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An 'Extended But-For' Test for the Causal Relation in the Law of Obligations

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Abstract—This article explores the question of what character relations must have before the orthodox law of obligations will describe them as 'causal' relations. The article does not purport to identify the metaphysical nature of 'causation'. Instead it provides a non-reductive account of what is essential before the law has *described* the relation between a specific factor and the existence of a particular indivisible phenomenon as 'causal'. Section 1 presents a simple test for this relation—an 'extended but-for test'—that can be deployed in a straightforward way without engaging with theoretically complex and often problematic accounts of causation based on the notion of sufficient sets, such as Wright's NESS account. Section 2 demonstrates how important principles relating to the separateness of a legal entity and to legal responsibility can resolve theoretical puzzles and in turn illuminate why the orthodox law of obligations does not choose to describe as 'causal' a relation wider than the one identified in this article.

Keywords: causation, responsibility, legal reasoning, torts, negligence

1. *Characterising the Relation*

A. *Introduction and Preliminaries*

The clarity of legal analysis often suffers from uncertainty surrounding the meaning of causal terms. In this article I explore what, as a minimum, it means when the orthodox law of obligations describes a factor as a 'cause'. Section 1 begins by noting that in most Western discourse to say a factor is a 'cause' of a phenomenon is to say it bears some sort of explanatory relation to the existence of that phenomenon. It then argues that within this context law is free to choose the character relations must have before it will describe them as 'causal' relations. I explain that law's concern with how the phenomenon would have

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been prevented led it to choose to recognise as causes factors but for which the phenomenon would not have existed. I then explain that the law also has an interest in identifying as causes contributions to the production of the phenomenon but, because of the way the law individuates the phenomenon, not all contributing factors are captured by the simple but-for relation. The discussion culminates in a formulation of the causal relation in the law of obligations—that is, a statement of the character relations must have before the orthodox law will describe them as 'causal' relations—for which an 'extended but-for test' is presented.

(i) What field is indicated by causal language in Western discourse?

The human mind perceives many relations in the world, for example: this statue *is not* that statue; this statue is *next to* that statue; this statue is *taller* than that statue; this statue is *older* than that statue. Law could stipulate that one or more of these relations were a 'causal' relation for the purposes of its discourse—after all, words can mean whatever we say they mean—but law does not do this. Understandably, given that it is a social practice, law follows Western discourse which confines the term 'causal' to the relation of a factor to the *existence* of a phenomenon: did this specified factor bear the 'relevant' relation to the existence of this particular phenomenon (where relevance usually relates to explanation of the phenomenon, the whys of its existence)?[1] The relation between epiphenomena, such as the sounding of a Manchester factory hooter at 5 pm and workers at a London factory leaving work after 5 pm, is therefore not usually identified as 'causal' in Western discourse. The sound is not identified as a 'cause' of the workers' departures, it bears no explanatory relation to them. In contrast, it being 5 pm is identified as a 'cause' of both the sound and the departures.

It is worth noting that even within this field (of the relation of a factor to the existence of a phenomenon) usage has shifted. Aristotle thought that a full account of the existence of a particular phenomenon required consideration of four different explanatory relations, all of which he described as 'causal'.[2] For example, in the context of the making of a bronze statue of a nymph to decorate a tomb these Aristotelian 'causal' relations would be the relation to the phenomenon of (i) the material out of which the statue came to exist (accordingly bronze was the 'material cause'), (ii) the form of the phenomenon (so the shape of the nymph was the 'formal cause'), (iii) the source/agent of the phenomenon (so the sculptor was the 'efficient cause') and (iv) the goal for which the phenomenon exists (so decoration of the tomb was the 'final cause'). Relations (i), (ii) and (iv) no longer attract the description of

[1] As the following discussion explains, for the law of obligations, what is relevant to that explanation is how the phenomenon would have been prevented and how it was produced, see the discussion to n 100.

[2] S Broadie, 'The Ancient Greeks' in H Beebee, C Hitchcock and P Menzies (eds), *The Oxford Handbook of Causation* (OUP 2009) 21, 27–33.

'causal' in Western discourse, including law, while other relations which do not fit easily into the concept of production in (c) may do so, such as a failure to prevent the statue's creation.

(ii) In legal analysis the relata are often abstractions

Causation is understood as a relation and in a statement that X is a cause of Y, X and Y are called 'relata'. Two preliminary observations worth making concern the 'relata' addressed by legal analysis.

Law is interested in the existence of a wide range of phenomena. It is interested not only in the states of affairs on which philosophers focus (such as a cannonball's state of rest upon a cushion) but also in abstract, often law-designated, states such as the legal validity of a certain document or the state of marriage. Similarly, law is interested not only in the transitions on which philosophers focus (such as the making of a statue, the collision of billiard balls or the occurrence of a physical injury) but also in abstract transitions such as entry into a commercial transaction, the revocation of a will or the forfeiture of a lease.

Legal enquiries also differ from philosophical ones in terms of the character of factors law is prepared to recognise as appropriate candidates for being a 'cause' of the existence of a particular phenomenon. For many philosophers this character is restricted by their prior metaphysical commitments: for example, many argue that an absence, such as an omission to act, cannot qualify as a 'cause' within their discourse.[3] But law is not constrained by such metaphysical commitments and so it seamlessly accommodates as 'causes' factors variously characterised as specific events, facts, states of affairs, aspects of conduct events or things, absences, omissions, information and reasons, including entirely abstract phenomena such as a specific marriage, divorce, forfeiture and breach of obligation.

Throughout the following discussion it is important to remember how heterogeneous 'causal' enquiries in the law of obligations are. For example, they may well concern whether one abstraction had the 'relevant' relation to the existence of another abstraction: the law may conclude that a woman's 'marriage to Walter had caused his prior will to be revoked by operation of . . . law'[4] or ask whether 'divorce causes [a party] to lose this right under the legislation of the host member-State'.[5] Moreover, law often deals with situations where the abstraction having the 'relevant' relation to the other abstraction is an omission, as when non-payment of rent is a 'cause' of the forfeiture of a lease.[6] That 'causal' enquiries in law routinely deal with

[3] D Ehring, 'Causal Relata' in Beebee, Hitchcock and Menzies (n 2) 387; MS Moore, *Causation and Responsibility* (OUP 2009).

[4] *Matter of Moerschel's Estate* 86 Ill App 3d 482, 407 NE 2d 1131, 1132 (1980).

[5] Case C–237/91 *Kazim Kus v Landeshauptstadt Wiesbaden* [1993] 2 CMLR 887, Opinion of AG Darmon, 898.

[6] *Northcote v Duke* [1765] Ambler 511, 27 ER 330, 332.

abstractions is clear to those with legal training, and this would have included David Hume, the great philosopher on whose work most modern metaphysical accounts of causation build. It follows that, to be adequate, any account of the 'causal relation' in the law of obligations must clearly encompass such abstract relations.[7]

(iii) How the law individuates the relata and why it does so

The law of obligations is concerned with the rights and responsibilities of separate legal entities, so these form the units of enquiry and analysis. This means that in relation to candidates for being a 'cause', say of an injury, the law of obligations will not ask if 'Tom plus Dick plus Harry' was a cause of it but whether Tom was a cause, whether Dick was a cause and whether Harry was a cause.[8]

Similarly, when the law of obligations is addressing whether a factor was a 'cause' of a phenomenon, an enquiry it conducts with hindsight, it will describe, or to use the philosophical term, individuate, the particular phenomenon of interest at a level of specificity or generality that matches the law's concern.[9] So for example in pursuit of the law's concern to identify the phenomenon accurately, the law will describe it with as much specificity in relation to time and place as the available facts allow. An example is 'Amy's death by poison at noon on Friday 13 June 2014 under Dan's palm tree'. In doing so the law avoids the pre-emption issues that puzzle those philosophers whose analysis eschews such cognisance of facts known in hindsight.

But the aspect of the particular transition or state of affairs that the law of obligations regards as significant may be more coarse-grained than the known facts. For example, suppose a husband had been shot through the head simultaneously by two bullets each of which would have been sufficient to kill. When his widow sues one of the two unrelated shooters the substance of her complaint is that her husband had been alive and now is dead. There are no degrees of severity of this end state and, in terms of what the law recognises as actionable and quantifiable in damages, her loss is no greater because the death was over-determined.[10] Accordingly the widow and the law find it convenient to individuate the phenomenon of interest as 'death' not 'death by two bullets'.

[7] Compare Richard W Wright who, focussing primarily on physical relations, describes his account as one of 'natural (scientific…) causation'. See RW Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' in R Goldberg (ed), *Perspectives on Causation* (Hart 2011) 285.

[8] Compare accessory liability, N McBride and R Bagshaw, *Tort Law* (4th edn, Pearson 2012) ch 36.

[9] Compare Wright who often overlooks this critical distinction: Wright, 'The NESS Account' (n 7) 292–93; RW Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 Iowa L Rev 1001, 1025. On the general point see J Stapleton, 'Unnecessary Causes' (2013) 129 LQR 39, 42–43.

[10] J Stapleton, 'Choosing what we Mean by "Causation" in the Law' (2008) 73 Missouri L Rev 433, 442 n 19.

