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*Contents*

*'Handbook of Firearms and Ballistics-book  
review' by Sally Ramage*

*'Police search warrants' by sally Ramage*

*'Causation and responsibility- book review' by  
Sally Ramage*

**Book review by Sally Ramage**

**Brian J Heard, *Handbook of Firearms and Ballistics*, (John Wiley and Sons Ltd; Oxford 2008).**

**ISBN 978-0-470-69460-2**

John Wiley and Sons has a series of handbooks written by forensic experts. The aim is to explain to the layperson, including judges, solicitors and barristers, scientific expert knowledge. This handbook on firearms and ballistics is welcome. It is a fallacy, however, to think that, in the past, lawyers did not always grasp such expert knowledge. Case-law shows that there have been very eloquent and astute cross-examination in courts where the case was won because of the barrister's good grasp of such knowledge and ably transmitting this to the jury.

In 1878, Charles Peace<sup>1</sup> (featured in Madam Tussauds' waxworks and in a film in 1949 *The Case of Charles Peace*) was charged with shooting a Blackheath police officer with intent to murder. He nearly escaped being charged because John and William Hebron were charged with killing police officer Nicholas Cook on 1<sup>st</sup> August 1878. The Hebron brothers were the original suspects because they had been heard to make threats to kill the police officer Cook for causing their arrest in an earlier incident. There was a boot mark at the scene of crime and police said that it matched a boot worn by the older Hebron brother. Apart from ballistic expert evidence, this 1878 case must have been the first ever shoeprint case, some 130 years before the established UK police shoeprint database. Evidence was called to prove that William Hebron had tried to buy gun cartridges at a local ironmonger's. Evidence was called of someone who claimed to have seen William Hebron near the crime scene minutes before the police officer's death. However, there was evidence that the two brothers were working at a nursery. Their death sentence was reduced to life after a successful petition by local residents.

Charles Peace later confessed to this murder of police officer Nicholas Cook. On 29<sup>th</sup> November 1876, Charles Peace had shot and killed Arthur Dyson, an engineer employed by the North-Eastern Railway. Charles Peace was not arrested and went on to live the life of a music-loving man in a respectable neighbourhood. However, he was arrested one night with housebreaking tools in his possession, after which it was discovered that he was the killer in 1876 and he was so charged. What was unique about Charles Peace was not the murders he committed but the disability he was under when he shot and killed two persons, Dyson and Cook, in separate incidents. At an early age, Charles Peace injured his left hand and leg whilst employed in a mill. He coped with his disability by concealing the injured hand under his coat and wearing a false arm in his sleeve, terminating with a hook. Charles Peace killed his victims by strapping his revolver to his wrist!

Handguns have been used since 1247<sup>2</sup> and the first recorded use of a hand cannon appeared in 1449 in the form of an illustration of a mounted soldier with a hand cannon resting on a fork attached to the pommel of the saddle.

Firearms are governed by the Firearms Act 1968, the Firearms Act 1982, the Firearms (Amendment) Act 1988, and the Firearms (Amendment) Act 1997. Firearms offences include:

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<sup>1</sup> See also David Ward, *King of the Lags: The Story of Charles Peace*, (Elek Books, London 1963).

<sup>2</sup> See Will Fowler, Anthony North and Charles Stronge, *The History of Pistols, Revolvers and Submachine Guns: The Development of Small Firearms, from 12th-century Hand Cannons to Modern-day Automatics*, (Southwater, London 2008).

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- 'possession with intent to endanger life' as per the Firearms Act 1968, section 16;
- 'possession with intent to cause fear of violence' as per Firearms Act 1968, section 16A;
- 'using firearms to resist arrest' as per the Firearms Act 1968, section 17(1);
- 'possessing firearm while committing a Schedule 1 offence', as per Firearms Act 1968, section 17(2) (Schedule 1 offences being damage, assaults and wounding, rape and other sexual/abduction offences, theft, robbery, burglary, blackmail and taking a conveyance). Other firearms offences include:
  - 'trespassing with firearms' as per the Firearms Act 1968, section 20(1);
  - 'trespassing with firearm on land', as per Firearms Act 1968, section 20(2);
  - 'having firearm with intent to commit an indictable offence or resist arrest', as per Firearms Act 1968, section 18(1);
  - 'having firearm or imitation firearm in a public place', as per Firearms Act 1968, section 19;
  - 'using someone to mind a weapon' as per the Violent Crime Reduction Act 2006, section 28(1);
  - 'possession or acquisition of firearms by certain people', as per Firearms Act 1968, sections 21 to 24; and
  - 'shortening and conversion of firearms', as per Firearms Act 1968, section 4(1).

