

REFLECTIONS ON FACTUAL CAUSATION

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A major thesis of the Becht-Miller book on factual causation is that since causation is a factual issue, "courts should not pass to the consideration of values until they have exhausted the possibilities of answering the question of fact—in short, until they know either what the fact was or know that they do not know and why they do not know."¹ The authors take issue with Professor Malone² who advocates mixing factual and evaluative considerations in determining cause in fact, or at least contends that the two are inseparably bound together in the factfinding process.³

The Becht-Miller thesis raises two major questions. First, can we really identify cause in fact as something separate from our own value judgments, which are so critical in determining proximate or legal cause? And second, is it likely to make a difference in legal outcome whether we follow the Becht-Miller approach or the Malone approach?

The authors' answer to the first question is disarmingly simple. They assume "that men have some true knowledge of causal sequences in the world,"⁴ and that our reasoning on the subject corresponds with "common sense ideas of the events of ordinary life."⁵ Thus, dropping a book on one's foot causes injury whether the book is blue or red, and therefore the color of the book is not a cause of the injury; but shaking a door causes vibrations even though the effect may completely dissipate within a matter of minutes.⁶

Perhaps we intuitively know such things in much the way Kant perceived his human maxims.⁷ But the authors' answer to Professor Ma-

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1. A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 20 (1961).

2. Malone, *Ruminations on Cause in Fact*, 9 *STAN. L. REV.* 60 (1956).

3. A. BECHT & F. MILLER, *supra* note 1, at 3-8.

4. *Id.* at 9.

5. *Id.* at 151.

6. *Id.* at 14, 139.

7. I. KANT, *THE CRITIQUE OF PURE REASON* 547 (1929).

lone on this point is not completely satisfactory. Malone contends that persons perceive different causes of an event depending on their perspective, *e.g.*, as a neighbor, engineer, physicist, judge, or doctor.⁸ Becht and Miller concede this, but respond that all of these perceptions may be factually correct. Most events have many actual causes, and "[t]he fact that a person selects a cause for reasons of his own does not make cause evaluative."⁹

The authors neatly avoid joining issue with Professor Malone by concluding that all of the alleged causes are factual causes. Malone's hypothetical is that of a young driver whose speeding car throws a rock into a pedestrian. Becht and Miller assert that a neighbor might view the driver's parents as the cause.¹⁰ But is this because they, knowing he was a reckless driver, allowed him to drive or simply because they bred and raised him? John Donne's statement, "[a]ny man's death diminishes me, because I am involved in Mankind,"¹¹ is a noble pronouncement, but it hardly corresponds with our common sense knowledge of causal sequences any more than does calling parents the cause of their child's conduct simply because they are parents.

If we possess common sense knowledge of causal sequences, why should there be any disagreement whether one event is the cause of another? The answer must be that some of us are more perceptive than others. But is not the determination of perceptiveness evaluative, thus rendering the causal determination evaluative also?

The parallel series approach demonstrates the problem of determining factual cause. Becht and Miller initially use this approach to determine whether an omission¹² is the factual cause of an event. If the event would not happen when the omitted act is supplied, they treat the omission as causal; but if the event would happen even after the omission is supplied, they treat it as noncausal.¹³ For example, if a hurricane blows down an unbraced tree, but the tree would have blown down even if braced, the failure (*i.e.*, omission) to brace the tree is not a

8. A. BECHT & F. MILLER, *supra* note 1, at 5-6.

9. *Id.* at 5.

10. *Id.*

11. J. Donne, *Meditation XVII*, in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE 441 (1952).

12. The authors recognize that "what did not happen cannot be a cause of anything that did happen, at least not in the sense in which something that did happen can be a cause. It can be called a 'cause' only in a figurative sense." A. BECHT & F. MILLER, *supra* note 1, at 22.

