

THE ROLE OF CAUSATION IN DECISION OF TORT LAW

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Tort law depends on three key concepts: Causation, responsibility, and fault. However, I argue that the three key concepts are neither necessary, nor sufficient, for tort.

I. INTRODUCTION

The place to begin is at a distinction in law that seems at first intuitive, but on closer examination proves very difficult to pin down, and that is the distinction between public and private law. Lawyers commonly refer to the distinction, and could divide certain types of litigation into one or the other category - tax law and welfare law fit neatly into the public realm, contracts and torts fit instead into private law. But what exactly is the significance of the distinction? I'll develop some ideas about distributive and corrective justice in order to draw out this distinction, since the division of public and private law depends in some part on the division of distributive and corrective justice.

However, these ideas depend largely (as do all good ideas) on more fundamental metaphysical notions - in this case on the relationship between causation, fault, and responsibility. And so this relationship will be the main focus of the remaining sections of the paper. Fault, responsibility, and causation are inter-related concepts that are important to private law in a number of ways that I will describe. For our purposes, it will be important to take note of them for two immediate reasons:

1. Metaphysical problems with an analysis of causation extend into practical usage of the term. Often, in these trouble cases, strict causation is perniciously left aside, replaced instead by causal or moral intuitions. This practice is especially dangerous when undertaken by a judge or jury. This is because it has the result of undermining objectivity, and a fortiori hiding the fact

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of the undermined objectivity behind the veil of supposed causation.

2. Responsibility, fault, and causation come apart on some significant cases. That is, one might overshadow or even trump another. Since all three are important, it should be clear the circumstances under which one of these concepts should be edged out by another - especially, as we shall see, in tort law.

Tort law is going to be especially important to this discussion, since my second worry (above) is especially well demonstrated in private law, where one party must prove injury by another party in order to win judgment.

Along the way I'll discuss some aspects, analyses, and criticisms of metaphysical and scientific accounts of in the contemporary study of causation. We'll be referring to this concept as a technical term in a very technical way, so it's important to determine what the experts think about it, in order to increase our ability to determine whether lawyers are using it correctly.

Finally, I'll conclude by giving some criticisms of some of the views discussed, and summarize my conclusions of some of the foundational work in this field. Let's begin.

II. PUBLIC V. PRIVATE

Distributive justice is concerned primarily with the distribution of certain goods (money, property, awards and punishment) across a society. Questions of taxation, for example, are addressed in this realm. How should the tax burden be distributed? Equally, so that every individual is required to pay an equal share? Or according to wealth, so that the rich end up paying a higher share of the taxes? Or according to land ownership or use, according to the view that those who own large lots of land are getting a relatively higher share of protection from the government?

Likewise, we must decide by what rules we will punish those who commit crimes, as well as determine what crimes we will punish. The former is probably a harder decision to make. For example, how do you distribute justice to a person guilty of a murder? Taking

his life might seem like an equitable solution - an eye for an eye. But should 'equitable' be the deciding factor? And what about a serial murderer? You cannot kill him several times. What should we, as a society, do with rapists? Or with adulterers?

I don't know the answers to these questions. And for this discussion, we can set them to the side. The important detail to note is that distributive justice is concerned overwhelmingly with public law and public policy. Regarding issues from taxation to murder, these are issues that we feel are best handled within the realm of, as well as prosecuted by, the state. Public law, it could be said, is concerned with what rights we have to be free of harm in general. This is not so for corrective justice, however.

Corrective justice instead occupies itself with putting right some injury. Contract law and tort law are examples of issues best addressed by this form of justice. Under what conditions are contracts legitimate? What penalties should be levied when a contract is broken by one party? When one party inflicts a certain type of injury or harm on another, often he has an additional right, not only to distributive justice, which punishes those who infringe on the rights of others, but he also has an additional right to be compensated for his losses by whomever injured him.

Likewise, and more importantly for this discussion, tort law falls within the realm of corrective justice. When Adam injures Eve, Eve may find that Adam owes her compensation for the injury he inflicted. If that is the case, then Eve has the right to take the case to a judge to determine what, if any, penalties Adam must face to correct the matter. In doing so, the judge takes steps to reset any damage done by the unwarranted injury, bringing an equilibrium to the situation between the two parties.