*The Handbook of Firearms and Ballistics* by Brian J Heard has ten chapters, the topics being: firearms; ammunition; ballistics; forensic firearms examination; range of firing estimations and bullet hole examinations; gunshot residue examination; gun-handling tests; restoration of erased numbers; qualifying the expert and cross-examination questions and classification of firearm-related deaths.

One thing that the Charles Peace case in 1878 demonstrates is that violence and the possibility of injury make robbery a serious crime and this is the reason why the criminal justice system responds to such violence by punishing such robberies more harshly. Robbery violence is a by-product of robbery encounters. A literature review reveals that in modern times, there is a connection between drugs and crime and a rising homicide rate in young people<sup>3</sup>. In the classical sub-cultural perspective, lower-class communities generate a distinctive amoral world, which glorifies and legitimates aggressive behaviour, especially young men. There are high homicide rates, especially in disadvantaged communities. Scholars are aware of homicides they term 'retaliatory homicides', and 'cultural retaliatory homicides', due to problematic policing, neighbourhood culture, interpersonal violence, poverty, unemployment and disadvantage. The power that weaponry confers is another factor in gun crime, which requires expert knowledge to bring about successful convictions. Guns are being used as a symbol of power to achieve goals by inducing compliance with the user's demands. Firearms and ballistics remain a male past-time.

To achieve successful conviction, prosecutors need to understand the basics of firearms and ballistics and this book by Heard is fit for that purpose. It is good that the barrister, police officer, solicitor and layperson understand some of the ways that conviction is secured.

Evidence is rapidly lost from the surface of hands and within three or four hours, all gun shot residue ('GSR') particles will have been lost from the hands. Brian

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<sup>3</sup> See BBC Online, "Youth guilty of cross-fire murder", BBC, 22.05.2008; BBC, "Boy, 13, hid guns for gang member", 30.01.2009.; Philip J. Cook and Jens Ludwig, *Gun violence: the real costs*, (OUP, Oxford 2002); Daniel Friedman, *Saving our children: an in-depth look at gun violence in our Nation and our Schools*, (Authorhouse, London 2006).

Heard explains it well on page 259 of his book: '*... the GSR vented from the breech end of a pistol is of low velocity. In addition, as such, particles can only be found on the surfaces immediately surrounding the breech of the weapon, that is, the hands. The likelihood of any GSR particles being found on any of these alternative sites, unless a strong wind is blowing towards the firer, is therefore small*'.

Using the 'Jill Dando' murder case example, in which Barry George was prosecuted for her murder; Brian Heard reminds us that the Criminal Cases Review Commission<sup>4</sup> had found that Barry George had a right to a retrial<sup>5</sup> because his conviction was founded on a single particle residue. The court of appeal found that, at his trial, the jury had been misled about the significance of a single microscopic speck of GSR found in the lining of an inside pocket of Barry George's overcoat. Brian Heard explains what particles are to be flagged for further investigation, eliminated from further investigation and which potentially negative samples are. He explains that in the Barry George murder prosecution<sup>6</sup>; there were 200 fields that must be examined on the sample stub.

Chapter 4, on forensic firearms examination, is a fascinating chapter. Since 1900, there has been an established firearm identification process. The Buffalo Medical Journal had then published an article, which revealed that bullets fired through different makes and types of weapon, of the same calibre, were impressed with rifling marks of varying type. Today, experts can reveal whether there was an accidental discharge by faulty lock mechanism, failure of the safety mechanism or inadvertently pulling the trigger, especially when the weapon is violently pulled away from the person holding it. In sum, this book has been very enlightening. It illustrates that a highly technical subject can be explained to a non-expert. It is a useful reference book for lawyers.

## **POLICE SEARCH WARRANTS**

by

**Sally Ramage**

This article will address searches under police and criminal evidence act sections 8.

