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Review of "The Test of Factual Causation in Negligence and Strict Liability Cases," By Arno C. Becht & Frank W. Miller

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This book does not attempt to make every college administrator his own lawyer. Its primary purpose is to give the college administrator an awareness and understanding of basic law and legal concepts as they relate to the colleges. It is intended to assist him in planning procedures in order to avoid the possibility of litigation. By calling attention to the importance of reviewing day-to-day procedures to make sure they include sound legal safeguards, it is intended to encourage the recognition of incipient legal difficulties that require the services of an attorney.

The book not only fulfills that purpose and does it well—but also goes much further. It is a guide-book with which all college administrators should be familiar.

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THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES, Arno C. Becht and Frank W. Miller. St. Louis: Washington University Committee on Publications. 1961. Pp. 223. $4.50.

Dissatisfied with the traditional but-for and Restatement of Torts tests of factual causation, Professors Becht and Miller, the authors of this philosophical treatise, propose an entirely new method of approach to the question of causation in negligence and strict liability cases. By the term, "factual causation," the authors refer to cause-in-fact, or, as it is sometimes called, legal cause. No consideration is given to the problem of proximate causation, and the narrow question examined is whether defendant's conduct actually caused plaintiff's harm. That this somewhat narrow inquiry takes 223 pages to examine is indicative of the book's detail and completeness.

The usual method of determining factual causation is the but-for test; that is, but for the negligence of A, would B have been harmed; or, to put it another way, B's harm is not caused by A's negligence if B would have been harmed without A's negligence. The authors find inadequate this test and also the Restatement test, which is basically the but-for test with an additional standard to cover a narrow group of cases which do not come within the but-for rule.[1] The question

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1. Section 432 of the Restatement of Torts provides:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have been sustained even if the actor had not been negligent.

(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.

presented under the Becht-Miller approach, which could be called the when-and-as test, is whether B would have sustained his exact harm when and as he did regardless of A's act. If he would have, A's act is not a cause of B's harm; if he would not have, A's act is a cause of B's harm.

The emphasis in the when-and-as test is two-fold: (1) A's *conduct* must be examined to determine whether B would have been harmed when and as he was without it; and (2) B's precise harm must be examined in minute detail to determine whether it would have been identical without A's conduct. Examining A's conduct under the when-and-as approach eliminates the requirement of the but-for test that A's conduct must be a *necessary* cause of B's harm. For example, A and B in separate transactions sell rope to C knowing that he is bent on hanging himself and has tried to do so on several previous occasions. C uses A's rope and hangs himself. Under the when-and-as test, A caused C's death because C would not have died when and as he did (with A's rope) unless A had sold him the rope. Under the but-for test, however, A did not cause C's death because but for A's conduct, C would have died anyhow using B's rope. Thus, under the but-for test, there is no causation unless A's conduct was necessary in causing C's death, or, stated differently, there is no causation unless C's death would not have occurred without A's conduct. Under the when-and-as test, there is causation as long as A's conduct did in fact cause C's death and regardless of whether C's death would have occurred without A's conduct.

Different results are reached also when B's harm is examined in great detail. For example, A and B negligently, but independently of each other, shoot C at the same time and each bullet alone would have caused instantaneous death. Under the when-and-as test, A's act, as well as B's act, caused C's death, since if C's death is examined in detail, it is apparent that C would not have died when and as he did (of two bullets) without A's act or without B's act. Under the but-for test, on the other hand, neither A's nor B's act is the cause of C's death because but for A's act, or but for B's act, C would have died anyhow. Thus, both A and B would escape liability under the but-for test and neither would escape under the when-and-as test.

The authors' analysis in depth also requires a distinction between two basic types of negligence—acts and omissions. Thus, where A negligently pulls the trigger of his gun and shoots B, his negligence consists of the act of pulling the trigger, and A's act producing B's injury is called simple causation. Where, on the other hand, the negligence consists of an omission, such as the failure of driver A to keep a lookout for pedestrian B, and the negligent omission

produces injury to B, the authors call this hypothetical causation. Where the negligence consists of an act, the when-and-as test is applied to determine whether the exact harm would have occurred when and as it did without the negligent act. Where the negligence is an omission, the when-and-as test is applied by determining whether the plaintiff would have been harmed when and as he was with the negligent omission supplied. Thus, in the example where driver A negligently fails to keep a lookout and strikes and injures pedestrian B, the negligent omission, failure to keep a lookout, is supplied and if B's precise injuries would have occurred when and as they did with A keeping a lookout, then A's negligent omission is not a cause of B's injuries.

