescribe, no hubieren podido impedir el hecho".

control of the activity that caused the damage. Such control is part of the content of a relationship of dependence.

II. On causation

1. Dealing with insignificant Contributions to a damage: Concurrence of causes and contributory causation

§ 27. *Concurrence of causes.* As a general rule, the concurrence of causes is not problematic from the point of view of civil liability. All the conditions necessary for the damage (qualified by a test of adequacy) are equally causally linked to it.[34]

§ 28. *Action so insignificant in its contribution to the damage, that it is not a cause.* If an action is insignificant in terms of natural causation, so that if removed the damage does not disappear or diminish significantly, one may say that said action has not contributed to produce the damage and that, consequently, there is no causal nexus between both occurrences. Absence of causality would of course exclude liability.

§ 29. *The first of two cases that must be distinguished.* Two cases must be distinguished, correctly to understand the application of this rule. *In the first case,* there are two or more actions; let us call them A and B. A, however, makes an insignificant contribution to the occurrence of the damage, while B is in all material aspects by itself sufficient and adequate to cause it. Here the test of the *conditio sine qua non* will reach the conclusion that A is not part of the causal chain (if A is mentally removed, the damage is in all material aspects equally produced), but B is (if B is mentally removed, the damage would not have been produced). The solution is simple: A is not the cause of the damage, B is. If A is not causally linked to the damage, it cannot imply liability for its agent.

§ 30. *Second. A more complex case. In the second case,* damage is the fruit of the addition of many actions, each one of which, on its own, is as insignificant as A in the first case (*supra,* § 29). It is the sum of all these A-actions that caused the damage: "none of the negligent actions is a necessary condition of the damage; However, all together are"[35]. To give

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34 Barros, *op. cit*, p. 421.

35 Barros, *op. cit*, p. 422.

this case the same solution given above (*supra*, § 29) would imply that the very actual damage has no cause. This is certainly absurd.

§ 31. *Cases of contributory causation.* Doctrine has named this problem as *contributory causation.* What characterizes these cases is that there is a problem of causation with respect to each action, because each of them fails the test of *conditio sine qua non.* The solution is that all persons whose negligent action intervened in the production of the damage are liable[36].

This problem is common in cases of environmental damage. It may occur that each company is responsible for small amounts of contamination that considered in isolation would have been entirely harmless; but the addition of all of them causes a significant damage. Could any (hence every!) one of them be excused on the ground that its contribution was in itself entirely harmless? This would of course create a liability gap, despite that it is known that the damage comes from the sum of all those actions.

§ 32. *There is no joint and several liability in cases of contributory causation.* In principle, the liability that arises from such negligent actions ought not to be joint and several, but simply joint. Each person who contributes to the damage would be responsible only for that part which it contributed itself, because there is no express rule of joint and several liability. This being the case, it will be necessary to discern to what extent each action or omission contributed to provoke the final damage.

In certain cases, however, this requirement of linking each particular action with a particular share of the damages will burden the victim with a *probatio diabolica.* When this is the case, legal doctrine tends to adopt an expansive reading of Article 2317, making the liability of those involved joint and several. This will be discussed in some detail below, at § 45ff.

§ 33. *Summary.* As a general rule, all conditions necessary for a damage are equally causally linked to it.

1. However, if an action is so insignificant that, if removed, the damage does not disappear or diminish significantly, one may say that said action has not contributed to produce the damage and, consequently, there is no causal link.

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36 *Ibid.*

2. If each person is responsible for a small part of the contamination, which had in isolation been harmless but which has caused a damage in combination with other sources, each person is only liable for its part of the damage (unless the different actions may in fact be understood as the same act).

3. If the application of this rule burdens the victim with an impossible proof (*probation diabolica*) liability is joint and several.

2. CONTRIBUTOR'S LIABILITY

§ 34. *Liability for the totality of the damage.* The defendant is to be held liable for the total value of the damages suffered by the victim in two cases: (i) if his/her action is the only relevant action (*i.e.* it is the sole relevant cause); or (ii) if, not being the only relevant cause of the damage, his/her action and the other causally relevant actions can be understood as "one delict or quasi-delict". This latter condition will trigger the application of Article 2317 of the Civil Code, according to which if there is one delict or quasi-delict committed by several agents, all of them are jointly and severally liable for all damages (below, at § 45ff, a third case, the case mentioned in § 32, will be discussed).

§ 35. *Except in the case governed by Article 2317, each tortfeasor is only responsible for the damages that he/she effectively causes.* If Article 2317 is not applicable and there is a plurality of agents, each agent is only obligated to repair the damages caused by his/her negligent action (though see *infra*, § 45ff). As elaborated above, the basic principle is that the losses that someone suffers cannot be passed on to a third party unless they can be attributed to the negligent action of said third party. This is understood to follow from the two main norms on extra-contractual liability contained in the Civil Code:

> Article 2314. The person that has committed a criminal offence or quasi-criminal offence that *has inflicted damage upon another,* is obligated to make the indemnification". (emphasis added).
>
> Article 2329. As a general rule, *all damage that may be attributed* to fraud or negligence of another person, should be repaired by it." (emphasis added)

It follows that, in principle, the existence of a cause distinct and independent from the action of the tortfeasor, whether negligent or incidental, derived from natural processes, from the action of a third party

or from the action of the victim him/herself, shall give rise to a proportional reduction of the tortfeasor's liability. Thus, for example, if it can be proven that the action of the tortfeasor only caused about 20% of a certain total damage, then the tortfeasor is liable only for 20% of the damages.

§ 36. *For each tortfeasor, it is indifferent whether the remaining damage can be attributed to the action of another.* What about the remaining 80% of the damage, in the example just mentioned? This might have been caused by (a) the independent negligent action of a third party, in which case the victim will be entitled to recover this part of the damage from said third party, or it might be the consequence of (b) a non-negligent action or event, in which case the victim will not be able to recover that portion from anyone. This is also an application of the general principle: damage that someone suffers which is not caused by the negligent action of another party should be borne by the victim him/herself.

From the point of view of the victim, the difference between cases (a) and (b) above is clear: only in one case will he/she be compensated, whereas in the other he/she will have to bear the cost him/herself. But from the point of view of the tortfeasor, it depends on whether there is joint and several liability or simply joint liability. If all agents are joint and severally liable, each might be made to pay the victim 100% of compensable damage. This means that the difference between (a) and (b) will be as important for each agent as it is for the victim; but if liability is simply joint, (a) and (b) will not make a difference, since each tortfeasor will have to pay only for the damages he/she actually caused.

