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**Causation in Law and Philosophy:
A Comparison of Solutions to Cases of
Novus Actus Interveniens**

Carole C. Dastous

A Thesis
in
The Department
of
Philosophy

Presented in Partial Fulfilment of the Requirements
for the Degree of Master of Arts at
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ABSTRACT

Causation in Law and Philosophy:
A Comparison of Solutions to Cases of
Novus Actus Interveniens

Carole C. Dastous

In their book, Causation in the Law, H.L.A. Hart and Tony Honore argue that voluntary or abnormal interventions can resolve cases of new intervening event. These factors, they say, "negative causal connection" between an initial wrongful action, and harm or damage.

The thesis evaluates the philosophical grounds for the soundness of the criteria of Hart and Honore, and then compares these criteria with the civilian law's solutions.

To this end, three cases of new intervening event in the civilian jurisprudence of the Province of Quebec were selected. The criteria of Causation in the Law were applied to each of the civilian cases in order to detect whether the civilian law is consistent with the criteria reviewed by Hart and Honore.

As it appears that it is not, an explanation for the disparity was attempted.

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INTRODUCTION

Novus actus interveniens is a latin expression which means "new intervening act." Black's Law Dictionary defines the term in this way:

The "intervening cause," which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which could not otherwise have followed and which could not have been reasonably anticipated.¹

Conceptual and legal difficulties are created by cases which involve this causation. The most pressing problem for the law is how to distinguish, among (at least) two possible, competing causes, which is the one that has caused the harm or damage. This problem is compounded, for while the law's task is to seek compensation for the victim, it must not do so unfairly to the wrongdoer. The law must distinguish as clearly as possible where the effects of one cause begin and where the effects of the other cause end.

According to H.L.A. Hart and Tony Honore², the authors of Causation in the Law, the attempts by English common law to deal with novus actus interveniens cases have complicated the

¹"Intervening Cause." Black's Law Dictionary, 5th ed. St.Paul: West Publishing Company, 1979.

²H.L.A. Hart and Tony Honore, Causation in the Law, 2nd ed. (Oxford: At The Clarendon Press 1985). Hereafter referred to as Hart and Honore.

issue. To clarify this, the authors argue that in the legal language of causation, there is the presence of two criteria with which to resolve cases of new intervening event. These two are a voluntary action (if human) or an abnormal intervention (whether by a human or by a thing.) In the language of the authors of Causation, these are the factors which can "negative causal connection" between an initial wrongful action and harm or damage.

The primary task of the thesis will be to compare the criteria of Causation in the Law with the civilian law's criterion for resolving cases of new intervening events. This will be done by using the voluntary and abnormal criteria of Hart and Honore as templates over the civilian law's own criteria for new intervening events i.e., the gravity or seriousness of the fault.

To this end, three cases of new intervening event, in the civilian jurisprudence of the Province of Quebec have been selected. The comparison appears in Part V of the thesis.

In a subsidiary task, the thesis will inquire whether the criteria of Causation in the Law are suitable in themselves. This will be accomplished by presenting, and then reviewing critically, some commentators of Hart and Honore's project.

In the thesis, the meaningfulness of counterfactual statements (as a dimension of the study of "sine qua non" causation) will not be addressed. The focus throughout will

remain on the comparison of the criteria.³

³For further reading on counterfactual statements (known synonymously as "contrary-to-fact" or "unfulfilled") refer to, among others: David Lewis, Counterfactuals, (Cambridge: Harvard University Press, 1973); Robert Stalnaker, "A Theory of Conditionals," Studies in Logical Theory, ed. Nicolas Rescher (Oxford :Blackwell, 1968); and William L. Harper, "Ifs", University of Western Ontarion Series in Philosophy of Science, v.35. The entry "Contrary-to-Fact-Conditional" in the Encyclopedia of Philosophy is also useful but somewhat out of date.

Part I
New Intervening Cause in the Civilian Law of Quebec
Chapter 1
The Regimes of Civil Responsibility

It is in the third title of the Civil Code of Lower Canada, "Of Obligations" that we find the civilian law of responsibility. Although the title begins at article 982 C.C. with the general provisions of obligations, it is not until article 1053 C.C. that the civilian regimes of responsibility appear.

There are several regimes of civil responsibility, each with its own grounds of responsibility and each with its own means of exoneration. The regimes vary in severity from the proof of fault required in article 1053 i.e., the less severe regime, through presumption of fault for parents and educators i.e., in the regimes from articles 1054.1 to 1054.6, to the strict liability regimes for the owners of buildings i.e., articles 1054.7 and 1055 C.C. We will review each one in turn in order to identify where questions of new intervening cause arise most prominently.

a. the first regime: personal fault

The first regime in the Civil Code in civil responsibility is found under art. 1053 C.C. This is the first regime not only literally in the Code's presentation of them, but also conceptually and intellectually. Article 1053 C.C. says that:

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."¹

The 1053 C.C. regime is the cornerstone of civil responsibility, for in the text of this article we find the core elements of fault, damage, and a causal relation between fault and damage.

This regime also has the requirement of a capacity, in the wrongdoer, to discern right from wrong; this requirement, though, and the compensation in cases in which persons do not have this capacity, is under review.²

There have been difficulties created by the wording of art.1053 C.C. concerning the person to whom is owed compensation. In the 1053 C.C. regime, responsibility is held against a wrongdoer for harm caused by his fault to "another" ("autrui," in French). In 1929, the Supreme Court of Canada gave its decision on the Congrégation des Petits Frères de Marie c. Régent Taxi [1929] S.C.R. 650. In that case the judges held that "another" is to be taken in the broad sense of the term, so as to include any person with a claim for damages, not necessarily only the immediate victim. Two

¹ see Appendix A, the Civil Code of Lower Canada.

² See art.1519 and art.1520 of the Draft Bill An Act to Add to the Reformed Law of Obligations to the Civil Code of Quebec. (1988)
p.24

judges, of Quebec originally, were dissenters. In 1965, a similar case appeared, which ran counter to the majority holding in Régent Taxi. In La Reine c. Sylvain [1965] 1 R.C. de l'E. 261 but in other cases as well, the position of the judges is more similar to the dissenting opinion of the judges in 1929.

Under art. 1053 C.C., then, it is imperative that fault be proven, rather than presumed, as well as a demonstrated causal relation. The requirement of proven harm is usually less difficult to meet, although cases with this type of difficulty also reach the courts.

The requirement in the civilian law of Quebec for the presence of fault is shown in the case of P.G. du Québec c. Lapierre [1979] C.S. 907; [1983] C.A. 631. In this case, the government of the Province of Québec had instituted a program of compulsory vaccination for children. The Lapierre child underwent the vaccination, as was required for all children of her age. Eventually, the child suffered a severe reaction to the vaccine, and was seriously and permanently handicapped. The parents of the child sought compensation for this handicap. In the case, it was ruled that the defendant was not liable. The reason for the vaccination program was not debatable, and the vaccination program had been well conducted. There was no fault committed in setting up the program. In fact, omitting to have done so would have been a fault, insofar as there was a threat of an epidemic. The

Private Law Dictionary and Bilingual Lexicons defines "fault" variously as the "transgression of an obligatory judicial norm" and (synonymously) as "a violation of one's existing duty whether it be one voluntarily assumed by contract (contractual obligation) or one imposed by law (legal or extracontractual)." ³ In the Lapierre case, the government of Quebec was obliged to organize a program of vaccination, in the light of potentially serious medical problems to a significant number of people. The fact that there was a causal relation between this action, and the Lapierre child's reaction, was unfortunate but irrelevant. There was no reason to continue the inquiry, or to seek the other grounds of liability in the 1053 C.C. regime.⁴

The characteristics of the first regime, then, include fault, a causal relation between that fault, and the alleged harm. The most important trait, however, is the following. Both the fault and the causal relation (to the harm) are traceable to the same person, insofar as the person is capable of discerning right from wrong. The person who is held responsible, in a 1053 C.C. case, is the person who has both committed the fault and who has caused the harm. So here a new intervening cause will relieve the agent at fault from

³"Fault," Private Law Dictionary and Bilingual Lexicons, 1988.

⁴In the case, Lapierre claimed that an individual should not be made to suffer the results of the vaccine, even when the vaccine was necessary for the good of the many in the community.

liability. In the remaining regimes of civil responsibility, however, this conceptual relationship is not present. The person who is held responsible is not always the person who has actually caused the harm, or the damage. The second regime of civil responsibility is the first example of the different conceptual relationship between fault and causation.

b. the second regime: parents and educators

The next regime on the conceptual and legal continuum is that in art. 1054, specifically 1054.1 to 1054.6: the regime for those who have persons (or things) under their care. This regime is more severe than the 1053 because its proof is less demanding. In 1054.1 to .6 there is a presumption of fault against the defendant. The severity comes from the fact that fault need not be proven, since it is presumed already to exist. The defendant must exonerate himself by showing appropriate means of exoneration. In art. 1053 the fault must be proven by the victim. The defendant in art. 1053 can exonerate himself by showing reasonable care and precaution, the presence of a cas fortuit, the victim's own fault or the fault of another party.⁵ In 1053 C.C., there is no burden of evidence which pre-exists upon the plaintiff, while there is a burden of proof on the defendant which exists in 1054 whenever all other conditions are met. For instance, in Alain c. Hardy [1951] S.C.R. 541, an action is brought against a

⁵Often, a "cas fortuit" is synonymous with absence of fault. There is an example of this in Coyle Tanning Co Ltd. c. Kelimpex Ltd [1979] C.S. 343.

father and his twenty one year old son. In the case the son borrowed the father's truck with his father's permission. The son collided in his vehicle with a stationary vehicle, injuring one of its occupants. It is held that the action against the father should be dismissed, and that against his son maintained. The reason why the father is exonerated from the plaintiff's claim under I054 C.C., is that the father showed proper education and surveillance over his son. The father, having fulfilled his duties, was deemed not at fault in lending his son the vehicle. Had the father been proven to have failed in one of his duties he might have been held responsible under I054 C.C., although his son's age would have served to mitigate this responsibility.

Presumption of fault in art.I054 is shown well also in the case Cohen c. Coca-Cola Limited [1967] S.C.R. 470 . Plaintiff Cohen was injured by a fragment of glass coming from a bottle of Coca-Cola which exploded spontaneously. The judge accepted that the explosion of the bottle in plaintiff's hands was due to a defect in the bottle for which Coca-Cola was responsible. The reasoning is that Coca-Cola's duty is to provide containers sufficiently strong to withstand normal handling; if there is an explosion by one of them it is presumed, and need not be proven, that Coca-Cola failed in its duty. If there is no proof to the contrary the company is taken to have committed a fault. The elements which must be brought as evidence of Coca-Cola's fault, in order to use the

regime in I054 C.C., are that the bottle was handled by plaintiff Cohen in an ordinary manner, that plaintiff did not provoke or contribute to the explosion, that his injury is the direct result of the explosion and that the bottle belongs to Coca-Cola and not to another company. In the case, these elements were proven.

In a regime of presumption of fault, then, the three basic elements still appear i.e., fault, causation and harm. These are the same three elements of civil responsibility which appeared in art I053. In the second regime, however, the relation of fault to causation is changing. In the 1054.1-.6 regime, fault and a causal relation are not regrouped under the same person. As is apparent in the wording and the meaning of the text, 'fault' would be attributed to the person who has someone, or something, under his care. The requirement of a causal relation, however, in the 1054.1-.6 regime, would fall upon the person or thing for whom the defendant is responsible. In the second regime, the person who is responsible for harm or damage, and the person who has caused it, are distinct. Causation's role is also diminished insofar as the responsibility is shifted away from the de facto wrongdoer, onto another wrongdoer, i.e., the person defined in the text of 1054. The reason why the two persons are distinct, and why causation is thus diminished, is found outside the law. There are social imperatives which dictate, for example, that parents have duties to perform. Likewise,

there are imperatives, social and cultural, which dictate that educators also have duties. When parents and educators fail to perform these duties, it is they, and not their charges, who are held responsible. There are also other kinds of duties and other kinds of imperatives, besides these. In the third regime, we find the conditions for the use of regimes which involve employers. Again, we find that fault is diminished further, and made subordinate to the various non-legal imperatives.

c. the third regime: employers

The next regime is the employers' regime, in 1054.7 C.C. It reads "Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed." The conditions for the use of this regime include that the wrongdoer be employed by the defendant employer, at the time of the wrongful action, and that the harm not be caused by the victim, or by a third party. Once the conditions are proven, the employer cannot exonerate himself. The 1054.7 regime is a regime of strict liability, as is the 1055 C.C., which follows it immediately in the Civil Code.

In Transport Provincial c. Fortier 258 R.C.S. (1956), two rambunctious persons board a bus, which is driven by a Transport Provincial employee. Throughout the ride, the passengers speak loudly, and make insulting remarks at the driver. The driver does not speak to them during that time.

Once at the destination of the bus, the two passengers disembark, and walk half-way across the street. At this point, they are assaulted from behind by the bus driver. The issue in the case is whether the driver's wrongful action i.e., the assault, took place during the execution of his duties. It is not sufficient for the wrongful action to have taken place on the 'occasion of' the driver's duties. Judge Taschereau concludes that the bus company is not responsible, since the driver's wrongful action took place after the execution of his duties. Says the judge: "Cet assault...a...été commis alors que le voyage avait pris fin..." The judge rules that the bus company is not responsible for the harm caused by its employee. In order for this regime to be used by a plaintiff, the wrongdoer needs to have been engaged in an activity which benefits the employer.

When all the conditions for this regime have been fulfilled, the employer is strictly responsible for the harm or damage caused by his employee. Yet, it is not the employer himself who has done the wrong. In this regime, then, the relation between fault and causation is also changed. The person who is held responsible is not the person who has committed the fault.⁶

d. the fourth regime: buildings and things

In I055 C.C. is found the regime for buildings and for

⁶ It could be argued, however, that the employer has committed a fault in selecting, and then in hiring, the employee in question.

owners of animals. The regime for the owner of a building in I055.3 is more relevant today than the regime of owners of animals in I055.I; for in 1991 there are considerably fewer owners of animals for whom to formulate regimes of civil responsibility than there were in 1866, at the inception of the Civil Code of Lower Canada. We can dispense readily, then, with art.I055.I and.2 and proceed to the still relevant regime in I055.3.

The Civil Code says "The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in construction." In I055 C.C., ownership of property is the basis for the use of the regime; in fact, I055 C.C. acts as a limit on the otherwise absolute disposal by an owner of his property. The limit which is imposed is the owner's obligation to maintain his property in such condition that it will not become a source of danger for others.

Specifically, I055 C.C. is used as a regime only when the ruin which has caused damage is the result of "want of repairs" ("défaut d'entretien") or of an "original defect in its construction ("vice de construction"). A claimant under this regime must show that the ruin of the building is related to either a lack of repair or a defect of construction, and that harm is suffered as a result of this ruin. In Collin c. Vadenais (1928) 44 B.R. 89 for example, the plaintiff is a lessee in a third floor apartment. The plaintiff's child is

injured seriously after a fall from the apartment's balcony. On the balcony there was a cupboard. The plaintiff's child was playing in the cupboard when the floorboards gave way. The issue in the case is whether the owner is responsible for the injury suffered by the plaintiff's child. The judge in the case, Chief Judge Lafontaine, says "qu'il appert par la preuve que les planches de la paroi de l'armoire se sont détachées par suite de leur état de vétuste, son manque de solidité et leur défaut d'entretien...[que] le bois était pourri ainsi que les clous..." In the case, Judge Lafontaine rules that the owner is responsible for the child's injury, and that it was his duty to protect the occupants of the premises.

Once the conditions for the regime are fulfilled, an owner can exonerate himself only by invoking a fortuitous event or a "force majeure". Ignorance of the defect or of the need for repairs is not an excuse; moreover, unlike the keeper of things in 1054.I, the owner cannot exonerate himself by showing his impossibility to prevent the harm from occurring.

Chapter 2

How the Civilian Law of Responsibility Resolves Cases of

New Intervening Events: the Gravity of the Fault

Let us turn now to how cases of new intervening events are resolved by judges and lawyers in the Province of Quebec. Cases such as the new intervening event appear in all legal jurisdictions, not only in the English common law addressed by Hart and Honore. The difficulty of distinguishing one cause

from another persists from one jurisdiction to the other.

In La Responsabilité Civile Délictuelle, Baudouin explains how judges weigh causal factors, and how they decide between competing causal factors. The causal chain can be broken, explains Baudouin, by the fault of a third party, by the victim's own actions, or by a new, or fortuitous event.

A causal link can be broken, says Baudouin, and an initial wrongdoer discharged partly or completely "que si la gravité de la seconde [faute] est supérieure ou au moins égale a la première [faute]. En cas contraire, la tendance est de retenir les deux fautes comme ayant contribué au préjudice et d'opérer ainsi un partage pur et simple de la responsabilité."⁷

In order to understand the fine distinction which is made by jurisprudence between the 'gravité' of competing faults, let us review a case in which faults are of equal weight, and a case in which they are of unequal weight. Dequire Avenue Ltd. c. Adler [1963] B.R. 101 is an instance of faults of equal weight.⁸

In the case, employees of Adler paint an unoccupied apartment. Doing so required that the painters disconnect a

⁷Jean-Louis Baudouin, La Responsabilité Civile Délictuelle (Cowansville : Les Editions Yvon Blais Inc. 1985) 189.

