Causation in the Law

This entry explains, in general terms, the place of causal questions in the law and the law's way of tackling them. It traverses the major debates about causation that have occupied lawyers and philosophers of law, and connects these with parallel debates among philosophers writing about causation in general. One recurrent theme is that lawyers disagree about which questions that arise in connection with the law are to be regarded as genuinely causal ones. Another recurrent theme is that puzzles about causation are often made more bewildering, in the law, by their interplay with problems of process and proof in the courtroom.

Section 1 identifies the main way in which causal questions come up in the law, namely in connection with the ascertainment of responsibility. Section 2 explains how (Anglophone) lawyers have traditionally organised their causal inquiries into two stages: "cause-in-fact" and "proximate cause". Sections 3 and 4 explore these two stages in turn. In section 3 the emphasis is on the use of counterfactuals to isolate causal contributions. In section 4 the emphasis is on a range of legal techniques for limiting the reach of causal responsibility once causal contribution has been established. Section 5 introduces some difficulties for the law's causal inquiries that come of the law's distinctive requirements of proof.

1. Causation, responsibility and liability

For the most part, the law's interest in causation comes of its interest in establishing legal responsibility, where legal responsibility is in turn relevant to determining legal liability (e.g. liability to pay compensation, to make restitution, or to be punished). Some lawyers use "responsibility" as a synonym for "liability" (Hart 1968, 196). But it seems better to think of legal responsibility, in the relevant sense, as a condition of legal liability (Hart 1968, 216; Raz 2010, 3). Something has gone amiss in the eyes of the law and someone has to answer for it; that someone is responsible in law; depending on what he or she has to say, legal liability may ensue. On this view, liability to pay a fine for evading income tax is responsibility-based, but the original liability to pay the income tax is not (there is no need for anything to have gone amiss for that liability to be incurred).

Nothing in what follows turns on this distinction. But mentioning it helps to bring out the main way in which questions of causal contribution arise in the law. They arise because of the need to find a connection between the something that went amiss and the someone who is called upon to answer for it (who may be a human being, a corporation, a state, or anyone else with legal personality). That the someone made a causal contribution to the something is often but not always a connection that matters in assigning legal responsibility. D evades tax, for example, only if D makes a causal contribution to the deficit on D's tax account.

Why "often but not always"? Because sometimes the law holds person A responsible for the causal contribution of person B, irrespective of whether A made a causal contribution to B's making of that causal contribution. That is the situation when an employer is "vicariously" responsible for the torts of his employees. Sometimes, moreover, the law holds A responsible for the causal contribution of something owned or controlled or supervised by A (e.g. an animal or machine) irrespective of A's own causal contribution. In both situations the responsible person is said by lawyers to "bear the risk" of a causal contribution that is not his or her own. The responsibility of A who bears the risk may be additional or alternative to the responsibility of B who made the causal contribution. The responsibility of A may be voluntarily undertaken (the law then says that the risk was "assumed") but it need not be (the risk is then "imposed").

One's own causal contribution, and one's "bearing the risk" in respect of the causal contribution of another person or a thing, are the two main routes by which one may end up being legally responsible for some outcome (Honoré 1995, 84-5). A possible third route, discussed in section 5 below, is that of adding to the risk that the outcome would occur (known as "probabilistic linkage": Wright 1985b).

These characterizations presuppose a situation in which what is amiss in the eyes of the law is (or entails) some outcome: a loss, an injury, a deficit, a death, a detriment, a breakdown, etc. There are many legal rules under which actions or

activities are regarded as amiss irrespective of their outcomes. The law regulates criminal attempts and conspiracies even when they come to nothing, as well as bare possession of drugs and firearms, trespasses and libels with or without damage, etc. It is natural for those thinking first about the philosophy of action to regard these rules too as throwing up questions of causal contribution. For surely there is a causal contribution in every action or activity, namely the contribution of the agent to it by virtue of which it qualifies as an action or activity of that agent? That should not be taken for granted. Be that as it may, in the law the question of causal contribution arises almost exclusively in connection with responsibility for outcomes (where the action of another person counts as a possible outcome of interest to the law). The questions of whether and how one contributed to one's *own* actions are largely allowed to pass in silence by the law, or they are worked around. The focus of "causation in the law" (and of this article) is therefore the causal connection between action and outcome, not the prior connection, be it causal or otherwise, between agent and action.

