CAUSATION AND RESPONSIBILITY*

By Michael S. Moore

I. Introduction: Liability, Responsibility, and Metaphysics

In various areas of Anglo-American law, legal liability turns on causation. In torts and contracts, we are each liable only for those harms we have *caused* by the actions that breach our legal duties. Such doctrines explicitly make causation an element of liability. In criminal law, sometimes the causal element for liability is equally explicit, as when a statute makes punishable any act that has "*caused* . . . abuse to the child. . . ."[1] More often, the causal element in criminal liability is more implicit, as when criminal statutes prohibit *killings*, *maimings*, *rapings*, *burnings*, etc. Such causally complex action verbs are correctly applied only to defendants who have caused death, caused disfigurement, caused penetration, caused fire damage, etc.[2]

One might think that the simple fact that these causation-drenched legal texts exist is enough to justify judges and legal theorists in taking an immediate leap into the scientific and philosophical theories of causation. Such a leap would be based on the supposition that when a legal text uses a word from science and everyday life like "cause," it must then mean for the word to be interpreted in its ordinary or scientific sense. Such a supposition is belied by the practice of most lawyers and legal theorists. Since at least the 1920s in America, the standard educated view has been that "cause" as used in the law is mostly or entirely a legal construct, serving the law's distinctive purposes and not corresponding to the concept that may be employed by other enterprises or disciplines. Specifically, the idea has been that "cause" as used in scientific explanations has little to do with "cause" as used to attribute moral and legal responsibil-

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[1] Annotated Code of Maryland, Art. 27, Section 35A(2).

[2] Argued for in Michael S. Moore, *Act and Crime: The Implications of the Philosophy of Action for the Criminal Law* (Oxford: Clarendon Press, 1993), ch. 8.

ity. The oft-quoted words of Sir Frederick Pollock give one influential expression of this conclusion: "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."[3]

Part of the lawyerly distaste for metaphysical adventures about causation stems from a deep and abiding skepticism about metaphysics in general, whether it be a metaphysics of morals, minds, events, or causal relations. There are several strands to such skepticism. One strand is purely metaphysical: the doubt is that there is any reality to answer questions like, "What is a moral quality?," "What is an intention?," "How do we individuate events?" Another strand is epistemic: even if there are such things as causal relations, moral qualities, mental states, and natural events, and even if such things do possess unitary natures, we less-than-omniscient persons cannot know such things with any certainty. Yet another strand is political: even if there are such things and even if they can be known with certainty by someone, knowledge of such technical matters cannot be very widely shared or easily communicated; as a result, such truths ought to be avoided in designing workable legal institutions, because such truths will be controversial and thus productive of needless conflict.[4]

These kinds of doubts cannot be allayed in the abstract. The only way to allay such doubts is to seek to produce a plausible, understandable, communicable, metaphysical notion of causation. Searching for such a notion is also the only way such doubts can be justified. This basis for lawyerly disdain for the metaphysics of causation, thus, can hardly demotivate my present enquiry.

There does exist, however, a nonskeptical basis for denying the relevance of the metaphysics of causation to the interpretation of legal usages of "cause," and, if correct, this view would demotivate any enquiry such as this. Such a basis begins with the quite correct insight that legal texts are to be interpreted in light of the purposes (values, functions, "spirit," "mischief," etc.) such texts serve.[5] Often such purposes will justify an interpreter in holding the legal meaning of a term to be quite different from the ordinary meaning of the term in nonlegal English. "Malice," for example, means roughly "recklessness" in Anglo-American criminal law, whereas it means spiteful or otherwise bad motive in ordinary English.[6]

[3] Sir Frederick Pollock, *Torts*, 6th ed. (New York: Banks Law Publishing Co., 1901), 36.

[4] Such politics-based skepticism about metaphysics surfaced recently with regard to my use of the metaphysics of events to answer certain questions of criminal law. Compare Samuel Freeman, "Criminal Liability and the Duty to Aid the Distressed," *University of Pennsylvania Law Review* 142 (1994): 1455–56, with Michael S. Moore, "More on Act and Crime," *University of Pennsylvania Law Review* 142 (1994): 1750–59.

[5] On purposive interpretation of legal texts, see Michael S. Moore, "The Semantics of Judging," *Southern California Law Review* 54 (1981): 279–81; and Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review* 58 (1985): 383–88.