§ 37. *This is a consequence of a principle of liberty.* The underlying idea of this allocation of liability is directly linked with a principle of liberty, by virtue of which each person assumes the risks of damage that are inherent in the activity or form of life that the person concerned elects to develop. Just by living among free agents each person assumes a certain level of admissible risk. To assume a certain level of admissible risk implies that if such risk is materialized in damage, the victim will have to bear it. When the damage instead is caused by the negligent action of another person such damage is not a consequence of the assumed level of acceptable risk, and therefore only he/she who caused it ought to bear it. In the words of Alessandri: "Since men can act freely and independently, each must be able to reap the benefits that either his luck or his industry

will yield, just as he must bear the damages caused by nature or by the act of another"[37].

Additionally, there is a pragmatic reason. According to Barros: "[a] society governed by an extensive principle of liability would be asphyxiating, because each damage would give rise to the search for a liable party, to the extent that almost always there is a third party whose action or omission could have avoided the loss[38]".

§ 38. *Summary*. A person who causes damage through negligent contribution must indemnify it.

1. *In full,* if the entire damage is attributable to his/her action (Art. 2314);

2. *In full,* if the person is one of several agents of the one and "same delict or quasi-delict" that has caused it, in which case all agents should be responsible jointly and severally (Art. 2317 of the Civil Code).

3. *Only to the extent caused by said person,* and not for the entire damage, if the action has neither caused the totality of the damage, nor is part of the one and "same delict or quasi-delict" that has caused it. With respect to the rest of the damage, it should be indemnified by those persons who have caused it negligently, if that was the case, or it shall be borne by the victim, if the negligent action cannot be attributed to anyone.

4. Liability is again joint and several, however, if this burdens the victim with a *probatio diabolica, i.e. an impossible burden of proof.*

3. THE DISTRIBUTION OF LIABILITY IN A CHAIN OF SEPARATE AND INDEPENDENT ACTIONS THAT ULTIMATELY CAUSES A DAMAGE

§ 39. *This is an issue of both causality and negligence,* because it is a question of the liability of an agent who performs an action which is not in itself the immediate cause of the damage, but a pre-requisite of the subsequent action that caused the damage. The question of when and under what conditions it is appropriate to attribute liability for the negligent action

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37 Alessandri, Arturo, *De la Responsabilidad Extracontractual en el Derecho Civil Chileno* (Santiago: Imprenta Universitaria, 1943), p. 109. In a similar sense, Barros: "Said principle has its moral foundation in the order of liberties that allow us to develop our life plans, because in the same way that we benefit from living together, reciprocally we must support the costs that arise from these relations". Barros, *op. cit*, p. 24.

38 *Ibid*.

of another party has already been discussed (*supra*, § 4ff). Now, I will discuss the implications that in terms of causality follows from the fact that the negligent action that immediately caused the damage had as its necessary pre-requisite another action, taken by another agent.

§ 40. *Adequate causality*. According to the *conditio sine qua non* test, both the above actions would belong to the causal chain that leads to the damage. But as we shall see this conclusion is too broad, too indiscriminate. It needs to be limited by some criterion. The doctrine of adequate causation was formulated to provide such criterion. This doctrine is currently largely accepted by Chilean doctrine[39] and judicial practice[40]. It adds a further requirement to the *conditio sine qua non* test, with the consequence that an action may be *necessary* for a second action that in turn causes damage (because it satisfies the *conditio sine qua non* test), but nonetheless fail to be *adequate* to produce said damage. In this case, in accordance with the limiting idea of adequate causality, the chain of events would not be seen as a relationship of causality.

According to the doctrine of adequate causality there is a relationship of causality between two events where the second is a consequence of the *normal course of the events* derived from the first.

§ 41. *The idea of "normal course of events"*. To understand the doctrine of adequate causation, therefore, it is necessary to clarify the meaning of the notion of *normal course of events*.

The underlying idea is that a certain action should be sufficient to produce the result in question, in accordance with general experience. Because of this, consequences can be anticipated by a reasonable observer. This means that from the whole set of actions that are *conditio sine qua non* of a certain result a subset of actions is created. This subset is defined by a normative element based on criteria of foreseeability and closeness. Particularly relevant for issues of causality is the latter notion, that of closeness.

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39 Barros, *op. cit.*, p. 383ss.

40 C. de Antofagasta, 28.6.2002, N° LegalPublishing 26734. Rol N° 1302-2003. The concept of "necessary condition" has the quality of basic or minimum requirement to establish the causality, but it does not give criteria to establish – facing a concrete case – the causal relation that is relevant for the law to establish. For the purpose of the latter casual relation it is necessary to determine also whether the damage is attributable to the action according to the norms.

While the test of the *conditio sine qua non* takes causality to be a purely naturalistic element, the concept of adequate causation makes it into a normative concept, *i.e.* a concept the application of which depends not only on natural fact but also on the application of norms.

§ 42. *Intervention of a third party and normative limitation of the causal chain.* When the question concerns the (possible) causal intervention of a third party through a negligent action, the question on the normative limitations of the causal chain of events gains its maximum relevance. This is because the action of the first agent can be normatively excluded by the action of the second agent from the causal chain of events. Since this is a normative limitation of the chain of events, this might occur even if the first action is naturalistically linked to the damage (*i.e.* even if it satisfies the *conditio sine qua non* test).

An example might help clarify this point: if a subject purchases a hammer in a store and later uses it to kill a person, the test of *conditio sine qua non* would imply that both the assassin, as well as the seller of the hammer and its manufacturer, are agents of actions which are all part of the causal chain of events that led to the killing. This is because without any of those actions the result would not have occurred[41].

The theory of adequate causality seeks to prevent this consequence, providing criteria objectively to circumscribe the scope of the events that are part of a given causal chain.

§ 43. *Objective limitation of the scope of events included in a given causal chain.* The doctrine of adequate causation takes causality to be a social concept, not a purely naturalistic one. Because of this, the social world is relevant at the moment of specifying whether or not two events or actions are linked by a causal relationship, whether or not one can be said to be the cause of the other. Our social world includes, among other things, behavioural norms that agents are capable of following or breaching; therefore, relevant actions can be described as according to or in breach of applicable norms.