To repeat the proposition that just appeared in brackets: the action of another person counts as a possible outcome of interest to the law. There are cases of complicity in which the law looks for a causal contribution by A to B's action. B's action may in turn be one with a further outcome (e.g. the death of a third party). If A pays B to kill A's enemy and B duly does so, B is said to be the "principal" in the killing and A is said to be B's "accomplice". That distinction still holds even if A is the head honcho and B is his minion, and irrespective of which is the more culpable. An interesting question, of which more below (section 4.3), is whether the crucial difference between principal and accomplice is a causal difference, since it is not a difference of culpability. For the moment it is enough to note that the law uses many subtle shades of causal language to mark the varying role of other people's actions, and indeed of other mediating links, in what it evocatively calls the "chain of causation". The law does not always describe making a causal contribution as "causing". It also speaks of "occasioning", "giving effect to", "inflicting", "failing to prevent", "permitting", "aiding", "facilitating", and "enabling", among many others. It also uses words like "killing", "wounding", "depriving", "damaging", and so on, where the regulated outcome and the regulated causal contribution are conveyed together in a single word. What are the implications of these choices? When A pays B to kill A's enemy and B duly does so, did A also kill A's enemy? If so, why is a law of complicity needed? (On this question see Moore 2007, Gardner 2008). We may think that the law is trying to mark a causal distinction here even if there isn't one to mark. And that may reveal something, for better or worse, about the law's implicit causal metaphysics.

There is no doubt that the law has some implicit causal metaphysics. On some puzzles about the nature of causality the law cannot but take a stance. Here is one example. In the debate about whether the relata of causal relationships are events or facts (Bennett 1988), the law inevitably cleaves to the "facts" view. Legal

causation is fact-causation. In assigning responsibility the law begins, of course, with a sequence of events, spatio-temporally located. But to build its narrative of causal contribution, or indeed of anything, it cannot but convert the raw sequence of events into a sequence of legally salient facts (known as "the facts of the case"). These facts include the legally relevant causal relata. In many legal systems, for example, if a claim for damages is brought against a motorist for negligently causing injury to another road user, it is not enough for the injured party to show that the motorist drove negligently and that, while driving negligently, she caused the injury. It must be shown that she caused the injury *by* her negligence. The fact that the defendant was driving negligently is the antecedent that interests the law in those legal systems. The fact that the plaintiff was injured in a way recognized by law is, correspondingly, the legally relevant consequent. If the former fact made no difference to the latter - to resort temporarily to a vague formulation of the law's criterion of causal contribution - then the sequence of events is without the legal significance that the plaintiff claimed for it. This leaves it open to the law to approximate an event-causal picture on some occasions and for some purposes, by endowing with legal salience the very fact that the event occurred, never mind any further facts about it (Moore 2009, 366-8). A leading case on these issues is The Empire Jamaica [1957] AC 386.

2. The law's two-stage causal inquiry

Many legal systems explicitly or implicitly divide the causal inquiry, undertaken for the purpose of ascertaining legal responsibility, into two stages or phases. First there is what is known as the "cause-in-fact" or "factual causation" phase. This is supposed to establish whether the legally relevant action of the defendant made a causal contribution of some kind to the legally relevant outcome. However it is not generally enough, in the law, to establish a causal contribution of *some* kind. There remains the question of whether the causal contribution is of the *right* kind for legal responsibility (either for legal responsibility in general, or for legal responsibility under some specific legal rule or rules). The law does not respond in an undifferentiated way to causal contributions. The second part of the inquiry, known as the "proximate cause" or "legal causation" phase, is concerned with the differentiation. It treats some causal contributions as insufficient for legal responsibility. They are not "operative and substantial" (see R v Smith [1959] 2 Q.B. 35) or they are "too indirect" (see Todorov v D.C.H. Healthcare Authority (1991) 921 F.2d 1438) or they are "insignificant" (see R v Cheshire [1991] 1 WLR 844) or they do not cross some other applicable legal threshold.

There is much in this way of carving up the subject of causation in the law that is unfortunate. First, labelling phase one as the "cause-in-fact" or "factual causation" phase is tendentious. It suggests that phase two is somehow less factual. But the questions that arise for the determination of a court in phase two of the causal inquiry are also classified by the law as questions of fact, not questions of law. In

systems with jury trial, they are all left to the jury. Was the causal contribution operative and substantial? Was it indirect? Was it significant? The answers to these questions all belong, in the sense explained already in section 1 above, to the "facts of the case". (See Stapleton 2001, 151-3, for a possible rejoinder.)

Secondly, one may easily be misled into exaggerating the difference between the two phases of inquiry by the emphasis that is inevitably placed, in explaining phase two, on the law's selectivity or differentiation among causal contributions. Inasmuch as the law is *choosing* who is to be legally responsible, can "who is legally responsible?" really be a causal question? Can it really be a matter of choice whether a causal relation obtains between any two relata, be they legally described or otherwise? There is some slippage between these two would-be rhetorical questions. One can consistently answer "yes" to the first and "no" to the second. Even in phase one of the causal inquiry, notice, the law selects and differentiates. It selects causal contribution as the basis of legal responsibility. It differentiates those who make a causal contribution from those who do not. That it further differentiates those who make causal contribution type x from causal contribution type y, in phase two, therefore does not show that the distinction between type x and type y is not a causal distinction, and so does not show that what is going on in phase two is not truly part of the causal inquiry. One question is: What kind of causal contribution, if any, did A make? Another is: How, if at all, should the answer to the first question bear on A's legal responsibility? The distinction between these questions cuts across the distinction between phase one and phase two of the causal inquiry. Both questions bear on both phases.