(iv) Law can choose the character that relations must have before it will describe them as 'causal'

We have seen that in most Western discourse to say a factor is a 'cause' of a phenomenon is to say it bears a 'relevant' explanatory relation to the existence of that phenomenon. Within this field is the law free to choose what character is 'relevant', that is, which explanatory character relations must have before it will describe them as 'causal' relations? Richard Wright, a leading legal theorist of causation, thinks not. He asserts, wrongly in my view, that, inside and outside law, there is only one relation that is properly described as 'causal' and that his NESS ('necessary element of a sufficient set') test captures it: 'The NESS test captures the essential meaning of the concept of causation. This meaning was first articulated by the philosopher David Hume.'[11]

Many philosophers also think there is only one relation that is 'causal' but,[12] because they hold different prior metaphysical commitments, philosophers disagree on which relation it is.[13] In other words, philosophers agree that a 'causal' relation in some way goes to explain the existence of a phenomenon—at least in some weak sense of 'explanation' such as how the presence of oxygen is part of the explanation of why a fire happened—but because they disagree on what is metaphysically relevant to the existence of the phenomenon, they disagree on which relation should be characterised as the 'causal' relation. For example, on the basis of certain perfectly rational arguments, one group of philosophers conclude that the idea of 'absence causation is *metaphysically abhorrent*'[14] and that only the physical relation of an energy-momentum flow (a pushing or a pulling) should be described as 'causal'.[15] Such philosophers refuse to identify the relation between a mother's omission to feed her baby and its death by starvation as a 'causal' relation. Other philosophers would identify it as 'causal' because they have a wider view of what is metaphysically relevant to the existence of a phenomenon and would include contrastive information concerning why it exists rather than does not exist.

Wright describes philosophers who reject omissions as 'causes' as 'blind'[16] and fails to engage with the underlying metaphysical rationale on which they base their view. These philosophers do not dispute that when mothers fail to feed their babies, the babies die; rather, they argue that a metaphysically sound account of the baby's death would not extend to cover the relation between the

[11] RW Wright, 'Causation in Tort Law' (1985) 73 California L Rev 1735, 1789. For Wright's most recent account of the NESS approach see Wright, 'The NESS Account' (n 7).

[12] eg Jonathan Schaffer asserts that 'there is a single notion of causation at work in the law, scientific explanation and common sense thought'. J Schaffer, 'Disconnection and Responsibility' (2012) 18 Legal Theory 399.

[13] The disagreement is notorious: Beebee, Hitchcock and Menzies (n 2) runs to 790 pages.

[14] J Schaffer, 'Contrastive Causation' (2005) 114 Phil Rev 297, 300 critiquing this view (emphasis in original).

[15] eg DM Armstrong, 'The Open Door: Counterfactual versus Singularist Theories of Causation' in H Sankey (ed), *Causation and Laws of Nature* (Kluwer 1999) 175, 177; P Dowe, 'Causal Process Theories' in Beebee, Hitchcock and Menzies (n 2) 213, 219.

[16] Wright, 'The NESS Account' (n 7) 314.

failure to feed and the death. Wright provides no competing metaphysical rationale for his claim that there is only one 'essential meaning of the concept of causation',[17] a meaning he claims is captured by the NESS relation. Moreover, since his exposition of the NESS relation depends on what he terms 'causal laws',[18] his account of the concept is circular.[19]

Fortunately debates as to what is metaphysically relevant about the existence of a phenomenon do not need to trouble lawyers.[20] The law simply has no need to decide which is the correct metaphysical account of a phenomenon's existence. Indeed, most lawyers follow Hume[21] in thoroughly disparaging the project of marrying law and metaphysics.[22]

Because the law has no need to resolve metaphysical disputes about the concept of 'causation' it is free to choose what character relations must have before it will describe them as 'causal' relations.[23] Consider the matter of omissions again. Law often imposes a specific affirmative obligation on specific individuals with the goal of preventing some phenomenon. The affirmative obligation may consist of removing something such as an obstruction on the highway, or the obligation may be to prevent something from coming into existence as when there is parental obligation to feed a baby in order to prevent the biological processes of starvation. So in addressing the existence of a phenomenon in the actual world (a baby's death) in which the obliged party omitted to fulfil an obligation (to feed the baby), the law is especially interested in the contrastive information that, in the hypothetical 'counterfactual' world where that specific omission was reversed (and the obligation to feed was fulfilled), the phenomenon would not have existed. For law, in particular in light of its *ex post* concern with how the phenomenon would have been

[17] Wright, 'Causation in Tort Law' (n 11) 1789.

[18] For Wright's most recent attempt to defend his account, see Wright, 'The NESS Account' (n 7).

[19] R Fumerton and K Kress, 'Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency' (2001) 64 Law and Contemporary Problems 83, 102. See also S Steel, 'Publication Review: Perspectives on Causation' [2012] Edinburgh L Rev 458, 460 and MS Moore 'Further Thoughts on Causation (and Related Topics) Prompted by Fifteen Critics' in B Kahmen and M Stepanians (eds), *Critical Essays on 'Causation and Responsibility'* (De Gruyter 2013) 331, 336–39. Wright's NESS account is also forensically unfriendly (see texts cited at n 81); relies on a notion of 'causal priority' that is not used in the law (see n 108); and appears to eschew hypothetical counterfactual analysis despite it being explicitly central to much case law (Wright, 'The NESS Account' (n 7) 304). Wright pays inadequate attention to abstractions (Wright, 'The NESS Account' (n 7)) and to how the law individuates relata (Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof' (n 9)). Wright's NESS account also fails to identify the principles of responsibility on which rest the law's analysis of cases involving the oversubscribed failure of a prevention route and offers a notoriously asymmetric analysis of them (see n 108 and n 126).

[20] For the view that lawyers should concern themselves with metaphysics here, see Moore, *Causation and Responsibility* (n 3).

[21] 'A man might as well think of making a fine sauce by a mixture of wormwood and aloes, as an agreeable composition by joining metaphysics and Scottish law': JYT Greig (ed), *The Letters of David Hume*, vol 1 (OUP 1932) 304. Hume was legally trained and would have known, for example, that the law routinely describes an omission (such as non-payment of rent) as a 'cause' (of the forfeiture of a lease), eg *Northcote v Duke* (n 6).

[22] Typical views include: F Pollack, *The Law of Torts* (11th edn, Stevens & Sons 1920) 36, 'the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause'; Lord Atkin in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) 164, 'the word "cause" has in philosophy given rise to embarrassments which in this connection should not affect the judge'.

[23] See Stapleton, 'Choosing what we Mean by "Causation" in the Law' (n 10).

prevented, this contrasting counterfactual information provides a critical perspective on the existence of the phenomenon of the baby's death. In other words, from the law's hindsight counterfactual perspective, the parent's failure to feed is a critical part of the explanation of the death.

In short, given its goals, the law has a practical reason for identifying the relation of such an omission to the existence of the phenomenon as 'causal': namely, it communicates information about that existence—how it would have been prevented—that is vital to law's hindsight interest in the phenomenon.

(v) Law's analysis depends on its understanding of features of the world and specific facts known with hindsight

To say that legal discourse has a choice about what character relations must have before it will describe them as 'causal' relations, and that this choice does not turn on metaphysical considerations, is not to deny that there is an actual world operating outside law's analysis. In that world, the laws of nature hold, doctrinal rules apply within a legal jurisdiction, specific terms govern the legal relations of two individual contracting parties, a certain voting regime will determine ballots of a Board of Directors and so on. Sometimes these features of the physical[24] and jurisdictional world[25] are described as 'causal laws' but that terminology would be confusing here[26] where we are exploring what character the law has chosen that individual relations must have before it will *describe* them as 'causal'. Yet it deserves emphasis that, in an individual case, it is only through its prior understanding of these features of the world that law is able to determine whether the relation between a specified factor and the existence of a particular phenomenon has the character that the orthodox law of obligations requires for relations to be described as 'causal' in its discourse.[27]

In addition to depending on its understanding of such features of the world, law also fully exploits its understanding, secured with hindsight and by evidence, of the specific facts of what happened in an individual case.[28] Law's use of terms such as 'necessary' and 'sufficient' must be read in the light of its hindsight knowledge of such features and facts. Suppose Gayle persuaded Harry to push Beth's car off a cliff with Gayle's green pole but, if Gayle had not done so, Roy would have persuaded Harry to do exactly the same thing. Some metaphysicians are reluctant to say that Gayle's persuasion of Harry was 'necessary' for the destruction of the car because, viewed in advance, there had been another route by which the car would have been destroyed anyway. From this perspective, Gayle's persuasion was not 'necessary' for the car to be

[24] 'Our extra-legal understanding of the natural processes': R Bagshaw, 'Causing the Behaviour of Others and Other Causal Mixtures' in Goldberg, *Perspectives on Causation* (n 7) 361, 371.
[25] Which the law also takes to operate in all relevant hypothetical versions of that world.
[26] And risk the same circularity that infects Wright's claims, see text to n 19.
[27] See text to and following n 40.
[28] See also text to nn 31, 105 and 128.

destroyed. In striking contrast to such philosophical discourse, legal analysis operates from a hindsight perspective of the known facts, laws of nature and so on.[29] From law's hindsight perspective it easily concludes that, but for Gayle's persuasion, the destruction of Beth's car which *actually* occurred would not have occurred. Gayle's persuasion was 'necessary' for that *actual* phenomenon. The hypothetical back-up story by which Beth's car would have been destroyed in exactly the same physical way anyway may be relevant to other issues (such as the valuation of Beth's legal claim against Gayle), but is no hindrance to law's recognition that it was Gayle, not Roy, who was involved in the actual destruction, which is the phenomenon under analysis.[30]

It is also because the law has no qualms about relying on its knowledge of features of the world, such as the laws of nature, and on its knowledge of specific facts of what happened in an individual case, that it would easily dismiss the greenness of the pole as irrelevant to its analysis of the 'causes' of the destruction of Beth's car.