In the previous case (above at § 42), for example, none of the subjects whose intervention is prior to the purchase of the hammer by the

41 For argument's sake one could, of course, go even farther: even the parents of the manufacturer of the hammer could be included in the story, since if they had not conceived their son, he would not have manufactured the hammer that the store owner subsequently sold to the assassin.

ultimate culprit has a duty of conduct associated with avoiding the actions that explain, *ex post*, the result of death of the victim. Neither is the seller in the store prohibited from selling a hammer to anyone in particular, nor is the manufacturer prohibited from distributing it to the store[42]. Consequently, anyone who acts in accordance with the law is excluded from the causal chain. Because of this, we can say: though the seller's decision to sell the hammer is *conditio sine qua non* of the killing, it is not part of the causal chain of events that lead to it.

This means that the fact that the agent is not under a duty to take into account certain eventualities (the fact that sellers are under no duty to carry out a scrutiny of the psychological stability of their customers) has a dual consequence[43]: on one hand, it (a) contributes to exclude the negligence of an agent (in the example: the seller), given that one cannot act in breach of duties of conduct if there are no such duties; but also (b) excludes a relevant *causal relationship*, to the extent that the actions in question lack normative interest: they have remained outside the *normal course of events*, that is to say, outside the relevant normative chain that lead to the damage.

The situation is indeed different if the seller has a duty not to supply or sell. For example, if the law imposes upon the seller a duty to carry out certain background checks on the purchaser of a firearm, the action of the seller who failed to perform those checks becomes relevant, again in a double sense: because (a) the breach or non-observance of the duty may justify the conclusion that the seller's action in selling was negligent, and also (b) the existence of such a duty attracts, so to speak, the selling to the normal course of events that led to the damage, that is to say, to the relevant causal chain of events. It makes such action *causally visible*, and possibly adequate to explain the damage.

§ 44. *Summary*. 1. The notion of causality is not a purely naturalistic notion. It has a normative component. Such a normative component is contained in the notion of "adequate causation".

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42 Nor the parents of the manufacturer from having a child, and so on.

43 This is the reason why the relevance of the contract linking two agents had to be discussed here, when the issue is causality, and above at § 24ff, when the issue was negligence.

2. An event or action might be causally linked to another in a naturalistic but not a normative sense, because the former is not sufficient to cause the latter.

3. Since social life is in part constituted by norms of behaviour that can be breached or complied with, those norms contribute to establish criteria of adequacy. (Thus, for example, the seller who sold the hammer to the assassin is not part of the chain of events that led to the murder, insofar as he/she did not breach any duty related to the sale.)

4. A NOTE ON JOINT, JOINT AND SEVERAL, AND IN SOLIDUM LIABILITY

§ 45. *Cases in which the liability is not joint and several (simply joint).* As explained above (*supra*, § 34ff), when the actions of two or more agents can be understood as "one delict or quasi-delict", all of them will be joint and severally liable. Otherwise each will be liable for the damages his/her action caused. This is because the general rule is joint liability, while joint and several liability is an exception. For tort law, the exception is contained in Article 2317, which requires "one delict or quasi-delict".

§ 46. *If there is joint and several liability, it becomes simply joint once the victim has been compensated.* Once compensation has been paid to the victim, liability becomes joint. This means that if one agent is forced to compensate all damages he/she can then sue each other liable agent for his/her share. The policy reason behind this rule is not to burden the victim with the task of identifying each agent and suing each of them for his/her share.

§ 47. *An expansive reading of Article 2317.* As we have seen (*supra*, § 14), tort law as stated on the Civil Code has been considerably expanded and developed by legal doctrine. One of the aspects in which this is so is this particular point. Legal doctrine has come to identify a further case in which liability is joint and several: when it is sufficiently difficult to determine the extent to which the action of each caused or contributed to cause the damage. This can be seen as an expansive interpretation of Article 2317, in that it makes the indivisibility of the damage the criterion to determine the cases in which several actions should be understood as one delict or quasi-delict.

It must be noticed that this further case of application of Article 2317 is triggered by a fact: the special difficulty of producing evidence linking a particular share of the damage suffered by the victim and the action of

each tortfeasor. As it happens with all facts, this has to be proven. According to Article 1698 (*supra*, § 10), the burden to prove this fact will fall on the claimant.

§ 48. *Reasons for the previous conclusion.* This expansive interpretation of Article 2317 relies on various reasons. Although the wording of Art. 2317 requires the realization of a *same delict or quasi-delict*, part of the doctrine considers it to be applicable not only to cases of co-authorship (defined by concerted action), but also to cases of causality occurring simultaneously, that is, cases where the damage has been provoked by the acting of various agents without any consultation or cooperation between them. This interpretation is based on the idea of equivalence of the conditions, by virtue of which all those causes that are necessary in the production of the damage should be considered as equal for purposes of its production.

This is the assumption that fails in cases of *contributory causation*; as was indicated above (at § 31), in these cases the *conditio sine qua non* test fails with respect to each one of the actions considered in an isolated manner.

The problem that then arises is that of the contribution to the damage. If each liable agent is liable only for his/her share of the damage, the victim will get compensation only if he/she can prove how each particular share of the damage is related to the action of each liable agent. In many cases this will amount to a *probatio diabolica*, implying that the victim will not be able to prove the size of the share and thus not be able to recover. To protect the victim from this *probatio diabolica* was precisely the policy reason behind Article 2317. Legal doctrine solves this problem by understanding liability to be joint and several in all cases in which the existence of a plurality of agents would burden the victim with a *probatio diabolica*. As explained above, this can be justified either by claiming that it is an expansive interpretation of Article 2317, or by creating an *ad hoc* category that shares the fundamental characteristics of the joint and several liability: obligations *in solidum*[44].

This solution does not deny that each agent's contribution to the damage may be of a different magnitude, but it does transfer the problem of its determination to a different seat, where the defendants will discuss

44 Barros, *op. cit.*, p. 423.

among them, once the victim has been compensated. The objective is precisely to liberate the victim from having to prove the causal relationship between the different actions and each percentage of the damage, question that in the majority of the cases becomes an obstacle that is impossible to resolve.

