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

ISBN 978-0-19-925686-0

Book review by Sally Ramage

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 is the causal relationship between conduct and result.[1] In law, the doctrine of causation is only applicable where a result has been achieved and so causation is immaterial with regard to inchoate offences. Responsibility in law often depends on showing that a specific action or event or state of affairs has caused specific harm or loss to another. So what is the nature of causation, the relation between causation and legal responsibility, and the criteria for the existence of causal connection in law? Causal connection in law relates to what are causally relevant conditions and what are the grounds for limiting responsibility. Law is concerned with the application of causal ideas, embodied in the language of statutes and decisions, to particular situations. This involves a conception of what a cause is outside the law. This use of cause serves to provide recipes and make predictions. Another function is the extent of responsibility of agents for the outcomes that follow on their agency or intervention in the world. It is to attribute responsibility to an agent for outcomes that his, her or its agency serves to explain and that can therefore plausibly be treated as part of the agency's impact on the world. Here the purpose is to settle the extent of responsibility that attaches to a particular human action or other event or state of affairs. This responsibility is then attributed to an agent or, metaphorically, to the other event or state of affairs in question (e.g. outbreak of war, high unemployment). The attribution of responsibility on causal grounds is not confined to law. Historians and moralists, for example, assess the responsibility of agents for the outcomes, political, social, economic or military of what they did or failed to do. Lawyers focus on the harmful outcomes of particular actions.

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[2]. 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 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

[1] Moore argues the case of omission which he terms 'non-omissive allowing', in for example a case of passive euthanasia.

[2] 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*.'

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[3] 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[4] 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. [5]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. 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[6] 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'.

---

[3] 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.

[4] But Moore argues that causation matters morally in that what we feel is that when out 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.

[5] Moore calls this 'the description problem'. How does one describe the risk that makes the defendant negligent?

[6] 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…'*

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
There are many contexts in which a person is civilly or criminally responsible.[7] 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. [8]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*[9] 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 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.

---

[7] 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.
[8] 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).
[9] 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.

Reasonably foreseeable harm must be compensated. This is the first principle of negligence.
In England the more recent case of *Caparo v Dickman* [1990] introduced a 'threefold test' for a duty of care. Harm must be reasonably foreseeable; there must be a relationship of proximity between the plaintiff and defendant and it must be 'fair, just and reasonable' to impose liability. However, these act as guidelines for the courts in establishing a duty of care; much of the principle is still at the discretion of judges. In a negligence case, the plaintiff must prove his loss, and a particular kind of loss, to recover. In some cases, a defendant may not dispute the loss, but the requirement is significant in cases where a defendant cannot deny his negligence, but the plaintiff suffered no loss as a result. If the plaintiff can prove pecuniary loss, then he can also obtain damages for non-pecuniary injuries, such as emotional distress. 'Reasonable risk' cannot be judged with the benefit of hindsight

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.

Bibliography
Calabresi, G., ‘Concerning Cause and the Law of Torts’ *University of Chicago Law Review*, 43 (1975): 69-108.
Sally Cunningham and C.M.V. Clarkson, *Criminal liability for non-aggressive death,* Aldershot, Ashgate Publishing, 2007.
Donald Davidson, ‘Causal Relations’ in *Essays on Actions and Events*, Oxford: Clarendon Press, 1980.
Donald Davidson, ‘The Causal Relation Issue in Negligence Law’ *Michigan Law Review*, 60 (1962): 543-576.
Kupperman, Joel, 1991, *Character*. (New York: Oxford University Press).
Hart, H.L.A., and Tony Honoré, *Causation in the Law*, 2nd ed., Oxford: Clarendon, 1985.
Honoré, A.M. (Tony), ‘Causation and Remoteness of Damage’, *International Encyclopaedia of Comparative Law*, Vol. XI, Ch. 7, The Hague: M. Nijhoff, 1971.
Keeton, R.E., *Legal Cause in the Law of Torts*, Columbus: Ohio State University Press, 1963.

Lucy, W., ‘Conduct and Causation’, in *Principles of Private Law*, Ch. 5, Oxford: Clarendon Press, forthcoming 2006.
Milo, Ronald D., 1984, *Immorality* (Princeton, NJ: Princeton University Press).
Nagel, Thomas, 1986, *The View From Nowhere.* (New York: Oxford University Press).
Stapleton, J., ‘Law, Causation and Common Sense’, *Oxford J. Legal Studies*, 8 (1988): 111-131
Waldron, J., ‘Moments of Carelessness and Massive Loss’, in *Philosophical Foundations of Tort Law*, D. G. Owen (ed.), Oxford: Clarendon Press, 1995, pp. 387-408.
Wright, R.W., ‘Causation in Tort law’, *California Law Review*, 73 (1985): 1737-1828.