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## Hart & Honoré: *Causation in the Law*

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CAUSATION IN THE LAW. By *H. L. A. Hart* and *A. M. Honoré*. London: Oxford University Press. 1959. Pp. xxxii, 454. \$8.80.

What is the meaning, wherever found, of a legal proposition that a given event is to be attributed to a prior contingency if, but only if, the former was *caused by* the latter?

Countless statutory prescriptions and judicial pronouncements are phrased in these simple terms. That the simplicity is deceptive must

surely be understood, for the relevant exegetics are exceeded in their variety only by their bulk. That the lawgiver has so rarely chosen to define the attributive nexus in more precise terms must appear as one of the great curiosities of the law unless it be that he nevertheless assumes the phrase "caused by" to convey a meaning sufficient to his ends. In this country contemporary writers have persuaded themselves, and much of the profession, that in the nature of things the phrase *can* mean nothing more than that the contingency is a *necessary condition* of the event, and that all other considerations which have in the past appeared under the rubric "proximate cause" are properly understood only if filed in different pigeon-holes, "duty," "negligence," "policy" and the like; in short, that nothing useful can be said under the heading "cause" except that one condition or occurrence is *a* cause of another. This view seems to have derived from the realization that any happening is attributable to the coexistence of a very large number of conditions, the absence of any one of which would have forestalled the event, and the conviction that there is no philosophically valid reason for singling out any one of them as "the cause."

Judges, on the other hand, have for many years claimed a common sense rather than a philosophical descent for the concept of cause in its legal aspect. The authors of *Causation in the Law* believe this claim to be sound. They also believe that the "cause in fact" notion does not accurately reflect common understanding of the word "cause." The conclusion is asserted rather than demonstrated, and presumably issues from the authors' own awareness of common sense concepts. In this respect, however, they are on no less firm ground than the authorities whose views they dispute.

When, they argue, an ordinary man in his daily pursuits refers to the cause of an event, he is *not* merely pointing out that absent the one the other would not have occurred. His problem is not that of the philosopher, or of the scientist, who is concerned with *types* of occurrences, and seeks invariable sequences as the bases of general rules. The focus of his attention is, rather, a particular occurrence, a departure from the normal or expected sequence of events, for which he seeks an explanation. The complete explanation would be the entire set of conditions, without every one of which the event would not have occurred. Nevertheless he quite habitually selects one of these conditions and calls it "the cause." In doing so, he identifies to his own satisfaction the factor which *made the difference* between normal course and abnormal event.

This notion of cause is not simple; it is, rather, a group of related ideas. The most elementary is that of the actor who is thought of as having *done* something. Simple transitive verbs are used — push, pull, bend, break — describing an immediate bodily manipulation of a thing. Such manipulations frequently are carried out for the purpose of producing secondary effects, whereupon the terminology of cause and effect first enters. One *pushes* his enemy over the cliff and *causes* his death. These

are the cases where "cause and effect" has its most obvious application; they are also paradigms for the use of causal language in other kinds of cases, many of which are quite different in content from the basic model. The central part played by voluntary human intervention is traced, therefore, to the very root of the concept. The deliberate production of an effect, wherever present, is in itself a sufficient explanation. One need look no farther.

The use of the word "cause" in everyday life, however, extends far beyond these simple cases. The other idea which dominates thinking is the contrast between what is abnormal and what is normal in relation to a given thing or subject matter. When one seeks an explanation for an event, factors which are normal are disregarded, because they do not make the difference. The abnormal factor, which does make the difference, can be thought of as intervening or intruding into an existing state of affairs, and an analogy is seen to the basic case, the deliberate production of an effect. On the other hand, what is normal is not necessarily that which happens naturally. Human intervention may be normal, and an omission to intervene abnormal. The omission, therefore, in certain contexts will be the factor that makes the difference between the usual, expected course of events and the abnormal occurrence. When this is true it achieves causal status.

