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Volume 17
Issue 2 *Issue 2 - March 1964*

Article 6

3-1964

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John H. Mansfield

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Recommended Citation

John H. Mansfield, Hart and Honore, Causation in the Law, 17 *Vanderbilt Law Review* 487 (1964)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol17/iss2/6

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Hart and Honoré, Causation in the Law* —A Comment

*John H. Mansfield***

It is scarcely necessary at this date to give notice of the publication of *Causation in the Law*. Since its appearance four years ago the book has become widely known and has been much discussed by legal scholars, particularly in the fields of torts and criminal law. Doubtless it has received similar attention from philosophers, for it is a work that seeks to achieve something which is seldom attempted, and then with little success, namely, to combine legal and philosophical thinking in a way that secures the understanding and approval of both philosophers and lawyers by satisfying the analytical rigor of the philosopher without offending the practical instincts of the lawyer. That the book would quickly receive widespread attention was made inevitable by Professor Hart's eminence both as a legal scholar and a philosopher and by the intrinsic interest of the subject matter. It is a remarkable fact that after so much discussion, extending over so many years, of the role that causation plays in law, it should still be a subject that engages the deepest attention and maximum intellectual effort of legal scholars. The explanation lies in the fundamental character of the concepts involved and the extreme difficulty of perceiving their application in particular cases. It is a subject in which solid work is still welcome because still much needed. Since at this date the book is hardly in need of the notice and brief appraisal customarily expected in a book review, it has seemed to me that it might be more useful to make a few observations, some approving, some critical, on a number of the more interesting problems with which the authors concern themselves, and to attempt to come to grips with the points that give difficulty even to the relatively instructed reader.

First some of the virtues of the book should be mentioned and also its more serious deficiencies, for both virtues and deficiencies it surely has. One great gain from following the authors in the development of their analysis is a heightened awareness of what they appropriately refer to as the "ubiquity and diversity" of causal ques-

*H. L. A. Hart & A. M. Honoré, Causation in the Law (1959). Mr. Hart is Professor of Jurisprudence at Oxford University; Mr. Honoré is Rhodes Reader in Roman-Dutch Law at Oxford University.

**Professor of Law, Harvard University.

tions.[1] We begin to see the nature of the lawyer's interest in causal questions; it is like that of the historian, but strikingly different from that of the scientist. Further, what may at one time have seemed relatively straightforward, flat terrain, characterized only by the single simple question of *sine qua non,* quickly emerges as an extraordinarily complicated region, marked by all manner of interesting, overlapping, and intersecting features. The variety of causal questions which the authors treat can only be suggested. For example, they ask: How can an omission to act or a persistent state of being be considered the cause of anything? What do we mean when we say that one person caused another to act by providing him with a reason for acting (a relationship the authors characterize as an "interpersonal transaction")? How has one caused harm when he has provided another with an opportunity for inflicting it? What is meant by causing loss by depriving another of a chance of economic gain? The significant point is that although these questions are all properly thought of as involving causal concepts, the concepts that are involved have distinct characteristics and cannot necessarily be subsumed under a single, all-embracing notion of causation. It is the authors' aim, in which they are highly successful, to open our eyes to the variousness of the world of causal concepts, and to wean us from a tendency toward oversimplification in these matters. At the same time, by bringing together in one place the full range of causal notions, they seek to present an integrated view of the whole subject, so that appreciating the diversity of causal concepts, we may nevertheless perceive their common characteristics. In performing this task, the authors give masterful treatments to a number of subjects. I mention in particular the chapter on "Causation and *Sine Qua Non,*" and the discussion of "interpersonal transactions."

The authors seem to have encountered the greatest difficulty in organizing their discussion. This can be explained in part by the fact that the book is the resnlt of collaboration between two persons and there may have been uncertainty as to where responsibility lay for certain matters. Also the task undertaken—to bring together a great variety of causal questions whose common characteristics are not always easily perceived—posed a severe challenge to a unified discussion. Whatever the explanation, the result is a very considerable amount of confusion and repetitiousness, and often serious uncertainty as to the exact nature of the authors' argument. Many important subjects are treated in half-a-dozen places, but nowhere with completeness. The reader cannot be sure that he understands the authors'

1. HART & HONORÉ, CAUSATION IN THE LAW 79 (1959) [hereinafter cited as HART & HONORÉ].

position until he has read through the entire book, and even then he must labor hard to integrate and reconcile scattered discussions of a subject. Often there appears to be no good reason why a full exposition could not have been given in one place early in the book. Unfortunately these organizational difficulties reduce the practical usefulness of the book and are very likely to deter persons from referring to it who would gain much from doing so.[2]

As I have said, many subjects are dealt with in a lucid and masterful fashion. The discussion of others, however, can only be described as incomplete and obscure, and the reader is denied the full analysis of which he stands in need. Particularly open to criticism are the first seventy-odd pages of the book, which deal with causal concepts outside the context of legal thought. This is by far the most important part of the book, since it provides the foundation for all that follows, and yet the discussion is often carried on as if the reader had already read and digested material that comes much later. This first section should have been either reduced to a short introduction or greatly expanded to include much of the later material. At certain points it is unclear exactly what is being discussed, and the relationship between ideas developed here and others confronted later in a legal context is not made sufficiently clear. The quality and clarity of the discussion increases markedly after one has worked through this opening material.[3]

Another point must be emphatically made. At times the authors are

2. A partial bill of particulars would include the following: The discussion of the notion of "incidental connection" is carried on in at least three separate places. *Id.* at 109-16 and 121, 191-94, 228-29. The problem of "additional" and "alternative" causation is dealt with in a number of places. *Id.* at 116-19, 121, 189-90, 216-29. The same is true of the relation between the generalizations underlying causal statements and "interpersonal transactions." *Id.* at 119-20, 176-78. Passages dealing with "abnormality" and "voluntary conduct" in their bearing on causal inquiries are scattered throughout the book, and reference must be made to many places to understand adequately what the authors mean by a "coincidence." Clues to the distinction between "explanatory" and "attributive" causal inquiries are embedded in various places throughout the first hundred pages of the book.

3. The initial and important discussion of "abnormality," and the role it plays in establishing circumstances as "causes" rather than "mere conditions" (*id.* at 31-38) is carried on without sufficient reminders of the exact context in which the point arises and the purpose for which the classification is to be made. Furthermore, it is not made sufficiently clear how these purposes are related to legal purposes. The chapter on "Causation and Responsibility" is especially vague on what it is that is under discussion, and a certain elusiveness marks all the authors' observations here and elsewhere on the difference between "explanatory" and "attributive" causal inquiries. And see the cryptic and unsatisfactory analysis of "providing opportunities." *Id.* at 55-56.

Later examples of the authors' failure to give the reader a sufficiently full exposition of their thought are the passage concerning omissions in relation to the notions of "causal irrelevancy" and "alternative causation," *id.* at 121, and the discussion concerning the difference between lack of causal connection and the fact that "plaintiff has not suffered any infringement of the right for which he claims compensation." *Id.* at 226-28.

so taken up with the investigation of causal concepts that they seriously neglect important noncausal factors. Granted that their aim was to investigate the structure and function of causal concepts, still they were bound to give attention to other doctrines and policies of the law habitually involved in the factual situations that give rise to causal problems. They were bound to provide a framework of general legal thought in order to give the reader a proper perspective on the role that causal concepts play in legal decisions.[4]

The principal thesis of *Causation in the Law* is that questions that have traditionally been dealt with by courts in causal terminology, including the question of "proximate cause," are true causal questions, and that they are and should be resolved by reference to common-sense causal notions of a nonlegal character. In the authors' words, "the plain man's causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies, although the issues are often very different in kind and complexity from those that confront the plain man."[5] The common-sense causal notions to which the courts refer are by no means retricted to the notion of a condition *sine qua non*. Although this is an extremely important causal concept, and in a sense a central one, it is far from being the only causal concept that the law adopts; and efforts to reduce all causal questions of legal significance to this single concept are in conflict both with decided cases and with sound views of what the law ought to be. From this statement of the authors' principal thesis, it is immediately apparent that they have entered the lists against what many have supposed, in this country at least, to be the trend of enlightened judicial decision and scholarship during the past thirty or forty years. They have taken up the challenge of those who have labored long and hard to show that in large measure the terminology of causation is in fact used by the courts to mask the application of noncausal policy considerations.

EXPLANATORY AND ATTRIBUTIVE CAUSAL STATEMENTS

The authors set forth as a fundamental proposition that there are

4. The section on "voluntary human conduct," *id.* at 129-51, provides some striking examples of forcing causal explanations on cases that can be much better explained on other grounds. The question of whether benefits payable under an insurance policy or pension plan should be deducted from the plaintiff's damages is discussed as if the main problem were whether the benefit was caused by the defendant's wrongful conduct. *Id.* at 81, 150. And see the discussion of Beatty v. Gillbanks, 9 Q.B.D. 308 (1882). HART & HONORÉ 333-34.

5. *Id.* at 1.

two principal contexts in which causal statements are made, the context of "explanation" and the context of "attribution."[6] The explanatory context is as follows: We are puzzled by the happening of a particular event, probably because it is unusual in the light of our past experience. Our uncertainty receives an answer in the statement that a certain circumstance was the cause of the event. The statement that the circumstance was the cause of the event provides an explanation of the event.

The authors have in mind here cases in which we are ignorant of a circumstance that had a bearing on the occurrence of the puzzling event, and the statement of causal relationship is made as the result of a successful effort to uncover this circumstance. It seems at first that ignorance of such a prior circumstance is the hallmark of the "explanatory" context; but it soon develops that this is not the case and that the explanatory context includes situations in which, although there is no ignorance of any relevant prior circumstances, there is, nevertheless, a need and desire for an "explanation" of the later event. The explanation is provided by the application of a variety of common-sense causal notions. These include both the idea that one event is the cause of another if their relationship exemplifies a common sequence between types of events and also other ideas that distinguish causes from mere "conditions." Here, as much as where there is ignorance of a prior circumstance, the function of the application of causal notions is to explain.