A similar solution has been adopted in comparative legislation and jurisprudence[45]. It has the advantage of applying the rationale behind Article 2317 to cases in which the same problem arises. It can also be projected to other similar problems like that 'anonymous fault' (*'culpa anónima'*) where it is not known specifically who produced the damage, but it is known that it belongs to a determined set of persons[46]. In all these cases, the solution has the same foundation: to discharge the victim of having to prove the causality of each one of the defendants, transferring this responsibility to the person(s) who is more likely to have the relevant information.

§ 49. *Limits of this in solidum liability*. On the contrary, if the actions or activities of each defendant are possible to differentiate between them, and it is feasible to determine with a reasonable degree of precision the contribution that each has made to the damage suffered by the victim, it does not seem plausible to extend the range of application of Article 2317; under such circumstances there is no risk that the victim will remain under-compensated, given that each defendant is made responsible for the damage that it demonstrably produced.

The upshot of this is that the general rule, according to which liability is simply joint, applies to cases in which actions and contributions to damage are *different and differentiable*.

§ 50. *Summary*. 1. The rule contained in Article 2317, which imposes joint and several liability when there is a plurality of agents of "one delict or quasi-delict", has been expanded by legal doctrine to cases in which different acts cause damage in a way that it is very difficult or even

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45 In fact, this is the judicial solution for this problem in France, where there is no rule of joint and several liability equivalent to that of Article 2317 of the Civil Code.

46 See Barría, Rodrigo, "El daño causado por el miembro indeterminado de un grupo y su posible recepción en el Derecho Civil Chileno" ("Damage caused by an indeterminate member of a determined group and its possible reception in Chilean law)", *In* 1 *Revista de Derecho Escuela de Postgrado. Universidad de Chile* (2011), pp. 151-183.

impossible for the victim to determine which action caused which damage.

2. The general rule, according to which liability is simply joint, applies to cases in which actions and contributions to damage are *different and differentiable.*

III. On The force of previous decisions from superior courts

§ 51. *Judicial decisions are not binding on subsequent cases, but may be given weight.* From a formal point of view, it is an established point in Chilean doctrine that judicial decisions do not have binding force beyond the cases in which they are actually pronounced. According to Article 3° of the Civil Code,

> Judicial decisions do not have binding force, except in the cases in which they are actually pronounced (second paragraph)[47].

Now, this refers to the question of formally binding force, that is to say of precedent as a source of legal norms that bind judges in subsequent cases.

From a broader point of view, it can be said that judicial decisions, or at least some of them, acquire in some cases a special importance: Because they are issued by superior courts (especially the Supreme Court), or when they solve a difficult problem in what has come to be seen as a satisfactory manner, or they exhibit an especially solid reasoning. For these or similar reasons, some decisions get to be quoted in subsequent cases. In these instances, we can say that these decisions have special *weight.* Said weight will be greater or lesser depending on substantive reasons, just as legal doctrine is more or less influential.

§ 52. *A decision of a higher Court has more weight in an analogous case.* An element that may contribute to give a decision special weight is that it has been pronounced by a higher Court in a case where the facts are substantially the same as the subsequent case.

§ 53. *The similarity between two cases is related to what is legally relevant in each case.* However, it is important to note that the similarity between two cases is not simply a matter of fact. This is because it is not the natural

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47 "Las sentencias judiciales no tienen fuerza obligatoria, sino en las causas en que actualmente se pronunciaren".

similarities that make two cases similar, rather the similarity of the legal issues actually raised in them. And this depends not only on the facts that are alleged, but also on the way in which each case is developed. To explain why this is the case a very brief notice on procedural issues must be given.

In Chilean civil procedure the basic rule applicable to courts is that of *passiveness* [48] or, as is also referred to, the *"dispositive" principle*. According to the principle of passiveness as stated in Article 10 of the Organic Code of Courts (*Código Orgánico de Tribunales*), Courts cannot act without being requested to do so by the parties; according to the dispositive principle, it is for the parties to act as to get proceedings moving towards its resolution, including submitting relevant arguments and evidence. This is normally expressed by saying that the "procedural impulse" (*"impulso procesal"*; that is to say, the force that moves the case towards its resolution in a decision) emanates from the parties, not the judge.

The consequence hereof is that in civil cases judges are not, except exceptionally when the law allows them to take the initiative and act *ex oficio*, authorized to decide on issues that the parties have not submitted for examination, however relevant they might seem to an external observer. Therefore, for example, if the claimant files an action clearly outside the limitation period, the judge will not have the power to declare that this is so if the defendant has not raised the motion to time-bar the action. In this sense, both the facts and the legal arguments, as well as the interpretation and qualification of the facts and norms that is carried out by the parties in their written pleadings, become relevant in relation to the decision that the Court adopts.

§ 54. *The case is therefore defined by what is actually submitted by the parties.* In particular, the concrete arguments and defenses submitted by both parties give form and establish the limits to the jurisdiction of the court[49].

For this reason, it may occur that, in two cases where the facts on their face are very similar, the legal issues to be decided are nonetheless

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48 This principle is enshrined in Article 10, paragraph 1 of the Organic Code of Courts (*Código Orgánico de Tribunales*): "the Courts may not exercise their jurisdiction, only at the petition of the party, with the exception of those cases in which the law authorizes them to proceed pursuant to law".

49 If the judge decides issues that are in this sense outside his or her jurisdiction, the decision might be annulled because of being "ultrapetita" (literally, awarded more than what was requested).

considerably different. For example, because in one of them the defendant raised a formal motion that the defendant in the other case did not raise, or introduced a substantive motion based on facts that were not alleged in the other case. Different submissions will imply that the jurisdiction of the courts will differ, and this might imply that decisions that are valid for one case are not applicable to the other.

§ 55. *The evidence is also presented on a case-by-case basis, depending upon the facts that are invoked.* Cases that are in the abstract identical may justifiably be adjudged in a different manner if a certain circumstance is proved relevant in one and not in the other. Again, in the civil procedure it is for the parties to find and submit evidence to the judge, and the judge cannot take a proactive attitude.