[6] On the criminal-law meaning of "malice" in the law of homicide, see Moore, "Natural Law Theory," 332–36.

It is certainly possible that "cause" is like "malice" in this regard. Whether this is so depends on what one takes to be the purpose of those legal texts that use "cause." Consider American tort law by way of example. Following the welfare economics of A. C. Pigou, it became fashionable to think that the purpose of liability rules in tort law was to force each enterprise or activity within an economy to pay its "true costs."[7] Those costs included damage caused to others by the activity as much as they included traditional items of cost like labor, raw materials, capital, etc. The thought was that only if each enterprise paid its true costs would the goods or services produced by that enterprise be correctly priced, and only if such correct pricing occurred would markets achieve an efficient allocation of resources. This came to be known as "enterprise liability" in the tort law of 1950s America.

If the point of tort law were to achieve an efficient allocation of resources, and if such efficiency could be achieved only by discovering the "true costs" of each activity in terms of that activity's harmful effects, then "cause" as used in tort liability rules should mean whatever the metaphysics of causation tells us the word means. For on this theory it is the harmful effects that an activity really causes that are the true costs for that activity; and this rationale thus demands a robust use of some metaphysical view about causation.

Contrast this Pigouvian view of tort law with the post-1960 view of Ronald Coase: tort law indeed exists in order to achieve an efficient allocation of resources, yet such efficiency will be achieved whether tort liability tracks causal responsibility or not.[8] Coase's essential insight was that opportunity costs are real costs too, so that a forgone opportunity to accept a payment in lieu of causing another person some harm already forces the harm-causer to "internalize" all costs of his activities. Such harm-causer need not be liable for such harms in order to have him pay for the "true costs" of his activity; he already "pays" by forgoing the opportunity to be bought off by the sufferer of the harm. As each harm-causer and harm-sufferer decides on the desired level of his activity, he will thus take into account all effects of his interaction without tort liability forcing him to do so.[9]

On this Coasean analysis of tort law, there is simply no need for liability to turn on causation. Rather, either tort liability is irrelevant to efficient resource allocation (in a world of low transaction costs), or tort liability should be placed on the cheapest cost-avoider (in a world where trans-

[7] A late expression of this view of tort law is to be found in Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," *Yale Law Journal* 70 (1961): 499–553.

[8] Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1–44.

[9] I thus put aside those who interpret Coase to be a causal skeptic. (See, e.g., Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 [1973]: 164–65, for an interpretation of Coase according to which the Coasean insight was that we cannot say what is the cause of what.) Coase made a much better point than this "interactive effects" interpretation gives him credit for: it is that causation does not matter for the efficient allocation of resources.

action costs are high) in order to induce that person to take the cost-effective precautions. In either case, legal liability should not track causal responsibility, for even when there are high transaction costs the causer need not be the cheapest cost-avoider.

The irrelevance of causation to efficiency has left economists struggling to make sense of "cause" as used in American tort liability rules. Since no metaphysical reading of "cause" is appropriate to the goal of efficiency, some policy calculus is given as the legal meaning of "cause." Such policy calculus typically generates a probabilistic interpretation of "cause" in tort law, so that any activity that raises the conditional probability of some harm that has occurred is said to have "caused" that harm.[10] For any theory seeking to use tort law to give incentives to efficient behavior in a world of high transaction costs, this probabilistic interpretation is seemingly just what is required. To criticize such probabilistic interpretation of legal cause on the ground that probability is a poor metaphysical account of what causation is, would thus be beside the point . . . if efficiency is the point of tort law.[11]

My own view, undefended here, is that it is not. On my view, the best goal for tort law to serve is that of corrective justice. Such a corrective-justice view of tort law asserts that we all have primary moral duties not to hurt others; when we culpably violate such primary moral duties, we then have a secondary moral duty to correct the injustice we have caused. Tort liability rules are no more than the enforcement of these antecedently existing moral duties of corrective justice.

This corrective-justice view of tort law demands a robustly metaphysical interpretation of legal cause. For legal liability tracks moral responsibility on this view, and moral responsibility is for those harms we *cause*. "Cause" has to mean what we mean when we assign moral responsibility *for* some harm, and what we mean in morality is to name a causal relation that is natural and *not* of the law's creation.