In the "attributive" context we trace the consequences of a particular event. Our concern is not why something happened, but, given one event, what later events can be properly ascribed to it as its consequences. Again, ignorance of relevant circumstances, in this case later circumstances, is not the essential point. The problem is, rather, to characterize known events as the consequences of an earlier event by the application of common-sense causal criteria. Our purpose in doing this may be to ascribe to an actor "responsibility" for the later events, in the sense that he is to be blamed, punished, or made to compensate for an injury. But such a purpose is evidently not essential; the historian often thinks within an attributive context even though his purpose is simply to understand events.

It is easier to set forth this distinction between explanation and attribution than to see its importance. The authors' own idea of its significance is obscured by variations in the terminology they employ. At one point they speak of "the different types of context in which causal statements are made,"[7] at another time of "attributive" and

6. On this subject, see *id.* at 22-23, 30, 37, 59, 64-68, 128 n.2.
7. *Id.* at 22.

"explanatory causal statements,"[8] and at still another point of "explanatory inquiries."[9] What this language fails to make clear is the extent to which causal notions vary according to whether they are employed in an explanatory or attributive context. If they do not vary significantly, then it is hard to see why the authors have gone to such great efforts to establish the distinction between explanation and attribution.

It seems clear that the authors cannot take the position that in the attributive context the purpose of ascribing responsibility to an actor affects the character of the causal notions involved. Such a suggestion would undermine one of their principal theses, which is that responsibility is determined in part by causal notions, but that causal notions are not mere reflections of our ideas about responsibility. In particular, the causal language employed by the courts is not simply a vehicle for implementing ideas about what it is fair and just that the defendant should be held responsible for. Thus, in their view, the fact that in an attributive context our ultimate purpose may be to blame, punish, or compel compensation does not itself shape the character of the causal concepts involved.

If this is true, then what is there to distinguish causal thinking in the explanatory and attributive contexts? The answer seems to be, very little. What we are left with is that in the explanatory context our thought in some sense starts with a later event and moves backward to an earlier event, whereas in an attributive context it starts with an earlier event and moves forward to a later one. But does this result in significantly different notions about what constitutes causal connection? If when we think first of y we conclude that its cause was x, will we not when we think first of x conclude that its consequence was y? Whether we think backwards or forwards, will not our notion of the relationship between the two events be much the same? Not necessarily, say the authors at one point,[10] but their discussion and the examples they give are not particularly convincing. And in fact, much of their later analysis ignores the very distinction that they have taken such pains to establish and lends little support to the assertion that attributive inquiries "have special features that require elucidation."[11] In view of this, would it not perhaps have been better to deal with causal notions in a single, unified discussion, instead of examining them in the separate contexts of explanation and attribution? This approach would have avoided unnecessary repetition and the misleading suggestion that these notions vary significantly according to the context in which they arise, whether explanatory or attributive.

8. *Id.* at 30.
9. *Id.* at 31.
10. *Id.* at 128.
11. *Id.* at 23.

CAUSATION AND BLAME

The authors, as has been noted, refer to the fact that causal inquiries are frequently carried on in a context in which the ultimate purpose is to ascribe responsibility to a human actor. By "responsibility" they apparently mean that the actor is to be blamed, punished, or made to compensate for a loss. The authors do not really pursue the fascinating question of the relation between causal notions on the one hand and the nature of our judgment of an actor or his conduct on the other. How does the fact that an actor's conduct caused injury affect our judgment of its blameworthiness? The authors touch upon but do not examine this question when they mention that "one ground at least for saying that an act is blameworthy is that it has caused harm . . ." and that "our judgments of moral responsibility are powerfully influenced by causation . . . ."[12] In another place they speak of blaming a person for the occurrence of harm, and being "blamed for . . . harmful consequences."[13]

When we invoke the doctrine of strict liability, this question of the relation between causation and blame is present. We may say that the defendant was not at fault in the circumstances of a particular case, because although the risks to those in the plaintiff's class were great, the benefits to be realized from the defendant's conduct were even greater. Nevertheless, even though the defendant was not at fault, he must compensate the plaintiff for his injuries. Possible reasons for this are that the obligation to compensate will provide an incentive for those in the defendant's position to exercise the very highest degree of care possible, and that the defendant is in a position to predict and insure against losses regularly resulting from his activities, and that it is only fair that the defendant should compensate those who have been injured by conduct on the part of the defendant from which he has benefited.

On the other hand, we may decide that the defendant was indeed at fault, with our judgment of fault not resting simply on the fact that he engaged in conduct which created certain risks, but also on the fact that he engaged in this conduct without making provision for those who might be injured by it, or that he failed to compensate those who were actually injured by it. The fault arises not from engaging in the conduct as such, but in doing so without making financial provision for potential victims. The advantages to be realized from the defendant's conduct are not so obvious or so great as to relieve him of the obligation to do what he can to offset the injurious

12. *Id.* at 271.
13. *Id.* at 230-31.

effects of his activities. Here a judgment of blameworthiness attaches because we consider the defendant's conduct broadly and not merely to determine whether a particular risky activity was justified. We consider the defendant in his full social and economic context.

Another possibility is that the actual occurrence of loss or injury persuades us that we were wrong in our initial judgment of the defendant's conduct. It is no longer a matter simply of general theory and abstract discussion. There has been actual loss to real human beings, and this fact compels us to reconsider the balance of advantages and disadvantages in the defendant's conduct. Is this not often true of the judgments that we pass on our own conduct, that the actual occurrence of injury to others opens our eyes to the self-deceiving nature of our earlier justifications and the inflated value that we placed upon our own interests? Sometimes the fact of actual injury merely affects our judgment about the blameworthiness of such conduct in the future, perhaps because our estimate of the likelihood of injury resulting from such conduct has been altered. In other cases, however, the occurrence of injury causes us to reverse our judgment about the blameworthiness of the very conduct that brought about the injury and to condemn it.

Does the matter go further than this? Does the very occurrence of harm itself in some way provide a reason for blame? Why does the tragic hero of Greek drama feel a sense of guilt when his conduct brings about a disastrous result, even though everyone agrees that he was justified in acting as he did? Is it because he subconsciously desired the result? The explanation in fact goes deeper than this. The driver who accidentally kills a child who darts out unexpectedly from between parked cars feels grief, regret, and in some sense guilt. He has caused an injury to another, an objective evil, and the assurance that his conduct was blameless only partly consoles him for what he has done. It does not undo what he has done. Perhaps what is true of the driver is also true, to some slight extent, of the person who merely witnesses the death of the child or reads about it in a newspaper. But for the driver himself, the one whose conduct caused the death, there is the bitter experience of directly participating in the hardness and cruelty of life.

The problem is seen in another form when we recall that completed crimes are punished more severely than attempts. The authors note this curiosity, and offer the following explanation for it. The notion that there shonld be a difference in punishment is deeply rooted in the popular conscience, and to ignore it is to risk nullification by jury verdicts. To respect this sentiment will not weaken the deterrent effect of the law's threat, for the person who embarks on a course of

criminal conduct usually contemplates success and will not be less deterred if he knows that punishment in event of failure will be less severe than if he succeeds.[14] In other words, the objective of deterrence, taken alone, justifies only that amount of punishment necessary to deter, and it is not necessary to punish attempts as severely as completed crimes in order to maintain the desired deterrent force. This argument, one might suppose, could justify not punishing attempts at all, or letting go unpunished every hundredth murderer, since this would not significantly affect the deterrent pressure on the whole class of potential criminals. The truth of course is that other considerations than deterrence affect whether, and how much, we punish those who have engaged in forbidden conduct. Among these considerations are the need to isolate dangerous persons and the hope of rehabilitation. Also included are the desire for retribution and the feeling that justice will not be done unless the punishment is in some degree measured by the culpability of the defendant. In the context of attempts and completed crimes, it is this last notion that is deeply rooted in the popular conscience. The successful criminal and the person who engaged in an unsuccessful attempt are in some sense not of equal culpability. They are different in that the defendant who succeeded in his purpose has done an injustice to another; he has brought about an objective evil in the form of an injury to another; he has actively participated in the cruelty and tragedy of life. He has done a worse act than the person who failed and is in some sense a worse man. It is this largely intuitive judgment that finds expression in existing law.

THE CENTRAL CAUSAL NOTION

Let us move now into the main current of the authors' thought about causal concepts. In the discussion that immediately follows, the question of legal liability is not necessarily involved. The primary effort is to gain insight into the structure of causal concepts as such. Only if we are sure of our ground here and have correctly penetrated the intricacies of nonlegal causal notions is it possible with any confidence to go on to determine the bearing of these notions on the issue of legal liability.

The authors insist that the notion of a condition *sine qua non* is not the only significant causal concept. A condition that is a *sine qua non* does not necessarily deserve description as a cause, and furthermore, a condition may be a cause even though it is not a *sine qua non*. On the other hand, the authors do recognize that there is a concept, closely

14. *Id.* at 354-55.

related to the notion of *sine qua non,* which is in a sense fundamental to all causal analysis, at least in regard to physical occurrences. This central causal concept is essentially that elucidated by Hume and Mill, but with qualifications designed to bring it more exactly into line with what the authors find to be the characteristics of ordinary thought. For Hume and Mill, when we say that x is the cause of y, what we mean is that, according to experience, events of type x are invariably and unconditionally followed by events of type y. The singular causal statement about x and y is supported by a generalization, founded in experience, about regular sequence between types of events. The authors accept the essential correctness of this analysis. They go on, however, to point out that the standard of "invariable and unconditional" cannot in fact be satisfied on the basis of ordinary experience, and that indeed it cannot be satisfied completely even through the process of scientific inquiry. The generalizations actually used to support causal statements are less stringent and uncompromising. They are cast in terms of types of events that commonly or frequently, rather than invariably and unconditionally, succeed one another. The types of events are broadly stated so as to include a large number of contingencies. For example, the singular causal statement that blow x was the cause of wound y is supported by the general truth that blows are commonly or frequently followed by wounds. In the words of the authors, the generalizations "sit loosely to their instances, since they cover a wide range of different occurrences, and we are indifferent to their detailed specification."[15] We are more concerned with detailed specification when our aim is to predict the outcome of a particular event. When our purpose is simply to explain one event as the cause or consequence of another, there is no need for such specificity.