Unsurprisingly, many are drawn to the view that what is going on in phase two, or most of it, is not truly part of the causal inquiry. That makes them what Hart and Honoré (1985, lxvii) call "causal minimalists". Influenced by the writings of causal minimalists in the legal academy, especially in the middle of the twentieth century in the United States, courts in the Anglophone world have gradually become less inhibited about using "proximate cause" or "legal cause" as a basket into which various questions of fact bearing on the defendant's responsibility can be thrown, never mind whether they are causal questions. In this way an earlier generation of causal minimalists (e.g. Becht and Miller 1961, Green 1962), by influencing the development of the law's classifications, have helped to vindicate the causal minimalism of their successors (e.g. Wright 1985a, Stapleton 1988).

Of course, this vindication is a vindication only relative to the law. That causal minimalism has been endorsed by the courts does not show that the courts were right to endorse it. Just as the law may try to mark a causal distinction even where there isn't one to mark, it may fail to recognize as causal a causal distinction that it marks. Some of what is said in the courts and by commentators suggests that the argumentative slippage exposed above plays some part in causal minimalism's rise to the position of orthodoxy in the law. The determination of "proximate cause" or

"legal cause" is dominated by questions of legal policy, it is said, not by questions of causal contribution. This is a false contrast. One perennially important legal policy is to make the ascertainment of legal responsibility responsive to matters of causal contribution (Hart and Honoré 1959, 86; 1985, 91). Unless one is already a causal minimalist for other reasons, it is not clear why one should assume that the work to be done under the heading of "proximate cause" or "legal cause" must be in the secret service of *other* legal policies, such as making the culpable pay (Green 1962, 548-9). Section 4 below will touch on some possible explanations.

Less influential than the work of Green and his followers, but much discussed, has been Wex Malone's thesis (1957) that even phase one of the causal inquiry is not wholly about causation. Malone's arguments, like Green's, depend on the idea that legal policy is being illicitly smuggled into an ostensibly causal inquiry. He makes much of the role of the jury, and its potential vulnerability to being swayed by the language, including the causal language, of witnesses and judges. While one might regard this as exposing some error in the characterisation of the causal inquiry as "causal", one might equally regard it as exposing some problems with the juridical process by which the inquiry is being conducted. Even if the law's questions are about one thing, the jury's answers may be about another. It is hard to think about causation in the law without being drawn into various orthogonal problems of process and proof. Some of those will be the subject of section 5 below.

Although the law's division of the causal inquiry into these two phases has all the above-mentioned pitfalls, and is rejected by some as specious (e.g. Epstein 1973, 168), it helps to understand the issues confronted by the law, and the law's troubles in confronting them, if one follows the law's characteristic taxonomy. The following two sections thus explore the two phases of the causal inquiry in turn, retaining their treacherous traditional labels.

3 "Cause-in-fact"

To isolate a causal contribution ("cause-in-fact") the law has traditionally turned to counterfactuals. It has asked whether the outcome would have occurred *but for* (i.e. in the absence of) the relevant action of the defendant or other relevant antecedent. Also known as the necessity or *sine qua non* test, it is interesting that it is often presented in the law as a *test*. This differs from the role often carved out for it in philosophical writings on causation, where it is usually being advanced or criticized as a *criterion* of causal contribution, i.e. as part of the very idea of causality. On the "test" view, there is some independent idea of causality (which may of course be left unexplored) for which "but for" is supposed to provide a decent diagnostic proxy, like a certain pattern of spots might provide for an illness which is not essentially (analytically) spotty. Whether the law decisively opts for the "test" view of "but for" is doubtful. Often it remains vague on the test/criterion

question. This is a question on which, perhaps, the law does not need to settle on any implicit metaphysics.

The "but for" test is widely thought to be satisfactory when used as a mere test. It serves the law well from day to day. But special cases in which it yields false negatives are widely thought to rule it out as a criterion. Two hunters independently but simultaneously shoot a third through the heart, two contractors independently fail to deliver essential building supplies on time, or two arsonists independently set forest fires that later converge simultaneously on the same house. Since neither antecedent is necessary for the bad outcome given the other, the "but for" criterion delivers false negatives for both of them. How do we know the negatives are false? Because we have an outcome that must otherwise be regarded as having been caused by nobody and nothing, both the candidate antecedents having been eliminated from the causal inquiry as unnecessary. Mackie suggests that necessity can be rescued as a criterion for causal contribution in these cases by applying it to the two antecedents together. The two fires (etc.) are "cluster" causes, he says (Mackie 1974, 47). This may strike us as the wrong answer where there is no concerted action by the twin hunters, by the twin contractors, or by the twin arsonists. These people don't do anything together, and that includes causally contributing. Whatever they do, they do it separately. Moreover, that this be the case is no mere desideratum of the law's individualistic liability regime. It reflects a judgment of philosophical propriety. We can't deem two agents unknown to each other to be acting in concert just because doing so will rescue a proposed criterion of causal contribution. The law can deem false things to be true, but philosophers lack that power.