### **Police and Criminal Evidence Act, section 8**

Section 8<sup>7</sup> provides magistrates with the power to issue search warrants to search premises. Section 8 sub-section 1 provides the conditions under which a section 8 search warrant will be granted. There must be reasonable grounds for believing that an indictable offence under the Immigration Act 1971 has been committed and that there is relevant material on the premises that will assist the investigation of the offence. Of course, such material excludes legal privilege material.

Subsection (1A) provides for the warrant to cover more than one premises and subsection (1C) provides that the warrant may cover more than one visit to the premises.

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<sup>4</sup> The Commission is an independent body established under the Criminal Appeal Act 1995.

<sup>5</sup> In light of fresh scientific evidence about firearms residue. See Duncan Campbell, "George granted retrial in Dando murder case", *The Guardian*, 15.11.2007.

<sup>6</sup> See the retrial case-law *George v R* [2007] EWCA Crim. 2722; There was a possibility of innocent or adventitious contamination of the coat with the particle by the police.

<sup>7</sup> Police and Criminal Evidence Act 1984, s 8 as amended by the Immigration and Asylum Act 1999, Schedule 14, the Serious Organised Crime and Police Act 2005, sections 113 and 114 and Schedule 7 and the Finance Act 2007, section 86. The way that such police searches are conducted is ruled by Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises (Code of Practice B), Police and Criminal Evidence Act 1984.

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Subsection 2 authorises the police to seize and retain anything for which the search has been authorised. Subsection 3 gives the conditions under which the section 8 search warrant is applied for.

The section 8 search warrant may be sought if it is not practicable to communicate with the owner of the premises or that it is known that entry will be refused without a search warrant or that if entry is applied for from the owner, the purpose of the search will be frustrated. Annex B of PACE provides additional guidance on s8 PACE search warrant provisions. Search warrant provisions are an important part of the legislation, making the search warrant compatible with human rights.

### **Search warrants per Asylum and Immigration Act 1996, Chapter 49**

The Asylum and Immigration Act 1996 stipulates in section 1 to 3 that,  
“(1) A constable or immigration officer may arrest without warrant anyone whom he has reasonable grounds for suspecting to have committed an offence to which this section applies.

(2) If—

(a) a justice of the peace is by written information on oath satisfied that there is reasonable ground for suspecting that a person who is liable to be arrested under subsection (1) above is to be found on any premises; or

(b) in Scotland, a sheriff, or a justice of the peace, having jurisdiction in the place where the premises are situated is by evidence on oath so satisfied,  
he may grant a warrant authorising any constable to enter, if need be by force, the premises named in the warrant for the purposes of searching for and arresting that person.

(3) The following provisions, namely—

(a) section 8 of the Police and Criminal Evidence Act 1984...”

### **Human Rights**

Issues of compliance with article 8 and art 14 of the Human Rights Act 1998 will inevitably arise and the warrant may sometimes be challenged. Any entry, search and seizure, unless performed strictly by the rules could be challenged as a breach of the Human Rights Act 1998. Challenges of searches made under common law have often been made and a notable challenge was the case of *James Hewitson v Chief Constable of Dorset Police Force*<sup>8</sup> when it was found that the circumstances of the search and seizure of items without warrant from premises, in the context of extradition proceedings, fell outside the common law powers of search and seizure prescribed by authority.

### **Personal injury suffered because of a search**

There have been claims made that the carrying out of a search warrant has caused psychological injury and such a case, though unsuccessful, was the case of *Hayley Kennedy v Chief Constable of Merseyside*<sup>9</sup>. In this case, the claimant Hayley Kennedy sustained psychiatric injury after police officers forcibly entered her home under a search warrant to arrest her boyfriend was not entitled to damages as there was no evidence demonstrating a lack of reasonable and probable cause for obtaining the warrant. However, the search of a home for the prevention of crime was held to be compatible with the European Convention on Human Rights 1950 Article 8 if the search was conducted in accordance with a judicially issued warrant.

### **Judicial Review**

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<sup>8</sup> The Times, 6 January 2004.

<sup>9</sup> Liverpool Crown Court 28<sup>th</sup> April 2004.

The case of *Philip Graham Bell v Chief Constable of Greater Manchester*<sup>10</sup> established that the correct procedure for challenging a search warrant is by judicial review<sup>11</sup> which assures the public that the country is run by 'rule of law' and represents a check on any alleged abuse of powers by ministers and other officials of the United Kingdom.