(vi) For this discussion assume all relevant features of the world and specific facts are known

Law does not ignore or speculate when it knows a fact,[31] for example, that a death was by poison and happened exactly at noon on Friday under Dan's palm tree. Given that my aim is to explore the question of what character relations must have before the orthodox law of obligations will describe them as 'causal' relations and to formulate a forensically useful test for it, it is important that the analytical waters are not muddied by the separate challenge of evidentiary gaps (though I acknowledge that, in highly circumscribed situations, these have led the law not to insist on proof of that character).[32] So, throughout the discussion it can be assumed, unless I make the contrary clear, that all relevant features of the world and specific facts are known.

B. *Law's Concern with How the Phenomenon would have been Prevented: But-For Causes*

We can see why the orthodox law of obligations would find it highly inconvenient to choose some candidates for the character relations must have before it will describe them as 'causal' relations. For example, if the character chosen were that the specified factor was to blame for the existence of the particular phenomenon it would be too narrow in the light of the many cases

[29] See text to n 41.

[30] In the terms explained later, a positive requirement for the destruction of Beth's car that actually happened was Harry having enough reasons to decide to push it and on the facts, as the law knows with hindsight, it was Gayle who made an *actual* contribution to that requirement. Roy made none. On decisional causation see Stapleton, 'Unnecessary Causes' (n 9) 45–46, 56, 61.

[31] See also text to nn 28, 105 and 128.

[32] See n 79.

where the law seeks to identify the involvement of an entirely innocent factor with the existence of a phenomenon. Similarly, the character of physical necessity would also be too narrow because the law is often concerned with the relation of one abstraction to the existence of another. Conversely, and as the later discussion illustrates,[33] the law would find some relations intolerably wide.

Traditionally, the character that the law required was that of hindsight necessity (in the sense already discussed).[34] To establish that a specific factor was a 'cause' of the existence of a particular phenomenon, it had to be shown from a hindsight perspective of the known facts and features of the world that, but for that factor, the phenomenon would not have existed. The well-known short-hand term of the 'but-for' test itself emphasises that the perspective to be taken is counterfactual and informed by hindsight. Clearly this choice of the but-for relation reflects the law's interest in how the phenomenon would have been prevented.[35]

(i) A contrastive relation: between the actual world and how the hypothetical but-for world would have played out

The but-for relation indicates a contrast between the actual world and a hypothetical counterfactual world. For example, the actual world in which an act interfered by contributing a necessary part of the physical mechanism by which an injury occurred—such as Harry's push on Beth's car—stands in contrast to the hypothetical counterfactual world where that act was absent, because there the injury would have been absent too. Notice that the omission of Ian, Harry's custodian, to prevent Harry's push bears the same contrastive relation to the destruction of Beth's car: but for that omission to restrain Harry, the destruction would not have happened.

An appreciation of the contrastive nature of the but-for relation is especially illuminating where the particular phenomenon of interest is the persistence of a state of affairs but the claimant complains of it in terms of the defendant's breach of obligation being a cause of an 'injury' or 'loss'. The explanation for this terminology is that the actual static state is being contrasted with the *improved* state that the complainant alleges he would have enjoyed in the playing out of the hypothetical no-breach world: in relation to this latter hypothetical world to which the complainant alleges he was entitled, his current static state represents a 'loss'. Such situations are common, as when: but for the careless sloth of a solicitor instructed to draw up a will in favour of the testator's daughters, they would have each inherited £9000;[36] or when,

[33] See text to n 97.
[34] See text to n 29.
[35] See eg *McDonald v Toledo Consol St RY Co* 74 F 104, 109 (6th Cir 1896): 'but for the presence of this mass of snow, he would have been able to have . . . prevented any injury'.
[36] *White v Jones* [1995] 2 AC 207 (HL).

but for one contractor's breach of contract, the other party to the contract would have made profits in another transaction.[37]

Next it is worth emphasising that the but-for contrast of interest in the law of obligations is between what happened in the actual world and how the world would have played out without the *specified aspect* of the defendant's conduct which is alleged to have been the wrongful breach of obligation. In other words, the hypothetical no-breach world is a *counterfactual* one because it is specified by reversing the precise factor or which the complainant alleges was the wrongful aspect of the defendant's conduct.[38] For example, while it is not wrongful to hand a lightweight object to a toddler, a complainant might well allege that it was wrongful to hand a lightweight *loaded* gun to a toddler. The specification of what constitutes the alleged breach of obligation—the loadedness of the gun—provides the appropriate specification of the hypothetical no-breach world: in this case, a world in which the defendant's conduct is exactly the same—he hands the same object to the child—except that the gun is not loaded.[39]

Law's evaluation of whether the contrastive but-for relation exists in a particular case depends, as we saw earlier,[40] on its understanding of features of the world (both how they operated in the actual world and how they would have operated in the hypothetical no-breach world) and on its knowledge of specific facts of what happened in the individual case. From this information, and viewing the matter with hindsight, the law identifies what we might call the 'requirements' for the existence of a particular phenomenon (as that phenomenon was individuated by the law).[41] For completeness we should note that sometimes individual human dispositions generate a relevant requirement. For example, suppose the disposition of an individual lender, Larry, was such that he would not enter any loan transaction unless the borrower was supported by two bank-approved sureties. If Larry did enter a loan transaction with a borrower, a requirement of that entry would have been two bank-approved sureties.

To illustrate the requirements for the existence of a particular phenomenon as individuated by the law, take the destruction of Beth's car. In relation to that phenomenon, the law will identify both the positive force of gravity and the number of units of physical force required to push Beth's car off the cliff as

[37] See text to n 85.

[38] See G Williams, 'Causation in the Law' [1961] CLJ 62, 70 n 22: 'every statement of causal connection asserts what would have happened if the facts had been different'.

[39] Contrast D Hamer, '"Factual Causation" and "Scope of Liability": What's the Difference?' (2013) 77 MLR 155, 165–69, who inappropriately suggests a counterfactual where the defendant does not hand over the gun at all. See also J Stapleton, 'The Normal Expectancies Measure in Tort Damages' (1997) 113 LQR 257, 284 n 73.

[40] See text to n 27.

[41] Such requirements are infinite—eg a requirement for X's entry into a transaction was that X was born—but only a few will be relevant within the aims and constraints of the legal enquiry.

requirements for the destruction of the car that actually happened.[42] In a sense it was also a 'requirement' for that destruction that no one restrained Harry. But as we will see,[43] it is helpful to distinguish positive requirements of the mechanism of what happened, such as the number of units of force, from negative 'requirements', such as the *absence* of anyone stopping Harry.

The same distinction can be made in relation to an abstract transition such as the making of a valid will. The positive requirements are mandated by statute and include that the will is in writing; that it is signed by the testator (or by some other person in his presence and by his direction); that this signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and that each witness attest and subscribe to the will in the presence of the testator.[44] A negative 'requirement' of the state of a valid will is that the testator has not subsequently married, since a testator's marriage automatically revokes his will.[45]

Often the evaluation of whether the contrastive but-for relation exists is easy because it turns on agreed facts and well settled laws of nature: had the ship *Wagon Mound* not carelessly discharged its bunker oil into Sydney Harbour we know that Morts Dock would not have burned when it did.[46]

Similarly, evaluation may be made easy by unequivocal evidence that a party behaved in a certain way in the actual world. For example, suppose that when Mary is delivering her first baby in Hospital E she undergoes a particular form of caesarean section which means that a future vaginal delivery would greatly endanger the baby. Suppose Hospital E records this vital information[47] but, in breach of its legal obligation of care, it misfiles the relevant page of medical notes in another patient's medical file. A year later Mary is pregnant again and under the care of Hospital F. Hospital F obtains her past medical records file from Hospital E and consults it carefully but, there being no warning therein of the dangers of vaginal birth to her new baby, Victor, Hospital F allows nature to take its course and Mary gives birth vaginally. Victor suffers brain damage as a result.

Whether Hospital E's careless misfiling is recognised as a cause of Victor's injury depends on how things would have played out in the hypothetical world in which this careless aspect of Hospital E's conduct had been absent—in other words, if Hospital E had carefully ensured that Mary's medical file contained an adequate warning against future vaginal deliveries. Since, with hindsight, the law knows the fact that in the actual world Hospital F called for and carefully consulted Mary's medical file, it will find it a relatively simple matter to evaluate what would have happened in this hypothetical no-breach world,

[42] See also n 30.
[43] See section 2 of this article.
[44] Wills Act 1837, s 9.
[45] ibid s 18(1).
[46] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 454 (PC).
[47] Mary is also informed but she, without fault, fails to remember this information.

namely Hospital F would have discovered the warning and most likely Victor would have been safely delivered via caesarean. In short, the law easily identifies the conduct of Hospital E as a cause of Victor's injury because it can confidently conclude that, but for that conduct, he probably would have been delivered safely.

Finally, it is worth noting that when law contemplates the hypothetical no-breach world it does not hold constant all other factors except the breach. Rather it will consider how the hypothetical world *would have played out* absent the breach including the possibility that the absence of the breach would have affected other factors, for example, the conduct of a third party. The hospitals case is a good example: in the absence of Hospital E's breach, Hospital F would probably have provided different medical treatment to Mary than it actually did.[48]

(ii) 'Prevention-foiling' but-for factors

When a factor bears the contrastive but-for relation to a particular phenomenon the law often says that the factor 'resulted in' that phenomenon.[49] With some but-for factors it is easiest to see them 'resulting in' the phenomenon by having the effect of directly introducing into the scenario a contribution to one of the positive requirements for the existence of the particular phenomenon and thereby helping change the course of events to a new course of events including the particular phenomenon in issue. Examples include the *Wagon Mound* releasing its bunker oil into Sydney Harbour and Harry's act of pushing Beth's car over the cliff.