This is even more clearly true of criminal law. If the point of criminal law were the utilitarian point of deterring crime, then a constructed idea of legal cause perhaps could be justified; such a functional definition would take into account the incentive effects of various liability rules. But the function of criminal law is not utilitarian; it is retributive. Criminal law serves the exclusive function of achieving retributive justice.[12] This

[10] See, e.g., Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *University of Chicago Law Review* 43 (1975): 69–108; Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," *Journal of Legal Studies* 9 (1980): 463–503; and William Landes and Richard Posner, "Causation in Tort Law: An Economic Approach," *Journal of Legal Studies* 12 (1983): 109–34.

[11] For a good discussion of the economists' misuse of "cause" to name an increase in conditional probability, see Richard Wright, "Actual Causation versus Probabilistic Linkage: The Bane of Economic Analysis," *Journal of Legal Studies* 14 (1985): 435–56; and Wright, "The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics," *Chicago-Kent Law Review* 63 (1987): 553–78.

[12] Or so I argue in Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997), chs. 2–4.

requires that its liability rules track closely the moral criteria for blameworthiness. One of those criteria is causation of morally prohibited states of affairs.[13] Thus, again, "cause" as used in criminal law must mean what it means in morality, and what it means in morality is to name a relation that is natural and *not* of the law's creation.

Putting aside any policy-based approach to defining "cause" for legal purposes allows us to ignore at least half of the legal literature on causation. For much of that literature is explicit in its eschewal of any attempt to plug in a correct metaphysical account of causation as the legal meaning of "cause." This is certainly true of economists like Guido Calabresi,[14] Steven Shavell,[15] William Landes, and Richard Posner,[16] whose analysis of legal cause (as probabilistic) is not based on the metaphysical view that the causal relation is in fact a probabilistic relation.[17] This is also true of those other descendants of the American Legal Realists, the Critical Legal Studies scholars like Mark Kelman.[18] Such "crits" join the older Legal Realists like Wex Malone,[19] Henry Edgarton,[20] and Leon Green[21] in relegating "legal cause" to the role of a mere label that decorates policy judgments made on strictly noncausal grounds. Such legal tests for causation as the "one house rule" in torts,[22] the "year and a day" rule in homicide,[23] the "harm within the risk" test of both torts[24] and criminal law,[25] the foreseeability test of proximate causa-

[13] See ibid., ch. 5, where I take issue with the Kantian view that our deserts are determined by our culpability ("inner wickedness") and not by the effects of our actions in the real world.

[14] Calabresi, "Concerning Cause" (*supra* note 10).

[15] Shavell, "Analysis of Causation" (*supra* note 10).

[16] Landes and Posner, "Causation in Tort Law" (*supra* note 10).

[17] Contrast the simple, conditional probability analysis used by economists (*supra* note 10) with the more complicated probability analysis of causation by philosophers. See, e.g., Wesley Salmon, "Probabilistic Causality," *Pacific Philosophical Quarterly* 61 (1980): 50–74. No philosopher would propose a simple increase in the conditional probability of an event E by the existence of an event C as an analysis of causation, for that completely fails to distinguish epiphenomena, accidental correlations, and preempted conditions, on the one hand, from true causal relations, on the other. Yet from the point of view of an incentive-based system that eschews any attempt to analyze a pre-legal notion of causation, such an increase in conditional probability may be an appropriate trigger for legal liability.

[18] Mark Kelman, "The Necessary Myth of Objective Causation Judgments in Liberal Political Theory," *Chicago-Kent Law Review* 63 (1987): 579–637.

[19] Wex Malone, "Ruminations on Cause-in-Fact," *Stanford Law Review* 9 (1956): 60–99.

[20] Henry Edgarton, "Legal Cause," *University of Pennsylvania Law Review* 72 (1924): 211–44, 343–75.

[21] Leon Green, *Rationale of Proximate Cause* (Kansas City, MO: Vernon Law Book Co., 1927).

[22] *Ryan v. New York Central R.R.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866). (Railroad liable only for the first house that its negligently emitted sparks ignite, not for each subsequent house that first house, in turn, ignites.)

[23] See Joshua Dressler, *Understanding Criminal Law*, 2d ed. (New York: Matthew-Bender, 1995): 466–67. (A death occurring more than a year and a day from the act of a defendant conclusively presumed not to be the effect of that act.)

[24] See Green, *Rationale* (*supra* note 21). On this test, one asks whether the harm that happened was an instance of the type of harm whose risk made the defendant's action negligent to perform; this is not a causal inquiry, but rather a culpability inquiry.

