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WHEN CAUSE-IN-FACT IS MORE THAN A FACT: THE MALONE-GREEN DEBATE ON THE ROLE OF POLICY IN DETERMINING FACTUAL CAUSATION IN TORT LAW

Like Lewis Carroll's snark, cause-in-fact is not easy to describe or locate. Even when we feel that we have grasped it, more often than not we are left clutching just another boojum or perhaps thin air. And like Carroll's snark hunters, lawyers and legal scholars have doggedly pursued the elusive concept of cause-in-fact; they have rarely, however, captured it in words adequate to define it or to describe what tort goals it serves. Wex Malone and Leon Green have been more successful than many of these pursuers; each has produced incisive, influential studies of the cause-in-fact requirement as it functions in its tort habitat. Professor Malone, however, was the one to recognize that once ensnared in the tangled facts of hard cases, factual cause often turns out, upon closer scrutiny, to be another species of cause entirely—legal or proximate cause.

Both scholars have been instrumental in the reception of the duty-risk analysis in Louisiana's tort law—Green as deviser of the method and Malone as one of its most authoritative advocates. Not surprisingly, however, the two scholars have differed in certain details of the analysis, especially with respect to the nature and the role of cause-in-fact within both the duty-risk scheme and the tort action in general. Although the Louisiana Supreme Court has committed Louisiana tort jurisprudence to the duty-risk analysis, the court has yet to provide definitive guidance on the best means of handling cause-in-fact within the duty-risk scheme.

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1. Although Lewis Carroll never attempted to define "snark," the compiler of a famous nineteenth-century dictionary did. The imaginary animal invented by Lewis Carroll as the subject of his mock-heroic poem The Hunting of the Snark (1876). It was most elusive and gave endless trouble, and when eventually the hunters thought they had tracked it down their quarry proved to be but a Boojum. The name [Snark] has sometimes been given to the quests of dreamers and visionaries.


4. The Louisiana Supreme Court has sampled the gamut of cause-in-fact tests without settling on any one test or indicating whether one test is to be preferred in bench trials and another in jury trials. See, e.g., Siniriere v. Lavergne, 391 So. 2d 821, 826 (La. 1980) (using but-for test to determine cause-in-fact); Vonner v. State Dep't of Pub. Welfare, 273 So. 2d 252, 255 (La. 1973) (endorsing the substantial-factor test); Laird v. Travelers Ins. Co., 263 La. 199, 209-10, 267 So. 2d 714, 717-18 (1972) (gauging cause-in-fact by a test combining elements of but-for and substantial-factor); Hill v. Lundin & Assocs., 260 La. 542, 547, 256 So. 2d 620, 622 (1972) (using a Greenian "contributed in any way," "had something to do with" test of causal relation); Dixie Drive It Yourself Sys. v. American Beverage Co., 242 La. 471, 482, 137 So. 2d 298, 302 (1962) (blending the substantial-factor
Therefore, the Malone-Green debate over the role of policy considerations in determining cause-in-fact has particular relevance for the Louisiana lawyer. As this article will demonstrate, Wex Malone’s insightful ruminations on cause-in-fact provide the best guidance for Louisiana’s courts in handling the causal requirement in both bench and jury trials. To understand the differences between Green’s and Malone’s positions on cause-in-fact, however, one must first appreciate the setting within which the duty-risk method had its genesis.

**Origins of the Duty-Risk Analysis**

Leon Green and the American Legal Realist movement came to intellectual maturity in the same decade, the 1920’s. Although Dean Green has been denominated a Legal Realist by numerous tort scholars, there has been some argument over whether he considered himself a member of the group. Of his dedication to the principles clustered under the title “Legal Realism,” however, there has been no doubt: Leon Green and the Legal Realists stood in sharp reaction against the arid formalism of late nineteenth- and early twentieth-century tort law.

Not until the rise of the collegiate law school in the late nineteenth
century did anything resembling a discrete, recognizable category of tort law exist in America. Indeed, one modern historian has argued that the theory of negligence liability sprang fully armed from the brow of Professor Oliver Wendell Holmes. According to G. Edward White, those in the vanguard of the "law as science" movement, but especially Holmes, prescinded from the loose "collection of writs" that was "torts" an inchoate fault principle which they transformed into a universal and unifying theory of liability; by this principle they created the new legal paradigm of negligence to govern the new legal realm of tort. Most legal historians maintain that this promotion of negligence to the ruling tort standard was an instrumental use of the law calculated to encourage (some use the epithet "subsidize") nineteenth-century industrialism and venture capitalism. An integral component of this legal subsidy, along with the unholy trinity of the fellow-servant rule, contributory negligence, and assumption of risk, was the doctrine of proximate cause.

As part of the reaction

12. The proximate or legal cause issue consists in a demarcation of liability by balancing the protection to be afforded the plaintiff's interest against the hazard and the utility of defendant's conduct. L. Green, Rationale of Proximate Cause 11-13 (1927). For the assorted issues that have accumulated under the rubric of proximate cause, see Prosser, Proximate Cause in California, 38 Calif. L. Rev. 369, 374 (1950).
against tort law’s subsidy to industry, the Legal Realists, led by Leon Green, conducted a penetrating critique of the doctrinaire metaphysics of proximate cause.\textsuperscript{14}

Green realized that, as used by the appellate courts, proximate cause could be likened to the medieval alchemist’s “universal solvent” which was so potent it dissolved every container devised to hold it. Since no trial court decision could withstand the corrosiveness of proximate cause, jury trial had effectively been replaced by appellate trial.\textsuperscript{15} To understand the radicalism of Leon Green’s views on causation, one need only note the language he used in waging his “campaign” against proximate cause and the language used by scholars to describe his effort—both sources are interlaced with martial imagery.\textsuperscript{16} This phraseology captures the spirit of Green and the Legal Realists: they were engaged in a war against a petrified legal conceptualism. This “crusade mentality” goes a long way towards explaining Green’s extreme and in some ways untenable position on the role of cause-in-fact in tort law.

\textbf{Leon Green and the Bifurcation of Proximate Cause}

In stark contrast to the causation-bound inquiry of proximate cause, the duty-risk analysis aims to delineate and clarify the controlling issues in tort cases, largely by the division of the proximate cause issue into

\textsuperscript{14} L. GREEN, supra note 12, at 136 (“The myth of ‘proximate cause’ finds its only rivals in those of theological origin.”); G. WHITE, supra note 5, at 92.

\textsuperscript{15} Green, supra note 2, at 561; Smith, supra note 6, at 500 (“Beginning with The Rationale of Proximate Cause in 1927 down to the present, [Green] has attacked the doctrine as an impermissible tool of legal analysis and thought that cripples the legitimate legal aspirations of plaintiffs.”).

\textsuperscript{16} See, e.g., L. GREEN, supra note 12, at 39 (“So far the attempt has been merely to clear the way for a serious attack upon the principal redoubts of ‘proximate cause’ which are to be found in negligence cases.”); Robertson, supra note 7, at 397 (“[W]hen confronted with verbal corruption—word-schemes wildly out of joint with the apparent facts of litigation and life—[Green] assumed that it was up to him to do battle with this pretentious clutter.” (emphasis added)); Smith, supra note 6, at 500 (noting that Green “attacked” the doctrine of proximate cause).

