

# Index

AB v Ministry of Defence, 232 Barker v Corus, 222, 228-9 abductive inference, 66 in CL, 306, 310-11 exceptional rule of liability in, 236-9 accessorial liability, 106, 115 actio de effusis vel dejectis, 153 probabilistic liability in, 293 Acton v Pearce & Co., 298 Beever, Allan, 180-2 actual frequentism, 62 Bennett v Minister of Community Welfare, Allied Maples v Simmons & Simmons, 240 - 1BGH NJW 1981, 201–2 BGH NJW 1983, 203 302-3 alternative liability, 161-8 rejection of, 163 BGH NJW 1988, 202-3 BGH NJW 1993, 208 BGH NJW 1994, 202 Amaca Pty Lyd v Ellis, 246 Anderson v Maloney, 161 BGH NJW 1996, 203 Anderson v Somberg, 252 apportionment, of liability BGH NJW 2012, 201-2 in asbestos litigation, 256 BHP Billiton Petroleum v Dalmine SpA, 245 in proportional liability, 230 Blum v Merrell Dow Pharmaceuticals Inc, 74 asbestos litigation, 168-70, 228-36, 254-7 Bonnington Castings Ltd v Wardlaw, 222-3 Boustead v North Western Strategic Health apportionment in, 256 Authority, 244 asymmetric overdetermination, 21 Athey v Leonati, 172, 240-1, 297 BPR. See balance of probability rule Australia, BPR in, 51 breach of duty autonomy to inform, 215-18 reversal of burden of proof and, beyond defined, 344 as informed decision-making, 344-5 medical contexts, 202-3 valuable options and, 343-4 reversal of burden of proof and, in medical contexts, 200-6 value of chance and, 343-5 Briginshaw v Briginshaw, 51 Bailey v Ministry of Defence, 22, 244-5 Brown v Corus (UK) Ltd, 232 Brown v Superior Court, 166 Bak v Glenleigh Homes Pty, 303-4 Baker v Willoughby, 21 Brownlie & Son v Magistrates of Barrhead, 242 balance of probability rule (BPR) burden of proof, 48-9, 101, 122-5. See also burden of proof and, 135-6 reversal of burden of proof consequential-liability causation and, BPR and, 135-6 casum sentiit dominus and, 125 52-3, 56-9 meaning of, 61-6 under Civil Code, reversal of, 158-61 medical negligence and, 57 civility as influence on, 124-5 proportional liability in, 236 consequentialist justifications of, 135-7 distribution of, 125–6 under §830 I 2 BGB, 143–4 standards of proof and, 128-9 wrong-constituting causation and, 50-1, 54-5 elements of, 49

419



### 420 INDEX

burden of proof, (cont.) fairness and, 282 faute collective and, 158-61 foundations of, 48 freedom and, 125 garde en commun and, 158-61 under German tort law, 48-9, 286 legal framework for, 126-7 legal scope of, 48 in probabilistic liability, 297 proportional liability rules and, 129-35 with recurrent uncertainty, 284 responsibility and, 125 status quo as influence on, 122-4 under-deterrence and, 136-7 in U.S. tort law, 251-61 Burks v Abbott Laboratories, 193 but-for test, 16-17, 23 NESS analysis and, 25-33 Bydlinski, F., 144 Canada, tort law in causal inference cases in, 84 defendant indeterminacy in, 170-4 proof of causation in, 174 Canning-Kisher v Sandwell & West Birmingham Hospitals NHS Trust, 244

Canterbury v Spence, 258-9 Cass Civ 1e, 7 Feb 2006, 264 Cass Civ 1e, 7 May 2008, 333 Cass Civ 1e, 8 April 1986, 159 Cass Civ 1e, 16 October 2013, 264 Cass Civ 1e, 17 June 2010, 160 Cass Civ 1e, 18 March 1969, 330 Cass Civ 1e, 24 April 2006, 266 Cass Civ 1e, 25 Nov 2010, 268 Cass Civ 1e, 26 Jan 2012, 268 Cass Civ 1e, 27 Jan 1970, 330 Cass Civ 1e, 28 Jan 2010, 333 Cass Civ 2e, 1 July 2010, 333 Cass Civ 2e, 2 April 1997, 156 Cass Civ 2e, 2 July 2002, 264 Cass Civ 2e, 4 March 1966, 266 Cass Civ 2e, 5 March 1975, 266 Cass Civ 2e, 12 July 2007, 264 Cass Civ 2e, 13 June 2013, 263 Cass Civ 2e, 15 December 1980, 156 Cass Civ 2e, 16 Jan 1985, 61 Cass Civ 2e, 20 July 1993, 334 Cass Civ 2e, 20 June 2002, 266 Cass Civ 3e, 18 May 2011, 268 Cass Crim 18 June 2002, 330 casum sentiit dominus, 125 causal counterfactuals, 17 causal inference, 68-9, 102 boundaries of, 80-5, 102-3