For example, in one case where moral damages are claimed for the death of a family member, the claimant can claim a given amount saying that it corresponds to what the claimant was awarded in a similar, previous case (maybe the case of another victim in the same mass accident). But the evidence offered by the victim in one case might be stronger than that in the other. If the victim in the prior case prepared and deployed his/her evidence with more consistency (offering psychological reports and solid testimonies of depression, for example) or if in the current case the defendant proves that between the claimant and the direct victim there was no affective relationship, then two cases that look very similar *in the abstract* might lead to different solutions *when considering them in their particular detail.*

§ 56. *The judge knows the law: iura novit curia.* The limit to what has been said is that judges are not bound by the legal allegations made by the parties. Although it is hoped that these allegations will illuminate and facilitate the judge to reach his/her decision, on this point the principle is *iura novit curia.* According to this principle, the Court is sovereign to interpret the facts, and to interpret and apply the relevant norms.

§ 57. *The Chilean form of drafting judicial decisions reflects the fact that they do not have binding force.* As has already been said, it is a central part of Chilean legal culture that judgments are not binding beyond the cases with respect to which they are delivered. Also, as has been emphasized, this does not prevent a decision from acquiring persuasive weight for one reason or another. But it is important to bear in mind that judicial

decisions in Chilean legal practice are drafted with the understanding that they will not be relevant beyond the case itself. That is to say, there is an internal relationship between the manner in which decisions are conceived and written and the effect they are understood to have. For this reason, it is not unusual for Chilean decisions to lack sufficient information to enable the interpreter to determine with sufficient precision, for example, the characteristics of the case that are central with a view to distinguish it from subsequent cases. This type of information is fundamental in a decision that is known to be binding in the future, but is not important when we are dealing with a decision that will only be applicable to the current case.

§ 58. *Summary*. 1. Formally speaking, judicial decisions have no binding force beyond the cases in which they are delivered, though for different considerations they might have certain persuasive weight.

2. When assessing the weight of one decision for a subsequent case, attention should be given not only to any apparent factual similarities between them, but also and in particular to the legal (procedural and substantive) differences.

3. It is important to bear in mind that in Chilean legal practice judicial decisions are drafted assuming that by and large they will be entirely irrelevant beyond the case at hand. In many cases this will constitute a significant obstacle to apply it to a subsequent case, because it will mean that the decision fails to contain enough information to assess, for example, whether it should be distinguished or not.

Prof. Fernando Atria

EXPERT REPORT ON CHILEAN LAW
(supplement)

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Santiago, Chile

13 January 2017

The matter of the content and scope of the presumption of negligence of Article 2329 has not been discussed with the clarity that the same requires by doctrine.[1] In this sense, an explanation of the presumption of Article 2329 must refer to two elements: first, what are the *conditions of application* of the rule of Article 2329; second, what are the *consequences* of the application of said rule. This may be expressed in the following manner: the conditions of application determine what must be proven by the plaintiff who invokes in his favour the rule of Article 2329; the consequence is a shift in the *onus probandi*. To answer these questions, we have to look at the idea of a presumption.

§ 1. *The idea of presumption: from a known fact, one can "deduct" another fact*. One may define a legal presumption as Article 47 of the Civil Code does: "a fact is said to be presumed when it may be deducted from certain known information or circumstances". As has been explained in § 12 of my Expert Opinion dated 2 June 2016, presumptions may be judicial or legal. Judicial presumptions are those elaborated by the judge in concrete. Legal presumptions are those contained in abstract in a legal rule. The presumption of Article 2329 is a legal presumption[2].

Article 2329, then, is a rule that establishes that when certain facts or circumstances have been proven, another fact may be "deducted". Thus presumptions involve two facts: one is the "known" fact and another that is "deducted" from the former, in virtue of the presumption. The logic of the presumption is certainly pragmatic, because it makes sense only if the former

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[1] For a general revision of the doctrine that interprets Art. 2329 as a general presumption due to the fact itself, see: Carlos Ducci, *Responsabilidad civil (extracontractual)*, Santiago: Imprenta El Imparcial, 1936, p. 133-136; Carlos Ducci, Responsabilidad civil. *Actividades peligrosas -hechos de las cosas- circulación de vehículos*, Santiago: Editorial Jurídica de Chile, 1971, p. 97-110; Arturo Alessandri, "Une nouvelle interprétation de l'art. 2329 du Code civil chilien". In: *Études de Droit Civil à la mémoire de Henri Capitant*, Paris: Dalloz, 1939, p. 9 et seq; Arturo Alessandri, *De la responsabilidad extracontractual en el Derecho Civil chilen*o, Santiago: Imprenta Universitaria, 1943, n. 195-196, p. 292-295; and Enrique Barros, *Tratado de responsabilidad extracontractual*, Santiago:_Editorial Jurídica de Chile, 2006, n. 91-93, p. 147-151.

[2] See Barros, *op. cit.,* § 97, p. 156 et seq.

fact is easier to prove than the latter. In such case, the application of the presumption will permit the person who asserts the same to prove the (difficult to prove) second fact by proving the (easy, or at least easier to prove) first fact.

To explain the presumption of Article 2329 of the Civil Code implies identifying these two facts, the "known" and the "deducted" by virtue of the presumption.

In accordance with said Article, "As a general rule, all damage that may be attributed by the maliciousness or negligence of another person should be repaired by it". As Barros indicates, what the law requires is not that the damage *is effectively attributable*, rather that *it may be attributed*, that is to say, that it occurs in a context in which "experience shows that the damage provoked in such circumstances is usually due to the negligence or malicious act of the person who causes it"[3].

§ 2. *Conditions of application of the presumption of Article 2329*. If this is correct, then it is clear that Article 2329 assumes that the plaintiff, or in general the person who invokes the presumption, shall prove (a) his damages and (b) that said damage was produced in such circumstances that is usually due to the negligence or malicious act of the person who causes it. This second fact (b) to be proven includes the proof of (i) a causal link between the damage and what occurred in these circumstances (i.e. the alleged tortious act) and (ii) an evaluation of these circumstances in accordance with normal experience.

A clarification of element (b) (ii) might be in order. The point of the presumption is to avoid burdening the victim with the need to prove negligence when he/she was harmed in circumstances in which the damage itself justifies the *prima facie* conclusion that the agent acted negligently. The standard example (to which we shall return) is Arturo Alessandri's[4]. Alessandri cleverly observed that, since trains are supposed to move without

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[3] Barros, *op. cit.,* p. 150. Also see Alessandri, *op. cit.,* n. 196, p. 293. In jurisprudence, see Supreme Court, 7 September 2000. RDJ, Vol. XCVII, Santiago: 2000. Second part, second section, p. 65. In one of its recitals, the Court indicates: "When the legislator uses the subjective expression 'may', it wishes to refer in general terms to any damage that is possible, probable or rational of being attributed to a malicious act or negligence".