In the deeming vein, the law could always make do with a workaround for the false negative cases that would allow it to cling on to necessity as a criterion of causal contribution. It could treat someone whose action is a sufficient condition of some outcome as bearing the risk of that outcome notwithstanding that the outcome was not one to which, by the test of necessity, that person made any causal contribution. A less artificial response, however, is to admit that sufficiency plays some role in a sound analysis of causation, albeit a role that is somehow only foregrounded in situations in which necessity alone leaves a causal vacuum.

A prominent suggestion (Hart and Honoré 1959, 106-8; 1985, 112-4; Wright 1985a; Honoré 1995b) is that a more exactly correct counterfactual criterion for causal contribution combines necessity and sufficiency in the following way: an antecedent makes a causal contribution to an outcome only if there is at least one sufficient set of conditions for the outcome, of which that antecedent is a necessary member. This "NESS" criterion ("Necessary Element of Sufficient Set", so labelled by Wright 1985a) echoes Mackie's idea of an "INUS" condition ("Insufficient but Necessary part of a condition which is itself Unnecessary but Sufficient": Mackie 1965, 245). Mackie used this criterion in the analysis of causal

regularities (1974, Ch 3). He did not apply it to singular causal relations of the kind that dominate the law. The criterion does, however, pay dividends when so applied. The false negatives turn positive. In each case there are two sufficient sets. One contains the first bullet/non-delivery/fire but not the second. The other contains the second bullet/non-delivery/fire but not the first. The first bullet/non-delivery/fire is a necessary member of the first set, in the sense that without it the set is not sufficient for the outcome. By the same token the second bullet/non-delivery/fire is a necessary member of the second set. Rather than two negatives we get two positives. That seems to many to be the right result. At any rate, it is easier to accept than the causal vacuum of two negatives.

Does the NESS criterion bring with it a concomitant risk of false positives? Think about our complicity example again. This time think not of A's original procuring of the killing by B, but of some subsequent aiding of B by C (by C's selling to B the gun that he uses for the killing) or of some subsequent encouraging of B by D (by D's reminding B how much he hates the man he is about to kill). The NESS criterion makes these contributions straightforwardly causal even when, to return to the earlier vague formulation, they made no difference to the outcome. Suppose that B had access to a gun without C's help, and that B was already driven by hate without being reminded by D. Hart and Honoré are reluctant to classify these forms of complicity as straightforwardly causal (1959, 347; 1985, 388). If their reluctance is warranted, it may seem that their own NESS criterion must be over-inclusive, or at least too straightforward in its inclusivity. An alternative reaction to these cases that is more friendly to the NESS criterion has it that the reluctance is unwarranted. It comes of being seduced prematurely by the thought that C and D made no difference to the outcome. With a more fine-grained view of what counts as the relevant outcome - noting that the law of complicity attaches significance, for example, to which particular gun was used - one can recover one's faith in the idea that C and D contribute causally to it (Gardner 2007, 137-40). Then there is no false positive.

Some resist the NESS criterion and the "but for" criterion alike, for they resist the idea that causal relations are best analysed by resort to counterfactuals. One charge is that omissions may satisfy the counterfactual conditions but are incapable of causal contribution, for "being no things at all [they] do no causal work" (Moore 2009, 153). This presupposes a narrow account of what can count as a "thing". If such an account is required by the view that the basic relata of causal relations are events, not facts, then that counts against such a view.

A different charge is that all counterfactual analyses presuppose a world of causal regularities. Absent such regularities, all our "what ifs?" are doomed to imponderability. For absent such regularities, there is nothing which is such that it would have happened if such-and-such an antecedent had been absent. The problem here is not only that it is doubtful whether all singular causal relations do

instantiate causal regularities. There is also the problem that, to make progress at this point, we need some analysis of causal regularity that is not itself counterfactual (Moore 2009, 379-80). If we could have that, it might seem that we have now left our counterfactual analysis behind and returned to using counterfactuals as mere tests, not criteria, for the existence of causal relations. The only way out of this maze seems to be to deny that counterfactuals presuppose regularities, which is indeed the common rejoinder (see Moore 2009, 382-90).

4. "Proximate cause"

4.1 Degrees of causal contribution

By asking whether a causal contribution is "substantial" or not, the law represents causal contribution as a matter of degree. Such scalarity is often taken to be irreconcilable with the counterfactual analysis of causal contribution; necessity and sufficiency are often held to be binary properties (Wright 1988, 1146). That causal contributions are scalar is treated as axiomatic by some, for whom counterfactual analyses become correspondingly less appealing or more in need of qualification (Moore 2009, 397-8; Stapleton 2010, 475-7).