proof by generalisation, 80-2 statistical evidence for, 85 causal redundancy, 16 causal uncertainty, 5-10 absence of mechanistic knowledge and, 8-9 in Canadian tort law, 174 conceptual problems with, 372-6 consistency problems with, 378-82 in English tort law, 169-72, 220-51, 275-6, 292-325, 372-5 factual, 6-7 in French tort law, 59-62, 153-61, 261-8, 275-6, 335-6, 372-5 full liability and, 275-9 general, 6 in German tort law, 89-90, 199-220, 275-6, 372-5 through human agency, 10 indeterminism as factor in, 9-10 multiplicity of possible causes, 8 normative problems with, 382-4 normative significance of, 279-81 probabilistic liability and, 335-6 randomness as factor in, 9-10 scientific, 6-7 similarity of possible causes, 8 by source, 7-10 specific, 6 time as factor in, 7 in U.S. tort law, 92-5, 161-8, 252-61, 2.75 - 6causation, proof of. See also burden of proof; presumption of causation; proof rules, for causation; wrong-constituting causation in Canadian tort law, 174 through case-specific evidence, 75-6 for compensation, 105-7 for consequential liability, 38 consequentialist justifications for, 116-17 consistency as issue in, 2-3 counterfactual nature of, 9 defined, 2 economic analysis and, 117-21 under §830 I 2 BGB, 148-50 in English tort law, 13, 85-9, 169-72, 220-51, 275-6, 292-325, 372-5 through epidemiological evidence,

to establish secondary responsibility, 38

in French tort law, 59-62, 90-1, 153-61,

general reasoning and evidence in, 68-75

for establishing cause of action, 39-40

freedom of action and, 107-8

261-8, 275-6, 335-6, 372-5

increased risk in, 82-5



INDEX 421

in German tort law, 39-40, 89-90, garde en commun and, 155-61 199-220, 275-6, 372-5 liability in solidum under, 155-8 with IBE, 78-80 liability loss under, 11-12 through inference, 66-9, 76-80 liability-grounding causation under, justification of, 104-5 59-60 for liability, 104-7 reversal of burden of proof, 158-61 standards of proof in, 59-61 moral particularisation and, 109-10 through perception, 67 civility, principle of probabilistic liability and, 38 burden of proof influenced by, proportional liability and, 231, 234 124-5 reversal of burden of proof and, 206, protections under, 125 CL. See loss of chance liability 221 - 47in U.S. tort law, 92-5, 161-8, 252-61, claimant indeterminacy causative variant in, 199 275 - 6in wrongdoing, as essential to, 108 full liability and, 198-9 causation, tests for. See also burden of proof; probabilistic liability and, 356 presumption of causation; proof rules, recurrent uncertainty and, 284-5 for causation; standards of proof classical probability, 62 alternative analyses of, 33-7 Clements v Clements, 173 but-for test, 16-17, 23, 25-33 Clough v First Choice Holidays and Flights Ltd, condition sine qua non, 16-17 232 Coffman v Keene Corp, 257 contribution by pre-emption, 18-19, Collins v Eli Lilly & Co, 166 comparative law, 12–13 contribution in overdetermined situations, 20-5 compensation in English tort law, 21-2 as moral responsibility, 109-16 in German tort law, 23 proof of causation for, 105-7 hypothetical, 19 conceptual uncertainty, 15 necessity in, 26 concrete endangerment, 150-1 NESS analyses of, 25-33 Conde v Velsicol Chemical Co, 73 omission in, 24-5 condition sine qua non test, 16-17 in prevented claim theory, 183-4 consequential-liability causation Stapleton's but-for test of, 35-6 in English tort law, 52-3 causative defendants variant, 140, 196 in French tort law, 60-1 claimant indeterminacy and, 199 in German tort law, 56-9 in English tort law, 170 proof of, 38 in German tort law, 152-3 quantum extent of damage in, 58-9 under prevented claim theory, 196 Consumer Protection Act, 11, 192 in U.S. tort law, 165-8 contributory negligence, 362-4 chance, loss of, 339-48 Cook v Lewis, 170-2 attitudinal accounts of, 340-2 Cooper v Sisters of Charity of Cincinnati, 260 autonomy accounts of, 343-5 Corbett v Cumbria Kart Racing, 79 damage assessment from, 351-2 corrective justice, 111-12, 180-7 Cottrelle v Gerrard, 172, 240-1 derivative value account of, 346 determinism and, 347-8 Countess Dowager of Seafield v Kemp, 242 goods and freedoms from risk, 346-8 Cour de Grenoble, 157-8 legal rights against, 348-52 Creutzfeld-Jakob Disease Litigation, Group A and non-compensatory damages for, 354-5 C Plaintiffs, 87 security and, 345–6 value of, 342–3 Cunningham v Charles Pfizer & Co, 257 Chaplin v Hicks, 294-5, 304 damage, 41-2. See also evidential damage Chester v Afshar, 51 damages assessment Chin v St. Barnabas Med. Ctr, 252 CL and, 353 Chubb Fire Ltd v The Vicar of Spalding, 319 IR and, 353 with loss of chance, 351-2 Civil Code (France) defendant indeterminacy under, 153-61 non-compensatory, for lost chances, faute collective and, 155-61 354 - 5



