

Index

- adequate causal link, 37
- adequate causal theory
 - adequate causation, 39
 - in English law, 37
 - in German law, 39
- adequate causality
 - scope of the risk, 37
- adequate causation, 39
 - in French law, 41
- aims of competition law, 57
 - consumer welfare, 58
 - multiple objectives, 58
- Allied Maples Group Ltd v Simmons & Simmons* [1995] EWCA Civ 17, 97
- all-or-nothing approach, 79, 108
- antitrust injury, 48
- apportionment of liability, 81
- Arkin v Borchard Lines Ltd* [2003] EWHC 687 (Comm), 117, 139
- balance of probability, 116, 122
- balance of probability rule
 - burden of proof and, 116
- Barker v Corus (UK) plc* [2006] UKHL 20, 37
- BGH 6.7.1993 VI ZR 228/92, 156
- BGH, 12.7.2016, KZR 25/14, 156
- BGH, 17 February 1970 ('Anastasia Decision'), 125
- BGH, 28.6.2005, KRB 2/05, NJW 2006, 155
- BGH, 28/6/2011, KZR 75/10, 100
- Broadcom Corp. v Qualcomm Inc* 501 F.3d 297 (3d Cir. 2007), 46
- Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977), 48
- burden of proof, 109
 - allocation, 146
- burden of persuasion, 109
- causal uncertainty, 142
- departures, types of, 142
- English law, 122
- German law, 124
- in EU law, 112
- in French law, 127
- in Italian law, 129
- informational asymmetry, 143
- moral justification, 160
- probatio diabolica, 82
- relaxation rules, 142
- risk allocation, 109
- burden of proof, 83
- cartel. *See* anticompetitive agreements
- Case C-6/74 *Société Roquette Frères v Commission of the European Communities* [1976] ECR 677, 52
- Case C-8/08 *T-Mobile v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, 119, 147
- Case C-12/03 P, *Commission v Tetra Laval* [2005] ECR I-987, 138
- Case C-42/84, *Remia* [1985] ECR 2545, 39
- Case C-49/92 P *Commission v Anic Partecipazioni* [1999], 147
- Case C-56/65 [1966] ECR 235, 135
- Case C-62/86 *AKZO Chemie BV v Commission* ECLI:EU:C:1991, 286, 147
- Case C-73/95 P, *Viho Europe BV v Commission of the European Communities* [1996] ECR I-5457, 87
- Case C-74/14 *Eturas and Others* ECLI:EU:C:2016:42, 144
- Case C-97/08 P *Akzo Nobel NV OJ C* 128, 86
- Case C-199/92 P *Hüls v Commission* [1999], 147

- Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*
 [2001] ECR I-06297, 1, 97, 166
- Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, 137
- Case T-11/89 *Shell International Chemical Company v Commission* [1992] ECR II-757, 86
- Case T-201/04 *Microsoft Corp. v Commission*
 [2007] ECR II-3601, 137
- Case T-216/13 *Telefónica v Commission* ECLI:EU:T:2016:369, 112
- CAT JJB Sports Plc v Office of Fair Trading, 123
- causal contribution, 82, 85
- causal inference, 143
- abductive inference, 143
 - deductive inference, 143
 - inductive inference, 143
 - prima facie evidence, 144
 - presumption, 145
 - proof proximity, 159
- causal presumption
- control, presumption of, 89
 - causal probability
 - semantics, 75
- causal proportional liability, 77, 89
- causal proportional theories.
- See* causal proportional liability
- causal redundancy, 104
- causal regularity, 44
- direct causal link, 43
 - in English Law, 34
 - in French law, 40
 - in German law, 38
 - in Italian law, 43
 - quantitative or scalar, 23
- risk theory, 24
- risk, scope of, 37
- causal uncertainty, 2, 4, 7–8, 10–11, 13, 16, 19, 43, 69–74, 77–79, 114–115, 117, 121, 142, 153, 161, 165, 192
- counterfactual proof, 73
- definition, 69
 - economic harm, 71
 - factual uncertainty, 72
 - general, 72
 - in English law, 84
 - in French law, 83
 - in German law, 85
 - in Italian law, 85
 - indeterminate defendants, 79
 - indeterminism, 73
 - overdetermined causation, 81
 - probabilistic causation, 74
 - scientific uncertainty, 72
- sources, 70
- specific, 72
- underdetermined causation, 82
- causation
- all-or-nothing approach, 108
 - and cumulative effects of contracts, 82
 - decisive influence, 89
 - empirical method, 8
 - function of, 5
 - in economic analysis of law, 11
 - in EU law, 66
 - in US antitrust law, 45
 - regularity theories, 9
- causation, proof of, 106
- discretionary power, 119
 - statistical probability, 120
 - standards of proof, 120
 - economic evidence, 120
 - in English law, 122
 - in German law, 124
 - in French law, 127
 - in Italian law, 128
 - informational asymmetries, 141
- causation, proof of evaluation, 119
- causation in fact
- material causation, 19, 25
- causation test
- adequate causal theory, 37
 - but-for test, 35
 - NESS, 21
- cause in fact
- but-for test, 35
- claimants indeterminacy, 103
- collective redress, 103
- common sense, 31
- comparator-based model, 138
- compensatory principle, 1, 14, 59, 80
- competition law infringement
- exclusionary offense, 18
 - exploitative offense, 17
- competition law liability
- causal contribution, 82
 - comparative fault, 90
 - contributory negligence, 89
 - joint and several liability, 80
- competition law liability
- apportionment of liability, 89
- competition law objectives
- Damages Directive aims, 59
 - liability, 57
- concerted practice, 111
- conditio sine qua non.* *See* but-for test
- consequential damages, 166
- convergence of national rules, 64