In the case of other but-for factors it is more convenient to see them as 'resulting in' the phenomenon by having the effect of preserving the phenomenon's existence or by allowing it to come into existence by foiling a potential route by which the phenomenon would otherwise have been prevented. Where the 'prevention-foiling factor' was the only reason the route failed, it is a 'prevention-foiling but-for factor' and is recognised as a cause of the existence of the phenomenon. An example is Ian's failure to prevent Harry's push on Beth's car.

Section 2 explores why it is that a prevention-foiling factor is not recognised as a cause if the potential prevention route would also have failed simply because another part of the route was, or would have been, missing.[50] For example, consider the following example which adapts a well-known scaffolding case: suppose a worker on a scaffold slips and falls onto a pedestrian injuring her. She sues the worker's employer in the tort of negligence and succeeds in proving that it was a breach of the employer's duty of care not to

[48] See also *Wright v Cambridge Medical Group* [2011] EWCA Civ 669, [2013] QB 312 [124].

[49] eg *Galashiels Gas Co Ltd v Millar* [1949] AC 275 (HL) 287: 'the failure in the lift mechanism . . . resulted in the death' (MacDermott CJ).

[50] See also the discussion in the text to n 86.

supply the worker with a safety harness that, if worn by the worker, would have prevented him falling when he slipped. Whether this aspect of the employer's conduct[51] is recognised as a cause of her injury will depend on how, hypothetically, things would have played out had the harness been supplied to the employee.[52] If evidence of the worker's disposition establishes that he probably would have used the harness in such a hypothetical no-breach world (and therefore not fallen because the prevention mechanism of harness-plus-usage would have been complete), the employer's failure to supply it in the actual world is regarded as a 'cause' of the pedestrian's injury: the failure 'resulted' in the injury by foiling a potential route by which it would otherwise have been prevented (though we might also see it as 'resulting' in a contribution, namely the man's fall). But if another part of the prevention route would also have been missing (for example, because the employee would not have worn the harness) the prevention-foiling factor of the employer's failure to supply is not recognised as a cause.

A prevention-foiling factor may be an omission such as a failure to install a highway crash barrier,[53] or it may be an act such as the act of removing a highway crash barrier.[54] The earlier discussion also included illustrations: in the cases of Hospital E misfiling a page of Mary's medical notes and the mother's omission to feed her baby, the phenomenon was the occurrence of injury; in the cases of the solicitor's sloth and the contractor's breach of contract, the phenomenon was the persistence of the complainant's financial state.

C. *Law's Concern with How the Phenomenon was Produced: Contributing Causes*

In the modern era it has become increasingly clear that if the law restricts its notion of being a 'cause' to but-for factors—factors but for which the particular phenomenon would not exist—inconvenient results, sometimes bordering on the incoherent, would be generated. The reason for this is simple and lies in how law chooses to individuate the relata in causal questions. Earlier[55] we saw that in law the unit of enquiry and analysis is the separate legal entity. Similarly, we saw that law describes the particular phenomenon of interest at a level of specificity or generality that matches the law's concern and specifically that there are many contexts in which it will individuate the phenomenon in a

[51] The causal enquiry is dependent on how the specific factor is formulated and in the law of obligations this turns on a normative judgment, such as what aspect of a defendant's conduct was allegedly unreasonable; see Stapleton, 'Choosing what we Mean by "Causation" in the Law' (n 10) 450.

[52] eg *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA) 1610: 'causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the [person] have done if the equipment had been provided' (Stuart-Smith LJ).

[53] Or the omission of a golf course to protect its patrons from lightning strikes: *Sall v T's Inc* 136 P3d 471 (KS 2006).

[54] eg *Bird v Pearce* [1979] RTR 369 (CA); *Vervik v State Dept of Highways* 302 So2d 895 (LA 1974).

[55] See text to and preceding n 8.

more coarse-grained way than the known facts would permit: such as 'death by a poison', 'destruction of a car', 'collapse of a bridge', 'making a valid will', 'passage of a resolution' or 'entry into a transaction'.

When the phenomenon is individuated in this more coarse-grained way it might be that a positive requirement for its existence was a certain amount of an element, for example

- 2 mls of a poison are required to kill[56]
- two units of a physical force are required to move a car over a kerbstone
- 20 units of weight are required for a bridge to collapse[57]
- two witness signatures are required for the making of a valid will[58]
- a simple majority of votes in favour is required for passage of a resolution[59]
- the disposition of a lender, Larry, is such that he requires two sureties as a precondition of him agreeing to enter into any loan transaction[60]

Suppose that, on the occasion in point, there were more contributions of that element than needed to meet the relevant requirement (ie the amount of that element was 'oversubscribed'[61]) and, moreover, that it was so oversubscribed that, absent the contribution resulting from the specified factor, the required amount would still have been present because the other contributions of that element were sufficient. In such a scenario, but for the specified factor, the phenomenon *as individuated* would still have existed. In other words, even though the specified factor had resulted in a contribution of that element, its contribution was unnecessary for the existence of the phenomenon as individuated.

To illustrate, consider:

> A, B and C, acting independently but simultaneously, each negligently leans on Paul's car, which is parked at a lookout at the top of a mountain. Their combined force results in the car rolling over a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by the push of any one actor would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient.[62]

To simplify the discussion, assume each push was of equal force. If Paul could simply sue the cluster of A, B and C, he could establish this defendant-cluster was a cause using the traditional 'but-for' test because he could show that, but for the conduct of A+B+C his car would not have been destroyed. But the law

[56] On overdoses, see Stapleton, 'Unnecessary Causes' (n 9) 55, 59 and 61.
[57] ibid 47–48.
[58] Wills Act 1837.
[59] Stapleton, 'Unnecessary Causes' (n 9) 43–44.
[60] See text following n 41.
[61] Stapleton, 'Unnecessary Causes' (n 9) 41.
[62] *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (ALI Publishers 2010) s 27, illustration 3.

of obligations will not permit him to do so because the unit of enquiry is the separate legal entity:[63] he must launch a separate claim against each pusher. So, for example, in the claim against A, the specified factor will be A's push.

What about the particular phenomenon of interest here? How will the law individuate it? In some ways it will individuate it finely. For example, the law knows (and will not pretend otherwise) when and where Paul's car was destroyed: it will accordingly individuate the phenomenon of interest incorporating this time and place information.[64] The law also knows the precise accompanying debris pattern. If the law individuated the phenomenon of interest with this fine detail (eg 'the destruction of Paul's car accompanied by this precise debris pattern'), Paul would succeed under the traditional but-for test in establishing that A's push was a cause of it because, but for A's push, the car's destruction would not be accompanied by the same debris pattern because debris patterns depend on the total force applied to the car.[65]

But the reason the traditional 'but-for' test of causation proves so inconvenient in these cases is that the law individuates the phenomenon in a more coarse-grained way than this. The law individuates phenomena at a level of generality that matches the law's concern.[66] So here it will individuate the phenomenon of interest to match the substance of Paul's legal complaint, namely as 'the destruction of Paul's car'. This means that in light of the relevant laws of nature (specifically, the amount of force required to propel the car past the kerbstone) the law would conclude that A's push was not necessary for the existence of the phenomenon *individuated in this coarse way*: even without A's push, Paul's car would still have been destroyed because the pushes by B and C were alone sufficient to push the car over the kerbstone.

B's push is also not a but-for factor; neither is C's push. If the law insisted that a factor could not be the 'cause' of a phenomenon unless it bore a but-for relation to it—a choice that a legal discourse is, on my account, free, of course, to make—the result would be that even though we know exactly what happened and by what physical agency, the law would not identify any of these three individuals as a 'cause' of the destruction of Paul's car.[67] What is the ordinary citizen to make of this? Might such a result tend to bring the law into disrepute in the eyes of the citizen?

Such embarrassment is threatened in a wide range of situations such as when a group of company directors each votes in favour of marketing a dangerous product which goes on to kill some users (the voting regime

[63] See text to n 98. That this cluster was necessary for the destruction of the car is therefore irrelevant for the law of obligations (compare JL Mackie, *The Cement of the Universe* (OUP 1974) 47).
[64] See text to and following n 9.
[65] See also Stapleton, 'Unnecessary Causes' (n 9) 42–43.
[66] See text to n 9.
[67] Stapleton, 'Unnecessary Causes' (n 9) 43.

requiring a simple majority);[68] a heroin dealer supplies a dose to an addict who dies of an overdose in circumstances where the death would have happened anyway from the other doses he had bought from other dealers and injected;[69] there are three witnesses to the making of a valid will (when only two are required); an employer dismisses an employee after receiving multiple defamatory reports about him, but the employer's disposition is such that he would have done so even without the defamatory report from the specific defendant because he placed sufficient weight on the other reports.[70]

What should the law of obligations have done when confronted with this type of oversubscribed case? One awkward form of accommodation would have been to insist that only the but-for relation was to be recognised as 'causal'; and then, while maintaining that a specified factor that resulted in an unnecessary contribution to the existence of the phenomenon as individuated was not a 'cause' of that existence, to try to handle such a factor by saying its relation to the phenomenon was still relevant in some 'non-causal' way.[71] Courts who have squarely confronted the issue took the more coherent and transparent approach of recognising the relation of such a factor to the existence of the phenomenon as 'causal'.[72] In other words the relation of A's push on Paul's car is identified as a contributing *cause* of the phenomenon as individuated by the law (namely, 'the destruction of Paul's car'), albeit an unnecessary cause.

The most well-known scenarios where courts have recognised an unnecessary factor as a cause are those where it had resulted in the required amount of the relevant element, that is in a *sufficient* contribution to the existence of the phenomenon. A classic example here is when a fire, alone sufficient to burn down a building, first merged with another before the combined fires burnt the building down.[73] But it is important to emphasise that courts have also recognised an unnecessary factor as a cause when it resulted in a contribution that was *insufficient*: a good example here is where a resolution was passed by a

[68] See the 'Lederspray' decision of the German Federal Supreme Court, BGHSt 37, 106, 6 July 1990, discussed in Stapleton, 'Unnecessary Causes' (n 9) 43–44.