### 422 INDEX

damages assessment (cont.) with probabilistic liability, 334 Davies v Taylor, 50, 304, 322-3 deductive inference, 66 defective blood products, 263-4 defence of lawful alternative conduct, 41, 214 defendant indeterminacy. See also §830 I 2 actio de effusis vel dejectis and, 153 under Canadian tort law, 170-4 causative defendants variant and, 140, 152-3, 165-8, 170, 196, 199 claimant injury causation, 175-6 conceptualisation of doctrines for, 193-4 under English tort law, 168-74 extent of loss variant and, 139-40, 151-2, 164-5, 170, 195-6 fairness and, 184-91 faute collective and, 155-61 under French tort law, 140, 153–61 full liability and, 194-5, 198-9 fungibility requirements and, 167-8 garde en commun and, 155-61 under German tort law, 140-53 insolvent defendants and, 178 iustifications for liability under, 174-96 liability in solidum and, 155-8, 160 multiple defendants and, 179 nature of loss as factor in, 177 non-tortious potential causes in, 193 prevented claim theory and, 176-7 probabilistic liability and, 356 proportional liability with, 194-5 recurrent uncertainty and, 284-5 rejection of, under Civil Code, 153-5 reliance upon wrongdoing and, 189-91 remoteness as factor in, 177-8 RI argument, 190-1 Second Restatement of Torts and, 162-3 in Summers v Tice, 161-2 Third Restatement of Torts and, 162-3 tortious potential causes in, 193 untraceable defendants and, 178 in U.S. tort law, 161-8 Deliktsrecht, 11. See also German tort law strict liability under, 12 destruction of proof doctrine, 206-7 determinism, chance and, 347-8 deterrence-based arguments full liability and, 269-75 for probabilistic liability, 361-2 for risk liability, 349 Dillon v Twin State, 19 Dingley v Chief Constable, Strathclyde Dixon v Clement Jones Solicitors, 297

documentation of treatment, reversal of burden of proof and, 207–9, 214 Dorshell v City of Cambridge, 171 doubling of the risk test, 86 Doyle v Wallace, 301-2 Drake v Harbour, 81, 248 Dudarec v Andrews, 298 duty to inform alternative forms of, 217-18 by doctors, 215-17 purpose of, 218 reversal of burden of proof and, failures in, 257-9 DW Moore & Co v Ferrier, 312 §823 I BGB, 40 §830 I 2 BGB, 141-53 application requirements for, 144-51 burden of proof under, 143-4 concrete endangerment requirements under, 150-1 as exceptional rule, 145 expansion of, 148 insolvent defendants under, 187 liability under, 143-4, 147-8 nature of loss under, 177 in older cases, 142 standards of proof under, 144 English tort law breach of basic duty and, 11-12 causal concepts in, 16-37 causal counterfactuals in, 17 causal questions in, 37-45 causal uncertainty in, 275-6, 372-5 causation tests in, 21-2 causative defendants variant in, 170 CL under, 367-9 defendant indeterminacy under, 168-74 deterrence-based arguments in, 269-75 establishment of causation in, 39 extent of loss variant in, 170 material contribution to injury under, 239-46 more than wrongful condition under, 275 nature of duty condition under, 276 omissions in, 24-5 overdetermination in, 24-5 pre-emption in, 24-5 probabilistic liability in, 292-325 proof of causation in, 13, 85-9 proportional liability under, 220 reversal of burden of proof under, 220-47

