

BCL/MJur philosophical foundations of the common law | Causation and Responsibility

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THESE seminars take place in weeks 2, 4, 6 and 8 of Hilary Term 2017, on Thursdays at 2pm, at All Souls College. For the first seminar we will use John Gardner's rooms (staircase VII, room 2). If that is unsatisfactory we will move to another location at All Souls for later weeks.

Introductory reading

Tony Honoré, '[Causation in the Law](#)', in Zalta (ed) *Stanford Encyclopaedia of Philosophy* (Winter 2010 ed.)

1. 'But for' and other counterfactuals

When liability in criminal law or private law depends on the actual damage that D did to P, we need to identify what will count as D's doing damage to P in the relevant sense. What is the relevant test of causality? Tort lawyers in the common law countries have traditionally divided up this enquiry into the elements of 'factual' and 'legal' (a.k.a. 'proximate') causation. We follow this tradition: in this first seminar we focus exclusively on so-called factual causation. As a test of factual causation lawyers have often used the famous 'but for' or 'sine qua non' test. But is this test sound? Even if it is, is it any more than a test? Does it capture the very nature of causality or does it just track something else called causality? If the latter then what exactly is a causal relationship?

Required reading

J.L. Mackie, *The Cement of the Universe* (paperback ed, 1980), [preface](#) & [ch 2](#)

T. Honoré, '[Necessary and Sufficient Conditions in Tort Law](#)', in Owen (ed), *The Philosophical Foundations of Tort Law* (1995) also in Honoré, *Responsibility and Fault* (1999)

J. Stapleton, '[An "Extended But-For" Test for the Causal Relation in the Law of Obligations](#)', *Oxford Journal of Legal Studies* (2015) 35, 697

Further reading

W. Malone '[Ruminations on Cause-in-Fact](#)' *Stanford LR* 9 (1956), 60

H.L.A. Hart and Tony Honoré, *Causation in the Law* (2nd ed, 1985), [preface §2](#) & [ch5](#)

R. Wright, '[Causation in Tort Law](#)', *California Law Review* 73 (1985), 1735 at 1774-813

M. Moore, '[For What we Must Pay: Causation and Counterfactual Baselines](#)', *San Diego Law Review* 40 (2003) 1181 at 1213-58.

Questions for discussion

But for *what*, exactly? Consider *The Empire Jamaica* [1955] P 52.

Does the NESS (Necessary Element of a Sufficient Set) test of causality succeed in coping with the overdetermination cases in which the simpler 'but for' test of causality failed?

'Causation in law is all just policy.' Is this true even of the so-called 'factual causation' inquiry?

Does the theory of causation provide any principled solution to cases of unrelated illness or injury superseding a tortious injury, such as *Baker v Willoughby* [1970] AC 467? (Cf *Jobling v Associated Dairies* [1981] 2 All ER 752.)

2. Intervention and remoteness

Does the requirement of so-called factual causation exhaust the causal aspect of the inquiry? Lawyers are ambivalent. On the one hand they continue to speak of certain intervening events as 'breaking the chain of causation' even though they do not negate the 'but for' or NESS relationship.

American tort lawyers talk unselfconsciously about 'proximate' causes as if causes could be more or less proximate qua causes. On the other hand lawyers are cynical about their own use of this causal language, often claiming that the questions at stake in 'proximate cause' or 'broken causal chains' are moral or policy questions about 'responsibility' rather than authentic questions about causation.

One of the problems here is that questions of remoteness of damage and questions of *novus actus* have been clustered together under the 'proximate cause' heading. Should they be? Should we instead have a tripartite analysis according to which there is the NESS or but-for question (causal), then the *novus actus* question (still causal), then the remoteness question (admittedly non-causal)? Anyway, isn't the contrast between 'factual' questions and 'moral or policy' questions quite possibly a false contrast of some kind? How about the contrast between causal and non-causal questions?

We need to explore the extent to which we should expect our analysis of the very nature of causation to be independent of evaluative assumptions (e.g. about the special role of human beings in the world and the special importance of responsibility).

Required reading

L. Green, '[The Causal Relation Issue in Negligence Law](#)', *Michigan Law Review* 60 (1961), 543

Hart and Honoré, *Causation in the Law*, (2nd ed, 1985), [preface §3-5](#), [ch2](#), [ch3](#)

Further reading

R. Wright, '[Pruning the Bramble Bush](#)', *Iowa Law Review* 73 (1988), 1001 at 1011-1018

J. Stapleton, 'Perspectives on Causation' in Horder, *Oxford Essays in Jurisprudence: Fourth Series* (1999)

M. Moore, '[The Metaphysics of Causal Intervention](#)', *California Law Review* 88 (2000), 827

Questions for discussion

Is *novus actus interveniens* a causal doctrine? Is it a doctrine of remoteness of damage?