Moving away from counterfactual analyses for this reason may, however, be too hasty. Arguably counterfactual analyses do accommodate scalarity in causation, at least where questions of comparative causal contribution by two or more antecedents are concerned. In framing every counterfactual there is the question of how much to alter the real world, in our imaginings, in order to establish the necessity or sufficiency of an antecedent or a set of antecedents. For example, should we be envisaging a world in which A did not stab V1 at all? Or a world in which there was a stab, but a less forceful one? Or maybe one with a stab that was similarly forceful, but a moment later? Realising that we always have such latitude in the framing of our counterfactuals may lead to new worries about the implications of a counterfactual analysis of causation. It may lead us to conclude that in respect of at least some antecedents it is metaphysically indeterminate (and not just epistemically uncertain) whether they made causal contributions or not. Would that be a problem? (For the view that it would not, see Mackie 1974, 42-3). Whether or not it would be, in one way the discovery of this latitude seems to be an unmixed blessing. It seems to allow for scalarity in the relative causal contributions of different antecedents to the same consequent. Arguably, relatively larger causal contributions are made to the same consequent by those antecedents which are such that relatively smaller adjustments to the antecedent would have made relatively bigger differences to the consequent (Lewis 2000, 190-1).

An alternative proposal cashes out the scalarity of relative causal contribution in terms of the relative probabilities of all the various antecedent-consequent pairings that satisfy the applicable "cause-in-fact" criteria (Kaiserman 2017, 6). That

second proposal chimes better with the two-stage approach of the law. It makes the question of *how much* causal contribution A made distinct from, and a natural follow-up to, the question of whether A made a causal contribution at all.

Since it is a perennially important legal policy to make the ascertainment of legal responsibility responsive to matters of causal contribution, it is tempting to assume that the law's interest in the scalarity of relative causal contribution is to divide up legal responsibility among various causal contributors in proportion to their respective causal contributions. That, however, is only rarely what is at stake in common-law legal systems. The common-law tradition is to treat causal responsibility (under any given legal rule) as binary - either you are or you aren't causally responsible - and to regard the scalar feature of causal contribution as relevant only to the setting of a threshold for being causally responsible. Once one's causal contribution has crossed the "substantial" line, or once it is more than "*de minimis*" as the law sometimes puts it, there is normally no further question of how much causal contribution one made. The default rule is that all substantial causal contributors have full (or better: absolute) causal responsibility irrespective of the causal responsibility of any others. Hence, *ceteris paribus*, each bears "joint and several liability" for the whole of any damages payment.

Since "the whole of any damages payment" is a finite amount, it is tempting for lawyers to suppose that the amount of causal contribution to be shared around among causal contributors is likewise finite. The greater the causal contribution of defendant A, the less that of defendant B, all else being equal. So far as causal contribution is concerned, accusing others is therefore the best defence. This "displacement" view of causal contribution is not, however, an automatic corollary of the view that causal contributions come in degrees. On this point, the criminal law context may offer less distracting thought experiments. Should pointing to the causal contribution of an accomplice necessarily be regarded as reducing the causal contribution of the principal? Think of B who pulls the trigger and A who procures B's doing so. B's culpability is perhaps reduced or even eliminated by, say, coercion. But B's causal contribution to the death seems to be the very same as if A did not exist; it is the very causal contribution that A, being squeamish about his line of business, doesn't want to make for himself, and hence prefers to get B to make for him. (See Mellema 1985 for discussion of these themes.)

4.2 Novus actus interveniens

The law might in principle extend responsibility to take in any causal contribution whatsoever, or any that is more than *de minimis* (see CSX Transportation Inc v McBride (2011) 564 U.S. 685). The default rule in the common law is, however, that no legal responsibility attaches to an antecedent that is separated from its outcome by what is known as a *novus actus interveniens*, or a *novus actus* for short. In the expression "operative and substantial", this is the "operative" part.

Suppose that V1, stabbed by A, will survive if he is taken to hospital by ambulance; alas a bridge collapses as the ambulance is crossing it and all inside, including V1, are drowned in the river. Or suppose that a police officer who is called out to V2's house (to investigate a burglary committed by A) pilfers V2's wallet while ostensibly hunting for clues. Such cases are sometimes known as "coincidence" cases (Hart and Honoré 1959, 74; 1985, 78) but the name may mislead. It may be taken to suggest that there is no causal contribution by A. In fact A does make a causal contribution, as the law acknowledges, to both V1's death by drowning and V2's loss of her wallet. A's actions undeniably put V1 in the doomed ambulance and bring the pilfering officer to V2's home. Yet A's legal responsibility is unlikely to be regarded as extending to V1's death or V2's loss because the bridge failure and the pilfering are likely to be regarded as "breaking the causal chain" that links A to those outcomes. Since a causal relation admittedly still exists, in what sense has the causal chain been broken?

Hart and Honoré (1959, 31-39; 1985, 33-41) propose that our thinking about causation is structured not only by the framing of counterfactuals but also by the search for abnormalities. Providing causal explanations, in law or history or chemistry or medicine or anywhere else, is not just a matter of giving a long list of causal antecedents. The question "what caused that?" (or "what brought that about?" or "who did that?" etc.) is a request for explanation set against a backdrop of shared assumptions about what would normally have unfolded. To mention in reply to such a question a fact that was quite unexceptional (there was oxygen in the room, blood in the veins, traffic on the freeway, life on earth, etc.) may be to mention a causal antecedent (a "cause-in-fact") but it is not to provide a causal explanation. That there was oxygen in the room becomes a potential causal explanation for an outbreak of fire only if the room was supposed to be oxygen-free, e.g. to avoid combustion of some highly reactive material stored there. Otherwise, one explains the fire causally by pointing to the presence of the highly reactive material. The oxygen is taken for granted.