Index

221

- Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors* [2009] EWHC 2609 (Comm), 87
- Cooper Tire & Rubber Company Europe Limited v Dow Deutschland Inc* [2010] EWCA Civ 864, 179
- corrective justice, 1, 3, 5, 14, 26, 59, 74, 80, 88, 141, 152
- first-order duties, 6
- second-order duties, 6
- Corte d'Appello Cagliari 23.1. 1999, *Unimare S.r.l v Geasar S.p.a.*, 177
- Corte d'Appello Turin 6.7.2000, *Indaba Incentive Co v Juventus FC S.p.A.*, 188
- Corte di Cassazione civ., *Telecom v Sign and Others*, 16 May 2007, n 11312, 103
- Corte di Cassazione *Sara Assicurazioni v G.V.*, 30 May 2013, n 13667, 140
- Corte di Cassazione sez. III, 4 marzo 2004, n 4400, 92
- Corte di Cassazione, *Allianz v Tagliaferro*, 26 May 2011, n 11610, in Giust. civ. Mass. 2011, 5, 808 (2011), 140
- Corte di Cassazione, *Blasi v Az. cons. trasp. pubbl. Napoli*, 22 April 1993, no 4725, 102
- Corte di Cassazione, *Fonsai v Nigriello*, 2 February 2007, n 2305, 130
- Corte di Cassazione, *Montani et al v Lloyd Adriatico*, 25 September 1998, no 9598, 101
- Costner v Blount National Bank* n 52 578 F.2d 1192 (6th Cir. 1978), 47
- counterfactual, 20, 73, 132, 134–135
- counterfactual buyer, 26
- Cour d'Appel Paris, *SNC Doux Aliments Bretagne etc v SAS Ajinamoto Eurolysine*, 27 February 2014 No 07/10478, 176
- Cour de Cassation civile, 1re, 12 November 1985, Bull. civ I, no. 298, 94
- Cour de Cassation, comm., 15.6.2010, 09/15816, 176
- Cour de Cassation, commercial division, *Ajinomoto Eurolysine v SNC Doux Aliment Bretagne and Others* No 09/15816 (15 June 2010), 95
- Cour de Cassation, *Doux Aliments v Ajinomoto Eurolyne* 09-15816, 175
- Cour de Cassation, *JCB Services et al. v Central Parks*, 6 October 2015, no. 13-24-854, 83
- Cour de Cassation, Le Gouessant, 15 May 2012, 11-18495, 176
- Cour de Cassation, *Orange v Cowes*, 25 March 2014, No 1313839, 95
- Court of Appeal of Paris, *M. Merhi Bassam v SNC Société Presse Paris Services – SPPS*, No 08/21750, 27 April 2011, 96
- Court of Appeal of Versailles, SA *Concurrence v SA Aiwa France*, No 01/08413, 9 December 2003, 96
- Court of Cassation, *Fonsai v Nigriello*, 2 February 2007, n 2305, 146
- Crehan v Inntravel Pub Company CPC* [2004] EWCA Civ 637, 34, 97
- cumulative foreclosure effect, 90
- damages action
- harmonization process, 66
- damages actions
- in English law, 34
- in French law, 40
- in German law, 38
- in Italian law, 43
- liability standards, 54
- scope of, 61
- statutory duty in English law, 35
- deterrence, 15
- Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, 178
- direct causal link
- in EU law, 52
- proximity principle, 52
- direct purchaser, 167
- Directive on damages actions 104/2014, 50
- documentary evidence, 106
- duplicative causes, 104
- duty of consistent interpretation, 5
- economic evidence, 131
- admissibility, 131
- econometrics, 132
- probative value, 145
- effectiveness, 2, 49, 53, 55–56, 58–60, 62–63, 65–67, 81–82, 97, 113, 118, 144, 148, 150, 156–157, 189
- effectiveness, principle of, 50
- Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284, 178
- Emerson Electric Co & Ors v Mersen UK Portslade Ltd & Anor* [2012] EWCA Civ 155, 88
- Enron Coal Services Limited v English Welsh & Scottish Railway [2011] EWCA Civ 2, 98
- Enron Coal Services Limited v English Welsh & Scottish Railway Limited* [2009] CAT 36, 139
- equivalence, 2, 29, 53, 55–56, 59, 64–65, 68, 82, 118
- equivalence, principle of, 50
- evidence, 106
- circumstantial evidence, 146
- evaluation, 162
- value of the proof, 161