[4] See the following footnote.

crashing, the occurrence of a train crash is in itself evidence of negligence on the side of the train company. One could call these activities "risky activities", bearing in mind that what characterizes them is that damage is a pointer to negligence, a pointer strong enough to shift the burden of proof. The proof of element (b) (ii), as explained above, relies fundamentally on general experience, and for this reason it might not require a significant amount of evidence. This is, however, something to be ascertained in view of the concrete circumstances of the case.

Hence, (a) and (b) would be facts that in accordance with Article 47 may be called "known", that is to say, facts that should be proven by the person who invokes the presumption of Article 2329 for it to be applicable. Once those facts have been proven, the presumption of Article 2329 allows for "the deduction" of (c), the fact of the defendant's negligence and (d) that said (presumed) negligence had a causal link with the damage.

(a) and (b) are the conditions of applicability of the presumption. They are facts or circumstances that should be proven by the person who asserts that the presumption should apply. These facts or circumstances are those that permit one to establish that damage has been caused as a consequence of a risky activity. Condition (a) covers the damage itself and condition (b) refers to the causal link between the risky activity and the already proven damage.

It should be noted already here that to argue that the presumption covers also any of these two underlying matters, (a) or (b), would not make any sense since it would then be impossible to identity the situations where the presumption applies. It would not make sense to say that the damage effectively caused is presumed, and it would not make sense to say that it is presumed that the damage has been caused by the risky activity. Both the fact of the damage as well as the circumstance of it having been caused by the dangerous activity are conditions for the application of the presumption, and therefore should be proven in accordance with general rules, that normally will mean that they should be proven by the plaintiff. I will revert to this issue below.

§ 3. *The consequence of the presumption: the fact that is "deducted"*. Once the conditions of application of the presumption are identified, we can now say something about the consequences of the presumption. The proof of the damage and the causal link between the damage and the activity proven to be risky allow, in accordance with the rule of Article 2329, one to establish that it refers to a damage "that may be attributed to the maliciousness or negligence of another person", and the consequence will be that said damage "should be repaired by it", that is to say, that all the conditions for the damage to be compensable have been satisfied. In other words, it is presumed that all conditions for liability in addition to the damage and the causal link have been satisfied. In particular, these are that (c) the person who carried out the activity that caused the damage acted negligently, and (d) that said negligence had a causal link with the damage.

§ 4. *Discussion of traditional cases*. Now, to make reference to some traditional examples: the passenger who suffered damage as a result of a train crash should prove that (a) he/she suffered damage and (b) that said damage (i) was caused by the accident, and that (ii) experience shows that train crashes are usually the consequence of negligence on the part of the train company[5].

Or, to make reference to a case that according to Barros is paradigmatic in English law: the passerby on the street that is injured as a result of a barrel falling from a higher floor must prove (a) that he/she has been injured, and (b) that this damage (i) was caused by the falling barrel and (ii) that according to experience the fact that a barrel lands on the street is consequence of negligence in the handling of the barrel[6].

Moving from the examples to the rule of Article 2329, it can in summary be said that for it *to be applicable*, the plaintiff that invokes it should prove (a) that he/she has suffered damage and (b) that said damage (i) has been caused in circumstances caused by the action of the defendant, and (ii) that experience indicates that when such damage is suffered in these circumstances, it is

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[5] The train crash is an example of Alessandri: see Alessandri, *op. cit.,* (1943), p. 292.

[6] Barros, *op. cit.,* p. 150, note n° 221.

due to the negligence of the party who contributed to create these circumstances. When these factors have been proven, the *consequence* is that claimant does not additionally need to prove the negligence of the defendant, nor that such negligence is causally related to the damage; this is presumed.

§ 5. *Prof. Domínguez' Addendum dated 23 September 2016*. Prof. Domínguez' Addendum is related to the interpretation of Article 2329 Civil Code. I believe, for reasons explained in §§ 15–17 of my Expert Opinion, that Prof. Domínguez is right in interpreting Article 2329 as containing a legal presumption of negligence for one's own actions. The content of such presumption must be discussed in the light of the considerations above.

Prof. Domínguez claims that when Article 2329 applies, "[t]he victim does not need to prove the negligence of the author of the harm, nor the causal link between the latter and the former, being sufficient to prove the existence of the fact that caused harm to him/her" (p. 2). In his opinion, "there is no doubt that the courts accept that the rule [in] question contains a presumption of fault and of causation in the liability [for one's own actions]" (p. 3, translation amended)[7].

For reasons indicated above, however, Article 2329 could not contain a presumption of causation between the act and the harm. The fact that the harm suffered by plaintiff has been caused by defendant's action has to be proven by plaintiff. Reference has been made to Alessandri's standard example, that of a train crash. "A train crash is an event which, by its very nature, presupposes negligence; trains ought to move without crashing[8]".

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[7] A brief explanation of the amendment of the translation, which in my view better expresses prof. Domínguez's idea. Prof. Domínguez Spanish original refers to "responsabilidad por el hecho propio", and this has been translated, in Arica Victims KB's submission, as "liability for the fact itself". But "propio" refers to the agent, not to the act: "el hecho propio" is not "the fact itself", but "the act of one's own", as opposed the act of another. The general rule in the Civil Code is that one is liable for one's own actions, but sometimes one is liable for the acts of another. Thus article 2321 specify the conditions in which parents are liable for the acts of their children, and according to article 2322 employers are in some cases liable for the acts of their employees. Prof. Domínguez is clarifying that article 2329 applies only when liability for one's own actions is concerned.

[8] Alessandri, *op. cit.,* (1943), §195, p. 292.

This is indeed the case. But it is also clear that the plaintiff will have to prove that the harm he/she has suffered is due to the crash. If causation also in that regard is presumed under Article 2329's rule, the basis that would limit the presumption to some damages caused in the world, and not to others, would disappear. This is the reason why, in my view, it does not make sense to claim that the presumption in Article 2329 covers causality.

