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CAUSATION: LINGUISTIC, PHILOSOPHICAL, LEGAL AND ECONOMIC — *Richard W. Wright & Ingeborg Puppe* — 461

Causation plays an essential role in attributions of legal responsibility. However, considerable confusion has been generated in philosophy, law and economics by the use of causal language to refer not merely to causation in its basic (actual/factual/natural) sense, which refers to the operation of the laws of nature, but also to the quite different normative issue of appropriate legal responsibility. To reduce such confusion, we argue that causal language in these disciplines should be used to refer solely to causation in its basic sense. While it is often said that the law need not and should not concern itself with philosophical analyses of causation, we demonstrate that this is incorrect with respect to causation in its basic sense. After surveying the philosophical foundations of the modern analyses of causation, we discuss the inadequacy of the counterfactual strong necessity (sine qua non, but for) criterion for a condition to be a cause in a specific instance, which is dominant in modern philosophy, law and economics. We argue instead for the need to employ the more comprehensive, factual, weak necessity/strong sufficiency criterion, which is based on the "covering law" account elaborated by John Stuart Mill and has been developed in the modern legal literature as the "NESS" (necessary element of a sufficient set) criterion. We discuss the importance of understanding the required standards of persuasion for proving causation (or any other required fact) as generally requiring a warranted belief rather than a mere statistical probability. We note the confusion and paradoxes that result from some courts' employing the statistical probability interpretation of the standards of persuasion in certain situations involving inherent uncertainty regarding causation, rather than acknowledging the inherent uncertainty and explicitly addressing the normative responsibility issue. Finally, we criticize the efficiency theorists' attempt to explain the causation requirement for legal responsibility, despite causation's being irrelevant under their theories.

Causation, Counterfactuals and Probabilities in Philosophy and Legal Thinking *Florence G'sell* 503

Since the function of causation is to recount and explain observed phenomena in order to make a judgment on civil liability, promoting a purely legal conception of causation appears to be problematic. The purpose of this contribution is to show that the various theories of causation found in legal thinking are, in many respects, the extension of philosophical developments. Therefore, two points will be made. The first part of this paper will present the three main theories that are discussed by contemporary philosophers. The second part will show how philosophical accounts are present in legal thinking. This part will deal with three major legal theories: the theories based on the counterfactual approach of causation, the theories based on the covering law model and the probabilistic account of causation in the law.

Causation and Standard of Proof From an Economic Perspective *Bruno Deffains, Claude Fluet, & Maiva Ropaul* 527

Causation is a problematic notion, as explained by Ronald Coase regarding the "bilateral nature" of externalities. However, causation has played only a minor role in standard economic models of civil liability. An exception is the sub-literature on *Uncertainty Over Causation and the Determination of Civil Liability*, the benchmark paper written by Steven Shavell in 1985: ". . .the familiar notion that for parties to be led to reduce accident risks appropriately, they should generally face probability-discounted or 'expected' liability equal to the increase in expected losses that they create. This, of course, is naturally the case in the absence of uncertainty over causation, for parties then face liability if and only if they cause losses." Thus, difficulties would seem to arise only when causation is uncertain. This paper looks at situations where causation is unambiguous, i.e., there is no "uncertainty over causation". However, we focus on situations where the tort system may provide sub-optimal incentives because of (i) limited liability problems (judgment-proofness), and (ii) other sources of uncertainty, for example, about the injurer's actual level of care. We ask whether information about causation then plays a useful role in assigning liability.

Causation in Hepatitis B Vaccination Litigation in France: Breaking Through Scientific Uncertainty? *Jean-Sébastien Borghetti* 543

Vaccination against hepatitis B has been available since 1982 and is strongly recommended by most health professionals. In France, the hepatitis B vaccine is very widespread, but it has come under suspicion that it can cause demyelinating diseases such as multiple sclerosis. Several epidemiological studies have been carried out to discover if there is indeed a connection between the hepatitis B vaccination and demyelinating diseases, but no such connection has been established so far. Many cases have nevertheless been brought before French courts, in which plaintiffs argue that they have developed a demyelinating disease due to the hepatitis B vaccination, and claim damages either from the State or from hepatitis B vaccine producers.

French courts have been surprisingly favorable to such claims. They have accepted that causation between the hepatitis B vaccination and the plaintiff's disease could be established on a case-by-case basis, despite the state of scientific uncertainty regarding the possible side effects of this vaccination.

This article presents the context in which litigation about the hepatitis B vaccination has emerged in France and how it has developed. It goes on to explain what positions French courts have adopted and how the latter have managed to bypass scientific uncertainty. It finally offers a critical assessment of the state of

French law, focusing on its conceptual shortcomings on the issue of causation as well as on the argumentative flaws in the justifications given by French courts for their position.