13. *Id.* at 24.

cause.¹⁴ The parallel series analysis also applies to acts. If the event would not happen when the act is omitted, the act is causal; but if the event would happen even after the act is omitted, it is noncausal. Thus, if an overloaded cable and pulley break, but would have broken even if properly loaded, the act of overloading is not a cause of the breakage.¹⁵

In contrast, in discussing the famous "two-fires-combining" situation, the authors say: "Of course, if the defendant's fire actually caused the harm it would make no difference under our assumptions that the other fire would have produced the same harm even in precise detail."¹⁶ They probably would find causation here, although they might reduce damages to reflect the diminished value of the burned property in view of its impending destruction by the other fire.¹⁷ Similarly, they would find causation in the shake of a door even if "precisely the same combinations would have occurred without the shake. . . ."¹⁸ If the parallel series analysis applies to some situations but not others, the distinctions are unclear.

Professor Green's principal criticism of the Becht-Miller approach is directed at their insistence that "the causal relation must be found between the *segment* of defendant's conduct that is negligent and the victim's injury."¹⁹ Green's criticism is difficult to comprehend if one is basing liability on negligence.²⁰ As to strict liability, the analysis of factual causation is more complex²¹ because the inquiry is not restricted to the negligent segment of the conduct, but is broadened to consider defendant's conduct at large. This analysis resembles Green's

14. *Id.* at 83.

15. *Id.* at 57-58.

16. *Id.* at 18.

17. *Id.* at 137-38. See notes 29-43 *infra* and accompanying text.

18. A. BECHT & F. MILLER, *supra* note 1, at 139.

19. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 550 (1962). See A. BECHT & F. MILLER, *supra* note 1, at 12-13. Professor Green notes that "[c]ause,' 'fault,' and 'blame' have a large area of common meaning and are frequently used synonymously." Green, *supra*, at 562. This recognition is apparently used by Professor Green to justify imposing liability in negligence cases where the causal conduct of the defendant is not negligent. *Id.* Compare note 20 *infra*, with note 33 *infra*.

20. "Through all the diverse theories of proximate cause runs a common thread; all agree that defendant's wrongful conduct must be a cause in fact of plaintiff's injury before there is liability." 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 1110 (1956). Compare *id.*, with Green, *supra* note 19, at 544-45 n.4.

21. "As is well known, the fundamental problem of any system of liability which is not fault-based is the causal problem." Atiyah, *Book Review*, 45 U. CIN. L. REV. 340, 344 (1976).

approach to causation in negligence cases.²² So, for example, the authors say that "in the vast majority of cases a principal's acts are simple causes of his agent's torts and a master's of his servant's, for the tortfeasor's being where he was or in possession of the equipment that did the harm was caused by the conduct of his employer."²³ Professor Leflar, in reviewing the Becht-Miller book,²⁴ takes exception to their assertion that one who is vicariously liable for the acts of another is a cause of the actor's tortious conduct "since vicarious liability is itself based on reasons of policy which exist independently of any causal forces that may or may not operate between the parties."²⁵

Becht and Miller also stress the distinction between rules of factual causation and those of damage determination:

The distinction, then which we draw between the cause and the damages issues is this: If the question is whether the defendant could have prevented the other source from doing the harm, it is a question of causation. If the other source would have done the harm anyway, in spite of all that the defendant could have done to prevent it, the issue is not causation, but damages.²⁶

Where the issue is damages, they assert it may be appropriate to reduce recovery to further "the policy against overcompensation."²⁷ But where the issue is causation, the plaintiff may be entitled to a joint and several judgment against multiple defendants.²⁸ The authors criticize the *Restatement of Torts* for characterizing as multiple causes of an accident a municipality's negligent maintenance of a sidewalk and an accumulation of ice thereon.²⁹ Viewing it instead as a damages issue, they contend that courts should reduce recovery by the amount of damage that the exercise of due care would not have prevented, *i.e.*, the amount attributable to the ice accumulation.

The distinction Becht and Miller draw between the rules for deter-

22. See Green, *supra* note 19.

23. A. BECHT & F. MILLER, *supra* note 1, at 44.

24. Leflar, Book Review, 75 HARV. L. REV. 1691 (1962).

25. *Id.* at 1693. Although Becht and Miller contend that the master is a cause of the servant's wrong, they nevertheless agree with the opinion of Hart and Honoré that "causation should be traced from the servant, not the master in such cases." A. BECHT & F. MILLER, *supra* note 1, at 167. Part II of their book, *id.* at 153-223, is a review of H. HART & A. HONORÉ, CAUSATION IN THE LAW (1959), with which they largely agree.