### Judicial Review of the Judicial Review Procedure

A matter not yet addressed by any of the United Kingdom police forces is the application for a judicial review of the judicial review procedure in force. Indeed, the intensity of judicial review of corporate decisions is the central issue of corporate law. The constraints of such a challenge are, on one hand, the deference by judges to decisions of business managers that is reflected in the business judgment rule, and on the other side, the intrusive judicial involvement by which the court asks the corporation or other defendant to prove the intrinsic fairness of the transaction. This has occurred in other European countries and such cases have been heard in the European Court of Human Rights in Brussels.

One instance of this is the corporate case decided on July 17 2006, *Benno Paul Hafner v Attorney General, Isle of Man*, in which a Swiss lawyer challenged the exercise of a statutory discretion on the part of the attorney general for the Isle of Man in issuing an application seeking a summons in terms of Section 21 of the Criminal Justice Act 1991 of Tynwald, ("the Act") to require the examination of witnesses and the production of documents from corporate service providers in the Isle of Man pursuant to an ongoing criminal investigation in Australia into the affairs of several individuals and alleged contraventions of certain Australian securities and investment legislation between 1991 and 1995. The review consisted of a review of the relevance of similar requests being made in several other jurisdictions; the nature and breadth of questions being put to the potential witnesses in the Isle of Man; the death of one of the parties under initial investigation in Australia; and the time within which the court needs to review the exercise of the attorney general's decision when an application is made in terms of Section 21 of the Act. The court also reviewed arguments in terms of Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights, having been satisfied that the provisions of the convention had application.

### Technical sloppiness

This case involved both a section 9 PACE warrant and a section 8 PACE warrant. The section 8 warrant was applied for when it became necessary for the police to search other premises, including the Redcap's family home in relation to a fraud. The section 8 warrant was granted and it was executed whilst Mr. Redknapp were abroad. It was executed in the presence of newspaper reporters, a clear breach of the Redknapp's privacy rights, especially because Mrs. Redknapp was at home at the time, if the police had tipped off the press as to the time and place of the search. The Redknapps challenged the issuing of the warrant, the contents of the warrant<sup>12</sup> the jurisdiction of the warrant and the wide description of the material that was to be searched. Since section 8(3) PACE which described preconditions to be met, were not performed, the automatic result found by the judge, was that the warrant was unlawfully issued, invalid, and must be quashed. This case of *Harry James Redknapp and Sandra Redknapp v Commissioner of Police of the Metropolis, City of London Magistrates' Court, William McKay, Peter Storrie, Milan*

<sup>10</sup> [2005] EWCA Civ 902

<sup>11</sup> These are heard in a special Administrative Court by one of eighteen High Court judges (sitting at the Queen's Bench Division) who have special expertise in public law. Under Order 53 Rule 4(1) Civil Procedure, an application for leave to apply for a judicial review must be made within three months of the date at which the grounds for the application first arose, unless the court considers that there is good reason for extending the period.

<sup>12</sup> The police had not completed the application form correctly and had not indicated which of the four conditions required as per s8 (3) PACE, was applicable. The warrant did not include the home address of the Redknapp's as one of the premises to be searched, giving no indication that this was a private home.

*Mandaric and Amdy Faye*<sup>13</sup>, held that a warrant to search the business premises of the football manager, Harry Redknapp, was issued unlawfully.

### Conclusion

Care must be taken in completing the application form for a search warrant. The defence lawyers must pay due attention to the technicalities involved in such a search.

### BOOK REVIEW BY SALLY RAMAGE

**Michael S. Moore, *Causation and responsibility*, (Oxford University Press, Oxford 2009)**

**ISBN 978-0-19-925686-0**

This book by Michael S. Moore is actually a compendium by all the author's presented papers on the subject over the years, nicely woven into twenty chapters. The topics it covers are *causation in the legal liability doctrine; moral blame; agency in morality and the law; characteristics of the law; the concept of causation; negligence; torts of negligence; proximate causation; the doctrine of intervening causation; accomplice liability; and the theories of causation.*

### Causation and Legal Responsibility

When rules of law attributing responsibility for harm caused are formulated in statutes, regulations and judicial decisions, the word 'cause' is often used. The notion that causal connection between agency and harm must be established is however often implied even when the word is not used. This is true, for example, of the use of verbs such as 'damage', which imply a causal relation between an agency and the harm done. In legal contexts the possible range of agency is not confined to human conduct, but may extend to damage done by the agency of juristic persons, animals, inanimate objects such as motor vehicles and inanimate forces such as fire. In all these instances the use of the notion of cause is central to the legal inquiry, since to establish responsibility it must be shown that the harm was done or brought about by the agency that the law treats as a potential basis for the existence or extent of liability.