Thus, Leon Green had this in common with the Legal Realists to whom he is often linked: he attempted to replace transcendental nonsense with the functional approach to law. Hessel Yntema referred to the animus behind this development as “the Copernican discovery that law is a practical science.” Yntema, Jurisprudence and Metaphysics—A Triangular Correspondence, 59 Yale L.J. 273, 273 (1950). See also G. WHITE, supra note 5, at 75; BUTUS, American Legal Realism, 8 How. L.J. 36, 41-42 (1962).

\textsuperscript{17} L. GREEN, supra note 12, at 122.

In most American state courts [factual causation] is combined with other issues, usually false issues such as proximate cause, legal cause, and the like, or combined with the negligence foreseeability formula, thereby submerging the causal relation issue in a complex of doctrinal terminology that serves primarily as a source of errors for appellate review and frequent reversals.

Green, supra note 1, at 561 (footnote omitted).
two distinct issues—cause-in-fact and duty. The Green methodology first confines the causation issue to a neutral, purely scientific inquiry, namely, cause-in-fact or what Green calls either causal relation or causal connection. Second, Green reformulated the legal or proximate cause question as the “duty” or “scope of duty” issue; this question of whether the plaintiff’s interest warrants protection—the limits of responsibility question—was to be answered by the express use of policy considerations to mark the metes and bounds of the defendant’s duty through risk inclusion and exclusion. The conviction behind Green’s splitting the atom of proximate cause was his belief that policy factors should be driven from the cover of “causation” and made to do service in the open, and it was this conviction that made the bifurcated causal inquiry the keystone of the present duty-risk structure.

Leon Green advanced two further reasons for the bifurcation of proximate cause, reasons which are actually opposite sides of the same coin. First, cause-in-fact is the threshold problem whose resolution should precede any consideration of the responsibility issues of duty and breach. In order to facilitate this purely factual inquiry (and at the same time unburden the later policy inquiry), Green recommended the exclusion of all liability and policy concerns from the province of causal relation. Second, Green thought that this dissociation of factual and legal cause likewise would clarify the policy-centered “duty” analysis by excluding the jargon of proximateness and remoteness, with its innuendo that a question of merely physical causation was under review.

18. L. Green, supra note 12, at 132; Green, supra note 2, at 548.
19. L. Green, supra note 12, at 66, 69, 71. As commonly expressed, there are four stages or steps to the duty-risk analysis:
   (1) Is there a factual connection between plaintiff’s injury and defendant? (2) Does the legal system’s protection extend to the interest that plaintiff seeks to vindicate; and if some protection is afforded what standard of care does the legal system impose on the defendant? (3) Was that standard of care breached by the defendant [when he harmed plaintiff’s protected interest]? (4) What are the damages?


20. For references to Green’s “atomistic” view of causation, see H. Hart & A. Honore, Causation in the Law 98, 262 (1959); Crowe, The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer, 22 LOY. L. REV. 903, 904 (1976). The metaphor is employed to convey the idea that Green split “proximate cause” into the discrete issues of “legal cause” and “cause-in-fact.”

Part of nineteenth-century jurists' problems in recognizing and drawing the distinction between factual and proximate causation arose because the global term "cause" served double duty. As Wex Malone explained: "At the close of the [nineteenth] century courts used the term 'cause' indiscriminately to express either their conclusion as to 'what happened' or as a means of explaining what law 'ought to do about it.'”

The essence of the duty-risk approach lay in its clarification of the litigation process through the precise division of cause into its scientific, physical, factual half and its social-policy half. Clarity of expression, Green and the other Legal Realists believed, would produce clarity of thought and justness of decision.

As a natural consequence of his atomization of proximate cause, Green developed two corollaries to his "causal contribution" view of cause-in-fact. First, Green distrusted all tests of causation. Thus, he banished the but-for test from the domain of duty-risk analysis because it was an evaluative, not scientific, test. Second, Green thought that at this stage of the analysis all the court should try to do is link the defendant and his behavior or his product with the injury; he flatly rejected the negligence-cause and defect-cause tests espoused by the vast majority of courts and commentators.

Lawyers' and jurists' use of unmodified "causation" terms to solve issues of fairness between contending parties has an ancient heritage extending back to the classical era in Roman Law. See J. Dawson, Unjust Enrichment: A Comparative Analysis 44-47 (1951).

L. Green, supra note 12, at 168-70; see also Thode, supra note 19, at 13 (but-for test conceals policy choices behind facade of factual inquiry); Thode, The Indefensible Use of the Hypothetical Case to Determine Cause in Fact, 46 Tex. L. Rev. 423, 430 (1968) (stating that counterfactual hypotheses are used by courts in conjunction with the but-for test to resolve not factual but policy issues).


[I]t is necessary to prove not merely that the product caused the plaintiff's harm but that the defect was the causative agent. In the normal case this is done by applying the sina [sic] qua non or but-for test to the injury event. But-for the defect would the injury have occurred?

Id. at 409 (footnote omitted).
context. Indeed, Green so distrusted "causation" and its connotations that, in the interest of clarifying the task at each stage of the analysis, he excised the word "cause" from his phrasing of both the causal-relation and scope-of-duty agendas.

Wex Malone’s Dissent from Green’s Views on Cause-in-Fact

In his Stanford Law Review essay on cause-in-fact, Wex Malone disagreed with Green’s atomistic view of factual cause and both of Green’s causal corollaries. Although Wex Malone can generally be described as a devotee of the duty-risk analysis, his views on the true nature of factual causation are radically different from Green’s. While Leon Green, Wayne Thode, and other duty-risk analysts have advocated an atomistic policy-neutral causation—one which essentially reduces the causal issue to a question of proper identification, i.e., does plaintiff have the correct defendant in court—Wex Malone and others believe that factual causation entails policy considerations. Professor Malone was aware of the

28. See, e.g., Green, The Importance of Identifying the Issue in Litigation, 42 Tex. L. Rev. 835, 836 (1964); infra text accompanying notes 58-60.

29. Dean Green originally phrased the factual causation inquiry as a pursuit of the "appreciable or substantial factor" in the causal panorama. L. Green, supra note 12, at 135, 137. Later, perhaps influenced by his colleague and disciple Wayne Thode, he must have become distrustful of the policy-colored "substantial factor" test (Professor Jeremiah Smith had forged it as a test of proximate cause), for Green began using the phrase "causal connection" to describe factual causation and phrased the causal inquiry, roughly, as whether the defendant’s whole conduct contributed in any way to plaintiff’s harm. See, e.g., Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42, 44 (1962) [hereinafter cited as Green, Duties]; Green, Identification of Issues in Negligence Cases, 26 Sw. L.J. 811, 811, 813-14 (1972) [hereinafter cited as Green, Identification]; Green, supra note 28, at 836; see also Peczenik, Causation and Fault in Torts: How to Save the Lawyers from the Philosophers, in LAW AND THE FUTURE OF SOCIETY 231, 237 n.23 (F. Hutley, E. Kamenka & A. Tay eds. 1979) ("[Green’s causal] thought evolved from the formula ‘substantial factor’ to a more liberal formula, ‘contributed to injury’.”); Crowe, supra note 20, at 904. But Green was so smitten with Jeremiah Smith’s substantial-factor formula that it reappeared in some of his later essays. See, e.g., Green, The Submission of Issues in Negligence Cases, 18 U. Miami L. Rev. 30, 34 (1963); Green, supra note 27, at 1197; Green & Smith, supra note 19, at 1118.

