The Test of Factual Causation in Negligence and Strict Liability Cases. By
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A damage suit lawyer who happened to confuse actual cause with legal
cause might look for argument when he should be looking for proof, or vice
versa. The authors of this book believe a special effort must be made to treat
actual cause issues as problems involving what happened; that these prob-
lems must be distinguished from issues arising when facts are settled and
problems about the legal effect attaching to those facts are raised. Though
at times this book throws a spot of light on some need for proof these authors
are not centrally concerned with the likelihood that evidence problems will
be confused with problems of substantive law. Their concern is with clear
analytical thought about factual cause; they do not try especially to advance
the art of establishing or attacking causal connections.

However, their analysis, it seems to me, does not face up to an analytical
distinction central to an understanding of the subject. They do not discriminate
between two different meanings of the concept of actual cause which lie at the
heart of its analysis. Let me illustrate and contrast these two.

(1) Cause and Effect. Mr. Sharecropper, who is obliged by his lease to
farm with reasonably good husbandry, uses the wrong kind of fertilizer on
his sugar beets, with the effect that he has a crop failure when all of his neigh-
bors harvest bumper beet crops.

(2) Cause and Consequence. In the course of burying his dog, spitefully
poisoned by Mr. Blackheart, the impecunious dog owner finds a pot of gold;
in consequence he is able to buy a car and have an automobile accident in
which Mr. Victim is injured.

These two hypotheticals are both cases of causal relationship between con-
duct and its outcome—in the sense that the fate of each of the injured is bound
up with the two improprieties. But the two causal relationships are quite dif-
ferent. The crop failure was an effect of improper husbandry in the sense that
the science or art of farming recognizes the general connection between proper
fertilization and yield. But automobile accidents in general are unrelated to
spiteful dog poisoning; in our hypothetical automobile accident case, though
the injury was, in fact, a consequence of dog poisoning, the dog poisoning af-
fected Mr. Victim’s safety but his injury was not an effect of it. A consequence
can be an aftermath or upshot, an unusual quirk of fate, a twist of connected
events that nevertheless smacks of coincidence.

This is a distinction that an analysis of actual cause must make if problems
in advocacy and adjudication are to be clearly understood. When, on the
one hand, the cause-and-effect relationship becomes problematical the advo-
cate must appeal to science, art, or common knowledge for general fact truth
relevant to his case. On the other hand, the subject of cause-and-consequence,
though a factual one, rarely depends on any such knowledge; outcomes may
be fortuitous, unique, unusual, exceptional; when they are, they do not typify, for example, the workings of the laws of physics, the techniques of carpentry, or the lore of successful wooing. I do not mean, of course, that the two are not easily confused. Often a perceptive observer sees general truth in what looks like specific accident to a lesser man.

Most, but not all, of the book reviewed deals with the analysis of cause-and-consequence. The authors seldom wrestle with such practical problems as, for example, the medical difficulties in determining the relationship between traumatic injury to a pregnant woman and defects of her afterborn child. Instead they are concerned with such problems as whether the illegal speed which brings a person to the scene of an accident is a cause of that accident. They analyze this kind of problem by developing terms and expressions that are familiar to neither lawyers nor scientists; they distinguish between simple cause and hypothetical cause; they talk about constructing parallel series and equating injuries; in sum they develop a highly analytical method to distinguish between true consequences and after-events not properly so classified. This method is built on the authors' carefully refined definition of cause and consequence. On this creative refinement they determinedly build their precise analytical structure. The result is a new, closely-reasoned system so demanding that few students, lawyers or courts will master it.

I normally share with these authors the view that we think more clearly, practice law better, and decide cases more intelligently when we make the effort to discriminate between what-happened-in-fact and what-to-do-about-it-in-law. However, when we know that, for example, a railroad improperly delays a shipment en route which is then destroyed during that delay by a holocaustic flood, we already know all the facts in the scientific, non-legal, cause and effect sense. No expert adept in floods, railroads, or scientific method has anything to add. Yet a causation problem remains. It seems factual but when we talk about whether a court should find that the loss was a consequence of the flood (and say, on the one hand, that the shipment would have been safe had it not been delayed, while, on the other, that it would have been destroyed even if it had been dispatched on time had the flood happened a few hours earlier or the shipment been made a few hours later) we are already in the process of disposing of a case in law; we are no longer settling facts to which the law will thereafter apply. It so happens that this area of law is difficult, not always too rational, and a challenge to academicians. It seems to me that these authors are the modern day counterparts of Beale and MacLachlan who in an earlier time tried to conjure a more definite law of proximate cause out of factual cause analysis.

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1 See Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633 (1920).

2 Who was then known as McLaughlin, and who wrote Proximate Cause, 39 Harv. L. Rev. 149 (1925).