The relationship between causing harm and legal responsibility is complex<sup>14</sup>. The complexities concern the *incidence* of responsibility, the *grounds* of responsibility, the *items* between which causal connection must be demonstrated, and the *variety of relationships* that can in some sense be regarded as causal. Much law is concerned with the distribution of social risks. The responsibility of the person who bears the risk may be additional or alternative to the responsibility of the person who wrongfully caused the harm in question. Thus, if an employer is responsible for harm caused by his or her employee to another person the employee may or may not also be legally responsible for that harm. In law the main grounds of responsibility for harm are therefore an agent's personal responsibility for causing harm and a person's responsibility arising from the fact that he, she or it bears the risk of having to answer in legal proceedings for the harm in question.

To cause harm to another is also not a sufficient condition of legal responsibility. For a person to be legally responsible for causing harm to another requires, apart

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<sup>13</sup> [2008] EWHC 1177 (Admin)

<sup>14</sup> Moore argues the case of degrees of responsibility citing examples such as accomplice liability in IRA cases and CIA renditions; in introducing moral responsibility, Moore argues that the law's emphasis on causation is based on moral responsibility. He states: '*If causation determines both the degree of prima facie wrongfulness and the permissibility of consequentialist justification of otherwise wrongful actions in morality, then a justice-oriented tort and criminal law is justifiably focused on causation.*'

from a number of conditions relating to jurisdiction, procedure and proof, that the conduct should be of the sort that the law designates as unlawful (e.g. negligent driving) or as a potential source of liability (e.g. keeping a dangerous animal). It also requires that the purpose of the law should encompass harm of the sort for which a remedy is sought. Thus, in some contexts only physical, not economic or psychological harm grounds a legal remedy. The link that must be established in legal proceedings between events is of a special type. A person's conduct or a natural event or process can always be described in a number of different ways, but only certain descriptions of an alleged cause are crucial in legal proceedings. For example, if a claim for damages is brought against a motorist for causing injury to the claimant by driving negligently, only that description of his or her manner of driving that amounts to negligence is capable of constituting a relevant cause.

The relationship between causing harm and legal responsibility is also complex because of the great *variety of relationships* between agency and harm that can be regarded as in some sense causal, or analogous to a causal relationship. An omission<sup>15</sup> to prevent harm when the person concerned has a legal duty to prevent it can ground legal responsibility but would ordinarily be described as 'not preventing' rather than causing the harm.

Again, legal responsibility is often imposed, in the context of interpersonal relationships, on those who influence others by advising, encouraging, helping, permitting, coercing, deceiving, misinforming or providing opportunities to others that motivate or enable them to act in a way that is harmful to themselves or to others.

In some cases (coercion, deceit) the persons held responsible would naturally be said to have caused the persons influenced to act as they did, while in others they would not, though the weaker interpersonal relationship is in some respects analogous to more plainly causal relationships. Failing to help or provide opportunities to others by advising, warning, informing or rescuing them or supplying them with agreed goods and services are other grounds of responsibility for negative agency that, again, are at least analogous to causal relationships. The existence of this wide spectrum of causal or near-causal grounds of responsibility recognised in law and morality raises the question whether any uniform theory of causation is capable of accounting for all of them.

### **Risk theory**

In law responsibility for harm can rest on risk allocation as well as on causation. The risk theory has merits that are independent of its claim to explain what it is for an agency to cause harm. It can be treated as illustrating a wider principle that responsibility for harm is confined to the type of harm envisaged by the purpose of the rule of law violated<sup>16</sup>. For example, if a rule requiring machinery to be fenced is designed to prevent harmful contact between the machinery and the bodies of workmen, a workman who suffers psychological harm from the noise made by the unfenced machine cannot ground a claim for compensation on the failure to fence.<sup>17</sup> The fencing requirement was not designed to reduce noise, even though a proper barrier would have reduced the noise to such an extent as to avoid the psychological trauma.