Corrective justice does not concern itself with the character of the individuals. In this case, the judge does not worry whether Adam is a good Christian and business owner, or whether Eve is a Communist and a sexual deviant. Rather than judging based on the character of the individuals, the judge is concerned only about the character of the injury. She must take pains to judge without respect

to the persons, judging only the deed.

Notice here that injury is neither necessary nor sufficient for a judgment in tort law. Richard Epstein, in several places,² has argued that the role of strict liability should be expanded in tort cases. Citing Aristotelian corrective justice, he claims that the victim should be compensated for any injury brought about by the assailant. But strict liability is not sufficient for Aristotelian corrective justice. Strict liability is the view that all that is needed for liability is injury - injury entails liability. Corrective justice for Aristotle goes one step further, and requires that wrongful liability - injury plus fault entails liability - is necessary for a tort. And importantly, notes Posner³ strict liability holds no place in tort law. The idea that a party has a *duty* of compensation based merely on the *fact* of injury belongs to distributive justice. Distributive justice, remember, is concerned with what rights a person has to be free of injury *prime facie*, rather than how or if he should be compensated.

So far, we see that injury is not sufficient for liability. According to Aristotle, and to Posner, we're going to need some additional criteria. We're going to at least need the normative notion that the injurer *ought not* to have caused the injury. Given that, we will have injury, normativity, and causation, but even that will prove to be not be quite enough.

Borgo⁴ agrees with Epstein that strict liability (i.e., injury entails liability) is all that is required in tort law. He argues, however, that the notion of causation which is used to decide liability should be a special idiosyncratic version of causation, i.e., one that necessarily contains the moral weight needed to determine wrongdoing in addition to fault. Causation, he says, should be thought of in this context in terms of moral responsibility for consequences. The

2 See Epstein, Nuisance Law: Corrective Justice and its Utilitarian Constraints, 49 *Journal of Legal Studies* 8 (1979), and Epstein Defenses and Subsequent Pleas in a System of Strict Liability, 165 *Journal of Legal Studies* 3 (1974).

3 Posner, R., *The Problems of Jurisprudence*, Harvard UP 324 (1990).

4 Borgo, J. (1979), *Causal paradigms in tort law*, 8 *Journal of Legal Studies* 419, 54.

context of causation carries with it other implications simply by virtue of what we generally consider a cause.⁵

Again, Posner's answer to this is simple: causation is not identical with responsibility. Consider the following scenario: a new hardware store opens across the street from an old hardware store, generating business taken from the other store's customer base. Any successful profits of the new store will inevitably cause injury to the old store. But, as Posner argues, we would not hold the new store responsible for the injuries sustained by the old store, even given the fact that it caused them.⁶ And so based on the same argument, it would not be reasonable to hold them liable, either.

This discussion is meant to motivate, in the reader, the intuitions that simple concepts like causation and responsibility and liability come apart in the simplest cases, and furthermore that the relationship between them is by no means clear. I'll now take the time to draw out just what we, as prudent jurists, mean and ought to mean by these various concepts.

III. FAULT, CAUSATION, RESPONSIBILITY

Tort law, as a discipline, is a relatively new phenomenon to the justice system. We find that criminal law, of course, goes back at least to biblical stories. In ancient Greece, criminal cases were pressed by families of victims, rather than by the state. In one Platonic dialog, for example, we find Euthyphro about to bring his father to court for murder. But the concept of the tort is relatively new, and so the ideas surrounding it, including the conditions it must meet, are still freshly evolving.

Also evolving, therefore, are the concepts associated with tort law. Concepts such as fault, causation, and responsibility are essential to the tort case, but all are problematic. And not only does each hold an ambiguous position in law, associated with each term one finds mounds of philosophical problems as well. In a discussion of responsibility, for example, the position that you hold on free will

⁵ This point will come up again when we talk about Mackie's "Causal Field" hypothesis.

⁶ See Note 3 at 324, 25

obviously will be relevant. It's important, then, that we try specifically to set out just what we mean by each of these terms, as well as what is the relationship between them.