[25] American Law Institute, Model Penal Code, section 2.03.

tion,[26] and the explicitly ad hoc policy balancing advocated by Edgarton and others,[27] all make no claims to reflecting any underlying reality about causation. They are policy-justified tests that divorce causation in the law from any understanding of causation outside the law. In what follows, I shall thus ignore this part of the legal literature on causation.

What I shall focus on are those cases, doctrines, and legal theories whose authors were at least attempting to get the metaphysics right in their analysis of causation in the law. What I wish to examine in the body of this essay is whether the law that has developed as a result of such attempts in fact contains within it a coherent conception of causation. I do not ask in what follows whether the concept of causation presupposed by the law is true; I ask only whether there is any concept that is sufficiently coherent that it *could be* true.

II. The Seeming Demands of the Law on the Concept of Causation

During the heyday of ordinary-language philosophy, Peter Strawson urged a task he termed "descriptive metaphysics."[28] The idea was that instead of asking how things are, we could ask how a given body of discourse presupposed things are. In other words, we can tease out the metaphysical presuppositions of a body of practices without ourselves committing to the metaphysics of such practices.

This is the task I set for myself in this essay. Without (here) taking a position on what metaphysics of causation is correct, I attempt to describe what the liability doctrines we have in the law presuppose causation to be like. I save for another day the question of whether this metaphysical view of causation is true.

I shall approach the law's presuppositions about causation in two steps. In this section of the essay, I shall take at face value the usages of "cause" by various legal doctrines, here assuming that all such doctrines are what they purport to be, doctrines of cause-based liability. In the next section of the essay, I shall be more critical, throwing out some doctrines on the grounds that they cannot be doctrines of cause-based liability, despite their self-labeling in these terms. This second step allows us to narrow the concept of cause employed by the law to a point where there might be

[26] On foreseeability, see Moore, *Placing Blame* (*supra* note 12), ch. 8. The test purports to ask a single question: Was the harm that happened foreseeable to the defendant as he acted?

[27] Edgarton, "Legal Cause" (*supra* note 20). ("Proximate cause" is the label put on the conclusion of balancing social and individual interests on a case-by-case basis.)

[28] P. F. Strawson, *Individuals* (London: Methuen, 1959). Ordinary-language philosophy (e.g., at Oxford University from 1945 to 1965) went further than I go in the text. Such ordinary-language philosophers as Gilbert Ryle, Ludwig Wittgenstein, and J. L. Austin thought that the *only* metaphysics one can do is the descriptive metaphysics described in the text. For a critique, see Michael Moore, "The Interpretive Turn: A Turn for the Worse?" *Stanford Law Review* 41 (1989): 927–34.

some chance of discovering an answering concept of cause in some plausible metaphysics.

A. Distinguishing causation from mere correlation

Juries are routinely instructed that they must not confuse mere temporal succession between the defendant's act and some harm, with causation between the two. For example, the defendant's negligently maintained transom hit the plaintiff at a certain place on his head; the plaintiff subsequently developed cancer at that spot. Not only is such temporal succession not identical to causation, but such succession is not even very good evidence of causation. Evidence of such succession, without something more, is not enough evidence of causation to get to a jury.[29]

What if the plaintiff introduces evidence that such trauma on heads is *always* followed by such cancers? This may well be enough evidence of causation to get to the jury, but it is still not to be identified as causation. Juries are still instructed that even invariant succession does not inevitably betoken causation.[30] After all, it might be true that there have been and will be only five such head traumas ever, that all five are followed by cancers, and yet, that there is no causal connection between any of these head traumas and cancer. It is universally true that all clumps of gold that ever have existed and that ever will exist are less than a cubic mile in size; yet there is no causal relationship between the fact that some clump is gold and the fact that such clump is less than a cubic mile in size.

Seemingly missing in examples such as the last is any *necessitation* of the second fact by the first. Missing is the kind of necessity seemingly present between the fact that a clump is uranium and the fact that a clump is less than a cubic mile in size. A clump of uranium *cannot* be a cubic mile in size (because it would exceed critical mass); that necessity backs up and explains why, in fact, there never has been a cubic mile of uranium. No such necessity backs up and explains why there never has been a cubic mile of gold.[31]

Thus, universal correlation cannot be identified as causation (even if the former is good evidence of the latter). Needed is some kind of necessity explaining why there is a universal correlation between two types of events such as head traumas and cancers.