⁸All or most of the cases mentioned appear also in Monique Ouellette, Réginald Savoie, Adrien Popovici, and Jean-Louis Baudouin, Recueil de Textes et d'Arrets: Responsabilité Civile Délictuelle, (Montréal: Faculté de Droit Université de Montréal, 1986-87). Henceforth, it is to this text that all page references will be made.

gas oven from its main gas line. Once their task is accomplished the painters omit to replace the gas oven in its original position, and omitted also to block the opening from the main gas line; about one month later, superintendents of Deguire work in the same apartment and with the same gas meters in the apartment's basement. Deguire's employees accidentally open the gas meter to the apartment, thus allowing gas to invade the apartment through the still open gas line. Some time later a prospective tenant visits the apartment; an explosion follows, perhaps from the visitor's cigarette.

The judge rules that the actions of the employees of both Deguire and Adler are wrongs. The way in which the faults are of equal weight is apparent in the judge's use of the term "continuous fault". The first fault, says the judge, "est une faute continue, tout comme le danger qu'ils [the employees] ont créé et laissé subsister, et qu'elle doit être retenue comme l'une des causes déterminantes de dommage." The initial fault is continuous because the gas main remained opened throughout the actions of all the parties involved; and there did not intervene any new events or actions. The judge says of the second fault that the superintendents of Deguire opened the gas meter "sans se préoccuper de la raison de sa fermeture antérieure"⁹ The facts of the case are important in assigning the weight of faults as well as the relationships

⁹Deguire Avenue Ltd. c. Adler [1963] B.R. 106.

between them for the final outcome of the damage. Both faults are factually continuous, in my words, and reprehensible according to the judge. In Deguire the gravity of the second fault was not greater than the initial one, and thus did not constitute a new intervening event.

Dubois c. Dubois [1978] C.A. 569 is a case in which faults are of unequal weight. In the case, the plaintiff Dubois lost nearly all the sight in his eyes as a result of the conjunction of a number of faults. The plaintiff was aboard a school bus, in the company of the defendants i.e., other boys, and the driver of the bus. The bus driver had been keeping a bottle, misleadingly labelled, which contained a dangerous substance. One of the boys stole the bottle from the driver. This was one of the faults which were committed, according to Judge Paré. Another fault consisted in the actions of the bus driver and, by extension, of his employer. Judge Paré says: "[un propriétaire] et un conducteur d'autobus scolaire avaient le devoir d'éviter que cette bouteille d'alcool à l'aspect trompeur vienne en la possession de jeunes étudiants." One of the faults is the driver's own, in leaving on board the bus the bottle. Another fault is committed when the defendant boy steals the bottle and sells it to the plaintiff Dubois. Since art. 1054.7 C.C. is involved, the bus driver and the bus company "invoquent la maxime novus actus interveniens pour conclure que le lien de causalité entre les actes des appelants et le dommage a été rompu par

l'intervention des agissements" of the boy who stole the bottle, and then sold it to the plaintiff. The Judge disagrees that there is a new intervening event; those are his words: "[un propriétaire et un conducteur d'autobus scolaire] devaient savoir que si l'un des jeunes passagers s'emparait de cette bouteille il pourrait...en consommer le contenu ou la leur donner ou meme la vendre, comme ce fut le cas." It is irrelevant in which way the bottle found its way into the hands of the boys, since the driver and the bus company had the prior obligation of care toward their passengers. In the case, Judge Paré agrees with the ruling of the previous court, and concludes that the driver and his employer are responsible for the harm suffered by the plaintiff Dubois.

The defendants claim that the plaintiff should share the responsibility for his injury, since he drank from the bottle, and was tardy in seeking medical help once his illness began. To this claim the judge replies that the plaintiff had no reason to suspect that the bottle had contained poison, and was justified in suspecting only overindulgence as the cause of his illness.

In the Dubois case, then, the burden which exists on the driver (and the bus company), especially since he is an adult, is a heavy one. There are other faults which are committed in the case, but none more serious than the violation by the driver of his duty as a guardian, in the sense of art. 1053 C.C., and as employee of the bus company, under art. 1054.7

C.C. In these circumstances, there is no new intervening event.

The third example in civilian law of novus actus interveniens is the Beudoin case.¹⁰ In the case, a fireworks employee forgets an explosive (une "pièce pyrotechnique") at the site of a fireworks display. In the case, the defendant, a fireworks company, is held responsible for the harm suffered by the plaintiff's son. Following a fireworks display, a company employee negligently leaves an explosive at the site. The plaintiff's son finds the object and returns home, to hand it to his father. The father, the Beudoin in the case, assigns his feeble-minded assistant the duty of disposing of the unwanted object. The assistant complies by exploding it, in the presence of Beudoin's son. It is decided that the father's actions constitute a novus actus interveniens and relieves of responsibility the fireworks company.

The judge's reasoning is that the father knew (or should have known) of the potential for danger created by the object; and that his action in handing the object to his assistant lacked "prudence raisonnable"¹¹ Judge Sylvestre says that the actions of the father, of his assistant, and of his

¹⁰Ouellette 313.

¹¹Ouellette 317.

son¹² "rencontrent, dans l'opinion du tribunal, les exigences ou les caractéristiques de l'acte nouveau et indépendant qui peut libérer une première personne de sa faute initiale..." The judge explains: "Il s'agit dans le cas actuel d'un acte indépendant qui n'est aucunement la conséquence de l'acte posé par la défenderesse, acte que le demandeur [Beaudoin] a posé librement et qui entraîne totalement sa seule responsabilité."

In all three cases, then i.e., in Dequire, Dubois and Beaudoin, there are some guidelines which the judges seem to follow. First, there are those guidelines imposed by the attribution of cases to particular regimes of civil responsibility, according to their facts and to the claims of the parties. Second, and of greater importance here, is the measure which is used to determine the presence of a new intervening event. This is the fault which is committed, and the pre-existing burden of duties which is imposed by the various regimes. Faults are committed when these duties are not fulfilled. The criteria for a new intervening event lies embedded, then, in the language of the articles of the Civil Code. When the fault committed by the intervening agent is more serious than the fault committed by the initial wrongdoer, there is a new intervening event.

In the next part, we will review the criteria proposed by Hart and Honore to resolve new intervening event cases, in

¹²The son was deemed old enough to be able to discern right from wrong. When this is the case, a person is able to assume responsibilities and duties.

order then, to apply the criteria to the small sample of civilian cases. To this end, it is necessary to locate their project in its proper context on legal theory.

Part II
Hart and Honore's Project in
Causation in The Law

In their book, Hart and Honore attempt to achieve two interrelated goals: first, to clarify the language of causation in the law, and second, to evaluate and oppose the body of legal theory which they call "causal minimalism".

In their review of case law, the authors have found that courts use, or claim to use, the "ordinary man's" conception of causation in determining legal responsibility.¹ This claim by the courts is the starting point of Hart and Honore's inquiry: to clarify what is the common sense notion of causation which the courts say they apply, consciously or not, in resolving cases of tort law.²

The authors define the common sense notion of causation in order to use it to oppose the body of legal theory which they call "causal minimalism".³

¹Hart and Honore XXXIV. The expression "common sense principles" is found by the authors in the case Hogan v. Bentwick Collieries [1949] 1 All E.R. 588

²Hart and Honore XXXV. The book is directed mostly at tort law, although there are four chapters that deal with causation in criminal law, as well as causation in contract law.

³Minimalists discussed or mentioned by the authors include Becht and Miller, Leon Green, and theoreticians of economics in the law.

As the word implies, minimalists are theoreticians for whom causal issues play a minor role in assigning responsibility.

Most often, say Hart and Honore, advocates of causal minimalism confine issues of causation to "whether the harm would have occurred in the absence of the wrongful conduct" or (at another place in the Preface) that minimalists are those "who for the most part hold that the only genuine causal issue is that of sine qua non causation or 'cause in fact'." Liability, then, for the minimalists, includes the following two elements: a causal link between harm and wrongful action (or event) which does not include considerations of intention, reasons or moral factors (in the broad sense of the term, descriptive of moral agency); and, conversely, a non-causal link in which all and any considerations of policy play a large role.

Hart and Honore do not dispute that the sine qua non question is necessary in a causal investigation. They think that there is more to be said of a cause than that it is the 'cause in fact', or material cause. Their notion of causation involves reasons and opportunities, as well as causes in the sense understood by the minimalists i.e., physical causes. Only the first notion of causation of Hart and Honore is similar to the minimalist notion of sine qua non cause. The authors' second and third notions of causation are broader than the minimalist notion.

At the same time as the authors attempt to enrich the notion of causation in the law, they are also careful to avoid

the other pitfall which they identify in legal theory, i.e., the overlap of causal issues with issues, broadly speaking, of policy.

Hart and Honore argue that sine qua non causation is an insufficient method to determine liability and one too often indistinguishable from concerns of policy. But they are not advocates of the other tendency in legal theory i.e., "causal maximalism".⁴ Hart and Honore do not argue that "questions of responsibility should be settled solely by reference to causal criteria." In their Preface, the authors say that causal maximalism is "The doctrine that causing harm is a necessary and sufficient condition of tort liability. They [the causal maximalists] urge that this principle ought to be, and to some extent already is, embodied in tort law."

The position of common sense causation against the confines of causal minimalism and causal maximalism provides the background of the authors' project.

What is of interest to this study, however, has a narrower focus. Hart and Honore, as part of their common sense notion of causation, attempt a resolution of what is known in the law as *novus actus interveniens* cases. This type of legal problem appears in their third notion of causation.⁵ Not all

⁴Among the maximalists, Hart and Honore mention Richard Epstein and others, such as G.P. Fletcher.

⁵Hart and Honore have overlooked the presence of *novus actus interveniens* cases in their second notion of causation; we will see this later.

cases of 'providing opportunities' are cases of new intervening cause, but this third notion of cause in law is the starting point.

Hart and Honore suggest two criteria for distinguishing whether an action or an event "negatives causal connection" and constitutes a new intervening event. It is this particular aspect of Hart and Honore's common sense causation that is of interest to us: their solution to the alleged ambiguities which surround novus actus interveniens cases, a solution which goes much beyond the narrow confines of sine qua non causation, without, as they claim, expanding to the breath of causal maximalism.

We will detach the third notion of causation and its criteria in order to review it as a potential solution to cases of new intervening event in the civilian law of the Province of Quebec.

The following section will review what the authors mean by the first, second and third notions of common sense causation.

Chapter 1

The Three Notions of Causation of Hart and Honore

a. the central notion: physical causes

In the first and central notion of causation, Hart and Honore have been "concerned with cases where some event, other than human action, is said to be the effect, result, or consequence of some other event or of some human act or omission."⁶ For example, the human action of striking someone over the head results in a fractured skull. Likewise, a strong wind can shake loose the branch of a tree, and the branch strikes and shatters a window. In both examples, there is an event, i.e., the administration of a blow and the strong wind, which results in some other event namely, a fractured skull and smashed glass. Hart and Honore make the important comment that the outcome in cases of central causation is something "other than human action".⁷ In the case of the window, there is no human action involved; windows do not retaliate and presumably the windows' owners do not do so either. In the case of the fractured skull, however, the characterisation of Hart and Honore is crucial. For what the authors mean to say is that in a case of the central notion of causation, the causal effect stops at the infliction of the harm. For the sake of argument we assume that the victim will not, in a fit of pain, commit murder, or seek revenge on the

⁶Hart and Honore 51.

⁷The emphasis is mine.

defendant's kin or the defendant himself, or induce someone to do so in his place.

In cases of what Hart and Honore call the central notion of cause, we find then that a cause is defined as a physical manipulation of objects (they use the verbs push, pull, twist) by other objects or by humans, which results in an interference in the objects' characteristic natures. Skulls, noses and windows, for instance, are usually intact rather than broken. The first denotation of 'cause' is "an interference in the natural course of events which makes a difference in the way these develop."⁸ The authors add that the notion of a cause as essentially an interference in the normal course of events is "at least as essential as the notions of invariable or constant sequence so much stressed by Mill and Hume."⁹ Commentators object to the intrusion of morality and value-laden decisions in causation).

In anticipation of the comment by Michael Martin, namely that the central notion of bodily manipulation "may well be rejected without great loss" to the conceptual unity of common sense causation, we will trace the presence in the other two notions of causation of the notion of "interference". If there is a conceptual unity in the common sense notions of

⁸Hart and Honore 29. The emphasis is by Hart and Honore.

⁹Hart and Honore 29. This is also the source I think of morality in the determination of causation. Commentators object to the intrusion of morality and value-laden decisions in causal issues.

causation, then it will be possible to ascribe the unity to the sense of "interference" described above.

b: the second notion: giving reasons

According to Hart and Honore, what distinguishes the first or central notion of cause from the second notion is that in the latter cases, while the cause of an event is human action, the cause does not end with action. Rather, the cause becomes the "reason" for further action. Hart and Honore call the second notion of cause "interpersonal transactions". The authors explain that they have "reserved this topic for separate treatment because we have here a set of principles different, in certain ways, from those involved in the central type of causation of physical events and occurrences other than human actions."¹⁰ The important difference between the first and second notions of cause is that in the second, the effect continues beyond its reception. Hart and Honore speak in the second sense of causation of "relationships": "In this field of relationship between two human actions we have to deal with the concept of reasons for action rather than causes of events."¹¹ These are cases in which one person is said, either by words or deeds, to cause another to act or where one action is done "in consequence of", "because of", or "as the result of " another.¹² Hart and Honore say that the range

¹⁰Hart and Honore 510.

¹¹Hart and Honore 51.

¹²Hart and Honore 51.

of notions which falls under the second notion of cause is exemplified by the expressions, from those persons who have taken action, of "He made me do it", "He persuaded me to do it" or "He induced me to do it". Hart and Honore specify that what is entailed by the expressions of one person "causing" or "making" another do something which, we presume he would not normally do, is "that the first person should intend the second to do the act in question"¹³ and use persuasion or inducement which render the action not wholly voluntary. Conversely, a cause is the "reason" provided by the first person to the second insofar as the latter says that such reasons were given, and that it is these which prompted the actions.

Hart and Honore say that interpersonal relationships "though often and intelligibly called causal connection, especially by legal writers, do not depend upon 'regular connection' or sequence as the causal relations between physical events do."¹⁴ The first or central notion of causation yields statements which can be generalized. For instance, in most or all cases of blows to the nose, the nose will be broken. A generalization can be made that a blow to the nose interferes with the way the nose usually is, namely, intact, healthy. The first notion of causation, then, is the prototype for the definition of causation i.e., an

¹³Hart and Honore 52.

¹⁴Hart and Honore 51-52.

interference. However, the first notion is also, according to the authors, the only one in which generalizations can be used. Or at least, it is generalizations as rigid as the ones sought by the predecessors of Hart and Honore, Hume and Mill.

The second notion of causation comes much closer to reflecting the types of problems in the case law. What is reflected in the case law is that there is more to causation than mere direct physical manipulation or interference with the usual state of things, i.e., their health, which can be interfered with. Hart and Honore say that it is more accurate in cases that are more complicated than the ones discussed in physical manipulation to speak of reasons for actions rather than causes. The authors say that

it would be somewhat unnatural in the informal discourse of ordinary life to describe any of this range of cases ['he made me do it' types] by saying that one person caused another to act; and in some cases this description would be positively misleading.¹⁵

In cases of interpersonal transactions, such as in cases where one person provides another with a reason to act and to interfere with things, there is no dependence for the truth of the cause on a generalization. Hart and Honore say that in the second notion of causation an "honest account" from the person who acted that he did so because of another's threats, would

¹⁵Hart and Honore 52.

settle the question of the truth or falsity of the account."¹⁶ The cause in the second sense of causation is identified then in this way: by the admission by the wrongdoer that 'he made me do it' or other such claim. This does not imply that in other similar circumstances the same results would appear, but only that in this case and providing that the account is an honest one, the 'reasons' were indeed the 'cause'.

c. the third notion: providing opportunities

The third related conception of causation in the "cluster" of causal concepts¹⁷ is the "occasioning" harm, or providing an opportunity to cause harm.

This type of causation has more resemblance to the second notion of causation, than it does to the first or central notion. Hart and Honore say that this notion has "analogies with interpersonal transactions."¹⁸ The last notion in the cluster is defined in this way: "The central notion in these relationships is that of one person providing another not with a reason, but with an opportunity for doing something or with the means or information which he requires in order to do it."¹⁹ The analogy is that something is provided to the actor: in the second case it is reasons; here, it is

¹⁶Hart and Honore 23.

¹⁷Hart and Honore XXXIII.

¹⁸Hart and Honore 59.

¹⁹Hart and Honore 59.

opportunity. Hart and Honore give the example of a man entrusted by his friend to watch over the friend's house. The man leaves the doors to the house unlocked. A thief enters the house and steals silver spoons. According to the authors, the man "has provided the thief with an opportunity to enter and steal the spoons though he has not caused him to steal or made him steal."²⁰ In this case, say the authors,

it would be natural to say that the loss was the consequence of the failure to lock up the house; the careless friend might be held morally and legally bound to compensate the owner for the loss just as for loss 'directly' caused, for example, by carelessly starting a fire.²¹

Hart and Honore explain that cases of providing someone (or some thing) with the opportunity or the means for acting harmfully, differ from the cases of interpersonal relationships because there is the absence of a personal relationship between the wrongdoer and the intervenor. The 'relationship' aspect of the second sense disappears in the third. These are not cases where one person does or says something with the intention that it should appear to the other as a reason for doing something." In the case of an interpersonal relationship, the cause of harm is the one of

²⁰Hart and Honore 59.