scope of, 10-12

standards of proof in, 16, 50-3, 247-51

wrong-constituting causation in, 50-1



INDEX 423

epidemiology	freedom of action, 107–8
Hill criteria for, 71–4	French tort law. See also presumption of
proof of causation through, 70–4	causation
Evans v Queanbeyan City Council, 246	article 1382 under, 39
Evers v Dollinger, 261	burden of proof under, 48–9
evidence, preservation of, 213–14	causal concepts in, 16–37
evidential damage	causal overdetermination in, 23
causation of, 276–9	causal uncertainty in, 275-6, 335-6, 372-5
consequential-liability causation and,	CL under, 335–6, 367–9
58–9	consequential-liability causation in, 60-1
evidential probability, 61, 64–6	defendant indeterminacy under, 140,
ex ante risk, 231	153–61
exceptional rule of liability, 183	doctrine of perte d'une chance, 326–30
reversal of burden of proof and, 226–8,	establishment of causation in, 39
236–9	extent of loss variant in, 164–5
extent of loss variant, 139–40, 195–6	full liability under, 261–8
under distinct claim theory, 195	more than wrongful condition under, 275
in English tort law, 170	nature of duty condition under, 276
in French tort law, 164–5	probabilistic liability under, 325–65
in German tort law, 151–2	proof of causation in, 90–1
under RI argument, 195–6	standards of proof in, 59–61
	tort of negligence under, 40–5
F H v McDougall, 51	frequentist probability, 62
factual causal uncertainty, 6–7	full liability. See also presumption of
Fairchild v Glenhaven Funeral Services, 168–9,	causation
172, 222, 226–8	causal uncertainty and, 275–9
exceptional rule of liability in, 236–9	claimant indeterminacy and, 198–9
impossibility of proof and, 239	culpability arguments for, 285–7
single agents and, 228, 239	defendant indeterminacy and, 194–5,
fairness	198–9
burden of proof and, 282	deterrence-based arguments, 269–75
defendant indeterminacy and, 184–91	under English tort law, 220–51
difficulty of proof and, 282–5	with evidential damage, causation of,
full liability and, 282–7	276–9
LP and, 321	fairness and, 282–7
probabilistic liability and, 364–5	under French tort law, 261–8
recurrent uncertainty and, 283–5	under German tort law, 199–220
in reversal of burden of proof, 205–6	justifications of, beyond defendant
RI argument and, 184–9	indeterminacy, 268–87 material contribution to injury and,
false negatives, in standards of proof, 127 false positives, in standards of proof, 127	239–46
Fatal Accidents Act, 181, 230	moral concerns as influence on, 271
faute collective, 155–8	more than wrongful condition in, 275
liability under, 155–7	with reversal of burden of proof, 200–18,
reversal of burden of proof under,	231–3, 239–46, 287
158–61	RI argument and, 285–7
Feltham v Bouskell, 319	simple uncertainty for, 198
Fisher v Knibbe, 297	types of bias with, 272
Fitzgerald v Lane, 225–7	fungibility requirements, 167–8
Flores v Borg-Warner Corp., 254	rungionity requirements, 107 0
Folland v Reardon, 298–9	garde en commun, 155-8
Forster v Outred & Co., 311–12	in Cour de Grenoble, 157–8
framing bias, 122–3	reversal of burden of proof and, 158–61
France. See also Civil Code; French tort law;	Gardner, John, 112–13
responsibilité civile extracontractuallé	Gardner v National Bulk Carriers, 260–1
Cour de Cassation, 264–8	general causal uncertainty, 6
Cour de Grenoble, 157–8	German tort law
· · · ·	



### 424 INDEX

German tort law (cont.)

burden of proof under, 48-9, 286 causal concepts in, 16-37 causal uncertainty in, 275-6, 372-5 causative defendants variant in, 152-3 CL under, 367-9 consequential-liability causation in, 56–9 defendant indeterminacy under, 140-53 Deliktsrecht and, 11-12 deterrence-based arguments in, 269-75 double causation under, 23 Drinking Water Ordinance under, 213 §823 I BGB in, 40 establishment of causation in, 39-40 extent of loss variant in, 151-2 full liability under, 199-220 insolvent defendants under, 187 medical negligence in, 57 more than wrongful condition under, 275 nature of duty condition under, 276 omissions in, 24-5 overdetermination in, 24-5 under Patients' Rights Statute, 200-2 pre-emption in, 24-5 pre-emption under, 19 proof of causation in, 39-40, 89-90 reversal of burden of proof under, 200–18 RI argument under, 185-6 standards of proof in, 53-9 tort of negligence under, 40-5 wrong-constituting causation in, 53-5 Gouldsmith v Mid Staffordshire General Hospital NHS Trust, 45, 81 Gregg v Scott, 235-6, 299-300, 309-10, 319, 321 Gregg v VJ Auto-Parts Inc, 254 Grieves v FT Everard, 313-14 gross negligence, 200, 287