In complicated cases, these three criteria come apart. Problematically, in those cases, one or another of them gets forced out. And so the puzzle is, don't we think that each of these criteria is relevant, if not necessary, to prove liability? And a further puzzle is: if we do, how does one explain cases in which one or another is absent, but in which we still want to find a defendant liable? I'll address the first question first.

A tort is some damage done for which the offender is liable to the victim in a civil suit. In its simplest terms, A must pay for damaging B's property, if (1) A is at fault, that is, he *wrongly* did that damage to B, (2) A is the cause of the damage, that is, it is actually true that he did it, and (3) he is responsible, that is, he committed the act *willfully*. In the simplest torts we will find all of these conditions satisfied. If, for example, Adam used a key to scratch the paint on Eve's car, Adam should have to pay a penalty to Eve, as well as cover the costs of the repairs. But not only are these conditions not necessary, they are not even sufficient. Counterexamples from cases, as well as intuition, show that it is less than clear what role these conditions play in tort. But first, let's look at the intuition that they *are* jointly necessary and sufficient.

IV. NECESSARY AND SUFFICIENT CONDITIONS

Take the case of Adam scratching Eve's car again. If Adam scratched the car accidentally, without knowledge, and while taking due care, then we could argue that he did not do so willfully. In this case damage to the car should be covered by Eve's insurance company, since it was an "accident." Adam's good nature might motivate him to help cover the cost once he learned about the causal nature of the act. But a judge would find that the insurance company is responsible for the damages, not Adam.

On the other hand, if he did act willfully, we may be more inclined to attribute responsibility to Adam. Given this, and given that the other two conditions, fault and causation, are satisfied, then

we would hold Adam liable. Assuming the presence of the other two conditions, then, it looks like intuition finds that responsibility is both necessary and sufficient.

Let's now look at the case of fault. Did Adam *wrongly* scratch Eve's car? Or wasn't his action wrong? Did the scratch occur while he was helping Eve remove a bumper sticker supporting a presidential candidate who did not win the most recent election? Did he scratch the car while trying to crush a bee who had landed on her trunk, knowing as he did that Eve is deathly allergic to the sting of a bee? In these cases, our intuitions would be unlikely to tell us that Adam is liable for the damage that he caused, being as it is that acted as he did with the best intentions.

Assume, instead, that Adam did bring about the scratch wrongly, which is to say that he is at fault. In that case, we would also hold him liable, regardless of whether his action was malicious or otherwise. And so just as long as the other two conditions are also satisfied, it seems that fault is both necessary and sufficient for liability in this case.

Of course, if Adam's action caused the scratch, and the other two conditions are satisfied, then we'd find him liable. In fact, given the other two conditions, the case turns on the question of causation. If it can be shown that there is a causal link between his action and the scratch, then he's guilty. Likewise, if there's no causal connection (i.e., the key never physically touched the car) then he's not guilty. In this case, given the other two criteria, causation is both necessary and sufficient.

In simple cases, then, intuition tells us that, in tort law, fault, causation, and responsibility are jointly necessary and sufficient for liability. This means that, given all three, we have liability, but take any of the three away in this case, and we do not. What's more, the system of laws is set up so that, in making a determination of liability, the judge or jury seeks to satisfy all three of these conditions. So we have not only intuition on our side, but also the underlying system that supports tort law.

But are things really so simple as I've cast them? Of course

not - they never are. In the above case, it was intuition that guided the thought that all of *four* concepts were present. We had fault, causation, responsibility, and liability. That's right, the outcome of the above case seemed so simple because liability came in with the intuition. But what about cases where intuition also gives us liability, but where one or another of the other three conditions comes apart? Where would that leave our case in terms of necessary and sufficient conditions? Would we still find that all three conditions were both jointly necessary and sufficient for liability? We'll first take a look at the contemporary analysis of causation, which will help us better to answer the above questions.

V. CAUSAL CHAINS

Before I go on to talk about causation in the law, I should spend some time developing one analysis of causation, i.e., the counterfactual account. The most well received theory currently regarding causation stems from David Lewis' work giving a counterfactual account of causation. Lewis argued extensively that *c* causes *e* if there is a relation of *causal dependence* running from *C* to *E* (According to Lewis's definition, *C* stands for 'cause', and *E* for 'effect', though they're just variables). And causal dependence is stated counterfactually:

E causally depends on *C*, if in a world where *c* would have been the case, then *e* would have been the case, and if *c* would not have been the case, then *e* would not have been the case.

