JURISPRUDENCE
2023, VOL. 14, NO. 1, 55–75
https://doi.org/10.1080/20403313.2022.2119014

Routledge
Taylor & Francis Group

OPEN ACCESS Check for updates

Legal causation*

Thomas Byrne [a,b]

[a]Department of Linguistics and Philosophy, Massachusetts Institute of Technology, Cambridge, USA;
[b]University of California, Los Angeles School of Law, Los Angeles, USA

ABSTRACT
I propose a new formalist account of legal (/proximate) causation – one that holds legal causation to be a matter of amoral, descriptive fact. The account starts with a metaphysical relation, akin to but distinct from common-sense causation, and it argues that legal causation aligns exactly with that relation; it is unified and principled.

KEYWORDS
Legal causation; proximate causation; legal formalism; MAKING; novus actus interveniens

1. Compare:

> Wanting to break Ben's leg, Annie sabotages the lintel of his front door. When Ben returns home and opens the door, the lintel collapses upon him, breaking his leg.
>
> As above, but this time Ben notices the sabotage and instead of opening the door, he heads to buy a new lintel. On the way, he is hit by a car, breaking his leg.

In both cases, Ben's leg wouldn't have broken but for Annie's actions, but only in the first case will the courts (rightly) find Annie guilty of battery, on the grounds of that broken leg. Lawyers say that this is because only in the first case is Annie a *legal cause* of Ben's broken leg.[1]

But what is legal causation? There are two broad schools of thought. The first, *legal formalism*, holds that whether someone is a legal cause of some harm is a matter of amoral, descriptive fact. Just as, for example, whether Ben's leg wouldn't have broken but for Annie sabotaging the lintel is a matter of amoral, descriptive fact.

More specifically, the received view (amongst the legal formalists) is that while legal causation is a technical legal concept, it's one that aligns closely with our everyday, concept *common-sense causation* (henceforth, just 'causation').[2] For instance, H.L.A. Hart and Tony Honoré say:

CONTACT Thomas Byrne byrne@law.ucla.edu thomasjbbyrne@gmail.com; UCLA School of Law, 385 Charles E. Young Dr. East Los Angeles, CA, 90095

*For discussion and comments, I'm grateful to Joseph Byrne (who discussed these ideas with me many times over), Maia Cohen, Cosmo Grant, Caspar Hare, Brendan de Kenessey, Daniel Rhodes, Brad Skow, Jake Wojtowicz, and two associate editors of *Philosophy and Public Affairs*, who commented on an earlier draft. Lastly, I'm particularly indebted to the editors and reviewers of *Jurisprudence* for their help and comments, throughout.

[1]Often also called *proximate cause*.

[2]Unfortunately, various concepts go by the name 'causation.' The law talks of both legal causation (/proximate causation) and factual causation (where X is a factual cause of Y if and only if Y wouldn't have occurred but for X). There is also common-sense causation, as used by the person on the street when they say that, e.g., 'the firework caused the fire' – the study of this common-sense causation is a mainstay of contemporary metaphysics. To further add to the confusion,

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (http://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

> Over a great area of the law [the courts] have, in using causal language, sought to apply a group of causal notions embedded in common sense.[3]

Why is the received view only that legal causation 'aligns closely with' causation, as opposed to that it just is causation and that someone is a legal cause of a harm if and only if they cause that harm? Well, because there are many clear counterexamples to that stronger thesis. Here are three such counterexamples (each of which will prove useful later on):

> WINDOW: Annie is throwing rocks at the wall of Ben's house. Seeing this, a passerby is inspired to thrown his own rock. The passerby's rock smashes one of Ben's windows.

> LIGHTNING: Annie beats Ben and leaves him immobile. A freak thunderstorm rolls in and Ben is hit by a lightning bolt, which stops his heart; he dies.[4]

> FLOOD: heavy rain has raised the level of the river to dangerous levels. To protect her house, Annie blocks the doorway with sandbags. The river soon floods and the floodwaters, unable to enter Annie's house instead enter Ben's, one door down.[5]

These are counterexamples since, each time, Annie plainly causes the harm suffered by Ben, yet in none of the cases is Annie a legal cause of that harm. For example, in the first case Annie plainly causes Ben's window to break (by inspiring the passerby by to break it), yet the courts are in no doubt that Annie is not a legal cause of that broken window. The same goes for the other cases too and that is why the received view isn't that legal causation just is causation.

Since legal causation aligns closely, but not perfectly with causation, the standard formalist approach to legal causation (the one found in both legal textbooks and the rhetoric of court judgments) first asks whether the defendant was a cause of the harm in question and then provides various principles (/'tests') for determining whether the defendant was additionally a legal cause of that harm.[6]

One such principle asks if someone else willingly did something that was a temporally more proximate cause of the harm in question. If someone did, then that action would qualify as a so-called *novus actus interveniens* and 'break the chain of causation' between the defendant's action and that harm. This principle neatly returns that Annie isn't a legal cause of the broken window in WINDOW since, in that case, the passerby's throwing of the rock is such a *novus actus interveniens*.

---

metaphysicians think of factual causation simply as one possible account of common-sense causation, as opposed to anything distinct. In this paper, I will not talk of factual causation. I will talk of legal causation and I will always refer to it as 'legal causation' (and cognates). Since there is no natural way of saying 'X common-sense causes Y,' I will reserve all unqualified uses of 'causation' to refer to common-sense causation.

[3]HLA Hart and T Honoré, *Causation in the law* (Oxford University Press 1959).

[4]When appropriate, I reference the judgment(s) that corresponds to the case vignette; and when possible, I provide one from England & Wales and one from the US. In this instance, see *Alphacell Ltd v Woodward* [1972] AC 824 and *Hames v. State*, 808 S.W.2d 41, [1991] Tenn.

[5]See *Nield v London and North Western Railway Company* (1874–75) L.R. 10 Ex. 4: ' … the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes … '. See also *Heins Implement v. Hwy. Transp. Com'n*, 859 S.W.2d 681 (Mo. 1993).

[6]Hart & Honoré themselves don't hold what I am calling the received view. They instead argue for an account of common-sense causation that, e.g., denies that Annie causes the window to break in WINDOW, and thus aligns perfectly with legal causation. Since I think it's common-sense that Annie causes the window to break in WINDOW, I think their approach is misguided. One clear example of the received view in action is P Murphy and E Stockdale (eds), *Blackstone's criminal practice 2006* (Oxford University Press 2005).

However, that principle is no help with cases like LIGHTNING, which lack any such third-party action. Accordingly, the standard formalist approach provides another principle, this time asking whether there was some intervening 'act of God' that similarly amounted to a *novus actus interveniens*, 'breaking the chain of causation'; if so, then the defendant is not a legal cause of the harm. This principle neatly returns that Annie isn't a legal cause of Ben's death in LIGHTNING, since the lightning bolt is such an 'act of God.'

Many other principles exist for many other sorts of cases.[7] Nonetheless, there are still cases that defy any useful generalisation. FLOOD is one such case: the courts agree that Annie isn't a legal cause of Ben's house flooding, yet there is no general principle that accounts for why that is so.[8]

The piecemeal nature of this formalist approach motivates a certain scepticism about legal formalism. Those sceptics – the *legal realists* – hold that, despite appearances, whether someone is a legal cause of some harm isn't a factual matter whatsoever. Instead, they hold that it is a moral matter. In turn, they hold that the explanation of why Annie isn't a legal cause of the harms in WINDOW, LIGHTNING, etc. is simple: namely, Annie isn't morally responsible for those harms (or, perhaps, that public policy is such that she shouldn't be held responsible – or whatever it might be).