Haack, S., 94 Haft v Lone Pine Hotel, 252-3, 277 Hanif v Middleweeks, 297 Hart v Secretary of the Department of Health and Human Services, 93 Haxton v Phillips Electronics Ltd, 181 Health and Safety at Work Act, 238 Henderson v Hagblom, 296-7 Heneghan v Manchester Dry Docks Ltd, 169, 228, 233-5 Hicks v United States, 259-60 Hill, Austin Bradford, 71-4 Holtby v Brigham & Cowan, 238, 243-6 Hotson v East Berkshire Health Authority, 51, 277, 306-9 human agency, causal uncertainty through, Hurley v United States, 260 Hymowitz v Eli Lilly & Co., 167

hypothetical causation, 19 reversal of burden of proof and, 214 hypothetical frequentism, 62 hypothetical negligence, 174

IBE. See inference to best explanation impossibility of proof principle current law and, 319-20 justifiability of, 320, 322-3 litigation economy and, 324-5 in probabilistic liability, 319–20 RI and, 324-5 increased risk liability (IR), 290-1, 339-48. See also chance, loss of under current law, 332-4 damage assessment and, 353 with economic loss, 311-13 with physical injury, 313-14 quantification of loss in, 299-302 indeterminism, causal uncertainty and, 9-10 inductive inference, 66-7 inference. See also causal inference abductive, 66 components of, 67 deductive, 66 in presumption of causation, 261-2 proof of causation through, 66-9, 76-80 through RCTs, 69-70 reversal of burden of proof and, 204 inference to best explanation (IBE), 78-80 insolvent defendants under §830 I 2 BGB, 187 prevented claim theory and, 178 under RI argument, 187-9 intime conviction, 59-60 IR. See increased risk liability

Jones v Great Western Railway Co, 67 Jones v Secretary for State for Energy and Climate Change, 86–7 Joseph Brant Memorial Hospital v Koziol, 171 Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd, 48

Kaminsky v Hertz, 92 Katzenmeier, C., 129 Keefe v Isle of Man Steam Packet Company, 250 Kenyon v Bell, 300 Kitchen v Royal Air Force, 295–7, 325 Kramer v Weedhopper of Utah Inc, 92 Krantz v McCutcheon, 300

Lander v East Texas Salt Water Disposal Co, 164–5 Landrigan v Celotex Corporation, 74 Lange v Bennett, 171 Law Society v Sephton & Co, 311

INDEX 425

Lee v Minister of Correctional Services, 285 Lee v Nursery Furnishing, 222 Leigh v London Ambulance Service NHS Trust, 244 Letnik v Municipality of Metropolitan Toronto, Leuer v Johnson, 163 Levicom v Linklaters, 81 liability. See also defendant indeterminacy; full liability; probabilistic liability; proportional liability; risk liability accessorial, 106 alternative, 161-8 apportionment of, 230, 256 causal, in tort of negligence, 42-3 causation for determination of, 38 under defendant indeterminacy, 174-96 deontological constraints and, 131 economic models of, 270-1 under §830 I 2 BGB, 143-4, 147-8 exceptional rule of, 183, 226-8, 236-9 under faute collective, 155-7 market share, 161-8 negligence-based proportional, 118 non-causal, 43-5, 114-15 outcome responsibility and, 110 probabilistic, 38 proof of causation for, 104-7 in RI argument, 194-5 vicarious, 106, 114-15 liability in solidum, 155-8, 160 Liriano v Hobart Corp., 257-8 litigation economy, 324-5 Lohrmann v Pittsburgh Corning Corp, 254 loss, theories of, 340-6 loss of chance liability (CL), 290, 302-14, 339-48. See also chance, loss of in Barker v Corus, 306, 310-11 contractual origins of, 294-9 under current law, 332-4 damage assessment and, 353 economic loss or gain in, 302-5 under English tort law, 367-9 under French tort law, 335-6, 367-9 under German tort law, 367-9 for physical injury, 305-11 skepticism of, 337-8 violation of autonomy with, 337 loss principle (LP) consequentialist considerations in, 321 fairness considerations in, 321 fit with current law, 315-17 justifiability of, 317-19 in probabilistic liability, 314-19 LP. See loss principle