The authors add one further point to their exposition of the central causal concept. When we make a singular causal statement, such as that blow x caused wound y, we do more than invoke a generalization about sequence between types of events. In addition, we commit ourselves to provide an explanation of any case in which a blow is not in fact followed by a wound. We commit ourselves when we are confronted with such a case to find an aspect of it that explains why the result is different from that called for by the generalization. We engage ourselves, in other words, to narrow our original generalization to take into account the exceptional case, and to provide another generalization that will explain it.

In spite of all that Hume, Mill, and now the authors have done to clarify this central causal concept, there remains a shadow of a doubt

15. *Id.* at 43.

whether their explanations fully satisfy our desire to know, or whether they exhaust completely the content of what we experience. We have been told over and over again how little we assert or really claim to know when we say that one thing caused another. And yet there remains a question, especially hard to justify in an age that has so stringently narrowed the acceptable ways of knowing, whether an explanation of causal connection exclusively in terms of generalizations about regular or common sequence fully comprehends our experience, and whether it penetrates as deeply as we might wish into the structure of reality. There is a seemingly ineradicable desire, which cannot be put down simply to primitiveness of thought, for an explanation along the lines of the Continental "individualizing theories," which are discussed at the end of the book.[16] These theories often speak of the power or energy that marks out a condition as a cause; they are of course derived from Aristotelian analysis. It ought to be frankly recognized that these theories have some claim to be considered closer approximations to "common-sense causal notions," upon which the authors place such great value, than those of Hume and Mill. The notion of causal connection as a matter of regular or common sequence between types of events is the product of careful philosophical analysis and not the unadorned reflection of the patterns of ordinary thought. As the authors themselves say, "some German writers regard the individualizing theories as more in accordance with common sense than other views . . . [but] the vague character of common sense judgments of causation and the obscure metaphors involved in the individualizing theories themselves have stood in the way of their acceptance . . . [by legal scholars]."[17]

Multiple Cause

For the sake of the present discussion, let us put aside these doubts and accept the essential correctness of the authors' analysis of the central causal concept. The clarification of this concept is but the beginning of the struggle. Most interesting and intractable of the problems that remain are those that may be loosely described as problems of multiple causation.

In order to make any headway with these problems, it is necessary to settle upon a reasonably precise definition of certain terms. The term "sufficient condition," used frequently throughout the book, corresponds closely in meaning to the basic causal notion as expounded by the authors. When we say that x is a sufficient condition of y, we

16. *Id.* at 386-91.
17. *Id.* at 391.

mean that events of type x are commonly followed by events of type y; we have resort to a generalization about common sequence.

The assertion that x is a sufficient condition of y is not necessarily made in an effort to furnish an explanation of a particular case that has occurred. It may be made simply as a general observation, or for the purpose of prediction, or for the purpose of giving instructions to another about how to produce the result y. Even when the happening of a particular result y is under consideration, the assertion that x is a sufficient condition of y does not necessarily imply that an x was present in the given case. We may mean simply that if x had been present, y would have followed. Frequently, however, when we are trying to understand a particular case, and we say that x was a sufficient condition of y, we mean both that events of type x are commonly followed by events of type y, and that an x was actually present in the given case.

When we say, in explaining a particular case, that a condition was a *sine qua non,* we mean that it was sufficient condition in this last sense—events of type x are commonly followed by results of type y and an x was present in this case—and in addition we mean that if this condition had not been present the result would not have occurred. The judgment that the result would not have otherwise occurred is made on the basis of probabilities.

Whether a condition is a *sine qua non* of the result frequently depends on how the condition is described. If it is described broadly it may be true that had that condition not been present, the result would not have occurred. On the other hand, if it is described narrowly, and if other conditions are assumed to remain unaltered, then the condition so described may not have been essential to the result, and so not have been a *sino qua non.*

As the authors point out, a sufficient condition is not necessarily a *sine qua non.* This is so because even though x is a sufficient condition of z and was present in the particular case, y, another sufficient condition of z, may also have been present. Thus z would have occurred even if x had not been present. This fact, that a condition which is both sufficient and present is not necessarily a *sine qua non,* presents philosophers and lawyers with some of their most difficult problems.

An example of this situation is where *A* and *B* simultaneously fire bullets into *C's* brain, each sufficient to bring about his death; or where *A* and *B* simultaneously carry candles into a gas-filled room and there is an explosion; or where *A* and *B* set fires each sufficient to destroy *C's* house, and the fires combine and destroy the house. The law can find good reason in these cases to hold both *A* and *B* liable, civilly

and criminally, even though the conduct of neither was a *sine qua non* of the result.[18]

It should be noted that an analysis of these cases as involving two conditions sufficient for the same result, but neither a *sine qua non* of that result, requires a description of the result—death of *C*, explosion, destruction of the house—at a certain level of generality. Only if there is such generality in description is it possible to analyze the case as one where two sufficient conditions of the result were present. If our description of the result is made more specific, it may appear that only one of the conditions present was a sufficient condition of the result so described, and indeed, that under the facts of the particular case it was a *sine qua non* of that result.

A case mentioned by the authors gives an example of the significance of description.[19] The *Carslogie* negligently damaged the *Heimgar*, which was temporarily repaired so as to be seaworthy, but needed further long-term repairs. While crossing the Atlantic, the *Heimgar* was seriously damaged in a storm, and had to be put in dry dock for a period of time. While there, both the damage from the storm and the damage inflicted by the *Carslogie* were repaired. If we describe the result we are interested in simply as loss of use for a certain number of days, then it is clear that the *Carslogie's* negligence, although a sufficient condition of this result, was not a *sine qua non*. On the other hand, if we focus on the particular physical damage to the *Heimgar* from its encounter with the *Carslogie*, and make that the result whose causal antecedents we are interested in, then the *Carslogie's* negligence was both a sufficient condition and a *sine qua non* of this result.

There are times in the authors' discussion when they do not make sufficiently clear the difference between this sort of case and the case where *A* fires a bullet into *C*'s brain, which brings about *C*'s death, and then *B* fires a bullet into *C*'s brain; or where *A* sets a fire that burns down *C*'s house, and then a fire set by *B* passes over the place where the house stood. There should be no suggestion that in these cases also, as in the case where *A* and *B* fire simultaneously into *C*'s brain, the only causal explanation that we can give is that two sufficient conditions were present neither of which was a *sine qua non* of the result. To the contrary, we have no difficulty here in saying that *A*'s conduct actually caused the result, whereas *B*'s conduct merely would have caused it if *A*'s had not already done so.

What is the difference between the case where *A* and *B* fire simul-

18. See *id.* at 216.

19. Carslogie S.S. Co. v. Royal Norwegian Gov't, [1952] A.C. 292, discussed at HART & HONORÉ 148.

taneously into *C*'s brain, and the case where *B* fires only after *C* is already dead? In the case where *C* is already dead, the conditions we are concerned with are *A*'s and *B*'s actions in firing (call their actions *x* and *y*), and we ask how these actions differed in their relation to the death of *C* (call this result *z*). The answer is that although it is true that the sequence *x-z* and the sequence *y-z* each exemplifies a type of sequence that according to experience commonly occurs, so that *x* and *y* are in that sense sufficient conditions of the result, it is not true that each sequence occurred in the particular case under consideration. The sequence *x-z* occurred, but the sequence *y-z* did not occur. *B*'s action in firing his gun took place only after *C* was dead. If in this case we say that *y* was a sufficient condition of *z*, we do not mean to imply that the sequence *y-z* actually occurred.

The case of the fires that follow one another is a bit more difficult. In the first place, we must be clear what is the condition whose relation to the result we wish to determine. It makes a difference whether we are talking about the act of setting the fire, or some other condition subsequent to this conduct. Let us assume we are talking about *B*'s act in setting the fire (event *y*). If this act took place after *A*'s fire had already destroyed the house, then the case is exactly like the one just discussed, where *B* fires a bullet into *C*'s brain after *C* is already dead. The sequence *y-z* did not in fact occur in the particular case. But suppose *B* set his fire before *A*'s fire reached the house, so that it can be said that the sequence *y-z* did occur? We would still say that whereas *A*'s conduct caused the destruction of the house, *B*'s conduct merely would have caused it. This is so because, although it is true that *B*'s action took place before the destruction of the house (event *y* before result *z*), certain intermediate conditions that experience teaches us must ordinarily occur before conduct such as *B*'s is followed by a result like the destruction of the house (*e.g.*, the ignition of combustible material between where *B* started his fire and the house) did not in fact occur in this case, or at least did not occur before the destruction of the house by *A*'s fire. In other words, it is correct to say that in this case too the sequence *y-z* did not occur, if we understand by *y* not only the setting of the fire, but also all the intermediate conditions that experience teaches us must occur before an event such as the destruction of the house will follow.