I don't know whether the standard formalist approach warrants that scepticism – perhaps it does, perhaps it doesn't. Either way, I want to propose a different formalist account of legal causation. This account is formalist in that it holds that legal causation is a matter of amoral, descriptive fact. However, unlike the standard formalist approach, it holds that legal causation has nothing to do with common-sense causation whatsoever. Moreover, it is unified and principled.

Here is a simple primer for my account. Recall the pair of cases that I opened with:

> Wanting to break Ben's leg, Annie sabotages the lintel of his front door. When Ben returns home and opens the door, the lintel collapses upon him, breaking his leg.
>
> As above, but this time Ben notices the sabotage and instead of opening the door, he heads to buy a new lintel. On the way, he is hit by a car, breaking his leg.

Only in the first case is Annie a legal cause of Ben's broken leg. Why is that? I say it's because, only in the first case, does Annie *break* Ben's leg (you break those legs that you collapse lintels onto, but not those that someone else hits with their car). More generally, it says that the defendant is a legal cause of someone's broken leg if and only if the defendant breaks that leg. Similarly, it says that Annie isn't a legal cause of Ben's death in LIGHTNING because Annie doesn't *kill* Ben. More generally, it says that a defendant is a legal cause of someone's death if and only if the defendant kills that person.

The job for the next few sections is to generalise that account and to define it – that is an exercise in metaphysics; afterwards I argue for it. To be clear, my conclusions in this

[7] See, for example, P Murphy and E Stockdale (eds), *Blackstone's criminal practice 2006* (Oxford University Press 2005) and WL Prosser and others, *Prosser and Keeton on the law of torts* (West Publishing Company 1984).

[8] To be clear, I do not claim that the courts offer no principle, but only that it is not one that can generalise beyond the watery specifics of the case. E.g. 'if an extraordinary flood is seen to be coming upon the land the owner of such land may fence off and protect his land from it, and so turn it away, without being responsible for the consequences' *Whalley v Lancashire and Yorkshire Railway Co* (1884) 13 Q.B.D. 131. See also *Heins Implement v. Hwy. Transp. Com'n*, 859 S.W.2d 681 (Mo. 1993).

paper are strictly metaphysical, concerning the nature of legal causation; I make no claims about whether and to what extent those conclusions should be adopted by the courts as a matter of practice. They are also limited: I do not, for instance, offer a rubric that will, for every possible case, immediately settle whether the defendant is a legal cause of a given harm.

2. In this section I introduce a metaphysical relation, akin to but distinct from common-sense causation. I begin with some background.

When, for example, a window breaks, it might be the case that

> Annie caused the window to break,

and it might be the case that

> Annie broke the window.

Often the two will go hand-in-hand – for instance, when Annie throws a rock at the window – but they needn't and we've already seen one such case where they don't:

> WINDOW: Annie is throwing rocks at the wall of Ben's house. Seeing this, a passerby is inspired to thrown his own rock. The passerby's rock smashes one of Ben's windows.

Annie causes the window to break (by inspiring the passerby to break it), even though she doesn't break it herself.

Similarly, when the house floods, it might be that Annie caused the house to flood and it might be that Annie flooded the house. These can also come apart and, again, we've already seen one case where they do:

> FLOOD: heavy rain has raised the level of the river to dangerous levels. To protect her house, Annie blocks the doorway with sandbags. The river soon floods and the floodwaters, unable to enter Annie's house instead enter Ben's, one door down.

Here, Annie doesn't flood Ben's house, even though she causes his house to flood by diverting the waters his way.

And, it's important to note, this is nothing special about Annie nor people, since the same holds more generally. When the chocolate melts, it might be that the fire caused the chocolate to melt and it might be that the fire melted the chocolate. These can come apart, too: if the fire cuts power to the air-conditioning, then the fire doesn't melt the chocolate, even though it causes the chocolate to melt (by causing the summer air to melt it). However, having noted this generality, I will now set it aside and restrict my attention to only those cases involving people, since only people are candidates for legally causing something.

There's a pattern here. *Break*, *flood* and *melt* are all verbs that can be used both *intransitively* and *transitively*. A verb *V* is used intransitively in a given sentence when it doesn't allow a grammatical object (e.g., 'the window broke'), while it is transitive when it does (whether explicitly, e.g., 'Annie breaks the window,' or implicitly, e.g., 'stop stealing [cars]!'). If we mark these intransitive and transitive uses with the subscripts 'I' and 'T,' then we can capture the pattern as follows. For thing *X* and verb V, when

> X V_I's (e.g., the window breaks),

it might be the case, for person *A*, that

(i) A causes X to V_I (e.g., Annie causes the window to break)

and it might be the case that

(ii) A V_T's X (e.g., Annie breaks the window).[9]

Now, it has long been understood that each instance of (i) shares something important with every other such instance; namely, that they are all instances of the same metaphysical relation – namely, common-sense causation. Accordingly, it has long been understood that we can theorise about what it is for, e.g., Annie to cause the window to break by theorising about causation in general (or, indeed, by theorising about what it is for, e.g., Annie to cause the house to flood). Such theorising is a mainstay of contemporary metaphysics.

Elsewhere, I've argued that the same goes for (ii) and that each instance of (ii) shares something important with every other such instance; namely, that they too are all instances of the same metaphysical relation – a relation that, while akin to causation, is distinct from it.[10] My reasoning was simple (and, indeed, was exactly as you'd expect for a claim of this sort): stark similarities exist across all instances of (ii).

These similarities become apparent once we consider minimal variations of some of the cases, above. For instance, recall

> WINDOW: Annie is throwing rocks at the wall of Ben's house. Seeing this, a passerby is inspired to thrown his own rock. The passerby's rock smashes one of Ben's windows.

Even though Annie inspired the passerby to break Ben's window, Annie herself did not break that window. And it turns out that this is but a single instance of a general principle; namely, that if A causes X to V_I merely by causing B to (willingly) V_T X, then that is sufficient for it to be the case that A does not V_T X. After all, if Annie had instead inspired the passerby to, e.g., repair Ben's window, then nor would Annie have repaired that window; or if she had instead inspired the passerby to open the window, then Annie herself wouldn't have opened it; and so on.

And recall FLOOD: waters head towards Annie's house, Annie blocks her doorway and the waters instead enter Ben's house; yet Annie does not flood Ben's house. This is nothing special about floodwaters nor floods. Suppose instead that the paint factory explodes and a wave of red paint heads towards Annie's house, Annie blocks her doorway and the paint instead enters Ben's house; Annie doesn't *redden* Ben's house, even though she causes it to redden. Or suppose that a plague of locusts heads towards Annie's greenhouse, Annie closes the door and the locusts instead enter Ben's greenhouse; Annie doesn't *destroy* Ben's crop, even thought she causes it to be destroyed. (Generalising this similarity is a messy affair and since it isn't relevant here, I won't get into it.)

[9] A reviewer asks whether this pattern obtains in other languages. I'm reliably informed that it obtains in French, Hindi, Italian, Marathi, Portuguese and Spanish. I suspect it obtains more generally, too. In any case, that it obtains widely is strong evidence that the distinction between (i) and (ii) isn't a mere linguistic distinction.

[10] T Byrne, 'MAKING Metaphysics' (2021) 21 Philosophers Imprint <http://hdl.handle.net/2027/spo.3521354.0021.020> accessed 10 May 2022.

Other cases reveal further similarities and all these similarities require explanation. I concluded that the best such explanation is that every instance of (ii) is an instance of the same metaphysical relation. For lack of a better name, I christened that relation *MAKING*, where

> A MAKES X V_I if and only if A V_T's X.