MATERIAL CONTRIBUTION TO RISK IN THE CANADIAN LAW OF TOXIC TORTS *Lynda M. Collins* 567

Causation is acknowledged as the single biggest hurdle to recovery for plaintiffs in toxic tort actions in Canada (and elsewhere). Scientific uncertainty involving questions of both generic and specific causation has frequently precluded recovery for plaintiffs even where defendants have negligently exposed them to toxic risk. Three types of uncertainty have been identified: plaintiff indeterminacy (where we know that the defendant has harmed some proportion of a particular population but no individual can prove causation); defendant indeterminacy (where we know that a group of defendants has harmed a particular plaintiff or plaintiffs but each can escape liability by pointing the finger at the other); and indeterminacy of harm (where plaintiffs have been exposed to a risk that may or may not materialize in the future). In Canada, there is no recovery for risk exposure, unless it produces a measurable psychiatric harm. The problem of plaintiff indeterminacy remains, with a resulting under-deterrence of toxic harms and under-compensation of injured plaintiffs. The Supreme Court of Canada has, however, solved the problem of defendant indeterminacy for Canadian plaintiffs. Taking inspiration from both United Kingdom and American theories of collective liability, the Court, in *Clements v. Clements*, adopted a uniquely Canadian test for material contribution to risk as a proxy for proof of causation. This article argues that the *Clements* test is a promising start for causation reform in Canada but does not go far enough towards incentivizing information disclosure and precaution in the manufacture and dissemination of chemical products and pollution.

CAUSATION IN CASES OF EVIDENTIAL UNCERTAINTY: JURIDICAL TECHNIQUES AND FUNDAMENTAL ISSUES *Ken Oliphant* 587

This paper reviews from a comparative legal perspective the range of juridical techniques that have been developed in different legal systems to address perceived problems of uncertain alternative causation. It finds that the process of development has generally proceeded in an *ad hoc* and unprincipled fashion, without regard for overall coherence. It argues for a more principled legal approach in which the appropriate legal response (full liability, proportional liability or no liability) is adopted on the basis of a ranking of the different categories of cases in which problems of causal uncertainty can arise, reflecting the strength (or weakness) of the arguments in favor of the imposition of (at least some) liability.

ATTRIBUTION OF LIABILITY: AN ECONOMIC ANALYSIS OF VARIOUS CASES *Michael Faure* 603

In many cases liability is attributed in a different way than through the clear cut situation where one tortfeasor causes harm to one single victim. Those cases of complicated attributions in tort law are analyzed in this article from an economic perspective. After briefly sketching the economic starting points in section II, the way in which multiple tortfeasors are dealt with in the law is analyzed in section III. Section IV analyzes the perspective of multiple tortfeasors in law and economics, distinguishing between the situations of full solvency, insolvency and insurability of more particularly joint and several liability. The article then shifts attention to one particular phenomenon, channeling of liability, whereby the legislature exclusively attributes liability to one (of many possible) tortfeasor(s). Section V analyzes this phenomenon from an economic as well as an insurability perspective. Finally, section VI examines the situation where someone other than the original tortfeasor may be held liable—the case of vicarious liability. In all cases the question is addressed whether these deviations from the original attribution make sense from an economic and insurability perspective. The crucial question is obvi-

ously to what extent the legal rules found in various legal systems correspond with the idea of providing all parties who could prevent an accident appropriate incentives to effectively do so.

OVERDETERMINED CAUSATION CASES, CONTRIBUTION AND THE SHAPLEY VALUE *Samuel Ferey & Pierre Dehez* 637

The overdetermined causation cases (duplicative causation, concurrent causes, etc.) challenge the consistency and relevance of the but for test in torts. A strict application of the but for criterion to these cases leads to paradoxes and solutions that violate common sense. This explains why a large amount of literature has been developed in philosophy and jurisprudence to provide more accurate causation criteria. This paper adds to this literature by considering overdetermination cases from an economic and mathematical point of view. Following Martin van Hees and Matthew Braham in their 2009 article *Degrees of Causation*, we consider over-determined cases through cooperative game theory and define "overdetermined causation games". We characterize these games in terms of marginal contribution to the great coalition and we provide a typology of different overdetermined causation cases. Lastly, we apply to these games a traditional sharing rule developed in cooperative game theory, the Shapley value, to assess the "causal" contribution of each tortfeasor.

ECONOMIC ANALYSIS OF LIABILITY APPORTIONMENT AMONG MULTIPLE TORTFEASORS: A SURVEY, AND PERSPECTIVES IN LARGE-SCALE RISKS MANAGEMENT *Julien Jacob & Bruno Lovat* 659

The economic analysis of civil liability aims to demonstrate how the civil liability system can be set to provide the potential injurers with optimal incentives to regulate the level of risk they bear. However, despite a wide range of applications, there are few studies on the apportionment of liability between several tortfeasors. In this article, we especially focus on the case of an industrial activity involving a firm, whose activity is potentially harmful for the society, and one of its input providers. They both have an impact on the level of risk through an effort in care and quality. After highlighting the originality of our contribution within this literature, we propose an efficient sharing rule. We demonstrate that this rule of apportionment depends on the relative degree of solvency of the agents and, more importantly, it crucially depends on the market relationship that links the two contributors; thus calling for a collaboration between the competition agency, and the legislatures and courts.