²¹Hart and Honore 59.

whom we say that he provided reasons for action; and the provision of these reasons went beyond mere advising but resembled instead inducement. The case for reasons probably is stronger when threats and force are used.²² In the case of the unlocked house, the unlocked door is the cause, for instance, and not a written invitation to local crooks to rob the house.

The provision of opportunities applies also to non-human intervention. For instance, the man to whom is committed the care of the house is equally responsible if he fails to shut windows during or before a storm. The man is the cause and is responsible for having provided the opportunity for damage. According to Hart and Honore, the storm is not an extraordinary event. Providing the opportunity is as good as doing it, for the law.

Chapter 2

The Presence of "Intervention" in the Three Notions of Causation

Two important observations need to be made here about the three concepts of causation. In all three notions there is a strong sense of the cause being an interference in events. As noted already, the first notion of causation includes the sense of interference in things. When noses and windows are broken there is usually an explanation why something has happened which ususally does not.

In the second sense of causation i.e., of giving reasons

²²Hart and Honore 187.

in interpersonal relationships, the interference in the way things usually are is more difficult to trace, but it can be done. We are not wrong if we speculate that when one person provides reasons for another person to act, the presumption of Hart and Honore is that the second person would not normally act in the way suggested by the first person. The first person's inducement is the sine qua non cause without which the actual wrongdoer, the one who is the cause-in-fact of harm, would not have acted. The presumption is that the one who suffers the inducement is morally a good person, one who if left to himself would not deliberately inflict harm upon people or cause damage to things.

In the third sense of causation, the notion of intervention or intrusion is more complex to identify than the in second sense. By the same token, it is the most interesting aspect of the whole of Hart and Honore's discussion of causation, and the more difficult to defend.

In order to detect whether there is intervention or intrusion in the usual course of events in this third sense, we must identify what, if any, would be the relation of the initial wrongful act to the harm, or potential harm. That is before the intervention which is the actual cause-in-fact, or cause sine qua non in the restricted sense of the causal minimalists. This will enable us to understand two things: first, the relation between the first and the third senses of

causation, a controversial issue;²³ and second, the importance for Hart and Honore of intervention and the nearly moral presumption of a normal or good state of things.

My presumption is that, in the third sense as in the two first senses, the intervention although it is mediated is still an intervention in a state of things which were it not for the negligent provision of opportunity, would not occur. If not for the negligently unlocked doors to the house, and barring other relevant circumstances, such as a neighborhood especially prone to robberies, the robbery would not have taken place. The normal state of things, a house with all the belongings intact and in their rightful place, would continue. In all three cases, intervention into something 'normal' is presumed. What varies it seems between the second and third senses of causation is the kind of causal action; the variation is what Hart and Honore mean, correctly, that there is only an "analogy" between "interpersonal relationships" and "providing opportunities". The reason why the similarity is not complete is that in the third sense the intervention is voluntary or abnormal.

This leads us to the next claim: if in all three conceptions there is implied the normality of things which is what is being interfered with, then there is at least some conceptual unity to common sense causation.

²³Martin, in his article, says that the first sense of causation can be eliminated. We will review his claim at a later part of the paper.

The first sense is one in which interference is direct and physical. In the other two senses, while there is causal action, it does not exclude direct, physical interference. For instance, in the second sense of causation, the one who acts after he is provided with reasons is the one who is the cause-in-fact, that is, the one who inflicts the harm or breaks the vase. Likewise in the third sense, the thief to whom, unbeknownst to him, an 'opportunity' is provided, is the one who causes the actual harm, although the provider of reasons is held responsible.

Hart and Honore's goal was to oppose the causal minimalists by showing that there is more to be said about the notion of a cause than that it is merely the sine qua non or 'cause-in-fact'. Hart and Honore show this by the application of reasons and opportunities to actions, actions which on first look are merely sine qua non or cause-in-fact, as minimalists would say. Hart and Honore pay attention to causation that occurs in the world of human interaction, not only in an empirical manner strictly. The 'inter' of interaction is stressed by Hart and Honore.

Chapter 3

Martin's Objection to the Conceptual Unity of Hart and Honore's
Notion of Causation

In the introduction to their book, the authors of Causation say that the chapters in which they distinguish 'causing harm' from 'occasioning harm' were the "most difficult to write and also no doubt the most difficult to read." The "extension of liability from a basis of causing harm to include cases of providing opportunities" is conceptually a difficult one to make. Martin intends to show that Hart and Honore have in fact not succeeded in making it.

In his book, Martin says that "despite providing a unifying idea for the various common sense notions of causality analysed by Hart and Honore, the central notion may be rejected without great loss."¹ Martin suggests the authors should clarify the status and the evidence for the central notion.

Martin deals with the central claim of the authors of Causation: that there is a central notion of causation on which the other two are modelled. Martin says "It seems possible to reject their account of the central notion of causality and yet accept their other ideas."

Martin proposes three hypotheses with which to conceive of the role of the central notion of causation. We will take

¹Michael Martin, The Legal Philosophy of H.L.A. Hart: A Critical Appraisal (Philadelphia: Temple University Press, 1987) 100.

each one in turn.

a. the historical hypothesis

In the first hypothesis Martin says

One way of understanding the thesis that the central notion of causality in common sense thinking is based on the bodily manipulation of an inanimate object that brings about certain changes in the object is to suppose Hart and Honore are putting forth the following historical hypothesis...Historically all of our concepts of causality evolved from the central notion of causality.²

Martin says of his proposed historical hypothesis that "it asserts an historical connection between the various common sense causal notions, bringing them together under the one basic idea and its extension." If the hypothesis is rejected, says Martin, another unifying idea for the various common sense notions must be sought. Ultimately Martin rejects this hypothesis.

"Even if one admits linguistic intuition as a reliable method of verifying theses about ordinary usage this would hardly verify" the historical hypothesis. After all, says Martin, the hypothesis "is not about contemporary usage, but about its historically distant origins. Thus, present-day linguistic intuition seems irrelevant. Unfortunately"

²Martin 98-99.

concludes Martin, "it is not clear that there is historical evidence to support" a historical hypothesis.

Martin begins his argument from a much earlier point than do Hart and Honore. The central issue for the authors is to convince us that it is possible, and indeed advisable, to extend to the second and third notions of causation, the first or central notion i.e., cases in which an event which is not a human action is the result, effect or consequence of another event, or of a human action (or omission). The conceptual relationship which Hart and Honore attempt to establish is between the second and the third notions on the one hand, and the first notion on the other. The first notion per se is not problematic for Hart and Honore. For Martin, though, the first notion poses an immediate problem. The internal nature or definition of the first notion of causation, however, is generally accepted. To question whether, physical bodies interact with other bodies and how human agents interact with physical bodies is not the issue for Hart and Honore. "Bodily manipulation of an inanimate object that brings about certain changes in the object", as Martin says, is not an issue for the authors. Hence, if this is the case, there is hardly any need for a hypothesis such as Martin's concerning the historical evolution of this central notion of causation.

However, Martin's first objection points also to the claim that if Hart and Honore do not consider the first notion of causation internally problematic, then maybe they ought to

have done so. The authors' 'Philosophical Preliminaries' includes a review of Hume's view of causation. But for Hume it seems the fact that things affect each other is less a problem than the pattern in which they do so, and whether we can correctly discern this pattern.

In their book, Hart and Honore rely on a relatively contemporary analysis of the meaning of (legal) causation. In their survey of case law, the majority of cases fall into the nineteenth and twentieth centuries, with one case which dates back to 1718.³ Hart and Honore focus on the legal definition and usage of causation and attempt to corroborate it from common sense notions of causation. There is an abundance of case law in that period of time. But as Stapelton remarks the authors fail to provide an empirical study of the alleged correlation.⁴ Fortunately the authors give a few case references in which judges claim to rely on common sense in matters of causation.

Hart and Honore are not concerned with "historically distant origins" of causal notions. They are concerned with those of Hume and Mill, the relatively contemporary doctrines of causation (traditional and modern), and with the evidence in the case law of judges' use of common sense. In this context, there is no need to question, as Martin does, whether

³Amies v. Stevens, (1718) Strange 127, 93 ER 428.

⁴Jane Stapelton, "Law, Causation and Common Sense," Oxford Journal of Legal Studies 8 (1988) : 123.

"present-day linguistic intuition" is relevant or not.

Martin's historical hypothesis is substantially misdirected. What is historically specific in Causation is the case law. Knowing the dates at which the cases were adjudicated at least provides one with a venue to check the temporal context of the discussion.

b. The logical hypothesis

The second hypothesis of Martin is the "logical hypothesis". "It may be argued" says Martin, that Hart and Honore

intend their view as a logical thesis, not an historical one. Thus it might be argued that in order to possess the concept of one natural event's causing another natural event, or to possess the concept of one human action's causing another human action, one must have the concept of a human action's bringing about some change in an inanimate object. This suggests the following logical thesis:...a logically necessary condition of having any notion of causality is having the central notion of causality.⁵

Martin's second hypothesis is more cogent than his first. For it seems a logical necessity indeed for the authors to presuppose the possibility of bodily changes brought about by bodies themselves, or by human action on them. Yet Martin

⁵Martin 99.

rejects the logical hypothesis. He says "One can imagine a group of people who believe that floods and other natural events intervene in the natural course of events, but that humans do not."⁶ Martin gives a brief example and concludes "To be sure, such views sound strange to us but they are completely coherent." If there are such groups of people, as Martin suggests, they certainly constitute a minority. Throughout Causation in the Law, Hart and Honore address only those groups and cultures who indeed believe that human action can cause changes to other human action, or to inanimate objects.⁷ The project of the authors does not include a comparison with other groups and cultures, for whom Martin's logical hypothesis would indeed not be valid. Martin's logical hypothesis, then, does not constitute a serious threat.

c. the psychological hypothesis

The third and final interpretation by Martin of Hart and Honore's extension of the causal notion is the psychological one: "that people learn the central notion first and then extend it in various ways." Martin says the authors provide "no evidence to support this hypothesis." and does not elaborate on this any further; presumably because it is his weakest interpretation.

Martin does not explain at all what he means by a 'psychological hypothesis'. He only says that Hart and Honore

⁶Martin 99.

⁷The Civil Code makes the same assumption.

provide "no evidence" to support such a hypothesis. Martin is somewhat mistaken. In Causation, there is some evidence not only of some notion of the 'psychological', but evidence as well of efforts by the authors to show how a 'psychological' notion of causation is in fact not sufficient for the analysis of the legal notion of causation. The authors' objections to Hume's causation serves this purpose, as do also their overall efforts to enrich the sine qua non notion of causation employed by the minimalists.

In chapter two of their book, the authors explain the central notion of causation. In their explanation, it is explicit that human beings do in fact learn, as Martin says, about the central notion (although whether they do so "first" as Martin claims, is another question). Hart and Honore say that human beings have learnt, by making appropriate movements of their bodies, to bring about desired alterations in objects, animate or inanimate, or in their environment, and to express these simple achievements by transitive verbs like push, pull, bend, twist, break, and injure.⁸

Whether it can be said that Hart and Honore claim that "people extend" the central notion to the other notions is the next problem. In Causation, the authors are concerned with the conceptual clarification of the extension, on the one hand, and with the manifestation of this extension in the language of the law, on the other. To determine whether 'people extend'

⁸Hart and Honore 28.

the notion would require empirical analysis, an element which is lacking in Hart and Honore's study.⁹ The steps through which the extension is made would have to be identifiable. Martin makes no suggestion for this task. This is not to say, however, that such an extension, through 'learning' or through another mechanism is not possible.

The authors of Causation give a review of the causal notions of Mill and Hume. Their interest in Hume in particular is founded on the Hume's attempt to show a foundation to the notion of causation. Hume provides Hart and Honore with a conception of how human beings come to know the relationships between things. Whether the humean explanation of causality is 'psychological,' and whether the explanation is similar to what Martin means by 'psychological' is not clear. Martin does not explain what he means by 'psychological'; perhaps it is to mean that people learn first i.e., sensually, empirically about the world of things (and that the world is the only source of knowledge) and then, through habits of mind, extend their knowledge of causation in various ways. This would not be unlike Hume's version of the acquisition of knowledge of causation. Perhaps it is because Hart and Honore owe an intellectual debt to Hume, that it is possible to detect a trace of the 'psychological' in Causation, in the sense understood by Martin. However, Hart and Honore explain the variation of their notions of causation from those of their

⁹Stapelton 123.

predecessors.

Most of all, Martin's three hypotheses do not pose a threat to Hart and Honore for the following reason: Martin's objections and his proposed solutions are provided for problems which do not exist at all for Hart and Honore. There is little or no evidence in Causation in the Law of a logical or historical hypothesis, as these are defined by Martin. There could be, however, some evidence of a psychological hypothesis in Causation; but without further clarification from Martin, it is not possible to make a judgment.

In a chapter titled "Philosophical Preliminaries", the authors address the conventional notions of causation of Hume and Mill, in order then to distinguish their own notion of causation. In the following part, we will review the philosophical background for the thoughts of Hart and Honore.

Part III

The Philosophical Background of Causation in the Law:

Hume and Mill

In their book, Hart and Honore review the discussions on causation by David Hume and J.S. Mill. As we have seen in Part II, the definition of causation as 'common sense' is at variance with traditional ones. The reason why Hart and Honore select Hume and Mill as their argumentative (and sequential) starting points is apparent in the authors' review of them in their chapter 'Philosophical Preliminaries.'

The authors' notion of causation relies on the notion of interference, rather than on consistency or regular sequence. A review of the notions of causation in Hume and Mill is necessary in order to heighten the distinctiveness of the common sense notion of Hart and Honore.

Chapter 1

Review by the Authors of the Meaning of Causation for Hume

For David Hume (1711-1776) causation was confined to necessary, not merely sufficient, causal connections between observable pairs of objects and events. One of the problems which confronted Hume was to give an explanation for the idea of necessity in causation without ascribing this idea to the objects themselves. "Upon the whole" says Hume in the Treatise of Human Nature, "necessity is something, that exists in the

mind, not in objects."¹ Ascribing the idea of necessity to the objects themselves would have been inconsistent with Hume's conviction that the mind's content (perceptions) is derived only from sensory data. Hume's solution to this problem was to say that the mind had the tendency to make causal connections between events and objects which it is accustomed to find in constant conjunction. Hume writes: "Either we have no idea of necessity, or necessity is nothing but that determination of the thought to pass from causes to effects and from effects to causes, according to their experienc'd union."²

According to Hart and Honore, Hume's view of causation is too simple. Hume, they say, refers to particular causes only as events or objects. Hume's analyses in the Treatise are insufficient or inappropriate for the types of cases which "permeate" law. "The category of what is spoken of as causes is not restricted" say the authors, "to 'events' or 'objects'."³ As the definition of the three notions of cause has attempted to show, in Part II, Hart and Honore have enlarged the notion of what can rank as causal. Only the first notion of causation, resembles what Hume would agree is a

¹ David Hume, A Treatise of Human Nature, ed. L.A. Selby-Bigge (London: Oxford University Press, 1965) 165-166. Henceforth referred to as Hume.

²Hume 166.

³Hart and Honore 16.

cause. There is no equivalent in humean causation for the second and third notions of cause. In Mill, Hart and Honore find corrections to this aspect of humean causation. Mill, they say, will not accept only that an "active force" is the cause of an occurrence.⁴ Mill has an enlarged notion of causation.

Chapter 2

Review by the Authors of the Meaning of Causation for Mill

The first way in which Hume's causation is inappropriate for legal discussions is that it includes only what Hart and Honore call the first notion. But there are two other ways in which Hume's analysis is not useful for the lawyer. Mill, say the authors, "differs from Hume on all of them." The next two comparisons by Hart and Honore of Hume and Mill are more important.

In A System of Logic⁵ Mill says

It is seldom, if ever, between a consequent and single antecedent that [this] invariable sequence subsists. It is usually between a consequent and the sum of several antecedents; [the concurrence of all of them being requisite to produce, that is, to be certain of being followed by, the consequent."]

Hart and Honore are satisfied with Mill in this respect for a

⁴Hart and Honore 14-15.

⁵John Stuart Mill, A System of Logic Ratiocinative and Inductive, (London: Longmans, Green and Co Ltd, 1967) 214. Hereafter referred to as Mill.

number of reasons. The authors conduct a study of causation in the law. The issues with which lawyers deal in general are complex, but they are also rich in substance. The law and legal imperatives exist in all aspects of human life. There is regulation for taxes, labour, crimes, property; the state even is subjected to legal imperatives.

Relationships between men, in the broad sense of the term (not the authors' 'interpersonal relationships') is what constitutes the complexity of an antecedent. Relationships vary greatly. Circumstances which constitute antecedents vary greatly as well. A few simple examples can illustrate this. The case in which a criminal commits a serious offence with the use of a weapon is different from a case in which another criminal commits the same offense but without the weapon. The case of a young child who injures a schoolmate during an unsupervised recess is different from the child who does so during a supervised recess. A promised shipment of goods delayed by a severe storm but which causes no loss to the promisee is different from a similar case in which there is an absence of promise to deliver and an ensuing loss.

Hart and Honore confine their study to tort law on one hand, and to what they call the 'typical perplexities' of the lawyer namely, *novus actus interveniens*, on the other hand.⁶ This restriction is sufficient to show that antecedents can be

⁶Except for a few chapters on criminal law and legal theory, Causation is directed to tort law.

more complex than Hume could have envisaged they were. The "shift in the form of inquiry" done by Mill is well suited to tort law since tort law involves the irreducible component 'man' and his relationships with other men. Hart and Honore have made a wise choice, then, in choosing Mill for a predecessor.