Surprisingly, perhaps, such universal correlation backed up by some kind of necessity is still not to be identified as causation. For yet to be

[29] See, e.g., *Kramer Service, Inc. v. Wilkins*, 184 Miss. 483, 186 So. 625 (1939).
[30] Although *invariant* succession is admissable as good evidence of causation.
[31] The example is David Armstrong's in his argument that accidentally true generalizations must be distinguished from true causal laws. See Armstrong, *What Is a Law of Nature?* (Cambridge: Cambridge University Press, 1983).

ruled out is the problem of epiphenomenal correlations.[32] In the case of the head trauma and the cancer, suppose it were true that the kind of cancer involved is caused by, and can only be caused by, the kind of blow the defendant inflicted. Suppose further that the contusion on the victim's skin is not only caused by such a blow, but also it can only be caused by such a blow. Since the cancer takes longer to develop than the contusion, the cancer of necessity always succeeds the contusion, and thus one might think that the contusion caused the cancer. Yet we know this is false: the blow caused the cancer (it's my hypothetical) as well as the contusion, but the contusion is merely epiphenomenal to the cancer—in which case a universally true correlation, and one which is backed by a kind of necessity, is still not to be equated with causation.

All of this is, of course, quite commonsensical and not peculiar to the law's use of "cause."[33] Yet in its requirements that a jury be attuned to the possibility that a temporal sequence (no matter how universal and necessary) may not be a causal sequence, the law adopts common sense without change.

B. Distinguishing between equally indispensable conditions: The cause/condition distinction

The law, like common sense, assumes that causes necessitate their effects, as we have seen. They, in that sense, "make" such effects happen. The law also joins common sense in thinking that usually causes make a difference. This is expressed by the law in its widely used *sine qua non* doctrine, a doctrine which requires a jury to ask, "But for the defendant's acts, would the harm have happened?"[34]

An immediately obvious problem (for the idea that a cause is that which makes the difference for the happening of some effect) is that there are so many such conditions.[35] Sir Francis Drake could not have defeated the Spanish Armada without ships, without the lumber with which to build such ships, without oxygen in the air in England, without a Queen with some backbone, etc., etc. If all such conditions necessary to the happening of some event x are causes of x, then every case of causation is a case of *multiple* causation. (Such garden-variety multiple cause cases are

[32] For discussions of the epiphenomena problem, see Salmon, "Probabilistic Causality" (*supra* note 17); David Lewis, "Causation," *Journal of Philosophy* 70 (1973): 556–67; and Jaegwon Kim, "Epiphenomenal and Supervenient Causation," in *Midwest Studies in Philosophy IX: Causation and Causal Theories*, ed. Peter French, Theodore Vehling, and Howard Wettstein (Minneapolis: University of Minnesota Press, 1984).

[33] For a discussion of how law, morals, common sense, and science all converge to distinguish correlation from causation, see Moritz Schlick, "Causality in Everyday Life and in Recent Science," *University of California Publications in Philosophy* 15 (1932): 99–125.

[34] This is the dominant test for cause-in-fact in both torts and criminal law in America. See, e.g., *New York Central R.R. v. Grimstad*, 264 F.2d 334 (2d Cir. 1920); and American Law Institute, Model Penal Code, section 2.03(1).

[35] See Moore, *Act and Crime* (*supra* note 2), 267–76.

to be distinguished from the overdetermination kind of cases discussed in the next subsection.)

John Stuart Mill, with whom this problem is most famously associated, took exactly this view.[36] Each temporally present necessary condition had equal claim with every other such condition to be called the cause of some happening, in any suitably scientific sense of "cause." Mill relegated the discrimination we do make in ordinary speech, between "the cause" and "a mere background condition," to pragmatic features of the contexts in which such things were said. If we are doctors, we pick out the factors that we can treat; if we are moralists, those that are blamable; if we are historians, those that have appeal to normal human interest, as "the cause."[37] In reality, Mill held, all such conditions together constituted the cause.

It is often said that the law is much more discriminating than science in its usages of "cause."[38] This is easy to show with regard to temporally successive chains of conditions; as I shall explore later, the law's concept of cause presupposes that causation both tapers off over time and breaks off suddenly at certain points in time.