30. See, e.g., Malone, Ruminations on Dixie Drive It Yourself Versus American Beverage Company, 30 La. L. Rev. 363 (1970); Malone, Contributory Negligence, supra note 10, at 91; see also Crowe, supra note 20, at 903 n.2; Johnson, supra note 3, at 341.

31. Compare Green, supra note 29, at 33; Landes & Posner, Causation in Tort Law: An Economic Approach, 12 J. Legal Stud. 109, 110-11 (1983) (The requirement of cause-in-fact is minimal if not superfluous because it is usually obvious and cannot be the ground of decision where it is not obvious; the ground in those hard cases must be some public policy, whether economic or some other.); Thode, supra note 19, at 2; Thode, supra note 26, at 424, 434 with Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 87, 106-07 (1975) (discussing causal rules as attuned to the advancement of the economic-efficiency goals of the common law); Henderson, Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 Minn. L. Rev. 773, 778 (1979) (arguing that the con-
problems in any comprehensive causal "test," but unlike Green, he was not troubled by the evaluative overtones of either the but-for or the substantial-factor test since he had a gestalt view of cause-in-fact.  

To be sure, Malone was aware that the but-for test is too frail a reed to support factual causation in every case. The but-for test cannot identify the cause of harm in two broad categories of cases, namely, those involving omissions and multiple sufficient causes. Torts commentators and courts generally recognize that the but-for test breaks down "in situations where there are two independent factors, each being sufficient to produce the injury." In these two areas, the determination of cause-in-fact clearly involves normative policy choices; but it was Malone's insight to realize that policy factors are no less involved in the cases where causal tests appear to be working smoothly than in the cases where these tests fail to work at all.

A common belief, however, is that policy considerations have no role to play in the determination of cause-in-fact, "because no policy can be strong enough to warrant the imposition of liability for loss to which..."
the defendant's conduct has not in fact contributed." Although this maxim commands the general allegiance of even Wex Malone, he realized that its application can be troublesome. For example, how much factual connection and physical propinquity are enough to amount to legal cause-in-fact? Thus, because policy factors are necessary even in the causal inquiry, to understand the nature and role of cause-in-fact in the tort milieu, one must advert to the goals and purposes of tort law.

The Policy Objectives of Tort Law and the Cause-in-Fact Requirement

There are three generally recognized goals or guiding premises of tort liability: (1) compensation and loss-spreading, (2) fairness between the parties, and (3) deterrence of accident-producing behavior. Several commentators have investigated whether the cause-in-fact requirement advances any of these fundamental goals of tort law. The first of these, if restricted to loss-spreading, is not advanced by a factual causation precept; as Guido Calabresi has observed, loss-spreading aims exclusively to minimize the individual burden of accident losses by spreading them among either society at large or certain categories of persons, thereby diluting their impact. Since no positive correlation or necessary connection exists between the causing of accidents and the ability to bear losses, a factual causation prerequisite to liability is irrelevant to achieving the loss-spreading goal of tort law.

35. J. Fleming, supra note 11, at 170. See also Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127, 1130 (1934) (conduct not causal in fact cannot be causal in law).
38. See Calabresi, supra note 31, at 73-74.

Finally, it is said that the expansion of products liability works to "[spread] throughout society . . . the cost of compensating [accident victims]" . . . . This "spreading" argument is so powerful that it can explain away . . . all of tort law. If redistribution is desired there is no reason why the law should retain the requirements of causation and product defect; to the extent that any defendant can rely upon those requirements to defeat a plaintiff's cause of action, this "policy" of tort law will be defeated.


[If compensation by "spreading the risk" is the main objective [of strict liability in design-defect cases], the theory would be equally valid in justifying compensation for all injuries caused by all products even if they were not defective. This is because the manufacturer is the superior risk bearer regardless of the defectiveness of its product. Why, then, consider it as a selective rationale for defective products only?]

At first blush, "fairness" appears to dictate causal connection as a prerequisite to liability. But in fact, it is the requirement of causal connection as a guarantee of "fairness" that creates the major obstacle to recovery in modern toxic tort cases, as exemplified by the asbestosis and DES cases: the plaintiffs could not establish as more probable than not that any particular manufacturer marketed the item that produced the disease. One might question whether "fairness between the parties" truly requires the establishment of causal connection in such cases; in other areas of law, the mere creation of hazard is sufficient for responsibility.

In the criminal context, it is considered fair to impose liability for some crimes—for instance, reckless driving or attempted crimes—even though no specific harm results. Similarly, fairness in the civil context seems to require only that a defendant's liability be related to his conduct, and that liability... be roughly proportional to the seriousness of the risks that he has created.

...From the standpoint of fairness, the critical point is the crea-


For the same reasons that it has become so difficult to prove factual causation in these toxicity and pollution cases, it has likewise become more difficult to identify both the defendants, see Robinson, supra note 31, passim (examining the problem of indeterminate defendants in Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980)), and also the plaintiffs, see Delgado, Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs, 70 CALIF. L. REV. 881, 881-83 (1982) (expounding the reverse-Sindell scenario of indeterminate plaintiffs, e.g., those who get cancer but do not know whether it developed "naturally" or was caused by toxic waste pollution; in scientific terms the etiology of the disease may be unclear since the disease may also occur in a control environment that is free of the toxic contaminant). For an interesting analysis of Sindell and other problematic causation cases by an academic philosopher, see Thomson, Remarks on Causation and Liability, 13 PHIL. & PUB. AFFAIRS 101 (1984).

40. Robinson, supra note 31, at 739.
...tion of a risk that society deems to be unreasonable, not whether anyone was injured by it.\textsuperscript{41}

For the same reasons, the deterrence goal of tort law yields a similarly unsatisfactory justification of the cause-in-fact requirement. "To deter only unnecessarily risky behavior, the law [need only] require a causal link between the defendant’s behavior and the risk that it seeks to deter. It is not necessary, [therefore], that there be a link between the defendant’s risky conduct and a particular victim’s injury."\textsuperscript{42} Hence, a strict adherence to orthodox cause-in-fact rules would result in underdeterrence of toxic-substances torts,\textsuperscript{43} and the rules cannot therefore be explained as conducive to optimal deterrence.

There is, however, a neglected principle of justice that can explain the requirement of a causal nexus in every tort action. As a number of legal philosophers have observed: "[A]pects of the retributive theory [of tort liability] seem to loom large in explaining the legal concern for cause-in-fact."\textsuperscript{44} Hence, even though deterrence and loss-spreading cannot logically justify the cause-in-fact requirement, since notions of retributive justice are usually included within the idea of "fairness," this commonly avowed goal of tort law can be used to explain the causal precept.\textsuperscript{45} The author of a recent essay on the origins of the factual cause imperative was greatly influenced in his opinions on the matter by Holmes, Pound, and Malone. Having relied greatly on Holmes's history of the evolution of legal sanctions, the writer concluded that

the cause in fact requirement can be traced to the desire for

\textsuperscript{41} Id. (footnotes omitted). \textit{See also} Weinrib, \textit{A Step Forward in Factual Causation}, 38 MOD. L. REV. 518, 523-29 (1975).

\textsuperscript{42} Robinson, \textit{ supra} note 31, at 740 (emphasis added) (footnote omitted).