The third way in which Mill differs from Hume "and in so doing approaches much nearer the causal concepts of the lawyer and common sense" is the following.

For Hume, a cause had to be necessary, not merely sufficient. For Mill, on the other hand, a cause can be selected from a complex set of antecedents and thus, need not be necessary. In other words, there can be more than one cause for the same phenomenon. From Mill's Logic, Hart and Honore use this example: "if a person eats of a particular dish, and dies in consequence, that is, would not have died if he had not eaten of it, people would be apt to say that eating of that dish was the cause of his death."⁷ In other words, eating the dish would be the necessary cause of death. Hart and Honore continue with Mill's example:

there needs not, however, be any invariable connection between eating of the dish and death; [but there certainly is, among the circumstances which took place, some combination or other on which death is invariably consequent: as for instance, the

⁷Mill 214.

act of eating of the dish, combined with a particular state of present health.)⁸

Mill does not know the intellectual confines of Hume. In a later chapter of Logic, Mill says "it is not true that the same phenomenon is always produced by the same cause; the effect a may sometimes arise from A, sometimes from B..."⁹ With the third way in which Mill differs from Hume, Hart and Honore find a congenial starting point with which to construct the notion of common sense causation drawn from their abundant case law. The authors, however, make three remarks concerning Mill's analysis of causation. These are three alleged defects. These defects, in turn, and the resolutions provided by the authors are directly relevant to the criteria with which they propose to solve novus actus interveniens cases.

Three Alleged Defects of Mill's Analysis of Causation:

Hart and Honore in their 'Philosophical Preliminaries' give three alleged defects of Mill's analysis of causation. The following will study each one in turn.

a. traditional definitions of causation

The first alleged defect concerns the application of the standard of generalizability to common sense causal statements. In cases at least "where what is said to be caused is an event other than a human action"¹⁰ a comparison with

⁸Mill 214.

⁹Mill 285.

¹⁰Hart and Honore 22.

what generally happens is justified, say the authors. However, the types of generalizations which are involved in common-sense causation, and in the language of the law in particular, are "necessarily of a broader, less specific and often quite platitudinous type, and the way in which they are brought to the defence of singular causal statements is less simple than Mill suggests." say Hart and Honore. The first objection to Mill is not more specific than this. The objection refers to the difference in the type of data which is being generalized, namely, causes in the first or physical sense of the term, and causes in the other two senses developed by Hart and Honore. Mill's notion of causation is useful for certain types of causal problems but "seriously misleading as to others," such as 'providing reasons' and 'opportunities'.

b. not all causes can be generalized

The second objection is closely related to the first but is "more fundamental." It concerns the feature of causation in which a person acted for a reason (given to him by another person). This is the denotation of causation which is found amongst lawyers, historians and ordinary men, say the authors. To analyse this type of causation, they maintain, Mill's model of causation is not appropriate. The authors say "The statement that a person acted for a given reason does not require for its defence generalizations asserting connections

between types of events."¹¹ Instead, an "honest account" is sufficient to settle the issue whether or not one has 'caused' the harm . The authors add "It is no part of the meaning of such a statement that if the same circumstances recurred he would do the same again."¹² Hart and Honore are adjusting causal notions to the diversity and unpredictability of human action.

c. two types of inquiries

Hart and Honore say Mill has principally in mind the scientist's discovery of causal laws used in the explanation of occurrences. The authors say Mill "does not carry his examination of the different types of context in which causal statements are made very far."¹³ This is the authors' third objection. Hart and Honore claim Mill's examples show that "he is always thinking of a context where we ask for the cause of something because we are puzzled and do not understand how something has happened, and so ask for the cause because we want an explanation."¹⁴

The authors use this example to illustrate their point: a railway accident or someone's sudden death is puzzling since we do not know why or how it happened. The authors say an

¹¹Hart and Honore 23.

¹²Hart and Honore 23.

¹³Hart and Honore 23.

¹⁴Hart and Honore 23. The underlined is italicized in the text.

inquiry into the cause of the accident brings to light new facts which "make the difference" between having an accident and "normal functioning". Findings that the rail was bent, combined with the weight of the train, account for the train running off the lines. Hart and Honore say this type of context is explanatory, and that we find these very often in common-sense causal statements.

What 'explanatory' inquiry means, then, for Hart and Honore is the gathering of relevant facts which surround an unusual or "puzzling" event. This collecting of facts is similar to what Mill calls in Logic the 'complex set of conditions' for an event or the 'sum of several antecedents'.¹⁵

Mill's analysis is useful for what Hart and Honore call explanatory inquiries insofar as these are frequently if not always necessary in legal inquiries. However, in the legal context they claim these inquiries have a limited use. Here is their line of reasoning.

Hart and Honore say that explanatory inquiries are not the source of the lawyers' main perplexities:

These arise when, after it is clearly understood how some harm happened, the courts have, because of the form of legal rules, to determine whether such harm can be attributed to the defendant's action as its

¹⁵Mill 214.

consequence, or whether he can properly be said to have caused it.¹⁶

Unfortunately it is not entirely clear what the authors mean to say by 'the form of legal rules'; it is a safe assumption, however, that the authors refer again to the limitations of sine qua non causation and to the necessity of enlarging the concept so as to include actions, and specifically actions such as 'reasons' and 'opportunities'.

For the authors of Causation, gathering the relevant facts which precede an event is not problematic. What is problematic, however, is selecting from amongst sometimes competing factors the one(s) to be labelled 'cause'.

In an explanatory inquiry, in which we are puzzled about an occurrence, Hart and Honore say that we are concerned about something which has already happened. In this type of inquiry, our thoughts move from the later, puzzling or unusual event backwards, to something earlier in time which might explain it.¹⁷

Explanatory inquiries are essential in the legal process. However, they are not sufficient to the task of assigning

¹⁶Hart and Honore 24.

¹⁷In Causation, Hart and Honore use the example of the historian who asks 'Why?' about historical events. The authors use the historian in the discussion of types of inquiries perhaps because of the many disciplines included in the 'humanities', history uses particular, not generalized explanations in its search for truth and understanding. The analogy has been criticized, though.

liability. The law cannot ascribe liability and the duty to compensate to every earlier event simply because it appears as part of the context of the wrongful action. To do so would create an unfair burden of compensation for wrongdoers, as well as severe economic and administrative problems for the law. Likewise, as it is the authors' purpose to show, if the law confines liability to the cause-in-fact, or to the cause sine qua non, there are causally relevant factors such as reasons and opportunities which get overlooked.

The law then conducts attributive inquiries in addition to explanatory ones. In an attributive inquiry, say the authors, the historian's

thought very often takes the contrary direction; for in addition to providing explanations (answers to the question Why?) he is also concerned to trace the outcome, the results or the consequences of human actions or omissions which are his usual starting points.¹⁸

In other words, our thoughts in a causal inquiry can move not only 'backward' as they do in an explanatory inquiry but forwards as well, in the attempt to trace the consequences, effects or results of action. The reason why, according to Hart and Honore, the thought of the historian, and by analogy of the lawyer, can move in the "contrary direction" is "because the narrative of history is scarcely ever a narrative

¹⁸Hart and Honore 59.

of brute sequence, but is an account of the roles played by certain factors and especially by human agents.¹⁹

It is unfortunate for the authors to have chosen such terms as 'backward', 'forward' and 'contrary direction' to distinguish the thoughts contained in explanatory and attributive inquiries. This terminology gives the mistaken impression that explanatory and attributive inquiries are mutually exclusive and indeed 'contrary' to each other. It is important to note that while there may be movement of thought 'backward' and 'forward' over the facts, the facts themselves do not 'move'. There is only one set of facts i.e., actions such as giving reasons or providing opportunities, onto which are superimposed the various types of inquiries.

It might have been a better idea not to polarize the types of thinking which enter into causal inquiry. However, the terminology which describes the movement of the thought 'backward' and 'forward' is not entirely without justification. Hart and Honore say that history is not merely a "narrative of brute sequence," but is an account of the roles played by human agents. However misguided at times is the analogy with the historian, in this case it is well suited. When the law investigates a causal sequence, what it is trying to reconstruct is events and consequences that have a beginning point: human agents. Hart and Honore see a difference between a sequence which involves inanimate agents

¹⁹Hart and Honore 59.

(nature, animals) and a sequence which involves, at some point, human agents. A sequence which involves only inanimate things also has a starting point; this can be either in other inanimate things or in human agency. Hart and Honore's three notions of cause account for those variations. In some cases the law assigns agency to harm caused by objects i.e., cases of strict liability of owners of buildings in art.1055cc for example. But a sequence which clearly involves human agency is not, or ceases to be, merely 'brute sequence'.

The way in which Hart and Honore claim to distinguish between the two types of inquiries is with the criteria which negatives a causal connection, the voluntary or abnormal intervention.

Hart and Honore extend the notion of cause from the first to the third notion, according to "felt needs"(The authors do not specify what the 'felt needs' are). In doing so the authors unfortunately tend to polarize the types of inquiries. In his article²⁰ Fain repeats this tendency of Hart and Honore.

i. Haskell Fain's objection to the distinction between
inquiries

In his article, Fain gives four examples; two each to illustrate the voluntary and abnormal criteria for interventions i.e., for an intervention to qualify as a novus

²⁰Haskell Fain, "Hart and Honore on Causation in the Law," Inquiry 72 (1963) 505.

actus interveniens.

Fain asks us to consider a sequence which begins with leaves burning in a yard, followed by a normal breeze blowing the leaves into a house, with resulting fire. In an explanatory inquiry (or 'causal inquest' as Hart and Honore also call these inquiries) our thoughts move 'backward', to arrive at the initial fire. In an attributive inquiry (or 'tracing consequences') our thoughts move 'forward' in time, until we arrive at the fire in the house. "In both cases," says Fain, "we 'pass through' an intervening event, the normal breeze." Fain considers again the same scenario but with the intervention by a tornado i.e., an abnormal event for most cases. According to Hart and Honore's doctrine the tornado will negative causal connection, while the normal breeze will not.

Fain offers next two examples of cases that involve the voluntary criteria of Causation. A caretaker negligently leaves unlocked the front door of a house in his charge. A thief tries the door, finds it unlocked, enters and makes off with the spoons. According to Hart and Honore, Fain correctly points out, "this is a case where someone provides an opportunity for someone else to exploit." A causal inquest, concludes Fain, "would trace events back to the voluntary entry of the thief, then halt at that point." In the second example provided by Fain, A, taking proper precautions, burns trash in his yard. While his back is turned, B maliciously

carries some of the burning trash into the house and starts a fire. "A causal inquest would uncover the voluntary actions of B as the cause of the fire." In all of the examples Fain remains unconvinced that either a voluntary or an abnormal intervention can act as the cut off point of liability. He says at the end of section 2 of his article:

Is there a causal difference between the two cases? Hart and Honore claim that there is. The robbery is a causal consequence of the caretaker's action, despite the voluntary actions of the thief. A's actions in burning trash did not cause the subsequent fire because of the voluntary actions of B. The authors employ the expression 'occasioning harm' in their attempt to draw a distinction between the two cases.²¹

Fain nearly succeeds in showing how the criteria fail to distinguish between types of inquiries. In both cases there is voluntary action: in the case of burning trash, the voluntary action is B's; in that of the robbery, the 'voluntary' action is not B's, even though in fact B's action was voluntary. Rather, voluntariness is less an issue and is replaced by the provision by A of an opportunity. In both cases there is a voluntary action but in only one, according to Hart and Honore, is it deemed an intervention. Fain does not agree to the difference. Apparently, voluntariness if it is present at

²¹Fain 329-330.

all in the actions of the intervening agent should determine the break in causation. This seems to be Fain's position. The reason why Hart and Honore argue that a voluntary intervention will negative causal connection in many but not in all cases is the following:

As Hart and Honore explain in the Preface to the second edition, causing harm is only one ground for responsibility, although "centrally important and common". "In such cases [as giving reasons and providing opportunities] the prior actor who provides the opportunity or reason may be liable for the outcome of another's voluntary action."²² There are a few instances in which a human agent is liable despite a voluntary (or abnormal) intervention. In a segment titled "The rationale of common-sense causal principles as a basis and limit of responsibility'," the authors attempt to explain why a person should be held accountable for the provision of an opportunity. Hart and Honore use the expression "individuating action" to describe how A's action ends and B's begins:

The idea that individuals are primarily responsible for the harm which their actions are sufficient to produce without the intervention of others or of extraordinary natural events is important not merely to law and morality, but to the preservation of something else of great moment in human life. This is the individual's sense of himself as a separate

²²Hart and Honore LXXIX.

person whose character is manifested in such actions. Individuals come to understand themselves as distinct persons, to whatever extent they do, and to acquire a sense of self-respect largely by reflection on those changes in the world about them which their actions are sufficient to bring about without the intervention of others and which are therefore attributable to them separately.²³

This is the authors' rationale, i.e., individuating action, for separating the actions of A and of B in cases of new intervening events. This explanation is sufficient, perhaps, to explain the provision of an opportunity. Providing an opportunity can be causal insofar, it seems, as it is a mistake, in the general sense of the word (or a fault in the language of civilian law.) If A provides an an opportunity for B to steal spoons, the first, and wrongful, action is A's. There seems to be a strong conceptual link between providing an opportunity, and mistake or fault, although the authors do not speak of this. Providing opportunities, however, is merely an extended notion of physical causation. The notion of a fault in the first agent's actions would support Hart and Honore's claim that A is liable "despite," as Fain says, a voluntary intervention by B. Hart and Honore use personal identity as a rationale; but fault, or some similar notion,

²³Hart and Honore LXXX.

would be a better one.

Cases, however, where A is not liable "because", as Fain says, of an intervention by B, require a different explanation than the one provided above. If we are limited to Hart and Honore's concepts of the third notion of causation, of identity and intervention, the rationale is not very convincing. Why indeed would A not be liable despite occasioning harm? Hart and Honore say that voluntary action is the criterion. But we have seen the oddity of the definition of voluntariness: it is very narrowly defined in terms of legal and moral obligations. Perhaps voluntariness should be included as part of Hart and Honore's "individuating action" and "identity" notions. In any event, voluntary action negatives, in fact, an original action which is faulty; it is this which is not easy to agree to. Fain's objection, then, is very relevant and points to real difficulties in the formulation of the authors' thoughts both about voluntary interventions, and the notion of occasioning harm.

ii. Fain's second objection

Haskell Fain claims "It is not immediately apparent why the authors contend that tracing causal consequences is different from conducting causal inquests." and further "it is not clear why Hart and Honore claim that tracing consequences is not the inverse of conducting inquests."²⁴

²⁴Fain 328-329. See also W.H. Dray, "Causal Judgment in Attributive and Explanatory Contexts," Law and Contemporary Problems 49.3 (1986): 13-22.

Fain relies very much on the backward-forward metaphor of Hart and Honore. This metaphor is misleading, and it is a mistake to rely on it, as Fain does in his review.

What lies behind the metaphor is the distinction between interventions which can be generalized, and interventions which can not. In a movement of thought backward, i.e., in a causal inquest or 'explanatory' inquiry, it is possible to make generalizations, because there is a known sequence of events or actions. This is the traditional approach to causation, of identifying causes by means of the regular conjunctions between events. In a movement of thought forward, however, it is less possible to generalize because of the nature of the inquiry; the task is to identify the particular causal agent, rather than to trace regularities. Interventions by human agents primarily, but interventions by things as well (because human agents are accountable for things under their care) are much less predictable and thus, much less amenable to generalization. Hart and Honore show this well in their description of the second notion of causation. Moreover, when the law traces consequences (which is in fact what it does in its attributive inquiries), it never does so abstractly or in general. It is not possible to attribute responsibility, and the duty to compensate, in general. If that were the case, plaintiffs would never obtain compensation.

To summarize, then, it appears that there is indeed a difference between the two types of inquiries, but that this

difference is obscured by metaphorical language. Fortunately, the authors of Causation can continue with their stream of thought without too much damage to the credibility of their project.

iii. the typical perplexities of the law

Of the three alleged defects in Mill's analysis of causation, the third is crucial to the project of Hart and Honore. The authors claim that the explanatory inquiry is what appears exclusively in Mill's analysis of causation. Whereas for the law, claim Hart and Honore, attributive inquiries are also a necessity. When they address these types of inquiries Hart and Honore say

Typically what precipitates these difficulties [of attributing liability] is that, among the conditions required to account for the harm which has occurred, there is found in addition to the defendant's action a factor (usually a human action or some striking natural phenomenon) which itself has some of the characteristics by which common sense distinguishes causes from mere conditions; so that there seems as much reason to attribute the harm to this third factor as to the defendant's action.²⁵

At this point in Hart and Honore's thought there appears to be a refinement, perhaps a narrowing. For the authors equate, it seems, the law's problems with causation to cases of novus

²⁵Hart and Honore 24.

actus interveniens. They then set themselves the task of constructing a solution to these types of cases i.e., that there be a voluntary or an abnormal intervention. Perhaps Hart and Honore effect this equation in order to further highlight the shortcomings of the sine qua non solution to causation. Insofar as this is the case, it seems they are successful.²⁶ However, in the broader context of law we should be wary of such narrowings. Novus actus interveniens cases show well the necessity for conceptual clarification of the limitations of sine qua non causation; but we must be able to retreat from this focus. Whether or not Hart and Honore can lead us to such a retreat is not clear. There is another comment to be made regarding the 'typical perplexities' of the law. The third notion of causation, 'providing opportunities', is conceptually more important than either of the two others. This is not to say that the third notion is detachable from the first two, as Martin claims; but undeniably the third notion plays a major role in Causation. In contrast, for example, there is little or no attention accorded to whether in the second notion there is not also a new intervening event. This could appear insofar as the factor which is new is the reason provided by another person. It would be how the

²⁶ Stapelton says in her article that the thesis of Hart and Honore "appears at its most powerful in explaining the outcome in the so-called 'ulterior harm' cases." There are cases in which, she says, causal connection is not negated by an intervening factor which also satisfies a but-for relation to the harm.

intervention appears in the character or intentions of the actual wrongdoer; the presumption would be that, if not for the intervention by 'reasons', the latter would not have acted wrongfully, or would have acted wrongfully to a different degree. If we are not careful we could interpret Causation, and Hart and Honore's project, as a test of the criteria for solving novus actus interveniens cases, rather than as a study of (common-sense) causation in the law.