It is rare, however, that the law actually discriminates between *temporally co-present*, equally necessary conditions—what I am calling the ordinary, garden-variety multiple cause situations. It is only with its occasional "sole cause" doctrines that the law discriminates between equally necessary conditions, honoring one but not others as "the cause." Thus, one version of the irresistible-impulse test of insanity asks whether "the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*."[39] Similarly, one version of the abuse-of-process tort imposes liability only if the improper ("abusing") motive was the *sole* reason motivating the defendant's use of court process. Since there are always other co-temporal conditions necessary for the actions at issue in these cases, and yet liability is imposed despite this multiplicity, the law presupposes some criterion for distinguishing causes from merely necessary conditions.

C. *Preserving the possibility of overdetermining causes*

A well-known conundrum in the law concerns what are often called the overdetermination cases.[40] These are what might be called the exotic

[36] John Stuart Mill, *A System of Logic*, Book III, ch. V, section 3.

[37] For a discussion of these pragmatic features in various contexts, see Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970).

[38] Jeremiah Smith, "Legal Cause in Actions of Tort," *Harvard Law Review* 25 (1911–12): 104.

[39] *Parsons v. State*, 81 Ala. 577, 597, 5 So. 854, 866–67 (1887).

[40] The best contemporary legal discussion of these cases is to be found in Richard Wright, "Causation in Tort Law," *California Law Review* 73 (1985): 1775–98. Overdetermination cases are to be distinguished from garden-variety multiple cause cases. In the latter, no one event or state is sufficient to produce the harm, because more than one event is individually necessary to produce the harm. Such sets of individually necessary, only jointly sufficient conditions, are very frequent and may well be the most frequent kind of case. Wright

variety of multiple cause cases, in contrast to the garden-variety multiple cause cases discussed in the previous subsection. These are cases where there is more than one set of conditions sufficient to bring about the harm, in which case neither set is necessary to the occurrence of the harm. The law rather crisply assumes: (a) that we can distinguish concurrent overdetermination cases from preemptive overdetermination cases; (b) that for the concurrent type cases, each set of sufficient conditions is regarded as the cause of the entire harm; (c) that for the preemptive type cases, we can distinguish preempting causes from preempted factors; and (d) that preempted sets of sufficient conditions are not causes of the harm and that preempting conditions are causes of the harm.[41]

Thus, in the much-discussed "two fire" cases, where each fire is sufficient to destroy the building that has burned to the ground: (a) we should distinguish concurrent cases where the two fires join, and the larger fire resulting from this then burns down the structure,[42] from preemptive cases where one fire arrives first and burns down the structure, leaving nothing to be burnt by the second fire when it arrives; (b) when the fires join (the concurrent case), each fire is the cause of the destruction of the building; (c) where the fires do not join (the preemptive case), the first fire preempts the ability of the second fire to cause the building's destruction; and (d) therefore, in the latter case, only the first fire is the cause of the harm, and the second fire is not a cause of the harm.

With regard to (a) above, there is some ambiguity as to how we are to classify what I shall call *asymmetrical* overdetermination cases. That is, suppose the fire set by the defendant is much smaller than the second fire; the two join as before and the resultant fire destroys the structure. The second fire would have been sufficient by itself to have destroyed the structure, but the defendant's smaller fire would not have been, since it would have been extinguished by the available equipment before it could have destroyed the structure. There is some authority for the proposition that the larger fire is a preemptive cause, not a concurrent cause, and that therefore the defendant's fire is preempted as a cause of the harm.[43] Preferable, I think, is Richard Wright's view: these are concurrent causation cases, making both fire-starters liable for the whole damage.[44] Each

mentions (in ibid., 1793) a kind of case intermediate between regular multiple cause cases and the overdetermination variety. If there are three fires, no one of which is sufficient, but any two of which are sufficient, to burn the plaintiff's structure, then no fire is individually necessary to produce the harm. Although I do not separately treat these, we should consider these too to be overdetermination cases.

[41] See ibid.

[42] These are the facts of *Anderson v. Minneapolis St. Paul & S. St. Marie R.R. Co.*, 146 Minn. 430, 179 NW 45 (1920); and *Kingston v. Chicago and N.W. Ry.*, 191 Wis. 610, 211 N.W. 913 (1927).

[43] Cf. *City of Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300 (1918) (negligent maintenance of drainage wickets held not a cause of plaintiff's injury from overflowing reservoir, because the flood would have overflowed the reservoir even if the wickets were not clogged).

[44] Wright, "Causation in Tort Law" (*supra* note 40), 1794, 1800.