[69] This may have been the situation in *Burrage v United States* 134 US 881 (2014).

[70] As long as the defamatory statement had some influence on the employer's thinking and was not 'disregarded... altogether' it is recognised as a cause: *Associated Newspapers Ltd v Dingle* [1961] 2 QB 162 (CA) 189–90 (Devlin LJ).

[71] Compare the similarly awkward way Moore attempts to accommodate the phenomenon of liability for omissions despite his refusal to accept that an omission may qualify as a 'cause', Moore, *Causation and Responsibility* (n 3) 148.

[72] See cases cited in nn 68, 70 and 73 and Stapleton, 'Unnecessary Causes' (n 9).

[73] An example of the combined fires scenario is *Kingston v Chicago & Northwestern Railway Co* 211 NW 913 (WI 1927). See also *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 WLR 1353 [74]: 'where two persons independently search for the source of a gas leak with the aid of lighted candles' and an explosion results (Lord Nicholls); *Price Waterhouse v Hopkins* 490 US 228, 241 (1980): 'suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a "cause" of the motion... unless we can identify at least one of them as a but-for cause of the object's movement... This cannot be so', (Brennan J). See also *Strong v Woolworths* (2012) 246 CLR 182 [28] (French CJ, Gummow, Crennan and Bell JJ).

unanimous vote of a board of directors—the vote of an individual director was alone insufficient for passage, but it was recognised as a cause.[74]

Recognition that a factor resulting in an unnecessary contribution qualifies as a cause poses consequential challenges to legal analysis. When does and why should a legal rule impose necessity as an *additional* requirement of legal responsibility?[75] Where and how should the law respond to *unequal* contributions?[76] Against which benchmark should the law judge the valuation issue of whether an injury represents 'damage' for the purposes of the compensatory tort damages?[77] These lie outside the scope of this article.

Readers may, however, appreciate the reassurance that in very many cases where the defendant's wrongful contribution was both unnecessary and insufficient the recognition that it was a 'cause' of the existence of the phenomenon (as individuated) will not result in the liability of the defendant to pay compensatory damages. This is because even if a defendant's breach was a cause of an injury, he is not liable to pay compensatory damages if the same injury would have occurred in the absence of tortious conduct.[78] This means that if, absent the defendant's wrongful contribution, enough innocent contributions would have been present for the phenomenon's existence anyway, the defendant will not be liable. For example, A's wrongful push on Paul's car will not lead to A's liability if B and C's pushes were innocent.

D. *The Causal Relation in the Law of Obligations*

What then, at a minimum, is the character that relations must have before the orthodox law of obligations will describe them as 'causal' relations? If we take into account that courts who have squarely confronted the issue chose to recognise the relation of an unnecessary factor such as A's push to the existence of the phenomenon as 'causal', and leave aside certain exceptional cases,[79] this can be stated for the individual case as:

> A specified factor is a cause of the existence of a particular phenomenon (as that phenomenon is individuated by the law) only if, but for that factor alone, (i) the phenomenon would not exist or (ii) an actual contribution to an element of the positive requirements for the existence of the phenomenon would not exist.

[74] See n 68.

[75] As in economic duress in contract, see Stapleton, 'Unnecessary Causes' (n 9) 46.

[76] eg Bagshaw, 'Causing the Behaviour of Others' (n 24) 379–80 and Hamer, '"Factual Causation" and "Scope of Liability"' (n 39) 176–82 who label this a problem of 'causal potency'.

[77] Stapleton, 'Unnecessary Causes' (n 9) 54–61.

[78] ibid 55.

[79] For example, when courts concede they are departing from orthodoxy to recognise special rules of proof allowing claimants to jump evidentiary gaps (eg *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22, [2003] 1 AC 32) or when courts depart from the principle of individualistic responsibility in cases where the failure of a potential prevention mechanism was oversubscribed by the wrongful conduct of multiple legal entities, see text to n 111 and thereafter.

The presence of this relation can be tested for by an 'extended but-for' test which rests openly and directly on law's hindsight knowledge of features of the world, the particular facts of the case and what law knows to be the requirements for the existence of the particular phenomenon.[80] The significance of this new extended but-for test is that it is forensically simple to apply and avoids the sort of complex forensically-unfriendly 'causal sets' analysis promoted by Wright in his NESS analysis.[81] For example, in the context of a specified breach of obligation and the occurrence of a particular injury, this extended but-for test is:

> a breach is a cause of an injury only if, but for it alone, (i) the injury would not exist or (ii) an actual contribution to an element of the positive requirements for its occurrence would not exist.

It deserves emphasis that when the law of obligations recognises a specified factor as a 'cause' it is conveying contrastive information—namely that, while in the actual world the phenomenon or an actual contribution was present, if the specified factor had been absent that phenomenon or contribution would have been absent. Examples of (i) are well-known. Simple examples of (ii) are A's push on Paul's car and the omission of J, A's custodian, to prevent A from pushing the car: in each case, but for the specific conduct, an actual contribution (the force exerted on the car by A) would not have been present.

Now consider the famous case of *Barnett v Chelsea and Kensington Hospital Management Committee*,[82] where the trial judge found that the relevant element in the mechanism by which the victim died of arsenic poisoning was a disturbance of his enzyme processes. The defendant hospital's alleged breach was failing to admit and hydrate the man. Suppose the impact of this alleged breach had been to preserve the level of enzyme disturbance or to allow its increase: that is, suppose in the hypothetical world where the victim received careful treatment from the hospital, the level of his enzyme disturbance would have been lower by some increment than it actually was. If this had been the

[80] See text to nn 27–31 and to nn 41–45. This account encompasses the reach of, but extends beyond, the 'natural process account' recently sketched by Bagshaw, 'Causing the Behaviour of Others' (n 24) 373–75.

[81] For some criticisms of Wright's current complex formulation (Wright, 'The NESS Account' (n 7) 291) see n 19. Robertson has long highlighted the rarity of courts using a causal-sets approach, DW Robertson 'Causation in the Restatement (Third) of Torts: Three Arguable Mistakes' (2009) 44 Wake Forest L Rev 1007, 1022 n 107. He and Bagshaw, 'Causing the Behaviour of Others' (n 24) 370–73 have also comprehensively demonstrated the extreme awkwardness of any 'sufficient sets plus disaggregation' algorithm. I once tried to make such an approach workable (eg J Stapleton, 'Unpacking "Causation"' in P Cane and J Gardner (eds), *Relating to Responsibility* (Hart 2001) 145) but, convinced by their criticism, I abandoned the attempt. On some other points (nn 89 and 125) this article departs from my earlier work which, to the extent of any inconsistency, I happily recant.

[82] [1969] 1 QB 428 (CA). Compare Bagshaw, 'Causing the Behaviour of Others' (n 24) 371–72.

case then the breach would, on the above account, be recognised as a cause of the man's death because, but for the breach, that incremental contribution to the enzyme-disturbance element of the mechanism by which death actually occurred would not have been present.[83] On the actual facts of *Barnett's* case, however, the breach did not result in the preservation of, let alone an increase in, the level of enzyme disturbance, so it was rightly held not to have been a cause of the death.

Finally, it is useful to observe why limb (i) of the extended but-for test, which reflects law's interest in how the phenomenon would have been prevented, is not simply subsumed within limb (ii), which reflects law's interest in how the phenomenon was produced.[84] Suppose in breach of contract, contractor C1 omits to deliver peas to the other contractor, C2, in circumstances where C2 would have made a profit by selling the peas on to a third party. As we have seen,[85] the phenomenon C2 complains about when he sues C1 is the static state of his (C2's) finances, though he will couch his claim in terms of the 'loss' represented by the contrast between this state and the improved position he (C2) would have enjoyed in the playing out of the hypothetical no-breach world. The law recognises C1's breach as a cause of that phenomenon because, but for C1's breach, that static phenomenon would not have persisted (so the breach qualifies under (i)). However, C1's breach did not result in a *contribution* to any *positive* requirement for the persistence of the static state of the contractor's finances (so the breach does not qualify under (ii)). An identical analysis applies to the case where, but for the sloth of a solicitor, the testator's daughters would have inherited £9000 each.

2. *Resolution of Theoretical Puzzles*

A. *Oversubscribed Failure of a Potential Prevention Route*

The analysis in the foregoing section suggests the following question. Is it enough for the law to recognise a specified factor as a cause of a particular phenomenon if (in hindsight) the factor guaranteed the existence of the phenomenon because, though there had been a potential route by which the phenomenon would have been prevented, the factor sufficed to foil it? The answer is no: to be recognised as a cause the prevention-foiling factor must be necessary for that failure.[86]

[83] If, absent that incremental disturbance, the remaining innocently caused disturbance would still have produced death this would mean that, though the breach was a cause of the death, death was not 'damage' relative to where the law says the patient is entitled to be restored with compensatory damages. Stapleton, 'Unnecessary Causes' (n 9) 54–56.

[84] For a philosophical exploration of these concerns see N Hall, 'Two Concepts of Causation' in J Collins, N Hall and LA Paul (eds), *Causation and Counterfactuals* (MIT Press 2004) 225.

[85] See text to n 37.

[86] See also the discussion in the text to n 50.