Different specialists are of course often expected to find different things abnormal. What brought down the World Trade Center towers in 2001? A psychiatrist, a physicist, a political scientist, and an FBI investigator will all answer the question differently, pointing to very different abnormalities and holding very different things constant in the background. A physicist might well not mention hijackers or the Middle East. A political scientist, conversely, might well not mention the variable yield strengths of different grades of steel. Such differences are irrelevant to the Hart and Honoré point. Their point is that all explainers look for abnormalities (relative to their area of expertise or interest) when they are asked a causal question. Does that make abnormality one of the criteria for something (that is admittedly a causal antecedent) to qualify as a cause of something else? That is harder to say. Perhaps it is a pragmatic feature of causal discourse that it is expected to be explanatory. Alternatively, that causes are explanatory may be part

of the very idea of a cause, such that one who doesn't alight on an abnormality when asked for a cause doesn't fully grasp what a cause is.

One objection to the Hart and Honoré proposal, then, is that it belongs to the study of causal discourse rather than the study of causation (Stapleton 2001). A different objection is that, even if it belongs to the study of causation, it does not yet reveal the causal architecture of the *novus actus* doctrine. To reveal that, one needs to explain how a later abnormality (the bridge failure, the pilfering) eclipses the explanatory importance of an earlier one (the stabbing, the burglary). The intuitive idea is easy enough to grasp. If V1 was stabbed by A, how come he ended up drowning in a river? If V2 was burgled by A on a Tuesday, how come V2's wallet went missing on a Wednesday? Some extra contribution by somebody or something has clearly been omitted from each story. What is not so easy to see is why the addition of the omitted contribution entails or supports the subtraction of A's prior contribution (Brudner 1998, 93).

Hart and Honoré lean towards a displacement view of explanatory causation, albeit not of causal contribution more generally. Explanatory causes do not mount up indefinitely in the way that mere causal contributions ("causes-in-fact") do; they do not move in an "infinite stream of consequences" (Stapleton 2008, 449). Working back from the outcome that interests us, each time we find a new and independent cause in our chain, we stop tracing explanatory causation (straightforwardly) back to the one before. That is the sense in which the new and independent cause is said to "break the chain of causation". But that move deflects our worries onto the concept of independence. In what sense is V1's ending up on a collapsing bridge independent of A's actions, given that *ex hypothesi* it was A's action of stabbing him that put V1 there? True, the causal contributions (the stabbing, the bridge collapse) were clearly independent of each other in the sense that they were not part of any *concerted* action. But that is irrelevant, since there is no proposal to treat them as if they caused the death jointly, in a Mackie-style "cluster". The proposal is simply to treat each as having caused the death. In the context of that proposal, describing the later one, the *novus actus*, as "independent" may seem to beg the question.

Faced with these difficulties it is tempting to think that the novus actus doctrine belongs to the jurisprudence of "risk-bearing" as opposed to that of causal responsibility. When A stabs V1 or burgles V2's house, which risks of later causal contributions by others are to be borne by him? Not all of them. For a start, not risks of later causal contributions that are very abnormal, either in the sense of very statistically rare (e.g. highway bridge failure) or in the sense of departing very dramatically from legal or other norms (e.g. theft by a theft investigator). On this interpretation of what is going on, it is hardly surprising that the law takes a different view about grossly incompetent rescue attempts and medical treatments, as well as the victim's own aberrant reactions. In most legal systems, they are less

likely to be regarded as *novi acti*. Why? Presumably because A bears more risk in respect of what he gives others a reason to do than in respect of what he merely gives them an opportunity to do. And that is surely no causal distinction.

This does not suggest, however, that the *novus actus* doctrine belongs to the jurisprudence of "risk-bearing" *as opposed to* the jurisprudence of causal responsibility. It suggests a hybrid position: the limits of A's causal responsibility in law are sometimes chosen on risk-bearing grounds. It remains the case that the *novus actus* doctrine regulates the causal chain that must exist, in law, between a person an the outcome for which that person is to be held responsible. In that sense, *novus actus* is correctly classified as a doctrine bearing on causation.

Contrast the doctrine known as "remoteness of damage". According to the doctrine of remoteness of damage, A is not normally responsible in law for outcomes of unforeseeable types. We can see how V1's death by drowning might be too remote, if "death by drowning" is classified as a different type of outcome from "death by stabbing". That is, however, a way of limiting A's responsibility that differs fundamentally from the *novus actus* way. Under the doctrine of *novus actus* it matters not whether V1's death by drowning was unforeseeable. What matters is whether the *bridge collapse*, the intervening step in the causal chain, was suitably extraordinary. (That this may also be expressed in the language of "foreseeability" adds to the potential for confusion between the two doctrines: see Hart and Honoré 1959, 250-1; 1985, 278.)