\textsuperscript{43} Id. \textit{But see} Calabresi, \textit{ supra} note 31, at 85-87 (asserting that cause-in-fact advances the deterrence goal of tort law by creating economic incentives for persons to avoid socially reprobated activities). But of course if cause-in-fact is to be rationalized on deterrence grounds, the inquiry should be whether cause-in-fact engenders or hinders optimal deterrence. \textit{See also} Coleman, \textit{The Morality of Strict Tort Liability}, 18 WM. & MARY L. REV. 259, 262-63 (1976) (demonstrating that causal and fault-based rules are neither mandated nor supported by risk-spreading and deterrence rationales of tort law).

\textsuperscript{44} Chapman, \textit{ supra} note 36, at 6; \textit{see infra} note 46 and accompanying text. Moreover, the modern prominence of various species of strict-liability torts suggests that cause-in-fact should become even more important as the first essential link in the chain of civil culpability. \textit{See F. LAWSON, NEGLIGENCE IN THE CIVIL LAW} 50 (1950) ("The development of strict liability has thrown much more weight than formerly on the element of causation, which, as we have seen, is hard, and perhaps ultimately impossible, to divorce entirely from fault.").

\textsuperscript{45} That retributive justice has not more often been used to explain and justify sundry concepts in criminal and civil law is probably due to the fact that modern Western law has denied the psychological "givenness" of revenge in its attempts to anathematize retribution as a legitimate goal of "civilized" legal systems. \textit{See generally} S. JACOBY, \textit{Wild Justice: The Evolution of Revenge} (1983).
vengeance. This desire for vengeance resulted in the need to identify the person committing the harmful act or possessing the harmful object. Responsibility for the injury was associated with causation, both because the object itself was blamed for the harm and because the owner had control over the object doing the harm. Without these relationships, vengeance would not come about and liability would not attach.

Indeed, at bottom there may be no real difference between civil compensation and retribution. One commentator has argued that for a payment to count as compensation it must conform to "the intrinsic retributive component of sanctions." His thesis is that civil compensation aims to rectify the moral imbalance between tortfeasor and victim caused by the injury-event. Thus, if a Navajo village is destroyed by a brush fire and charitable persons in Phoenix send money to reduce the villagers' suffering, such contributions cannot qualify as compensation. "We can help the victims with our funds, but as a conceptual matter, we do not compensate them. Had an arsonist set the fire and been required to pay for the damage, however, [his] payments would constitute compensation." In tort law, then, compensatory and retributive justice are coextensive. Therefore, if the first listed goal of tort law is restricted to "compensation" rather than "loss spreading," and if the law focuses not on the bare fact of payment but on who should be required to pay and why, then the causal requirement will advance compensation to the precise extent that it satisfies retribution.

46. Zwier, "Cause In Fact" in Tort Law—A Philosophical and Historical Examination, 31 De Paul L. Rev. 769, 784 (1982). Leon Green also noted the "deep sense of early common law morality that one who hurts another should compensate him" and that this conviction tended "to tilt judgment in favor of the [plaintiff]." Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401, 1412 (1961). Further evidence for the central position of retribution in our legal system can be found in a recent book on the evolution of revenge. See S. Jacoby, supra note 45, passim. The author's collected evidence and argumentation suggest that retribution is more than consistent with a just society's rightful aims—it is demanded by them; for a natural moral instinct for revenge is one element of mankind's ideal of justice. And this instinct is not confined to the criminal law. Civil damages are often sought (and granted) as punishment of some sort. One of the commonest motives for filing a civil suit is to achieve retribution, to make the defendant "pay" in much the same sense that a crime victim wants the offender to "pay." Id. at 5-6, 11.


48. Id. at 699. See also S. Jacoby, supra note 45, at 350. For support, from the fields of comparative law and legal history, of Professor Fletcher's thesis that in a tort context compensation and retribution are opposite sides of the same coin, see D. Daube, Studies in Biblical Law 102-10, 114-16, 128 (1947); T. Elias, The Nature of African Customary Law 135, 155-61 (1956); MacCormack, Revenge and Compensation in Early Law, 21 Am. J. Comp. L. 69, 75, 80-81 (1973); McLaren, The Origins of Tortious Liability: Insights from Contemporary Tribal Societies, 25 U. Toronto L.J. 42, 52-60 (1975); Malone, Ruminations on Fault, supra note 10, at 1-5. Louisiana Civil Code article 2321 contains a vestigial remnant of the ancient notion of civil retribution through noxal surrender. See id. at 4-5, 4 n.12.
The Logical and Legal Fallacies of the But-For Test and “What If” Hypotheses

The principle of retributive justice also illuminates the infirmities of the but-for test and explains why the test's results seem so unsatisfactory in the hard cases, i.e., those involving omissions or multiple sufficient causes. In cases of concurrent or successive individually sufficient causes, the but-for test does not comport with our expectations; for if the conduct of each co-defendant is sufficient to cause the harm, the but-for test, strictly applied, would exonerate each wrongdoer. Clearly, to permit the multiple defendants to escape liability by endlessly passing the hot-potato of sufficient cause back and forth between them would offend the principle of retribution.

For like reasons, the same unsatisfactory results occur when the but-for test is applied to cases involving omissions. Indeed, these cases provide the classic medium for the but-for test, and it is here that the test's innate shortcomings are magnified. Professor Wayne Thode was the most thorough critic of the fanciful causation that results from the “pyramiding of probabilities” necessary to the use of the but-for test in negligent-omission cases. He discerned the similarity, if not identity, of using counterfactual hypotheses to determine cause-in-fact in “failure to act” cases and using the but-for test in “negligent act” cases.

49. The textbook example is provided by Cook v. Minneapolis, St. P. & S. Ste. M. Ry., 98 Wis. 624, 642, 74 N.W. 561, 566 (1898) where two fires, one negligently set by the defendant and the other of innocent origin, merged to burn down the plaintiff's house. Either fire, unjoined by the other, could have destroyed the house. See Carpenter, Concurrent Causation, 83 U. PA. L. REV. 941, 948 (1935); Strachan, supra note 34, at 391.

50. Cf. P. ATTIYAH, supra note 37, at 119 (“absurd” to let both defendants escape liability). Glanville Williams noted the breakdown of the but-for test in cases of successive or concurrent sufficient causes (in his parlance, “cumulative causation”) and stated that “[s]ituations of this type present a problem of legal policy.” Williams, Causation in the Law, 1961 CAMBRIDGE L.J. 62, 75. For the argument that by exculpating independent, causally sufficient wrongdoers the but-for test gives an unjustified windfall to tortfeasors, see Eaton, Causation in Constitutional Torts, 67 IOWA L. REV. 443, 460-61 (1982).

51. For the dangers of error in the jury's “pyramiding probabilities” in order to “reach its decision by assuming the certainty of each event in a chain of disputed events,” see Weinstein, Twerski, Piehler & Donaher, Product Liability: An Interaction of Law and Technology, 12 DUQ. L. REV. 425, 452 n.24 (1974).


[C]ause-in-fact analysis is a hypothetical reconstruction of how events would have turned out if something would have been different. The something that is assumed to be different is “no negligence.” In cause-in-fact analysis, the court asks “what if?” If there had been no negligence would the accident have happened anyway? If the accident would have happened anyway, even if there had been no negligence, there is no cause in fact. On the other hand, if the accident would not have occurred but for the negligence, there is cause in fact. In short, cause-in-fact analysis is both hypothetical and counterfactual analysis.