Admittedly, in many *dicta* by relevant authors this is not clearly stated. Thus Alessandri:

> If our interpretation is accepted, when dealing with an action that gives rise to this presumption, the victim need not prove the negligence of the author of the harm, nor the causal relation between the latter and the former; it will be enough to prove the existence of the tortious act. In the case, for example, of an accident caused by a train or a car crash, or by the falling of a barrel, the victim will only have to prove the damage suffered as a consequence of the crash or the falling of the barrel[9].

As can be seen, Alessandri seems to be claiming that the causal link between the action and the harm is also presumed ("the victim need not prove the negligence of the author of the harm, nor the causal relation between the latter and the former"). But upon closer examination the meaning of the passage is clear: once the victim has proven that the harm was suffered as a consequence of the alleged tortious act, the agent's negligence and the causal relevance *of such negligence* are presumed. This is because if negligence is presumed, only causality can perform what could be called an identifying function, *i.e.*, the function of identifying the relevant harm. Prof. Alessandri (and presumably Prof. Domínguez) is claiming not that the causal link between the alleged tortious act and the harm is presumed, but that the (presumed) negligence has a causal connection with the harm; that is to say, that Article 2329's presumption refers not only to the fact that defendant acted negligently, but also that *such negligence covers the causal link* between action and harm. The fact that the alleged harm was caused by the alleged tortious act, however, must be proven according to general rules.

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9 *Ibíd.,* §201, p. 298.

The same kind of ambiguity can be found in Prof. Barros' Treatise. When discussing the scope of the presumption, he states that:

> In comparative law, a typical case in which the presumption is applicable occurred in relation to liability for defective products: having proven the harm and the product's defect, one can presume, prima facie, that the cause of the harm was the product's defect (infra N° 556) and that the defect was due to negligence on the part of the maker or producer[10].

Thus Barros seems to be claiming that Article 2329 allows the Court to presume not only negligence, but also causation between the defect and the harm. But this cannot be taken at face value, because then the question would be: how can the relevant harm be identified? The car was defective, and for that reason the steering system failed and the plaintiff crashed. Plaintiff will have to prove a causal link between the crash and his damages. I believe that, upon reflection, this is what Barros himself would say. This is made clearer when considering the passage to which Barros makes reference, N° 556, a passage that deals with "evidentiary aspects" of liability for defective products:

> when the circumstances of the accident entitles one to think that the harm is most probably due to the defect, nothing prevents to apply here the presumption of a causal link between the harm and the product's defect, using the presumption contained in Article 2329[11].

As can be seen, the situation cannot be described by simply saying that Article 2329 contains both a presumption of negligence and a presumption of causation. Causation in concrete is presumed if adequate causation has been established, *i.e.* if it has been proven that given the nature of the harm and the nature of the action in question, the former is due "most probably" to the latter. But to say that Article 2329 applies "when the circumstances of the accident entitles one to think that the harm is most probably due to the defect" is to say that before the presumption applies this has to be established: it has to be proven that given the kind of harm that is alleged and the circumstances of the accident, the latter is the most probable

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10 Barros, *op. cit.,* §96, p. 153.

11 *Ibíd.,* §556, p. 765.

cause of the former. As before, the most plausible interpretation of Prof. Barros's passage is that once this has been established there is no need to submit independent evidence to the effect that the (presumed) negligence made a causally relevant contribution to the harm. It is in this limited sense that Article 2329 allows both negligence and causation to be presumed.


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Article 2329, then, is a rule that establishes that when certain facts or circumstances have been proven, another fact may be "deducted". Thus presumptions involve two facts: one is the "known" fact and another that is "deducted" from the former, in virtue of the presumption. The logic of the presumption is certainly pragmatic, because it makes sense only if the former

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To explain the presumption of Article 2329 of the Civil Code implies identifying these two facts, the "known" and the "deducted" by virtue of the presumption.

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A clarification of element (b) (ii) might be in order. The point of the presumption is to avoid burdening the victim with the need to prove negligence when he/she was harmed in circumstances in which the damage itself justifies the *prima facie* conclusion that the agent acted negligently. The standard example (to which we shall return) is Arturo Alessandri's[4]. Alessandri cleverly observed that, since trains are supposed to move without

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Hence, (a) and (b) would be facts that in accordance with Article 47 may be called "known", that is to say, facts that should be proven by the person who invokes the presumption of Article 2329 for it to be applicable. Once those facts have been proven, the presumption of Article 2329 allows for "the deduction" of (c), the fact of the defendant's negligence and (d) that said (presumed) negligence had a causal link with the damage.

(a) and (b) are the conditions of applicability of the presumption. They are facts or circumstances that should be proven by the person who asserts that the presumption should apply. These facts or circumstances are those that permit one to establish that damage has been caused as a consequence of a risky activity. Condition (a) covers the damage itself and condition (b) refers to the causal link between the risky activity and the already proven damage.

It should be noted already here that to argue that the presumption covers also any of these two underlying matters, (a) or (b), would not make any sense since it would then be impossible to identity the situations where the presumption applies. It would not make sense to say that the damage effectively caused is presumed, and it would not make sense to say that it is presumed that the damage has been caused by the risky activity. Both the fact of the damage as well as the circumstance of it having been caused by the dangerous activity are conditions for the application of the presumption, and therefore should be proven in accordance with general rules, that normally will mean that they should be proven by the plaintiff. I will revert to this issue below.

§ 3. *The consequence of the presumption: the fact that is "deducted"*. Once the conditions of application of the presumption are identified, we can now say something about the consequences of the presumption. The proof of the damage and the causal link between the damage and the activity proven to be risky allow, in accordance with the rule of Article 2329, one to establish that it refers to a damage "that may be attributed to the maliciousness or negligence of another person", and the consequence will be that said damage "should be repaired by it", that is to say, that all the conditions for the damage to be compensable have been satisfied. In other words, it is presumed that all conditions for liability in addition to the damage and the causal link have been satisfied. In particular, these are that (c) the person who carried out the activity that caused the damage acted negligently, and (d) that said negligence had a causal link with the damage.

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Or, to make reference to a case that according to Barros is paradigmatic in English law: the passerby on the street that is injured as a result of a barrel falling from a higher floor must prove (a) that he/she has been injured, and (b) that this damage (i) was caused by the falling barrel and (ii) that according to experience the fact that a barrel lands on the street is consequence of negligence in the handling of the barrel[6].