If A stabbed V1 on the dockside where it was amply foreseeable that V1 would stagger bleeding into the dock and drown, V1's death by drowning would not be regarded in law as too remote from A's action for A to bear responsibility for it, even if V1 in fact drowned in the ambulance on his way to the hospital. Still the collapsing bridge might avail A in a distinct *novus actus* argument about responsibility, for the law cares not only about what outcome occurred but also about how, i.e. by what causal route. A particularly unfortunate aspect of the label "proximate cause" is that it encourages the merger of the doctrine of *novus actus* with the distinct doctrine of remoteness of damage (Honoré 1971, 4 and 45-6).

4.2 Direct and indirect contributions

A displacement view of explanatory causation may encourage the view that an accomplice cannot be the cause of the outcome of their principal's action. Surely a serious wrong by another person breaks the chain of causation if anything does? Thinking along these lines, some regard complicity and causation as contrasting modes of legal responsibility: one is responsible *either* by causing the outcome *or* by being complicit in its causing (Kadish 1985). That is consistent with thinking that the accomplice is a "cause-in-fact" of what her principal causes, at least in "procuring" cases if not in "aiding" or "encouraging" cases (see section 3 above for this taxonomy). If one overlooks the cause-in-fact element in procuring another

to act, one draws the case of procuring too close to that of vicarious responsibility, where risks are assumed irrespective of any causal contribution to their realization (Kadish 1985, 336). With this in mind, it might be more revealing to say that the law has two causal modes of responsibility for outcomes, namely the accomplice mode and the principal mode (Gardner 2007). And saying this promptly leads one to wonder: is the difference between the two modes itself a causal one?

There is clearly a sense in which it is. The causal responsibility of an accomplice is derivative of that of a principal. When an accomplice makes a causal contribution to some outcome *qua* accomplice, she makes it indirectly, via the (direct, or more direct) causal contribution of a principal to the same outcome. This distinction marks a way in which causation in the criminal law departs, in many jurisdictions, from causation in tort law and other areas of private law. Tort law has no distinction between principals and accomplices. In recent times tort law has come largely to ignore the direct/indirect contrast, except when the mediating action rises to the level of a *novus actus interveniens*. Suppose a government department sends incarcerated young offenders on a rehabilitative outing to the seaside, and while there they vandalise some yachts. Since they are young offenders, this may well not be regarded by the law as a *novus actus*. It is rather predictable. The department is then held directly causally responsible in the law of torts. (The tale of the young offenders is from the leading tort case of *Dorset Yacht Company* v *Home Office* [1970] AC 1004.)

In a criminal trial that case would normally (leaving aside certain specific criminal offences of permitting or failing to prevent the actions of others) be classed as one of indirect causal responsibility, suitable for complicity liability at most. A criminal court would hold the department to be directly causally responsible in such a situation only if the young offenders has been turned into its "innocent agents", e.g. by being hypnotized or drugged by the department to increase their aggression or lower their inhibitions, or deceived by the department into thinking that the yachts were supposed to be vandalised. That is revealing. The direct/indirect distinction is applied only in connection with mediating human actions. If A kills V3 using a spring-gun, a man-trap, or any other complex mechanism (including via human being B whose agency has been circumvented) that qualifies as a direct case, not an indirect case. And that remains so even if the mechanism leaves something to chance, e.g. one bullet, six chambers.

This distinction drawn here between human mediators and others helps to fuel doubts about whether the direct/indirect distinction, and hence the principal/accomplice distinction, should be regarded as a causal distinction in anything but the most superficial sense. Surely, from the point of view of cause and effect, a human mediator is just another potential link in the causal chain like any other, or (to switch metaphors) just more flotsam in the "infinite stream" of the universe? If that proposition is true, it is true in virtue of the criteria for the correct

use of the concepts of cause and effect. The proposition makes various assumptions about those criteria. One is that the concepts of cause and effect are in some sense prior to the concept of an agent. One needs to invoke the concepts of cause and effect to elucidate the concept of an agent; one does not need to invoke the concept of an agent to elucidate the concepts of cause and effect. But even in physics, even in understanding the "infinite stream" of the universe, that assumption is questionable. Physics is full of agency: the agency of stars that "hold" their planets in orbit; the agency of particles that mutually "attract" or "repel"; the agency of heat sources that "provide" energy, etc. It is at least an open question whether the concepts of cause and effect that are in use in physics can be fully unpacked without relying on the concept of a (physical) agent that does such things as holding, repelling, and providing. True, human agents are missing from the list. But that is only because physics deals in exclusively physical agents, and human beings do not straightforwardly meet that description. Should we nevertheless limit the list of causal distinctions we are willing to draw to those that are intelligible within physics? Or should we insist that distinctions drawn by historians, psychoanalysts, and lawyers, but invisible to physicists, are no less likely to be causal distinctions? One may suspect that those interested in a narrow range of causal relata will detect only a reduced range of possible causal relations, and overlook at least some causal distinctions.