Id. at 392 (emphasis added) (footnote omitted).
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[T]he hypothetical-case test . . . is merely a more sophisticated version of the "but for" or *sine qua non* test . . . . "But for" has all of the drawbacks and the same lack of rationality as a determinant of cause in fact as does the hypothetical case test—it focuses the jury's attention on speculation about what might have happened rather than on the cause in fact problem of "what happened."

Thode also suggested the grave practical consequences of "hypothetical" but-for causation for the plaintiff's *prima facie* case when he tersely observed: "Even if otherwise an acceptable test, the production of proof to establish a negative in a fictional situation is obviously a very onerous burden." Perhaps Wex Malone was too sanguine, then, when he maintained that the but-for test satisfied the common man's sense of causation. For most jurors, such a pseudo-scientific test must stand as a prominent example of esoteric expertise, and the idea that the ordinary man measures claims of everyday causation by a rigid but-for test is unrealistic. The ordinary man asks about what actually happened, while the but-for test asks what would have happened had reality been otherwise.

If the standard for comparison is the ordinary person's implicit sense of causation, Green arguably has a more realistic theory of legal cause-in-fact than Malone, for Green distrusts the but-for test: "Tests of this character have the same vice as any 'if,' or any analogy. They take the eye off the ball." Moreover, numerous philosophers have also noted the difficulties involved in finding actual, scientific cause based on counterfactual causation. Indeed, one logician whose specialty was the study of

53. Thode, *supra* note 26, at 431. Professor Thode's mentor had made the same point almost forty years earlier.

In no case does [the but-for test] present the issue to be determined. It sends the inquirer back to discover if the result could have happened without the defendant's participation. The assumption is that if the result would have happened anyhow, then the defendant is not a cause. Such an inquiry at this point is vicious from two aspects: (1) it presents an inquiry impossible of determination; the case is not what might have happened but what has happened; (2) the inquiry while stated in what seems to be terms of cause is in fact whether the defendant should be held responsible.

Green, *supra* note 21, at 605 (footnote omitted).

54. Thode, *supra* note 26, at 426 n.13. "The test of factual in the sense of but-for causation . . . is not an easy one to apply, because it involves speculation." Williams, *supra* note 50, at 69. See also Carpenter, *supra* note 49, at 948 (question of cause-in-fact should not be "what would have occurred" but "what did occur").


57. Green, *supra* note 2, at 556. Green's criticism of the but-for/hypothetical cause test as taking your eye off the ball means that the test "takes the focus off the defendant's conduct and goes abroad for other causes." Id. at 557. See also Green, Duties, *supra* note 29, at 68.
counterfactual causes concluded somberly that their validation entails "an infinite regressus or a circle . . . . In other words to establish any counterfactual, it seems that we first have to determine the truth of another. If so, we can never explain a counterfactual except in terms of others, so that the problem of counterfactuals must remain unsolved." This passage expresses, in philosophical language, the lawyer’s concern about the lack of a realistic causal description in the "pyramiding of possibilities" that takes place when the but-for test is used.

Given the logical and legal infirmities in the use of counterfactual hypotheses and the but-for test to "prove" cause-in-fact, it is surprising that courts have continued to employ the test for as long as they have. It is certainly not because commentators have failed to call the problems to the courts’ attention. Perhaps their penchant for the device is grounded, as Green and Thode suggested, in its utility as a means of delimiting liability on the basis of ostensibly neutral causal language, thereby circumventing the difficult but essential scope-of-duty analysis. Rather than marshaling the many social policy factors that should be considered in setting the ambit of potential liability, the courts have restricted the inquiry by employing the one factor of but-for causation to dispose of the case.

Malone’s Gestalt Theory of Cause-in-Fact

As mentioned earlier, Professor Malone is disturbed by neither the but-for nor the substantial-factor test. His equanimity is probably a result of his gestalt theory of causation. Professor Malone succinctly stated his view of the unitary nature of causation in the introduction to his seminal study of cause-in-fact.

I find that even with reference to this issue of simple cause [i.e., cause in fact] the mysterious relationship between policy and fact


59. In addition to the critiques by Green and Thode, several other commentators have exposed the shortcomings of hypothetical/but-for causation. See, e.g., Cole, Windfall and Probability: A Study of “Cause” in Negligence Law—Part II, Factual Uncertainty and Competitive Fairness, 52 CALIF. L. REV. 764, 790 (1964); Twerski, Weinstein, Donaher & Piehler, The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age, 61 CORNELL L. REV. 495, 532-33 (1976) (observing that the “inherent unreliability of untested theoretical propositions” undermines the integrity of the judicial process).

[In our saner moments, we ought to be ready to admit that cause-in-fact is one of the most intractable items to prove in a law suit. . . . The use of the hypothetical but-for to prove causation presumes that the process of mental “instant replay” of the accident is a valid fact-finding endeavor. More than one reputable scholar has taken issue with that thesis.

Twerski, supra note 27, at 413 (footnote omitted).

60. See Thode, supra note 26, at 427, 430; see also Cole, supra note 59, at 767-68.
is likely to be in the foreground. In this Article it will be demonstrated that policy may often be a factor when the issue of cause-in-fact is presented sharply for decision, much as it is when questions of proximate cause are before the court. Malone, unlike Green, was simply not disturbed about the use of causal tests that are at base evaluative. Because he recognized (and welcomed) the jury's inclination to employ "policy" or "justice" sentiments when deciding causal relation questions, he expressed confidence in both the but-for test and the substantial-factor test.

For these same reasons, Malone was not disposed to heed Green's fervent insistence that factual cause should not try to link the plaintiff's damages to the defendant's negligence or to the product's defect, but should merely try to link the hurt to the defendant's conduct or product as a whole. Green had two reasons for believing that the causal inquiry should simply be "Did this defendant's total conduct or undertaking in any way contribute to plaintiff's injury?" First, this test was a natural consequence of absolute bifurcation. Since in Green's view there should be absolutely no "responsibility" concerns tinting the neutral cause-in-fact issue, Green claimed the causal inquiry should not focus on the liability-tinged aspect of the defendant's conduct; rather, the law should look to defendant's full behavioral pattern as the causative agent. Second, Green leveled against the negligence-causation doctrine his strictures against hypothetical cause; in applying the negligence-causation rule, he argued, one was confronted with the absurdity of having "nothing" cause "something."
Malone's Support of the Orthodox Negligence-Causation Rule

Because Professor Malone believed that the complete “atomization” of proximate cause was a vain psychological hope,68 he adhered to the orthodox negligence-causation test of causal link69 rather than to Green’s “holistic” view of the causative agent.70 Malone clearly holds the high ground in this skirmish, if for no other reasons than administrative efficiency and judicial economy. As many scholars have observed, the absence of cause-in-fact ends the plaintiff’s case without any further deliberation on duty, breach, or damages.71 Thus, economy in the use of judicial resources dictates that the causal focus fall upon the negligent conduct or the defective feature of the product; the negligence-causation rule is, as it were, a requirement of the consolidation of all claims applied internally to the case itself.72 To do later what could be done at the threshold of the case would be wasteful and inane.

In a passage examining proximate cause in strict products liability, Professor William Crowe, a disciple of Green’s, unwittingly indicated the inefficiencies and confusions that can be created by using Green’s holistic view of the causative agent rather than the defect/negligence-causation rule endorsed by Wex Malone.