Consider the earlier injury that baby Victor suffered from his vaginal delivery. With hindsight we can see there had been a potential way the vaginal delivery would have been prevented: namely if Hospital E had carefully filed a warning note in Mary's file and the later hospital had called for the file and heeded the warning. Now imagine a case where the later hospital, Hospital F* did *not* request Mary's medical file from Hospital E. I will call this the 'Hospital E/Hospital F*' case.[87] The route by which vaginal delivery would have been prevented again failed but here the failure was 'oversubscribed'. It would have failed simply because Hospital E did not ensure Mary's file contained the warning. It also would have failed simply because Hospital F* did not obtain Mary's file. If the law of obligations applies its orthodox analysis it will not recognise either hospital as a cause of Victor's injury even though it is clear, with hindsight, that each alone was sufficient to foil the potential prevention route.

We can express this orthodox approach in general terms: where there had been a potential route by which a phenomenon[88] would have been prevented, that route failed, and the specified factor was alone *sufficient* for that failure, but it was *not necessary* for that failure because the failure was oversubscribed, that factor will not be recognised as a cause of the phenomenon.[89] It is important to appreciate that courts confront such cases very frequently indeed.

In one group of cases ('Scenario 1' cases), of which the Hospital E/Hospital F* case is an example, the specified factor (which might be an act[90] or an omission in breach of an obligation) resulted in the absence of one necessary part of a potential prevention route and another factor (act or omission) resulted in the absence of another necessary part. A common example is where one driver failed to signal, another driver failed to keep a look out (for such a signal) and the vehicles collided injuring a third party. Another very common example is where the conduct of a product manufacturer resulted in the absence on its product label of a warning not to use the product in a certain risky way, the product user then did not read the label at all and used the product in the risky way, whereupon the risk eventuated injuring a third party[91] or the user himself. Finally, there is the notorious scenario where the conduct

[87] Compare the facts of *Elayoubi v Zipser* [2008] Aust Torts Reports 81-895.

[88] The analysis also applies when what is in issue is the oversubscribed failure of a route by which an *unnecessary* contribution (such as A's push on Paul's car) would have been prevented.

[89] Contrast my earlier mistaken view that it would be convenient for law to choose to designate such a relation (an example of what I termed 'duplicate necessity') as 'causal': Stapleton, 'Choosing what we Mean by "Causation" in the Law' (n 10) 474, 479.

[90] The term 'double omission' cases is too narrow. Contrast RW Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt L Rev 1071, 1126 and Stapleton, 'Choosing what we Mean by "Causation" in the Law' (n 10) 477.

[91] Here orthodoxy concludes that 'there is no conceivable causal connection between [the culpable failure to warn] and plaintiff's injury': *Ramirez v Plough Inc* 863 P2d 167, 177 (CA 1993). Compare where both failures are culpable (n 112).

of a brake repairer resulted in a car's brakes being inoperative, the driver failed to deploy the brake pedal,[92] so the car continued forward and hit a pedestrian.

In another group of cases ('Scenario 2' cases) the specified factor (which might be an act or an omission in breach of an obligation) resulted in the absence of one necessary part of a potential prevention route and it is determined that, had it not done so, another *hypothetical* factor (act or omission) would have operated and resulted in the absence of that or another necessary part.[93] Again a very common example is where a first factor resulted in the absence of a warning and, since warnings are often disregarded,[94] the determination is made that, even if the warning had been present in the particular case, it would probably not have been heeded by the relevant person. Another familiar example is where the first factor resulted in the absence of a safety device such as a harness for employees but the evidence is that if it had been present the specific employee would probably not have used it and would, for example, still have fallen either to his death[95] or onto a third party. Yet other examples arise in the context of medical treatment. In one a doctor did not attend a patient but it was determined that even if she had, she would probably not have ordered the treatment that would have prevented the patient's injury.[96]

Though theorists agree that these scenarios pose some of the thorniest problems for any account of the causal relation, it seems no theorist has appreciated how closely related they are to each other. From the preceding discussion, however, we are now in a position to resolve, in a principled, coherent way, the challenge these scenarios seem to present.

B. *Respect for the Separateness of Legal Entities Explains Law's Choice*

Why is it that, for a prevention-foiling factor to be described as a cause, orthodox legal principle requires that it be *necessary* for the failure of the potential prevention route and therefore necessary for the existence of the phenomenon? Why does the law choose this requirement? Why is it not enough for the claimant to point out that, but for the defendant's breach *and but for another actual factor such as another agent's conduct*, the phenomenon would have been absent? For example, in the Hospital E/Hospital F* case, why is it not

[92] Compare *Saunders System Birmingham Co v Adams* 117 So 72 (AL 1928), on which see Robertson 'Causation in the Restatement (Third) of Torts' (n 81) 1013 n 43.

[93] Philosophers identify esoteric versions of Scenario 2 such as 'redundant threat cancellers', see P Godfrey-Smith, 'Causal Pluralism' in Beebee, Hitchcock and Menzies (n 2) 326, 330.

[94] MA Jones and AM Dugdale (eds), *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2005) ss 11–32 cited with approval in *Coal Pension Properties Ltd v Nu-Way Ltd* [2009] EWHC 824 (TCC), [2009] NPC 65 [54] where the defendant–manufacturer of a gas boiler booster failed to warn the third party user of the need to do certain regular maintenance to avoid an explosion, an explosion injured property of the claimant but the latter's claim failed because the claimant was unable positively to prove the third party would have heeded the (hypothetical) warning [62].

[95] *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295 (HL).

[96] *Bolitho v City and Hackney HA* [1998] AC 232 (HL).

enough for Victor to point out that but for the conduct of Hospital E *and* the conduct of Hospital F* he would not have been injured? Why is this amalgamation of factors refused? Why does the law of obligations not recognise the more distant (in the sense of doubly hypothetical) relation between Hospital E's breach and Victor's injury as 'causal'? Why, in the law of obligations, does legal orthodoxy find that relation intolerably wide?[97]

The answer lies in the law of obligations' normative concern to respect the separateness of a distinct legal entity. Whereas in regulatory contexts the law may be interested in multiply-hypothetical relations, for example in order to identify how the absence of two or more factors might prevent certain injuries in the future,[98] in the law of obligations the separate legal entity is the unit of enquiry and analysis.

In the important context of imposing legal responsibility the law of obligations' respect for the separateness of a distinct legal entity grounds a fundamental normative principle: except under special doctrines such as vicarious liability, an individual defendant is only identified with and held responsible for the impact, relative to the hypothetical world in which he conforms to the legal norm, that his *own* violation of the norm had on the world as he found it. The law of obligations' responsibility model is 'individualistic' in this sense.

The impact that the specific aspect of an individual legal entity's conduct has on the world as he found it[99] is revealed by contrasting, from a hindsight vantage point, the actual world and how the hypothetical world, absent that specific aspect *alone*, would have played out. Now, remember that in Western discourse to say a factor is a 'cause' of a phenomenon is to say it bears some sort of explanatory relation to its existence.[100] As we have seen, for the law of obligations two dimensions are critically relevant to the existence of a phenomenon: how it would have been prevented and how it was produced. This explains which character the law chooses that relations must have before it will describe them as 'causal' relations: either the impact of the specific factor is that, without it *alone* the phenomenon would have been prevented, or without it *alone* a contribution to the phenomenon's production would have been absent (this is why I have included the word 'alone' in the extended but-for test).

We can now see why, in cases where there has been an oversubscribed failure of a potential prevention route, none of the prevention-foiling factors is

[97] Compare relations that would be too narrow (see text to n 33).

[98] For example, a regulator might formulate proposals to ensure both the future recording of accurate hospital medical records *and* their future consultation by later treating hospitals.

[99] This aspect of the law's perspective explains why in law 'causal' relations are often intransitive. Suppose X placed a roadside barrier on a dangerous cliff-top bend. Seeing this, Y was later prompted to remove it. Later Z loses control of his car and plummets over the cliff to his death in circumstances where the barrier would have prevented the fall and death. Law would conclude X is a cause of Y's conduct which in turn is a cause of Z's death (because law looks at the impact Y had on the world *as Y found it*) but X is not a cause of Z's death.

[100] See text to n 1.

identified as a cause of the phenomenon. It is not because, but for that factor, the injury would still have happened: after all, an unnecessary cause, such as A's push, *is* identified as a cause even though, but for it, the phenomenon would still have been happened. It is because, relative to the world as it would have played out absent such a prevention-foiling factor *alone*, the factor made no impact at all.[101] It made no difference.[102] This may be contrasted with factors recognised by the law as causes: (i) a but-for factor does make such an impact because without it the phenomenon would have been prevented; (ii) a contributing factor, even an unnecessary one such as A's push, also has such an impact because without it there would be one fewer actual contributions to an element of the positive requirements for the existence of the phenomenon as individuated.

The principle that a defendant is not responsible[103] for the state of the world, including the actual or hypothetical conduct of another agent, is manifest in the well-known maxim that the defendant can 'take the world as he finds it' even if that is to his advantage.[104] In fact, it is useful to distinguish three corollaries of the principle of defendant individualistic responsibility, namely a defendant is not responsible for other aspects of the world (i) as it is known by the time of trial to have played out, (ii) nor as it would probably have played out but for his breach, (iii) nor as he found it.

Corollary (i) is relevant in Scenario 1 cases such as the Hospital E/Hospital F* case. In examining the relation of Hospital E's conduct to Victor's injury the law will not ignore what is known, by the time of trial, as a fact.[105] Hospital E can point out that Hospital F* did not call for Mary's file (a failure for which Hospital E was not responsible). This means that if we compare the actual world and how the hypothetical world, absent the conduct of Hospital E *alone* would have played out, we see no relevant impact.

The operation of corollary (ii) is crucial in Scenario 2 cases such as the famous safety harness case, *McWilliams v Sir William Arrol & Co*,[106] which involved an employee's fall from a scaffold. There had been a potential route

[101] Except, as Sandy Steel points out, to ensure other prevention foiling factors would not be recognised as 'causes' (private communication).