So in some possible world where *c* occurs, in that same possible world we find that *e* occurs. Lewis then goes on to define causation not in terms of causal dependence, but in terms of chains of causal dependence. He defines a chain of causal dependence (or a causal chain) as any relation between *C* and *E* where *E* causally depends on *X*, which causally depends on *C*, where *X* is some finite number of causally dependent events.

Lewis invokes the concept of chains of causal dependence to avoid to main problems in the metaphysics of causation - the preemption pairing problem, and the problem of effects. For our

purposes, however, we can set these important problems aside. The important lesson to learn here is that causation is between events, where the relationship between those events is that of a counterfactual chain of causal dependence. The following discussion of liability in tort law, as we'll see, will rely heavily on causal chains.

VI. NEITHER NECESSARY, NOR SUFFICIENT

VI.A. FAULT

To start, think about the concept of fault in this context. Deodands - inanimate objects which are the subject of legal cases - were once thought to be liable in tort cases. If a wagon wheel rolled down the hill and crashed into the side of your building, causing damage, you had a legitimate complaint against the wheel. In many cases, if causation was proved, the wheel would be destroyed (presumably to prevent any further causation, but possibly "give the wheel what was coming it is" Distributive, or retributive justice?). Although we no longer prosecute deodands, the case shows that intuition about responsibility comes apart from causation in hard cases. That is to say that intuition gives us liability, but not responsibility. So we base the liability on the causation, rather than determining that the wheel was responsible.

In this instance, responsibility is abandoned, and what we are left with is a distinction between accidental and intentional harm. Imagine the case of a driver of a pick up truck who hits and kills a kid on a motorcycle on some back road. Did he cause the death of the kid? Certainly by any analysis, the causal chain connects the truck driver to the subsequent death of the biker. But is he responsible? Along the distinction between accidental and intentional harm we find the distinction between criminal and civil liability. Certainly by driving an automobile, he has a duty and undertakes a responsibility to do so with due care. But he owes this responsibility to the public, to society, and so any penalties that a judge may serve him will be criminal. If the accident was unintentional, there is no civil case. But if it was intentional, his survivors may sue the driver in a civil case.

Elizabeth Smith argues that the legal test for whether an act is faulty has come to be *foreseeability*. And fault, as we've seen above, is of paramount importance to private law. Oliver Wendell Holmes remarked, "where there is no fault, there is no liability in tort."

But even where there no obvious fault, but a heavy injury, it seems unfair for the victim to bear the entire burden of loss. If a train is carrying hundreds of cases of industrial fireworks, even if the greatest care was taken during the storage and packaging of the fireworks, the owner of the train should not bear the burden of loss should an accident occur. Even if every precaution were taken, such a large loss as the destruction of a train and cars and rail should not be carried by the train owner alone.

This is when Smith's notion of foreseeability becomes important. If a reasonable person should have known or been able to foresee that a problem might occur but does not, then his/her mental state is said to be faulty. Even if they act with the best intentions, and no malice at all, they failed to give proper attention, and their actions therefore imposed risks onto others. Since a reasonable person should have been able to foresee a problem, their acts are considered careless and therefore negligent.

An example is *Polemis v. Furness, Witting & Co.*,⁷ which concerned a ship used to transport chartered cargo to Africa. The cargo on this voyage was flammable, and when a heavy board fell, it ignited the substance, burning and destroying the ship. The question was whether the charterers should have foreseen that the plank would fall, and if so, are they negligent for the effect?

The Court ruled that the charterers should have foreseen that the plank would fall, and should have foreseen that a falling plank would cause a spark and a fire in a hold full of flammable material. Consequently, using the test of foreseeability, the ship owners were ruled to be liable, and had to pay damages.