Martin and Fain have attempted to show that Hart and Honore's attempt to formulate the notion of causation is not entirely successful. Martin is not convinced that there is unity to the tripartite notion of causation. We have shown that Martin is not completely able to sustain his claim. Fain, for his part, has objected that the criteria, voluntariness in particular, does not enable a distinction between types of enquiries. The replies were that interference is the notion which can provide the alleged missing unity to the notion of causation. Hart and Honore do well, however, to avoid using interference in all three notions of causation, since this would allow the infiltration of moral issues into issues of causation. The reply to Fain is that Hart and Honore have inadvertently polarized the movement of the thought that seeks to identify causes from mere conditions. The thought that Fain objects to what is, in our opinion, a mistake in the thought of Hart and Honore, weakens considerably his comment.

Assuming, then, for the sake of argument, that voluntary

and abnormal interventions can indeed be considered factors which can negative causal connections, let us review what commentators say about the criteria per se.

The task now is to determine if the criteria are valid, in order to attempt the comparison with the civilian cases.

Part IV

Voluntary Intervention

The common sense notion of causation may be salvaged if we detach it from the objections of Martin and Fain. If the notion is coherent to some degree, even only to a slight degree, we can focus on the question whether the criteria which identify new intervening events is workable. If the criteria appears workable there is reason to think it could be transposed into the civilian context of civil responsibility.

In Causation, Chapter six is used by the authors

"to establish that courts have often applied, in their determinations of causal questions, a central concept in which great emphasis is laid on voluntary action or abnormal and coincidental events as negating causal connection."¹

The 'causal connection' to which Hart and Honore refer is the first type of causal connection but with a proviso: in a connection which is 'negated' by an intervention we must speak in such terms as if A had hit B directly. However, because A is no longer the only causal factor in the production of the harm, we can not speak in terms of the first sense of causation as described previously. However, this is not to say in a novus actus interveniens case no direct causation occurs; merely that it is performed by the second, not the first wrongdoer. Hart and Honore say "the general principle of the traditional doctrine is that the free,

¹Hart and Honore 130-131.

deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant, negatives causal connection." ² In the first edition of Causation the authors say that the act, to be voluntary, must be intended to produce the consequences which in fact it produced. In the second edition the authors say "this was a mistake. It is clear that the intervening act can be voluntary in the full sense though it is not intended to produce the harm that in fact ensues." ³ Extending liability to include cases of occasioning harm, as Hart and Honore claim to do is a difficult task. Having to show an intention to produce certain consequences would increase the difficulty of formulating a workable sense of causation. Hart and Honore wisely restrict the scope of their definition this way:

The intention of the intervening actor is, however, relevant in the sense that he must intend to exploit the situation created by the defendant, i.e., to treat it as providing the opportunity or occasion for a certain course of conduct." ⁴

Chapter 1

Definition of Voluntary Intervention

The way in which Hart and Honore define the voluntary intervention is the following: their use of 'voluntary' and

²Hart and Honore 136; (*italics by the authors*)

³Hart and Honore 137.

⁴Hart and Honore 137 note #25.

'not voluntary' "depends on a conception of a human agent as being most free when he is placed in circumstances which give him a fair opportunity to exercise normal mental and physical powers and he does exercise them without pressure from others." The first and least complex example of non-voluntary conduct is physical compulsion.⁵ Cases of non-voluntary conduct which are "not unlike physical compulsion" include concussions, shock, dizziness, fright and hypnosis.⁶ The more interesting, and controversial cases of non-voluntary conduct come later in Hart and Honore's list. These include the preservation of property, self-preservation, the safeguard of other rights or privileges,⁷ legal and moral obligations, unreflective acts as well as mistake, accident, opportunities taken, routine and independent discretion, and earned benefits.⁸

There are a number of remarks to be made about Hart and Honore's definition of voluntary conduct. For the authors the human agent is 'most free' when he is not suffering from various types of constraints, such as those listed above. It is not entirely correct to define 'voluntary action' in this way, for defining action in this way is to place it in a legal

⁵Hart and Honore 142.

⁶Hart and Honore 143.

⁷Hart and Honore 146.

⁸The last few in Hart and Honore's list, such as mistake, accident and negligence, will be dealt with in a later part.

vacuum. In general, to define voluntary action as one performed without constraint is at best unrealistic. Human action is hardly ever without some constraints which render it not absolutely unconditional. In the case of Hart and Honore's definition of voluntary action, the context of both the action and of its analysis is legal. The nature of the context and the fact that context matters to Hart and Honore is evident in their list of what constitutes a constraint.

If we read closely the list of non-voluntary conduct we find a pattern. For the authors, conduct is non-voluntary which aims to protect, respect or preserve the people or things which the law itself says deserve to be protected, respected or preserved. This correlation is what constitutes, I think, the legal context for Hart and Honore's definition of voluntary conduct. For example, in the case of an intervening act done to preserve property, during which plaintiff is injured, the act is not voluntary and will not constitute a 'break' in causal connection. Hart and Honore say that we do not expect a person to abandon valuable property if there is a chance to save it.⁹ Likewise, an intervening act of 'self-preservation' is regarded as unfree if the actor had literally a choice but not a fair choice, the alternative being a risk of injury or death.¹⁰ Hart and Honore in their survey of case law, hope to find voluntary action defined as the ability to choose absolutely free from constraint. They theorize that

⁹Hart and Honore 146.

¹⁰Hart and Honore 144.

voluntary conduct occurs only in few cases; these include cases in which there is no constraint such as the need to preserve property or one's rights, or respect one's legal or moral duties. The apparent correspondance between voluntary action and the types of things which the law tends to enforce, in my words, is what constitutes the legal context of Hart and Honore's thought. Strictly speaking, this correspondence is not wrong. It is a fact that laws are made to protect some things. The drawback, however, is the consequence that conduct is not voluntary in this context, given the context's various constraints.

It appears that Hart and Honore give a place of honor to the legal context. Voluntary action is defined in an unusual way already. Hart and Honore allow human action to be infiltrated by the aims of the law. Obligation, regulation, protection and, in criminal law, punishment, are the imperatives of the definition of voluntary action. For Hart and Honore the law is pervasive, to the point of distorting their conception of voluntary action.

a. value judgments

Somewhat the same thoughts appear in the literature which reviews Hart and Honore but they are expressed with different words. What is the issue in general for the critics is the presence of value judgements or of interests in the determination of common sense causation.

For example, Stapelton says that voluntary and involun-

tary acts are defined "in an odd way."¹¹ She says the definition of 'involuntary' is so wide that it covers virtually all but deliberate acts. For example, it covers acts done under moral or legal obligation, with the result that the intervention of a doctor to treat the victim of a road accident, for example, is classed as 'involuntary'...This is a remarkable departure from ordinary usage for authors committed to analysis of the accurate use of plain language. ¹²

Stapelton adds that the definition of involuntary action serves to disguise the fact that the division between those acts which negative causal connection [in the first sense] and those that do not appears...to be value-based, that is, to depend on the evaluation of the interest served by the intervening act.¹³

Indeed, Hart and Honore say under the heading 'legal obligation' that "the law adopts the view that the performance of a legal obligation, where choice is concerned as not wholly free because of the pressure of duty, does not negative causal connection." ¹⁴

The importance of a judgment that is value-based, as

¹¹Stapelton 124.

¹²Stapelton 124-125.

¹³Stapelton 125.

¹⁴Hart and Honore 147.

Stapelton claims is the case, should be measured against the type of causal model which Hart and Honore attempt to construct. In many disciplines in the social sciences, a judgment which is 'value-based' would not be acceptable. In such a context Stapelton's comment would be appropriate. However, the context of Hart and Honore is not the social sciences, it is the context of legal responsibility. Moreover, as we have seen in the description of common sense causation, their notion of causation is 'extended' so as to include a broad range of human action, broader than the 'A hit B' cases. This broad range is less empirical and less amenable to such investigation.

Hart and Honore believe, it appears, that a correlation between the interest served by an intervening act and the pressure of a legal duty is not problematic. Hart and Honore hold fast to the legal context for their study of causation. Hence it is not so surprising to find that an obligation (of any type) is compulsory. Nor is it surprising that, in consequence, the doctor of Stapelton's example is indeed not acting voluntarily.

Insofar as the evaluation of the interest served by the intervening act is done within the legal context of obligation then Hart and Honore are consistent in their analysis, and justified by its context. Having to exceed the boundaries of

the factually given is not, per se, disallowed. Howarth¹⁵ addresses somewhat this problem.

In his article, he says "judgments about what is sufficient knowledge for making an informed choice and judgments about whether one has "no real choice" because one must elect one of two "evils", cannot, says Howarth, "be resolved by factual information about the defendant or the situation alone."¹⁶ Howarth uses the following example and others to make his point: D injures P in a road accident. P refuses to have a blood transfusion for religious reasons. With the transfusion P would have survived; but instead, P dies. "From P's point of view" says Howarth "her intervening act is not fully voluntary because it is a choice between two evils. Whether a court should so treat it, however, involves issues of religious tolerance and judgments of what behavior counts as reasonable." Howarth says such judgments are not "purely factual".

W.H.Dray says "assessing the voluntariness of the second agent's action" requires a "value judgment."¹⁷ Here is how he makes his point.

Dray reviews the types of actions which Hart and Honore say are not voluntary. Beginning with the "least problematic"

¹⁵David Howarth, "Causation in the Law," Yale Law Journal 96 (1987): 1389-1424.

¹⁶Howarth 1514.

¹⁷W.H. Dray, "Causal Judgment in Attributive and Explanatory Inquiry," Law and Contemporary Problems 49.3 (1986) : 18.

cases in which "an action is not voluntary if the agent lacks adequate bodily control or the means of expressing his will," Dray continues: an action is non-voluntary also when, "and more interestingly" it is done "in response to a threat, when the action is coerced, or done under pressing obligation, when the action is a matter of duty, or is the one real choice in a difficult situation." The author then makes his point directly:

But to decide whether an action was in fact coerced, it is necessary to judge to what extent an alleged threat justified the agent's conclusion that he had to act as he did; and this requires an estimate of the importance of the interests threatened. If an action is more likely to be viewed as involuntary when a gun is pulled than when the "threat" consists of the promise of a frown, this difference surely has a moral basis. Similarly, whether an agent was in fact obliged to do what he did is a question that requires a judgment of the validity of the alleged obligation.¹⁸

The reason why there is objection to value-relatedness in the determination of a voluntary intervention is due to a claim by Hart and Honore in the Preface to the second edition of their book. In a short essay titled "The limits of legal responsibility"¹⁹ Hart and Honore say that there is a total of five

¹⁸Dray 18. The underlined is in italics in Dray's text.

¹⁹Hart and Honore XLVII-LI.

limits (or limiting ideas) of legal responsibility. These are the ideas of necessity, later intervention, probability (including foreseeability), the scope of the rule of law in question, and equity. The authors specify that the first two i.e., necessity and later intervention "count from a common sense point of view as 'causal', if we take 'occasioning harm' as being in a broad sense a causal relationship." The last three i.e., probability, the scope of the rule and equity "count as non-causal."²⁰ The authors make this addition to the second edition as a reply to critics of their first edition. Hart and Honore say that in the first edition they were accused of "distorting the relation of legal policy to causal issues." The authors say that causation was their main issue, but make the correction nonetheless, in their second preface.

Dray's and Howarth's point is that judgments by the courts about the voluntariness of an action are not sufficiently factual; whereas legal judgments presumably ought to be so.²¹ Hart and Honore claim, however, that assigning limits of legal responsibility in cases of later intervention 'count as causal'.

What has gone wrong? When the English courts in the authors' sample make judgments about the voluntariness of an agent's action, they probably do need to refer to more than

²⁰ Hart and Honore XLVII.

²¹ It is not entirely clear whether judgments are always completely factual.

factual information about the case and the defendant's situation, as Howarth says. However, the courts' judgments have a limited horizon; their judgment is not general or absolute. One type of limit on that judgment is the legal context, the same legal context as we find in Hart and Honore. Courts are bound to judge how obligations are fulfilled and how privileges are awarded. The fact that they make judgments is less an issue than the manner and method of their deliberations.²²

In general, courts are not interested in voluntariness per se but on the correlation between the intervening agent's action and the reason for the action. The courts have the same duty (or the similar duty) as the intervening agents: to follow rules and obey duties as well as to enforce them.

If there is a problem at all it would seem to lie less with the alleged value-relatedness than with the definition of voluntariness. According to our authors, an action is not voluntary when it is done out of some type of obligation or duty. What seems to escape Hart and Honore, is the thought that an action done under legal or moral obligation carries a logic of constraint, as is the case when it is called involuntary. An action not done voluntarily, however, in that sense of the term, need not always carry a negative denotation. Hart and Honore have a broad definition of what is non-voluntary conduct; likewise what is voluntary is very narrowly defined.

²²For example, which sources are used to support decisions, as well as the strength of the analogies which are drawn between these sources.

That Hart and Honore have such a broad range of involuntary conduct perhaps indicates their inherent wish that conduct be voluntary. For example, that the benevolent intervention by the doctor be termed 'voluntary; as Stapelton would agree, to define the doctor's intervention as voluntary would be more sensible. By excluding as 'involuntary' much human action that intervenes in other actions and events is to be somewhat.

Acting under compulsion of some kind of duty, thus 'involuntarily', is not necessarily a bad thing. Hart and Honore seem to think that it is, and this is unfortunate.

Hart and Honore hope that common-sense notions of causation will be used by the courts as alternatives to extremes of sine qua non causation and policy. The success of their enterprise hinges largely on whether or not the criterion for the new intervening event is workable by itself, without recourse to policy, or at least not before causal limitations have been set by common-sense notions.²³ If, as commentators claim, facts alone are not sufficient to determine whether an intervention is voluntary, then Hart and Honore may have failed to prove that common-sense language in the law can resolve cases of novus actus interveniens. Even if that is the case, the authors surely have not failed in showing the limits of sine qua non causation by exposing how much more is involved in the causation of human actions and relationships.

b. morality in causation: Fain's third objection

²³Hart and Honore XLVII.

Before we proceed to abnormality, the second criterion for interventions, there is another type of comment directed against the determination of the voluntariness of an intervening action. This comment is directed not at the measure of interest involved in an action but at morality.

In his article, Fain says "Hart and Honore often confuse causal questions with questions of moral responsibility".²⁴ The reason why Fain's comment is of relevance to our problem is due to Hart and Honore's claim to use only common-sense causation to determine causal issues. An intrusion of other types of criteria in causal determinations is a symptom that Hart and Honore are not entirely successful in showing clearly and unambiguously what they mean by common-sense notions of causation and particularly by interventions which negate them. Common sense is important to Hart and Honore. It is preferable to the success of their two stated goals that common sense is used in causal determinations in the law, not moral judgments, policy or the evaluation of interests. Fain makes his point as follows:

He says there is only one instance in Causation where Hart and Honore seemed "explicitely aware of the problem of demonstrating the difference between saying 'A is morally blameworthy for harm to B' and 'A caused harm to B'."²⁵ In those pages, says Fain, Hart and Honore "apparently contend

²⁴Fain 332.

²⁵Fain refers to pages 271 of the first edition of Causation; the location in the second edition is 301-302.

that "situations where A intends to and does harm B only with the aid of fortuitous 'intervening forces'...are examples of which we may say correctly that A is blameworthy for harm suffered by B, although A has not caused it."²⁶ Fain then makes his point:

May one not argue, however, that in such situations A is not morally blameworthy for the harm suffered by B but only for attempting to cause the harm? I claim then that Hart and Honore fail to show clearly that cases in which A causes harm to B are not coextensive with cases in which A is morally blameworthy for harm suffered by B.²⁷

To illustrate his point Fain uses the following example. Suppose, he says, A has endangered C, and B is harmed while trying to rescue C. The courts often hold A liable for harm to both B and C. But does A cause harm, asks Fain. B's action in trying to save C was voluntary and should negative causal connection between A's action and B's harm during the rescue attempt. Hart and Honore, says Fain, maintain that the courts are justified in holding A liable for harm to B because, appearances to the contrary, A has in fact caused it. "This sleight of hand is achieved by claiming that B's action in trying to rescue C was not really voluntary, so does not negative causal connexion." Then Fain asks

What has gone wrong? The disposition to merge causal

²⁶Fain 334.