26. A. BECHT & F. MILLER, *supra* note 1, at 127.

27. *Id.* at 124.

28. *Id.* at 104-20.

29. *Id.* at 136-37. "The ice had not been so long upon the sidewalk as to make it the duty of the town to remove it." RESTATEMENT OF TORTS § 432, illus. 5 (1934).

mining cause and damages is questionable. It turns on the ability of the defendant to prevent the other source of harm from occurring—a factor unrelated to “the policy against overcompensation”³⁰ supposedly underlying the damages rule. Moreover, it is unrealistic to make the distinction turn on whether the other source of harm would have occurred “in spite of all the defendant could have done to prevent it,”³¹ for example, by stationing a person on the sidewalk at all times.³²

These issues of causation and damages vex the courts, particularly since comparative negligence and comparative contribution have become widely used in settling disputes.³³ Courts divide on whether to permit a joint and several judgment against multiple tortfeasors or limit recovery against each tortfeasor to the amount of damage caused by his negligence or conduct.³⁴ Further, courts divide on whether to require apportionment where the defendant merely aggravates but does not originally cause the injury.³⁵

When the determination of causation is truly speculative,³⁶ Becht

30. A. BECHT & F. MILLER, *supra* note 1, at 124.

31. *Id.* at 136.

32. *See id.* at 124.

33. *See, e.g.*, *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (comparative negligence); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977) (comparative contribution). These cases review the developing law; both cases involve mixed claims of negligence and strict products liability. Where strict liability is involved, it may be necessary to compare causation rather than fault. *See, e.g.*, *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alas. 1976) (comparative negligence applied where defendant held strictly liable). *But see* 38 OHIO ST. L.J. 883 (1977). Professor Leflar criticizes Becht and Miller for their “failure to mention comparative negligence and discuss the problems of causation it presents in contributory negligence cases.” Leflar, *supra* note 24, at 1693. Note, however, that the widespread use of comparative negligence in this country is a recent development. As late as 1968, only seven states embraced the doctrine. Wade, Crawford, & Ryder, *Comparative Negligence*, 41 TENN. L. REV. 423, 444-45 (1974). The editor of the *American Trial Lawyer's Reporter* estimates that as of June 1978 “over 35 states by statutory or judicial change have switched from contributory to comparative negligence.” 21 A.T.L.A. L. RPTR. 200 (June 1978).

34. *Compare* *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978) (joint and several judgment against all defendants), *with* *Brown v. Keill*, ___ Kan. ___, 580 P.2d 867 (1978) (each defendant liable only for the portion of damages caused by that defendant). Under the *Brown* rule, the plaintiff may find part of his damages uncollectible if one or some of the defendants are insolvent or immune, or if a natural force causes part of the damages. *See* A. BECHT & F. MILLER, *supra* note 1, at 123 n.199 and authorities cited therein.

35. *Compare* *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976) (in crashworthiness case, plaintiff must apportion damages and can recover from noncausal defendant only the amount by which he aggravates the injury), *with* *Chrysler Corp. v. Todorovich*, 580 P.2d 1123 (Wyo. 1978) (in crashworthiness case, plaintiff may recover entire judgment against aggravating defendant where damages are incapable of practical division).

36. Much of the Becht and Miller book discusses cases of doubtful causation. The factual

and Miller are in accord with Professor Malone,³⁷ they would apply evaluative considerations to resolve the issue.³⁸ If recovery is the desirable outcome, they would jump the causation hurdle by lightening the plaintiff's burden of proof or by shifting it to the defendant.³⁹