Even if a given defect is deemed dangerous, it is not actionable unless it is a “proximate cause” of the injury complained. This writer uses the term “proximate cause” with some reluctance. It can be more accurately stated that the duty of a manufacturer not to produce a product that is unreasonably dangerously defective does not encompass the risk of a harm occurring which would have occurred even if the product had not been defective. . . . Stated [in terms of the duty-risk analysis], it can be said that the

68. See Malone, supra note 2, at 66-67.
69. See Malone, supra note 30, at 370.
70. Green had an “atomistic” view of cause-in-fact in that he believed the causal issue should be absolutely divorced from all evaluative and normative questions. On the other hand, Green took a “holistic” view of the causative agent in that he rejected the negligence-causation doctrine and held instead that the defendant’s full behavioral pattern, not just the substandard piece of it, should be regarded as the factual cause of the harm. See supra text accompanying notes 17-21, 27-28, 31.
71. See, e.g., Williams, supra note 50, at 64. “[T]he causation issue can short-circuit a lawsuit at the very outset. It is thus an issue that deserves the attention of counsel and experts at the earliest stages of litigation.” A. Weinstein, A. Twerski, H. Piehler & W. Donaher, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT: A GUIDE FOR MANAGEMENT, DESIGN, AND MARKETING 79 (1978).
72. Cf. P. Atiyah, supra note 37, at 120 (“There does seem to be a rational basis for [the but-for] approach, namely that a person should not be able to build his entire cause of action on a possibility, but only on a reasonable probability. This discourages speculative actions.”); cf. Weinrib, supra note 41, at 518-19 (“Since cause in fact can determine innocence but not liability, it functions as a test of exclusion, allowing a court to weed out defendants without having to decide whether their conduct was legally culpable.”).
To satisfy causal connection, Dean Green and Professor Crowe would ask simply whether the defendant’s total product (the car) had anything to do with the accident, and since the accident posited by Crowe was


74. By extrapolation from what Leon Green wrote about causal relation in negligence law, the proposition emerges that judges and lawyers should not restrict their gaze to the defect in the product when treating the cause-in-fact issue in strict products liability cases. “Legal defect” in a strict products liability action is analogous to “negligent acts or omissions” in a negligence case; each is a specific instance, under different standards of liability, of behavior that is alleged to fall below the norms set by law. Thus the Greenian position on cause-in-fact in products cases would be that the law should not narrowly focus on the defective or flawed aspect of the product; rather, it should suffice for causal connection that the trier-of-fact concentrate on the whole product, the item itself, as the cause-in-fact of the hurt.

Fortunately, we do not have to surmise that Green would support these ideas about causation in strict products liability, for one of his last essays dealt with litigation involving section 402A of the Restatement (Second) of Torts. See Green, supra note 27. After declaring that “the false issue of ‘defect-causation’ is a procedural cancer,” id. at 1187 n.5, Green affirmed his position on cause-in-fact by stating: “Whether . . . the seller’s placing the product in the stream of trade did contribute substantially to the consumer’s injury . . . is the only legitimate cause issue.” Id. at 1199. Green characteristically adhered to his holistic view of causation: He focused not on any flaw or defect in the product but on the availability of the product itself for use by consumers. But as noted in the text, administrative efficiency and the screening purposes of the cause-in-fact requirement militate against Green’s holistic approach. Why not cull unmeritorious claims as soon as possible, here at the gateway causal inquiry, rather than later at the scope-of-duty stage? See supra text accompanying notes 71-73; see also J. Fleming, *An Introduction to the Law of Torts* 109 (1967) (referring to the cause-in-fact issue as “[t]he first screening of all claims”). Before the recent inclusion, through article 1811, of a motion for judgment notwithstanding the verdict in the Louisiana Code of Civil Procedure, there was, as Professor Alston Johnson observed, a special problem for Louisiana courts in using the Greenian formulation of cause-in-fact, since Louisiana’s procedural law did not, before 1983, provide for “judgment notwithstanding the verdict.” Therefore, even though the pre-1983 defendant automobile manufacturer in Crowe’s example could have been exonerated in Louisiana by a court’s declaring that “the law will not hold him liable” because the steering mechanism was not defective, it was nevertheless most appropriate before 1983 to “question whether in Louisiana, where we lack the necessary tools to decide the [causal] question at a later stage, we are not better off relieving the [automobile] manufacturer at the earlier [cause-in-fact] stage.” 2 A. Johnson, *Louisiana Jury Instructions—Civil* 53 (1980). Even though article 1811 has removed some of the force from Professor Johnson’s observation, his basic point—that the courts should not procrastinate the nonsuiting of plaintiffs with tenuous causal claims—should still be heeded in order to advance both administrative efficiency and justness of decision; for there is likely to be some judicial reluctance to grant motions for judgment notwithstanding the verdict on lack of cause-in-fact grounds because of the understandable feeling that the causal issue, once given to the jury, should not be subject to routine reexamination and second-guessing by the judge.
a car wreck, it would be virtually impossible, using Green's holistic causal test, for the judge to nonsuit the plaintiff for want of cause-in-fact. In such cases, the standard defect-causation approach would avoid the absurdity of bringing the manufacturer of an allegedly defective product to bar when in fact the supposedly defective feature functioned properly or safely and therefore could not have been the cause-in-fact of the accident. To follow Professor Crowe's advice and dispose of such obvious "lack of cause-in-fact" cases on the basis of risk exclusion (or no proximate cause) would be to do later what could more logically and efficiently be done sooner—namely, to nonsuit the plaintiff on the cause-in-fact issue (before even considering the scope of duty) by fixing upon the substandard aspect of the product (the flaw) as the causative agent.

One further objection by Green to the negligence-causation rule remains to be addressed—namely, that it is subject to the same problems of speculation as the but-for/hypothetical cause test because it entails a "nothing" (disembodied legal concepts such as negligence and legal defect) causing "something" (physical damage or injury). This objection can be

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75. If the law should for reasons of, say, deterrence want to extend the duty to cover harms that arise whenever a defective product occasions harm, even when the defective aspect of the product is not the efficient cause-in-fact of the harm—if the law should decide to do this, it should not, for clarity's sake if no other, pretend that traditional cause-in-fact has been established. The courts should instead openly declare that a special duty has been devised in order to advance some desired social policy, such as deterrence or loss-spreading. See A. JOHNSON, supra note 74, at 52-53. Clearly, liability in such a "lack of cause-in-fact" case could not be justified on the basis of retributive justice—which as explained earlier constitutes the fundamental moral concern of the cause-in-fact requirement—because the injury-event in such a case would be an "accident" in the purest sense of the word.

76. A seller is strictly liable only if a substandard aspect of his product caused the harm at issue. See Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 603, 250 So. 2d 754, 755 (1971); RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965); Twerski, supra note 27, at 409 (quoted supra note 27); see also id. at 419.