²⁷Fain 334.

and moral issues is here in evidence. B's attempted rescue is praiseworthy and so, a fortiori, not blameworthy. If not blameworthy, then there is a disposition to say that B has not caused harm to himself, even though he would not have been injured but for his rescue attempt. The authors argue [says Fain] that the recognition of his moral obligation to save C limited B's freedom of choice. If his freedom of choice was limited, however, B's behavior could not have been voluntary. The curious consequence is reached, adopting this analysis, that moral behavior (because it is not voluntary) is not praiseworthy.²⁸

c. Reply to Fain's Third Objection

A number of remarks are in order concerning Fain's objection. Part of Fain's discontent with the distinction between moral and legal responsibility comes from the fact that Fain is not convinced that liability can be extended to include cases of providing reasons and creating opportunities. A great deal of Fain's thought in this, the third claim which he makes in his article, lies in his objection to this basic tenet of Hart and Honore's thought.

In Causation there are two instances in which the authors discuss the relation and the differences between moral responsibility or blame and causal or legal responsibility. Hart and Honore say

²⁸ Fain 335.

in both law and morals the various forms of causal connection between act or omission and harm are the most obvious and least disputable reasons for holding anyone responsible. Yet, in order to understand the extent to which the causal notions of ordinary thought are used in law, we must bear in mind the many factors which must differentiate moral from legal responsibility in spite of their partial correspondence.²⁹

The authors give three factors which differentiate legal from moral responsibility. These are, in brief, (1) the "general social consequences" which are attached to legal judgments but not to moral judgments; (2) the thought that "causing harm of a legally recognized sort or being connected with such harm in any of the ways that justify moral blame, though vitally important and perhaps basic in a legal system, is not or should not be either always necessary or always sufficient for legal responsibility"; and lastly (3) "morality can properly leave certain things vague into which a legal system must attempt to import some degree of precision." i.e., in morality we can evade more easily the complex issues of whether and, if so, which of the morally significant types of connection between action and harm exists. In law, such issues are less evaded.³⁰ Granted, these differences are on a much more

²⁹Hart and Honore 66.

³⁰Hart and Honore 67.

general level than, for instance, the comparisons between sine qua non and common-sense causation. But they do show 'explicitly' the awareness by the authors of Causation of the differences between moral and legal responsibility.

Since a large part of the stated goals of the authors as well as a large part of their book itself is devoted to the third notion of causation, their second distinction of the moral issue is important.

Hart and Honore use the example of A who "throws a lighted cigarette into the bracken which catches fire. Just as the flames are about to flicker out, B, who is not acting in concert with A, deliberately pours petrol on them. The fire spreads and burns the forest. A's action," say the authors "whether or not he intended the forest fire, was not the cause of the fire: B's was." To agree with the conclusion that B, not A, caused the fire we must first agree that liability can be extended to include cases of occasioning harm. Fain does not, or at least is very skeptical.

Hart and Honore explain how B, and not A, is the cause of the fire: B's intervention is voluntary and "displaces the prior action's title to be called the cause."³¹ And further, "B in this case was not an 'instrument' through which A worked or a victim of the circumstances A has created." B has freely exploited the circumstances created by A. Then Hart and Honore come to the point which interests us i.e., how they distinguish causal from moral responsibility:

³¹Hart and Honore 74.

Compared with this the claim of A's action to be ranked the cause of the fire fails. That this and not the moral appraisal of the two actions is the point of comparison seems clear. If A and B both intended to set the forest on fire, and this destruction is accepted as something wrong or wicked, their moral wickedness, judged by this criterion of intention, is the same. Yet the causal judgment differentiates between them. If their moral guilt is judged by the outcome, this judgment though it would differentiate between them cannot be the source of the causal judgment; for it presupposes it. The difference just is that B has caused the harm and A has not.³²

For Hart and Honore the causal judgment, on common sense principles, distinguishes between the actions of B and those of A. The causal judgment is the basis for further judgments; these can be moral or legal. This is correct insofar as the extension of the notion of cause is conceptually relatively sound.

Hart and Honore in these two segments are not completely concerned with showing the 'moral blameworthiness' of one or the other actor. Their predominant concern, to the exclusion of other issues, is causation.³³ However, it is possible to get at the issue indirectly. Fain says that Hart and Honore fail to show that cases in which A causes harm to B are not

³²Hart and Honore 74.

³³Hart and Honore XLIII.

coextensive with cases in which A is morally blameworthy for the harm to B. In other words, cause and blame coexist.

Fain is mistaken. The context of the study of Hart and Honore is important. The law's task in civil responsibility (or torts) is to compensate victims for the harm or damage which they or their property have suffered. To fulfill this task fairly to both victim and wrongdoer involves consideration of, among other things, the three factors above. Hart and Honore do not think that A's behavior is less reprehensible morally than B's; only that causally and legally speaking A did not cause the harm. A has merely occasioned the harm. On common sense terms, 'occasioning' is not the same as 'causing'.

A final comment about Fain's objection concerns his example. Usually in cases of intervening events, Hart and Honore discuss the harm to the victim more than the harm to the intervening agent. In the case of Fain, however, the example used is of an attempted rescue in which the rescuer himself is injured in his attempt. In Causation's Index, 'rescue' is listed in only two places, pages 75 and 147-48.³⁴ In Hart and Honore's very brief mention of the rescuer's duty they say if "a person attempts a rescue when not under an obligation legal or moral to do so his act will

³⁴Of the second edition, not the first. Fain quotes the first edition of Causation, having published his article in 1969. In the second edition, the corresponding pages are 72 and 139.

negative causal connection."³⁵ The authors do not mention here the case in which the rescuer is himself injured, and whether the initial wrongdoer is liable for this harm. At the second place where 'rescue' is mentioned, erroneously on page 75 (rather than page 76) a case similar to Fain's does appear. In such cases, the rescuer " 'had no choice' to do what he did."³⁶ A has created a "predicament for B narrowing the area of choice so that he has either to inflict some harm on himself or others, or sacrifice some important interest or duty." B's action is the outcome of a choice between two evils, forced on him by A, say Hart and Honore. A's action is the cause of the injuries, in the final analysis.³⁷

Fain's analysis is correct until he considers B's action as 'praiseworthy'. For Hart and Honore praiseworthiness is always a second priority to causation in determining legal responsibility. That B's action is "praiseworthy and so, a fortiori, not blameworthy" is not an issue for Hart and Honore. Fain follows with what seems a fallacy of equivocation on the term 'praiseworthy'. In the context of Causation, blameworthiness would have some relevance to harm caused to another person than the intervenor; whereas for Fain the harm in his example is to B himself. This is not only equivocal but lacking in 'common sense'. It is correct to say B's "freedom

³⁵Hart and Honore 148.

³⁶Hart and Honore 76.

³⁷Hart and Honore 77.

of choice was limited"; Hart and Honore say likewise in their example. B's action could then not be voluntary; this too is consistent with the authors of Causation. Curiously, though, Fain arrives at the same conclusion as we have, regarding the (denotation) of a non-voluntary intervention. Namely, moral behavior is not praiseworthy because it is not 'voluntary'. However, as concerns the nature of the intervention, Hart and Honore's concern except in cases of rescue is with harm to the victim. It does not matter to them in their context that action is praiseworthy; what matters is a workable definition of voluntary action.

Surprising consequences follow from the definition in Causation of voluntary action. The most surprising is that involuntary intervention is robbed of any benevolence it may have. In a twisted way this is supportive to common sense causation.

Chapter 2

Abnormal Intervention

The task of distinguishing whether an intervention is normal or abnormal is part of what the authors call the explanatory inquiry. "It is important to remember" they say, "the general form of the causal questions with which we are concerned: 'Is certain harm the consequence of a certain wrongful act given the presence of a third factor?'"¹ In other words, the authors' query is whether the harm or damage can be attributed to the defendant in spite of the presence of an abnormal intervening event.

a. definition of abnormal intervention

In Causation, abnormality is discussed in more than one place in the text and, it seems, in more than one way. Indeed, the definition of abnormality is closely associated with the definition and conception of coincidence.²

By 'coincidental' the authors mean the following:

We speak of a coincidence whenever the conjunction of two or more events in certain spatial or temporal relations (1) is very unlikely by ordinary standards and (2) is for some reason significant or important,

¹Hart and Honore 16.

²Reviewers of Hart and Honore do not always use the term 'abnormal'. Howarth, for instance, speaks in the same sentence of voluntary and coincidental interventions (see David Howarth, "Causation in the Law," Yale Law Journal 96 (1987) 1389.), while Foot in her article does not make the distinction, or mention the term at all (see Philippa Foot, "Hart and Honore: Causation in the Law," Philosophical Review 72 (1963) 505.)

provided (3) that they occur without human contrivance and (4) are independent of each other.³

To illustrate their claims, the authors use this example. A hits B who falls to the ground stunned and bruised by the blow; at that moment a tree crashes to the ground and kills B. The issue is whether A has killed B (committing a murder) or whether, irrespective of A's intentions, B was killed by the tree.

The authors analyse the case using the four steps enunciated as constituting a coincidence. They claim that the example of the tree which falls just as B is struck down satisfies the four criteria. First, they say, while neither event, i.e., a person striking another and a person being struck by a tree, is very rare or exceptional, their conjunction, however, is "very unlikely when judged by the standards of ordinary experience." Second, they say, the conjunction was "causally significant" since it was a necessary part in the process which has led to B's death. Thirdly, Hart and Honore say that

This conjunction was not consciously designed by A; had he known of the impending fall of the tree and hit B with the intention that he should fall within its range, B's death would not have been the result of any coincidence. A would certainly have caused

³Hart and Honore 78.

it.⁴

This satisfies the requirement that there be no human 'contrivance,' i.e. while there is human action, it is not deliberate or intentional. And lastly, each member of the conjunction is independent of the other whereas, say Hart and Honore,

if B had fallen against the tree with an impact sufficient to bring it down on him, this sequence...though freakish...would not be a coincidence and...the course of events would be summarized by saying that in this case, unlike that of the coincidence, A's act was the cause of B's death, since each stage is the effect of the preceding stage.⁵

In the definition of coincidence, the notion of causation in the first sense of the word, i.e., direct, physical, reappears. In the case of the coincidence, the tree's fall is not physically related to the previous action of A, whereas in the case in which B's fall dislodges the tree and kills him, there is some physical connection between A's initial action and B's ultimate death. There is a domino effect in the second case which is absent in the first, a "dependence" of one event on the other. In this case A can be responsible, even if he did not intend to kill B.

⁴Hart and Honore 79.

⁵Hart and Honore 79.

Hart and Honore make a further distinction to the notion of coincidence which brings the definition closer to the legal context in which it is meant to be used. There is a legal notion of coincidence which uses implicitly the general notion of coincidence enunciated above, i.e., the one with the four characteristics. The special application of the general notion of coincidence to causal questions of the legal type, say Hart and Honore, is that "a conjunction of events may be causally significant because their occurrence in some spatial or temporal relationship is necessary for the production of some harm which has occurred." Most often, add the authors, it is the occurrence "of an event during the short period occupied by another that creates doubt." An example illustrates their point: A is run over by defendant's negligence and suffers injuries; on his way to the hospital A is struck by a falling tree and is killed. This is deemed a coincidence since, in addition to the other required factors, in this case "it was very unlikely that, in an interval of time so short as that during which the victim passed under the tree, the tree would fall on him."⁶

By specifying the short period of time during which a conjunction of events takes place the authors are, in my opinion, keeping their definition of causation in the realm of the particular, and thus fit for the legal context. For it is a feature of the causal analysis in the law that it concern

⁶Hart and Honore 164.

itself with particular, not generalized (or generalizable) sequences.

The notion of coincidence seems more useful in a comparison of civilian case law than the notion of abnormality. The specification of a time frame for the coincidence should be useful in any comparison of concepts. In the few cases from civilian jurisprudence which have been selected there is no mention of an 'abnormal' event or action, although there is of 'prevision raisonable' (in the Beaudoin case). Let us turn now to the definition of abnormality.

The basic principle is that normal physical events, even subsequent to the wrongful act, do not relieve a wrongdoer of responsibility but that an abnormal conjunction of events (in this case the wrongful act and the third factor) negatives causal connection, provided that the conjunction is not designed by human agency. The third factor must, however, be an event later in time than the prior contingency. Abnormal circumstances of the thing or person affected, existing at the time of the prior contingency, do not negative causal connection. The third factor must also be causally independent of the prior contingency.⁷

The place which the notion of coincidence seems to occupy within the context of abnormality is the following. The basic

⁷Hart and Honore 162-63.

principle for an abnormal intervention includes the presence of an "abnormal conjunction of events"; it is this that counts as the coincidence. Part of the definition of abnormality is very similar to that of coincidence, for example, that the conjunction not be designed by human agency. Hart and Honore show this well with the example of the falling tree.

There is a great difference from coincidence, however, in one aspect of the notion of abnormality. This is the proviso that an abnormal circumstance which exists at the time of the initial wrongful action does not negative causal connection, while one which exists subsequently to it does negative the connection.

b. Philippa Foot's objection

Philippa Foot in her article⁸ reviews Hart and Honore's notion of abnormality. Because of an apparent lack of difference, however, between the concepts of abnormality and foreseeability⁹, Foot's objection includes a discussion of foreseeability. The aspect of the foreseeability doctrine to which Foot objects is what Hart and Honore call the extended

⁸Philippa Foot, "Hart and Honore 'Causation in the Law'" Philosophical Review 72 (1963) 505.

⁹John A. Mansfield, in " 'Causation in the Law' A Comment," Vanderbilt Law Review 17 (1963-64) 487, says that the notion of abnormality is not easily distinguishable from the notion of foreseeability, a notion which Hart and Honore claim to dispute. The authors say in their chapter on foreseeability that there is a small resemblance between abnormality and foreseeability in what they call the variant view of foreseeability. The resemblance, they say, is not complete.

view of the wide foreseeability doctrine.

In Causation in the Law, Hart and Honore propose that not only are common sense causal notions used in the law, but that they should be used instead of other means of determining liability. One of those other means is foreseeability, a notion which they review in their chapter nine. Throughout the review of foreseeability, say the authors, common sense causation is used not as a supplement but as an alternative to existing causal notions. With this framework in mind, we can review briefly their exposition.

Hart and Honore identify two views of foreseeability in their survey of common law cases. In the narrow view, the foreseeability of harm is relevant to whether the defendant was negligent, but not to the extent of his responsibility once his negligence is shown. In the wide view, the foreseeability of harm is relevant also to the extent of a negligent defendant's responsibility. In this view, there is no sharp division between culpability and compensation, since negligence and responsibility are determined by the same test. According to this view, the authors have found, a defendant is responsible for and only for such harm as he could reasonably have foreseen and prevented.

The authors then divide the wide foreseeability doctrine into two parts: the limiting and the extending principles of foreseeability. In the limiting principle of the wide view of foreseeability, a defendant is not liable for unforeseeable

harm, even if, on common sense principles, he caused it. The limiting branch

of the doctrine is attractive because of its alleged claims to consistency, simplicity and fairness, say the authors. The doctrine in fact fails, they claim, due to the ambiguous usage by courts and lawyers of the term foreseeable.¹⁰ In the extending principle of the doctrine, a defendant is liable for foreseeable harm of which his act is a necessary condition even if, according to common sense causal principles, he did not cause it. This doctrine fails, according to Hart and Honore, because it is unfair: the rule would allow recovery "even in cases where the harm would not result from defendant's act but for the voluntary intervention of a third party."¹¹

In her article, Foot uses the same example as do Hart and Honore in Causation in the Law.¹² Foot says

In the manner of abnormality, it is generally accepted that where A and a later condition B were both necessary for a given result, A cannot be

¹⁰Hart and Honore explain the ambiguity as consisting in the confusion between the practical and the theoretical senses of foreseeability. The practical sense of foreseeability points to the "sort of harm the chance of which made the act negligent," say the authors, on page 278 of Causation. In the theoretical sense, they say, "the manner of occurrence of the intervening act or event must be 'foreseeable' in the ... sense that, given the negligent act or some consequence of it, its occurrence must not have been too improbable."

¹¹Hart and Honore 276.

¹²Hart and Honore 165.

called its cause if B is an abnormal or coincidental feature of the situation. Thus if a man injured in an accident is killed by a falling tree on the way to hospital, we should say that the original accident was the cause of his injuries but not of his death.¹³

Foot's objection follows directly:

It seems plausible to say that in deciding such cases in this sense the courts are indeed following common-sense notions of causality. What is not so clear is the principle on which a man is relieved of responsibility in such cases. Is it because the abnormal or coincidental event is just the one which was not foreseeable, and a man is not, in general, held responsible for that which he could not foresee? Or is it, as [Hart and Honore suggest] that the analogy with the primitive examples of causation (simple operations with familiar objects) is here too remote?

c. reply to Foot

Foot provides answers to the questions which she has raised concerning the example of the tree. Concerning the second possibility i.e., that the analogy with the primitive examples of causation is too remote, Foot says only that "this second explanation does not sound particularly plausible," and does

¹³Foot 512.

not explain further. It appears that her first objection here is directed at the extension from the first through to the third notion of causation. Foot is not only not convinced of the validity of the extension, but fails also to explain in what respect the extension is not valid. She poses her second objection in this way: that "the authors' criticism of the foreseeability [and risk] theories leaves one a little uneasy."¹⁴ Foot uses another example to make her point: the case of plaintiff who is injured by defendant's negligence, and suffers serious consequences from wrong treatment in hospital. We find the same example in Causation in the Law.¹⁵ Foot argues

But surely it was foreseeable in the plain sense that anyone might have known that it was the kind of thing not unlikely to happen if the original harm was brought about. If doctors are really as careless as is suggested, it would not be at all unreasonable to say to oneself, 'Even if I injure someone only slightly it may turn out to be serious for him in the end,' and there is no reason why this should not be a ground on which the action can be called negligent.¹⁶

Foot's second objection, i.e., that one which concerns

¹⁴Foot 512.