If the authors' test solves some difficulties, it creates others. These difficulties, occurring either in negligent omission cases or in negligent act cases, arise when A's omission or act is a cause under the when-and-as test of B's harm, but if A's negligent omission is supplied, or his negligent act is changed slightly so that it is not negligent, B would still have sustained substantially the same, although not identical, harm. In the omission cases, for example, suppose driver A fails to keep a lookout and hits pedestrian B who darts in front of A's car. Even if A had kept a lookout, he would have hit B and caused substantially the same, but not identical, injuries. A rigorous application of the when-and-as test shows that since B's injuries would have been slightly different if A had kept a lookout and perhaps swerved a little, A's negligence was a cause of B's exact injuries. The authors correctly suggest that the omission to keep a look out should not be a cause of B's injuries in this case because the injuries would have been substantially the same regardless of whether A had kept a lookout. A standard called "equating the injuries" is therefore applied in order to exonerate A. Comparing the injuries B would have sustained with a lookout with those he sustained without a lookout, a determination is made whether the injuries in the two situations are substantially the same. If they are, then there is no causation as a matter of law; if they are substantially different, there is causation as a matter of law; and if it is doubtful whether they are substantially the same, the jury would determine causation.

The same problem can arise when A's negligence is an act. For example, driver A is traveling 31 miles per hour in a 30 mile zone and hits and injures pedestrian B. It is clear B would have sustained almost the same injuries if A had been driving below the speed limit at 29 miles per hour. Under the when-and-as test, A's act of speeding caused B's injuries because they would not have been precisely the same if A had been traveling at a speed of 29 miles per hour. The authors properly say that there should be no causation in this type

of "act" case and suggest that a parallel set of fact situations should be compared as in the negligent omission cases. Thus, a comparison is made between B's injuries with A driving at 31 miles per hour and his injuries with A driving just within speed limits at 29 miles per hour. If the injuries are substantially the same, there is no causation. This type of case is called a "parallel series in act case" and arises generally: (1) where speeding causes harm; (2) where excess weight causes harm; and (3) where defendant's position in space causes harm.

A case which recently found its way to the Supreme Court of the United States is cited by the authors as a good example of judicial obliviousness to the problem of factual causation. In *Kernan v. American Dredging Co.*,[2] defendant's tug was towing a scow which carried a kerosene lantern on its deck. The lantern was three feet above the water. A navigation rule provided that "scows shall carry a white light" and that "the white light shall be carried not less than 8 feet above the surface of the water."[3] The lamp ignited flammable vapors on the water and the resulting explosion killed a seaman for whose death plaintiff sought recovery under the Jones Act,[4] a federal law providing seamen or their survivors with an action against negligent employers. The district court[5] and the court of appeals for the third circuit[6] denied recovery on the ground that the regulation was not intended to cover the type of accident which occurred. The Supreme Court reversed in a five-four decision. Mr. Justice Brennan, speaking for the slender majority, held that even though the navigation rule was designed to prevent collisions between ships and not to prevent flammable vapors on the surface of the water from igniting, still recovery should be allowed because, unlike the common law, the Jones Act has no requirement that a regulation must be designed to protect against the type of accident that occurred. Justice Harlan, joined by Justices Frankfurter, Burton and Whittaker, dissented. Although they recognized the problem of causation in the case,[7] the dissenters preferred to grasp the major issue and argued that the Jones Act does not eliminate the common law re-

2. 355 U.S. 426 (1958).

3. The regulation provided in pertinent part:

Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow. . . . The white light shall be carried not less than 8 feet above the surface of the water. . . . Id. at 427-28.

4. 46 U.S.C.A. § 688 (1920).

5. 141 F. Supp. 582 (E.D. Pa. 1956).

6. 235 F.2d 618 (3d Cir. 1956).

7. 355 U.S. at 441-42.

quirement that a regulation must be designed to protect against this type of accident involved before there can be liability.

The causation problem concerns the wording of the navigation rule which required a light to be carried at least eight feet above the water and did not, in negative terms, prohibit a light below eight feet. The negligence, then, consisted of an omission, failure to have a light eight feet or more above the surface. Removing the negligent omission by supplying a light at eight feet (and leaving intact the light at three feet which itself was not the negligence), the seaman still would have been killed when and as he was. Defendant's negligence cannot, therefore, be said to have caused the death. Also, under the conventional but-for test, but for defendant's negligence, the seaman would still have been killed. The authors conclude that there was no causation and hence no liability.