In Louisiana the trial judge could in the appropriate case nonsuit a plaintiff for lack of cause-in-fact either by directing a verdict under articles 1672(B) or 1810 of the Louisiana Code of Civil Procedure or by giving a judgment notwithstanding the verdict under article 1811. For a case involving facts very similar to those posited by Crowe and in which the New Jersey Supreme Court upheld a verdict for defendant directed by the trial judge on the ground that no causal nexus had been shown between the defendant (and his control of the product) and the accident, see Scanlon v. General Motors Corp., 65 N.J. 582, 598-601, 326 A.2d 673, 681-83 (1974). This case demonstrates the administratively efficient method of handling such cases. Products liability cases involving modifications or tampering by the plaintiff can, and often should be, decided not on grounds of "foreseeable misuse" but on the basis of no factual causation. In many such cases the original product contained no defect; the purchaser's jury-rigging of the item could then be regarded as the true cause-in-fact of the accident. Cf. Hanlon v. Cyril Bath Co., 541 F.2d 343 (3d Cir. 1975) (plaintiff's employer replaced manufacturer's safety switch with a sensitive, easily activated starter; this modified starter constituted a substantial change in the product); Rios v. Niagara Mach. & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974) (safety device attached by purchaser to the drill press corrected any preexistent design defects in the press; purchaser's own safety device malfunctioned thereby permitting the occurrence of plaintiff's injury).
overcome by avoiding conclusory terms of law in phrasing the causal issue, recasting it instead in liability-neutral terms such as "allegedly substandard conduct" or "allegedly substandard aspect of the product." This linguistic substitution scotches Green's objection that incorporeal concepts cannot physically cause anything, for now a physical aspect of the product or some feature of human conduct is treated as the antecedent causative agent, not a legal conclusion such as "negligence" or "legal defect.""  

Modern Scholarship on the Unity of Fact and Value

In sum, then, Wex Malone's gestalt account of cause-in-fact is more efficient, more realistic, and more consonant with retributive justice than Leon Green's atomistic theory. Moreover, if any further support were needed, Professor Malone has received it in abundance from both philosophers and lawyers. A philosophical essay by the late John Miller strongly supports Malone's gestalt theory. Professor Miller, like Malone, reminded us that the natural, objective factual order occurs in consequence of a human will or demand, or it does not occur at all. The "paradox of cause" is that in a world that contained only factual or natural causation, natural cause could not be disclosed. Subjective purpose and objective nature, Miller argued, are mutually implicative; their relation, in a word, is dialectical: "To assert cause as a property of an absolutely objective and impersonal region is not a dogmatism; it is nonsense." As Miller's study indicates, a natural consequence of a gestalt view of cause is that there is not one type of factual causation but many, each shaped and defined by the purpose or goal of the causal inquiry.

77. But see Cole, Windfall and Probability: A Study of "Cause" in Negligence Law—Part I, Uses of Causal Language, 52 CALIF. L. REV. 459, 505 n.133 (1964) ("It is one thing to say that 'conduct' is a 'cause in fact.' But in what sense does one say 'negligence' or an 'aspect' is a 'cause in fact' of injury?" (emphasis added)).
79. Id. at 16.
80. Id. at 18. An English lawyer-jurisprudent also supports Malone (and Miller) on the evaluative nature of causation. "The plain man, when confronted with a causal problem, does not distinguish between the question of factual causation and that of responsibility; he gives a single answer, yes or no, which is intended to resolve both questions." Williams, supra note 50, at 69. See also J. FEINBERG, DOING & DESERVING ch. 8 (1970) (demonstrating the close, at times inseparable, relationship of "cause" and "fault"). And a torts scholar associated with the law-and-economics school has made causation the linchpin of his comprehensive theory of tort liability because in his view it efficiently and accurately joins damage to responsibility.
81. A number of philosophers had earlier made important contributions to the development and promulgation of this theory of causation. See, e.g., M. COHEN & E. NAGEL,
argued this thesis so persuasively\textsuperscript{82} that his essay has become authoritative on the point, and numerous legal scholars now agree with him.\textsuperscript{83}

In an illuminating essay on the rhetoric of law, James B. White expounded a characteristic of legal discourse that supports the Malone thesis: the tendency of legal conversations about rules to shift imperceptibly from a language of description to a language of judgment.\textsuperscript{84}

[A] legal rule . . . appears to be a language of description, which works by a simple process of comparison, but in cases of any difficulty it is actually a language of judgment, which works in ways that find no expression in the rule itself. In such cases the meaning of its terms is not obvious, as the rule seems to assume, but must be determined by a process of interpretation and judgment . . . .\textsuperscript{85}

Hence a rule of causation, whether but-for, substantial-factor, or some other, is necessarily evaluative in its attempt to describe "what in fact happened."	extsuperscript{86} As a consequence of this phenomenon, Dean Green's ab-
solute bifurcation cannot be considered practically attainable or philosophically accurate; for the words "fact" and "policy" are misleading when used in ways that suggest a clean, clear distinction.

To give Green his due, however, he probably never intended his duty-risk methodology to contain a philosophically accurate account of causality. Rather, his atomism was a tactical necessity, an integral step in the creation of his duty-risk method: the naturally indivisible was split for purposes of analysis. Green's bifurcation was an artificial but necessary division of proximate cause—without the severance, the duty-risk scheme would have collapsed and the campaign against proximate cause would have been lost. Therefore, the Greenian atomistic theory of cause-in-fact stands not as an accurate account of causality but as an admonition to the judge that he be aware of the differing requirements for the different components of the plaintiff's prima facie case and that he consciously consider and use the relevant policy factors only at the "scope of duty" stage of his deliberation. In short, Green's duty-risk method required the bifurcation of proximate cause so that the crucial duty-responsibility analysis would be clarified by its total separation from the factual-cause inquiry.

Even Wex Malone concedes the force of Green's atomistic cause theory as a useful analytical tool in tort litigation, for he too felt that judges should not use the jargon of proximate cause to short-circuit the crucial scope-of-duty inquiry.

Much difficulty can be avoided if it is borne in mind that cause is exclusively a fact inquiry in which we are interested only in what happened, or what might have happened. This by no means suggests that the trier is invited to ignore policy limitations when he eventually passes judgment. It does mean, however, that policy and fact should be kept separate and that causation should be maintained utterly devoid of any policy overtones.


87. The artificial division of that which is by nature indivisible concerned Professor Malone. "For the layman," Malone observed, "cause and purpose are a single blend." Malone, supra note 2, at 66. Hence the bifurcation of those issues makes us "lose much of the meaning of the very phenomenon we are investigating." Id. For the emphasis the Legal Realists placed on process and method and how Leon Green's duty-risk analysis reflects this trait, see Zwier, supra note 46, at 799-800.

88. Malone, supra note 30, at 371. See also W. MALONE & A. JOHNSON, WORKERS' COMPENSATION LAW AND PRACTICE § 251 in 13 Louisiana Civil Law Treatise (2d ed. 1980). "Causation-in-fact is properly a neutral inquiry, shorn of any policy implications. It is established by the production of evidence limited to the sequence of events that actually occurred, without addressing for the moment the question of what the law ought to do about that sequence of events." Id. § 251, at 545-46 (footnote omitted). Professor Malone expressed a similar, though not identical, view in his "Cause-In-Fact" essay.

When policy can be recognized openly as the dominating factor, . . . the problem
It will not do to reconcile this later view with the thesis of his “Cause-In-Fact” essay by appealing to the passage of time; although Professor Malone assented for purposes of analysis to Green’s bifurcation,9 one must conclude by recognizing the psychological and practical realism of his gestalt view of causation. Indeed, if Malone sometimes agreed with Green, Green fully reciprocated. So compelling was Malone’s study of cause-in-fact that Dean Green approved its thesis; he admitted that in the hard cases involving close causation calls, the judge and jury will be greatly swayed by the concerns of fairness and social policy.60

The Malone thesis, then, expresses a causal realism that is wanting in Green’s theory. As a matter of human psychology, the cause-in-fact

can be meaningfully labeled as one of proximate cause, duty, risk, negligence, etc. On the other hand, when the attention of the trier is focused primarily on what happened . . . , the issue is properly termed one of simple cause [i.e., cause in fact] although policy impulses may assist materially in giving the proper turn to the judgment.