(For example, A MAKES the window break if and only if A breaks the window; A MAKES the house flood if and only if A floods the house; and so on.)[11]

3. In that same paper, I also pointed out that while we might not be familiar with MAKING, as such, we are very familiar with its various instances and, in turn, we are experts at determining when A does and doesn't V_T X. We can flex that expertise by running through some subtle contrast cases. (I revert to cases that don't involve people so as to rule out the possibility that readers' judgements are normatively driven.)

> *Does the rhino kill Ben?*
>
> A rhino tramples Ben, leaving him immobile. A freak thunderstorm rolls in and Ben is hit by a lightning bolt, which stops his heart; he dies.
>
> As before, but this time there is no thunderstorm. Instead, the sun sets and Ben dies of exposure overnight.
>
> *Does the fire melt the chocolate?*
>
> A fire cuts power to the air-conditioning unit, deactivating it. Without air-conditioning, the room heats up and the chocolate inside melts.
>
> As before, but this time there is no air-conditioning unit and, instead, the fire simply radiates heat in the chocolate's direction.
>
> *Does the wind break the branch?*
>
> The howling wind agitates a bear who jumps up and down on the tree branch until it snaps.
>
> As before, but this time there is no bear. The wind buffets the branch until it breaks and falls to the ground.

I trust that you answered as follows: the rhino doesn't kill Ben when he's struck by lightning, but it does when he dies of exposure; the fire doesn't, as we've already seen, melt the chocolate when it deactivates the air-conditioning, but it does when it radiates heat in the chocolate's direction; and the wind doesn't break the branch when it agitates the bear, but

[11] Certain instances of this schema are ungrammatical. For instance, consider the verb *smile* which lacks a transitive form ('Annie smiled_T Ben' is ungrammatical): A MAKES X smile if and only if A smiles X. That this instance of the schema is ungrammatical tells us nothing about the world, but only reveals the caprice of our language. After all, there is no reason why *smile* couldn't have a transitive form and there is no reason why we couldn't say, for instance, 'could you go and smile that child, he'll ruin the photo otherwise.' Just as there's no reason why, for instance, you can *redden* something, but there is no corresponding word for orange ('he oranged_T the picture' is bad English). The same issue Arises for those verbs that lack an intransitive form, such as *harm* (e.g. 'Ben harms_I'). This again is an artefact of our language. For starters, *harm* used to be used intransitively (e.g. 'The men is fresh, too, and won't harm_I for a bit of exercise'). In both cases, the correct response to the issue is to simply coin the missing verb forms. However, to avoid clunky language, I will restrict myself to verbs that do have both transitive and intransitive forms: *break*, *flood*, *kill*, *melt*, etc. See JJ Thomson, *Acts and other events* (Cornell University Press 1977) and T Byrne, 'MAKING Metaphysics' (2021) 21 Philosophers Imprint <http://hdl.handle.net/2027/spo.3521354.0021.020> accessed 10 May 2022.

it does when it buffets the branch. Congratulations: you're an expert at determining when A does and doesn't V_T X.

I'll also mention how our expertise with MAKING endures across cases with strange counterfactual properties (counterfactual properties that have proved vexatious for both legal- and causal theorists elsewhere). Here are three such examples:

> Two lions are independently stalking a lame antelope. The first lion tracks the antelope down and eats it, but if it hadn't then the second lion would have eaten it instead.
>
> Winds are blowing a forest fire towards Ben's shed. Before it arrives, a dam fails and a torrent of water washes Ben's shed away.
>
> Annie is due to take a cruise on Monday. On Sunday she is bitten by an asp, admitted to hospital and misses the cruise ship's departure. On Tuesday the cruise ship sinks with all hands lost. On Wednesday, Annie eventually succumbs to the venom.

In the first case, the antelope would have died regardless of what the first lion did; in the second, Ben's shed would have been destroyed even if the dam hadn't failed; and in the third, Annie would have died even if the asp hadn't bitten her (indeed, she would have died sooner). Even so, there's no doubt that the first lion killed the antelope, that the water destroyed Ben's shed, and that the asp killed Annie.

Ultimately, we are all experts at determining when A does and doesn't V_T X. And that we're experts is no surprise. Each of these different instances of MAKING – floodings, killings, breakings, etc. – are as familiar to us as, e.g., chairs, parties and the colour red; and just as we instinctively know whether something is a chair (or a party, or coloured red), so too do we instinctively know whether some action is, e.g., a killing. (To be clear, I do not claim that for *every* action we immediately know whether it's an instance of MAKING. I say more about those unclear cases in §7, but for now it suffices to point out that nor do we immediately know for every thing whether it's a chair (consider beanbags) or whether it's red (consider salmon pink), etc.; and just as our lack of omniscience there doesn't undercut our general expertise *vis-a-vis* chairs, nor does our lack of omniscience here undercut our general expertise *vis-a-vis* MAKING.)

I am emphasising this expertise because I will, throughout the rest of this paper, be asserting of this-or-that case that it is (/isn't) an instance of MAKING – that Annie does kill Ben here, that she doesn't flood Ben's house there, and so on – and I don't want the grounds of those assertions to be mysterious. And they aren't mysterious: my grounds for asserting that a given action is an instance of MAKING are the same as my grounds for asserting that a given thing is a chair, or red, or whatever – namely, we know it when we see it.

4. With MAKING introduced, I can now state my account of legal causation:

> A is a legal cause of X V_I-ing if and only if A MAKES X V_I.

And since A MAKES X V_I if and only if A V_T's X, that amounts to the following:

> A is a legal cause of X V_I-ing if and only if A V_T's X.

For example, Annie is a legal cause of the window breaking if and only if Annie breaks the window; Annie is a legal cause of Ben dying if and only if Annie kills Ben; Annie is a legal cause of the house flooding if and only if Annie floods the house; and so on.

Earlier I claimed that this account of legal causation is amoral in that, by its lights, whether A is a legal cause of some harm isn't itself at all fixed by any moral features of the situation. That claim amounts to the claim that whether A V_T's X is not at all fixed by any moral features of the situation.

Why think that claim is true? For two reasons. Firstly, whether A V_T's X cuts across every possible moral distinction (and indeed every combination of them): A might, e.g., break the window either permissibly or impermissibly; A might flood the house either justifiably or unjustifiably; A might destroy the car either with blame or without it; and so on. And given that whether A V_T's X cuts across every possible moral distinction, what moral features of the case could be left to fix whether A does or doesn't V_T X?

And secondly (and as mentioned above) it's not only people that can MAKE Xs V_I: fires can melt things, boulders can break things, and meteors can exterminate things, yet fires, boulders and meteors are each ineligible for moral evaluation. (After all, it makes no sense to say, e.g., that the fire melted the chocolate permissibly or impermissibly, or that it was wrong for the meteor to exterminate the dinosaurs – just as it makes no sense to say that the fire melted the chocolate gleefully, etc.) And since fires, boulders, etc. are ineligible for moral evaluation, yet fires and boulders can MAKE Xs V_I (and can also, as we saw, cause X to V_I without MAKING X V_I), it cannot be moral features of the situation that are fixing whether they do indeed MAKE X V_I. Ultimately, whether A V_T's X is an amoral matter.

I also claimed earlier that my account of legal causation has nothing to do with (common-sense) causation (and, thus, that MAKING has nothing to do with causation). What does that claim amount to?

One way that MAKING might have something to do with causation is that MAKING might just *be* causation. However, we've already seen that that isn't so since whether A MAKES X V_I can come apart from whether A causes X to V_I (recall, for instance, when Annie causes the window to break by causing the passerby to break it, yet doesn't break it herself).

