CAUSATION AND JUSTICE: A COMMENT

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I. INTRODUCTION

Causation draws thoughtful torts professors like a flame draws moths. The philosopher in him or her is drawn to the questions: What does causation mean? And how do we learn about causation? The systemizer sees in causation a possible basis for justifying or reformulating tort law; the teacher picks up a wealth of intriguing hypotheticals to test and stretch students' minds, as well as a set of confusing legal opinions for critical analysis.

My friend Arno Becht is above all a dedicated teacher. His work on causation[1] reflects that commitment to teaching. With a limited number of basic assumptions and a narrow focus on cause in fact, he and his coauthor Frank Miller hammered out a set of analytical tools and then applied them to categorize and pick apart a number of problem cases. Intellectual rigor, clarity, and honesty marked their work. Shortly before Professors Becht and Miller published their work, H.L.A. Hart and A.M. Honoré published *Causation in the Law*,[2] somewhat broader in scope and more philosophical in tone. The Hart and Honoré book later inspired Richard Epstein,[3] who developed a unified theory of tort liability drawing on a causal theory similar to Hart and Honoré's. In this commentary, I hope to pull those two causal theories apart and examine their weaknesses—invoking Arno Becht's analytical spirit without following precisely his path.

II. HART AND HONORÉ

Many torts scholars argue that the only real question of causation in a tort case is whether the harm would have occurred without the con-

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

2. H. HART & A. HONORÉ, CAUSATION IN THE LAW (1959).

3. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

duct in question.[4] Any further limitation on liability couched in terms of proximate cause must be based on policy grounds unrelated to causal relationships.[5] Hart and Honoré set out to refute that common view and to defend what they call the traditional view.[6] They admit that a policy choice underlies the decision to recognize causing harm as an element in legal responsibility.[7] They claim, however, that particular questions of whether a defendant's act was *the* cause of harm are questions of fact, not questions of policy, even though not limited to the issue of whether the harm would have occurred without the defendant's act.[8] This claim invites the obvious question: What is the difference between a question of fact and a question of policy? They answer:

> [T]he traditional insistence that questions of causation are questions of fact . . . meant that the criteria for deciding such questions were not inventions of the law but were to be found outside the law in what was assumed, rightly or wrongly, to be part of the ordinary man's stock of general notions.[9]

If ordinary usage of causal terms itself depends on judgments about moral responsibility, however, then logically those moral judgments must be different from the judgment that you are morally responsible for harm for which you were the cause. Thus the causation question would really be resolved by an implicit reference to those moral judgments without further inquiry into whether they ought to control legal decision. But Hart and Honoré themselves recognize that the decision to adopt common judgments about moral responsibility as the basis for legal liability must be a policy decision.[10] Their defense of the traditional view thus stands or falls with their ability to show that the common man distinguishes the cause of harm from other necessary or sufficient conditions of the harm on morally-neutral grounds that derive solely from the ordinary meaning of causal terms.

Hart and Honoré argue that "cause and effect" is an empirical notion with a core meaning derived from standard cases. We apply causal

4. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 239 (1971). *See also* McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 153 (1925), who provides an exception to the general principle in a situation where two independent causes concur and each of them would have been sufficient to cause the identical result.

5. *See generally* W. PROSSER, *supra* note 4, at 244-46.

6. H. HART & A. HONORÉ, *supra* note 2, at 3-6, 85-89. *See generally* Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920).

7. H. HART & A. HONORÉ, *supra* note 2, at 86.

8. *Id.*

9. *Id.*

10. *Id.* at 62.

language in other cases by analogy to the standard cases. No one, therefore, can give a single all-inclusive definition of causation. To understand the meanings of causal terms we must look to the standard case and the analogies extending causal terms to other cases.[11]

For Hart and Honoré, the paradigm case of "cause and effect" is this: A human being by a positive action manipulates an object to produce a desired effect.[12] This gives us the core meaning of causation:

> Common experience teaches us that, left to themselves, the things we manipulate, since they have a "nature" or characteristic way of behaving, would persist in states or exhibit changes different from those which we have learned to bring about in them by our manipulation. The notion, that a cause is essentially something which interferes with or intervenes in the course of events which would normally take place, is central to the common-sense concept of cause . . . .[13]

Ordinary usage shows what is crucial in the paradigm case. We commonly call negative conditions and omissions causes, although they exert neither force nor movement. The central notion cannot therefore be one of force or movement; instead the central notion must be that of a change in the ordinary or normal course of events.[14] One's failure to take ordinary or normal precautions against harm can therefore be seen as the cause of the harm not prevented.[15]