Malec v JC Hutton, 299 Mallett v McMonagle, 52, 299-301 malpractice. See medical negligence March v Stramare, 240-1 market share liability, 161-8 Mäsch, Gerald, 318 material contribution to injury analysis of, 246 in English tort law, 239-46 full liability and, 239-46 historical origins of, 240-3 in modern law, 243-6 material contribution to risk analysis of, 223-6, 228-33 as form of weak causal connection, not confined to mesothelioma, 233-4 McGhee v National Coal Board, 223-5 McGlone v Glasgow Greater Health Board, 77-8 McWilliams v Sir William Arrol & Co Ltd, 17, 24, 222-3, 305 medical negligence causal uncertainty in, 249-51 destruction of proof doctrine and, 206-7 doctor's duty to inform and, breach of, 215 - 17documentation of treatment in, 207-9. 214 exclusion from proportional liability rule, in German tort law, 57 preservation of evidence in, 213-14 reversal of burden of proof for, 200-6 mesothelioma, 226, 233-4 Mickelwright v Surrey County Council, 250 Miller v Ministry of Pensions, 50 Milward v Acuity Specialty Products Group Inc, 74 Ministry of Defence v Wood, 74 Minnesota Mining and Manufacturing v Atterbury, 74 Moeller v Garlock Sealing Technologies, 254 morality, consequentialist theories of, 116-17 more than wrongful condition, 275 Morgan v UPS, 363 Morin v Autozone Northeast Inc, 255 Mountford v Newlands School, 249 Murphy v Brentwood District, 181

necessary element of a sufficient set (NESS) analysis. *See also* sufficiency beyond but-for test, 25–33 of causation, 25–33 for false negatives, 28–9 for false positives, 29–32 for incompleteness, 32–3



426 INDEX

necessity in causation, 26 meaning of, 26 negligence-based proportional liability, 118 NESS analysis. See necessary element of a sufficient set analysis Newbury v Vogel, 259 Nichols v Warner, Scarborough, Herman & Harvey, 297 Nissen Trampoline v Terre Haute First National Bank, 257 no better off rule, 42 no worse off due to multiple torts rule, 42 nomological sufficiency, 32-3 non-causal liability, 43-5, 114-15 Novartis (Grimsby) Ltd v Cookson, 86, 232 Nowsco Well Service Ltd v Canadian Propane Gas & Oil Ltd, 84 Nulty v Milton Keynes Borough Council, 50, 64 Oberdiek, J., 343

obligation de securité, 263 OLG Celle NIW 1950, 144-5 OLG Hamm 18 January 2014, 89-90 OLG Hamm 2003, 75 OLG Koblenz NJW 2000, 55 OLG Koblenz VersR 2000, 55 OLG Koblenz VersR 2013, 151 OLG Köln NZV 1990, 151 OLG Rostock OLG-NL 2004, 55 Otter v Church, Adams, Tatham & Co, 222-3, 305 outcome responsibility, 110 liability and, 110 overdetermined situations, 20-3 asymmetric overdetermination, 21 in English tort law, 24-5 in French tort law, 23 in German tort law, 24-5 sufficiency in, 21 overtaking causation, 19

Parker v British Airways Board, 184
Party Walls Act, 249–50
Patients' Rights Statute, 200–2
PC. See probabilistic causal liability
Performance Cars Ltd v Abraham, 19
Perry, Stephen, 341, 344
perte d'une chance, doctrine of,
326–30
Phethean-Coles v Hubble, 247
Porat, A. and Stein A., 129, 277–81
Poseidon Ltd & Sellars v Adelaide Petroleum NL,
322
pre-emption, 18–19
in tort law, 24–5

presumption of causation Cour de Cassation and, 264-8 with defective blood products, 263-4 defined, 261-2 by exclusion, 265 factual examples, 264-8 in French tort law, 261-8 inference in, 261-2 legal examples, 262-4 obligation de securité and, 263 risk increases as influence on, 265-8 prevented claim theory causative defendant variant in, 183-4 claimant condition as factor in, 183 defendant indeterminacy and, 176-7 doctrinal boundaries under, 183 exceptional rule of liability and, 183 insolvent defendants and, 178 invasion of right to physical integrity in, 180-1 multiple defendants and, 179 nature of loss as factor in, 177 paradox of, 178-9 remoteness as factor in, 177-8 untraceable defendants and, 178 vindication of, 182-3 prevention principle, 4 prima facie proof, 219-20 probabilistic causal liability (PC), 291–2 probabilistic liability, 38. See also loss of chance liability aggregate claims for, 365 all-or-nothing tendencies in, 337 in Barker v Corus, 293 burden of proof in, 297 claimant indeterminacy and, 356 contributory negligence analogies and, 363 damage assessment with, 334 defendant indeterminacy and, 356 defined, 290 deterrence-based arguments for, 361-2 development of, 292-314 doctrinal disputes over, in French tort law, 330-2 in English tort law, 292-325 exclusion of recovery and, 335 exposure to risk in, 314-19 under French tort law, 325-65 impossibility of proof principle in, 319-20 incentives and, 361-2 injury requirements, 293 IR in, 290-1, 299-302, 311-14 justification of, 339-48, 355-65 justificatory problems for, under French