Malone, supra note 2, at 97.

89. It is beyond cavil that in his later works (and implicitly even in his “Cause-In-Fact” essay, see supra note 88) Malone endorsed the Greenian belief that in the cause-in-fact and legal-cause inquiries the word “cause” can meaningfully be assigned separate, distinct meanings; but as Professor Zwier recognized, on this topic of bifurcation Malone’s “analysis is primarily ex post facto.” Zwier, supra note 46, at 775 n.30. Hence Malone’s endorsement of Green’s causal atomism is a matter of analytical, not philosophical, conviction; he supported Green’s theory as a principle of analysis, not as an axiom of ontology. As Professor Malone stated in conversation with the author, a proximate-cause/substantial-factor charge is a perfectly acceptable and functional instruction to give a jury in view of their tendency to decide the case as a whole. But in a bench trial or on appellate review, the duty-risk analysis is the preferable, more functional mode of decision-making, since the schooled, self-conscious professional should be better able to compartmentalize the case and confine the bulk of society’s policy imperatives within the “duty” segment of analysis. Interview with Wex S. Malone at the Paul M. Hebert Law Center, Baton Rouge, Louisiana (Feb. 6, 1984). Thus it is not mere coincidence that the only state to adopt wholly and wholeheartedly the duty-risk analysis is Louisiana, a mixed jurisdiction that inherited the civilian custom of bench rather than jury trials in civil suits; for the duty-risk method is best suited to bench trials or appellate review of facts (which amounts to the same thing). Duty-risk analysis is therefore well-known in civilian jurisdictions as the purpose-and-scope-of-legal-protection theory or the scope-of-rule theory. See Hayashida, The Necessity for the Rational Basis of Duty-Risk Analysis in Japanese Tort Law: A Comparative Study, 1981 Utah L. Rev. 65, 79; Honofé, Causation and Remoteness of Damage, in 11 International Encyclopedia of Comparative Law—Torts ch. 7, at 60-63 (A. Tunc ed. 1983). For a view contrary to the belief of Malone and Green that the judge can more effectively bifurcate proximate cause than can a jury, see Robertson, The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana, 29 La. L. Rev. 78 (1968) (arguing that it is even easier for the law-fact distinction to be obscured in a bench trial than in a jury trial).

90. Green, supra note 2, at 554-55, 555 n.29, 560-61; Green, supra note 21, at 606 (“As a matter of fact, when a case is submitted to a jury, however clearly marked may be the issues which the jury are supposed to answer, I have always felt that in most instances they give their answer on the whole case.”); see also Twerski, supra note 27, at 414; Weinrib, supra note 41, at 530.
decision is instinct with norms and evaluation. As Malone and other commentators have pointed out, the evaluative process occurs even within the mechanical but-for test. Every effect is preceded by overwhelming array of causes and conditions, so the trier-of-fact must discern and follow the pertinent thread in the labyrinthine causal pattern if the but-for or substantial-factor or any other causal test is to serve its screening and retributive-justice ends. Only through an evaluative sifting can we segregate the *causa causans*—the dramatic cause that catches and keeps our interest—from the numerous other causes and conditions that make up the background or operative field of the *causa causans*. Without preliminary evaluation, any causal test, even the mechanical but-for test, will be reduced to absurdity, defining “cause” so broadly that we are left with what Glanville Williams dubbed “Adam-and-Eve causation.”

Malone’s telling insight was the realization that normative factors must always play a greater or lesser role in the causal determination. Thus, cause-in-fact is not simply a fact, but comprises a congeries of physical relations and purposive deductions; the causal determination is not a neutral inquiry but a forensic method of reasoning. Cause-in-fact is a process, not an event.

91. For implicit support of the Malone thesis (and express support of Epstein and Borgo over against Calabresi and the Coaseans) through an application of Jean Piaget’s work on causality to the law of tort, see Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. Cal. L. Rev. 711 (1983).

92. See Probert, *supra* note 6, at 375 (“[W]e believe we may separate the fact (cause) from the value (responsibility), forgetting that the fact arose somewhere in time out of a value judgment . . . .”). Concerning the analogous topic of bifurcation, Professor Probert stated: “The bifurcation of proximate cause has created some further classification problems of its own, perhaps because the very split is tenuous.” *Id.* at 377. See also Weinrib, *supra* note 41, at 529-33 (arguing factual causation, like proximate cause, is fundamentally a value-freighted concept).

93. See Borgo, *supra* note 86, at 432-33, 439-40; Williams, *supra* note 50, at 63.

94. Williams, *supra* note 50, at 64. “[A]n inquiry into factual causation must be made with an object in view, because all the causal antecedents of an event (especially if non-happenings are included as causes) are too numerous to be catalogued or investigated or thought about.” *Id.* at 65. And in a study of nuisance law, Richard Epstein implicitly acknowledged the normative nature of cause-in-fact when he criticized R.H. Coase’s application of the concept of “joint causation by co-tortfeasors” to the conduct of defendant and plaintiff.

The weakness of [Coase’s] position is its failure to recognize that for legal purposes the question of causation can be resolved only after there is an acceptance of some initial distribution of rights.


Conclusion

The gestalt philosopher Wolfgang Koehler entitled one of his books *The Place of Value in a World of Facts.* From the viewpoint of human experience, however, a more accurate title would have been *The Place of Facts in a World of Value*; for we find it as hard to grasp a fact as a snark, while at the same time everyone has values and applies them constantly. Malone wisely tempered Green’s atomistic causation by applying his gestalt view to the forensic pursuit of cause-in-fact. He knew that since “value” necessarily colors our perceptions, it was a simplistic legal description that endeavored to discover facts by blanching away all evaluative hues. Malone’s insight was that in all stages of a difficult tort case fact and value shade one into the other. He recognized that value is often the sovereign element of our perceptual experience: the values inherent in a judge’s or jury’s mindset can erode fact just as the Impressionists’ colors eroded form.

Thus, Professor Malone’s exposition of the forensic, purposive character of cause-in-fact will provide sound guidance for the Louisiana Supreme Court should that tribunal undertake to examine the goals of tort causation and declare the preferred tests of factual cause for bench and jury trials. The supreme court has effected revolutionary changes in Louisiana tort law over the past two decades by its adoption of the Greenian duty-risk analysis. It is time to consolidate and complete the revolution by incorporating within that analysis Wex Malone’s approach to cause-in-fact.

*James E. Viator*

97. The current Supreme Court of Louisiana should not feel radical if it decides to recognize and apply Malone’s teachings about the evaluative nature of cause-in-fact; in 1919 the supreme court wrote an opinion that can be fairly considered a classic model of the purposive causal determination. The sudden jerking of a streetcar knocked a passenger from his feet, and he landed on the small of his back. Although an autopsy showed that the victim had tuberculosis, chronic nephritis, acute chronic cystitis, acute chronic prostatitis, chronic selenitis, and sacral cancer, the court unblushingly held that “the cause of Mr. Thompson’s suffering, sickness, and death was . . . the existence of a malignant tumor, brought about by the blow which he received on falling on one of defendant’s cars.” Thompson v. New Orleans Ry. & Light Co., 145 La. 805, 815, 83 So. 19, 22 (1919).