More interesting is the possibility that A MAKES X V_I if and only if A causes X to V_I *in a particular way* (just as, for example, someone roasts a potato if and only if he cooks it in a particular way). The standard formalist approach to legal causation is like that: it says that A is a legal cause of X's V-ing if and only if A causes X to V_I in a particular way – i.e., without there existing a more proximate third-party that also caused the harm, and without there being an intervening 'act-of-God,' and so on. So if MAKING is also causing in-a-particular-way, then my account of legal causation would just be some variation of the standard formalist approach.

However, I think it's clear that MAKING isn't just causing in-a-particular-way. I think that because every plausible specification of just what that particular-way is admits of clear counterexamples. Elsewhere, I show that that is the case for an exhaustive range of specifications, but here I will consider only the most plausible ones.[12]

[12]A reviewer asks whether MAKING entails causing and, in turn, whether that is reason to think that MAKING must reduce to causation. Elsewhere, I've expressed doubts about that entailment. Consider a case from Hart and Honoré (1959: 220) where A poisons B on Sunday, such that B misses his cruise, which later sinks with all hands lost on Monday, before B dies from the poison on Tuesday. I suggested that while it's plain that A kills B (she poisoned him!), it's not clear whether she causes him to die – for starters, he lived a day longer than he otherwise would have. If that's right, then MAKING doesn't entail causation. But even if that's incorrect and MAKING does entail causation, that still doesn't

Proposed specification 1: MAKING is direct causation. A natural idea – plausibly one that can be traced back to Francis Bacon – is that while many things might cause X to V_I, only certain things will do so directly, where A1 directly causes X to V_I if and only if it causes X to V_I, but doesn't do so by causing some A2 to cause X to V_I. It then says that A V_T's X if and only if A directly causes X to V_I. For instance, recall when Annie inspires the passerby to throw the rock at the window, the passerby throws the rock, the window breaks. Friends of this specification would say that since Annie causes the window to break only by causing the passerby to cause the window to break, the passerby breaks the window, but Annie doesn't. But this specification immediately fails since the passerby too causes the window to break only by causing something else – namely, the rock – to cause the window to break. So it, in fact, falsely returns that Ben doesn't break the window.

Proposed specification 2: MAKING is *intended* causation. This would say that A V_T's X if and only if A intentionally causes X to V_I. Since inanimate objects can MAKE Xs V_I – boulders break windows, lightning burns trees, etc. – despite not doing so intentionally, this specification is a non-starter.

Proposed specification 3: MAKING is *foreseeable* causation. When A performs some action and, in doing so, causes X to V_I, sometimes it is foreseeable that A's action would cause X to V_I and sometimes it isn't. This specification thinks that this foreseeability makes all the difference and holds that A V_T's X if and only if A foreseeably causes X to V_I. Regardless of whether we understand this foreseeability subjectively (that is, foreseeable to A) or objectively (foreseeable to the reasonable person), this proposal cannot be right. Recall

> FLOOD: heavy rain has raised the level of the river to dangerous levels. To protect her house, Annie blocks the doorway with sandbags. The river soon floods and the floodwaters, unable to enter Annie's house instead enter Ben's, one door down.

We can stipulate that, in blocking her doorway, Annie foreseeably (both subjectively and objectively) caused Ben's house to flood, but that doesn't alter the fact that Annie didn't flood Ben's house.

That's a case where A foreseeably causes X to V_I, yet doesn't V_T X. We might wonder whether there are also cases where A V_T's X, but doesn't foreseeably cause X to V_I. There are. It's said that champagne was invented by mistake when French monks bottled some wine before it had finished fermenting, causing it to finish fermenting in the pressurised bottle and, in turn, to carbonate. If that's true, then the monk who bottled that wine caused it to carbonate without it being foreseeable to anyone that it would do so. Even so, the monk clearly carbonated the wine.

Proposed specification 4: MAKING is causation *without intervening human acts*. Jennifer Hornsby says that A V_T's X if and only if A causes X to V_I and there exists no human that more proximately causes X to V_I.[13] For instance, when Annie instructs Ben to throw the rock at the window, Ben more proximately causes the window to break and therefore Hornsby says that Annie doesn't break the window. This specification returns the wrong verdict in both FLOOD and LIGHTNING. Recall:

entail that MAKING reduces to causation: being scarlet entails being red, but *scarletness* doesn't reduce to *redness* (see T Williamson, *Knowledge and its limits* (Oxford University Press 2000)).

[13] J Hornsby, *Actions* (Routledge and Kegan Paul 1980).

LIGHTNING: Annie beats Ben and leaves him immobile. A freak thunderstorm rolls in and Ben is hit by a lightning bolt, which stops his heart; he dies.

Even though there exists no human that more proximately causes Ben to die, Annie doesn't kill Ben. Similarly, even though there exists no human that more proximately causes Ben's house to flood, Annie doesn't flood Ben's house.

Those are cases where A causes X to V_I without any intervening human acts, yet A doesn't V_T X. As before, we might wonder whether there are also cases where A V_T's X despite there being intervening human acts. There are: if I lay a bear trap outside your door, which breaks your leg when you unwittingly step on it, then I break your leg even though you walked into it (and, in doing so, more proximately caused your leg to break).

5. Over the previous two sections, I introduced MAKING – where A MAKES X V_I if and only if A V_T's X – and I defended my claims that MAKING is amoral and that it has nothing to do with causation. I also presented my account of legal causation:

A is a legal cause of X V_I-ing if and only if A MAKES X V_I.

And since A MAKES X V_I if and only if A V_T's X, that amounts to the following:

A is a legal cause of X V_I-ing if and only if A V_T's X.

Unfortunately, there is no simple criterion for judging whether this is correct. The natural idea – that it is correct just in case its verdicts align with the courts judgments *vis-a-vis* legal causation – won't do since some of those court judgments are certainly incorrect.[14] After all, those judgments are judgments of fact (at least, they are for the legal formalist), yet the courts are fallible and so we can be sure they'll have made mistakes – we just don't know where. Clearly, it's not a mark against my account that it doesn't align with an incorrect court judgment of legal causation.[15]

Instead my approach will be more indirect – inductive rather than deductive. In this section, I will detail various elements of legal causation that my account aligns with. To do so, I will run through a number of cases (or, more precisely, case vignettes of the sort used throughout this paper), each of which represents a central, settled and uncontroversial element of legal causation. To my mind, these elements constitute the central tenets of legal causation, but reasonable people can disagree over whether, and to what extent, that is so. Regardless, this section will detail elements of legal causation that my account aligns with.

On the other hand, in the next section I will detail some court judgments with which my account conflicts. It is a straightforward implication of my account that

[14]To regiment things, the courts will have 'judgments' of legal causation, while my account will have 'verdicts.'

[15]There are also *policy-driven* judgments that would cause problems for this criterion. The classic example is New York State's 'first building rule.' That rule states that if A starts a fire, which spreads from one building to many others, destroying them all, then A is only a legal cause of the destruction of the first building. Since my account makes no such ordinal distinction and simply holds that A is a legal cause of the destruction of any building that A destroys, any judgment of legal causation that falls under the first building rule would not align with whether A destroyed the building; and, in turn, would fail the criterion, above. But as Hart & Honoré say, such judgments 'have nothing whatever to do with causation … [Instead] they represent a particular *policy* which a particular legal system has adopted.' HLA Hart and T Honoré, *Causation in the law* (Oxford University Press 1959). For England & Wales, see *Environment Agency v Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22.

those judgments are incorrect. Ultimately, my view is that the alignment exhibited in this section renders those conflicts palatable, at the very least (I say more about this in that section).