A Louisiaua case discussed by the authors raises this problem,[20] and here they seem largely in accord with the suggestcd analysis. The defendant's unlawfully maintained bridge prevented the plaintiff's barge from proceeding along a waterway, and the plaintiff suffered

20. Douglas, Burt & Buchanan Co. v. Texas & P. Ry., 150 La. 1038, 91 So. 503 (1922), discussed at HART & HONORÉ 227.

financial loss. A lawfully maintained bridge farther along the waterway would in any event have obstructed the barge. The court held that the plaintiff could not recover from the defendant for its loss. According to the authors, "the unlawfully maintained bridge undoubtedly caused the delay of the barge, and this remains true even if another bridge would in any case have caused a similar delay."[21] By referring to "a similar delay," rather than simply to "delay," the authors move toward specificity in description of the results, and so have simplified the problem of causal analysis. If the result whose cause we seek is stoppage of the barge at a point in the waterway just above the defendant's bridge, then the defendant's conduct was a sufficient condition and a *sine qua non* of that result, and the lawfully maintained bridge not even a sufficient condition of the result so described. If, on the other hand, the result is described more generally as "delay of the barge," then the existence of each bridge is a sufficient condition of such a result. Still, in the case of the lawfully maintained bridge, as in the case of the second fire, certain intermediate conditions did not occur (passage through the water between the defendant's and the lawfully maintained bridge) that experience teaches must occur before the stoppage of a barge will result from an event like the maintenance of the lawful bridge.

Suppose the result is described as "the failure to arrive at a point farther along the waterway"? It would still seem that the second bridge did not cause this result, but merely would have caused it. Intermediate conditions did not occur that experience teaches us commonly do occur before a condition such as the maintenance of the second bridge is followed by such a result. On the other hand, if the two bridges were side by side across the waterway, I suppose we would have to concede that here, as in the case of the merging fires, and where *A* and *B* fire simultaneously into *C*'s brain, all that can be said is that the maintenance of each bridge was a sufficient condition of the result, but not a *sine qua non*. Analysis can come no closer than this to identifying the cause of the result.

Other problems in the area of multiple causation are raised by the authors' discussion of two contrasting sets of circumstances. In the first, the defendant failed to install a required safety device in his factory and an employee was injured, but the employee would not have used the device even if it had been installed. Or, to simplify the case by eliminating the need for judging what the employee probably would have done, let us say that the defendant installed a defective safety device, but the employee did not even attempt to use it. In the second case, the defendant installed a defective safety device and

21. *Id.* at 227.

an employee was injured, but he would have been injured in any case by a fire that destroyed his home shortly after the accident in the factory.[22]

Considering the second case first, if the result is described with particularity as to time, place, or manner, then the defendant's conduct in installing the defective device was both a sufficient condition and a *sine qua non* of that result. As to the fire at home, it merely would have caused a similar result. If the result is described with sufficient generality to inelude both injury in the factory and at home, then the analysis must be different. Then the defendant's conduct was not a *sine qua non* of the result. It was, however, a sufficient condition of the result, and furthermore a condition that preceded the result and constituted in the particular case an actual exemplification of a common sequence between types of events. The fire at home, on the other hand, merely would have caused the same result.

As to the first case, it is a little surprising to be told by the authors that here not only was the defendant's conduct in installing the defective device not a *sine qua non* of the result, but also it was not even "causally connected with" or "causally related to" the result.[23] In saying this they imply that the defendant's conduct was in some sense not even a sufficient condition of the result. In what sense was it not a sufficient condition of the result? How does the situation differ from the second case where, if the resnlt is described with generality, even though the defendant's conduct was not a *sine qua non* of the result, it was at least a sufficient condition? How does it differ from the case where *A* and *B* simultaneously fire bullets into *C*'s brain, where the conduct of each was a sufficient condition of the result?

One feature of the case we are discussing is that there are not present, as there are in other examples, two independent sets of conditions, each sufficient to produce the result. Rather, what we have is one set of jointly sufficient conditions, but in regard to one member of that set there are alternative conditions, alternative in the sense that either alone would complete the jointly sufficient set. Either the defendant's installation of the defective safety device, or the employee's failure to use the device, taken with the other conditions, would produce the result. The defendant's conduct is not a *sine qua non* because even if it were not present, the set of conditions of which it is a member would be complete.

It should be noted, however, that when we say that the defendant's conduct alone, or the employee's conduct alone, would complete a set of jointly sufficient conditions, we are assuming that the conduct of

22. *Id.* at 121.
23. *Ibid.*

the other would be the opposite of what it in fact was. In other words, when we say that the defendant's conduct would complete a set of jointly sufficient conditions, the set that we envisage would include as one of its members an attempt on the part of the employee to use the safety device. Such a set, a set which includes an attempt to use the safety device, is what experience teaches us is commonly followed by the result. But in the actual case the employee did not attempt to use the device. Thus an argument is open that the set of conditions that experience teaches us is commonly followed by the result, and of which the defendant's installation of the defective device would be a member, was not present or complete in this case. One of its members—an attempt to use the device—was missing. Is this the argument that the authors mean to suggest when they say that the defendant's conduct was not "causally related to" the result? If this is not their point, then why is it not enough to say simply, as in the second case, that although the defendant's conduct was a sufficient condition of the result, it was not a *sine qua non*?

In these difficult examples, as in the earlier ones, it is important to be as clear as we can about the correct application of purely causal principles. At the same time, the further one penetrates into these mysteries, the more one comes to realize that causal analysis does not in and of itself resolve the question of legal liability. In regard to the two cases just discussed, for example, there still remains to be decided whether the difference between them should make a difference in law. If the defendant is to escape liability where the employee did not try the safety device, but not where he would have been injured by a later fire in his home, then some justification for this difference in legal outcome will have to be produced, and it cannot be found in the causal analysis itself.

INCIDENTAL CONNECTION

The authors speak in another place of cases involving mere "incidental connexion."[24] Examples are cases where a defendant who is driving carefully but does not have a license is involved in an automobile accident,[25] or where the defendant wears a black glove at the time he shoots the victim.[26] There is only incidental connection, say the authors, between the failure to have a license and the accident,

24. *Id.* at 109-14.
25. See *id.* at 111.
26. See *id.* at 109. The authors give another well-known example: The defendant negligently set in motion on the floor of his factory an unguarded fan, and the plaintiff contracted pneumonia as a result of a chill caused by the fan. *Id.* at 237-38. See Thurogood v. Van Den Berghs & Jurgens Ltd., [1951] 2 K.B. 537.

or between the wearing of the black glove and the death of the victim. In these cases the absence of causal connection is even more complete than in the case just discussed, where the defendant installed a defective safety device that was not used. The absence of the license was neither a *sine qua non* of the accident nor a member of one of two independent sets of conditions sufficient to bring about the result. It did not even constitute—and in this it is different from the case involving the installation of the defective device—an alternative member of a set of conditions sufficient to produce the result. Indeed, one does not readily think of any set of conditions which includes the failure to have a license and which is commonly followed by such accidents. Under the facts as they occurred there was a total absence of a set of conditions that would include the failure to have a license, and that would commonly be followed by an accident. All that can be said is that the failure to have a license was a condition contemporaneous with a set of conditions that was sufficient to produce the result.

This exposition assumes that the failure to have a license is the circumstance whose causal connection with the result we seek to determine. Assume, however, that the basic question is whether there was a causal connection between the defendant's faulty conduct and the result. An argument can be made that the faulty conduct consisted not just in being without a license, but in "driving without a license." There is nothing wrong in being without a license as long as one is not driving; the fault in the situation comes from a conjunction of the two circumstances. Therefore, if the question is whether the defendant's fanlty conduct was a sufficient condition and *sine qua non* of the accident, the answer must be yes, because driving, a feature of the defendant's conduct essential to its faulty character, was a sufficient condition and *sine qua non* of the result. If the defendant had not been driving the accident would not have occurred. This is a hard argument to answer. The best that one can do is to suggest that we do not feel compelled to include driving in our description of the conduct whose causal connection with the result we seek to ascertain. The reason is that the usual way of avoiding fault in this situation is to get a license, not to stop driving. Driving is an existing activity upon which the legislature has imposed the requirement of a license, and it is assumed that most people will satisfy the requirement by securing a license. The idea of fanlt, therefore, is focused on the failure to have a license rather than on the activity of driving.

On the other hand, if it is clear that the defendant would have been denied a license if he had applied for one, and that the only way he could have satisfied the statute was by not driving at all, then perhaps that would be a case in which we would find it appropriate to

describe his faulty conduct as "driving without a license." In such a case his faulty conduct would be a sufficient condition and *sine qua non* of the result. If he had complied with the statute in the only way open to him the accident would not have occurred.

Those who are accustomed to the risk analysis will find in it another, and at times simpler, route to the result of no legal responsibility in a case of this sort. An accident in no way attributable to careless driving was not one of the occurrences the licensing statute was designed to avoid.[27] It must be granted, however, that the authors' explanation on the ground of a total want of causal connection is in a sense more fundamental. They are right in resisting the argument of those who maintain that there is causal connection between the defendant's conduct and the result and justify this by describing the conduct comprehensively as "driving without a license." There may be causal connection between driving and the accident, as has already been pointed out, but that does not mean that there is any sort of causal connection between the faulty aspect of the defendant's conduct—being without a license—and the accident. The authors are right in objecting to the idea that in such cases the risk analysis is the only route to the conclusion of no liability.