¹⁵Hart and Honore 264.

¹⁶Foot 512.

foreseeability of harm at hospital, locates her line of thinking in Hart and Honore's extended, not limited, view of the wide foreseeability doctrine. In the example of the hospital, according to Foot, the initial wrongdoer, not the attending physician, is responsible for the harm. The extent of the foreseeability which Foot seems to advocate here is similar to the universal, or broad, duty of care which we find in the civilian regime under art.1053 C.C. However, for a defendant to worry in advance of the possible carelessness of doctors would seem to require foreseeability beyond the call of duty in 1053 C.C. Foot is not completely mistaken to think that doctors in hospitals can be careless; such carelessness has been documented. However, as Hart and Honore claim, it is unfair to hold defendants responsible under an extended view of foreseeability; by the same token, it is unfair to ascribe responsibility under Hart and Honore's extended view of the wide foreseeability doctrine. For this reason, Foot's objection is not very legitimate.

In the Preface to the second edition of Causation, in a segment which is entitled "The Rationale of Common-Sense Causal Principles as a Basis and Limit of Responsibility" the authors explain why an abnormal or voluntary intervention should negative, as they say, a causal connection.

The idea that individuals are primarily responsible for the harm which their actions are sufficient to produce without the intervention of others or of

extraordinary natural events is important.¹⁷

The reason, explain the authors, is the preservation of "the individual's sense of himself as a separate person whose character is manifested in such actions." The correlation between individual identity, then, and voluntary (or abnormal) intervention is indicated by the authors in this way:

Individuals come to understand themselves as distinct persons...and to acquire a sense of self-respect largely by reflection on those changes in the world about them which their actions are sufficient to bring about without the intervention of others and which are therefore attributable to them separately.¹⁸

Things which are not attributable to defendants separately are actions committed voluntarily by intervening agents, and abnormal events. To attribute responsibility as broadly as Foot suggests would defeat the purposes of Hart and Honore concerning the individualizing role, for persons, of actions and events. For this reason as well, Foot's objection is not acceptable.

In the next Part, Comparative Case Law, the purpose is to compare the notions of voluntary and abnormal events with the criteria used by civilian judges to resolve *novus actus interveniens* cases. In the sample of civilian cases, some

¹⁷Hart and Honore LXXX.

¹⁸Hart and Honore LXXX.

sense of foreseeability is apparent, i.e., prevision
raisonnable, while the notions of both voluntariness and
abnormality are less apparent.

Part V
Comparative Case Law: The Use of Common Law Criteria
for New Intervening Events
in the Civilian Law of Responsibility

In their book, Hart and Honore say that over a wide area of tort law the principle has been applied that a voluntary or abnormal intervention between a wrongful act and harm will negative causal connection. Hart and Honore's review of case law is confined largely, if not exclusively, to (English) common law cases. The question which we raise now is whether civilian judges in the courts of the Province of Quebec have used the same criteria in resolving cases of novus actus interveniens, or whether they have used different criteria. If the latter is the case, the task will be to compare the civilian criteria for the new intervening event to Hart and Honore's and to determine whether, or to what extent, the non-traditional definition of causation of Hart and Honore has any role to play in this difference.

Search into the civilian case law in civil responsibility of the past ten years or so has yielded only a handful of new intervening event cases. We will consider the following cases: Beaudoin c. T.W.Hand Fireworks [1961] C.S. 709; Cité de Pont-Viau c. Gauthier MFG. Ltd. [1979] C.A. 77-85; and Dubois c. Dubois [1978] C.A. 569. Of the three selections, only in the first two is the causal relation between wrongful act and harm broken; in the third case, Dubois, the judge rules that there

is no new intervening event. Nonetheless, the case throws light on how in civil law the various causal factors are weighed.

1. the Beaudoin case

Mr Justice Sylvestre in the Beaudoin case, summarized earlier, says that plaintiff's action, or that of his employee was an act "posé délibérement". That is, done deliberately, freely; and that plaintiff's act was in no way a consequence of the initial wrongful act by the fireworks company. Is this to say, however, that the intervening actions were voluntary in the sense in which Hart and Honore mean?

For Hart and Honore, a voluntary action, as we know, is one deliberate, informed and intended to exploit the situation created by a defendant. A non-voluntary action is one, among others, which is not a 'real' choice because the alternative is neglecting a duty. Beaudoin's actions were deliberate and informed: the father knew of the potential danger of the object; the judge gives proof of this in the case. In fact, it seems that the father's knowledge of the danger weighs more heavily in the decision than the deliberateness of the action. Whether Beaudoin's action was 'intended to exploit' the dangerous situation created by the fireworks company is a difficult issue. Hart and Honore explain what they mean by an 'intention to exploit' with the following examples:

A defendant who negligently allowed a pit to remain in a road was not liable to the plaintiff, a sheriff, when an escaping prisoner threw the sheriff

into the pit: the decision is otherwise if the intervening actor pushed plaintiff in accidentally or negligently."¹

The difference between the two examples is presumably that the escaping prisoner, in addition to acting voluntarily, did so with a purpose, namely, to escape. In the second instance, however, the action is inadvertent, more or less planned and without a purpose or goal. In another example of Hart and Honore, when "defendant wrongfully renewed a drug prescription he was not liable for the death of decedent who deliberately committed suicide by taking an overdose."²

In this example, there is a purpose to the intervening action i.e., suicide. The intention to exploit means then using the situation created by the initial wrongful action to further one's own goals. This is not inconsistent at all with the characterization of 'cause' by Hart and Honore. The condition which is selected among a variety of other conditions, i.e., the cause, is one which works through or interferes with the initial action, eventually causing the harm. In the examples selected by Hart and Honore, the intention to use circumstances to pursue one's own ends is apparent.

Returning now to Beaudoin, is it the case that the boy's father "intended to exploit the situation created" by defendant? Beaudoin's actions amounted to an effort to avoid an accidental explosion; but the judge said that Beaudoin showed

¹Hart and Honore 137.

²Hart and Honore 137.

a lack of reasonable care (prudence raisonnable) in the way that he disposed of the object. In their book, Hart and Honore speak of "mistake, accident, and negligence";³ familiar defects, they say, in human conduct. Mistake, they say, is "an act done without knowledge or appreciation of the circumstances" and does not negative causal connection. It is clear that Beaudoin did not make a 'mistake' in Hart and Honore's sense of the term. Accident means "the situation in which a consequence that is neither expected nor desired accrues from the agent's movements." In Beaudoin's case, the harm was certainly not desired, although it could have been expected, as the judge says. Hart and Honore say that the notion of accident is relevant to voluntary conduct of agents in this way:⁴

when the agent is not acting freely, for example because he is performing a duty or protecting his own interests, and in the course of this he accidentally does harm, his conduct does not negative causal connection. His conduct counts as unfree whether or not it is performed with success and accuracy. But if his conduct is voluntary, for example if he chooses to try to steal from a pedestrian rendered unconscious by defendant's negligence, and in doing so he accidentally injures himself or another, his conduct will

³Hart and Honore 149.

⁴Hart and Honore 151.

negative causal connection...This is because the decision to exploit the situation by stealing from the pedestrian has intervened."

The issue now is whether Beaudoin was acting freely in the sense in which Hart and Honore mean.

At the conclusion of the case, the judge says the "Il s'agit dans le cas actuel d'un acte indépendant qui n'est aucunement la conséquence de l'acte posé par la défenderesse [the fireworks company], acte que le demandeur a posé librement et qui entraîne totalement sa seule responsabilité." The parties in the case are the victim's father Beaudoin, and the negligent fireworks company, T.W.Hand. The issue is whether the father can obtain compensation from the company. The defendant is not the father himself; that is to say the regime in art.1053 C.C. is not invoked. Beaudoin is not being asked by the victim, viz.,his son, for compensation for harm caused to another, although the father did cause this harm, as judge Sylvestre shows in the case. Nonetheless, it could be argued that Beaudoin was subjected to the pre-existing duty to take reasonable care not to cause harm to others in 1053 C.C. This is a duty in which he failed by giving the dangerous object to his employee. If we follow the reasoning of Hart and Honore, we could say that the father was under a "legal obligation" (and a moral one as well) and that his action was not, in fact, voluntary.

Could we say that the harm suffered by Beaudoin's son was the result of an 'accident' if it could be argued that

Beaudoin's action was not voluntary but a "legal obligation"? As noted already, while the harm was not desired it could have been avoided. Hence the notion of 'accident' is not wholly applicable and we cannot determine if Beaudoin's action would on this score negative or would not negative the causal connection.

Was Beaudoin "negligent" in the sense in which Hart and Honore use the term? "A negligent act is unintentional but not accidental, for such act would reasonably be expected, in the circumstances, to lead to harm."⁵ Judge Sylvestre seems to think that Beaudoin was negligent in that sense. Hart and Honore make the specification that "In general the negligent act of a third party who is attempting to deal with a dangerous situation created by defendant is not held to negative causal connection unless it does so on the score of its gross abnormality." On this account, the judge's decision does not agree with Hart and Honore's reasoning, for Beaudoin's action did in fact exonerate the fireworks company (assuming that the action was grossly abnormal). "When, on the other hand, the decision of the third party to intervene was voluntary, and he does so in a negligent manner, the resulting harm will not be treated as the consequence of the original wrongdoing."⁶

According to Hart and Honore, the relation of mistake, accident and negligence is related to an exploitation of the situation created by a wrongful action in this way: "In both

⁵Hart and Honore 152.

⁶Hart and Honore 152.

cases [the authors group together accident and negligence]...it cannot be said that the agent intended to exploit the situation created by the wrongdoer."⁷

Assuming then that, while Beaudoin was 'negligent', his action was not completely 'accidental', and that it was not a 'mistake', although it may have been a fault, but that hypothetically under the regime of 1053 C.C. Beaudoin did not act voluntarily and thus did not exploit the situation created by the fireworks company, then Beaudoin would not be a new intervening event. This result is contrary to Judge Sylvestre's in the case.

2. the Pont-Viau case

Let us review the second civilian example of the novus actus interveniens.

In Cité de Pont-Viau, two men in a garage in Pont-Viau make repairs to a car which belongs to one of them. In doing so they use an electrical lamp which accidentally comes into contact with gasoline from the car's tank. The gasoline bursts into flames. Firefighters of the Cité of Pont-Viau are called to control what is deemed a small fire, easily containable "pour quiconque procède selon les règles de l'art." says Judge Lamer in the case. Unfortunately, two hours later, the nearby manufacturing plant, Gauthier Manufacturing Ltd, is engulfed by fire and destroyed. The issue in the case is whether the loss of the manufacturing plant is caused by, or is the 'consequence' (as Hart and Honore prefer to say) of the

⁷Hart and Honore 149.

initial wrongful action at the garage, given that the firefighters of the Cité de Pont-Viau, under the direction of a fire chief, committed serious faults in their attempt to extinguish the first fire.

What we find in the case of Pont-Viau resembles what we found in the Beaudoin case. In order to decide whether the actions of the second party is in fact a new intervening event, Judge Lamer goes at length to see whether the fire chief of Pont-Viau committed any faults in his management and supervisory efforts at the scene of the first fire. Judge Lamer, like Judge Sylvestre, is less concerned with voluntariness in the general sense found in Hart in Honore, than he is with finding evidence of fault.

In Beaudoin the finding that the victim's father had lacked reasonable care, and the evidence in the case law that reasonable care in similar circumstances might have averted harm, were important in the judge's decision to shift the burden of responsibility. Likewise in the Pont-Viau case, much effort is spent reviewing the fire chief's actions and to compare his efforts with the correct measures usually taken by fire chiefs and firefighters in similar circumstances. The facts reveal indeed that some of the directives given by the fire chief to his subordinates had for a result to push the flames from the fire in the garage towards the manufacturing plant; that he refused to use hoses and chemical products available at the site of the plant which could have been useful; that he further obstinately refused to request help

from another fire squad and finally that he gave an erroneous instruction which effectively aggravated the fire.

The Judge concludes :

Je suis ...d'opinion que le juge [de la première cour] a eu raison de conclure que le chef Lacasse a commis des fautes en ce qu'il n'a pas agi d'une manière conforme aux règles de son art, que ces fautes ont été la seule cause efficiente de l'incendie chez Gauthier Manufacturing et que la ville devrait être responsable des dommages qui furent ainsi causés."

In Pont-Viau, responsibility is shifted from the initial wrongdoing i.e., the fire started in the garage, unto the Cité de Pont-Viau through the faults of its subordinate, the fire chief. The reason for this shift is that in light of the facts and with the support of testimony and comparisons to similar cases, the first fire ought not to have been allowed to spread to the manufacturing plant nearby. Even when it did spread in this way, the damages might have been reduced somewhat by taking further, compensatory action. Opening the door at the back of the building once the fire had proceeded there was a mistake.

Undoubtedly, the fire chief was acting non-voluntarily if we use the definition of Hart and Honore. Chief Lacasse had a duty as "preposé" (or employee) of the City of Pont-Viau to intervene. If he intervened non-voluntarily under, say, Hart and Honore's legal obligation then the causal relation is not

negatived. However, this is absurd since, on the facts of the case, the spreading of the fire was preventable because the initial fire was not serious or difficult to contain; at least not for anyone taking appropriate action. That it did so is explained only through the chief's decisions.

The example of Hart and Honore leads to think that 'legal obligation' could include one's duty as employee and one's actions performed for the execution of one's duty. In other words, this is a question whether the civilian regime of art.1054.7 C.C. could not be the same as Hart and Honore's legal obligations. Hart and Honore give this example.

A striking example of an act done in pursuance of a legal obligation is to be found in Estes v. Brewster Cigar Co. (1930) 287 Pac. 36 in which after a quarrel defendant pursued plaintiff in the street shouting 'Thief! Robber!' A policeman, hearing this, shot plaintiff, who was held entitled to recover provided that the policeman had acted reasonably in pursuance of his duty to prevent the escape of a suspected felon.⁸

In Pont-Viau, there is evidence that the fire chief had not "acted reasonably" by not taking the advice of two other fire chiefs to request additional help. Unlike the policeman in Hart and Honore's example, the fire chief (and the Cité de Pont-Viau) will not be relieved of the duty to compensate.

Did the fire chief make a 'mistake' in the sense found in

⁸Hart and Honore 74

Did the fire chief make a 'mistake' in the sense found in Causation? A mistake is "an act done without knowledge or appreciation of the circumstances "; such an act, according to Hart and Honore, does not negative causal connection. In Pont-Viau, there is evidence that the fire chief received advice of two colleagues, asking him to request additional help. If there was such advice it is plausible to think the chief had, from that moment henceforth, some knowledge and appreciation of the circumstances which confronted him, viz., his department could not handle the fire by itself. According to Hart and Honore, then, the fire chief's act would not be a 'mistake' and would then indeed negative causal connection. This analysis is the same as the judge's in the case. The judge speaks of 'faults' rather than 'mistakes'; however the reasoning seems to be the same.

Did chief Lacasse cause an 'accident' or commit 'negligence'? An 'accident' "describes the situation in which a consequence that is neither expected nor desired accrues from the agent's movements." The notion of accident in Causation is closely related to free and voluntary conduct:

When the agent is not acting freely, for example because he is performing a duty or protecting his own interests, and in the course of this he accidentally does harm, his conduct does not negative causal connection. His conduct counts as unfree whether or not it is performed with success and

accuracy."⁹

In the Pont-Viau case, the fire chief was acting not voluntarily for he was in the performance of his duty, a 'legal obligation'. In the course of his duties he did 'cause' harm accidentally: setting fire to the manufacturing plant certainly was not in his plan of action. That incident surely was neither "expected nor desired". According to Hart and Honore, then, since the chief was not acting voluntarily, and accidentally caused damage, his conduct would not negative causal connection. The relation of voluntariness appears in that the intervention does not come from a "decision to exploit the situation" created by the initial wrongful action. The analysis of the chief's action using the notion of 'accident' yields a result contrary to the judge's decision in the case. Moreover, in this case in particular, we see how "odd" is the definition of voluntariness and what serious implications it has when used in legal decisions.

To continue with Pont-Viau, was the chief 'negligent'? Hart and Honore define negligence in this way: "A negligent act is unintentional but not accidental, for such act would reasonably be expected, in the circumstances, to lead to harm." The fire chief's case is one where the agent could have anticipated at least some consequences, if not the consequences which did in fact follow. This would be the strict application of the definition of accident. A negligent act, though, is unintentional but would be expected to lead to

⁹Hart and Honore 151.

harm; the chief's actions and decisions were in part intentional (his stubborn refusal to seek additional assistance) and in part unintentional (he used poor skill and judgment). In this light the chief's actions would be only partly negligent and he would be only partly responsible for the damage. In Causation, Hart and Honore add the proviso that

the negligent act of a third party who is attempting to deal with a dangerous situation created by defendant is not held to negative causal connection unless it does so on the score of its gross abnormality"¹⁰

The chief in Pont-Viau was attempting to deal with the dangerous situation created by the men in the garage. But he did so while committing "fautes grossieres". These faults should qualify as the "gross abnormality" referred to by Hart and Honore; in which case the result of the analysis from the point of view of negligence is the same as the judge's in the Pont-Viau case.

3. the Dubois case

In Dubois c. Dubois [1978] C.A. 569, first described on pages 15 and 16, Judge Paré rules that there is no new intervening event. Responsibility for the injury to the plaintiff is attributed to the bus driver and his employer, in spite of both the intervening action by the plaintiff's friend, and the contributing fault of the plaintiff. The criterion of Hart and Honore can nonetheless be applied to

¹⁰Hart and Honore 152.

evaluate the intervening agent's action.