[102] D Lewis, 'Causation' (1973) 70 J Phil 556, 557: 'we think of a cause as something that makes a difference'.

[103] It is true that whether law identifies a defendant's conduct as a 'cause' of the injury depends on other factors (eg whether a harness would have been worn) and in that sense the defendant's legal responsibility for the injury *hinges on* them, but this is not the same as saying he is responsible *for* those factors. On the possibility of exceptions to this orthodox position: in the factual causation context, see n 112; and in the context of whether an injury constitutes 'damage' for the purposes of compensatory damages, see Stapleton, 'Unnecessary Causes' (n 9) 60–61.

[104] *Baker v Willoughby* [1970] AC 467 (HL) 493 (Lord Reid).

[105] The application of this principle is best known in the context of the proper assessment of damages in the light of known vicissitudes: *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339 [75], [95]; *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 [12]; *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 (HL) 431 (Lord Macnaghten) 'why should [the fact-finder] listen to conjecture on a matter which has become an accomplished fact?' See also text to nn 28, 31 and 128.

[106] [1962] 1 WLR 295 (HL).

by which this fall would have been prevented consisting of two necessary parts. These were the supply by the employer of a harness and the employee choosing to wear it. The employer's breach of its obligation of care resulted in the absence of one part (the safety harness) but it was determined that, had the employer not breached but had supplied a harness, the employee would probably not have worn it. Here the employer can point out that, absent his breach, the world would have played out just as it did in the actual world—the breach had no impact. Exactly the same analysis applies very commonly in failure to warn claims where defendants often succeed in proving that even had they provided the required warning it probably would not have been heeded: as Justice Sopinka noted in such a case 'liability cannot be based on failure to take measures which would have no effect and be pointless'.[107]

Finally, corollary (iii) is relevant in Scenario 1 cases such as the Hospital E/Hospital F* case. If Hospital F* is sued because its failure to call for Mary's medical file was a breach of its legal obligation it can take the world in the state it found it and for which state Hospital F* is not itself responsible. Here this includes the fact that Mary's medical file did not contain the warning against vaginal delivery. Since the file did not contain the warning Hospital F* can point out that its conduct had no relevant impact in the world—because, absent its breach, it would have called for Mary's file and, not finding a warning, it would have allowed the vaginal delivery to go ahead exactly as it did in the actual world.[108]

C. *Another Normative Concern may Prompt Special Rules*

In many cases where the failure of a potential prevention route was oversubscribed, no problem arises when the law of obligations follows its orthodox approach of looking to the impact of the separate legal entity alone and concluding that none of the prevention-foiling factors is a cause. Consider a situation where the warning page was missing from Mary's file but the file was not called for by the second hospital. Suppose that the conduct of only one of the hospitals had been wrongful. The fact that Victor will fail to establish that this wrongful conduct was a cause of his injury would not be problematic at all. This is because it is a well-settled principle that

[107] *Hollis v Dow Corning Corp* [1995] 4 SCR 634 [78]. See also [75].

[108] In the most notorious application of his NESS approach Wright (inventing a 'causal priority' principle which the law simply does not use) asserts that a driver's failure to depress a brake pedal is a NESS 'cause' of an accident even though the brakes were completely inoperative: Wright, 'Once More into the Bramble Bush' (n 90) 1128–30; Wright, 'The NESS Account' (n 7) 317–18. Robert Stevens similarly asserts 'the driver cannot escape liability by arguing that if he had been careful and applied the brakes, they would not have worked anyway': R Stevens, *Torts and Rights* (OUP 2007) 136. Wright and Stevens fail to appreciate the ramifications of the principle of individualistic responsibility in the law of obligations, under which the driver is entitled to take the world (including the inoperative condition of the brakes) as he found it. On whether an exception to this principle is or should be recognised where the driver's failure was wrongful and the brakes were inoperative because of earlier wrongful conduct by a mechanic, see text to nn 109–123. Consider whether such an exceptional approach should adopt an asymmetry akin to that described in n 111.

compensatory damages should not make the victim better off than he would have been had he not been the victim of any tortious conduct.[109] If there has been only one wrongdoer and absent its wrongful conduct the potential prevention route would still have failed so that vaginal delivery and Victor's injury would *still* have occurred in exactly the same way, compensatory damages are inappropriate.

But what if the oversubscribed failure of the potential prevention route was due to the defendant's wrongful conduct coupled with other *wrongful* conduct (a type of Scenario 1) or because, absent the defendant's wrongful conduct, the route would probably have failed because there would have been other hypothetical conduct that would probably also have been *wrongful* (a type of Scenario 2)? Now the victim can point out that, absent all actual and hypothetical wrongful conduct, he would *not* have been injured. Such situations present a normative challenge to moral philosophers[110] and to the law of obligations.[111]

Should a defendant be permitted to escape liability by pointing the finger at another actual wrongdoer in a Scenario 1 type case where that other is joined and where, absent the wrongdoing of both, the phenomenon would have been prevented?[112] In Scenario 2 cases when the evidence suggests that, absent the defendant's breach, the hypothetical wrongful conduct of a third party would probably have thwarted the potential prevention route anyway, should the defendant be permitted to escape liability by pointing the finger at hypothetical third party wrongdoing?[113] A common example here is where, had the defendant fulfilled its obligation to provide an adequate product warning,

[109] Stapleton, 'Unnecessary Causes' (n 9) 54–55.

[110] eg C Sartorio, 'Two Wrongs do not Make a Right' (2012) 18 Legal Theory 473.

[111] A parallel concern is evident in sequential tort cases. Suppose certain effects of a first injury (produced by one tortfeasor) such as post trial reduced earning capacity had, before trial, been duplicated by a second injury (produced by a second tortfeasor) and the second injury was in no way connected with the first. The facts of *Baker* (n 104) were interpreted in this way by the House of Lords (though see Stevens, *Torts and Rights* (n 108) 139). In quantifying the liability of the first tortfeasor in *Baker* the House of Lords refused to make any adjustment for the fact that by the time of trial it was known that the reduced earning capacity would have been produced by the second tortfeasor anyway. Importantly, law's response to the concern is asymmetric in sequential tort cases: the second tortfeasor is permitted to take the world as he found it, even though this state had been produced by a preceding tortfeasor, *Performance Cars Ltd v Abraham* [1962] 1 QB 33 (CA). The concern can also arise where there is an evidentiary gap in identification as in *Cook v Lewis* [1951] SCR 830, discussed in *Clements v Clements* [2012] SCC 32, [19] 'allowing the negligent defendants to escape liability by pointing the finger at each other, would not have met the goals of negligence law'. See also *Wright* (n 48) [31] 'where there are successive tortfeasors, it cannot be right that each can avoid liability by blaming the other'; Stapleton, 'Unnecessary Causes' (n 9) 60–63 (actual, albeit unnecessary and insufficient, wrongful contributions).

[112] *Elayoubi* (n 87) [48]–[57]; *Restatement (Third) of Torts* (n 62) s 27, Reporters' Note, cmt i; AC Becht and FW Miller, *The Test of Factual Causation in Negligence and Strict Liability* (Washington University Press 1961) 95, 'to deny relief… [in multiple tortfeasor Scenario 1 cases] seems morally indefensible to us, and we would accordingly permit recovery though admitting that the causal relation usually required is lacking'. See also the discussion by David A Fischer of US cases where there was a product manufacturer's culpable failure to warn, a user's culpable failure to read and a third party was injured: DA Fischer, 'Causation in Fact in Omission Cases' [1992] Utah L Rev 1335, 1354–55. On amalgamating the conduct of multiple wrongdoers see DB Dobbs, *The Law of Torts* (West Group 2000) 417.

[113] *Clements* (n 111) [45].

it is probable that the third party recipient would have wrongfully failed to heed it.[114]

Clearly the normative objection to allowing wrongdoers to escape in this way is in tension with the concern to respect the separateness of a distinct legal entity. When and how it should prompt the law of obligations to adopt an exception to its orthodox causal analysis is beyond the scope of this article. But an example of where this has been suggested is interesting.[115] In *Gouldsmith v Mid Staffordshire General Hospitals NHS Trust*[116] the defendant hospital's breach consisted in not referring a patient to a third party specialist hospital which, had it adopted a particular treatment, would probably have prevented an injury suffered by the victim. In an orthodox observation the Court of Appeal noted that, if it could be shown that the third party would have adopted that treatment, the claimant would be able to show the defendant's breach was a cause of the injury. But, in addition the Court noted that, if the third party would not have adopted it, the claimant would still be able to succeed against the defendant *if* she could prove that the third party's failure to treat in this way would itself have been a breach of its legal obligation to her: in other words, if, in this Scenario 2 context, the hypothetical conduct of the third party would also have been wrongful.[117]

In passing it is worth noting two points. The latter unorthodox approach was not necessary for the resolution of *Gouldsmith* because the claimant was able to prove the third party would have adopted the particular preventive treatment.[118] Secondly, in operation such an approach may prove highly problematic because it requires the determination of both what the hypothetical conduct of a third party would have been and whether it would have been wrongful. Moreover, this may be in contexts where the third party is unidentified. Even in cases where the third

[114] For a court following the orthodox approach and permitting the defendant to escape liability, see *Coal Pension Properties Ltd* (n 94).

[115] Another is the rule in *Hollis* (n 107) [61] that a breast implant manufacturer should not be absolved of liability for its failure to warn a learned intermediary 'because of the possibility, *even the probability*, that the learned intermediary would not have advised [the patient] had the manufacturer issued [the warning]' (emphasis added). Sopinka J in dissent (McLachlin J agreeing) noted this offended the 'fundamental requirement of tort law that the plaintiff establish causation in order to prove the defendant"s liability' [75]. See also the special approach in *Walker Estate v York-Finch General Hospital* [2001] SCC 23 [88] which was however not needed on the facts [98].