⁷ *Re an Arbitration between Polemis and Furness, Witting & Co.* 3 KB 56 [1912]

VI.B. CAUSATION

We've seen the cases where responsibility, even in the presence of the other two conditions, is not necessary for liability. Now we'll look at cases in which causation is not a requirement. In **Summers v. Tice**,⁸ three friends were out hunting quail. Careless shots were fired, and the third individual was shot in the face, leaving his vision impaired. In this case, the judge ruled for the plaintiff, basing his decision on aggregate causation. He held both of the hunters liable equally for the damage to the third's vision, although only one pellet caused the damage, and so only one hunter was causally efficacious in the injury. The judge ruled that if one or the other of the hunters could not prove that he was not causally linked to the injury, then they both must share the liability equally. In this important case, the roles of who must prove what were reversed. We generally think that the victim must prove liability of the plaintiff. In the case of aggregate causation, the judge set stronger standards: he required them to prove that they were not liable. When neither one could, he levied his penalty on them both.

Aggregate causation is not unique to this case. Market liability was adopted by courts involved in cases in which the maker of a specific product could not be identified, but those firms that are in the market of producing those products *could* be identified. Liability is thus spread across all of the relevant firms

Sindell v. Abbott Laboratories⁹ is a case that involves DES, a substance prescribed by doctors, but later determined to be toxic. This case is difficult, because there were several manufacturers of DES. Some larger than others, so that it is difficult to determine how much of a share of the overall amount of DES was manufactured by each firm. In many cases, it is also difficult to determine which manufacturer made the doses which were taken by certain individuals. Furthermore symptoms don't appear until years after exposure to toxic chemicals - often showing themselves in the offspring of those exposed.

⁸ *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948)

⁹ *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980)

In *Sindell v. Abbott Laboratories*, the victim could not prove which of the many firms manufactured the drug that she took. In this situation, a large number of injuries were known to be caused by the drugs created by these several manufacturers. But neither the victim could not determine which made the one that injured her. Nonetheless, the judge ruled that each was sure to have caused some injuries. Penalties were paid by each defendant according to its own market share, according to how much it made and sold.

Causation remains intact in this case of aggregate causation. Although no direct causal link could be determined, the judge ruled that each defendant harmed *a class* of people, even if it could not be determined that it injured any individual person. But remember above, in *Summers v. Tice*,¹⁰ where causation was not even a requirement at all. One of the defendants definitely did *not* satisfy a causal link between his action and the injury. Still, even in the absence of causation, he was found to be liable.

This may not seem so problematic, but imagine the case where there are not two shooters but instead ten. In this case, the only causal relationship the other nine had to the injured party is that they happened to be hunting with the individual who was causally efficacious.¹¹

VI.C. RESPONSIBILITY

This might be one of the most difficult metaphysical and moral entities to pin down exactly. Responsibility is associated with problems of free will, of course, and analyzed in terms of the 'principle of alternate possibilities,' or more simply, 'could have done otherwise.' Imagine that Adam was intending to scratch Eve's car tomorrow with his keys. But Adam's brilliant psychiatrist made it so that if, just at the last minute, Adam decides not to commit the act, then a device will cause Adam to commit the act. It's not the case that Adam decides not to act, but it also is the case that he couldn't have done otherwise. In this case, we could not legitimately hold Adam morally responsible

¹⁰ *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948)

¹¹ Simmonds, N., *Justice, causation, and private law*. In *d'Entrèves*, M. P. and Vogel, U., editors, *Public and Private: legal, philosophical, and philosophical perspectives*, chapter 8, 149, 176 (Routledge, 2000).

for an act he could not have not committed, but in Court, we'd still hold him liable, since he acted willfully. The principle of alternate possibilities states that an agent is responsible for an act just in case he could have done otherwise.¹²

But we needn't look at so fanciful a model to see our intuitions that responsibility comes apart from liability. On the one hand, we believe that people should be responsible for the outcomes of their actions, but at the same time it would be unreasonable to hold someone responsible for the outcome of every causal process that results from their action (e.g., holding Hitler's mother responsible for the Holocaust, because she set certain events in motion.)¹³

Let's look at a case. In **Overseas Tankship, Ltd. v. Dock & Engineering Co., Ltd.**,¹⁴ a cargo ship (Wagon Mound) carelessly discharged some oil into the bay while at dock. The oil not only interfered with the operations of a nearby wharf, but later caused to wharf to catch fire, resulting in extensive damage to the wharf. Discharging oil into the water was not uncommon at that time.