CAUSAL NOTIONS AND LEGAL LIABILITY

Most of the matters considered so far turn on what commentators generally classify as questions of "factual causation." These concern primarily the central causal notion, the idea of a sufficient condition. Frequently the resolution of these questions, along with other factors, plays a role in determining legal liability. The law makes liability depend, in part at least, on the results of causal analysis, because experience shows that to do so furthers purposes that the law exists to achieve. When liability is made to depend on the presence or absence of causal connection between conduct and injury, the frequency of such injuries will obviously be affected. Liability is imposed on those who have some control over the activities that lead to such injuries. When the law accepts the results of causal inquiry in this way causal standards become in a sense legal standards. However, as I have already pointed out, even when we are concerned only with "factual causation" and the role it plays in legal decisions, there is frequently more involved than this sort of simple legal acceptance or adoption of the results of a nonlegal causal inquiry. The inquiry may indeed establish causal connection of some sort, but then the question must be answered whether a connection of this sort should be con-

27. The authors recognize this alternative. HART & HONORÉ 237-38.

sidered an adequate basis for legal liability. Assuming the defendant's conduct was a sufficient condition of the result, if it was matched by another sufficient condition equally present, or if there was another condition that would have caused the same or a similar result, should the defendant be liable? Contrariwise, if the defendant's conduct merely would have caused the result, or one similar to it—he shot a victim already dead—should he be liable? The answer to these questions is not found in causal analysis itself. There is no escape here from going beyond causal analysis to determine whether the aims and purposes of law will be served by the imposition of legal liability when a certain form of causal connection has been shown to exist.

Where problems other than those of "factual causation" are involved, most American writers have come to recognize as even more obvious the controlling importance of noncausal considerations. I refer here to the whole question of the extent of a faulty defendant's liability, to the problem of whether he should have the benefit of a test that limits liability to something less than the full range of consequences of which his conduct was a *sine qua non.* But it is precisely here that the authors register their most vigorous dissent. It is their thesis, and indeed the principal thesis of their book, that in the stock of common sense causal notions there are many beyond those already discussed—sufficient condition and *sine qua non*—and that these notions, as much as those of sufficient condition and *sine qua non,* are accepted or adopted by the law and allowed to affect the issue of legal liability. In other words, the authors resist the view that, apart from the area of "factual causation," when courts claim to engage in causal analysis for the purpose of determining legal liability they are not in truth searching for and applying causal principles at all, but instead are drawing upon and bringing to bear purposes, values, and considerations that have nothing to do with causation. This view would say that in such instances the courts, under the guise of applying causal principles, are in reality developing and applying criteria especially devised for the realization of legal purposes. The authors' opinion of this view is that it is an incorrect statement of what the courts are doing, and furthermore that it is unsound advice as to what they should be doing. When a court seeks to determine whether a defendant's conduct was the "proximate cause" of a result of which it was concededly a *sine qua non,* the court is, according to the authors, actually making an effort to find and apply nonlegal common-sense causal notions. It is not invoking criteria that are simply the creatures of legal thought in a legal context. It should be remarked here, however, that even though the authors insist that in these situations courts are engaged in applying genuine causal notions, they do seem to con-

cede that there is a qualitative difference between these notions and the notions of sufficient condition and *sine qua non,* and that advantages come from their analytical separation.

ABNORMALITY AND COINCIDENCE

In their discussion of the common-sense causal notions that are adopted by the courts for the purpose of determining the extent of a faulty defendant's liability, the authors stress the role that "abnormality" plays in causal thinking.[28] Thus we often identify as the cause of a result that member of a set of conditions jointly sufficient to produce the result whose presence under the circumstances was abnormal. For example, when asked for the cause of a fire, we say that a workman dropped a lighted cigarette, and not that oxygen was present at the place where the fire broke out. Not every member of a set of jointly sufficient conditions is entitled, in ordinary thought, to be designated as the cause. Only the condition whose presence is abnormal under the circumstances is the cause. From this it follows that in certain circumstances the defendant's conduct will not be the cause of an injurious result, even though it was a *sine qua non* of the result, if some abnormal event intervened between his conduct and the result.

What is the relation between this notion of abnormality and the idea of unforeseeability, more familiar to lawyers? Obviously they are much the same. Each involves the idea of a hypothetical observer before the event, with limited information about the causally significant factors, estimating the likelihood of the event's occurrence. The authors recognize this, but at the same time they are unwilling to identify the test of likelihood involved in common-sense causal thinking with notions of foreseeability that appear in other contexts, and in particular in the context of assessing negligence. What may be unforeseeable to a person in the defendant's position may not be unforeseeable to a person in another position with more information, and so not be "abnormal." Furthermore, the notion of abnormality may involve a high degree of unlikelihood.[29]

In any event, it is not abnormality standing alone that the authors find to have been adopted by the courts and given a role in the determination of legal liability. Rather it is the more complicated causal notion of a "coincidence" that relieves the defendant of liability, and abnormality is ouly one of the elements of a coincidence. What is a "coincidence"? According to the authors it includes three essential

28. *Id.* at 151.
29. On this subject, see *id.* at 75, 151 n.5, 154, 157, 195, 238.

elements. (1) an abnormal circumstance, (2) independent of the defendant's conduct, and (3) not existing at the time he acted.[30] For example, suppose *A* knocks *B* to the ground, and a rotten tree unexpectedly falls on *B*. The injuries that *B* receives from the fall of the tree are the result of a coincidence. The fall of the tree was abnormal under the circumstances; it occurred independently of *A*'s conduct (in the sense that the conduct was not a *sine qua non* of the fall of the tree); and it occurred after *A* acted. On the other hand, if *A* knocks *B* against a rotten tree, which then as a result of the impact unexpectedly falls on *B*, his injuries are not the result of a coincidence. Even though the fall of the tree occurred after *A* acted, it did not occur independently of *A*'s action.[31] The destruction of the ship in the *Polemis*[32] case was not the result of a coincidence. Although the presence of the gases in the hold was a circumstance that was independent of the workmen's conduct in dropping the plank, it was a circumstance that existed at the time they acted. The explosion indeed occurred after the workmen acted, but it was not a circumstance that was independent of their conduct.

It should be mentioned that the authors do recognize a closely related situation in which there is no liability because of lack of causal connection, but which they are unwilling to classify as a coincidence.[33] An example is the case where the defendant negligently delays the transport of the plaintiff's goods across a bridge threatened with destruction by a flood. There is a continuing high risk that the bridge will be destroyed, and in fact it is swept away at the moment that the goods are being carried across it. The loss of the goods cannot, in the authors' view, be considered the result of a coincidence, because of the considerable risk that the bridge would be destroyed. There was nothing abnormal about the destruction of the bridge when it came. Nevertheless, because the defendant's conduct did not increase the risk of loss, but merely shifted it in time, it cannot be regarded as the cause of the loss, and so the defendant should not be liable. Here we see the authors making inroads on the coincidence requirement in order to accommodate cases that can be explained with no difficulty on the basis of the risk theory.

It is important not to confuse the notion of a coincidence with the

30. On the subject of "coincidence," see *id.* at 66-67, 72-76, 151-66.

31. Of course, everything turns on what circumstance we focus on as the abnormal one. If we take the rottenness of the tree as the abnormal circumstance instead of its fall, then it can be argued that there is no coincidence in the first example since although the rottenness of the tree was independent of the defendant's conduct, it coexisted with it. There would be no coincidence in the second example for the same reason.

32. *In re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560.

33. HART & HONORÉ 157.

idea of mere incidental connection, which has already been discussed.[34] Where there is only incidental connection, as where the defendant was driving without a license, the faulty conduct of the defendant is neither a sufficient condition nor a *sine qua non* of the result. All that can be said is that the absence of a license was a condition contemporaneous with those conditions that were jointly sufficient to produce the result. The contrary is true in the case of a coincidence. There the defendant's conduct is both a sufficient condition and a *sine qua non* of the result. What relieves the defendant of liability is not a total lack of causal connection, but the coincidental character of the connection.

Suppose for example the defendant is exceeding the speed limit when his automobile is struck by lightning. His excessive speed is both a sufficient condition and a *sine qua non* of the injury. If he had not been speeding, he would not have arrived at that particular point when he did, and so would not have been struck by lightning.[35] In retrospect we can see that the course of events exemplified general truths about sequence between types of events, even though in order to see this it may be necessary to trace the events step by step rather than simply to consider the relation between speeding and destruction of automobiles by lightning. The fact that such general truths about sequence between types of events can be invoked shows that it is not a case of mere incidental connection. Nevertheless it was, as we would say, sheer coincidence.

Suppose the defendant would have been struck by lightning even if he had been going at the proper speed? Even so, this would not make it a case of mere incidental connection. One could still say that the course of events exemplified general connections between types of events, and that the speeding was a sufficient condition of the result. It would, however, destroy the contention that the speeding was a *sine qua non* of the result, for another sufficient condition of the same or a similar result would have been shown to be present.

The decisive question that must now be asked of the authors' views is the following. Granting that they have correctly identified a common-sense notion of coincidence—and one is certainly entitled to some doubt on this point, for would not most people be just as ready to say that the result was coincidental where *A* knocked *B* against the tree as where *A* knocked *B* to the ground and then the tree fell on him?—is

34. The authors touch upon this distinction. *Id.* at 116 n.1.

35. Another example is provided by Central of Ga. Ry. v. Price, 106 Ga. 176, 32 S.E. 77 (1898), discussed at HART & HONORÉ 155. As a result of defendant's negligence, plaintiff was carried beyond her destination. The railroad arranged for her to spend the night at a hotel, and during the night a lamp provided by the hotel exploded and injured her.

such a notion of any real assistance either in explaining the decisions of the courts or in providing an acceptable basis for determining the question of legal liability? So far as the notion involves the idea of foreseeability, it undoubtedly plays a large role in the courts' thinking about the proper extent of a faulty defendant's liability. A large role, although not necessarily a dispositive one, for there are instances where good reasons exist for holding the defendant liable even for unforeseeable results. It is not terribly important whether such a limitation, grounded in the notion of risk or foreseeability, is thought of as an aspect of the requirement of causal connection, so long as we are clear what we are talking about. On the other hand, insofar as the idea of coincidence involves more than a question of foreseeability or abnormality, there is considerable doubt as to the role it plays or ought to play in legal decisions. In this connection, the authors are perhaps too ready to accept judicial phraseology as indicative of the considerations that in fact underlie decision. Furthermore, they confront—or rather do not confront—the difficulty of explaining why it is that liability should turn on this special notion of the coincidental, and how the ends of law will be served by drawing the line of responsibility according to whether the unforeseeable event was independent and not coexistent with the defendant's conduct. Assuming that it exists in common thought, why should such a notion, which has grown up without any particular reference to the imposition of legal responsibility, be taken as a guide in determining that question?[36]

VOLUNTARY ACTION

In addition to the notion of the coincidental, the authors say that voluntary action also plays a special role in causal inquiries and therefore in the determination of legal responsibility. At one point they go so far as to say that "whatever else may be vague or disputable about common sense in regard to causation and responsibility, it is surely clear that the *primary* case where it is reluctant to treat a person as having caused harm which would not have occurred without his act is that where another voluntary human action has intervened."[37] Where there is a voluntary act, it, and not some other conduct or circumstance that preceded the act, is the cause of the result.[38]

In order to be clear about the authors' meaning here, it is necessary to distinguish two senses of the term voluntary. Voluntary may refer

36. "The only defence of the principle is that it is rooted in common-sense ideas of human action and causation, which picture human beings as intervening on a stage already set." *Id.* at 166.