[116] [2007] EWCA Civ 397. See also *Turjman v Stonewall Hotel Pty Ltd* [2011] NSWCA 392 [4] (Bathurst CJ and Allsop P).

[117] This unorthodox approach has been variously characterised as an 'alternative route to proving causation' (*Gouldsmith* (n 120) [44] (Maurice Kay LJ)) or as a route to liability where the defendant's 'negligence has not in fact caused or contributed to the injury' (*Wright* (n 48) [98] (Elias LJ)). Since the availability of the rule depends on whether the hypothetical conduct, that is determined would have taken place, would itself have been wrongful, a doctrine relevant to breach (such as that in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (HC)) becomes relevant also at the factual causation stage.

[118] *Gouldsmith* (n 120) [31]–[33], nor was it necessary in *Wright's* case (n 48) [124] (CA) where the approach was also accepted by Lord Neuberger MR [31], [61]. Compare the scepticism of Elias LJ [101].

party is identified, the defendant will be unable to join it as a party to the proceedings because, by definition, the relevant conduct of the third party is merely hypothetical.[119]

What is more important for our discussion is that the unorthodox approach of the *Gouldsmith* dictum was an extension,[120] to a hypothetical third party context, of the separate rule that it would be 'an affront to justice'[121] for a defendant to escape on the basis of his *own* hypothetical wrongdoing. As Lord Browne-Wilkinson noted in *Bolitho v City and Hackney Health Authority*, 'a defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter'.[122]

The rationale for this *Bolitho* rule is entirely consistent with the law of obligations' respect for the separateness of legal entities for it merely amalgamates actual and hypothetical conduct of the *same* defendant (or those for whom the defendant is vicariously liable). Exactly the same principle would allow the amalgamation of the two pieces of wrongful conduct in Scenario 1 contexts where both were that of the same defendant: for example, if Victor's injury had occurred after the *same* doctor both wrongfully failed to file the warning against vaginal delivery in Mary's medical record and then wrongfully failed to refer to Mary's file when handling her later care.[123]

D. *Desert Travellers*

When I started thinking about causation many moons ago I did not pay enough attention to the fact that the law describes the particular phenomenon of interest in as fine grained a way in respect of time and place as the known facts allow.[124] My neglect prevented me seeing how the law would respond to the following famous scenario.[125] On Sunday Agent 1 contaminates a desert traveller's only water keg with an odourless poison which would kill within 24

[119] Certainly, 'because the [third party] hospital was not before the court… it was not open to the judge to determine [its] legal responsibility', *Wright's* case (n 48) [122] (Smith LJ). See also Maurice Kay LJ's concern with the potential 'evidential vacuum', *Gouldsmith* (n 120) [46] and N McBride and S Steel, 'Suing for the Loss of a Right to Sue: Why *Wright* is Wrong' (2012) 28 PN 27. Equivalent evidentiary dilemmas arise in Scenario 1 contexts, eg where it is clear the defendant did not call for the patient's file but it is unclear if the relevant warning had been recorded therein by an earlier hospital: *Zipser v Elayoubi* [2009] HCA Trans 88. For the parallel problem in the context of distinguishing tortious and non-tortious intervening vicissitudes see *Jobling v Associated Dairies* [1982] AC 794 (HL) 816 (Lord Keith).

[120] Contrast *Gouldsmith* (n 120) [53] (Wilson LJ).

[121] *Wright* (n 48) (Lord Neuberger MR) [57].

[122] [1998] AC 232 (HL) 240 approving *Joyce v Merton, Sutton and Wandsworth HA* [1996] 7 Med L Rev 1 (CA) 20 (Hobhouse LJ) (hypothetical conduct of in-house vascular surgeon of the defendant).

[123] eg *Restatement (Third) of Torts* (n 62) s 26, illustration 3. See also *David John Roberts v JW Ward & Son (A firm)* (CA, 10 December 1981): the defendant cannot 'set up his own error to escape the consequences of his own negligence. I see the persuasive force of the purely logical approach, based upon causation; but logical arguments based upon causation do not always deter the courts from doing justice' (Griffiths LJ).

[124] See text to and following n 9.

[125] Accordingly, I recant that part of my analysis in 'Perspectives on Causation' in J Horder (ed), *Oxford Essays on Jurisprudence: Fourth Series* (OUP 2000) 61, 82–84 and Stapleton, 'Unpacking "Causation"' (n 81) 145, 178–83. Mea culpa.

hours of ingestion; an hour later an unrelated Agent 2 drains the contaminated liquid from the keg; on the following Friday at noon the traveller dies of thirst. The law, I now see, would identify the particular phenomenon of interest here as the traveller's 'death by thirst on Friday at noon'. Only the conduct of Agent 2 bears to this phenomenon the causal relation identified in this article.

Finally, it is illuminating to apply the foregoing analysis to another well-known desert traveller case: one in which, on Sunday Agent 3 replaces the water in the keg with salt, and an hour later an unrelated Agent 4 removes the keg completely; on the following Friday the traveller dies of thirst at noon. The law would identify the particular phenomenon of interest in exactly the same way as before, namely the traveller's 'death by thirst on Friday at noon'. Though it may not be immediately obvious, this is a Scenario 1 case, structurally comparable to the Hospital E/Hospital F* case. There was a potential route by which this death by thirst would have been prevented: namely, water being in the keg and the keg being within reach of the traveller. This route failed and that failure was oversubscribed: Agent 3 was responsible for one part being missing and Agent 4 was responsible for the other part being missing.

The relation of the conduct of Agent 3 to the death is not one that *orthodox* legal principles would regard as causal, nor is the relation of the conduct of Agent 4. Under orthodox principles of individual responsibility each agent is permitted to demand that only his impact on the world be assessed. Agent 3 can claim that by trial we know how the world played out and his substitution of the salt in the keg turned out to be irrelevant because Agent 4 removed the keg. And Agent 4 can claim an entitlement to take the world as he found it: and in this case he found a keg with no water in it so, even if he had left it alone, the death would have happened exactly as it did.[126] Again, it is true that a legal system might baulk at this result where both agents acted wrongfully and it might well respond with some exceptional approach to enable the victim to recover compensatory damages from one or both agents.[127] My point is that such a move would be exceptional and an inroad into the law of obligations' orthodox respect for the separateness of each of these distinct legal entities, a respect which illuminates why, in choosing the character relations must have before it will describe them as 'causal' relations, the law chooses that identified in this article and not a wider one.

[126] Wright initially asserted NESS analysis reveals Agent 3 was a cause of the death and not Agent 4 (Wright, 'Causation in Tort Law' (n 11)) 1802; now he asserts NESS analysis gives the opposite result, namely that Agent 4 was a cause and not Agent 3: Wright, 'The NESS Account' (n 7) 298 n 88.

[127] See nn 108–123 and text thereto.

3. *Summary*

(1) In most Western discourse to say a factor is a 'cause' of a phenomenon is to say it bears some sort of explanatory relation to the *existence* of that phenomenon. Within this context a discourse may choose the character that relations must have before it will describe them as 'causal' relations.

(2) For the law of obligations two dimensions are critically relevant to the existence of a phenomenon: how it would have been prevented and how it was produced. This explains the character the law chooses: either the impact of the specific factor is that, without it alone the phenomenon would have been prevented, or without it alone a contribution to its production would have been absent.

(3) This character can be simply stated for the individual case as:

> a specified factor is a cause of the existence of a particular phenomenon (as that phenomenon is individuated by the law) only if, but for that factor alone, (i) the phenomenon would not exist or (ii) an actual contribution to an element of the positive requirements for the existence of the phenomenon would not exist.

Examples herein of (i), but-for causes, include:

- Harry's push on Beth's car
- Ian's failure to restrain Harry
- *Wagon Mound* releasing its bunker oil
- Slothful solicitor's failure to ensure the will was drawn up
- Contractor's failure to deliver peas.

Examples herein of (ii), contributing causes, include:

- Harry's push on Beth's car
- Ian's failure to restrain Harry
- *Wagon Mound* releasing its bunker oil
- A's push on Paul's car
- J's failure to restrain A
- A company director votes in favour of a resolution which is unanimous
- Specific heroin dose where overdose death would have happened anyway
- One of three witness signatures to a will where the requirement is two
- A report defaming an employee is one reason employer dismisses him
- A fire merges with another before it burns down a building.

(4) When, in an individual case, the law is determining whether a specified factor is a 'cause' in the above sense it relies openly and directly on its knowledge of features of the world such as the laws of nature, doctrinal formulae, evidence of the dispositions of the agents involved and so on, as well as its knowledge of specific facts of what happened in the individual case (from all of which it identifies the positive requirements

for the existence of the phenomenon, as individuated). In this process law uses hindsight and need ignore no facts.[128]

(5) The 'extended but-for' test, which identifies whether a breach of obligation is a 'cause' (in the above sense) of an injury, is forensically straightforward:

> a breach is a cause of an injury only if, but for it alone, (i) the injury would not exist or (ii) an actual contribution to an element of the positive requirements for the occurrence of the injury would not exist.

(6) Consideration of how law treats cases where there has been an over-subscribed failure of a route that would have prevented a phenomenon illuminates important principles in the law of obligations relating to the separateness of a legal entity and to legal responsibility. These in turn illuminate why the orthodox law of obligations does not choose to designate as 'causal' a relation wider than the one identified in this article.

[128] Compare Wright's misleading notion of 'roping off': Wright, 'The NESS Account' (n 7) 292–93. See also text to nn 28, 31 and 105.