At issue here was foreseeability of the damage and probability of the damage. The Court ruled that although the fire was a probable consequence of the action of the ship, it was not responsible for the damage since it was not a foreseeable outcome of the action. That responsibility comes away from liability is best seen with praise and blame. That the consequences of your action was unforeseeable to you at the time is reason to withhold praise, just as it is with blame, but not a reason to deny causation.

VII. MACKIE ON CAUSATION

A house catches fire and subsequently burns to the ground. Investigators come to the scene, and determine that a short circuit in one outlet was the cause of the fire. But what exactly do they mean when they say that it was *the cause*? They cannot mean that the short circuit was the necessary condition of the fire, since any

¹² Frankfurt, H., *Alternate possibilities and moral responsibility*, 46 Journal of Philosophy 829, 839 (1969).

¹³ See Smith, pp. 149-51 for a discussion.

¹⁴ *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* 1 UKPC 388 AC (1961).

homeless person walking by might have thrown a cigarette onto the dry grass, and ignited the house. Likewise, they cannot mean that the short was a sufficient condition of the fire, since the short circuit required the presence of oxygen in the atmosphere, along with some oily rags nearby, and a proper degree of neglect at just the right time (had the queen of England flown over at just that moment and doused it with water, the fire would never have gotten a chance to start). The short was determined to be the cause, but it was neither necessary nor sufficient. So what exactly was it?

Mackie argues that the short circuit was an insufficient but necessary part of a condition which was itself unnecessary but sufficient for the resulting event.¹⁵ He calls this the *INUS* condition. So what the experts are saying in this case by calling the short circuit the cause, is that it is a condition of this sort - an *INUS* condition. In fact, when we make statements in which we claim that one event caused another event, we are often referring to it as satisfying this sort of condition.

But I can formalize that a bit more. Let AB-C be a minimally sufficient condition (A is the short circuit, B is the oily rags, and -C represents the negative event where the queen neglected to extinguish the fire from the air). If we string together all of the minimally sufficient conditions disjunctively, (AB-C or D-E-F or -GHI or ...), then we have the necessary and sufficient conditions. Each individual AB-C is a minimally sufficient condition, and each letter (e.g., B) is an *INUS* condition.

Whether this is right remains to be seen.¹⁶ But it still leaves open the question, why do the experts determine that the short circuit was *the* cause of the fire, rather than any of the other *INUS* conditions? Mackie admits that context plays a large role here, and invokes the notion of the 'causal field.'

Imagine the case in which Adam contracted the flu at time t. The question is: what causes influenza? But this depends on the

15 Mackie, J., *Causes and conditions*, ed. Sosa, E. and Tooley, M., *Causation*, Oxford Readings in Philosophy, chapter 1, 1, 32 (Oxford University Press, 1993).

16 For a reply and objection to the necessary and sufficient condition account of causation, see Kim, 1993.

context of the question. You might be asking a wide-context question: *what causes influenza in humans?* The answer, then, involves a discussion of the way viruses attack cells and reproduce, overcoming the host body and causing sickness. But your question might be a more narrow-context one: *given the presence of the influenza virus, what caused this Adam to contract the illness at t while others who were also exposed to the virus did not?* The answer to this question will instead focus on issues such as weakened immune system in Adam, the presence of antibodies in other folks, and the like.

Mackie calls the context of the question a 'causal field.' In the wide-context question, the causal field is the region that surrounds all people at all times in which they are exposed to this virus. But in the more narrow-context version of the question, the causal field contains only Adam, and the viruses to which he was exposed, and the time that he was actually sick.

So now we are ready to relate this solution back to our problem with the short circuit. When the experts make the claim that 'A caused B', they are really referring to the elliptical proposition that states that 'A caused B in reference to the field F.' And remember, to say that A was the cause is merely to claim that it was an INUS condition of a condition that was itself minimally sufficient to bring about the effect.¹⁷

The notion of causal field is going to be important to the project at hand in many important ways. First, it is one of the best philosophical accounts of causation in terms of necessary and sufficient conditions. Given that all of the theories we've looked at so far are trying to piece causation into legal theory in terms of its necessary or sufficient conditions, Mackie's arguments help us to formalize that. Second, in the next section of this article, Hart and Honoré will argue that the contextual dependence of causal statements does not reduce to arbitrary policy judgments. I'll defend their position, by invoking Mackie's causal field.¹⁸

¹⁷ See Note 16 at 39, 41

¹⁸ Actually, although Mackie develops the notion fully, the causal field's first appearance was due to John Anderson *The Problem of Causality*, in *Australasian Journal of Psychology and Philosophy*, 16 (1938).