Under what conditions, and why, should the actions of a third party break the chain of causation for the purposes of an action in tort?

Are principles of causal responsibility, such as principles of *novus actus interveniens*, to be attacked and defended in just the same way as other moral and legal principles?

'Unfortunately for [Hart and Honoré] they have backed a loser in supporting *Re Polemis* and criticizing the foreseeability test [in *Wagon Mound No 1*]' (Glanville Williams). Is Williams collapsing two different issues?

3. Causation and liability

The starting point of the common law of torts is that the liability of an individual in respect of a past harm hinges upon a causal connection being proven, on the balance of probabilities, to exist between a relevant aspect of that individual's conduct and the harm, by the party seeking redress for it.

Two kinds of departure from this starting point might be envisaged. One relaxes the epistemic threshold at which causation is held to be 'proven' or alters the person who must prove it (or its absence) in order to succeed. Another allows liability to be established even where it is known or accepted that the individual did not cause the harm.

In this seminar, our primary interest is in non-causal liabilities. Does the common law of torts recognize them? Is vicarious liability an example? Are instances of liability where the defendant has only been shown to have increased the risk of the claimant's harm? Are there situations where individuals ought to be legally liable and such liability can only be justified on non-causal grounds?

Required reading

P. Cane, *Responsibility in Law and Morality* (2002), 136–140; 206–208

C. Sartorio, '[How to be Responsible for Something Without Causing It](#)' *Philosophical Perspectives* 18 (2004), 315

Further reading

D. McCarthy, '[Liability and Risk](#)', *Philosophy & Public Affairs* 25 (1996), 238 esp. from 244

A. Ripstein and B. Zipursky, '[Corrective Justice in an Age of Mass Torts](#)' in Postema (ed), *Philosophy and the Law of Torts* (2001)

V. Tadros, *The Ends of Harm* (paperback ed 2011), [181-196](#)

S. Steel, *Proof of Causation in Tort Law* (2015), 43–46; ch 3

Questions for discussion

Can the common law's starting point (see text on left) be explained by its understanding wrongs as having a causal component?

Are there any situations where a non-causal explanation of liability is more plausible than a causal explanation?

If we accept liability in circumstances where there is only a very weak form of causal connection, are we left with a convincing case against non-causal forms of liability?

Do situations in which the courts have held individuals liable despite the absence of proof of causation lend any support to the idea of non-causal liability?

Are the main objections to non-causal liability practical ones concerning the allocation of the right to sue?

4. Why causation matters

In the preface to the second edition of *Causation in the Law*, Hart and Honoré ask: 'Why should we regard [causing] as the central form of legal responsibility for outcomes?' and they admit that the book makes little direct progress with that question. The question connects their work with puzzles in the theory of action and moral theory, often cast as problems about luck. If how our actions turn out is always 'up to nature' (Donald Davidson's phrase) how can it ever be our doing, let alone our responsibility, let alone our moral responsibility?

In this way the law seems to be drawn into the problem that has come to be known as the problem of moral luck. If criminal law or tort law or the law of contract is going to be morally defensible, or even morally intelligible, don't we need to explain how people can be regarded as agents, in a morally salient way, of the outcomes of their actions? But can so regarding them survive the realisation that one and the same moment of carelessness, or even one and the same intention, could lead (depending on the fates) to no harm or massive harm or anything in between?

Required Reading

Honoré, 'Responsibility and Luck', *Law Quarterly Review* 104 (1988), 530; also in his *Responsibility and Fault* (1999)

Waldron, 'Moments of Carelessness and Massive Loss' in [Owen \(ed\), *Philosophical Foundations of Tort Law* \(1995\)](#)

Further reading

Gardner, 'Obligations and Outcomes in the Law of Torts' in Cane and Gardner (eds), *Relating to Responsibility* (2001)

Goldberg and Zipursky, 'Tort Law and Moral Luck', [Cornell Law Review](#) 92 (2007), 1123

Further further reading (post-seminar)

Williams, 'Moral Luck', [Proceedings of the Aristotelian Society Supplementary Volume 50 \(1976\), 115](#); also in his *Moral Luck* (1981)

Nagel, 'Moral Luck', [Proceedings of the Aristotelian Society Supplementary Volume 50 \(1976\), 136](#); also in his *Mortal Questions* (1979)

Questions for discussion

Could there be a criminal law without causal elements (e.g. of inchoate crimes only)? Could there be a similar law of torts or contract?

Should tort lawyers and law-reformers be concerned with the so-called 'problem of moral luck', or is this a worry only for criminal lawyers and law-reformers?

If equally inadequate care to avoid harm is taken by A and B alike, and all else is equal as between them, but only A's action does any harm, does it make sense to say that only A's action is wrongful?

Is there an economic case for plaintiffs recovering in torts according to the actual damage they suffered?

What, if anything, is the connection between the problem of wrongdoing by results and the problem of strict liability in tort law?