Hart and Honoré claim that this notion of causation as a change in the normal course of events provides one of the two bases in ordinary usage for distinguishing between the cause or causes of an event and "mere [necessary] conditions."[16] This distinction, they claim, is "explanatory"—based solely on common sense notions of causation—and not "attributive"—based on notions of moral responsibility.[17] The first way to distinguish cause from mere condition is to determine which conditions are normal and which abnormal. "[Normal] conditions which are present as part of the usual state or mode of operation of the thing under inquiry" are mere conditions.[18] The abnormal condition that "'makes the difference' between the accident and things going on

11. *Id.* at 24-26.
12. *Id.* at 27.
13. *Id.*
14. *Id.* at 27-29.
15. *Id.* at 35-36.
16. *Id.* at 30-31.
17. *Id.*
18. *Id.* at 32-33.

as usual" can qualify as "the cause."[19] The second way to discover the cause is to look for "a voluntary human action intended to bring about what in fact happens."[20] That act qualifies as a cause, whether or not it is abnormal and regardless of the existence of abnormal necessary conditions that could qualify as causes under the first test.[21]

Hart and Honoré cannot support the claim that their distinction between cause and mere conditions derives solely from the common sense notion of causation without reference to noncausal notions. The first way to identify mere conditions (by distinguishing between abnormal and normal necessary conditions) suffers from a defect in their prior analysis of the common notion of causation. They say that the actor's manipulation of an object in the paradigm case is a cause because it changes the "normal course of events." By analogy, one's failure to take normal precautions to prevent harm is a cause, too, because it changes the "normal course of events." Not all omissions that are necessary conditions of the event are causal, then: only omissions of normal or ordinary precautions qualify.

Hart and Honoré's argument plays on an ambiguity in the phrase, "normal course of events." In describing any purely physical system, the "normal" course of events is the expected course of events, at least theoretically predictable by reference to general rules of physical causation. In describing human activity, the "normal" or expected course of events refers to traditional or habitual behavior, predictable only because that is the way people in general or one person in particular have in the past chosen to act.[22] Hart and Honoré shift from the first meaning to the second in moving from the paradigm case to the case of causation by omission. This can be seen by reading the meaning assigned it in the omission case back into the paradigm case. Assume I normally make tea every morning by boiling water and pouring it into a cup with a tea bag. Those acts, clearly causal in the paradigm sense, would not be causal under the meaning assigned to "normal" in the omission case. This drastic change in the meaning of "normal" in the two cases undercuts Hart and Honoré's claim that the core meaning of causation

19. *Id.* at 33.

20. *Id.* at 39.

21. *Id.* at 38-41.

22. Even an extreme behavioristic assumption will not equate these two meanings of "normal" since the behaviorist would have to say that an individual's failure to take a normal precaution is determined and theoretically predictable by reference to general "scientific" laws of human behavior.

in the paradigm case applies by analogy only to omission of a "normal" precaution. Once they eliminate the element of forceful intervention from the core meaning of causation, all that Hart and Honoré can mean by saying that the actor's manipulation in the paradigm case changed the normal course of events is that without the manipulation events proceeding according to ordinary physical laws would have been different. But that, of course, is just the old notion of a cause as a necessary condition of the event in question. And that notion provides no basis for saying that my omission of a "normal" precaution to prevent your injury is any more of a cause than Joe Doak's omission of an extraordinary precaution. To say that my omission, rather than Joe's, is *the* cause is just to say that I am morally responsible for your injury and Joe is not.

Hart and Honoré's second basis for distinguishing cause from mere conditions also depends on noncausal notions. Under their theory, the same physical act could be the cause or a mere condition of harm depending solely on the intention of the actor. If John drives "normally" down the street and hits a child who runs in front of his car, John's driving may not be the cause of the harm under Hart and Honoré's theory. If John saw the child a long way off, saw that their paths would collide, and continued on intending to hit the child, his driving would be the cause of the harm. Hart and Honoré's claim that we distinguish the two cases in causal terms is puzzling. Ordinarily, we apply causal terminology interchangeably to accidental and intentional conduct causing harm: Thus, we say (1) "John hit him and broke his jaw," and (2) "John hit him accidentally and broke his jaw." The inclusion of the modifier "accidentally" does not change the causal claims,[23] and we would still say "John hit him and broke his jaw" even when John's conduct was "normal" in all respects. The basis for the distinction between the first and the second case must be something other than the common sense meaning of causation.

One need not look far to discover the basic concept underlying Hart and Honoré's attempt to distinguish causes from mere conditions. The common man has a well-developed sense of justice: each of us ought to give to others what is their due.[24] One who fails to give another his due has wronged him. Tort law developed to provide redress for private

23. *Cf.* Pitcher, *Hart on Action and Responsibility*, 60 *Philosophical Review* 226, 233-35 (claim that *A* hit *B* not defeated by saying it was accidental).