tort law, 335-8



INDEX 427

LP and, 314-19 defendant indeterminacy and, 190-1 minimisation of expected error and, extent of loss variant under, 195-6 359 - 61fairness and, 184-9 full liability and, 285-7 minimisation of expected justice and, 358-9 under German tort law, 185-6 quantification arguments for, 362-4 in impossibility of proof principle, 324-5 rationalisation of law, 314-25 insolvent defendants, 187–9 standards of proof for, fairness-based levels of liability in, 194-5 objections to, 364-5 objection from, 186-7 statistical causal wrongs principle and, reliance on wrongdoing of another in, 189-91 as unified category, 290 risk impositions in, 189 upward bias and, 361-2 strict liability applications, 190-1 probability. See also balance of probability untraceability of defendants and, 187-9 reliance on wrongdoing principle, 4, 175, rule 189-91 classical, 62 degrees of confidence and, 63-4 responsibilité civile extracontractuallé, 11, 11. evidential, 61, 64-6 See also French tort law frequentist, 62 primary duties under, 12 meaning of, 61-6 responsibility, 110-17 propensity interpretations of, 64 burden of proof and, 125 compensation as, 109-16 standards of proof and, 61-6 proof of causation. See causation, proof of legal liability and, 115-16 moral, for compensation, 109-16 proof rules, for causation. See also burden of proof; reversal of burden of proof; outcome, 110 standards of proof Resurfice Corp. v Hanke, 171-2 exceptional, 2-3 retributive justice, 287 general, 1, 3, 47 reversal of burden of proof justification of, 121-37 in asbestos litigation, 254-7 proportional liability, 194-5 breach of duty to inform, 215-18 apportionment in, 230 for causal uncertainty, 206-14 in Barker v Corus, 236 claimant injury by defendant under, 247 under English tort law, 220 critique of, 203-6 defence of lawful alternative conduct ex ante risk and, 231 judicial acceptance of, 236 and, 214 medical negligence excluded from, defendant wrongful conduct in, 214-18, probability of causation and, 231, 234 destruction of proof doctrine and, 206-7 punishment under, 132 doctrinal rationalisation and, 203-6 reversal of burden of proof and, 228–33 documentation of treatment and, 207-9, rules of, 129-35 214 under-deterrence and, 136-7 economic justification for, 206 proportional recovery, 227 under English tort law, 220-47 Proven causation principle, 4, 14, 292, exceptional rule in, revitalisation of, 226-8, 236-9 359 - 61punishment, under proportional liability failures in duty to inform, 257-9 fairness arguments for, 205-6 rules, 132 under French Civil Code, 158–61 randomised controlled trials (RCTs), 69-70 full liability with, 200-18, 231-3, 239-46, 287 randomness, causal uncertainty and, 9-10 RCTs. See randomised controlled trials garde en commun and, 158-61 under German tort law, 200–18 recurrent uncertainty, 283-5 burden of proof with, 284 for gross breaches of duty, beyond claimant indeterminacy and, 284-5 medical contexts, 202-3 defendant indeterminacy and, 284-5 for gross breaches of duty, in medical Rees v Darlington Memorial NHS Trust, 345 contexts, 200-6

relative injustice (RI) argument

for causal uncertainty, 380

hypothetical causation and, 214

inference of causation and, 204



## 428 INDEX

reversal of burden of proof (cont.) origins of, in English tort law, 222-6 under Patients' Rights Statute, 200–2 preservation of evidence in, 213-14 primary damage and, 201-2 proof of causation and, 206, 221-47 proportional liability and, 228-33 risk liability and, 221-39 sporadic, 252-3 undertaken test results and, 210-12 under U.S. tort law, 252-61 Reynolds v Gonzalez, 261 Reynolds v Texas & Pacific Railway Co, 84 RI argument. See relative injustice argument Richardson v Mellish, 294-5 risk, 83-4 risk liability, 106, 112-14 deterrence-based arguments for, 349 ex ante risk, 231 legal rights against exposure to risk, 348-51 presumption of causation and, 265-8 probabilistic liability and, 314-19 reversal of burden of proof and, 221–39 Roadrunner Properties Ltd v Dean, 249-50 Robbins v London Borough of Bexley, 247 Roberts v Dorman Long & Co Ltd, 222-3 Robinson v Bristol NHS Trust, 250 Roe v Minister of Health, 75 Roman law, causal uncertainty in, 141-2 Rondel v Worsley, 298 Rutherford v Owens-Illinois Inc, 254-5