As Becht and Miller point out, the only way to justify the decision is to say that having a light lower than eight feet was a violation of the regulation and that therefore two lights, one eight feet above the surface and one three feet, would constitute a violation of the navigation rule. They find such an interpretation "improbable" and "difficult to imagine."[8] To this reviewer it does not seem unlikely that if they had faced the problem, the same Justices who held the statute applicable in this case would also have held that the rule, which appears to be a little ambiguous,[9] called for only one light, eight feet or more above the water, and that therefore two lights, one eight feet above the surface and one three feet, violated the rule. Such an interpretation would justify a finding of causation and consequent liability. Regardless of result, it is unfortunate that apparently the lawyers in the case, and also the courts which had the facts before them, did not give the problem of causation any serious consideration.

After explaining in detail their method of analysis, which includes various assumptions, postulates and corollaries, Professors Becht and Miller spend the main portion of their book analyzing different types of factual causation problems. Their most extensive discussion deals with a most interesting fact situation. A and B are hunting in separate parties but very close to each other. A bird starts up near C, and both A and B negligently shoot their shotguns simultaneously at the bird. A pellet from one of the guns puts C's eye out and it is impossible to tell from whose gun it came. Is A liable? Is B liable? Are both A and B liable, or is neither liable?

The problem is one of doubtful causation; either A or B (and not both) negligently injured C, and it is impossible to tell which one.

8. P. 40.
9. See note 3 supra.

If C sues both A and B, at trial he can show only that he was injured and that A or B injured him, but it is a fifty-fifty proposition as to which of them it was. At the conclusion of C's case, A and B both argue that they are entitled to directed verdicts because C has not established by a preponderance of the evidence that A injured him, nor has C established by a preponderance that B injured him. The courts are divided on whether to direct a verdict in favor of the defendants or whether to permit plaintiff to go to the jury and recover against both.[10] The authors favor allowing a recovery against both A and B and suggest that plaintiff's burden of proof be relaxed in cases of this kind and that the defendants be forced to exonerate themselves if they can. There is no logical explanation why one view should be favored over the other, and any decision to allow a joint recovery must be based on a policy decision that "to hold otherwise would be to exonerate both from liability, although each was negligent and injury resulted from such negligence."[11]

It does not seem amiss to suggest that where both defendants are negligent and their negligent acts cause the uncertainty in determining which of them actually injured the plaintiff, the burden should be on each defendant to exculpate himself, and if both fail, recovery against both should be allowed. Plaintiff's case is in the nature of a converse interpleader action; he interpleads his injury and the negligence of defendants, and each defendant must then show why he should have judgment in his favor. In some jurisdictions, perhaps the court would permit a suit for declaratory judgment and hold that plaintiff makes a prima facie case by showing that he was injured and that one of the negligent defendants was responsible. Unfortunately, the courts, when they have permitted recovery against both defendants, have usually done so under the cloak of holding that defendants are joint tortfeasors, although the requisite concert of action is missing. As the authors point out, it is preferable simply to hold that the burden of proof should be relaxed in cases of this kind.

It is not unusual for problems of doubtful causation to arise in various kinds of situations which may confront the general practitioner of law. For example, plaintiff's property is damaged by one of several persons who handled it, but it is impossible to determine which one actually caused the damage. Or, plaintiff's property is damaged by an explosion, and risk of loss is covered by one of two insurance policies but it is not clear from the facts of the explosion which policy is applicable. Certainly, shifting the burden in cases of this kind is less severe than, as the courts have done in some recent

10. See Prosser, Torts § 45 at pp. 230-31 (2d ed. 1955).

11. Oliver v. Miles, 144 Miss. 852, 860, 110 So. 666, 667 (1926).

cases, allowing the use of *res ipsa loquitur* against two or more defendants where not only the causation is doubtful but also liability is equally unclear.[12]

Approximately one-third of the book is devoted to a detailed critical analysis by Professors Becht and Miller of a recent treatise on causation, *Causation in the Law,* by Hart and Honoré,[13] who are also professors of law. They have put together a theoretical examination and justification of the existing law of causation in negligence cases as well as in intentional torts, contracts and criminal law. Becht and Miller review the book in detail and criticize the Hart-Honoré approach and compare it with their own. The treatise does not seem to deserve the extensive treatment it is given, and perhaps it would have been preferable to have worked a discussion of the book into the main part of the Becht-Miller text, as was done in analyzing the but-for and Restatement approaches. A study of both books is necessary in order to compare them or to evaluate the Becht-Miller criticism of Professors Hart and Honoré but it does seem that the Hart-Honoré effort is more doctrinaire and less analytical than the Becht-Miller book.

One hypothetical factual situation discussed in the Hart-Honoré section of the Becht-Miller work is not only interesting but also shows a difference, both in approach and result, between the two sets of professors. B and C are going into the desert. A negligently furnishes B with poisoned water. Once out on the desert, B and C separate and C negligently takes B's poisoned water bag. B dies of thirst. Is A liable for B's death, or is C liable, or are both or is neither liable?