What creates difficulty for lawyers is the fact that frequently there is found among the conditions required to account for a given harm, in addition to the action of the person whose conduct is being examined, a factor (usually human action or a striking physical phenomenon) which itself has some of the characteristics by which common sense distinguishes causes from *mere* conditions, so that there seems as much reason to attribute the harm to this third factor as to the action of the party in question. The explanation for the idea that such events "break the chain of causation" is that, unlike normal conditions, they seem to destroy the analogy to the simple cause and effect cases. In the case of a voluntary human intervention, for instance, the intervener is not simply an instrument *through* which the remote actor has *done* something. His is a "new action" or "new cause," in itself a sufficient explanation of the event, and a reason for disregarding more remote conditions which are simply part of the set stage upon which *he* has acted. The other type of circumstance which is regarded as breaking the causal chain is that of "mere coincidence." If *A* strikes *B*, who falls to the ground, where he is struck and killed by a falling tree, the conjunction of the two events being very unlikely, occurring without human contrivance, and the second event being entirely independent of the first, common sense regards *A*'s blow as the cause of *B*'s bruise, but not of his death. When an abnormal condition essential to the harm exists *prior* to the act, on the other hand, the unexpected harm is not regarded as coincidence, but is traced to the act, for the abnormal condition is merely part of the subject upon which the actor acts, part of the stage which has been set before his "intervention."

Finally, there is a category of situation which is commonly, but metaphorically, described in causal language wherein the insulating effect of voluntary intervention and coincidence do not operate in the manner just described. This category is designated by the authors "occasioning harm" to set it apart from the cases wherein "causing harm" is the more appropriate term. It includes those cases in which the actor has provided another with a *reason* to do harm, or has provided or abnormally failed to remove an *opportunity* for another or for a natural event to do harm. The use of the latter notion in the law is an extension of the idea, common in non-legal thought, that the neglect of a precaution ordinarily taken against harm is the cause of the harm which thereafter occurs. In such cases the causal connection is *not* negated by those factors which would have that effect in the simpler type of case.

This is a very inadequate outline of the authors' description of the common-sense concept of cause, which becomes the point of departure for an extremely detailed discussion and exemplification of its influence on the solution of legal problems in the areas of tort, contract and crime. In the course of their discussion they also consider, and reject as inadequate to explain the cases, competing analyses of the limits of responsibility in terms of foreseeability and risk, and criticize theories of causation which are current upon the continent. The job done is extremely thorough, with a dogged consideration and reconciliation of problem cases, actual and hypothetical. In details the argument is debatable. The *Palsgraf* decision is attacked under the assumption that it represents a limitation on liability for culpably caused harm, rather than a criterion of culpability. "Foreseeability" appears as something of a straw-man, for it is doubtful that anybody urges it as a limitation in the general terms which are assumed as the basis for critique. There is in some instances a zeal to reconcile cases which suggests excessive commitment to the concept. In the main, however, the book seems to me to present a most revealing and potentially a most useful dissection of common modes of thought which are introduced into a consideration of legal problems, almost unobserved, by the semantics of the situation. When I call upon my own awareness of common-sense concepts to test the thesis, I am forced to conclude that a lawyer's training somewhat beclouds the issue. Nevertheless, the criticism of the "there is no cause but cause in fact" notion as a completely inaccurate reflection of ordinary thought has, for me, a distinct odor of truth. The analysis offers a plausible explanation for the special treatment which judges have always accorded cases involving human intervening causes, although in this respect one puzzle still remains. The authors' proposition is that voluntary conduct (i.e., the free, informed, deliberate act or omission of a human being intended to produce the consequence which is in fact produced, or conduct reckless of that consequence) intervening after the act of the party in question negatives causal connection, whereas involuntary conduct, which is defined to include negligent conduct, does not. It is my impression that, despite the disgrace

into which the last wrongdoer rule has fallen, cases are still decided, not infrequently, in which negligent intervention is held to have that effect. I therefore wonder whether the common-sense view of the situation may not also include within the basic cause model, to an extent which perhaps is incapable of definition, the negligent production of an effect by affirmative conduct.

The authors do not maintain that their common-sense concept of causation is the sole factor which determines legal limits of responsibility for conduct. They concede, and indeed advocate, that the scope of a given rule of liability should be defined with an eye to the policy which the rule was intended to effectuate. What they do contend, however, is that aside from the guidance they have sought in the policy of the rule, courts have responded to the commonly-held view of causation and utilized it as an additional matrix of legal responsibility. This analysis will probably not suggest a different result in very many cases from that which is otherwise achieved. It may, however, be an explanation of the result which is a more accurate reflection of the psychology of decision than that which has heretofore been advanced.

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