Sanderson v Hull, 232-3, 237 Savatier, R., 327-8, 332 scientific causal uncertainty, 6-7 Scott v Bradford, 259 Second Restatement of Torts, 162-3 secondary duties to authorize, 183-4 security, chance and, 345-6 Seley v GD Searle & Co, 257 Seltsam v McGuinness, 51 Senn v Merrell-Dow Pharms. Inc., 164 Shawe-Lincoln v Neelakandan, 250-1 Shore v Sedgwick Financial Services Ltd, 312–13 Sienkiewicz v Greif UK Ltd, 87-8, 99, 169-70, 231-4, 254 Sindell v Abbott Laboratories, 162, 165 Slaughter v S Talc Co, 254 Smith v Cutter Biological Inc., 163 Smith v Leech Brain, 52 Smith v Rapid Transit, 91-2 South Africa, 285 sporadic reversal of burden of proof, 252-3 Spring v Guardian Assurance Plc, 303-4 standards of proof, 49-66, 127-9 alterations of, 219-20

BGH and, 219-20 BPR and, 128-9 consequentialist justifications of, 135-7 consequential-liability causation in, 52-3,  $60 - \bar{1}$ under §830 I 2 BGB, 144 in English tort law, 16, 50-3, 247-51 false positives and negatives with, 127 in French tort law, 59-61 in German tort law, 53-9 liability-grounding causation and, 59-60 prima facie proof, 219–20 probabilistic liability and, 364-5 probability and, 61–6 proportional liability rules and, 129–35 reductions in, 247-51 risk increases in, 248-9 under-deterrence and, 136-7 in U.S. tort law, reduction of, 259-61 wrong-constituting causation and, 50-1, Stapleton, Jane, 35-6, 256 statistical causal wrongs principle, 356-8 statistical evidence, 86 statistical probability. See frequentist probability status quo, 122-4 psychological studies on, 122-3 Stealth Enterprises v Hoffmann Dorchik, 297 Steel v Joy, 18-19 Stevens, Robert, 341 Stewart v Ryan, 297 strict liability, application of exceptional rules in, 147-8, 192-3 strong necessity, 26 substantive liability principle, 4-5 sufficiency defined, 27 nomological, 32-3 in overdetermined situations, 21 Summers v Tice, 161-2, 165-6, 169-70, 193, 255 - 7

Tahir v Haringey HA, 309
Technical Chemical Co. v Jacobs, 257
Third Restatement of Torts, 162–3
Thomas (Gramling) v Mallett, 166
Thomson, Judith Jarvis, 107–8
time, causal uncertainty and, 7
Tom Hoskins Plc v EMW, 320
tort of negligence, 40–5
causal liability in, 42–3
no better off rule in, 42
no worse off due to multiple torts rule in, 42
noncausal liability in, 43–5
Transco v Griggs, 232



INDEX 429

The Trigger Litigation, 236–9 §286 ZPO. See wrong-constituting causation §287 ZPO. See consequential-liability causation

uncertainty. See also causal uncertainty; recurrent uncertainty simple, 198 tort liability under, 129, 185 under-deterrence burden of proof and, 136-7 proportional liability rules and, 136-7 standards of proof and, 136-7 United States (U.S.), tort law in. See also English tort law burden of proof in, 251-61 causal uncertainty in, 275-6 causative defendants variant in, 165-8 defendant indeterminacy in, 161-8 deterrence-based arguments in, 269-75 failures in duty to inform, 257-9 more than wrongful condition under, 275 nature of duty condition under, 276 proof of causation in, 91-101 reversal of burden of proof under, 252-61 standards of proof in, reduction of, 259-61 utilitarianism, 116

Vaile v Havering LBC, 248–9, 306 Vasiliou v Hajigeorgiou, 323 vicarious liability, 106, 114–15 Vyner v Waldenburg, 222 Wakelin v London & South Western Railway Co., Walker Estate v York Finch General Hospital, 172, 174 Wardlaw v Bonnington Castings, 240 - 3Watson v Ambergate Railway Co, 294-5 weak necessity, 26 wealth-maximisation, 116 Weinrib, Ernest, 109 welfare, defined, 117 Whitehead v Bruce, 81 Whitehead v Searle, 298 Williams, Vaughn, 295 Wilsher v Essex Health Authority, 225 Wright, Richard, 26 Wright v Cambridge Medical Group, 43-5, 181, 309 wrong-constituting causation BPR and, 50-1, 54-5 in English tort law, 50-1 in German tort law, 53-5 legal consequences of, 51 standard of proof and, 101-2 standards of proof and, 50-1, 101-2

XYZ Ltd v Schering Health Care Ltd, 85–6 XYZ v Portsmouth Hospitals NHS Trust, 323

Ybarra v Spangard, 162

Zuchowicz v United States, 257