I start with those cases that lack any complexity *vis-a-vis* legal causation – the 'easy' cases – before turning to more complex ones. If A shoots B, which results in B's death (in the usual way being shot results in one's death) then A is a legal cause of B's death and, of course, A killed B. If A drops a brick through B's windshield then A is a legal cause of B's broken windshield and, of course, A broke B's windshield. On the other hand, if A merely stands back while someone else shoots B in the heart, then A didn't kill B, nor is A a legal cause of B's death. And if A stands back while someone else drops a brick through B's windshield, then A didn't break B's windshield, nor is A a legal cause of the broken windshield. Unsurprisingly, these cases, and other easy ones like them, pose no problem for my account.

But what about 'hard' cases that do involve causal subtleties? For example, those cases where the standard formalist approach to legal causation becomes piecemeal? We saw three in the introduction:

> WINDOW: Annie is throwing rocks at the wall of Ben's house. Seeing this, a passerby is inspired to thrown his own rock. The passerby's rock smashes one of Ben's windows.
>
> LIGHTNING: Annie beats Ben and leaves him immobile. A freak thunderstorm rolls in and Ben is hit by a lightning bolt, which stops his heart; he dies.
>
> FLOOD: heavy rain has raised the level of the river to dangerous levels. To protect her house, Annie blocks the doorway with sandbags. The river soon floods and the floodwaters, unable to enter Annie's house instead enter Ben's, one door down.

In each of these cases, Annie is not a legal cause of the harm in question despite being a cause of that harm and so the standard formalist approach must introduce further principles to capture those judgments. On the other hand, my account happily aligns with those judgments: in the first case, Annie doesn't break Ben's window and so my account rightly returns that Annie isn't a legal cause of that broken window; in the second case, Annie doesn't kill Ben and so my account rightly returns that Annie isn't a legal cause of his death; and in the third case, Annie doesn't flood Ben's house and so my account rightly returns that Annie isn't a legal cause of his flooded house. (We might also consider a variation of FLOOD alluded to earlier: suppose that a plague of locusts heads towards Annie's greenhouse, Annie closes the door and so the locusts instead enter Ben's greenhouse and destroy his crop. Annie isn't a legal cause of that destruction and my account agrees since Annie doesn't destroy Ben's crop.[16])

Here are four more hard cases, each possessing some confounding causal factor.

> Annie mortally wounds Ben and leaves him for dead. Before Ben dies of those wounds, a passerby with a grudge shoots Ben dead.[17]

Even though Annie mortally wounded Ben, Annie is not a legal cause of his death. My account agrees since, even though Annie mortally wounded Ben, Annie didn't kill

[16]See *Greyvensteyn v Hattingh* [1911] A.C. 355.
[17]See *State v Scates* (1858), 50 NC 409; *People v. Elder*, 100 Mich. 515, Mich. Supreme Court (1894).

Ben. That's a case where Annie isn't a legal cause of the death despite having inflicted mortal wounds and we might contrast it with the following case where the wounds inflicted are not themselves fatal:

> Annie seriously wounds Ben. While those wounds by themselves are not fatal, they prevent doctors from operating on Ben's duodenal ulcer. Ben dies when the ulcer bursts.[18]

Here Annie is a legal cause of Ben's death. My account agrees since Annie killed Ben. Another case:

> Annie stabs Ben. At the hospital, an overworked doctor fails to notice that the knife has pierced one of Ben's lungs and, as a result, Ben is not given appropriate treatment. Ben dies.[19]

Even though the doctor's failure was a substantial cause of Ben's death, Annie is a legal cause of Ben's death. My account agrees since Annie killed Ben – despite the doctor's error. That case is often contrasted with the following:

> Annie stabs Ben. Ben is treated at the hospital, where his wound largely heals. A doctor mistakenly prescribes Ben antibiotics, to which he has already had one allergic reaction. Ben dies of anaphylaxis.[20]

Despite the similarities in these two cases – a stabbing combined with a medical error, resulting in a death – Annie is not a legal cause of Ben's death here. My account agrees since this time Annie didn't kill Ben.

The previous four cases all concern death – a reflection of the relevant case law. Notice however, how the same contrasts hold if we switch out death for, e.g., paralysation:

> Annie stabs Ben. At the hospital, an overworked doctor fails to notice that the knife has pierced one of Ben's nerves and, as a result, Ben is not given appropriate treatment. Ben is paralysed.

> Annie stabs Ben. Ben is treated at the hospital, where his wound largely heals. A doctor mistakenly prescribes Ben antibiotics, to which he has already had one allergic reaction. The anaphylaxis temporarily prevents blood from reaching his brain; Ben is paralysed.

Annie is a legal cause of Ben's paralysation in the first case, but not the second; and my account agrees since Annie paralysed Ben in the first case, but not in the second. (The subtlety of these contrasts makes stark an issue that has been lingering in the background: just what is it for A to kill B, or for A to paralyse B, or to break his arm, etc? I briefly turn to these questions in §7.)

Those same four cases also all concern a single defendant – another reflection of the relevant case law – but my account doesn't preclude the possibility of so called *joint enterprise* (/*liability*) in which multiple parties are legal causes of a particular harm. If A and B take turns emptying buckets of water into Victim's basement, then A and B are each legal causes of the flooding of Victim's basement; and my account agrees since A and B jointly flood Victim's basement. And if A and B each sprinkle half the lethal dose of poison onto Victim's food, then A and B are each legal causes of Victim's death; and my account

[18]See *R v McKechnie* (1992) 94 Cr App R 51.
[19]See *R v Smith* [1959] 2 QB 35 and *Thompson v. Fox*, 326 Pa. 209, 192 A. 107 (Pa. 1937).
[20]See *R v Jordan* (1956) 40 Cr App R 152 and *Brown v. N.Y. State Training School*, 285 N.Y. 37, 32 N.E.2d 783 (N.Y. 1941).

agrees since A and B jointly kill Victim. Or consider the famous *Dudley and Stephens* in which Stephens held Parker down, while Dudley slit his throat.[21] Since Dudley and Stephens jointly killed Parker, my account rightly returns that they are each legal causes of Parker's death.[22]

As I mentioned in the introduction, one general principle of legal causation asks whether there exists an action (willingly) performed by some other party that 'breaks the chain of causation' between the defendant's action and the harm in question – a *novus actus interveniens*. We saw an application of this principle in WINDOW, where Annie is not a legal cause of the broken window since the passerby's throwing the rock is a *novus actus interveniens*. Now, the parenthetical 'willing' is important. Consider, for example:

> Annie leaves a bear trap outside Ben's front door. Ben leaves for a work and, unwittingly, steps in the trap, breaking his leg.
>
> As above, but this time Ben sees the bear trap. Nonetheless, and with nothing to lose, Ben decides to step into it, breaking his leg.[23]

In both cases, Ben is a more proximate cause of his broken leg (after all, he is the one who steps into the bear trap), yet only in the second case is he a willing cause of his broken leg. Accordingly, the principle returns that while Annie is a legal cause of Ben's broken leg in the first case, she isn't in the second. My account agrees since only in the first case does Annie break Ben's leg.

Actually, the principle is more nuanced, still. It's not sufficient that the third-party be a willing cause, they must also be an *informed* cause – they must appreciate what it is they're doing. Consider:

> Annie secretly doses Ben's martini with a fatal dose of arsenic. Ben drinks the martini and dies.
>
> As above, but this time Annie informs Ben of what she had done. Nonetheless, Ben still decides to drink the martini; he dies.

In both cases, Ben is a more proximate cause of his death (after all, he is the one who pours the drink into his mouth); moreover, and unlike in the previous pair of cases, Ben willingly causes his death in the sense that he willingly pours the drink into his mouth. However, only in the second case, does Ben informedly cause his death since only in that case does Ben appreciate what it is he's doing – namely, drinking poison. Accordingly, the amended principle returns that while Annie is a legal cause of Ben's death (/his poisoning) in the first case, she is not a legal cause of his death in the second case. My account agrees since only in the first case does Annie kill (/poison) Ben.