37. *Id.* at 357.

38. On this subject see *id.* at 38, 69-70, 129-30.

simply to the fact that an act is the result of choice, no matter under what circumstances that choice is made. The bare fact of the choice justifies the use of the term. On the other hand, it may have reference to the idea of effective freedom, which looks not merely to the fact of choice but also to the circumstances under which the choice is made and the power of the actor over his environment. It seems clear that the authors do not use voluntary in the first sense. It is true that voluntariness of this sort does in a way negative causal connection. The will of the actor, insofar as it is "free," can be thought of as a first cause, existing independently of the environment; its exercise negatives causal connection between the environment and the actor's conduct. But it cannot be voluntariness in this sense that the authors say plays a special role in common-sense causal inquiries. For it is clear that common sense frequently speaks of causal connection even though voluntariness in this primary sense is present. We often speak of one person's causing another to act or causing the consequences of the other's action even though the second person's action was voluntary in the sense that he made a choice. We think and speak this way without abandoning our belief in the free will of the second person. The voluntariness that the authors are concerned with, although it may assume the causal independence that inheres in the very idea of will and choice, goes beyond this to weigh the circnmstances under which the actor made his choice. The voluntariness the authors are concerned with is that which turns on the presence of effective freedom.[39]

It is worthwhile to call attention here to the authors' very interesting discussion of the difference between physical and psychological causation, of the difference between saying that blow *x* caused wound *y* and that *B* acted because *A* threatened him with harm.[40] The two situations obviously have something in common, otherwise we would not use similar language to describe them, but there are also marked differences between them. The second case, where one person gives another a reason for acting, is what the authors refer to as an "interpersonal transaction." The situation is essentially the same when some circumstance in the environment other than the conduct of another human being provides the actor with his reason for acting. The distinctive element is not the source of the reason for acting, whether the conduct of another human being or some other circumstance, but that it is action on the basis of reasons that we are talking about, and that we are applying causal terminology to the processes of the human mind. Of course cases will frequently involve elements of both physical and psychological causation. Thus if *A* threatens *B* with injury if

39. See *id.* at 38 n.1, 131.
40. See *id.* at 21, 48, 52-55.

he does not shoot *C*, the relation between the threat and the death of *C* is an example of psychological causation, whereas the relation between the availability of the gun and the death of *C* is an example of physical causation. The gun is the physical means by which *B* acts, even though its availability can also be thought of as in a sense one of the reason for *B*'s acting. The two causal elements, the psychological and the physical, must coincide before the death of *C* will result.

The authors state that where one person has acted because of some reason furnished him by the conduct of another

> It is wrong to conclude that if this relationship between two actions is to subsist, the first person's words or deeds must have the general connexion with the act of the second which is characteristic of causal relationships between physical events. The statement that one person did something because, for example, another threatened him, carries no implication or covert assertion that if the circumstances were repeated the same action would follow; nor does such a statement require for its defence, as ordinary singular causal statements do, a generalization of the kind discussed . . . [in connection with physical causation].[41]

In another place they assert that "there is no implication of uniform sequence in asserting that one person acted for a given reason . . . ."[42]

Obviously, in saying that a person acted because of a reason we do in one sense rely on generalization. Our description of the particular occurrence as "acting because of a reason" employs a general category derived from our experience of human conduct. This is the way we think and speak about particulars; we do not grasp them directly, but only by reference to general categories or types. But the question here is whether, in our statement that a person acted because of a reason, we rely on a generalization of the sort that is employed in making statements about physical causation. The statement that *B* acted because of *A*'s threat does rest on an idea of sequence. The general notion of before and after is implicit in the statement. The difference is, as the authors suggest in the quoted passage, that in making such a statement we do not rely on a notion of uniform sequence.

It will be recalled that in their discussion of physical causation the authors expressly take the position that the generalizations underlying particular causal statements are not generalizations about invariable (which I take to be the same as uniform) sequence. The reason for this is that our knowledge of the factors at work in the physical world is never sufficiently complete to permit us to say that one sort of event invariably follows another. Furthermore, in order for these generalizations to be useful in our ordinary affairs, they must be cast in terms

41. *Id.* at 52.
42. *Id.* at 53.

of very broad categories of events, with the result that they necessarily include some instances in which the asserted sequence does not hold true. It is necessary, therefore, to speak of common or frequent rather than invariable sequence. In the case of psychological causation, on the other hand, although we also refrain from speaking of invariable, or indeed even of common, sequence, it is for a quite different reason. The reason is simply that we experience and believe in the reality of free will. There is sequence, it is true, but it is an accepted or chosen sequence, one that passes through the mysterious medium of the human will. A belief generated by the words or conduct of another becomes, by the exercise of will, the basis for action. What we are describing is the human mind and will, a phenomenon far more complex than anything encountered in the domain of physical relationships. To say that a person acted because of a certain reason is to say that he had a certain belief, that he chose to act, and that he freely made the belief the basis for his action. Perhaps the authors put it as well as one can when they say that it is a question of "whether the thought of a given reason weighed with him as he made up his mind . . . ."[43]

To return now to the problem of how voluntariness enters into common-sense causal notions, it is clear, as has already been said, that the voluntariness with which the authors are concerned is a voluntariness that turns on the presence or absence of effective freedom. In this connection they say that conduct is not voluntary, and so does not negative causal connection, unless its consequences are intended or there is a high probability of their occurrence.[44] Even as a report of the common use of words, this is a surprising assertion. Do we not frequently think of action as voluntary even though its results are unforeseeable? Furthermore, even if action taken in ignorance of results is to be considered involuntary, how does such involuntariness bear on the question of causal connection?

The authors also classify as involuntary action taken under a mistake[45] and action taken in certain kinds of predicaments.[46] I suppose there is an argument for saying that these factors do bear on voluntariness. If an actor is mistaken about some causally important circumstance, or if he is faced with disagreeable alternatives to acting, his power to control the enviroument according to his desires is limited. In a sense he is not free. Furthermore, there is a good argument that such involuntariness does play a role in common-sense

43. *Id.* at 52.
44. *Id.* at 131, 133, 143-44.
45. *Id.* at 38, 141-42.
46. *Id.* at 38, 135-39.

causal thinking. It is surely a good deal easier to say that *A* caused *B* to act and caused the consequences of *B*'s action when he held a gun to *B*'s head and threatened him with injury than when he merely advised *B* to act.

But again the decisive question for our purposes is whether this has any significance in regard to the question of legal liability. Assume we are able to reach some sort of agreement on what constitutes voluntariness, and assume further that we are able to resolve the numerous difficulties that beset the question of how such voluntariness affects common-sense notions of causation, what has all this to do with legal responsibility? Why should legal responsibility be imposed on the basis of the outcome of such an inquiry? Is the authors' approach a particularly useful one either for explaining how the courts have acted in these cases, or how they ought to act? Why should the voluntariness or involuntariness of intervening conduct govern the question of legal liability? If there are reasons why it should, they must be produced, for it is not enough to say simply that voluntariness plays a role in common-sense causal notions.

One way out of the difficulties the authors struggle with in dealing with the notion of voluntary action is to find that the governing principle here in regard to liability is neither voluntariness nor causation but foreseeability. It is the foreseeability or risk of *B*'s conduct that determines whether *A* will be liable for the consequences of that conduct. That *B* intended the consequences or was reckless in regard to them, that he was or was not mistaken about some causally significant factor, that he found himself in a position of choosing between disagreeable alternatives, all these things can be seen as bearing solely on the question of the likelihood of *B*'s acting as he did. Such an approach would of course greatly simplify the conceptual apparatus needed to determine the issue of the extent of a defendant's liability. It would reduce the applicable principles to the single one of abnormality or unforeseeability.

The authors steadfastly refuse to accept this simplification. They insist that foreseeability cannot be said to be the normal or usual rule governing the extent of liability.[47] Yet at the same time they make concessions that, taken together, seem almost completely to erode their own position and the argument that voluntary conduct is an independently significant factor. Thus they concede that when *A*'s conduct provided *B* with an opportunity to do harm, that is, when the possibility of *B*'s intervention was the very thing that made *A*'s conduct faulty, the foreseeability of *B*'s action entitles us to say that *A*'s conduct was the cause of the result, and therefore *A* should be

47. *Id.* at 180-81, 187.

liable. "Here, in attributing consequences to prior actions, causal judgments are directly controlled by the notion of the risk created by them."[48] Also, in regard to "interpersonal transactions," where one person provides another with a reason for acting, the authors seem to go a long way toward abandoning voluntariness as an independently limiting factor. In such cases, they say, causal connection "may be traced through an intervening voluntary action," and where *A* induced *B* to act, the harm that *B* does is "in consequence of" *A*'s inducement, and there is a basis for holding *A* responsible.[49] If the defendant is liable in these cases, notwithstanding the voluntary intervention of another person, what are the situations that remain where voluntary intervention will be an independently limiting factor? What cases do the authors have in mind in which the defendant is relieved of liability by the voluntary, even though foreseeable, intervention of another person?