IX. FURTHER RESEARCH

Of course, this entire vein of research owes its foundation to the work of Hart and Honoré in the middle of the 20th century. And while my concern about the other conditions is now shown to be less than concrete, causation still plays a strong role in private law. Liability is still based to a large degree on causation of harm. This is the work that Hart and Honoré were so concerned with, and it is my second concern of this article.

As we saw in Mackie, what we consider to be the cause of some event depends heavily on context. Context dictates which questions we ask, which will in turn determine the sorts of answers that we receive. This is important because, while factual, the answers give us only some of the information, leaving much of it out. What's left out is often as important to context as what's included. Context therefore dictates which causal chains we follow. This is important because there are often many causal links, and in complicated cases many links will contain many branches, making it impossible to consider the whole scene. Which causal chains we consider to be efficacious will dictate what we finally determine the cause to be, but which causal chain we select is itself determined by context.

What I've just described is part of the position called 'causal minimalism', a view espoused by legal realists. Causal minimalism tells us that causal language is just a cover for inconsistent enforcement of public policy. This sounds like a conspiracy theory but it's not: this behavior will often go unnoticed even to the judges and juries who commit it. The problem as they see it is that causal language is less than definite in most cases, and yet it is the strongest condition used to determine that outcome of tort cases.

The legal realists claim is that every event that satisfies the 'but for' condition counts as a potential cause of the event. 'The fire would not have occurred but for the presence of x', where x includes oxygen in the atmosphere, the Queen of England's neglect to fly over, as well as the dropping of the match. For the legal realists then, each of these events (even the negative events) hold equal claim as a cause of the subsequent fire.

The problem comes about when the judge or jury is called upon to choose one or another of these conditions, and assign it the role of *the* cause of the fire. The legal realists present us with a dilemma: is that determination factual, or is it representative of some policy decision on the part of the judge or jury? Their answer is that it is the latter.¹⁹

Hart and Honoré argue that this could not be further from the truth. To summarize their position, the legal realists are committing a fallacy when they move from, 'there are no simple principles guiding the Courts' decisions regarding causation,' to 'there are no principles at all guiding the Courts' decisions regarding causation'. That we cannot easily summarize the principles, or provide a simple analysis of causation is not evidence that there are no such principles in play. The legal realist position, according to Hart and Honoré, are committing something akin to the fallacy of arguing from ignorance.

Causal determinations are not nearly as arbitrary as proponents of this position would have you believe. Hart and Honoré instead give a simple common-sense argument: they say that in determining what is the cause of an event one only has to employ regular common sense. We first take the elements of an event that are either common or static. We may then legitimately remove them as the possible causes. The presence of oxygen, and probably the proximity of oily rags would be omitted here, since oxygen in the atmosphere is a common occurrence, and the rags had been sitting static (possibly) long before the fire started. Even if it is true that they are essential, they will not be counted among the causes.

The next step is to look at the state of affairs, and determine what, if anything, has occurred that is either abnormal or dynamic. We then scrutinize those events as the probable cause. Of course, the short circuit is abnormal and dynamic. A short circuit which causes a spark is abnormal - we almost never observe the occurrence of one of those - as well as it is dynamic.

There are two obvious reactions to this view. The first is that

20 See Note 12

the common/abnormal dynamic/static distinction is a pretty poor one for an analysis of causation. There are serious earthquakes that are caused by subterranean pressure that builds slowly over the course of thousands of years - pressure that is always present, and hardly abnormal, but most certainly the cause. Moreover, this pressure does not increase dynamically, but rather instead increases ever so slowly, until one day an earthquake is the effect. Certainly, there were many more dynamic events which occurred in the vicinity. But which we would not be willing to call the cause. This objection assumes that what Hart and Honoré are trying to do is give an analysis of causation, which they are not, instead of explain how common sense deals with questions of causation, which they are. Nonetheless, even as a heuristic, this common sense view leaves much to be desired.