24. *See generally* H. Sidgwick, THE METHODS OF ETHICS (5th ed. 1893), *reprinted as The Common Notion of Justice: Analysis*, in JUSTICE & SOCIAL POLICY 3 (F. Olafson ed. 1961).

injustices: one who has harmed another by conduct insufficiently respectful of his personal dignity (what is his due) ought to compensate the victim to redress the private injustice. One who voluntarily acts intending to cause harm to another obviously has not given him his due. To say that the actor is the only cause of the harm is just to say that he alone wronged the victim. Similarly, one who does not intend harm, but whose abnormal or unexpected behavior harms another, has not given the victim his due, for the victim could reasonably expect normal behavior, and the abnormal behavior therefore indicates disrespect for his personal dignity. Here again, to say that the actor is the only cause of the harm is just to say that he alone wronged the victim. Common sense notions of justice are at work here, not common sense notions of causation.

III. EPSTEIN

In 1973 Richard Epstein published an interesting article[25] attempting a unified theory of torts based on a theory of causation similar to that of Hart and Honoré. Epstein set out "to develop a normative theory of torts that takes into account common sense notions of individual responsibility."[26] He argued that neither a theory of moral blameworthiness nor a theory of economic efficiency can provide an adequate theoretical base for tort law: the first because we traditionally impose tort liability on a number of defendants such as the insane who are not morally blameworthy; the second because there are no scales to weigh the factors that must be weighed to decide in accordance with the goal of economic efficiency; and both because neither provides a basis for decision when the conduct of both parties is "reasonable" under their relevant criteria.[27] Epstein therefore proposes that a prima facie sufficient reason for imposing liability in tort is that the defendant caused the plaintiff harm.[28] To support this theory, Epstein then has to show

25. *See* note 3 *supra*. Before Epstein published his work on causation, Abraham Harari used Hart and Honoré's distinction between abnormal conditions that count as causes and normal conditions that are mere conditions to elaborate his theory that the question of negligence ought to be part of a broader, purely causal inquiry. A. HARARI, THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS (1962). To Harari the only important question is whether defendant's conduct was an abnormal condition and hence a cause of the harm. Insofar as Harari accepts without further analysis the causal theory of Hart and Honoré, his analysis of causation suffers from the same basic defects as theirs.

26. Epstein, *supra* note 3, at 151.

27. *Id.* at 153, 156-57.

28. *Id.* at 157-60.

that "the term causation has a content which permits its use in a principled manner to help solve particular cases. . . . [The concept of causation] must be explicated and shown to be a suitable basis for the assignment of responsibility."[29]

Epstein argued that the sine qua non or "but for" test—would the harm have occurred without the defendant's conduct?—does not correspond to the ordinary meaning of causation because the causation question asks what *did* happen and the sine qua non test asks what *would have happened* had things been otherwise.[30] The same view of causation that led Epstein to reject the "but for" test led him to argue that omissions cannot be causes. An omission is not something that happened; therefore it cannot be a cause since the causation question asks what *did* happen.[31]

Epstein's conclusion seems inconsistent with his announced method of explicating the common sense notion of causation: We often speak of omissions as causes, even in cases where the one who omits a precaution has not himself created the dangerous condition. Here, Epstein differs from Hart and Honoré,[32] Becht and Miller,[33] and John Stuart Mill,[34] who all agree that the common man recognizes omissions as causes. Hart and Honoré's examples ring true to ordinary usage: We say "the failure of the gardener to water the flowers caused their death,"[35] and the "signalman's failure to pull the lever was the cause of the accident."[36] Moreover, Epstein himself does not consistently adhere to his argument. In discussing whether an intervening act severs the causal connection between the defendant's conduct and the harm, he argues as follows:

> [A]ssume that the defendant leaves a vase precariously perched on the edge of a high shelf. *Y* picks up that vase and throws it upon the head of the plaintiff who was sitting in a position where he could have been struck by the vase if it had fallen. Here the defendant is not liable because there is no causal connection between his conduct and the plaintiff's harm. *Y* could have caused the same destruction even if that vase had been placed in a safe and stable position in the middle of the shelf. The dangerous

29. *Id.* at 160.
30. *Id.*
31. *Id.* at 190-91.
32. H. HART & A. HONORÉ, *supra* note 2, at 28-30.
33. A. BECHT & F. MILLER, *supra* note 1, at 21-25.
34. *See* H. HART & A. HONORÉ, *supra* note 2, at 15.
35. *Id.* at 35.
36. *Id.* at 15.

potential in the antecedent situation did not "result in" harm to the plaintiff.[37]

What is that but the "but for" test?