The authors' view that intervening voluntary action negatives causal connection leads them into a discussion that creates confusion about the nature of the defenses of assumption of risk and contributory negligence. They intermittently allow the impression to arise that these defenses rest on a lack of causal connection between the defendant's conduct and the plaintiff's injury.[50] Their concentration on the issue of causal connection blinds them to other considerations of equal significance in the law. Indeed, it can be said that their whole book fails to take a sufficiently comprehensive view of the factors that govern legal liability or to give adequate recognition to noncausal principles that frequently apply to the same fact situations that give rise to causal problems.

Voluntary conduct on the part of the plaintiff, it is said, bars him from recovery because it negatives causal connection between the defendant's conduct and the injurious result. At times this seems to be put forward as an explanation of the doctrine of assumption of risk. To the extent that it is so intended, it is clearly inadequate. That doctrine has long been seen to rest not on an absence of causal connection between the defendant's conduct and the result but on the fact that the plaintiff made an informed choice to expose himself to the risk. The plaintiff was in the best position to determine whether his interests would be served by encountering the danger created by the defendant's conduct. In some situations at least, the plaintiff is barred from recovery in order that persons in the defendant's position not be deterred from responding to the manifested desires of informed

48. *Id.* at 76; see also *id.* at 179-80.
49. *Id.* at 78, 171.
50. See *id.* at 133-36, 141, 144-48, 199.

and willing plaintiffs. That this defense is grounded in the independent, noncausal significance of the plaintiff's informed choice is demonstrated by the fact that it applies only when the voluntary actor is the plaintiff, and not when an informed choice by a third person is one of the circumstances that contributes to the plaintiff's injury, even though the causal connection between the defendant's conduct and the plaintiff's injury will be the same in the two cases. There are certain cases in which the plaintiff will not be barred by assumption of risk even though he made a choice to encounter the risk. These are cases in which he either did not appreciate the risk, or was in a predicament of a certain kind. His choice was made under circumstances that make it undesirable to attach any legal significance to the fact of his having made a choice. That these cases correspond closely to those in which the authors say that there was no causal connection because action was not voluntary makes one suspect that frequently when they speak of the relation between voluntariness and causal connection the true subject of their discussion is assumption of risk.

As to contributory negligence, it is certainly surprising at this late date to find any suggestion that this defense rests on a lack of causal connection. There is such a suggestion in the authors' statement that if the plaintiff unreasonably exposed himself to peril there is no causal connection between the defendant's conduct and the plaintiff's injury.[51] The basis for the defense of contributory negligence is of course not any lack of causal connection between the defendant's conduct and the result, but the desire to deter and educate persons in the plaintiff's position. So far as the authors' statement is intended to bear simply on the question of causal connection and not on the problem of contributory negligence, it seems inconsistent with statements they make in other places that for conduct to be voluntary and so to negative causal connection the actor must be reckless with respect to the result and not merely negligent. There are passages in which their views are somewhat clarified by the statement that it requires a greater degree of unreasonableness to negative causal connection than to justify a finding of contributory negligence.[52]

In their discussion of causation in the criminal law the authors maintain that voluntariness plays as decisive a role as in civil cases. The momentum of this view leads them into an extremely mechanical analysis of a number of cases and causes them to ignore important policies that have no connection whatsoever with causation. Thus, in discussing a case that involved prosecution under a statute making

51. *Id.* at 136.
52. *Id.* at 144, 148, 149.

it an offense to cause a noxious thing to be taken by a woman with intent to procure a miscarriage, the authors criticize the conviction on the ground that although the defendant gave the victim mercury to drink, she merely advised her to drink it, and did not cause her to do so.[53] To have caused the drinking of the mercury, the defendant would have had to use threats, lies, or commands. In the absence of any of these the victim's conduct was voluntary, and so there was no causal connection. The authors do not advert to the possibility that the court, even if it did not say so, was attempting to construe the statute in the light of the evils sought to be remedied and in a way that would further the statutory purpose, and not as a disembodied exercise in linguistic analysis.

In another case the question was whether the accused had committed the offense of assembling in such a way as to cause a breach of the peace. Their peaceful parade had been attacked without justification by a rival organization.[54] It is disheartening to have the authors discuss this interesting case, which involves important questions concerning the proper bounds of freedom of assembly and expression, as if the only issue were a semantic one about whether the accused had caused the breach of the peace or only occasioned it. Here words are in the saddle and ride mankind.

In these criminal cases, as in the area of torts, the principle which in fact governs liability may be not the voluntariness of the intervening conduct at all, but whether it was intended by the defendant or at least reasonably foreseeable. These are the considerations that the Model Penal Code makes decisive, and the authors criticize it precisely on the ground that it fails to list voluntary action as an independently limiting factor.[55] They do not say how such a test will serve the purposes of the criminal law. Of course in some cases the voluntariness of the intervening action, if it is that of the victim, will bring into play a principle which, similar to consent or assumption of risk in the civil area, negatives the criminality of the defendant's conduct.

THE RISK THEORY

By now the authors' views on the principles governing the extent of liability should be reasonably clear. As they see it, this question is determined by common-sense causal principles that are reducible essentially to the notion of a coincidence and the idea that causal

53. Regina v. Wilson, Dears. & Bell 127, 169 Eng. Rep. 945 (Cr. 1856), discussed at HART & HONORÉ 331.

54. Beatty v. Gillbanks, *supra* note 4, discussed at HART & HONORÈ 333-34.

55. *Id.* at 357.

connection cannot be traced through intervening voluntary action. These are genuine causal principles, drawn from common nonlegal usage, and their application by the courts is not a mere disguise for the application of noncausal considerations.

The authors' attitude towards other solutions to the problem of the extent of liability varies from grudging partial acceptance to downright irritation. If, as they say, much of contemporary literature on this subject is a literature of revolt against older conceptions,[56] their book is pretty clearly intended as a call to counter-revolution. At the least, they aim to sow doubt and confusion in the ranks of the revolutionists. Their attack on the newer theories—not so very new now, really, at least in this country—is two-pronged: that they are not consistent with existing law, and that as proposals for change they are unwise and ought not to be adopted. The authors are particularly severe with theories that espouse "policy" as the principle determinant of the extent of liability. Leon Green is, probably with justification, a special object of their attack, because of his view that it is not really possible to formulate any general principles for determining the extent of liability, and that we must rely on the intuition of judges and jurors to decide whether the particular interest of the plaintiff that was invaded ought to be given protection under the circumstances of the case.[57] This approach sells short the capacity of reason to formulate workable legal rules, and gives no guidance whatsoever to judges and jurors in the exercise of their functions. The authors do recognize that there are cases in which "policy" considerations extend liability beyond or cut it short of what common-sense causal principles would indicate—an example is the New York fire rule, which limits a defendant's liability to the first of several houses destroyed by his negligence[58]—but they insist that this is a minority phenomenon and must be sharply distinguished from the causal limitations that continue to govern the bulk of the cases.

The authors' criticism of the risk theory,[59] by which liability is limited to results within the risk that causes us to characterize the defendant's conduct as negligent, is of particular interest to readers in this country because of the sponsorship of that theory by eminent American judges and scholars. The authors classify it as a theory involving "policy" limitations on the extent of liability, evidently on the idea that any limitation not derived from common-sense causal principles, even one that turns primarily on foreseeability, is based on policy. Of course the authors' own notion of a coincidence turns to

56. *Id.* at 83.
57. *Id.* at 261-68.
58. See *id.* at 84-85.
59. *Id.* at 230-60.

some extent on foreseeability, but I do not suppose they would classify that as a policy limitation.

One must agree with the authors' rejection of the argument that the risk theory is somehow dictated by a logical necessity arising out of the notion of negligence itself. Neither the propositions of logic nor the meaning of words provide an answer to the problem of the proper scope of a faulty defendant's liability. The answer lies, rather, in an appraisal of individual and social values in order to reach a judgment that will satisfactorily reconcile the conflicting aims of compensating those who have suffered injury and at the same time not overburdening even culpable defendants.

Some persons have claimed to draw out of the requirement of causation itself a restriction on liability to foreseeable results, and have argued that the risk theory is in fact founded on notions of causal connection. They say that when a result is not within the risk by reason of which we characterize the defendant's conduct as negligent we cannot say that the defendant's *negligence* caused the result.[60] This argument does not seem to me to conform to what we ordinarily mean when we speak of causal connection. Indeed, on examination it turns out to be simply an assertion that liability ought to be restricted to results within the risk, without providing any reason why this should be so. Without getting too far into the ancient dispute about the difference beween primary and secondary qualities and the relationship between thought and external reality, one can surely say that it is best to think of negligence not as conduct existing in the physical world, but as an idea about conduct, a mental category to which physical circumstances conform. That this is the desirable way to view the matter is shown by the fact that an important element in the idea of negligence is the notion of risk and that it is only by a contortion of ordinary thought that we can think of risk or likelihood of a future occurrence as somehow a part of present physical conduct, a feature of the world as it presently is. Negligence is an idea, a conception about conduct, not conduct itself. Thus to say that negligence was not the cause of an unforeseeable result means either of two things. It may mean that there was no causal connection between the conduct as to which negligence is predicated and the result. This is clearly not true, for a causal connection founded on common sequence exists even though the result was unforeseeable. Even though as a matter of foresight the result was not likely to occur, once it has occurred we can see that its relation to the conduct exemplifies a common sequence between types of events. Second, to say that negli-

60. See *id.* at 236-37. Professor Robert Keeton appears to take this position in his recent book. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 4-18, 22, 81 (1963).

gence was not the cause of an unforeseeable result may mean that the unforeseeable result is somehow alien to the idea of negligence. Since we have cast the idea of negligence in terms of foreseeability and foreseeable results, such an assertion is of course true. But this has really nothing to do with causal connection as it is commonly understood, which concerns common sequence between types of events. It relates, rather, to the shape or dimensions of an idea, and the elements that make up that idea. And the fact that the idea of negligence excludes the idea of the unforeseeable result—something that we determined at the start—in no way provides a solution of the question whether a negligent defendant should be liable for an unforeseeable result. I conclude, therefore, that the effort to justify the risk theory on a causal basis, although it may be motivated by the laudable purpose of reconciling warring factions, in fact fails of its purpose, and leaves unanswered the principal question in dispute: should a negligent defendant be liable for unforeseeable consequences of his conduct?