STUDENT NOTES

FORCE-PLACED INSURANCE: THE LENDING INDUSTRY'S "DIRTY LITTLE SECRET" *Dana Cronkite* 687

Force-placed insurance, also called lender-placed insurance, is the insurance policy mortgage lenders obtain on behalf of borrowers when borrowers fail to maintain hazard insurance on their homes. Although the possibility of force-placed insurance is contemplated by mortgage contracts, the policies often provide little coverage and are much costlier than insurance policies acquired on the open market. Lenders obtain the policies at unfairly high prices and sometimes receive kickbacks from the force-placed insurance companies, while borrowers alone bear the burden of paying for them. As such, lenders have no incentive to obtain force-placed insurance at fair prices with adequate coverage. The dubious force-placed insurance practices garnered attention after the Great Recession when many borrowers lost their homes, sometimes as a result of exorbitant force-placed insurance

policies. Congress sought to remedy some of the practices through the Dodd-Frank Wall Street Reform and Consumer Protection Act. This Note explores the issues with force-placed insurance practices and suggests additional regulations that should be implemented to further police the force-placed insurance industry.

PROTECTING PUBLIC EMPLOYEE TRIAL TESTIMONY *Joseph Deloney* 709

In a number of jurisdictions around the United States, police officers and other public employees that regularly testify as part of their ordinary job duties can be placed in compromising positions. Because these types of employees regularly testify as part of their ordinary job duties, such testimony is considered "employee speech" and therefore unprotected by the First Amendment. Consequently, governmental employers can take adverse employment actions against an employee based on his or her truthful trial testimony without violating the employee's First Amendment rights. Drawing from the Supreme Court's 2014 decision in Lane v. Franks and other circuit court cases, this Note argues that trial testimony provided by a public employee during the course of their ordinary job duties should be considered "citizen speech commenting on a matter of public concern" and therefore protected by the First Amendment. Further, this Note argues that the traditional balancing test articulated by the Supreme Court in Pickering v. Board of Education of Township High School District 205, Will County, Illinois, is ultimately the proper inquiry to determine whether the governmental employer should be prohibited from taking adverse employment action against the employee based on their trial testimony.

VIDEO-STREAMING RECORDS AND THE VIDEO PRIVACY PROTECTION ACT: BROADENING THE SCOPE OF PERSONALLY IDENTIFIABLE INFORMATION TO INCLUDE UNIQUE DEVICE IDENTIFIERS DISCLOSED WITH VIDEO TITLES *Gregory M. Huffman* 737

The Video Privacy Protection Act ("VPPA") prohibits video tape service providers from disclosing their consumers' video rental or sale records. Although the VPPA was originally enacted to regulate disclosures by brick-and-mortar video rental stores, litigators have more recently used the VPPA as a vehicle to regulate disclosures by online video content providers.

The application of the VPPA to video streaming via web browsers and mobile devices raises new questions of statutory interpretation. One key question is whether the scope of the VPPA is broad enough to cover a disclosure of a unique device identifier of a user's device, rather than a user's name, in conjunction with the title of a video streamed by the device. With this question in mind, this Note reviews the scope of personally identifiable information ("PII") under the VPPA and argues that the scope of PII should include a disclosure of a device's unique device identifier and the title of a video viewed on the device.

AN ISSUE OF MONUMENTAL PROPORTIONS: THE NECESSARY CHANGES TO BE MADE BEFORE INTERNATIONAL CULTURAL HERITAGE LAWS WILL PROTECT IMMOVEABLE CULTURAL PROPERTY *Matthew Smart* 759

The last several decades have seen the stock market transform from an exchange-dominated marketplace to a fragmented arena where trading is dispersed among various locales. Gone are the days where exchanges served as the primary marketplaces for order execution. Today, many orders execute at off-exchange venues. Namely, investors can choose from thirteen exchanges, several electronic

communication networks, and more than forty dark pools. This Note analyzes the impact of off-exchange trading and the implementation of a trade-at rule as a remedy for the consequences associated with off-exchange trading.

INSIDE EQUITY-BASED CROWDFUNDING: ONLINE FINANCING ALTERNATIVES FOR SMALL BUSINESSES *Michael Vignone* 803

Equity-based crowdfunding is an innovative approach to promote growth in small businesses and educate the financially less sophisticated about investing. This Note discusses and analyzes the four different types of equity-based crowdfunding under the federal and state securities laws. By examining the strengths and weaknesses of current crowdfunding rules, businesses can decide which exemption is most suitable to their capital needs. This Note intends to spread awareness about equity-based crowdfunding to the general public by offering general assessments of the industry, traditional financing methods, and financing alternatives for small businesses and startups.

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