

## The Causal Relata in the Law

### Introduction

#### Two questions:

1. Must one unified concept of causation fit both law and science, or can the concept of legal causation differ from the scientific one?
2. An example for diverging: must legal “causes” and “effects” be immanent, i.e. exist in the real world?

### Separating Legal Causation from Scientific Causation

#### The motivation to diverge:

- Causation is more complicated to analyse in law than in science, because it involves both normative and pragmatic considerations.
  - Normative: unlike science, the law has a strong normative element aiming to correct injustices or encourage desired behaviour.
  - Pragmatic: if there is not enough evidence, time or resources to test the hypothesis, then:
    - The scientist can suspend judgement and refrain from any conclusion; but
    - The legal fact-finder must decide because refusing to decide is equivalent to deciding in favour of the defendant.
    - This need to decide explains why the legal fact-finder is equipped with evidential devices (e.g. burdens of proof, presumptions, etc.) that instruct her what to do when she cannot decide.

My argument: the concept of *legal* causation can be analysed without any prior commitment to the nature of causation in general.

#### Two possible lines of arguments:

- Accepting pluralism regarding causation:
  - The pluralist view: since language allows us to describe causation in many different forms, we should follow the language and allow many different accounts of causation to coexist (Schaffer).
    - Application: the usage of causal language is different in law and science. Therefore, two different concepts should be allowed to coexist.
- Even if one rejects pluralism: my argument is still sustainable.
  - The monist's view: causation is a unified concept; the same concept fits both law and science.
    - Attributing anything which is inconsistent with the unified concept of causation to the concept *legal* causation will render the legal concept to not be causation at all.

- Example: if the correct analysis of causation is the counterfactual one, legal causation cannot rely on Mackie INUS causation.
- My answer:
  - *Methodologically*, the investigation of the unified concept of causation must begin in some particular context, and later, be expanded to the other contexts.
    - This should be accepted by the monist, because existing investigations take this approach (by sometimes beginning in a scientific context).
  - My investigation: starts in the legal rather than in the scientific context.
  - If my investigation leads to a successful account causation *in the legal context*, the monist can either:
    - Argue that causation does not apply in law, but only in science.
      - This is a fairly radical move that undermines our current common understanding of both law and responsibility.
        - Both moral and legal responsibility usually rely upon causation.
        - Causation is relied upon in most legal fields (criminal; contract; tort; etc).
    - Accept the account of legal causation as a unified account of causation.
      - If my concept works in one context, then according to the monist, it must work in *any* context.
      - It is up to the monist to complete such a move.
    - Reject my account *even* as a legal concept.
      - This will require the monist to conduct the debate in the legal context.
      - Merely showing that the account of legal causation is invalid in other contexts will not suffice.
      - If my account is sustainable in one context but not in another, maybe what has to be rejected is the monist view...

### Consequence:

- Focus on legal causation and ignore questions about the existence and nature of a unified concept of causation in general.
- As for my own positions in these general questions, I suspend judgement.

**An Example: The Nature of the Legal Causal Relata**

Shift in focus: I try refocusing the legal debate from the nature of the causal *relation* to the nature of the causal *relata*.

- Causal *Relata* = the entities between which a causal relation holds.
- Example: if Alice caused Humpty's death by shooting him, the shooting and the resultant death are the *relata* between which the causal relation holds.

The question: are the causal *relata* in the legal context immanent or transcendental?

- Immanence: X is immanent iff X exists in the real world.
  - Transcendental: X is transcendental iff X is not immanent (no necessary connection to Kant).

In science: the causal relation is usually taken to hold between entities that exist in the real world.

- How to account for omissions? 2 popular answers:
  1. Bite the bullet: to deny causation by omissions/absences.
    - Example: "Omissions and so forth are not part of the real driving force in nature. Every causal situation develops as it does as a result of the presence of positive factors alone." (Armstrong, 1999, pg 177).
  2. Another concept: explain away our intuitions that absences can be genuinely causal by using another concept.
    - a. Examples:
      - i. Dowe: ersatz causation (causation\*).
      - ii. German Law: psuedo-causation.

Becht and Miller (legal scholars): hypothetical causation.

My claim:

- Neither of these two answers suffices for the legal context.
- The causal *relata* in the legal context have to be *transcendental* (see Mellor for the general claim)
- This way, a *single* concept of causation can account for both actions and omissions.

The argument:

1. Omissions do not exist in the real world.
2. Immanent *relata* cannot account for omissions.
3. Omissions must be a possible basis for legal liability.
4. For legal liability, there must be some connection between omission and harm.
5. This connection should be causal.

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The *relata* in the legal context must be transcendental.