- evidence, disclosure of, 113
- evidence, law of, 107
- evidential burden, 109, 115
 - scientific expert, 131
- exceptional proof rules
 - English law, 152
 - French law, 158
 - German law, 155
 - Italian law, 158
- exclusionary conduct, 165
- exclusionary practice, 16
- expert witness, 131
- exploitative abuse, 16, 165
- exploitative conducts, 8
- factual causation
 - in English law, 35
 - in French law, 41
 - in German law, 38
 - in Italian law, 44
 - in US law, 46
- Fairchild v Glenhaven Funeral Services Ltd* [2002]
 - UKHL 22, 37
- fairness, 141
- false acquittals, 116
- false condemnations, 116
- foreseeability, 115
- foreseeability test
 - reasonableness, 36
- French commercial court, 30 March 2011, SA
 - Numericable et al. v. SA France Telecom Orange, 128
- Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* (2014) EWHC 1547 (Comm), 179
- Gatt Communications, Inc. v PMC Associates, L.L.C.* 711 F.3d 68, 76 (2d Cir. 2013), 48
- general causation, 6, 72, 147
- Hanover Shoe, Inc v United Shoe Machinery Corp* 392 US 481 (1968), 180
- Healthcare at Home v Genzyme Ltd* [2006] CAT 29, 139
- Higher Regional Court of Düsseldorf, 9 April 2014, VI-U (Kart) 10/12, 100
- I Illinois Brick Co v Illinois* 431 US 720 (1977), 180
- indirect purchasers' claims, 167
- In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation* (2010) 739 F. Supp. 2d 576 (SDNY) 596, 46
- indirect economic losses, 164
- indirect harm, 44
 - counterfactual buyer or customer, 17
 - waterbed effect, 185
- indirect loss, 116
- inference, 112
 - abductive reasoning, 144
- indirect evidence, 144
- information asymmetry, 113
- inspections, 106
- Italian Court of Cassation civ. Sez. Un., 4 February 2005, n 220, 14
- Italian Court of Cassation, Comi/Cargest, judgment no 11564 of 4 June 2015, 130
- Italian Court of Cassation, Division III, no 7026, 2001, 129
- Italian Court of Cassation SU, 11 January 2008, no 581, 129
- Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR 5357, 52
- Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2006) ECR I-06119, 1, 50, 165
- joint and several liability, 80
 - in English law, 84
 - in French law, 83
 - in German law, 85
 - in Italian law, 85
- KG 01.10.2009, 2 U 10/03 Kart NZG 2010, 420, 173
- KG 01.10.2009, 2 U 17/03 openJur 2012, 11758, 173
- Kone AG and Others v ÖBB-Infrastruktur AG*, 188
- legal causation
 - and common sense, 28
 - and corrective justice, 26
 - and fairness concerns, 28
 - and foreseeability, 27
 - and legal policy objectives, 28
 - foreseeability of the harm, 29
 - generalizing theories, 27
 - in French law, 41
 - in Italian law, 44
 - remoteness, 36
 - remoteness in English law, 36
- legal policy theory. *See* scope of the rule
- LG Dortmund 01.04.2004, 13 O 55/02 Kart WuW/E DE-R, 1352, 173
- LG Mainz, 15.01.2004, 12 HK.O 52/02 Kart NJW-RR 2004, 478, 172