Was the plaintiff's friend acting voluntarily when he stole the driver's misleadingly labelled bottle? An agent is not acting voluntarily when he does not have a "fair opportunity to exercise normal mental and physical powers," the authors say. It does not appear from the facts of the case that the boy suffered from an incapacity to exercise these powers in a normal manner.¹¹ In Causation and the Law, in the list of non-voluntary conduct, Hart and Honore include the heading "Acts of persons under a disability."¹² Under this heading, the authors say

The acts of young children are often unreflective or misinformed and it is familiar that such acts do not normally negative causal connection, while the act of an older child, capable of appreciating what he is doing, may have that effect.¹³

In Dubois, the agent who intervenes between the driver's action and the harm to the plaintiff is a young adult, aged about 16 at the time of the incident. Given the age of the intervening agent, the action could be considered voluntary, according to Hart and Honore, and could thus constitute a new intervening event. In the case, however, Judge Paré decides differently. Not because the boy's age is insignificant but

¹¹The only form of pressure which could have been present in the context of the case is peer pressure. There is no mention of this, however, in the case.

¹²Hart and Honore 153.

¹³Hart and Honore 153-54.

because of the duties which are imposed by the civilian regimes of responsibility. Judge Paré refers to the Beaudoin case, which we have reviewed previously. In Beaudoin, the negligent intervention is by an adult i.e., the father of the boy injured by the explosive. The fact that the intervening agent is an adult is important to the judge's decision in Beaudoin, says Judge Paré in Dubois. In the Dubois case, Judge Paré weighs the importance, on the one hand, of the duties of an (intervening) adult against, on the other hand, the obligation of the bus company to care for its passengers. Judge Paré favors the pre-existing duty of care under the employer's regime of art. 1054.7 C.C. Judge Paré says in the case that the bus company has failed to perform its duty:

le transporteur avait l'obligation de protéger les jeunes gens contre leurs actes prévisiblement imprudents et c'est ce qu'il a omis de faire avec la conséquence que c'est précisément l'un de ces jeunes gens qui fut victime de sa négligence sans qu'il y ait intervention d'une personne adulte.¹⁴

In Dubois, the issue is whether or not the young man's action negatives the causal relation between the harm to the victim and the bus driver's negligence. The young man's age could constitute a reason to ascribe to him at least some of the responsibility for the harm; but Judge Paré insists instead on the duty of the employer. The decision by the Judge in Dubois is inconsistent with the results obtainable when the criteria

¹⁴Ouellette 343.

of Hart and Honore is applied i.e., interventions by persons capable of appreciating their own actions. We can review also the applicability of Hart and Honore's corollary criterion i.e., mistake, accident, and negligence, as we have done for the previous two cases.

Was the young man's action a "mistake"? Hart and Honore define this as an "act done without knowledge or appreciation of the circumstances." In Dubois, the boy steals a bottle which is labelled 'alcool' but which in fact contains a poisonous substance.¹⁵ The boy assumed that he had stolen, and was selling, a bottle of alcool. In this case, the boy's actions could constitute a mistake, according to Hart and Honore. Such an act would not negative causal connection since there was no knowledge that the bottle's content was in fact poisonous. In the general sense of the word, however, the theft of the bottle was a mistake. And the theft of a misleadingly labelled bottle was, as it turned out, a more serious mistake. In Dubois, the boy who stole the bottle did not know that it was misleadingly labelled. According to the criterion of Hart and Honore, his action would not be a new intervening event. The driver and the bus company would still be the responsible party. This comparison is consistent with Judge Paré's decision, but not, however, for the same reason. Was the boy's action a "negligence"? The issue is whether the theft of the bottle "would reasonably be expected, in the circumstances, to lead to harm." In Dubois, the result of

¹⁵"L'alcool frelate" instead of "l'alcool ordinaire."

drinking from the stolen bottle would be that usually associated with the overindulgence of alcohol; whereas the actual harm to the victim was considerably more serious. The harm is not the type which either the victim or the intervening agent had anticipated.¹⁶ The intervening boy's action then could not be negligent and thus could not constitute a new intervening event. This too is consistent with the outcome of the case. Lastly, was the harm the result of an "accident"? To reiterate, the authors of Causation in the Law say "the situation in which a consequence that is neither expected nor desired accrues from the agent's movements." is an accident. The definition by Hart and Honore of what constitutes negligence is suitable to explain the intervening boy's action. The application of negligence, as defined in Causation in the Law, provides the same result: the intervening action could not constitute a new event.

4. Summary

In the three civilian cases reviewed in this Part, one important feature appears with consistency in the respective Judges' decisions. This is the role played by each potentially intervening agent, and the duty which attends to each role. Faults are committed, in civilian law, when duties are not fulfilled, or when they are fulfilled improperly. From the review of the regimes of civil responsibility, we have seen that the types of duties vary from one regime to the next, so as to include all, or most, of the relationships entered into

¹⁶Ouellette 342.

under this type of regime. Once a judge has identified the roles of the various defendants in a case, he needs then to determine whether these defendants have committed faults in fulfilling their duties. If more than one fault is committed, as is the case in potential novus actus interveniens cases, judges must distinguish the seriousness of the faults.

In Beaudoin, the parties which committed the faults are all adults. All have a responsibility, yet, the judge reasons that the father was better able to prevent the harm, and failed to do so under the 1054 C.C. regime. In Pont-Viau, the fire chief makes various mistakes in handling the fire. These mistakes, serious ones, are committed while in the performance of his duties under the 1054.7 regime. Once the proof is provided that the regime is applicable, the judge can weigh the seriousness of the faults. Likewise, in Dubois, the bus driver makes mistakes while in the performance of the work for which he is employed. The judge rules that the driver, and his employer, have failed in their duty as transporters of young people. For this reason they, and not the boy, are responsible for the harm to the plaintiff.

It appears, from our comparative study, that the duties which appear in the various regimes of the Civil Code will determine who is at fault-although not the gravity of the fault, when there is more than one fault. Voluntariness is not an element in the civilian judges' reasoning. And while some comparisons are valid when using Hart and Honore's concepts of negligence, mistake and accident, the results are coincidental

rather than significant. It is the duties contained in each regime of the Code that are the significant elements.

PART VI

Conclusion

The primary task of the thesis was to compare the criteria of Causation in the Law with the civilian law's criteria for resolving cases of new intervening events.

To this end, in Part I of the thesis, the role of causation in the various regimes of the Code was explained. The civil law's criteria for resolving cases of new intervening events was also presented in this part.

There followed, in Part II, an explanation of Hart and Honore's project, and the definition (and critical review) of their proposed solution to *novus actus interveniens*.

In Part III of the thesis, the philosophical and intellectual background of Hart and Honore was reviewed at length, and the nature of their new notion of causation was further developed and critically examined.

In the first three parts of the thesis, then, the two components of the comparison were given in their respective contexts.

In Parts IV and V, equipped with an understanding of Hart and Honore's project, and with the knowledge of both the strengths and the weaknesses of their notion of causation, the comparison with civilian law was attempted.

This comparison of the civilian case law with the criteria of Hart and Honore has revealed substantial differences. We must attempt an explanation for this disparity.

In their book, the authors begin their inquiry into causation from the point of view that causal language in the law is not very different from the common sense language of causation. On this assumption, the authors trace the notion of causation in their sample of cases.

There are three potential explanations why we obtain different results when the criteria of Hart and Honore are applied to the civilian cases. This is, first, that the definitions of voluntary and abnormal interventions are not sustainable in themselves. This alternative seems to be supported by the literature which has criticized the ideas of Hart and Honore.

Second, the categories of new intervening event i.e., abnormal or voluntary intervention, are not used or little used in civilian law. The reason for this is found in a fundamental difference between English common law, and French civil law. English common law is not codified, whereas French civil law is. The language of the Civil Code does not include the categories described by Hart and Honore, categories which the authors claim are traceable in their sample of common law cases. Instead, in the regimes of civil responsibility, the categories which exist are those of fault, harm, and a causal relation to the harm. These categories, as we know, are subjected to the imperatives of the various regimes. However, they remain the conceptual building blocks in the civilian law of responsibility.

And third, it is possible that there is a discrepancy

between the meaning of common sense in English common law, and French (Canadian) civilian law. That is to say, when civilian judges and lawyers use common sense explicitly or implicitly, they do not mean the same as do the English judges and lawyers, in the sample of Hart and Honore. Indeed, the French (Canadian) judges use the notion of "gravité" in their deliberations, while (as reported by Hart and Honore) their colleagues in the English courts use voluntary or abnormal interventions. Common sense, then, would be relative rather than universal.

There are two possible explanations for this difference. First, what counts as common sensical in one cultural milieu may not necessarily be the same for another cultural milieu. Second, because the French civilian law is confined by the language of the Code, any resemblance of the French connotation of common sense with the English may be constrained.

If there is indeed a difference between the two senses of common sense (whether because of the constraints of the Code or whether because of the influence of the respective cultural milieus) what, if anything, is lost?

There are two ways to approach this issue. One is from the point of view of use, and the other is from the point of view of value.

In terms of value, it would be preferable for the notions of common sense to be applicable throughout jurisdictions, in spite even of the fundamental differences between English common law and French civil law. The classic criteria of

universality and of brotherhood is the basis for the claim to value. A common denominator for common sense would greatly facilitate these laudable ends.

From the point of view of use, however, a common notion of common sense is problematic. If the reference points of common sense are indeed culturally founded, then they will not readily be applicable across any contexts, including legal ones.

The unfortunate conclusion is that the criteria of Hart and Honore in Causation in the Law find only a limited application.

BIBLIOGRAPHY

Baudouin, Jean-Louis. La Responsabilité Civile Délictuelle. Cowansville: Editions Yvon Blais, 1985.

Brett, Peter. "Causation in the Law." Melbourne University Law Review 3.1 (1961): 93-96.

Cohen, Marshall. "Hart, Herbert Lionel Adolphus." The Encyclopedia of Philosophy. Ed. Paul Edwards. 8 vols. New York: Macmillan Publishing Co., Inc & The Free Press, 1967.

Copi, Irving. Introduction to Logic. 5th ed. New York: Macmillan Publishing Co., Inc., 1978.

Copleston, Frederick. A History of Philosophy. Volume V, Hobbes to Hume. The Bellarmine Series XVI. London: Burns Oates Washbourne, 1959.

---. A History of Philosophy. Volume VIII, Bentham to Russell. The Bellarmine Series XIX. London: Burns Oates Washbourne, 1966.

Dray, W.H. "Causal Judgment in Attributive and Explanatory Contexts." Law and Contemporary Problems 49.3 (1986): 13-22.

Fain, Haskell. "Hart and Honore on Causation in the Law." Inquiry 9 (1966): 322-339.

"Fault." Private Law Dictionary and Bilingual Lexicons. Kouri, Robert P., et al., eds. Montreal: Quebec Research Centre of Private and Comparative Law, 1988.

Foot, Philippa. "Hart and Honore: 'Causation in the Law'." Philosophical Review 72 (1963): 505-513.

Golding, M.P. "Causation in the Law." The Journal of Philosophy 15 (1961): 85-95.

Guérin, Marc-Aimé, ed. Index Gagnon 1976. Montréal: Guérin Editeur, 1975.

Hart, H.L.A. and A.M. Honore, Causation in the Law. 2nd. ed., Oxford: At The Clarendon Press, 1985.

Howarth, David. "Causation in the Law." Yale Law Journal 96 (1987): 1389-1424.

Hume, David. A Treatise of Human Nature. Ed. L.A. Selby-Bigge.

London: Oxford University Press, 1965.

"Intervening Cause." Black's Law Dictionary. 5th. ed., St-Paul: West Publishing Company, 1979.

Mansfield, J.H. "Hart and Honore Causation in the Law." Vanderbilt Law Review 17 (1963-64): 487-524.

Martin, Michael. The Legal Philosophy of H.L.A. Hart: A Critical Appraisal. Philadelphia: Temple University Press, 1987.

Mill, John Stuart. A System of Logic Ratiocinative and Inductive. London: Longmans, Green and Co Ltd., 1967.

Moles, Robert N. "Causation in the Law." Northern Ireland Legal Quarterly 38 (1987): 214-217.

Ouellette, Monique, Réginald Savoie, Adrien Popovici, et Jean-Louis Baudouin. Recueil de Textes et d'Arrets: Responsabilité Civile Délictuelle. Montréal: Faculté de Droit, Université de Montréal, 1986-87.

Pincus, Stephen M. "Progress on the Causal Chain Gang: Some Approaches to Causation in Tort Law and Steps Toward a Linguistic Analysis." Osgoode Hall Law Journal 24 (1986): 961-1022.

Stapelton, Jane. "Law, Causation and Common Sense." Oxford Journal of Legal Studies. 8 (1988): 111-131.

Taylor, Richard. "Causation." The Encyclopedia of Philosophy. Ed. Paul Edwards. 8 vols. New York: Macmillan Publishing Co., Inc & The Free Press, 1967.

Thomson, Judith Jarvis. "The Decline of Cause." Georgetown Law Journal 76 (1987): 137-150.

Weinrib, Ernest. "Causation and Wrongdoing." Chicago-Kent Law Review 63 (1987) 407-450.

White, Allan R., ed. The Philosophy of Action. Oxford Readings in Philosophy. London: Oxford University Press, 1986.

CASE LAW

Alain c. Hardy [1951] S.C.R. 541.

Beaudoin c. T.W. Hand Fireworks [1961] C.S. 709.

Cité de Pont-Viau c. Gauthier MFG. Ltd. [1961] C.A. 77.

Cohen c. Coca-Cola Limited [1967] S.C.R. 470.

Collin c. Vadenais (1928) B.R. 44.

Congrégation des Petits Frères de Marie c. Régent Taxi [1929] S.C.R. 650.

Deguire Avenue Ltd c. Adler [1963] B.R. 101.

Dubois c. Dubois [1978] C.A. 569.

Kelimpex Ltd c. Cayle Tanning Co. Ltd. [1979] C.S. 343.

La Reine c. Sylvain [1965] 1 R.C. de l'E. 261.

P.G. du Québec c. Lapierre [1979] C.S. 907, [1983] C.A. 631.

Transport Provincial c. Fortier (1956) S.C.R. 258.

APPENDIX

CHAPITRE TROISIEME
DES DELITS ET QUASI-DELITS

Art. 1053. Toute personne capable de discerner le bien du mal est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inabilité.

1866 a. s. 1053

N. 1382, 1383. (C. 1007, 1106, 2261, 2262, 2266, 2425) P. 100, 681; Cr. 13, 217, 219, 244, 249 s., 298 s., 322, 335, 430; M.M. 573.

Art. 1054. Elle est responsable non seulement du dommage qu'elle cause par sa propre faute mais encore de celui causé par la faute de ceux dont elle a le contrôle, et par les choses qu'elle a sous sa garde.

Le titulaire de l'autorité parentale est responsable du dommage causé par l'enfant sujet à cette autorité.

Les tuteurs sont également responsables pour leurs pupilles;

Les personnes chargées de garder un majeur non doué de discernement sont également responsables pour le dommage causé par ce majeur;

L'instituteur et l'artisan, pour le dommage causé par ses élèves ou apprentis, pendant qu'ils sont sous sa surveillance;

La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage;

Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers, dans l'exécution des fonctions auxquelles ces derniers sont employés.

1866 a./s. 1054; 1977, c. 72, a. s. 7; 1989, c. 54, a./s. 107.

N. 1384. (C. 1815) M. 175.

Art. 1054.1 Malgré l'article 1054, les tuteurs et les curateurs à un majeur, les personnes exerçant la garde d'un majeur dont le curateur public est tuteur ou curateur, de même que les mandataires exécutant un mandat donné par un majeur dans l'éventualité de son inaptitude, ne sont pas responsables du dommage causé à autrui par ce majeur, à moins qu'ils n'aient eux-mêmes commis une faute intentionnelle ou lourde dans l'exercice de la garde.

Ins. 1989, c. 54, a. s. 108.

Art. 1055. Le propriétaire d'un animal est responsable du dommage que l'animal a causé, soit qu'il fût sous sa garde ou sous celle de ses domestiques, soit qu'il fut égaré ou échappé.

Celui qui se sert de l'animal en est également responsable pendant qu'il en fait usage.

Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par suite du défaut d'entretien ou par vice de construction.

1866 a./s. 1055.

CHAPTER THIRD
OF OFFENCES AND QUASI-OFFENCES

Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Art. 1054. He is responsible not only for the damage caused by his own fault but also for that caused by the fault of persons under his control and by things he has under his care.

The person having parental authority is responsible for the damage caused by the child subject to such authority.

Tutors are responsible in like manner for their pupils;

Persons having custody of a person of full age lacking in discernment are responsible for any damage caused by such person of full age.

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

Art. 1054.1 Notwithstanding article 1054, tutors and curators to persons of full age, persons exercising custody of a person of full age whose tutor or curator is the Public Curator and mandataries performing a mandate given by a person of full age for the eventuality of his inability, are not responsible for damage caused by such persons of full age to third persons unless the tutors or curators are guilty of a deliberate or gross fault in exercising custody.

Art. 1055. The owner of an animal is responsible for the damages caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.

He who is using the animal is equally responsible while it is in his service.

The owner of a building is responsible for the damage caused by its ruin, where it has happened from want of repairs or from an original defect in its construction.