6. The previous section detailed various elements of legal causation with which my account aligns; this section does the opposite. I begin with three cases of *bonafide* conflict: ones in which the verdict returned by my account outright conflicts with the

[21]R v *Dudley and Stephens* (1884) 14 QB 273 DC. A grizzly case in which shipwrecked sailors, on the brink of starvation, killed and ate the weakest amongst them.

[22]What about accomplices (e.g. the getaway driver or the watchman)? The courts treats them differently and my account neatly explains why they are right to do so: getaway drivers and watchmen do not, e.g., kill the victims.

[23]See *R v Latif* [1996] and *Rodgers v. Yellow Cab Co.*, 395 Pa. 412, 147 A.2d 611 [Pa. 1959].

judgment of the court. Each time, I briefly explain where, by my account's lights, the court's reasoning went wrong.

Conflict 1: *O'Neill v. Port Jervis*.[24,25] In response to building work, the city of Port Jervis erected a barrier that jutted out from the construction site, crossed the pavement and continued several feet into the road. A pedestrian, O'Neill, was prevented from continuing along the pavement by the barrier and, in order to continue on her way, O'Neill walked around the barrier and into the road. She was struck by an oncoming vehicle and killed. On appeal, the courts held these facts did not constitute an in-principle barrier to the city of Port Jervis being a legal cause of O'Neill's death.

Since those same facts entail that the city of Port Jarvis didn't kill O'Neill (which it plainly didn't), those facts are sufficient for my account to return that the city was not a legal cause of O'Neill's death. Accordingly, the verdict returned by my account conflicts with the judgment of the court.

The court's reasoning is instructive: ' … [if] the city personified had been there and forced O'Neill … into the wheels of traffic, no doubt would exist in the minds of any one as to [legal causation].' The court then asked if it should be any different in the actual case where instead of being forced by the city personified, O'Neill was instead forced into the road by the 'necessity' of doing so in order to continue on her way. They answered in the negative and judged accordingly. My account explains where their reasoning went wrong since in the hypothetical case, the city personified would have killed O'Neill and that makes for all the difference in the world between that case and the actual one *vis-a-vis* legal causation.

Conflict 2. *Hain v Jamison*.[26] As a result of the farm-owners' negligence, one of their calves escaped its enclosure and wandered onto a nearby road, at night. While driving home, Hain spotted the calf, parked, and tried to move the calf off the road to safety. As she was doing so, another vehicle came around the bend and, unable to stop in time, collided with Hain, killing her. On appeal, the court ruled that the facts of the case did not constitute an in-principle barrier to the farm-owners being a legal cause of Hain's death.

Since those same facts entail that the farm-owners didn't kill Hain (which they plainly didn't), those facts are sufficient for my account to return that the farm-owners were not a legal cause of Hain's death.

It's again instructive to look at how the court arrived at its judgment. All parties agreed that if the escaped calf had wandered into the road and collided with Hain's car, killing Hain, then the farm-owners would have been a legal cause of Hain's death. The issue in contention was whether that case differed from the actual case *vis-a-vis* legal causation. The court framed that issue in terms of foreseeability: all parties agreed that if Hain had collided with the calf, then the manner of her death would have been foreseeable, but was the actual manner of her death similarly foreseeable (or, more precisely, could a jury reasonably conclude that it was)? The court concluded that it was similarly foreseeable and judged accordingly. By my account's lights, the court's mistake lay in framing the

[24]*O'Neill v Port Jervis*, 253 N.Y. 423.

[25]Why the switch from case vignettes to actual cases? Because in the previous section it was instructive to screen away specific details of a particular case in order to emphasise the generalisable elements involved. Here, though, it is those specifics that drive the conflicts.

[26]*Hain v Jamison*, 28 N.Y.3d 524

issue in that way. What fixes why the farm-owners would have been a legal cause of Hain's death in that hypothetical case is not that Hain's death would have been foreseeable, but that the farm-owner's would have killed Hain – just as, e.g., I kill you if my tiger escapes and eats you. And that difference makes all the difference between the hypothetical case and the actual one *vis-a-vis* legal causation.

Conflict 3: *Wallace*.[27] Wallace threw acid over van Dongen, inflicting horrific injuries that left van Dongen maimed, paralysed from the neck down and in terrible, incurable pain. Fifteen months later, and unable to take his own life, van Dongen travelled to Belgium, where he was euthanised in accordance with Belgium law. On appeal, the courts held that those facts of the case – in particular, how van Dongen had decided to travel to Belgium to be euthanised – did not constitute an in-principle barrier to Wallace being a legal cause of van Dongen's death (and, in turn, guilty of his murder).

Since those same facts entail that Wallace didn't kill van Dongen (which she plainly didn't), those facts are sufficient for my account to return that Wallace was not a legal cause of van Dongen's death.

The court's reasoning is instructive once again – although, the details given leave the ultimate crux of that reasoning a little unclear. The central issue (seemed to be) whether van Dongen's decision to end his life was voluntary in the sense required to render the resulting euthanasia a *novus actus interveniens*. On the one hand, the court considered *Kennedy*,[28] in which the defendant provided the victim the heroin with which the victim later overdosed. In that case, the court held that the victim's decision to inject was voluntary and, in turn, a *novus actus interveniens*. On the other hand, the court considered *Blaue*,[29] in which a stabbing victim refused a blood transfusion that would otherwise have saved her life (she was a Jehovah's Witness). There, the court held that the victim's religious beliefs rendered her decision to refuse the transfusion involuntary – since, in some sense, she had no choice but to refuse – and, in turn, not a *novus actus interveniens*. Returning to *Wallace*, given the 'truly terrible situation' van Dongen was in, and since death was the only possible escape from that situation, the court held that this case fell in with *Blaue* as opposed to with *Kennedy*. They concluded: 'there was nothing that could decently be described as voluntary … . in the decision by [van Dongen] to end his life' (76) and, therefore, his ending his life didn't amount to a *novus actus interveniens*. By my account's lights, and as was the case with *Hain*, the court's mistake lies in how they framed the issue: what fixes why the defendant wasn't a legal cause in *Kennedy* is not that the victim voluntarily injected the heroin, but instead that the defendant didn't kill the victim; what fixes why the defendant was a legal cause of the victim's death in *Blaue* is not that the victim had no choice but to refuse the transfusion, but that the defendant did kill the victim.[30] The extent to which the actions in question were voluntary is a red-herring. It's also a red-herring in

[27] *R v Wallace* [2018] EWCA Crim 690.
[28] *R v Kennedy* (No. 2) [2008] 1 AC 269.
[29] *R v Blaue* [1975] 3 All ER 446.
[30] In conversation, some people have questioned whether the defendant killed in *Blaue*, since the victim could easily ('easily'?) have averted her fate. I am reminded here of the scene in *Austin Powers* where Powers drives towards an anonymous henchmen in an extremely slow road roller. The henchman has minutes to move out of the way (and could easily have done so), but doesn't and is eventually squashed. The fact that the victim could easily have averted his fate has no bearing upon the obvious fact that Powers killed him.

Wallace: Wallace didn't kill van Dongen and that alone fixes that she is not a legal cause of his death.

In each of these cases, the verdict of my account conflicts with the judgment of the court – and while these are obviously not the only such cases, I believe they are representative. It's a straightforward implication of my account of legal causation that those judgments are incorrect. My view is that they are incorrect and, moreover, that we now know exactly where those judgments went wrong.

Those preceding conflicts are *bonafide*; I now turn to some which, in my view, are not – starting with some background.