The authors concede that the risk theory has one advantage over the use of common-sense causal notions. In many cases it enables us to avoid the often difficult question of whether the aspect of the defendant's conduct that prompts us to characterize it as negligent was causally relevant to the result or only incidentally connected with it. Thus in the case already discussed, where the driver of an automobile involved in an accident was not in possession of the license required by statute, it is not necessary under the risk theory to ask whether the failure to have a license was causally relevant to the accident. It is enough to say, in order to conclude that the defendant should not be liable, that an accident from careful driving was not within the risk sought to be guarded against by the requirement of a license. The risk theory provides a satisfactory reason for nonliability even though a causal inquiry would provide another and in a sense more fundamental reason.

According to the risk theory, a defendant should be liable only for results that are within the risk or risks the creation of which make his conduct negligent. How is this risk defined? It is not defined simply by asking what is foreseeable or reasonably foreseeable. Rather, it is the result of a consideration of the likelihood of injury, the gravity of the threatened injury, the importance of the defendant's conduct, and the burden of avoiding or reducing the danger. If the defendant's interest in acting is great, it may not be negligence to expose the plaintiff to a considerable risk. Risk or foreseeability in this sense, as defined by the idea of negligence, the authors refer to as foreseeability in the "practical" sense—practical because it is de-

termined by a practical judgment of whether in the light of the risk and all the other circumstances a reasonable man would or would not engage in certain conduct.[61] So far so good. But from this conclusion about the risk involved in the characterization of negligence, the authors go on to make a very puzzling argument against the risk theory. This argument, they say, destroys the claim that the risk theory has simplicity in its favor in that it employs a single test to determine both the culpability of the defendant and the extent of his liability.[62]

There are certain cases, say the authors, in which present law allows recovery, and in which there should be recovery, where the result cannot with justification be said to be within the risk or risks that cause us to characterize the defendant's conduct as negligence. There are, for example, the rescue cases, where the plaintiff is injured in going to the assistance of a person put in peril by the defendant's conduct, and also the cases where the plaintiff is injured by the defendant and then further injured by subsequent faulty medical treatment. Now of course we must be alive to the possibility that these cases, or any other special group of cases, represent a departure from the normal rule limiting liability to results within the risk of negligence because of particular policy considerations.[63] But apart from this possibility, one had supposed that these cases, although they certainly pose difficult questions as to whether a subsequent occurrence ought to be considered to be among the possibilities that made the defendant's conduct negligent, do not necessarily involve an abandonment of the risk theory or compel us to employ completely separate tests to determine negligence and the extent of liability. It seemed to be a question of deciding whether the action of the rescuer or the subsequent faulty medical treatment was one of the possibilities that caused us to characterize the defendant's conduct as negligent. The authors say, however, that it would be a "logical absurdity" to find that such a subsequent occurrence was within the risk that made the defendant's conduct negligent. What was the risk that made the defendant's conduct negligent? A risk of a certain degree and kind. The existence of this risk is sufficient to characterize the defendant's conduct as negligent; it is the risk that makes his conduct negligent, and any further or additional risk is not a risk that makes his conduct negligent. Results within this additional risk are not results within the risk of the defendant's negligence. Thus, in the rescue cases, since the defendant was negligent merely by virtue of having exposed to peril the person to be rescued, it is absurd to say that the additional

61. HART & HONORÉ 239.

62. See *id.* at 239-40.

63. See KEETON, *op. cit. supra* note 60, at 68-69.

danger to the rescuer also made him negligent, or that the injury to the rescuer was within the risk of his negligence. And in the medical treatment cases, since the defendant was negligent for exposing the plaintiff to the risk of the initial injury, the subsequent faulty medical treatment cannot be said to be within the risk that made the defendant's conduct negligent. Some quite separate test must be brought into play to determine whether the defendant should be liable for such "ulterior harm," for results that lie outside the risk that made the defendant's conduct negligent.

The answer to this puzzle, it seems to me, lies in clarifying what we mean when we say in a particular case that a person has been negligent. Concededly this is a matter of judgment as to which there can be disagreement. It is a matter of discerning and to some extent controlling the shape of an idea. What are the risks that should be and normally are taken as forming the basis for our judgment of negligence? Do we in fact, in the context of a particular case, use the term negligence in the way the authors suggest, that is, to embrace only the minimum risk of harm necessary to condemn the defendant's conduct? Do we not rather characterize the defendant's conduct as negligent on the basis of the full range of injurious possibilities that under the circumstances of the case his conduct creates, even if they exceed the minimum risk that would justify a condemnation of the conduct? If a defendant's conduct could result in either a slight wound or death, does not the possibility of death enter into the characterization of the conduct as negligent as much as the possibility of a wound? That in another case where there was only the possibility of a wound the defendant's conduct would still be considered negligent does not mean that in the particular case under consideration the possibility of the graver injury does not enter into and support the characterization of negligence.

The problems that confront the risk theory, and they are substantial, lie not in the authors' claimed logical absurdity, but in these questions: Does the theory in actual application provide a useful instrument for distinguishing between different types of results? Does the theory's application result in a fair and socially desirable adjustment between the conflicting aims of compensating injured plaintiffs and not overburdening culpable defendants? If one answers "yes" to these questions, it is not with any excess of confidence. It is, to some extent, a case of *faute de mieux* and the demonstrated inadequacies of other theories. As far as the usefulness of the risk theory in actual application is concerned, one need only recur to the case of subsequent faulty medical treatment for evidence of how difficult it often is to say whether a particular happening was or was not within the

risk that made the defendant's conduct negligent. Another example is furnished by the authors themselves.[64] As a result of the defendant's negligence, a taxicab was forced across a sidewalk and against the stone stoop of a house. Twenty minutes later a stone loosened by the impact fell on the pavement and struck the deceased. Was this result within the risk of the defendant's negligence? Everything turns, as has been so well and illuminatingly said by Professor Robert Keeton in his recent book on this subject,[65] on how broadly or narrowly one describes the result in the particular case and the risks that made the conduct negligent; this is inescapably a matter of judgment. But even if the risk theory gives us only flickering guidance in freakish cases of this sort, this should not be taken as calling into question its real value. In the great majority of cases it will point clearly to a particular result, and there can be much more confidence in its application.[66]

Present law, the authors say, stands against the risk theory. When they said this, they did not have the benefit of the Privy Council's decision in the *Wagon Mound* case.[67] That case seems to have gone a long way towards making the risk theory part of the law of England. Still, there remains the question of the justice and desirability of the theory, and that after all is the decisive question. The authors seem to come down finally on the side of saying that it is not just or desirable, and that there is no convincing reason why the defendant should escape liability for results that he has caused, according to common-sense causal notions, even though they were not within the risk of his negligence. This conclusion, however, must be viewed in the light of the very extensive concessions that the authors have made, as we have seen, concerning the role that foreseeability does play in common-sense causal thinking. Intervening voluntary action does not really survive their discussion in any significant way as an independent limiting factor. Abnormality, within the framework of "coincidence" they do accept as a limiting criterion, and abnormality, as I have suggested, cannot in actual application be very far from the notion of foreseeability involved in the risk theory. What remains are those cases where the result, although not within the risk of the defendant's negligence, cannot be brought within the somewhat artificial definition of a coincidence. Why the line should fall just here, so as to deny recovery for the coincidental but allow it for the unforeseeable but non-coincidental, the authors do not tell us, and I

64. *In re* Guardian Cas. Co., 253 App. Div. 360, 2 N.Y.S.2d 232 (1938), discussed at HART & HONORÉ 241-42.

65. KEETON, *op. cit. supra* note 60, at 51-60, 87-88.

66. See *id.* at 30.

67. Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., [1961] A.C. 388 (P.C.) (Austl.).

doubt that anyone can.

If in the course of this discussion I have been critical of certain of the authors' conclusions, it is not necessarily because they are unreasonable, but because they are sometimes advanced with an assurance unwarranted by the supporting analysis. At times the authors do not make clear the ground of their attack on an opposing theory. They say that it is contrary to common-sense causal notions. The proponents of the theory may well concede this, and still insist that such notions are not and should not be the basis for the decisions of the courts. It is simply not enough to say, as the authors too frequently do, that the explanation for the outcome of a particular case is just that the defendant's conduct was not the cause of the result. However, an attempt to understand some of the more difficult problems raised by this book should not be taken as indicating a failure to appreciate its real qualities. It is a work of careful and thoughtful scholarship that will long be referred to by students of this tangled subject. It is a strong and authoritative answer to those who have promoted an over-simplified view of the role that causal notions play in legal decisions, and have urged that the only causal question that a court must face is that of *sine qua non.* The authors have convincingly demonstrated the unsoundness of this view.