- LG Mannheim 11.7.2003, 7 O 326/02 GRUR 2004, 182, 172
- LG Mannheim 29.04.2005, 22 O 74/04 Kart EWiR 659, 173
- loss of chance, 91
 - in English law, 97
 - in French law, 94
 - in general, 91
 - in German law, 100
 - in Italian law, 101
- lost chances. *See* loss of chance
- lost opportunities, 16
- lost-volume effect, 16
- material causation, 10, 169. *See also* factual causation
- McGhee v National Coal Board* [1972] 3 All E.R. 1008, 1 W.L.R. 1, 36
- Miller v Minister of Pensions*, 122
- multiple defendants, 77, 79
- Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading*, 123
- OLG Karlsruhe 11.06.2010, 6-U 118/05 Kart, 174
- OLG Karlsruhe 28.1.2004, 6 U 183/03 NJW 2004, 2243, 172
- overcharge, 1, 9, 16–17, 26, 29–30, 75, 95, 102, 105, 138, 149–150, 165–167, 169–170, 172–173, 175–176, 178, 180, 182–184, 186–188, 190–191, 196
- overdetermined causation, 81
- parallel behaviours, 111
- Paris Court of Appeal, SNC Doux Aliments *Bretagne etc v. SAS Ajinamoto Eurolysine, No 07/10478, 10 June 2009*, 94
- passing on, 167
 - cause-in-fact, 169
 - English law, 178
 - EU law, 183
 - French law, 175
 - German law, 172
 - Italian law, 177
 - legal causation, 170
- perte de chance*. *See* loss of chance
- preemption, 104
- preponderance of the evidence, 116. *See also* balance of probability
- presumption, 145
 - carte harm, 148
 - conclusive, 146
 - EU courts, 147
 - EU law, 148
 - evidential, 146
 - factual presumption, 145–146
 - in English law, 153
 - in EU law, 149
 - in French law, 158
 - in German law, 155
 - in Italian law, 159
 - irrebuttable, 145
 - legal presumption, 145–146
 - persuasive, 146
 - presumption of innocence, 150
 - provisional, 146
 - rebuttable, 145
- price effects, 112
- private antitrust enforcement, 116
- protective scope of the rule, 59
- probabilistic liability, 117
- procedural autonomy, principle of, 119
- proof, 107
- proof proximity, 159
- proportional liability, 81
- protective scope of a law, 57
- protective scope of the rule, 61
- proximate cause, 46
- punitive scope, 62, 111
- pure economic loss, 11, 26, 69, 94, 132, 164
- pure financial losses, 12
- Rambus Inc. v FTC*, 522 F.3d 456 (D.C. Cir. 2008), 47
- Regulation 1/2003, 64, 118
- relaxation, proof rules, 111
- responsibility in solidum. *See* joint and several liability
- right of standing, 60
- right to compensation, 1, 50, 55, 63, 65, 109, 113, 115, 150, 173, 182, 189
- risk allocation, 141
- risk-liability theory, 137
- Sainsbury's Supermarkets Ltd v Mastercard Incorporated and Others* [2016] CAT 11, 88, 187
- scientific or economic uncertainty, 141
- scope of the norm, 62
- scope of the rule, 39
- secondary harms, 116, 164
- single economic entity principle, 85
- singular causation, proof of. *See* causation, proof
- solidary responsibility. *See* joint and several liability
- specific causation, 6–7, 24, 39, 72, 88, 132, 137, 147, 160
- standard of proof, 110, 114
 - and balance of probabilities, 121
 - free evaluation of the evidence, 124
 - in English law, 122

- standard of proof (cont.)
in EU law, 114
in French law, 127
German law, 121, 124
in Italian law, 121, 129
in national systems, 116
intime conviction, 120–121, 125
relaxation of, 151
requisite legal standard, 115
statutorily protected interest, 11, 26, 38, 164
stochastic causality, 137
subjective right, 11, 26, 164
- T-112/07 *Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission* [2011], 147
- Tele Atlas N.V. v NAVTEQ Corp.* No C-05-01673, 2008 WL 4809441, at *22 (N.D. Cal. 2008), 46
- Tribunal de Commerce de Nanterre SA *Les Laboratoires Pharmaceutiques Arkopharma v Ste Roche etc*, 11.5.2006, n. 02004F02643, 177
- Tribunal de Commerce de Paris, *Société les Laboratoires Juva Production v SAS Roche*, 10 September 2003, No. RG2003048044, 176
- Tribunale di Milano, 27 December 2013
Brennercom SpA v Telecom Italia SpA, no 22423/2010, 102
- Tribunale di Milano, *Brennercom SpA v Telecom Italia SpA*, 3 March 2014 no 14802/2011, 102, 139
- Tribunale di Milano, OK Com SpA c. *Telecom Italia SpA*, 13 February 2013, R.G. 76568/2008, 103
- Tribunale Milan, *SEA v Swiss International Air Lines* 27.06.2016, n 7970/2016, 184
- umbrella effect, 188
- underdetermined causation, 82
- United States v Microsoft* 253 F.3d 34 (D.C. Cir. 2001), 46, 137
- WH Newson Holding Ltd & Ors v IMI Plc & Ors [2013] EWCA Civ 1377, 178
- witnesses, 106
- Zenith Radio Corp. v Hazeltine Research, Inc. 395 U.S. 100 (1969), 46
- 2 *Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19, 30, 99, 139