- Step 1: Omissions do not exist in the real world
  - Example: A vicious doctor has a life-saving drug in her hand. The doctor sits in a chair near a dying patient who could be saved with drug and does absolutely nothing. The patient dies.
  - Analytical truth: in my view, this is analytically true, so the fact that “not giving the drug” does not exist in the real world is true *by definition*.
  - Yet, proof by negation can be provided (Mellor):
    - Assume the omission (“not giving the drug”) exists.
    - “The doctor did not give the drug” entails “the doctor did not give the drug quickly”.
    - But it *also* entails “the doctor did not give the drug slowly”.
    - Had the omission “not giving the drug” existed, how would “not giving the drug” have been done both quickly and slowly?
  - Negative events:
    - Possible response: one may argue that omissions can be immanent if one accepts that negative events exist in the real world.
    - Answer: instead of arguing for transcendental relata, I can argue that the legal concept of causation must allow negative events as causal relata.

→ Omissions do not exist in the real world; they are not immanent but transcendental.
- Step 2: Immanent Relata Cannot Account for Omissions
  - If causal *relata* are immanent, omissions (transcendental) cannot participate in causal relationships.
  - Our example:
    - The doctor’s action: sitting in a chair.
    - This is not an unlawful behaviour on its own, and, thus, cannot serve as legal relatum.
    - It is the doctor *not* doing something, not giving the drug, which caused the patient’s death.
    - But “not doing something” does not exist in the real world (step 1).
    - Yet, if *relata* are immanent, “not giving the drug” cannot participate in causal relationships.

→ So what in this example can function as the causal relatum *for legal purposes*?
- Step 3: Omissions Must be a Possible Basis for Legal Liability
  - Popular answer 1 (bite the bullet): there is no causation by omission (Armstrong).
  - Our example:
    - Our dedicated doctor should spend less time with his patients and more time in jail.
    - No one can seriously argue that this doctor should walk free only because there is no causation by omission.

- Me: even if omissions have nothing to do with causation, one should still be legally liable for the consequences of one's omission.
  - This step can easily be accepted by the opponents of causation by omission.
- Step 4: There must be Some Sort of Connection between Omission and Harm
  - The mere existence of unlawful conduct of the defendant and harm suffered by the claimant are not sufficient for imposing legal liability.
  - Our example:
    - If a person broke in and shot the patient whilst the patient suffers, the doctor would not be liable for murder (but only for an attempt).
  - ➔ There must be some sort of connection between the conduct and the harm.
- Step 5: This Connection has to be Causal
  - Popular answer 2 (another concept): the connection between the omission and the harm is a non-causal connection.
  - Answer 1: it is far from clear what this new non-causal connection is.
    - This new connection must avoid any reliance of causal notions otherwise the problem of omissions would return by the backdoor.
      - The similarity in names (*pseudo-causation*; *hypothetical-causation*; *ersatz-causation*) seems to be suspicious.
  - Answer 2: (even if such a connection can be properly defined)
    - Setting the argument: either this new non-causal connection leads to precisely the same legal implications as the causal connection, or it does not. No third option.
    - If this new connection leads to the same legal implications as the causal connection:
      - Pointlessness:
        - This new connection is almost identical to the causal connection (because there are no different implications) but it applies to transcendental *relata*.
        - However, if we have already allowed for transcendental *relata*, why insist that causal connection should not be between transcendental *relata*?
      - Parsimony:
        - What is the point, from a legal perspective, in distinguishing between these two concepts of connection (causal and non-causal connections)?
        - Would it not be better, for the sake of conceptual parsimony, to have one unified model of causation, based on transcendental *relata*?
    - If this new connection does not lead to the same implications as the causal connection:

1. Justification: what is the basis for the different legal treatment of our vicious doctor and another doctor who caused death by an action?
2. Description: most actions can be described as omissions and vice versa
  - Example: a car accident can be caused from pressing too hard on the accelerator, or as a consequence of *not* pressing on the break pedal.
  - If the implications between the connections differ each party in a legal litigation will describe the event in the way that fits her interests best.
  - What should be the criteria to determine which description should be used?

#### The argument again:

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The *relata* in the legal context must be transcendental.

#### Summary

1. Must one unified concept of causation fit both law and science, or can the concept of legal causation differ from the scientific one?
  - a. Easily accommodated by a pluralist view of causal concepts.
  - b. If a concept of causation works in the legal context, either the monist view:
    - i. Has to deny causation in the legal context; or
    - ii. Accept the legal concept as the unified concept of causation; or
    - iii. The monist view itself has to be rejected.
2. An example for diverging: must legal “causes” and “effects” exist in the real world?
  - a. A single concept of causation should be used to account for both immanent actions and transcendental omissions. Therefore, the *relata* in the legal context must be transcendental.