<sup>15</sup> Moore asserts that liability is proper in the negligent-provision of opportunity cases. However the liability is not cause-based liability (nor is it liability for purposefully aiding another to cause). Moore says these are cases of pure omission liability, eg. A railway company held liable for causing the rape of a passenger is not liable because it caused the rape but may be liable for failing to prevent the rape.

<sup>16</sup> But Moore argues that causation matters morally in that what we feel is that when our culpability causes serious injury to others, we are much more blameworthy than when it does not and that therefore causation should matter to liability in the areas of criminal law and torts.

<sup>17</sup> Moore calls this 'the description problem'. How does one describe the risk that makes the defendant negligent?



The limitations set by the purposes of legal rules cannot be regarded as causal. They vary from one branch of the law and one legal system to another. It is true that sometimes the purpose of legal prohibition may be the simple one of imposing responsibility for the harm caused by a breach of that prohibition. In that case the limits set by causal and purposive criteria coincide. But even in such a case it is a matter of legal policy which types of harm are to be compensated or to lead to criminal<sup>18</sup> liability.

### **Criteria for the Existence of Causal Connection in Law**

The theories concerning the criteria for the existence of causal connection in law fall into two classes. Some focus on the type of condition that the alleged cause must constitute in relation to the alleged consequence. Others are concerned with a specific feature that the cause must possess in relation to the consequence in order that causal connection may be made out. The first class of theory concerns the identification of the causally relevant conditions of an outcome, or, in the language of causal minimalists, 'cause-in-fact'. Must the cause be a necessary condition, a sufficient condition or a necessary member of a set of conditions that are together sufficient for the outcome? In law these terms, much discussed in the philosophical literature, are interpreted as meaning 'necessary or sufficient in the particular circumstances in issue'.

### **Proximate cause**

The theories about the specific qualities that an agency must possess in relation to the outcome in order to be its cause in law are often grouped under this rubric, though many other terms (e.g. adequate, direct, efficient, operative, legal, responsible) are also found in the literature. These limiting theories are invoked because if every causally relevant condition (cause-in-fact) is treated as grounding responsibility for the outcomes to which it is causally relevant the extent of legal responsibility will extend almost indefinitely. No rule is intended to give a remedy for every conceivable type of harm or loss. Another concerns the aspiration of the law to achieve results that are morally unobjectionable. This rules out certain claims that would be inequitable on the part of the claimant or unfair towards the agent.

Other proposed criteria of limitation are based on moral considerations. Theorists who regard fault as an essential condition of criminal or civil responsibility often argue that a person should not be liable for unintended and unforeseeable harm. There are problems about settling whether only the type of harm or the specific harm must be unforeseeable, and the moment at which foreseeability is to be judged. But foreseeability, though it bears some relation to probability, is clearly a non-causal criterion, and one that can apply only to human conduct, not to other alleged causes. Moreover some supporters of the risk theory argue that different criteria should govern the existence and extent of legal liability. Even if the foreseeability of harm is a condition of liability, sound principles of risk allocation place on the agent who is at fault in failing to foresee and take precautions against harm the risk that an unforeseeable extent of harm will result from his or her fault, provided that this is of the type that the rule of law in question seeks to prevent.

### **Criminal Action**

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<sup>18</sup> Moore states that: '*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...*'

There are many contexts in which a person is civilly or criminally responsible.<sup>19</sup> Those who unlawfully possess firearms criminally liable though no tangible harm is thereby caused to anyone. Both inside and outside the law many actions are regarded as wrongful whether or not they cause tangible harm. Those who trespass on another's land or who break a contract may be civilly liable.

### Civil action

Through civil litigation, if an injured person proves that another person acted negligently to cause his injury, he can recover damages to compensate for his harm. Proving a case for negligence can potentially entitle the injured plaintiff to compensation for harm to their body, property, mental well-being, financial status, or intimate relationships. However, because negligence cases are very fact-specific, this general definition does not fully explain the concept of when the law will require one person to compensate another for losses caused by accidental injury. Further, the law of negligence at common law is only one aspect of the law of liability.<sup>20</sup> Although resulting damages must be proven in order to recover compensation in a negligence action, the nature and extent of those damages are not the primary focus of negligence cases.