Elsewhere, Michael Moore writes:

> A common fault of the legal literature on causation has been its credulity with regard to the law's demands on the concept of causation. Typically, legal theorists have taken legal usages of 'cause' at face value in the sense that, without questioning such usages, they have thought that their theory of legal causation had to fit all of them … The law has mixed too many extraneous elements into what it calls '[legal] causation.'[31]

(I add that this mixing shouldn't surprise us. Given the piecemeal nature of the standard approach to legal causation, it's inevitable that the courts would miscategorise certain legal distinctions as distinctions of legal causation.)

This mixing results in additional conflicts between the verdicts of my account and the judgments of the court. Here is an uncontroversial, but fictional example (alas, its being uncontroversial requires that it be fictional). The law treats Evil Annie, who intentionally shoots the victim, differently to how it treats Innocent Annie, who accidentally shoots him. And while the law in fact justifies this difference by appealing to the different *mens rea* of the agents (as surely it should), it might have done things differently: it might instead have justified it by mixing intentions in with legal causation such that only Evil Annie counts as a 'legal cause' of the victim's death. In such a fiction, my account would conflict with the resulting court judgments (after all, my account draws no distinction between Evil- and Innocent Annie *vis-a-vis* legally causing Ben's death: if you shoot someone dead, you kill them – innocently or otherwise). However, that conflict would not be *bonafide*, like the three above, but *shallow*: arising because the courts had confusedly mixed intentions in with legal causation, despite them having nothing to do with causation, whatsoever. Plainly, a shallow conflict like that would be no mark against my account.

I used a fictional example because to say of an actual judgment that it's a result of the courts miscategorising some legal distinction as a distinction of legal causation is to make a substantive claim – yet there exists no simple criterion for assessing such a claim (what could it be?). Lacking such a criterion, all that's to be done is to detail some of the conflicts that I take to be shallow and, each time, to explain my reasons.

Conflict 4: omissions. Normally, omissions are insufficient for legal causation: if Annie can prevent Ben from drowning by simply raising her hand, yet doesn't (even if she doesn't because she wants Ben dead), then Annie is not a legal cause of Ben's death and she has committed no offence.

[31]MS Moore, *Causation and responsibility: an essay in law, morals, and metaphysics* (Oxford University Press 2009).

However, sometimes omissions are sufficient: in *Gibbins*, the father who omitted to feed his daughter was found to be a legal cause of her death; similarly in *Davis* for the daughter who omitted to care for her senile mother; and in *Pittwood*, where a driver was struck by a train on a level-crossing, the operator who omitted to lower the crossing gate was found to be a legal cause of the driver's death.[32] Since Pittwood didn't kill that driver, my account conflicts with the judgment of the court – and the same goes for Gibbins and Davis.[33]

In my view, this is a shallow conflict that arises because the courts have mixed an extraneous element into legal causation. Which element? A pre-existing duty to perform a particular action: Gibbins had a duty to care for his daughter, Davis had a duty to care for his mother, and Pittwood had a duty to lower the crossing gate when trains approached, yet all three of them failed to fulfil their respective duties. The courts are in no doubt that it's the existence of such a duty which separates the omissions that aren't sufficient for legal causation from the omissions that are.

I see no compelling reason to mix those duties in with legal causation. After all, the reason Annie the babysitter (who omitted to rescue Ben) should be treated differently to Annie the stranger (who similarly omitted to rescue Ben) is plain enough and nothing to do with causality: it's because only Annie the Babysitter had a duty to prevent Ben's death and only she failed to fulfil it. For the courts to instead justify that difference by appealing to 'legal causation,' such that only Annie the babysitter is a legal cause of Ben's death is confused.

Conflict 5: dangerous situations. In the previous section, I described how the willing and informed action of a third party is sufficient to 'break the chain of causation' (recall Ben willingly and informedly drinking the poisoned martini). However, exceptions arise when those actions are in response to a dangerous situation created by the defendant:

> Annie ties Ben's arm to the train tracks. With a train barrelling in his direction, his arm must be broken if Ben is to escape certain death.

And suppose that Ben thus breaks his arm; or that Charlotte, a passerby, notices his peril and breaks his arm: both times, the courts judge Annie to be a legal cause of Ben's broken arm. Since Annie doesn't break Ben's arm in either case, my account conflicts with the judgments of the court.

This is another shallow conflict. The reason Annie should be treated differently to, say, Ben's mother who pleaded with Charlotte to rescue him, is again plain enough and again nothing to do with how Annie caused his arm to break (since, by stipulation, Ben's mother also caused his arm to break by pleading with Charlotte to break it): instead it's because Annie created a dangerous situation and she is liable, both morally and legally, for those damages that (reasonably) occur in making the situation safe.

Moreover, it's a familiar part of law that the creation of a dangerous situation affects one's liabilities. Consider the US's Rescue Doctrine, which holds that the creator of a dangerous situation is liable for reasonable harms suffered by rescuers (e.g., if Charlotte had broken her own arm while rescuing Ben, above, this doctrine would hold Annie

[32]R v *Gibbins and Proctor* (1918) 13 Cr App Rep 134, 82 JP 28; *Davis v Commonwealth* 230 Va. 2021, 335 S.E.2d 375 (1985); R v *Pittwood* (1902) 19 TLR 37.

[33]In conversation, some people have said they thought that Gibbins and Davis (and caregivers in general) do kill their wards in such cases. I'm not sure about that – but if that's right, then such cases aren't conflicts, after all.

liable for her broken arm).[34] And in *Miller*, the court held that the defendant's failure to extinguish a fire made him a legal cause of the fire damage because he had (innocently) started the fire himself: his creation of the dangerous situation left him duty bound to extinguish it.[35] Just as there is no reason to insist that those liabilities are to be justified in terms of legal causation, nor is there reason to insist that Annie's liability for Ben's broken arm be justified in terms of legal causation: instead, its her creation of the danger that leaves her liable and the courts are confused to insist otherwise.

Those are just two examples of shallow conflicts, but I again believe that they are representative (both of shallow conflicts and of my response to them).

In conversation (and in review), some people have questioned my treatment of these shallow conflicts. They say that my account jettisons too much from the concept of legal causation such that what's left is too far removed from the original object of study. I disagree. In my view, what's jettisoned is rightly jettisoned and that view is buoyed by two factors. The first is that, for each jettisoned element, it's plain how the relevant liability is instead to be justified. When my account says, for example, that Gibbins's liability for his daughter's death cannot be grounded in his being a legal cause of her death (because he wasn't such a cause), we are not left puzzled as to how it is instead to be justified (*viz*. he had a legal duty to feed her which he failed to fulfil).

The second factor is that the resulting concept of legal causation is distinctively concerned with causality – with metaphysics – and excludes normative considerations like duties, moral responsibility, etc. As the preceding cases demonstrate, those normative considerations do justify liability for harms in certain situations, but they are special cases. The normal cases are those in which the defendant is liable because she stands in a particular metaphysical relationship to the harm in question; the law is neater and simpler when legal causation picks out just those cases and, by my account's lights, it does just that.

7. A is a legal cause of X V_I-ing if and only if A V_T's X. What does that amount to, practically speaking? In short, it amounts to the following: whensoever we need to determine whether A is a legal cause of, e.g., the broken window, we only need ask whether or not A broke the window: if she did, then she is a legal cause; if she didn't, then she isn't. Thankfully, that question is almost always easy to answer: we know MAKING we when see it. (As further evidence for that ease, notice how there was no difficulty, in any of the cases considered above, in determining whether A V_T'd X: no difficulty in determining whether Annie flooded Ben's house in FLOOD; that the farm-owners didn't kill Hain; that Wallace didn't kill van Dongen, and so on.)