But Epstein's arguments suffer from a deeper flaw. He said that the causation question asks what *did* happen. He seemed to assume that causation is something that we can see. But a moment's reflection should convince us that all we see are events. Thus, if we ask what happened and limit the answer to what can be perceived by the senses, we would have to say: *A* hit *B* on the nose and then *B*'s nose bled. To say that *A* caused *B*'s nosebleed is to assert a particular relationship between *A*'s hitting and *B*'s bleeding. We don't see that relationship, we conclude that the events are related in a certain way. If what we mean by causation is that the second event (*B*'s bleeding) would not have happened without the first event (*A*'s hitting), the causal judgment even in this simple case depends on an implicit reference to what would have happened otherwise. And if that is what causation means, there is no logical difficulty in considering omissions as causes. Epstein cannot reject sine qua non as the meaning of causation on the ground that the question of causation is a question of fact without also asserting that only that directly perceived counts as a fact.

Epstein's refusal to recognize that causation is a relationship, not an event, infects the rest of his analysis. Understandably, he refuses to attempt a definition of causation.[38] Instead, he explores four paradigms covered by the proposition *A* caused *B* harm, that he claims exhaust the application of that proposition:[39] (1) *A* hit *B*, (2) *A* frightened *B*, (3) *A* compelled *B* to hit *C*, and (4) *A* created the dangerous condition that resulted in harm to *B*.[40] To avoid the charge of circularity brought against inclusion of the phrase "resulted in" in the fourth paradigm, Epstein limits that phrase to reference to one of the first three paradigms.[41] Thus the fourth paradigm case of causing harm should be restated as follows: *A* created the dangerous condition that either (a) hit *B*, (b) frightened *B*, or (c) compelled *B* to hit *C*. Except for paradigm cases 2 and 4(b), however, these cases are not causal paradigms at all, for they only describe the cause and do not mention the effect: Thus

37. Epstein, *supra* note 3, at 183. Note also his argument about "large" intervening forces. *Id.* at 184.

38. *Id.* at 165-66.

39. *Id.* at 191 (by implication).

40. *Id.* at 166-89.

41. *Id.* at 177.

"*A* hit *B*" simply describes *A*'s action, it does not assert any causal relationship between *A*'s action and *B*'s harm. Similarly, although "*A* compelled *B* to hit *C*" does assert a causal relation between some unspecified conduct of *A*'s (an omission, perhaps?) and *B*'s hitting *C*; it does not assert a causal relation between that conduct and any harm to *C*. And, although the word "created" asserts a causal relationship between *A*'s conduct and a dangerous condition, neither 4(a) nor 4(c) asserts a causal relationship between that conduct and harm to *B* or *C*. "*A* frightened *B*" asserts a causal relationship between some unspecified conduct of *A*'s and *B*'s being frightened; ordinary usage would not limit that conduct to positive acts, as Epstein would have us believe. For instance, we would say: "You frightened me when you didn't call as you usually do."

A charitable reader might protest that Epstein said that these were paradigm cases covered by the proposition, "*A* caused *B* harm." One should therefore supply the missing event for Epstein in each paradigm case: thus *A* hit *B*, causing him harm; and *A* created the dangerous condition that (a) hit *B*, causing him harm, (b) frightened *B*, or (c) compelled *B* to hit *C*, causing him harm. Supplying the omission, however, weakens Epstein's claim that these four paradigms all identify positive acts of *A* and exhaust the meaning of "*A* caused *B* harm." Paradigm cases (2) and (3) are not on their face limited to positive acts by *A*, and if "creation" in paradigm (4) is limited to positive acts (which as a matter of ordinary usage seems probable), the four paradigms do not exhaust the meaning of "*A* caused *B* harm," for *A*'s failure to eliminate a dangerous condition, in ordinary usage, can also be said to have caused *B* harm. By emphasizing the obvious fact that causation is a relationship, not an event, the reformulation highlights these weaknesses in Epstein's argument.

Epstein claimed that the basic rationale for tort liability was this: As between two innocent parties, the one who caused the harm should bear the loss.[42] He recognized that if all necessary conditions are causes of the harm, this rationale can never help in deciding which of the two parties should bear the loss since both parties could always be said to have caused the harm under that test. His failure to make good on his claim that ordinary usage limits the causes of harm to positive human acts of the four paradigm types thus undermines his whole theory.

42. *Id.* at 152, 159-60.

Epstein's ultimate purpose in all this was to formulate a normative theory of torts based on common sense notions of individual responsibility and, in the process, to combat the prevailing utilitarian theories of tort law. That is an admirable purpose with which I am in sympathy. Epstein put up a valiant effort, but it was doomed from the start: common sense notions of causation are not common sense notions of individual responsibility. To carry out Epstein's program, one must analyze and evaluate common sense notions of justice. But American law professors, raised on a steady diet of positivism, find it hard to talk about justice.