### Negligence

A person has acted negligently if she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances. The hypothetical reasonable person provides an objective by which the conduct of others is judged. In law, the reasonable person is not an average person or a typical person but a composite of the community's judgment as to how the typical community member should behave in situations that might pose a threat of harm to the public.

The concept of *the reasonable person*<sup>21</sup> distinguishes negligence from intentional torts such as assault and battery. To prove an intentional tort, the plaintiff seeks to establish that the defendant deliberately acted to injure the plaintiff. In a negligence suit, however, the plaintiff seeks to establish that the failure of the defendant to act as a reasonable person would have acted caused the plaintiff's injury. An intoxicated driver who accidentally injures a pedestrian may not have intended to cause the pedestrian's injury. But because a reasonable person would not drive while intoxicated because it creates an unreasonable risk of harm to pedestrians and other drivers, an intoxicated driver may be held liable to an injured plaintiff for negligence despite his lack of intent to injure the plaintiff. Sometimes factual causation is distinguished from 'legal causation' to avert the danger of defendants being exposed. A new question arises of how remote a consequence a person's harm is from another's negligence. We say that one's negligence is 'too remote' of another's harm if one would 'never' reasonably foresee it happening.

<sup>19</sup> Moore observes that the classic application of transferred intent in torts is the same as in criminal law; it transfers across persons but not across harms.

<sup>20</sup> The case of *Donoghue v. Stevenson* the law of negligence, laying the foundations of the fault principle around the Commonwealth. In his ruling, justice Lord MacMillan defined a new category of tort, (which is really not based on negligence but on what is now known as the "implied warranty of fitness of a product" in a completely different category of tort--products liability).

<sup>21</sup> Moore gives this topic full explanations and reasoning. He notes that Adam Smith imagined an 'ideal observer' to be consulted for truth in ethical matters and John Rawls imagined a rational contractor in an 'original position' for the same purpose, whilst Plowden recommended such an 'ideal legislator' to judges, and the law of tort also takes a similar view.

### Contributory Negligence

Frequently, more than one person has acted negligently to create an injury. Under the common-law rule of contributory negligence, a plaintiff whose own negligence was a contributing cause of her injury was barred from recovering from a negligent defendant. For example, a driver negligently enters an intersection in the path of an oncoming car, resulting in a collision. The other driver was driving at an excessive speed and might have avoided the collision if she had been driving more slowly. Thus, both drivers' negligence contributed to the accident. Under the doctrine of contributory negligence, neither driver would be able to recover from the other, due to her own negligence in causing the accident. The doctrine of contributory negligence seeks to keep a plaintiff from recovering from the defendant where the plaintiff is also at fault. However, this doctrine often leads to unfair results.

### Damages

Even though there is breach of duty, and the cause of some injury to the defendant, a plaintiff may not recover damages unless he can prove that the defendant's breach caused a pecuniary injury. This should not be mistaken with the requirements that a plaintiff prove harm to recover. As a general rule, a plaintiff can only rely on a legal remedy to the point that he proves that he suffered a loss. It means something more that pecuniary loss is a necessary element of the plaintiff's case in negligence. When damages are not a necessary element, a plaintiff can win his case without showing that he suffered any loss; he would be entitled to nominal damages and any other damages according to proof. Damages are, in general, compensatory and not punitive in nature. This means that the amount paid matches the plaintiff/claimant's actual loss (in cases involving physical injury, the amount awarded should aim to compensate for the pain and suffering). The award should be sufficient so as to put the plaintiff/claimant back in the position he or she was before the tort was committed and no more, because otherwise the plaintiff/claimant would actually profit from the tort.

### Conclusion

This 600 page book by Michael S. Moore, professor of law at Pennsylvania Law School, is a tribute to law. It is a deeply reasoned work and should be read by legal academics and practitioners throughout the United Kingdom because it is pertinent to corporate manslaughter as per the United Kingdom Corporate Manslaughter and Homicide Act 2007 which came into force in April 2008 and introduced an offence where death is caused by 'a gross breach of a relevant duty of care' when the management or organisation of the organisation's activities by its senior management formed a substantial element in that breach. This Act applies to the Crown and public bodies, though the 'relevant duty of care' is modified in its application to some of them. Also, in light of the UK new homicide offence of causing death by careless driving under the Road Safety Act 2006, and the present reform of the homicide laws, this book is necessary reading. It is a difficult subject and proficiently handled by an expert in this field.

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