But what about those cases in which it isn't easy to determine whether or not A V_T'd X – what happens then? For example, consider *Scott v Shepherd* ('the famous squib case'):

> [Shepherd] threw a lighted squib made of gunpowder into a market where a large concourse of people were assembled. The squib fell on the stall of Yates. To prevent injury to himself and Yates's goods, Willis took up the squib and threw it across the market where it fell on the

[34]See *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (N.Y. 1921).
[35]R v *Miller* [1983] 2 AC 161. To be clear: Miller's liability was grounded in his failure to extinguish the fire and not in his starting the fire.

> stall of Ryal, who, to save his own goods, threw it across another part of the market, where it exploded and [blinded Scott].[36]

By my account's lights, Shepherd is a legal cause of Scott's blindness if and only if Shepherd blinded Scott, yet whether Shepherd blinded Scott isn't clear: on the one hand, he is the one who lit and threw the squib, but on the other, he didn't throw it anywhere near Scott. And, without knowing whether Shepherd blinded Scott, my account is silent on whether Shepherd is a legal cause of Scott's blindness.

However, the fact that we are not currently in a position to determine whether, e.g., Shepherd blinded Scott doesn't entail that we will never be. Instead, (I suggest that) it's merely a consequence of how we currently lack a theory of MAKING and that, in turn, is merely a consequence of the fact that MAKING has been overlooked by contemporary metaphysics.

What would it be to have such a theory? One type of theory about some concept X is an analysis of X – i.e., a theory of the form 'something is X if and only if it is Y and Z.' However, searches for analyses of this form are almost always futile (perhaps the only uncontroversial example is that something is a bachelor if and only if it is an unmarried man – yet even that raises uncomfortable questions about the Pope). I suspect that the project of analysing MAKING is similarly futile.

Instead, what we need is to start learning about MAKING, in general: whether that be by drawing connections between various instances of MAKING, or by discovering that every instance of MAKING is also an instance of some other phenomenon (or, conversely, that being an instance of some further phenomenon is incompatible with MAKING), and so on.[37]

And even though metaphysicians haven't paid attention to MAKING, it's not a project that needs to start from scratch. After all, if legal causation is MAKING, then lawyers have been paying oblique attention to MAKING for centuries. For starters, they have documented endless cases – data points – to work from; they have also drawn all sorts of distinctions between those cases and it's no coincidence that some of those distinctions neatly align with MAKING (recall, for instance, the discussion of *novus actus intervenieins* in §5). I have high hopes for this project.

I end this section by returning to *Scott v Shepherd* and (speculatively) illustrating how the theorising would go in that instance.[38] The general approach here is to start with cases where it's clear whether A MADE X V_I and to use those verdicts to help us in the unclear cases – moving from the known to the unknown. In that vein, consider this variation of a familiar case:

> Villain blows the dam sending a torrent of water towards the open doorway of Annie's house. Annie blocks her doorway with sandbags and so the floodwaters instead enter Ben's house, one door down.

We already seen that Annie doesn't flood Ben's house, but what about Villain? He certainly does: he unleashed the torrent of water and that is sufficient for him to have flooded any house that the water ended up in – despite Annie's involvement.

[36] *Scott v. Shepherd* 96 Eng. Rep. 525 (K.B. 1773).
[37] I make some tenuous steps in these directions in §5 of T Byrne, 'Increasing the Risk That Someone Will Die without Increasing the Risk That You Will Kill Them' [forthcoming] Philosophy and Phenomenological Research.
[38] I have already undertaken this sort of theorising in my discussion of *Blaue*, fn. 30.

Now consider a second variation:

> As above, but this time Ben also blocks his doorway. The result is that the water is diverted from Annie's house, to Ben's and, ultimately, into Charlie's house, one further door down.

I see no reason to think that this variation should be any different to the above *vis-a-vis* whether Villain flooded the house, despite the additional 'diverter.'

We can now ask whether there is a difference between the previous case and *Scott v Shepherd*. There are certainly many similarities: in both cases one person unleashes some threat (Villain, the water; Shepherd, the squib) towards one person, which is then diverted twice by a third- and fourth-party, before harming some victim. Given those structural similarities, there's good reason to think that what goes for Villain and Charlie *vis-a-vis* flooding should also go for Shepherd and Scott *vis-a-vis* blinding and, therefore, that Shepherd does blind Scot (and, ultimately, is a legal cause of Scott's blindness).

But, like I said, that's speculative and it glosses over certain factors that would need to be considered were this theorising not merely illustrative.[39] Even so, it demonstrates how to resolve the tricky cases – those cases where it isn't immediately obvious whether A V_T'd X.

8. Just above, I suggested that the search for an analysis of MAKING is futile; it's worth mentioning a straightforward implication of that futility. There will exist (at least, in principle) pairs of cases for which the first is, e.g., a killing, the second is not a killing, and yet there is no generalisable principle that can be pointed to that explains why that is so. I say 'in principle' because it's difficult to even contrive such a pair, but for illustration consider:

> Annie slowly drives at Ben in a road roller. Ben could easily move out of the way, but doesn't. Annie runs Ben down. Annie kills Ben.

> Annie pushes Ben, face first, into the swimming pool. Ben is an able swimmer and could easily rotate himself, but he doesn't. He remains face down and drowns. Annie does not kill Ben.

As I say, it's not clear that this is such a pair, but suppose it is and that there really is no generalisable principle that can be pointed to that explains why the first is a killing, but the second isn't. It would follow, therefore, that Annie is a legal cause of Ben's death in the first case, but isn't in the second case. In turn, it would follow that the only thing that could be pointed to explain those verdicts is that Annie killed Ben in the first case, but didn't in the second – no further generalisation could be given. The existence of such cases may or may not be tolerable to the courts as a matter of practice, but I have no view on that and so, having raised the issue, I set it aside.

9. Consider the toy account of legal causation that I quickly set aside in the introduction (albeit, presented in now-familiar terminology):

[39]One such factor is that, as described, Annie and Ben each had no choice but to divert the waters towards someone else's house, while perhaps Willis and Ryal could, if they'd been clearer-headed, have thrown the squib into a gap in the crowd. But, then again, would it have made a difference if there was some particular way that Annie *et al*. could have arranged their sandbags that would have instead diverted the waters into a ditch?

A is a legal cause of X V_I-ing if and only if A causes X to V_I.

(E.g. A is a legal cause of the window breaking if and only if A causes the window to break.) Of course, that account is false, but if it weren't, no one could deny it was principled and unified; nor could they use it as an objection to legal formalism. Why is that? Because it starts with the general metaphysical relation causation and it says that legal causation aligns exactly with that relation – without codicil or amendment.

As principled and unified as that account would be, it still wouldn't immediately settle, for every possible case, whether the defendant is a legal cause of the harm in question. That's because facts about causation are themselves sometimes unclear. (Consider, for example, when A and B each simultaneously shoot Victim in the head; did A cause Victim's death?) Nonetheless, the account makes plain exactly where the answer would lie in such cases: not in legal theory, nor in moral theory, but in metaphysics.

The same goes for my account of legal causation. It says that A is a legal cause of X V_I-ing if and only if A MAKES X V_I. In doing so, it starts with a general metaphysical relation, the one I call MAKING, and it says that legal causation aligns exactly with that relation – without codicil or amendment.

As we've seen, this account also won't immediately settle, for every possible case, whether the defendant is a legal cause of some harm. That's because facts about MAKING are also themselves sometimes unclear. Nonetheless, the account tells us exactly where to look in order to settle the matter: not in legal theory, nor in moral theory, but in metaphysics.

Disclosure statement

No potential conflict of interest was reported by the author.

ORCID

Thomas Byrne http://orcid.org/0000-0003-0139-5158