5. Proof of Causation

Discussions of causation in the law are always at risk of being diverted or derailed by worries about how causation is to be proved. The law's causal metaphysics is sometimes contaminated by its special forensic epistemology. In the context of the law of torts, in particular, the requirement that the plaintiff prove the facts that she alleges "on the balance of probabilities" throws up the following kind of problem.

Recall the case (section 3) in which two hunters independently but simultaneously shoot a third through the heart. In that case both bullets hit. But now imagine a variation in which only one bullet hits. (The facts are those of Summers v Tice (1948) 33 Cal.2d 80.) Here there is no problem with the "but for" test; one and only one of the hunters passes the test, because self-evidently one and only one of them fired the fatal bullet. The question before the court is: which one? Suppose the cases against the two hunters are evidentially indistinguishable (nothing to differentiate them in the ballistic reports, nothing in the camera footage, etc.) Under the normal rules of proof, neither of them bears tort liability. Each of them can say that, on the evidence, the probability that it was his bullet that hit the victim's heart is only 50%. But the law requires it to be *more than* 50% to satisfy the "balance of probabilities" standard. So the law returns a false negative, this time not because of its test of causation but because of its standard of proof.

Such difficulties more typically arise where a plaintiff has worked continuously in a dangerous occupation (e.g. asbestos removal) but has had a succession of different employers over the years. Or where a plaintiff has been taking a generic medicine for years, her supplies coming from a range of different manufacturers. It may only have taken one spore of asbestos, or one contaminated pill, to bring on the plaintiff's illness. But which employer, or which manufacturer, was behind it? The defendants may well be evidentially indistinguishable and the plaintiff then cannot satisfy the "balance of probabilities" standard in respect of any of them.

In some jurisdictions the law has been troubled by this situation to the point of making special provision for the affected plaintiffs. One option (favoured in Summers v Tice) is to reverse the burden of proof on the question of cause-in-fact, so that a defendant exceptionally needs to prove his non-contribution, on the balance of probabilities, to avoid a liability to pay damages. Another option is to tinker with the probanda, i.e. with what it is that the law requires proof *of*. Here are two (of many) ingenious tweaks (appraised in detail in Steel 2015, Ch 6):

(a) The plaintiff must prove cause-in-fact, not between a given defendant's toxin-exposing action and the illness, but only between the toxin and the illness. The damages award is then shared between all defendants who exposed the plaintiff to the toxin according to the probability that it was their exposure that brought on the illness. (The probability may be determined according to local market share for the generic drug, by the time spent working for each employer, etc.)

(b) The plaintiff must prove cause-in-fact, not between a given defendant's toxin-exposing action and the illness, but only between each defendant's toxin-exposing action and some raised probability of the plaintiff's developing the illness. Damages are paid, not for the illness but for the raised probability of the illness, itself re-analysed as a kind of loss. (Thus a 50% chance of 100% loss of hearing might be treated in the tally of damages as if it were as a 50% loss of hearing.)

Solution (b) raises various difficulties in the metaphysics of probability as well as the metaphysics of loss (see Perry 1995). When solution (b) is used by the law, it is not to help with the problem of evidentially indistinguishable defendants, but rather to help with a different class of tricky cases: those in which the illness has not materialized by the time the plaintiff's lawsuit comes to court, while some precursor condition has materialized. Say the plaintiff is HIV-positive but has not yet contracted AIDS. Then the courts may award damages on the basis that being HIV-positive is already a loss, viz. the loss of a more probably AIDS-free future.

Solution (a) is the more tempting one if the illness has materialized and the problem is only that of establishing causal responsibility. (A version of it is used in Sindell v Abbott Laboratories (1980) 26 Cal. 3d 588.) Solution (a), notice, does not dispense with the need for the plaintiff to prove causation (the toxin must still be proved to have caused the illness) but it does dispense with the need to prove

causal responsibility (i.e. to prove the causal contribution of any given defendant). Instead the plaintiff proves, on a balance of probabilities, that a given defendant contributed to the risk that the illness would occur.

It is possible to reanalyse this as an example of risk-bearing responsibility, akin to the vicarious responsibility of an employer. In a market for generic products or skills, it might be said, the participants bear some reciprocal risk of each other's causal contributions. However, some prefer to think of the "probabilistic linkage" in solution (a) as a distinct mode of legal responsibility. Indeed some think that it would be a more intelligent general basis for responsibility in the law of torts than either causal responsibility or risk-bearing responsibility. They favour rolling it out more widely such that it is no longer regarded as a workaround to be used only exceptionally to deal with intractable problems of proof (see Calabresi 1975, where "probabilistic linkage" is misleadingly called "causal linkage").

The debate over this proposal tends to mirror the debate in philosophical ethics that is played out under the heading of "moral luck in the way our actions turn out". Should we and our actions be judged partly by the bad outcomes that we actually bring about, or only by the bad chances that we take, irrespective of whether our doing so has bad outcomes? The law generally signs up to the former approach. But should it sign up instead to the latter approach, and say goodbye to causal responsibility? That marks the beginning of a new topic, with its own extensive literature (by way of introduction, see Honoré 1988 and Waldron 1995).

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