The problem is one of a harm from another source, which is discussed in detail in the main part of the Becht-Miller text[14] as well as in the analysis of the Hart-Honoré book.[15] In the hypothet, Hart and Honoré would hold both A and C liable for causing B's death. A is liable because his negligence would normally have shortened B's life and did not do so only because of C's negligence, and C's negligence should not exonerate A. C is liable because his negligence would normally have caused B's death and, again, A's negligence should not be used to exonerate C.

The Becht-Miller analysis holds A blameless and makes C accept the entire responsibility for B's death. The authors state that A's negligence was probably an omission—failure to furnish pure water. By supplying pure water for B, it is clear that B would have died

12. The cases are collected and analyzed in Note, The Application of Res Ipsa Loquitur in Suits against Multiple Defendants, 1954 Wash. U.L.Q. 215.

13. The Clarendon Press, Oxford, 1959.

14. P. 121-130.

15. P. 202-218.

precisely when and as he did (of thirst) regardless of what kind of water A supplied, and therefore A's negligence is not the cause of B's death. C's negligence was probably an omission also—failure to notice that he took B's water. By supplying C's negligent omission and assuming that he did not take the water, it is seen that B would not have died of thirst but of poisoning. C's negligent omission, then, is the cause of B's dying of thirst, and Becht and Miller would hold C liable for causing B's death.

In a variation of this hypothet, the authors assume that A, instead of negligently supplying B with poisoned water, negligently supplies him with an empty water bag. C, as before, negligently takes the bag and B dies of thirst. Although neither's negligence caused B's death under any causation test, the authors would hold both A and C liable on the ground that each would have been the cause of B's death by thirst if it had not been for the other's negligence. In the poisoned water case, on the other hand, A cannot under any theory be said to have caused B's death by thirst.

The authors admit that the different results in these two hypothets is somewhat peculiar in view of the fact that where A sends B into the desert with poisoned water he comes off better than where he is apparently less culpable and merely sends B out with an empty water bag. Under the author's approach, however, there is no way to avoid this ironic twist. Perhaps some persons might feel better about the result if they speculate that C eventually drank the poisoned water and died, in which case A would be liable for C's death even though he is not liable for the death of B. In any event, the result reached by Becht and Miller in the two cases seems better than holding that in both cases neither A nor C is liable for B's death, which would be the result reached by application of the but-for or Restatement test.

One of the authors' basic positions throughout the entire book is that evaluative or normative considerations can and should be excluded from an analysis of factual causation. Indeed, this is one of the basic tenets of the book and one of the reasons for disapproving of the but-for and Restatement tests of causation. While it does appear that a strict application of the when-and-as test in every situation avoids normative considerations, the authors admit that it cannot be strictly applied in every case. For example, where A's negligent omission causes B's harm under the when-and-as test, the authors say that A should not be liable if B's harm would have been substantially the same even without A's negligence. Such a limitation is clearly appropriate, but it seems little different from the Restatement requirement[16] that A's negligence be a "substantial factor" in

16. Section 431 of the Restatement of Torts requires that the actor's conduct

causing B's harm, which the authors criticize on the ground that it is normative. The value of the Becht-Miller approach is not that it eliminates normative considerations but that it uncovers and separates them from the factual problems of the law of causation. In the but-for and Restatement tests, on the other hand, normative and factual aspects are hidden and lumped together.

Professors Becht and Miller have painstakingly presented a new, fresh and thorough approach to the question of factual causation. In fact, the book seems a little too thorough in that unnecessary detail and apologia tend to distract the reader at times. While the but-for and Restatement tests of causation are adequate in most cases, the Becht-Miller method is a valuable tool in analyzing difficult problems of factual causation which the other tests cannot resolve. The authors' method arguably creates more difficulties than it solves, but the merit of the approach is that it exposes problems which the but-for and Restatement tests conceal. Although consideration has been given in this review to some of the more unusual examples discussed in the book, many of the hypotheticals analyzed by the authors are common factual situations which a general practitioner might expect to encounter. Nevertheless, the book was not written primarily for the practicing lawyer but, rather, for the philosopher of law, whether he be a lawyer, a judge, a teacher or a layman. It brings to the problem of factual causation a new jurisprudential approach not unlike the approach logical positivism has given to philosophy generally. While it is "prudent advocacy . . . not to argue a case to a court merely on grounds derived from a philosopher of law,"[17] still, many of the ideas contained in this philosophical book well may gradually find their way into the main stream of the law.

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be "a substantial factor in bringing about the harm" in order for there to be causation.

17. Patterson, Jurisprudence: Men and Ideas of the Law 329 (1953).

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