The second, and more pressing, concern is that even given that this common sense view works, it still leaves much of the causal judgment open to intuitions about context. If we first take all the conditions, strip away negative events, strip away common occurrences, and static states of affairs, we are still left with several events from which to choose as the cause. And if that is still the case, it looks like the legal realists are correct. If Hart and Honoré leave us with several candidates from which to choose, it may appear that when one does decide, it will be to forward a certain policy agenda, or to advance some range of public or social ends.

Hart and Honoré fully embrace this second concern. They recognize that causal judgments are, in a sense, relative to the perspective and interest of the individual making the judgment. Still, they argue, this does not reduce to a simple cover for blatant enforcement of policy on the part of the judge or jury. Refer again to our discussion above in which the question was asked, "what causes influenza?" The likely perspective of the individual posing the question might be of the man's physician. She might consider the presence of flu viruses to be a normal course of events, and his low immunity a feature that explains his contracting the illness at this time. Or she might be the man's wife, who considers the normal course of events to be his low immune system, and wonders how he

became exposed to the virus so as to cause the illness at this time. The doctor is asking, "why does he contract the illness (given the exposure to the virus) when most people do not?" The wife is wondering, "why does he contract the illness now (given his low immunity) when usually he does not?" The contextual perspectivism here invites the conclusion that the only *factual* conclusions here are the ones derivable by the 'but for' analysis discussed above. Any other conclusion is a matter of policy. But, say Hart and Honoré, this is an oversimplification of the situation for at least two reasons. I also give a third reason.

Primarily, the interests of the two investigators above likely shape their perspectives and therefore the specific questions that they ultimately ask. The physician is looking for general causal principles as an explanation for the illness, while the wife is looking for specific events that might have led to *this* instance of suffering. But regardless of the framing of the questions, or the interests of those who ask them, the answers will not be based on policy, they'll be based on fact. The perspective of those who ask the question cannot frame the answer that they receive.

Secondly, even when the judgments that are finally made *do* represent a context dependent causal judgment, that judgment is based on common sense principles, outlined above, rather than surreptitiously acting as a cover for policy issues about social goods. Common sense acts as a buffer to ensure objectivity.

And finally, and in support of the first two reasons, I'd argue that the concept of the 'causal field' is doing the work here. In fact, the truth is a compromise between the context dependence of the causal realists, who state that every *INUS* condition has an equal claim on being the cause, and Hart and Honoré who argue that there need not be policy guiding causal judgments at all. Remember that long conjunct of minimally sufficient condition is the actual cause of the event in question, but it is the context that asks the question to determine the relevance of each *INUS* condition. The context is what makes the answer relevant and what gives the judge or jury the ability legitimately to pick one cause over another.

To say that one condition over any other is necessarily the cause is misleading, and an oversimplification. It's true that each has a equal likelihood of finally being chosen by judge or jury. But one is chosen, and how that is done requires an explanation. But as Hart and Honoré suggest the context of the question, not the policy or the social aims of the judge determine what the answer will be. Just as it would be irrelevant to get an answer that would be out of context, a well determined context, and that is one that can be argued for by both sides, will rein as the one true condition.

IX. CONCLUSION

By way of conclusion, the reader should walk away convinced and enlightened on a number of topics. First, that distributive and corrective justice help elucidate a distinction between a more elusive fracture between public and private law. Public law finds itself overwhelmingly concerned with distributing goods across society, while corrective justice only attempts equalize some harm, while lacking the normative context inherent in the former. To lack that normative context is not so simple, as we saw, in determining just what 'causation' means in a legal context. Normativity sneaks in a legal account of causation. And in order to prevent such a thing, it was important to pull apart the concepts of liability from causation, responsibility, and fault. But that is often not as helpful as hoped, since neither condition proves itself to be necessary or sufficient in tort law.

Causation, being the more important, and possibly most illusive, metaphysical entity in tort law is relied upon very heavily. To elucidate that point, it was useful to outline the debate between the causal realists, and the great objectors to this position, i.e., Hart and Honoré. The problem at first seemed to be whether context dependence entails hidden policy enforcement, but a look at the causal literature helped to see that the distinction between the two camps could be brought a little closer together.