Moving from the examples to the rule of Article 2329, it can in summary be said that for it *to be applicable*, the plaintiff that invokes it should prove (a) that he/she has suffered damage and (b) that said damage (i) has been caused in circumstances caused by the action of the defendant, and (ii) that experience indicates that when such damage is suffered in these circumstances, it is

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due to the negligence of the party who contributed to create these circumstances. When these factors have been proven, the *consequence* is that claimant does not additionally need to prove the negligence of the defendant, nor that such negligence is causally related to the damage; this is presumed.

§ 5. *Prof. Domínguez' Addendum dated 23 September 2016*. Prof. Domínguez' Addendum is related to the interpretation of Article 2329 Civil Code. I believe, for reasons explained in §§ 15–17 of my Expert Opinion, that Prof. Domínguez is right in interpreting Article 2329 as containing a legal presumption of negligence for one's own actions. The content of such presumption must be discussed in the light of the considerations above.

Prof. Domínguez claims that when Article 2329 applies, "[t]he victim does not need to prove the negligence of the author of the harm, nor the causal link between the latter and the former, being sufficient to prove the existence of the fact that caused harm to him/her" (p. 2). In his opinion, "there is no doubt that the courts accept that the rule [in] question contains a presumption of fault and of causation in the liability [for one's own actions]" (p. 3, translation amended)[7].

For reasons indicated above, however, Article 2329 could not contain a presumption of causation between the act and the harm. The fact that the harm suffered by plaintiff has been caused by defendant's action has to be proven by plaintiff. Reference has been made to Alessandri's standard example, that of a train crash. "A train crash is an event which, by its very nature, presupposes negligence; trains ought to move without crashing[8]".

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[7] A brief explanation of the amendment of the translation, which in my view better expresses prof. Domínguez's idea. Prof. Domínguez Spanish original refers to "responsabilidad por el hecho propio", and this has been translated, in Arica Victims KB's submission, as "liability for the fact itself". But "propio" refers to the agent, not to the act: "el hecho propio" is not "the fact itself", but "the act of one's own", as opposed the act of another. The general rule in the Civil Code is that one is liable for one's own actions, but sometimes one is liable for the acts of another. Thus article 2321 specify the conditions in which parents are liable for the acts of their children, and according to article 2322 employers are in some cases liable for the acts of their employees. Prof. Domínguez is clarifying that article 2329 applies only when liability for one's own actions is concerned.

[8] Alessandri, *op. cit.,* (1943), §195, p. 292.

This is indeed the case. But it is also clear that the plaintiff will have to prove that the harm he/she has suffered is due to the crash. If causation also in that regard is presumed under Article 2329's rule, the basis that would limit the presumption to some damages caused in the world, and not to others, would disappear. This is the reason why, in my view, it does not make sense to claim that the presumption in Article 2329 covers causality.

Admittedly, in many *dicta* by relevant authors this is not clearly stated. Thus Alessandri:

> If our interpretation is accepted, when dealing with an action that gives rise to this presumption, the victim need not prove the negligence of the author of the harm, nor the causal relation between the latter and the former; it will be enough to prove the existence of the tortious act. In the case, for example, of an accident caused by a train or a car crash, or by the falling of a barrel, the victim will only have to prove the damage suffered as a consequence of the crash or the falling of the barrel[9].

As can be seen, Alessandri seems to be claiming that the causal link between the action and the harm is also presumed ("the victim need not prove the negligence of the author of the harm, nor the causal relation between the latter and the former"). But upon closer examination the meaning of the passage is clear: once the victim has proven that the harm was suffered as a consequence of the alleged tortious act, the agent's negligence and the causal relevance *of such negligence* are presumed. This is because if negligence is presumed, only causality can perform what could be called an identifying function, *i.e.*, the function of identifying the relevant harm. Prof. Alessandri (and presumably Prof. Domínguez) is claiming not that the causal link between the alleged tortious act and the harm is presumed, but that the (presumed) negligence has a causal connection with the harm; that is to say, that Article 2329's presumption refers not only to the fact that defendant acted negligently, but also that *such negligence covers the causal link* between action and harm. The fact that the alleged harm was caused by the alleged tortious act, however, must be proven according to general rules.

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9 *Ibíd.,* §201, p. 298.

The same kind of ambiguity can be found in Prof. Barros' Treatise. When discussing the scope of the presumption, he states that:

> In comparative law, a typical case in which the presumption is applicable occurred in relation to liability for defective products: having proven the harm and the product's defect, one can presume, prima facie, that the cause of the harm was the product's defect (infra N° 556) and that the defect was due to negligence on the part of the maker or producer[10].

Thus Barros seems to be claiming that Article 2329 allows the Court to presume not only negligence, but also causation between the defect and the harm. But this cannot be taken at face value, because then the question would be: how can the relevant harm be identified? The car was defective, and for that reason the steering system failed and the plaintiff crashed. Plaintiff will have to prove a causal link between the crash and his damages. I believe that, upon reflection, this is what Barros himself would say. This is made clearer when considering the passage to which Barros makes reference, N° 556, a passage that deals with "evidentiary aspects" of liability for defective products:

> when the circumstances of the accident entitles one to think that the harm is most probably due to the defect, nothing prevents to apply here the presumption of a causal link between the harm and the product's defect, using the presumption contained in Article 2329[11].

As can be seen, the situation cannot be described by simply saying that Article 2329 contains both a presumption of negligence and a presumption of causation. Causation in concrete is presumed if adequate causation has been established, *i.e.* if it has been proven that given the nature of the harm and the nature of the action in question, the former is due "most probably" to the latter. But to say that Article 2329 applies "when the circumstances of the accident entitles one to think that the harm is most probably due to the defect" is to say that before the presumption applies this has to be established: it has to be proven that given the kind of harm that is alleged and the circumstances of the accident, the latter is the most probable

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10 Barros, *op. cit.,* §96, p. 153.

11 *Ibíd.,* §556, p. 765.

cause of the former. As before, the most plausible interpretation of Prof. Barros's passage is that once this has been established there is no need to submit independent evidence to the effect that the (presumed) negligence made a causally relevant contribution to the harm. It is in this limited sense that Article 2329 allows both negligence and causation to be presumed.


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