Finally, will it make a difference in the outcome of a particular case whether one adopts Malone's mixed factual-evaluative approach or Becht and Miller's separation of the factual and evaluative elements? Conceivably, in a case of doubtful causation, a prior examination of the facts might lead to a different causation determination than one based on a factual review colored by evaluative considerations, and this different conclusion in turn might lead to a different outcome. But no examples are apparent. Nor is a different outcome likely when the evidence of factual causation or lack of causation is clearer, even if the two approaches yield different conclusions on causation. Thus, Becht and Miller conclude that speed is a factual cause of a party being at the point where an unavoidable accident occurs; many courts using what is apparently an evaluative approach to factual causation conclude that the speeding is not a cause.⁴⁰ Nevertheless, the authors reach the same conclusion of no liability as the courts do "because the rules against speeding, whether by plaintiffs or defendants, are not designed to prevent a person or object from being in a certain position in time and space."⁴¹ Conversely, they would impose liability where a driver who turns his automobile without signaling is struck by an inattentive

determination may often turn on slight differences of circumstances. For example, the authors discuss situations of alternative compliances, one of which would relieve the defendant of liability under the parallel series analysis while the other would not. They find it speculative whether the defendant should have warned (no liability since the warning would not have prevented the harm) or should have provided a safety guard (liability since the harm would have been prevented) for a piece of dangerous machinery into which the plaintiff accidentally falls. A. BECHT & F. MILLER, *supra* note 1, at 80-81. When the issue, however, is whether the defendant would have braced his tree or removed it, where the latter would have avoided damage from a hurricane while the former would not, the authors would find for the defendant, apparently because of the greater likelihood that an owner would brace a tree rather than remove it. *Id.* at 83-85. The differences in the quantum of inferences leading to different results in the two situations may be slight indeed.

37. See Malone, *supra* note 2, at 73.

38. A. BECHT & F. MILLER, *supra* note 1, at 81, 86.

39. *Id.* at 86.

40. See, e.g., Balfe v. Kramer, 249 App. Div. 746, 291 N.Y.S. 842 (1936); Berry v. Sugar Notch Borough, 191 Pa. 345, 43 A. 240 (1899); Doss v. Town of Big Stone Gap, 145 Va. 520, 134 S.E. 563 (1926).

41. A. BECHT & F. MILLER, *supra* note 1, at 68. A railroad company, however, might have a speed regulation "for, say, five minutes after passing a signal, for the purpose of allowing time for other trains to clear the road ahead." *Id.* at 72-73. Violation of such a regulation with resulting injury would then be legally and factually causal. *Id.*

driver. The plaintiff, a passenger in the second driver's car, should be able to recover against both drivers for his injury although "the negligence of neither defendant" is a cause of the harm because it "seems inexcusable to us" to deny recovery to the passenger.⁴² The authors find no causation because even if either defendant had exercised due care, he would not have avoided the accident.⁴³ Professor Green, using what is apparently an evaluative approach, would find factual causation and impose liability.⁴⁴

Regardless of whether the authors would reach the same outcomes as those who use an admittedly evaluative approach to factual causation,⁴⁵ their book stands as a monumental achievement of analysis and intelligence. As Professor Green says, "[t]he thorough detail of their arguments make for difficult but profitable reading."⁴⁶ And Professor Leflar says that

legal scholars are entitled to examine critically the law's purported logic and to seek improvement in it for the sake of both its purity and a better understanding of it. That is what Becht and Miller have done, and done remarkably well. Their study is careful, comprehensive, illuminating—and unique.⁴⁷

The value of Becht and Miller's book is to spur us to reach right results for right reasons on matters of factual cause.

42. *Id.* at 96.

43. *Id.*

44. Green finds it "difficult to visualize such occurrences" without asking why the second defendant did not see the first defendant's car even though no signal was given. Accepting the hypothetical as presented, he would impose liability against the first driver because that driver owed a duty to both the second driver and his passenger "not to drive across the path of the oncoming car without giving a signal." He apparently would not hold the second driver liable, however, because his failure to look was "not causally related to his own or his passenger's injury." Green, *supra* note 19, at 545 n.4. If one accepts the apparent premise of the Becht-Miller hypothetical, *i.e.*, the second driver could have seen nothing even if he were looking, then the second driver should not be held liable. Apparently, the authors did not intend to imply that the failure to signal would in effect render the first driver's car invisible because they would also hold the second driver liable to the passenger.

45. See generally Green, *supra* note 19; Malone, *supra* note 2; Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968).

46. Green, *supra* note 19, at 543.

47. Leflar, *supra* note 24, at 1694.

